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Railway Labor Act — Carrier's Right To Resort To Self-Help In Major Disputes Prior To The Exhaustion Of RLA Procedures

National Airlines, Inc. v. International Association of Machinists

When a system of transportation suddenly and unexpectedly ceases to provide service because of a labor dispute in the transportation industry, the ramifications can be disastrous. The effect of such labor strife is rarely limited to the disputing parties and often extends to a vast number of people, industries and labor markets and may spiral into a problem of national magnitude. A strike in one state often paralyzes transportation in an entire section of the country, resulting in passenger inconvenience, mail service slowdowns, work stoppages and a general interruption of commerce. Realizing that effective methods of mobilizing people and goods are essential to the national welfare, Congress in 1926 enacted the Railway Labor Act as an attempt to keep the lines of transportation open and moving during times of labor-management conflict. Although the RLA has brought a relative degree of industrial peace to the transportation industry, it nevertheless has some serious shortcomings, not the least of which is the failure to provide a statutory mechanism for the continuance of carrier operations during wildcat strikes. This deficiency often presents grave problems, especially when a major work stoppage occurs and the RLA machinery proves ineffective in alleviating it.

Such a situation is presented in National Airlines, Inc. v. International Association of Machinists. On October 31, 1968, National and the Machinists’ Union exchanged section 6 notices of intended changes in their collective bargaining agreement, thus instituting the elaborate procedure of negotiation established by the Act. While the

1. 416 F.2d 998 (5th Cir. 1969).
4. 45 U.S.C. § 151a (1964) delineates the general purpose of the RLA as follows: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.
5. See MacIntyre, The Railway Labor Act — A Misfit for the Airlines, 19 J. Air L. & Com. 274, 285-88 (1952), where it is suggested that airlines be removed from the jurisdiction of the RLA and placed under the "dominant labor law of the land" and that a remedial forum be established to supervise the activities between labor and management in the airline industry.
6. 416 F.2d 998 (5th Cir. 1969).
7. 45 U.S.C. § 156 (1964). These are the notices required to institute changes in rates of pay, rules, or working conditions. See note 32 infra.
procedures were in progress, National ordered that the number of men needed to taxi an aircraft be reduced from three to two. Three of the union workers refused to follow the order, believing the reduction to have created unsafe working conditions. National promptly suspended the three workers, an action which immediately precipitated a wildcat strike by the union at National’s Kennedy Airport and Miami International facilities.

National obtained an injunction against the union since the strike violated the status quo provisions of the Act and also breached the collective bargaining agreement. In response to these measures, the union obtained a temporary restraining order requiring National to employ three workers to taxi aircraft. Although National complied with the taxi dispute order, the workers failed to return to their jobs. Union officials admitted that they had lost control over their members. Thereafter, National sought and received from the district court a second injunction ordering the men to return to work. This second order also provided that the workers be notified that, upon failure to return to work, they would be subject to penalties which could include dismissal by National. When the strikers did not report to work the next day, National discharged approximately 940 Union workers.

The court of appeals modified the discharge, ordering that those workers whose positions were filled by National, either at the time of the discharge or before the time the strike would have run its course, would not be entitled to reinstatement; but that those strikers whose jobs had not been filled when the strike ended would be entitled to reinstatement. Of importance is the court’s answer to the question of whether a carrier may resort to self-help in a major dispute before the statutory procedures of the RLA have been exhausted. In recognizing that, under the circumstances of this case, a carrier has at least a limited right to self-help prior to the exhausting of its statutory remedies, the court made a novel though compelling departure from prior case law.

The paramount objectives of the RLA are to avoid any interruptions in or interference with interstate commerce and to promote the

8. See note 32 infra and accompanying text.
9. The temporary restraining order was changed to a preliminary injunction directing National to taxi with at least three men until the procedures of the Act had been exhausted. In sustaining the union’s position in the taxi dispute, the district court held that National violated the status quo by changing the number of men required to taxi an aircraft after the procedures of the Act were set in motion by the § 6 notices on October 31, 1968. It is interesting to note that the district court upheld the use of a three man taxi team despite the fact there was no substantial issue of safety involved in the use of the two man team. In fact, it recognized that the almost unanimous practice throughout the airline industry is to use two men to taxi airplanes. But the court’s paramount consideration was that a unilateral change had been instituted by the carrier during a freeze period when such modifications of the status quo are barred. See note 32 infra. Consequently, after it was found that the change in the taxi team number altered the status quo, the merits of the change became irrelevant, since the change per se violated the status quo. National Airlines, Inc. v. International Ass’n of Machinists, 303 F. Supp. 1132 (S.D. Fla. 1969).
10. 45 U.S.C. § 151a (1964); see, e.g., Terminal R.R. Ass’n v. Brotherhood of R.R. Trainmen, 318 U.S. 1, 6 (1943), where Mr. Justice Jackson stated:

The national interest expressed by [the RLA] is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be
continuance of the employer's operations and the employee-employer relationship. The Act does not undertake governmental regulation of wages, hours or working conditions, nor does it authorize anyone to set applicable standards. Basically, the RLA provides for the self-adjustment of labor problems in the transportation industries through a non-judicial process of conciliation, mediation and arbitration. It seeks to avoid strikes and attempts to foster the prompt and orderly settlement of all grievances and disputes, leaving a minimum of responsibility to the courts.

The procedure used for settling a dispute under the Act varies, depending on whether the labor-management conflict is classified as major or minor. The latter involves disputes over the interpretation as bad as the employees will tolerate or be made as good as they can bargain for. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. The Mediation Board and Adjustment Board act to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers.

Consider also that although the NLRA has been referred to in construing the RLA, the Supreme Court has warned that the former “cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes.”

A primary purpose of the major revisions made in 1934 was to strengthen the position of labor organizations vis-à-vis the carriers, to the end of furthering the success of the basic congressional policy of self-adjustment of the industry's labor problems between carrier organizations and effective labor organizations. The major-minor dispute distinction was first made by Justice Rutledge in Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723 (1945): The first [major] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the...
and application of existing agreements, whereas the former involves controversies over changes in existing agreements or the creation of new agreements. Under either type, the Act stipulates that the first step the parties must take is to "... exert every reasonable effort to make and maintain agreements ... and to settle ... disputes. . . ." If these attempts at settlement prove fruitless, then the parties must adhere to the methods provided by the Act.

Since minor disputes arise primarily over conflicts in the interpretation of existing agreements, they were not, in the judgment of Congress, of sufficient importance to justify a strike in a transportation industry with a consequent interruption of interstate commerce. Thus, if negotiations and conferences between the parties fail to bring an agreement, either party may refer the controversy to an adjustment board which determines the conflict and makes appropriate awards which are final and binding upon both parties. Since a strike is inconsistent with the aim of resolving minor disputes through binding arbitration, a union cannot lawfully resort to such measures; and if a strike should occur it can be enjoined to preserve the procedures of the RLA. On the other hand, courts generally have denied injunc-

acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

The second class [minor], however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world. (emphasis added). While the distinction seems relatively simple, its practical application often proves confusing. See Comment, Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes, 60 COLUM. L. REV. 381, 396 (1960), for an assessment of the utility of the major-minor classification as it has been employed by the courts. This comment also criticizes the apparent ability of either party to manipulate the classification of a dispute for its particular purposes thus making it increasingly difficult to rely on the major-minor distinction as an aid to the judicial handling of railway labor disputes. Note, Labor Law — Railway Labor Act — Major and Minor Disputes, 31 J. AM. L. & COM. 371 (1965), discusses the difficulty in defining the differences in major and minor disputes when applied to specific fact situations. See generally Harper, Major Disputes Under the Railway Labor Act, 35 J. AM. L. & COM. 3 (1969); Wisehart, The Airlines' Recent Experience Under the Railway Labor Act, 25 LAW & CONTEMP. PROB. 22, 27-33 (1960). In National, classification of the taxi dispute as major or minor was unnecessary, however, since the discharge occurred during the freeze period following the exchange of section 6 notices. See note 32 infra. 19. 45 U.S.C. § 152 (1964).
22. Brotherhood of R.R. Trainmen v. Chicago R. & Ind. R.R., 353 U.S. 30 (1957). In this case there was a conflict between the RLA, which supported the issuance of injunctions to uphold its minor dispute provisions, and the Norris-LaGuardia Act, ch. 90, §§ 1-15, 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1964), which withdrew from federal courts the power to issue injunctions in labor disputes. Chief Justice Warren resolved the discrepancy by holding that the two Acts must be read together as a pattern of labor legislation and that the more specific provisions of the RLA would then take priority over the general provisions of the Norris-LaGuardia Act.
tive relief against a carrier since it is not bound by any specific duty under the RLA to maintain the status quo in a minor dispute.\(^{23}\)

Unlike minor disputes where the process of negotiation must culminate in a final and binding decision, major disputes are not subject to a dictated settlement.\(^{24}\) There is no compulsion on the parties to agree at any stage of the procedure.\(^{25}\) But, "[w]hile agreement is not compulsory, the steps required by the Act are.\(^{26}\) The RLA "imposes a mandatory duty upon both carrier and union to follow its procedures."\(^{27}\)

The detailed framework of the RLA which facilitates the voluntary settlement of major disputes has recently been outlined by the Supreme Court:

A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services \textit{sua sponte} if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President," who may create an emergency board to investigate and report on the dispute. § 10. \textit{While the dispute is working its way through these stages, neither party may unilaterally alter the status quo.} §§ 2 Seventh, 5 First, 6, 10.\(^{28}\)

These procedures are "... purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute."\(^{29}\) To preserve the status quo and to prevent circumvention of the Act's processes, there are several "freeze"\(^{30}\) or "cooling-off"\(^{31}\) provisions incorporated in the RLA

\(^{23}\) See Comment, \textit{Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes}, 60 COLUM. L. Rev. 381, 391 (1960), and cases cited therein.


\(^{26}\) Id. at 787.

\(^{27}\) Id.


\(^{31}\) 67 CONG. REC. 4648, 4650 (1928).
which extend through the entire major dispute proceedings. Notwithstanding the mandates of the Norris-LaGuardia Act that injunctions in labor disputes shall not issue, these freeze provisions consistently have been held enforceable by the courts.

The purpose of this section, as one court has stated, “was to prevent rocking of the boat by either side until the procedures of the Railway Labor Act were exhausted.” Its function is to stabilize relations by artificially extending the lives of agreements for a limited period regardless of the intentions of the parties. During the course

32. The “freeze” or “status quo” provisions are found in 45 U.S.C. §§ 156, 155 and 160. Section 156 reads:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has lapsed after termination of conferences without request for or proffer of the services of the Mediation Board (emphasis added).

Section 157 stipulates that if mediation is undertaken by the National Mediation Board and notice is given to the parties that mediation has failed then for “thirty days the parties shall not be allowed to make changes in rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.” Section 160 provides that from the time the emergency board is created until thirty days after the board makes its report to the President, “no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.” See Comment, Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes, 60 Colum. L. Rev. 381, 388 (1960). See also MacIntyre, The Railway Labor Act — A Misfit for the Airlines, 19 J. Air L. & Com. 274, 278–81 (1952), for a criticism of the inequalities and lack of clarity of the phraseology of these “cooling off” provisions.


35. Id. at 34. Although § 6 refers only to carriers, “[i]n the legislative history indicates that when the rail unions and carriers agreed upon these provisions, the unions surrendered their right to strike pending exhaustion of major dispute procedures in exchange for a statutory provision restraining management from disturbing the status quo.” Rutland Ry. v. Brotherhood of Locomotive Eng'rs, 307 F.2d 21, 43 (2d Cir. 1964) (dissenting opinion). In American Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 169 F. Supp. 777, 789 (S.D.N.Y. 1958), the court concluded after a review of the legislative history that the freeze provisions of the Act including § 6 apply to both unions and carriers and “the parties may not, in the course of a major dispute under the Railway Labor Act, have resort to either the strike or lockout before the procedures provided for by the Act have been exhausted and a strike or lockout during that period is illegal and forbidden by the Act.” The view in American that the freeze provisions apply to both the carrier and the union is the one followed by most courts. See, e.g., Missouri-Ill. R.R. v. Order of Ry. Conductors, 322 F.2d 793, 796 (8th Cir. 1963). But see Comment, Enjoining Strikes and Maintaining the Status Quo, 60 Colum. L. Rev. 381, 389 n.51 (1960), where it is suggested that the union may strike even without having exhausted the procedures under the Act. The commentator reasons that American “did not consider the fact that § 6 applies only to carriers and the sections that could be applied to unions only operate after the conciliatory and mediatory proceedings have failed and the procedures for bringing public opinion to bear on the problem have been initiated.” But it would seem that to con-
of a major dispute resort to either the strike or lockout by the parties is prohibited by the terms of the RLA. Indeed, it has been consistently held that no self-help is permitted while negotiations continue or the Mediation Board has jurisdiction. Furthermore, “conduct of both parties in derogation of the major dispute procedures must be enjoined [since] the cooling-off policies of the major dispute procedures cannot be effectuated by allowing both parties simply to do away with the Act.” Resort to the courts, therefore, to facilitate compliance with the Act’s procedures is considered preferable to the use of self-help.

However, the RLA does not contemplate a total ban on self-help. “[C]ompulsions go only to insure that those procedures are exhausted before resort can be had to self-help.” While arbitration is not mandatory in major disputes, there is a statutory duty to exhaust the available remedies. But after these procedures have been observed without reaching a settlement, the Act gives no indication of what is to take place. As the Supreme Court has recently reiterated though, “[i]mplicit in the statutory scheme . . . is the ultimate right of the disputants to resort to self-help.” Thus, the parties may employ the pressures of the strike and lockout at the termination of the procedural process of the RLA. The use of these economic weapons has been phrased by one court as “. . . the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.”

strue § 6 as applying only to carriers would serve only to frustrate the purposes of the RLA since a strike would undoubtedly upset the status quo and cause interruptions to commerce.

37. The status quo provisions of the Railway Labor Act refer to the “representatives of the employees,” § 6, or the “parties to the controversy,” § 10 so that it is conceivable that only Union-sponsored strikes violate the Act. Such a literal analysis has not been applied, however, in construing other aspects of the Railway Labor Act, see, e.g., Brotherhood of Railroad Trainmen v. Chicago River and Indiana R. Co., 1957, 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622, and it would have served the purpose of the Act to hold that wildcat strikes, such as the strike involved here, did not come within the statutory ban on self-help. Moreover, it should be noted that § 2 of the Act provides that “it shall be the duty of . . . employees to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier . . .” National Airlines, Inc. v. International Ass’n of Machinists, 416 F.2d 998, 1003 n.3 (5th Cir. 1969) (emphasis added).


44. Florida E.C. Ry. v. Brotherhood of R.R. Trainmen, 336 F.2d 172, 181 (5th Cir. 1964). The court declared that when the machinery of industrial peace fails, the policy in national labor legislation is to let loose the full economic power of the dis-
seem that a contrary conclusion would serve only to frustrate the RLA's overall blueprint for the settlement of major disputes.\textsuperscript{45}

Thus the general trend of authority has been to permit self-help in major disputes by both the union\textsuperscript{46} and the carrier\textsuperscript{47} when the RLA procedures have been exhausted and to enjoin the carrier or the union when either attempts to alter the status quo while the machinery of the Act is still in progress. It appears that no court had, prior to National, sanctioned the use of self-help by the carrier before the exhaustion of its procedural remedies. But the trend of several recent cases\textsuperscript{48} concerning the appropriate use of self-help has culminated in the decision in National that under certain circumstances a carrier under the RLA may resort to self-help notwithstanding that the statutory major dispute procedures have not been concluded.

In Florida East Coast Railway v. Brotherhood of Railroad Trainmen, an unusual and complicated set of circumstances gave rise to the employment of self-help by the carrier.\textsuperscript{50} Certain employees of the railroad went on strike over a wage demand after the procedures under section 6 had been exhausted. The Trainmen's Union honored the picket lines of the strikers and refused to report to work. To continue operations, the railroad replaced the Trainmen Union employees with workers who were hired under conditions of employment that differed from the pre-existing collective bargaining agreement. Later, the railroad served a section 6 notice which sought to amend the original collective bargaining agreement so that it would substantially conform with the agreement under which the replacement workers were hired.\textsuperscript{51} The court held that the railroad violated the RLA by its unilateral abrogation of the existing collective bargaining agreement. But it viewed the major problem as one of "what the law permits when the protagonists have exhausted all of the elaborate governmental machinery for the settlement of a dispute, and neither is willing to budge." Keeping in mind the Act's primary purpose of preventing...
interruptions to commerce, the court therefore ruled that the railroad could unilaterally institute such changes as the district court found to be "reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions." Following the rationale of *Trainmen*, the Supreme Court reaffirmed the right of a carrier to institute self-help in *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway*. In this case, the dispute centered over a wage increase and the amount of advance notice for impending layoffs and job abolitions. When the procedures of section 6 had run their course without resolving the conflict, a lawful strike by the union followed. The district court then allowed the railroad to institute certain changes in its operations which were contrary to the existing collective bargaining agreement. The Supreme Court approved these alterations by the carrier, stressing that the carrier's right of self-help subsequent to the exhaustion of the statutory procedures was underlined by the public service aspects of its business. To require each change that the carrier institutes, the Court reasoned, to run the same gauntlet of negotiation and mediation as did the notice and pay provisions that gave rise to the strike would have the practical effect of bringing the railroad to a grinding halt. Furthermore, the Court recognized that when a carrier is compelled to employ an emergency labor force, "it may or may not be able to comply with the terms of a collective bargaining agreement, drafted to meet the sophisticated requirements of a trained and professional labor force." But, although the carrier could resort to self-help, the

53. In discussing these changes made by the carrier the court said: But this right of self-help is not a license for the wholesale abrogation of the agreement. As the term implies, it is help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers. *Id.* at 181.

54. *Id.* at 182. It is true that the procedures had not been exhausted under the second § 6 notice. But the carrier's right to self-help stemmed from the first § 6 notice, under which the procedures had been exhausted and "strike conditions" were in effect. Thus, the question became whether the carrier could resort to self-help after the union had resorted to a strike even though another § 6 notice had been exchanged which covered the changes the carrier had already instituted as its form of self-help. Whether there was an actual "strike" by the Trainmen Union is discussed at 179 n.22.


56. The court permitted the FEC to exceed the ratio of apprentices to journeymen and age limitations established by the collective bargaining agreements, to contract out certain work, and to use supervisory personnel to perform specified jobs where it appeared that trained personnel were unavailable. Several other FEC requests were denied. Subsequently, both sides appealed, but the court of appeals affirmed on the basis of its decision in *Trainmen*. *Florida E.C. Ry. v. United States*, 348 F.2d 682 (5th Cir. 1965).


58. 384 U.S. at 246. The Court went on to say that the Union remained the bargaining agent for both its members and the replacement employees and that the replacement workers were entitled to all the benefits of the prior collective bargaining agreements. But, the Court concluded, "when a strike occurs, both the carrier's right of self-help and its duty to operate, if reasonably possible, might well be academic if it could not depart from the terms and conditions of the collective bargaining agreement without first following the lengthy course the Act otherwise prescribes." *Id.* But realizing that a carrier might use the occasion of a strike to institute wholesale changes in the collective bargaining agreement, the Court carefully circumscribed the measures a carrier was permitted to employ.
Court permitted only those changes that were "reasonably necessary", (using the term in its strictest sense) to continue operations.

In both *Trainmen* and *Railway Clerks*, lawful "strike conditions" were in existence which were precipitated by the failure of the major dispute provisions to produce a settlement. Thus, before the carrier was permitted to resort to self-help, the Act's major dispute provisions had been exhausted and the union had already engaged in self-help itself. More important, both cases emphasize the carrier's right and duty to continue its operations and, if interpreted broadly, suggest that under certain conditions that right and duty may outweigh the mandate of the RLA that the statutory procedures must be exhausted before the carrier can resort to self-help.

It has been indicated by the fifth circuit in a prior case that a union may similarly be able to resort to self-help under the RLA prior to the exhaustion of remedies. In *United Industrial Workers of Seafarers v. Board of Trustees*, the carrier unilaterally changed working conditions by consumating a lease of its elevator facilities in violation of the status quo provisions of section 6, resulting in the layoff of thirty-four workers. The union members then picketed, but were enjoined by the state court. Thereafter, the district court issued an injunction enjoining the carrier from availing itself of the state court injunction. The fifth circuit affirmed, stating that if the union is to be enjoined from picketing in the future, it must be enjoined under the RLA and not under a state statute; and it must be enjoined in a federal, not state, court. In its discussion of section 6, the court stated that at the time the state court injunction was issued, the carrier itself was in violation of the Act and "[t]he cases suggest that at that time, under the Act, the Union had the right to strike; that right continues during and until exhaustion of the procedures set up by the Act." Furthermore, the court noted that "[i]f the carrier refuses to follow the procedures of the Act, or if those procedures are followed to an impasse, the Union may strike." Apparently the only obligation on the part of the union before it may strike if the carrier is in non-compliance with the Act is that it must do everything it can to exhaust all the procedures of the Act. The court reasoned that "[t]he Union's right to bargain, guaranteed by the Act . . . and presently enforced by this Court, would be illusory without a right to strike when bargaining has run its course if the Carrier continues to refuse to bargain."

Although the rationale of *United Industrial Workers* relating to self-help is but dictum, it nevertheless lends support to the conclusion arrived at in *National*. The *United Industrial Workers* court recognized that the right to strike prior to the exhaustion of remedies under

59. 400 F.2d 320 (5th Cir. 1968).
61. 400 F.2d at 334.
62. Id.
the RLA might become necessary if the carrier refused to bargain.\[^{63}\] National presents the same situation in reverse. There the carrier was seeking self-help because the Union members had refused to bargain. In both cases, the parties seeking self-help did everything possible to exhaust the procedures of the Act, and as the court held in United Industrial Workers, that is all that is necessary.

While it is true that National had first breached the status quo\[^{64}\] by reducing the taxi crew from three to two men,\[^{65}\] it did return to the status quo ante immediately after the first order by the district court. But during the time of the breach, the strikers were nonetheless in violation of the Act by engaging in retaliatory self-help against the carrier.\[^{66}\] The proper remedy for the strikers would have been a request for equitable relief from the courts\[^{67}\] to enjoin the carrier from altering the number of men in the taxi crew from three to two. This was the remedy the union followed, but apparently such action did not appease the strikers. Thereafter, when National returned to the status quo ante in compliance with the order, it resumed an accord with the procedures of the Act. At this point, there was no justification whatsoever for any judicial relief much less self-help against the airlines.

\[^{63}\] Id. at 333.

\[^{64}\] One problem left open by the court is that no effect was given to the airline's original order to reduce the taxi crew from three to two workmen. While there may have been other labor problems between National and the union (although none are given), it was this order which precipitated the suspension of the three workers, the subsequent wildcat strike, and the discharge of the strikers. It should be pointed out that the district court later sustained the union's position and ruled that National had violated the status quo. See note 9 supra. Thus, National, the party originally at fault but later in compliance, was allowed to resort to self-help despite its original effort to change the status quo. The fifth circuit, however, did not consider the equitable doctrine of unclean hands or the statutory enactment of that doctrine in § 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108 (1964), since the issue was not presented by the union as a basis for denying injunctive relief in regard to the initial injunction. Nevertheless, the court did note that while National's conduct may have barred the initial injunction, it would not have barred the second injunction against the strikers since National had complied with the restraining order and resumed the status quo ante. Thus because of this action to restore the status quo, it could be contended that National did have "clean hands" when it applied for the second injunction. See National Airlines, Inc. v. International Ass'n of Machinists, 416 F.2d 998, 1003 n.4 (5th Cir. 1969); United Indus. Workers of Seafarers v. Board of Trustees, 400 F.2d 320, 332-34 (5th Cir. 1968); Florida E.C. Ry. v. Brotherhood of Locomotive Eng'rs, 362 F.2d 482, 485 (5th Cir. 1966); Butte, A. & Pac. Ry. v. Brotherhood of Locomotive Firemen, 268 F.2d 54, 60 (9th Cir.), cert. denied, 361 U.S. 864 (1959). See also Harper, Major Disputes Under the Railway Labor Act, 35 J. Am. L. & Cos. 3 (1969), for a discussion of when an injunction may issue under the RLA. See generally Aaron, The Labor Injunction Reappraised, 10 U.C.L.A. L. Rev. 292 (1963). Consider also that the "lack of clean hands" has been viewed by some courts as merely one of several factors to consider in granting injunctive relief and is not by itself an absolute ban to such relief. See Brotherhood of R.R. Trainmen v. Akron & B.B.R.R., 385 F.2d 581, 614 (D.C. Cir. 1968); Illinois Cent. R.R. v. Brotherhood of R.R. Trainmen, 68 L.R.R.M. 2817 (7th Cir. 1968).

\[^{64}\] See note 60 supra and accompanying text.

\[^{67}\] See note 41 supra and accompanying text.

\[^{65}\] The carrier claimed that this change constituted only a minor dispute and therefore did not violate the status quo. The court rejected this argument observing that the discharge occurred after the exchange of § 6 notices during a "freeze" period when self-help is ordinarily unlawful. Moreover, the court acknowledged that this would be true even if the change in taxi crews constituted a minor dispute. Cf. Brotherhood of Ry. & Steamship Clerks v. Florida E.C. Ry., 384 U.S. 238 (1966). In other contexts, a district court may qualify an injunction with conditions in accord with traditional equitable considerations. Brotherhood of Locomotive Eng'rs v. Missouri-K.-T.R.R., 363 U.S. 528 (1960).

\[^{66}\] See note 60 supra and accompanying text.

\[^{67}\] See note 41 supra and accompanying text.
The continuance of the wildcat strike subsequent to National's resumption of the status quo *ante* seems clearly a violation of the Act, especially if the reasoning in *United Industrial Workers* is followed. Furthermore, a broad reading of *United Industrial Workers* might even suggest that National could have instituted self-help immediately after it returned to the status quo *ante*. But at this stage, it would seem that recourse to self-help would not be justified and that resort to the courts would be preferable. To allow self-help here before the courts have had an opportunity to correct the situation would be, as one court has stated, "allowing both parties simply to do away with the Act." In this respect, the *United Industrial Workers* reasoning of allowing a party recourse to self-help when the other party is in non-compliance with the Act would seem to completely vitiate the RLA's scheme for settlement.

In *National*, however, the carrier first sought its proper remedy in the courts, and even when this proved ineffective, it returned to the courts for additional assistance, which again proved inadequate. At this juncture, the carrier was confronted with a perplexing dilemma. It had already cancelled thirty-six flights as a result of the strike and was faced with the probability of further cancellations unless it could resume its normal operations. Thus, under the burden of this interruption in its service by wildcat strikers who refused to maintain the status quo and who openly defied the carrier, the union and the courts, National, having done all it could to restore the status quo, resorted to self-help, dismissing the strikers who did not return to work as was ordered by the district court in its second order.

By allowing National to resort to self-help prior to the exhaustion of the RLA's statutory procedures, the decision of the fifth circuit seems to break tradition with previous cases. But when read in the context of the purposes of the RLA, the result is in harmony with the Act's policy of continuing service to the public, maintaining commerce and preventing interruptions thereto. Moreover, it must be stressed that the dismissal was permitted only after several remedies had been tried without success and alternate remedies seemed inade-

68. *Cf.* NLRB v. Draper Corp., 145 F.2d 199, 204 (4th Cir. 1944), where the court said in regard to a wildcat strike in violation of the NLRA:

> When the union was selected by the employees and recognized by the company as bargaining agent, it was understood and agreed on all sides that bargaining with respect to wages, hours and conditions of work would be carried on between the union and the company in accordance with the above quoted statutory provision, that the employees would acquiesce in action taken by the union and that they would not undertake independent action with respect to the matters they had committed to it as their authorized agency. Not only did the company agree to bargain only with the union, but the employees agreed to bargain only through the union. Those who engaged in the "wildcat strike" violated this agreement.

69. *See* note 60 *supra* and accompanying text.

70. *See* note 41 *supra* and accompanying text.

71. The second order issued by the district court instructed the union to "advise the membership that it is the order of the Court and of the defendant IAM that all men return to work by their next shift, and that individuals who refuse to so report are subject to penalties which could include dismissal by NATIONAL AIRLINES." 416 F.2d at 1001. In other contexts it has been held that a district court may qualify an injunction with conditions in accord with traditional equitable considerations. Brotherhood of Locomotive Eng'rs v. Missouri-K.-T.R.R., 363 U.S. 528 (1960).
quate." In other words, as the court stated, "an unmanageable work stoppage" had resulted. While the court did not explicitly so state, it also seemed to be influenced by the danger of a crippling effect to the airline because of the strike. Since airlines deal in services, and not goods, they cannot prepare for a strike by building up inventory. Moreover, the great cost of operation for the airlines as opposed to dwindling profits, could result in a financial disaster to an airline faced with strike conditions. These factors, coupled with the immediate effect on the public as evidenced by the inconvenience to the passengers of the thirty-six flights, appears to have weighed heavily in the court's consideration. When viewed in the light of these compelling circumstances, the fifth circuit's decision amounts to no more than an attempt to regain the status quo ante by allowing National to replace the strikers so that it could continue its operations and prevent any commercial interruption.

Although the court did grant self-help prior to the exhaustion of remedies, it did so reluctantly and only after it carefully circumscribed its employment. It strictly limited self-help to the extent necessary to restore service regardless of whether recourse to such action was precipitated by a lawful or unlawful strike. "[I]ts exercise was allowable only so far as it served that end." Thus while it viewed replacement of the strikers as a reasonably necessary step to restore service, it frowned upon the mass discharge of the strikers, viewing such action as incompatible with the policy of the RLA.

It might be contended that National could open up a Pandora's box in the area of major disputes, causing a frustration of the Act's purposes by allowing self-help prior to the exhaustion of the RLA's procedural process; this result, however, does not seem likely. It must be stressed that the purpose of the RLA is not to establish and enforce inflexible standards but rather to promote commerce and establish a degree of harmony between the carriers and the unions in the transportation industry. It would seem then that the policy

72. Further injunctive relief at this stage would seem futile. Since the strikers had not obeyed the prior injunctions, there was no reason to expect them to comply with any new ones. Contempt citations or fines would also appear ineffective. The efficacy of such measures had greatly diminished once the union had lost control of the workers. Possibly, however, the carrier should have returned to the court for further instruction before discharging the strikers. But, then again, the court's actions had proved unsuccessful twice before and time was becoming critical to the carrier.


74. Id.

75. In Trainmen and Railway Clerks the carrier was confronted with a lawful strike whereas here the strike is unlawful. It might be contended that need for self-help is greater where the strike is unlawful and thus usually less subject to judicial, union or other control. But, the court felt that whether lawful or unlawful, restraint in the use of self-help is the best policy. See Gould, The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act, 52 Cornell L.Q. 672 (1967), for a discussion of approaches taken by the NLRB and several circuit courts in handling wildcat strikes.

76. 416 F.2d at 1006. The question of what is reasonably necessary is primarily one to be left to the discretion of the district judge. See Florida E.C. Ry. v. Brotherhood of R.R. Trainmen, 336 F.2d 172, 182 (1964).

77. Discharge would eliminate those workers best suited to carry on National's business as well as preventing the possible restoration of the status quo should the strikers choose to return to work before enough replacements were hired.
of the Act would be curtailed more by allowing wildcat strikers to openly repudiate the machinery of the RLA causing a cessation of airline service than to allow a carrier the right to institute self-help to restore flight operations. The fifth circuit’s decision that National’s recourse to self-help was not prohibited by the Act seems in accord with *Trainmen* and *Railway Clerks* for, as in those cases, resort to self-help was permitted when, and only when, all other remedies had failed to bring one of the disputants into compliance with the Act’s procedures, and existed only to the extent necessary to continue operations.