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Emergency Board Procedures Under Sections 9A and 10 of the Railway Labor Act

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EMERGENCY BOARD PROCEDURES
UNDER SECTIONS 9A AND 10
OF THE RAILWAY LABOR ACT

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I. THE STATUTORY PURPOSE OF PRESIDENTIAL EMERGENCY BOARDS

Presidential emergency boards are created to investigate and report on unresolved major disputes which "threaten substantially to interrupt interstate commerce." 45 U.S.C. § 160.

A. The Duty of the Parties to Settle Disputes

1. Section 2, First -- the parties are obligated to "exert every reasonable effort to make and maintain agreements . . . and to settle all disputes."

2. Section 5, First -- to assist in the settlement of disputes, either party may "invoke" the NMB's mediation services, or the NMB may "proffer its services in case any labor emergency is found by it to exist at any time."

B. Events Immediately Preceding Potential Emergency Board

1. Section 5, First -- where the NMB's "best efforts" to mediate a settlement are unsuccessful, the NMB "endeavor[s] to induce the parties to submit their controversy to arbitration"; if the parties refuse arbitration and no emergency board is created, the Board releases the parties from mediation, and the status quo must be maintained for 30 days.

2. If no emergency board is created, the parties are free to exercise self-help, i.e., carriers may institute changes in rates of pay, rules, and working conditions and union may engage in work stoppage or strike. Pan Am. v. IBT, 894 F.2d 36 (2d Cir. 1990). A emergency board may be created at any time after the 30-day period -- even if there has been a significant lapse of time. RLEA v. Boston & Maine Corp., supra.

   a. When an emergency board is created following self-help by the parties, the parties are required to restore the status quo ante, i.e., to restore the conditions existing prior to the dispute (the date of the Section 6 notice), rather than the conditions which existed following the exercise of self-help. RLEA v. Boston & Maine Corp., 808 F.2d 150 (1st Cir. 1986), cert. denied, 484 U.S. 803 (1987). The status quo includes not only those conditions specified in collective bargaining agreements, but the "actual objective conditions" existing on the property. Detroit, Toledo & Shore Line Railroad v. UTU, 396 U.S. 142, 153 (1969).

II. THE CREATION OF EMERGENCY BOARDS

A. Section 10, 45 U.S.C. § 160

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten 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 thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: Provided, however, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

* * *

After the creation of such board and for thirty days after such board has made 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.

1. The Act does not define what constitutes a substantial threat to interstate commerce, or what constitutes essential transportation services. Considerations may be:

   a. the effect of a strike or shutdown on the national or regional economy (looking at the availability of alternate carriers to provide service - a "city pairs" analysis);

   b. the immediate economic impact on the transportation sector or on other local, national or "vital" industries;

   c. the effects on military logistics and transportation;

   d. the particular administration's national transportation and labor policies; and

   e. the likelihood of congressional intervention.

2. NMB notifies the President that the dispute threatens interstate commerce.

   a. A decision by the NMB to notify the President under Section 10 is unreviewable absent "patent official bad faith or a gross statutory violation." IAMAW v. NMB, 2002 US Dist. Lexis 367; 169 LRRM 2157 (Jan. 14,2002). In that case, the US District Court for the District of Columbia found that this same high standard, used by the courts to review other NMB dispute resolution functions -- representation issues and mediation releases - should be applied in the emergency board context as well.

b. RLA places no time limits on when the NMB can or must notify the President; on occasion, the NMB has not notified the President until after the parties have resorted to self-help. Maine Central R.R. v. BMWE, 813 F.2d 484 (1st Cir. 1987).

c. Historically, emergency boards have most often been created to investigate disputes on railroads: there have been 200 railroad emergency boards, compared to only 36 airline emergency boards.

d. In the airline industry, three emergency boards have been created since 1997, ending a 31-year drought. An emergency board was established by President Clinton in the American Airlines/APA dispute, P.E.B. 233, created Feb. 15, 1997, but it did not issue a recommendation to the President, since the parties reached an agreement during its life. P.E.B. 235 was established by President Bush in the 2001 Northwest Airlines/AMFA dispute, but a settlement was reached before the required P.E.B. reporting date. P.E.B. 236 was established in the United Airlines/IAMAW dispute and an agreement was reached after the report was issued.

The most recent prior emergency board recommended by the NMB and created by the President was P.E.B. 168 in 1966, which involved the shutdown of five national airlines. In between, Congress provided for the creation of P.E.B. 189 to investigate a dispute between Wien Air Alaska Airlines and ALPA in 1979. In 1989, the White House announced that the NMB had recommended but that it would not create an emergency board in the Eastern Airlines/IAMAW dispute.

Several factors have led to the recent surge in emergency boards in the airline industry. One is the shear volume of passenger enplanements, having reached over 230,000 per day for the largest four carriers (American, Delta, Northwest and United), or up to two million passengers per week. Second, the dominant market share of individual major airlines at hub airports creates a greater regional impact of a shutdown (e.g. Northwest with 69% at Detroit, 72% at Minneapolis; Delta with 73% at Atlanta, 67% at Salt Lake City; United with 62% at Denver and 47% in San Francisco; and American with 62% at Dallas/Ft. Worth and 50% at Miami).

On March 19, 2001, President Bush publicly announced an interventionist approach to the threat of major airline shutdowns. He stated, "I intend to take the necessary steps to prevent airline strikes from happening this year." However, no emergency board was created in the "regional" Comair/ALPA strike, which lasted 89 days.

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3. The Section 10 of the RLA does not limit the President's discretion to determine

whether or when to create an emergency board, so long as the NMB has given the President official notification. Without official NMB notification, the President does not have authority to create an emergency board. See, e.g., IAMAW v. NMB, supra.

4. The President appoints all board members. The NMB may advise the President on the selection of emergency board members.

   a. Generally, emergency boards have been composed of professional labor-management arbitrators familiar with RLA and industry practices, and are on the NMB roster of approximately 500 neutrals. President authorizes members' compensation and expenses in appointment letters.

   b. "No member shall be pecuniarily or otherwise interested in any organization of employees or any carrier." Section 10. This has been applied to preclude board members who have an interest in any organization or carrier, airline or railroad, whether or not the entity is directly involved in the dispute.

5. Where the NMB determines that a dispute "threaten[s] substantially to interrupt interstate commerce," and notifies the President, and the President creates an emergency board to investigate; then, the status quo must be maintained starting from the creation of the emergency board through its report to the President 30 days later and for 30 days after the emergency board reports to the President.

a. Emergency boards are created by Executive Order. If President does not create an emergency board, then RLA dispute resolution procedures end, as does the status quo. Parties may exercise self-help at end of the 30-day "cooling off" period.

b. The duty to maintain the status quo is enforceable by injunction against the parties to the dispute; conduct by entities not a party to the dispute may not be enjoined under Section 10's status quo provision. RLEA v. Boston & Maine Corp., 808 F.2d at 159.

B. Section 9A , 45 U.S.C. § 159a - Commuter Railroads

§ 159a. Special procedure for commuter service

(a) Applicability of provisions

Except as provided in section 590(h) of this title, the provisions of this section shall apply to any dispute subject to this chapter between a publicly funded and publicly operated carrier providing rail commuter service (including the Amtrak Commuter Services Corporation) and its employees.

(b) Request for establishment of emergency board

If a dispute between the parties described in subsection (a) of this section is not adjusted under the foregoing provisions of this chapter and the President does not, under section 160 of this title, create an emergency board to investigate and report on such dispute, then any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is operated may request the President to establish such an emergency board.

(c) Establishment of emergency board

(1) Upon the request of a party or a Governor under subsection (b) of this section, the President shall create an emergency board to investigate and report on the dispute in accordance with section 160 of this title. For purposes of this subsection, the period during which no change, except by agreement, shall be made by the parties in the conditions out of which the dispute arose shall be 120 days from the day of the creation of such emergency board.

(2) If the President, in his discretion, creates a board to investigate and report on a dispute between the parties described in subsection (a) of this section, the provisions of this section shall apply to the same extent as if such board had been created pursuant to paragraph (1) of this subsection.

(d) Public hearing by National Mediation Board upon failure of emergency board to effectuate settlement of dispute

Within 60 days after the creation of an emergency board under this section, if there has been no settlement between the parties, the National Mediation Board shall conduct a public hearing on the dispute at which each party shall appear and provide testimony setting forth the reasons it has not accepted the recommendations of the emergency board for settlement of the dispute.

(e) Establishment of second emergency board

If no settlement in the dispute is reached at the end of the 120-day period beginning on the date of the creation of the emergency board any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is operated may request the President to establish another emergency board, in which case the President shall establish such emergency board.

(f) Submission of final offers to second emergency board by parties

Within 30 days after creation of a board under subsection (e) of this section, the parties to the dispute shall submit to the board final offers for settlement of the dispute.

(g) Report of second emergency board

Within 30 days after the submission of final offers under subsection (f) of this section, the emergency board shall submit a report to the President setting forth its selection of the most reasonable offer.

(h) Maintenance of status quo during dispute period

From the time a request to establish a board is made under subsection (e) of this section until 60 days after such board makes its report under subsection (g) of this section, no change, except by agreement, shall be made by the parties in the conditions out of which the dispute arose.

(i) Work stoppages by employees subsequent to carrier offer selected; eligibility of employees for benefits

If the emergency board selects the final offer submitted by the carrier and, after the expiration of the 60-day period described in subsection (h) of this section, the employees of such carrier engage in any work stoppage arising out of the dispute, such employees shall not be eligible during the period of such work stoppage for benefits under the Railroad Unemployment Insurance Act [45 U.S.C. § 351 et seq.].

(j) Work stoppages by employees subsequent to employees offer selected; eligibility of employer for benefits

If the emergency board selects the final offer submitted by the employees and, after the expiration of the 60-day period described in subsection (h) of this section, the carrier refuses to accept the final offer submitted by the employees and the employees of such carrier engage in any work stoppage arising out of the dispute, the carrier shall not participate in any benefits of any agreement between carriers which is designed to provide benefits to such carriers during a work stoppage.

1. Section 9A applies to publicly-owned and publicly-operated carriers that provide commuter rail service. Section 9A(a).

   a. The Rail Passenger Service Act defines a "commuter authority" as:

      [A]ny State, local or regional authority, corporation, or other entity established for purposes of providing commuter service, and includes the Metropolitan Transportation Authority, the Connecticut Department of Transportation, the Maryland Department of Transportation, the Southeastern Pennsylvania Transportation Authority, the New Jersey Transit Corporation, the Port Authority Trans-Hudson Corporation, any successor agencies, and any entity created by one or more such agencies for the purpose of operating, or contracting for the operation of commuter service. 45 U.S.C. § 502(8).

   b. The Rail Passenger Service Act defines "commuter service" as:

      [S]hort haul rail passenger service operated in metropolitan and suburban areas, whether within or across the geographical boundaries of a State, usually characterized by reduced fare, multiple-ride, and commutation tickets and by morning and evening peak period operations. 45 U.S.C. § 502(9).

c. RLA jurisdiction over rail carriers is delimited by the Interstate Commerce Act's definition of "rail carrier." RLA jurisdiction, however, also extends to "local public body" carriers, such as commuter rail carriers, which are otherwise exempt from ICA jurisdiction. See New Jersey Transit Policemen's Benevolent Ass'n v. New Jersey Transit Corp., 806 F.2d 451 (3d Cir. 1986), cert denied 483 U.S. 1006 (1987). The exemption of such entities continues under the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

2. Emergency boards may be created for commuter rail disputes under both Section 9A and Section 10; however, if the President creates an emergency board for a commuter railroad under Section 10, the Section 9A procedures apply to that emergency board. Section 9A(c)(2).

a. All Section 9A boards created to date have investigated disputes in the northeastern U.S., specifically on the Long Island Railroad, the Port Authority Trans Hudson Corporation, Metro-North Commuter Railroad, and the Southeastern Pennsylvania Transportation Authority.

b. Section 9A (a) includes an express provision extending its application to "Amtrak Commuter Services Corporation," however that entity was never created. The emergency board procedures of section 10 apply to Amtrak (the National Railroad Passenger Corporation), see Executive Order No. ___ (Aug. 21, 1997)(creating P.E.B. 234).

c. It is uncertain whether Section 9A (or the RLA itself) apply to other commuter lines serving cities such as San Francisco, Chicago, and Atlanta.

d. Prior to the passage of 9A, the LIRR argued that Congress did not intend the Act to apply to state-owned passenger railroads. Long Island Railroad v. UTU, 634 F.2d 19, 23 (2d Cir. 1980), reversed and remanded, 455 U.S. 678, 683 n.4, 109 LRRM 3017 (1982)(noting that LIRR's "significant volume of freight business" disposed of any question that, even prior to 9A, the railroad was subject to the RLA).

e. Jurisdictional questions also arise as to other commuter entities. See Tri-County Community Rail Organization, 17 NMB 321 (1990)(passenger railroad operating over CSXT right of ways in Dade, Broward, and Palm Beach counties held not subject to RLA jurisdiction).

f. Section 1, First (45 U.S.C. § 151, First) excludes electric railways from RLA coverage; thus, electric commuter railways are not subject to Section 9A procedures. See Railway Labor Executives Ass'n v. Staten Island Rapid Transit Operating Authority, No. CV-3831 (E.D.N.Y. 1988)(finding passenger railroad not subject to ICC or RLA jurisdiction).

g. Pubic agencies which acquire rail lines, property or rights of way for use in passenger rail service, but which have no role in controlling or operating railroad itself, are not subject to ICC jurisdiction. State of Maine -- Acquisition and Operation Exemption, ICC Finance Docket No. 31847 (May 20, 1991).

3. The President may, with NMB notification, create a board under authority of section 10 to address the commuter dispute; or, any party to the dispute or the Governor of any state through which the commuter railroad operates may require the President to create an emergency board. Section 9A(b).

a. Unlike Section 10's 60-day "cooling off" period after the creation of the board, under 9A the status quo must be maintained for 120 days from the creation of an emergency board. Section 9A(c).

4. If the dispute is not resolved during the 120 day status quo period, any party or the Governor may require the President to create a second 9A emergency board. Section 9A(e).

a. Upon creation of the second board, the status quo must be maintained for an additional 120 days. Section 9A(c)(1), (f), (g), (h).

b. Section 9A does not create a statutory deadline by which a party to the dispute must request the President to convene a second emergency board. United Transp. Union v. National Mediation Board (and Metro-North Commuter Railroad), No. 95-1452 (D.D.C. Sept. 7, 1995)(commuter railroad's request for second board, after expiration of 120 status quo period, was not untimely).

C. Congressionally Created Emergency Boards

1. In 1978, as part of the Airline Deregulation Act, Congress provided for the creation of P.E.B. 189 to investigate a dispute between Wien Air Alaska Airlines and ALPA.

2. In 1989, President Bush vetoed legislation which would have established a commission to investigate and report on a dispute at Eastern Airlines involving IAM, ALPA, and TWU.

3. In 1991, Congress appointed a "Special Board" to review the recommendations of P.E.B. 219, which investigated the disputes between 97 railroads, including all of the nation's 13 Class I railroads and most of the rail labor organizations.

4. Emergency boards 196, 197, 198 were created by Congress to investigate issues arising out of the transfer of Conrail commuter operations to the states of New York, New Jersey, and Pennsylvania, under § 510 of the Rail Passenger Service Act of 1970, Pub.L.No. 91-518, 84 Stat. 1328, as amended by the Northeast Rail Service Act of 1981, Pub. L. No. 97-35, 95 Stat. 681.

III. ACTIVITIES OF THE EMERGENCY BOARD

A. Section 10 Emergency Boards

1. Section 10 authorizes emergency boards to investigate and report to the President. The role of the emergency board is one of official fact-finder for the President. Emergency board reports are generally made public by the President. Boards generally hold oral hearings and take testimony and evidence from the parties. Boards are not charged with settling disputes, although they have engaged in mediation as part of their fact-finding, or have attempted to narrow the issues. The board's recommendations are not binding on the parties.

2. An emergency board has 30 days to investigate and report to the President; this period is often extended, however. For example, P.E.B. 219, created on May 5, 1990, received three extensions of time from the President to file its report, which was finally submitted on January 15, 1991. On each occasion, the parties and the NMB concurred with the emergency board in requesting the extensions.

3. The President may request the NMB to distribute the report. The President may also, however, choose not to release the report and generally does not release other documents submitted to or created by the emergency board. The report and all related documents are considered official presidential documents and have not been accessible under the Freedom Of Information Act.

B. Section 9A Emergency Boards

1. Section 9A(e) permits the appointment of two emergency boards for each dispute. A second emergency board may be created if the dispute is not settled at the end of the first 120-day status quo period. The first emergency board reports within 30 days of its creation; if either party does not accept the first emergency board's recommendations, it must, before the end of the next 30 days, "appear [before the NMB] and provide testimony setting forth the reasons it has not accepted the recommendations of the emergency board for settlement of the dispute." Section 9A(c). After the first 60-day period (for the emergency board's report and the parties' appearances before the NMB), a 60-day status quo period begins.
2. At the end of the first 120 days, if a party or Governor requests a second Section 9A board, the parties must submit final offers to that board within 30 days of its creation. § 9A(f).

   a. Within 30 days from the submission of final offers, the second board reports

to the President on its selection of the most reasonable offer. Section 9A(g).

b. Section 9A boards have been divided over whether to choose a single comprehensive final offer of one party as against the other, or to select the best final offers of either side on each issue. Compare Report of P.E.B. 201 ("Board . . . concluded that it is required to select a single 'package' offer"), and P.E.B. 227 ("The ground rules we set require the selection of that offer on a total package basis."), with Report of P.E.B. 207 ("Board is satisfied that it can make that selection either on the basis of the entire package offer . . . or on the basis of each individual item").

3. The second board's selection of a final offer is not binding on the parties. The consequences of rejecting the second board's recommendations are set forth in the statute.

   a. If employees reject the board's selection of the carrier's final offer, striking employees are not eligible for benefits under the Railroad Unemployment Insurance Act, 45 U.S.C. § 351 et seq. Section 9A(i).

   b. If the carrier rejects the board's selection of the employees' final offer, the carrier "shall not participate in any benefits of any agreement between carriers which is designed to provide benefits to such carriers during a work stoppage." Section 9A(j). These agreements between carriers are generally known as "mutual aid pacts."

4. There is a further 60-day status quo period following the second board's report, before the parties can resort to self-help. Section 9A(h).

C. Scope of the Emergency Boards' Jurisdiction over Issues

1. Neither Section 9A nor Section 10 set forth the scope of emergency board jurisdiction over issues related to the dispute.

2. P.E.B. 219's recommendations were alleged to have gone beyond the items set forth in the parties' Section 6 notices, particularly as related to crew consist issues which the union asserted to be a "local" and the carriers asserted to be a "national" issue. The D.C. Circuit upheld congressional action, ultimately (following a review by a Special Board) imposing P.E.B. 219's recommendations on the parties. UTU v. United States, 987 F.2d 784 (D.C. Cir. 1993).

3. In contrast, P.E.B. 217 (PATH/TCU), created under Section 9A, refused to consider issues that were not included in the parties' Section 6 notices, finding it was "not appropriate to allow issues to leapfrog the prior stages of the Act and to surface, without prior notice or consideration, in a final offer." See also P.E.B. 205 (LIRR/BLE)("The Board is convinced that it is inappropriate to make recommendations on issues which were neither the subject of bargaining nor presented in detail to the Board.").

4. Another issue concerns the authority of an emergency board to recommend terms for a subsequent contract period, i.e., recommend a "prospective" settlement. P.E.B. 226 (Metro-North/IBEW,IBT,TWU,UTU) undertook to recommend such a prospective settlement, pursuant to an explicit and "novel" agreement between the parties which "created a process . . . to resolve their disputes for both the old and new contract terms." (The parties had settled their prior round disputes before the NMB proffered arbitration.) The second emergency board, P.E.B. 227, thereafter selected final offers for the subsequent contract period. P.E.B. 231 (SEPTA/BLE) made recommendations concerning the dispute submitted to it, covering a retrospective three-year period, but also made recommendations concerning the prospective three-year period on issues for which there had been no Section 6 notices or real bargaining between the parties, stating: "While the 'dispute' initially may have been confined to the proposals contained in the Section 6 notice, the dispute evolved with the negotiations and mediation process."

IV. DISPUTES NOT RESOLVED BY EMERGENCY BOARDS

A. Limited Authority of Emergency Boards

1. Sections 10 and 9A do not empower emergency boards to settle major disputes; they merely investigate and report to the President.

2. The RLA's mediation procedures are intended to allow control of the timing of the bargaining process by the NMB to make settlements more likely; emergency board procedures are intended to draw attention to the dispute and apply the force of public opinion.

3. The status quo provisions of Section 10 and 9A, are intended to allow for the emergency boards to operate in a period of relative calm and to serve as "cooling-off" periods during which the parties can consider the recommendations, and to allow them the opportunity to reach agreement on the basis of the recommendations or otherwise.

B. Limited Authority of the NMB and the President

1. NMB does not have the authority to impose a settlement on the parties.

2. The President may intervene and attempt to pressure a resolution. The President, however, cannot impose the emergency board's recommendations or his own terms on the parties.

C. Congressional Intervention in Settling Disputes

1. Congress has played a major role in legislating the settlement of disputes which have not been resolved through the RLA's emergency board procedures.

a. The Commission on the Future of Worker-Management Relations, chaired by former Secretary of Labor John Dunlop, noted in its May, 1994 report that "[o]ut of the 17 times that Congress has had to intervene in rail disputes, five occurred in the last ten years, giving Congress a role it does not relish."

2. Congress may create additional boards to investigate a dispute, e.g., the Special Board appointed to review P.E.B. 219's recommendations, created by Pub. L. 102-29, 105 Stat. 169 (see UTU v. United States, 987 F.2d 784 (D.C. Cir. 1993)).

3. Congress may impose an emergency board's recommendations, e.g., settlement of the dispute between the Chicago & Northwestern Transportation Company and UTU, imposing P.E.B. 213's recommendations, Pub. L. 100-429, 102 Stat. 1617.

4. Congress may require the parties submit their disputes to binding interest arbitration, e.g., Pub. L. 99-431, 100 Stat. 987 (see Maine Central R.R. v. BMWE, 873 F.2d 425 (1st Cir. 1989)).

5. Congress may extend the status quo period, e.g., Pub. L. 99-385, 100 Stat. 819 (see Maine Central R.R. v. BMWE, 813 F.2d 484 (1st Cir. 1987), cert denied 484 U.S. 825, 126 L.R.R.M.(BNA) 2495(1987)

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Settling Airline Labor Disputes

By JOSHUA M. JAVITS

When American Airlines' flight attendants struck the company in November, President Clinton personally intervened, convincing the parties to arbitrate their differences. Wayne Horvitz, writing on this page on Dec. 20, suggested Mr. Clinton would have done better to convene a Presidential Emergency Board, a kind of dispute resolution mechanism available under the Railway Labor Act.

Mr. Horvitz, however, does not discuss the problems with emergency boards and, indeed, with any government intervention in private labor-management disputes. With national railroad negotiations and major airline talks due this year, and with an activist administration in Washington, the issue of government intervention is center stage.

Emergency boards seem benign and potentially helpful: A neutral third party makes recommendations, which the parties can use to justify softening hardened positions. Still, the emergency board option presents problems.

For starters, a board does not actually settle a dispute; it merely makes non-binding recommendations and almost inevitably prolongs the conflict. Moreover, creating a board lessens the chance the parties will reach an agreement during negotiations. Labor and management tend to come closer together through collective bargaining because the alternative — industrial warfare — is so unpalatable. This fear is the primary motivation for reaching an agreement.

Moreover, if emergency boards are too readily available and, thus, anticipated, the parties will tend to sit back and let the board do their work. Collective bargaining gives each side a first-hand appreciation of the needs, interests and resolve of the other. Settlement, absent real bargaining, is anathema to the labor negotiation process.

Second, once third parties become involved, they tend to stay involved. At American Airlines, if an emergency board had been created but had not resolved the dispute, the president and/or Congress would have been lobbied by one side or the other to take action. Moreover, disrupting the lives of 200,000 American Airlines passengers each day would have triggered a flood of phone calls to congressional offices demanding action.

Congressional intervention is even more likely when an emergency board has produced recommendations; Congress can easily convert them into a legislative settlement and impose it on the parties. The opportunity to lobby to "improve" the recommendations is also irresistible, bringing Congress further into a private dispute.

No president has created an emergency board for an airline disruption since 1966, when a 43-day strike against five major carriers shut down 60% of the industry. That conflict capped a long history of frequent airline emergency boards, which most participants — and Congress — considered unsuccessful.

The history of railroad labor conflicts over the past 30 years shows the near inevitability for emergency boards to be followed by congressional action. Most recently, four separate acts of Congress were needed in the four years from 1988 to 1992 to deal with rail disputes.

In many cases, collective bargaining in the railroad industry has become merely a formality; the real negotiating takes place in the halls of Congress. With an emergency board report in hand, Congress is tempted to impose its recommendations, or something like them, on the parties. The result? The two sides avoid compromise during negotiations and use the political system to resolve disputes. Politicians are then persuaded to take sides.

And no matter how well-intentioned, any government action will be perceived as "taking sides." In the last national railroad dispute, a creative emergency board process was engineered by the parties themselves — 10 of 11 national rail union presidents personally negotiated and agreed to the process. But this did not prevent the hostility, political bloodletting and scapegoating that occurred when the unions felt they drew the short straw at the end of the process. Based on the results of that process, the Democratic Congress ended those rail strikes against the will of the unions.

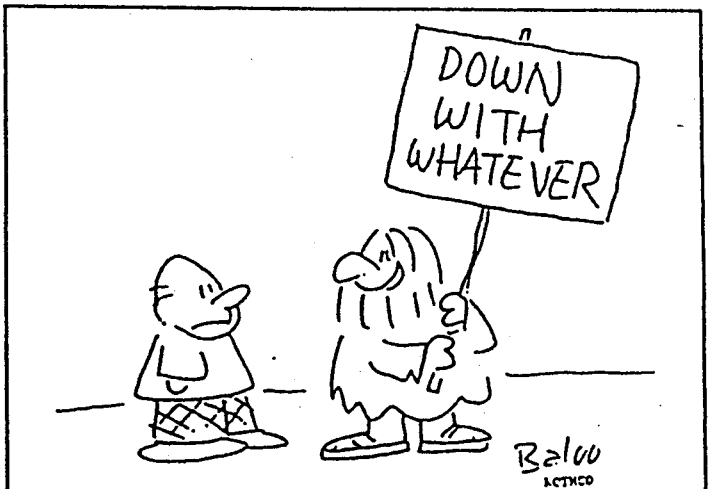
The debilitating effect of emergency boards on collective bargaining is only justified by the more harmful national impact of a major rail shutdown. Under the Railway Labor Act, there must be a substantial economic threat "to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service" before a president, with a go-ahead from the National Mediation Board, may convene an emergency board. The act's authors thought few boards would be created and expected them to deal with broad issues. They believed the RLA's voluntary arbitration provisions to be more useful.

The tough standard for creating a board seeks to avoid the politization and proliferation of these panels. It suggests restraint and the use of objective criteria in determining whether, and to what extent, the government should intervene.

If the legal standard for creating an emergency board — a real transportation emergency — is not met, should the president informally intervene? At American, perhaps ad hoc presidential action was preferable to the precedent of creating a board when an emergency did not exist. It is certainly questionable whether a short airline strike would have met the standard, especially since most of the dislocated passengers could have been accommodated on other airlines. Of course, the distinction between these forms of intervention is blurred if the president uses the threat of an emergency board to get the parties to "accept" arbitration.

But the real danger of personal presidential intervention is precisely that it is ad hoc, unpredictable and political. The uncertainty of whether the government will intervene in a specific case should be minimized by the use of objective criteria, to the extent possible. That way, the parties will know if the government is likely to act.

More important, virtually any government intervention will undermine collective bargaining, making the dispute more protracted and drawing the president and Congress into private conflicts. The least intervention is the best. Leave emergency boards for emergencies.



"This way, I don't have to keep painting new signs."

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The virtue of limited engagement

BY JOSHUA M. JAVITS

The countdown to a pilot strike at American Airlines two months ago, delayed by government intervention, was peacefully resolved when the pilots' union recently ratified a settlement agreement.

There had been every reason to believe that a strike would occur, perhaps affecting 1.5 million travelers a week, because of the deep divisions on the issues in dispute.

The dispute centered around pilot compensation and the introduction of the new small passenger jet aircraft. American sought to keep compensation stable and to give the new jet to its low-cost regional subsidiary, in recognition of the industry's historic low rate of return and the disparity between pilot and other American employee compensation. On the other side, the pilots wanted a piece of the huge recent profits at American and wished to enhance job security by obtaining the exclusive right to fly the new jets.

The parties reached a tentative agreement last August, but failed to ratify it. With the union leaders' credibility thus undermined by the lack of membership support, there was little hope for peaceful resolution. The table was set for another confrontation.

Enter the Railway Labor Act. It governs labor relations in the airline and railroad industries, and forces the parties through a series of locks and channels designed to narrow the number and nature of differences and to push the parties toward settlement.

In the American dispute, the parties negotiated, mediated under the auspices of the National Mediation Board, were released from mediation and entered into a 30-day cooling-off period.

A presidential emergency board studied the dispute for 30 days and made recommendations; a final 30-day cooling-off period followed.

Perhaps the key was the emergency board's decision to make recommendations, which almost precisely matched the mediation board chairman's final compromise proposal, just prior to the midnight appointment of the emergency board.

The near-match told the parties that dragging the process to the next level was not going to win them a better result from outside authorities. The public was enlisted in this "fair" result, the American mechanics and flight attendants who earn on average 50% to 80% less than the pilots became antagonistic toward their fellow unionists' threats to shut down the airline.

Perhaps more important, if Congress were to intervene in the dispute it would have a tailor-made resolution to impose on the parties: the emergency board report. The parties were thus put in a position to settle.

In the end, American was required to improve upon the emergency board report to reach an agreement in light of the pilots' rejection of the neutrals' recommendations, and their ultimate power to shut down the airline.

This dispute is not unlike other deep conflicts. It shows that focused, timely mediation and exposure of the issues to the light of day can diffuse a conflict, and that credible neutral analysis and assistance can persuade unbending protagonists.

Government intervention here was relatively minimal but it matched the nature and importance of the dispute and the potential impact on the public.

Ultimately, it played the key role in informing and bringing to bear the weight of public opinion and nudging the parties to a fair peace — a most appropriate and successful role.

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