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SELECTIVE OF THE BARGAINING REPRESENTATIVE UNDER THE RAILWAY LABOR ACT *

HOWARD W. RISHER†

I. INTRODUCTION

O NE OF THE MOST IMPORTANT AREAS of national labor policy is the determination of appropriate bargaining units. Although the concept of "appropriate unit" refers only to the "election district" for employee choice of a bargaining representative, determined under the Railway Labor Act¹ by the National Mediation Board, or under the Taft-Hartley Act² by the National Labor Relations Board, "the designation of the unit establishes the basic building block [of the bargaining structure]."³

Despite the fact that public policy has been closely concerned with the initial determination of the appropriate unit for conducting the representation election, the structure of collective bargaining in the broader sense has not been a direct concern of the federal government. Indeed, the considerations of Congress in enacting the Railway Labor Act and the Wagner Act⁴ were not, for the most part, directed to the effect of their actions on the structure of bargaining, but rather to the structure for organization. The initial unit designations by both the NMB and the NLRB were intended to effectuate the right to organize and bargain collectively; there was little, if any, concern for the impact of these decisions on the continuing need for a viable collective bargaining system.⁵ In contrast to the NLRB, however, the National Mediation Board has never re-examined the policies affecting the designation of the appropriate unit.

The determination of the bargaining unit has two distinct but equally important consequences. First, in designating the employees who are eligible to participate in the representation election, the Mediation Board has effectively determined who will constitute the

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* The research for this study was supported financially by a grant from the United States Department of Labor, Manpower Administration.
5. It may be argued that the policies of these agencies are still directed toward this end.

(246)
“majority.” Thus, the Board has indirect, but significant control over which labor organization, if any, will prevail. The second consequence of the NMB’s unit determinations rests on the theory that collective bargaining is a continuing process. The structure and scope of this process are determined, to an important extent, by the initial unit determination. If the unit determination fails to relate to the factual situation with which the parties must deal, effective and stable collective bargaining is undermined rather than fostered. It is submitted that the bargaining unit configurations promulgated by the National Mediation Board in both the railroad and air transport industries have shown inadequate concern for these consequences, and the industrial relations systems in these industries have been irrevocably impaired. The remainder of this article is devoted to an analysis of bargaining unit determinations by the NMB, and their impact on the structure of collective bargaining.

II. BARGAINING UNIT DETERMINATION UNDER THE RAILWAY LABOR ACT

Federal railroad labor legislation prior to the nationalization of the railroads in 1917 presumed the presence of a union, and consequently was silent on the problems of selecting union representatives. After the Government took over the railroads, the United States Railroad Administration recognized the right of each craft, within the total group of employees, to be represented by a union chosen by the majority of that craft. Moreover, the Railroad Administration forbade any interference with the choice of union representative, a policy which contributed to the growth of railroad union membership during the period.

When the railroads were returned to private ownership in 1920, the Railroad Labor Board sought to pursue a similar policy. Although there were no provisions for the right of self-organization in the Transportation Act, the Board stated in one of its decisions that employees had “the right to organize for lawful objects [and that] the majority of any craft or class of employees shall have the

6. By deleting or including certain employee groups, both the NMB and the NLRB can effectively control which union, if any, will win an election. Most groups of employees have traditional preferences for certain unions, usually dependent upon their occupational identification. These employees will generally vote according to those preferences if given the opportunity to vote.

7. The Railroad Administration was created by presidential proclamation pursuant to the exercise of wartime powers granted him by the Army Appropriations Act of August 29, 1916, ch. 418, 39 Stat. 645. As a result, the Government took control of all interstate railroads at midnight, December 31, 1917.

8. The Railroad Labor Board was created by the Transportation Act of 1920, ch. 91, § 304, 41 Stat. 470.
right to determine what organization shall represent members of such craft or class."9 Unlike the Railroad Administration, however, the Board had no authority to enforce its policy. As a result, its decisions were very often ignored or violated by unions and carriers alike.

The antipathy of both parties toward the Board resulted in their collaboration on the bill which became the Railway Labor Act of 1926.10 Although the RLA provided in Section 2, Third for the designation of representatives by either party, "without interference, influence or coercion,"11 it contained no formal machinery to effectuate this congressional mandate. If a dispute arose as to which union was the representative of a group of employees, the five-man Board of Mediation could intervene and attempt to achieve a settlement by a consent election or similar procedure.12 If either party declined to cooperate, the Board had no authority to make a determination, and the dispute remained unresolved.13 Moreover, the Act contained no provision specifying that the representative chosen by a majority of the employees was the exclusive representative of all employees in the bargaining unit. Finally, the 1926 Act failed to specify penalties for carriers that violated proscriptions against interference with the choice of representatives. In the last instance, however, the Supreme Court did rule that Section 2, Third conferred a right which was enforceable by resort to the injunctive process.14

A. Present Provisions for Unit Determination

The 1934 amendments to the RLA,15 adopted over the opposition of the carriers, were in large part intended to give better effect

9. 1921 U.S. R.R. Lab. Bd. 87, 96 (Exhibit B ¶¶ 4 & 15). Decisions of the Railroad Labor Board and its successor, the National Mediation Board, are collected in various compilations in volumes which are dated but unnumbered. Decisions of the Railway Labor Board are compiled in yearly volumes from 1920 to 1934. NMB decisions are compiled in four volumes, dated by fiscal years (July 1 to June 30), and which have been arbitrarily assigned numbers, as follows: Vol. 1: 1934-48; Vol. 2: 1948-53; Vol. 3: 1953-61; Vol. 4: 1961-68. From 1968 to the present there are no bound volumes. Hereinafter, decisions of the NMB will be cited by volume (pursuant to the arbitrarily assigned numbers) and page, as would any other report; e.g., 1 N.M.B. 25 (1935).
11. Id. at 578.
12. Section 5, First of the Act provides:
The parties or either party to a dispute between an employee or group of employees and a carrier may invoke the services of the Board of Mediation created by this Act, or the Board of Mediation may proffer its services.
Id. at 580.
13. Id.
to the policies developed under earlier legislation. While the role
of the new National Mediation Board in labor-management disputes
was similar to that of its predecessor, its duties in representation
disputes were formalized and enlarged.

Under Section 2, Fourth of the Amended Act,16 the representative
chosen by the “majority of any craft or class of employees” was
designated as the representative of all the workers in the “craft or
class.” Further, employer interference with or support of employee
organizations was strictly prohibited. If a representation dispute
arose, the NMB was given the duty, under Section 2, Ninth, “to
investigate such dispute and to certify to both parties . . . the name
or names of the individuals or organizations that have been design-
nated and authorized to represent the employee involved in the dis-
pute, and certify the same to the carrier.”17 As part of the investi-
gation, the Mediation Board was authorized “to take a secret ballot
or to utilize any other appropriate method” to determine the appro-
priate representative, and was given complete freedom to establish
rules and procedures governing the resolution of representation dis-
putes.18 No other federal agency, not even the federal judiciary, has
the authority to intervene.19 Thus, the Mediation Board was granted
wide discretion in determining the appropriate bargaining unit and
the exclusive employee representative, except that the unit so design-
nated, in conformity with the traditional structure of railroad union-
ism, must be a “craft or class.” No other proscriptions were placed
on the Board’s authority.

III. THE POLICIES OF THE NATIONAL MEDITATION BOARD

This broad grant of authority to the National Mediation Board
resulted not from careful congressional consideration of the implica-
tions of that grant, but rather from the inability of Congress to agree
on appropriate criteria for establishing a viable system of bargaining
units. In view of the paucity of knowledge of the problem in 1934,
congressional reluctance to press for a complete set of guidelines for
the unit determination process is understandable. Nevertheless, the
indecision of Congress in these sections of the Act contrasts sharply
with the definitive provisions for resolving contract disputes and for

16. Id. at 1187.
17. Id. at 1188.
18. In fact, until 1947, when the NMB was forced to comply with the Ad-
ministrative Procedure Act of 1946, 60 Stat. 237 (codified in scattered sections of
5 U.S.C.), it had frequently proceeded ad hoc and had never published a set of
standardized rules or procedures.
grievance 'adjudication.\textsuperscript{20} The policies promulgated by the National Mediation Board indicate that Congress erred in granting such authority without prescribing guidelines to prevent abuse.

\textbf{A. The Definition of "Craft or Class"}

By the time that the Railway Labor Act was amended in 1934, occupational groupings for representational purposes had been clearly delineated for most railroad employees. The major “standard” unions\textsuperscript{21} had already organized the overwhelming majority of railroad workers and resolved generally interunion jurisdictional disputes. The traditional “craft or class” groupings, as organized by the operating unions and, to a lesser extent, by the shopcraft unions, had been sanctioned by the Federal Railroad Administration during World War I. Those groupings were generally followed in the determination of bargaining units for most of the nation’s railroads. In the view of Commissioner Joseph Eastman, Federal Coordinator of Transportation and the principal draftsman of the RLA Amendments of 1934, the vague words “craft or class” were readily understood since they had been used “in labor parlance for a very long time, and . . . there would be no difficulty in determining what is a craft or class of employees.”\textsuperscript{22} Commissioner Eastman went on to state that disputes involving the delineation of a craft or class would be resolved by the Mediation Board under Section 2, Ninth.\textsuperscript{23}

Despite the general recognition in the trade of craft and class groupings for most railroad employees, the NMB was confronted with requests for several difficult decisions soon after its organization. When first faced with these problems, “the Board attempted to avoid any general ruling, but to decide each case on the basis of the facts developed by the investigation of that case.”\textsuperscript{24} When feasible, the Mediation Board chose to follow “the past practice of the employees in grouping themselves for representation purposes and of the carriers in making agreements with such representatives.”\textsuperscript{25} After several decisions had been made, however, in which small groups of

\begin{itemize}
\item 21. The common use of the word “standard” in the parlance of labor relations practitioners is of questionable usefulness and validity because of its all-inclusiveness. Basically, the term is meant to include those major, national unions which have dominated railroad labor relations since the turn of the century, including over forty separate unions some of which have since merged to form, among others, the United Transportation Union.
\item 22. \textit{Hearings on H.R. 7650 Before the Comm. on Interstate and Foreign Commerce}, 73d Cong., 2d Sess. 45 (1934).
\item 23. \textit{Id}.
\item 24. NMB, \textit{THE RAILWAY LABOR ACT AND THE NATIONAL MEDIATION BOARD} 16 (1940).
\item 25. \textit{Id.} at 15.
\end{itemize}
employees were ruled to be a craft or class, "insistent demands were made that the Board follow the same rulings in subsequent cases, and other groups of employees within a class or craft insisted that they too were entitled to separation as distinct crafts."\(^{26}\)

On the basis of this experience, the NMB concluded that the tendency to divide and further subdivide generally recognized crafts or classes of employees had already gone too far, and that the fragmented bargaining structure threatened to defeat the main purposes of the Act — the making of labor agreements and the avoidance of labor disputes.\(^{27}\) Accordingly, the Board early in its history decided to establish general policies for designating the bargaining unit of each occupational grouping in the railroad industry. Thereafter, the Board "chose to avoid unnecessary multiplication of subcrafts and subclasses, and to maintain, so far as possible, the customary grouping of employees into crafts and classes as it has been established by accepted practice over a period of years in the making of wage and rule agreements."\(^{28}\) Moreover, the Board took the position "that it is not authorized to create crafts or classes of employees but rather must recognize established crafts or classes."\(^{29}\) It would seem that adherence to such a policy gave the "standard" railroad unions a virtually unchallenged position in the industry, for the "standard" unions are the ones which have established accepted practice. "In effect, the Mediation Board [has defined] the bargaining unit to suit the jurisdictional claims of the standard railway unions."\(^{30}\)

In an early bargaining unit decision,\(^{31}\) the National Mediation Board indicated that the following factors were to be utilized in the determination of a craft or class:

1. Composition and relative permanency of the groupings along craft or class lines for representation purposes which the employees have voluntarily developed in the past among themselves:
   a. On the railroads generally.
   b. On the railroad where the dispute under investigation exists.

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26. Id. at 16.
27. Id.
28. Id. (emphasis added).
2. Extent, nature, and effectiveness of the collective bargaining arrangements and labor agreements developed by the employees interested in the dispute with the carriers employing them.

3. Duties, responsibilities, skill, training, and experience of the employees involved and the nature of their work.

4. Usual practices of promotion, demotion, and seniority observed or developed for the employees concerned.

5. Nature and extent of the communities of interest existing among the employees.

6. Previous decisions of the Board bearing upon the issues under consideration.

7. The intent and purpose of the Railway Labor Act in the matter of labor representation and the maintenance of sound labor relations on the railroads.\(^\text{32}\)

The importance of established practice is readily apparent from this list. Moreover, the factors also indicate the great emphasis placed on purported employee interest as opposed to the interests of the employer and the collective bargaining system. Significantly, while the National Labor Relations Board has re-examined its unit determination policies, especially those which relate to the determination of craft units, on several occasions since 1935,\(^\text{33}\) the NMB has proceeded without significant change in its initial policies. It has never delineated a craft or class which conflicts significantly with the jurisdictional claims of a national railroad union, despite the recognized problems of collective bargaining in the railroad industry. The impact of the policies promulgated by the NMB is accentuated by the fact that its authority in representation cases is virtually unlimited, and beyond the range of judicial review.\(^\text{34}\)

One of the earliest and most fundamental policies adopted by the NMB was its refusal to allow more than one craft or class of each type for any one carrier. The Board reasoned that reference to the “representative” in Section 2, Fourth of the Act\(^\text{35}\) indicated congressional preference for unitary representation on each railroad. Moreover, the Board concluded that the RLA vests the Board with no discretion to split a carrier or to combine two or more carriers in delimiting a bargaining unit.\(^\text{36}\) Thus, the failure of Congress to prescribe specifically a particular unit configuration has meant the gradual elimination of all local unions as they were forced to com-

\(^{32}\) Id. at 173-74.


\(^{34}\) Switchmen’s Union of North America v. NMB, 320 U.S. 297 (1943).


\(^{36}\) In the Matter of Representation of Employees of the Texas & Pacific Ry. — Powerhouse Employees and Ry. Shop Loaders, 1 N.M.B. 195 (1941).
pete in system-wide representation elections. Although small local unions have never been an important force in the industry, employee freedom of choice has been limited to this extent. While a desire to eliminate company-dominated unions was a factor supporting adoption of this policy, the advantage thus provided to the national unions would seem to have been unwarranted. Judge Rutledge of the Court of Appeals for the District of Columbia Circuit (later Associate Justice of the Supreme Court) wrote a strong dissenting opinion in Switchmen’s Union v. National Mediation Board, condemning the increased organizational strength this policy gave to the large unions. In his words: “The result of the election is, in these circumstances, a foregone conclusion. . . . This is but a policy of compulsory liquidation of the small bargaining units.”

Although this principle has had a decided impact on the structure of the bargaining system, it has not meant that the problems of negotiating and administering labor agreements have been mitigated. Labor agreements are contracts between two parties, the labor union and the carrier, and neither party can change or merge agreements by unilateral action. Labor agreement coverage seldom coincides with the craft or class utilized in the selection of the bargaining representative; rather, the coverage of the contracts remains today essentially the same as at the turn of the century when the major unions held individual agreements with each of several hundred carriers. The number of railroads has since been greatly reduced through mergers and acquisitions. The unions, of course, have also affected several recent mergers. Labor agreements, however, are still negotiated separately to cover employees of the historical system of individual railroads, even though many of these are now only divisions of larger carriers. Furthermore, contract administration is still largely within the domain of local lodges.

Although most of the national railroad unions had established well-defined jurisdictional boundaries by 1934, several major class bargaining units had not been firmly established when the RLA was amended. The most notable among these groups were the employees now included in the bargaining units represented by The Brotherhood of Railway Clerks, The Brotherhood of Maintenance of Way Employees and The Brotherhood of Firemen, Oilers and Railroad Shop Laborers. The decisions of the NMB in cases involving these workers have resulted in significant organizational victories for these unions. Table 1 indicates that relatively large proportions of these

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38. 135 F.2d at 797.
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<th>1969</th>
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### DECEMBER 1971  
**RAILWAY LABOR ACT**  

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† Percentage computations are based on carrier representation as reported by the National Mediation Board and the number of miles of track operated by each carrier. Although similar percentages were published by the NMB in most of the intervening years, no comparable statistics were computed in either 1935 or 1969. No reliable statistics have ever been published on the actual number of employees organized in each craft or class.

‡ Yard service employees includes yardmasters which generally come under the jurisdiction of the Railroad Yardmasters of America (RYA). Separate data was not published for these employees in 1935, while in 1969 the RYA represented 87 per cent of the craft.

* The International Brotherhood of Boilermakers merged with the International Brotherhood of Blacksmiths in 1952. In 1935, the Blacksmiths represented 47 per cent of this craft.
three classes of railroad workers remained unorganized in 1935. Most of the other crafts or classes were either represented almost exclusively by a "standard" union, as in the case of the operating employees and the telegraphers, or in the case of the shopcrafts by the remaining system associations and local unions (which frequently were company dominated) and the national shopcraft unions which had lost prominence after World War I. In each instance the crafts and classes were well established.

The Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), as its name indicates, encompasses a heterogeneous group of manual and white-collar workers. The craft or class organized by the union is based primarily upon the scope of an agreement, effective January 1, 1920, between BRAC and the Director General of Railroads.\(^{39}\) That agreement covered all "Clerks," "Other office and station employees" (designated in the agreement) and "Laborers employed in and around stations, store houses, and warehouses."\(^{40}\) Excluded from coverage under this agreement were supervisory employees and those office employees working directly for managers and officials. The work performed by the covered class of workers "calls for the performance of narrow and repetitious lines of tasks, such as trucking freight to and from cars, stowing freight in cars, checking freight, announcing trains, handling baggage and express, checking personal baggage, selling tickets at passenger stations, typing letters, reports and statements, keeping records, operating so-called business machines, etc."\(^{41}\) Occupationally the class varied from secretary to elevator operator, from stationmaster to janitor, and from freight station foreman to laborer.

When World War I began, the Railway Clerks was a struggling, young union but, regardless of strength, it was the only nationally prominent union working to organize these employees at the time the railroads were nationalized. The political pressure to provide union coverage commensurate with that of the operating and maintenance unions resulted in acceptance of BRAC's jurisdictional claims by the Railroad Administration. Despite a striking decline in the union's membership during the 1920's and early 1930's, the National Mediation Board adopted the Clerks' bargaining unit definition without change. From 1935 to 1937 the Clerks extended their repre-

\(^{39}\) In the Matter of Representation of Employees of the Norfolk & Western Ry. — Clerical Office, Station & Storehouse Employees, 1 N.M.B. 68, 69 (1938).

\(^{40}\) Id. at 69.

\(^{41}\) Id. at 73.
sentation on Class I railroads from 69 per cent of the total mileage (Table 1) to 95 per cent. Small organizations composed of more homogeneous classes of workers were easily defeated in representation elections involving the diverse system-wide class recognized by the NMB. Moreover, subsequent Board decisions added several unlikely occupational groups to the bargaining unit.

The most dubious decision disallowed the organization of station porters or “red caps,” an occupation in which Negroes predominated, as a separate bargaining unit. Despite the preference of the porters for the United Transport Service Employees union, an organization in which Negroes enjoyed full membership rights (BRAC did not allow Negroes to become full members until 1947), the Mediation Board ruled that station porters were part of the class of clerical, office, station and storehouse employees.

Similarly, the diverse classes of employees represented by the Brotherhood of Maintenance of Way Employees and the International Brotherhood of Firemen, Oilers, and Railway Shop Laborers and Helpers were recognized by the Mediation Board despite the lack of national acceptance of these classes. In 1935 these two unions represented employees on 71 per cent and 33 per cent of the nation’s track mileage, respectively. The Board has commented on the repeated requests from employees of these classes to be allowed to bargain separately, but early decisions denied employees this opportunity.

This general trend of decisions in the late 1930’s gave the “standard” railway unions a distinct advantage at a time when most of the nonoperating unions were struggling to maintain their stature within the industry. The Board was given wide discretion in designating bargaining units, but, without significant exception, the Board’s decisions coincided with the contentions of the major unions. It is apparent that the Board’s views in rendering these decisions were based on the supposition that employee interests were best served by strong unions.

42. This term would more aptly be “Class I line-haul railroads.” Such railroads are those which move freight or passengers between two points and have revenues for the three years preceding classification of over $5 million. Since Class I railroads employ 95 per cent of the industry’s workers, they, for all practical purposes, are the industry.
43. In the Matter of Representation of Employees of the Norfolk & Western Ry. — Clerical, Office, Station & Storehouse Employees, 1 N.M.B. 68, 73 (1938).
44. In the Matter of Representation of Employees of the St. Paul Union Depot Co. — Station Porters, 1 N.M.B. 181 (1940).
45. See p. 254 (Table 1) supra.
46. NMB, THE RAILWAY LABOR ACT AND THE NATIONAL MEDIATION BOARD 162 (1940).
Federal Coordinator of Transportation Eastman had worked with the national unions to amend the Act, and his views were subsequently imposed on the NMB by his former assistant, Dr. William M. Leiserson, who became the first Board chairman. To be sure, Congress recognized the need to eliminate company-dominated unions and to increase the organizational strength of railroad employees, but it is equally clear that the advantage given to the national unions by the Mediation Board was unnecessary. Railroad workers had not been reduced to the impotence experienced by workers in other industries, and the decisions of the NMB effectively denied to railroad employees the choice of alternate forms of representation. In several instances, long established local unions were supplanted by national unions after being forced to compete in Board elections.\(^47\) The representation provided by “standard” unions designated to bargain for certain occupational groups, notably those groups in which Negroes were predominant, was glaringly deficient, and served only to extend and strengthen the control of the designated unions, rather than to further the interests of the employees. While the policies of the NLRB have been occasionally reviewed and changed to reflect industrial development, the National Mediation Board has never initiated any major policy changes. Despite recent company and union mergers, and other major changes which are transforming the industry, the bargaining units recognized by the Mediation Board continue to reflect the conditions prevalent at the time the RLA was amended in 1934.\(^48\)

B. Jurisdictional Disputes

The importance of designating the employees who are eligible to vote in a representation election has been previously discussed. The inclusion or exclusion of selected groups of employees may well be the controlling factor in deciding which union is to be the certified representative. Section 2, Ninth\(^49\) places the responsibility for deciding these questions with the Mediation Board. As with its ap-

\(^47\) Although the NMB does not release to the public the results of each representation election, annual statistics released by the Board show that, while prior to the 1934 amendments there were few changes in representation, there have been a significant number of such changes since 1934. These changes have resulted in increasing representation by national unions and, a fortiori, a decline in representation by local unions.

\(^48\) The Court of Appeals for the District of Columbia Circuit has argued:

> It has become well settled that in making “craft or class” determinations, the National Mediation Board may regroup, amalgamate, or splinter “historic” bargaining groups, taking into account technological and functional changes. . . . Flight Engrs’ Int’l Ass’n v. NMB, 294 F.2d 905 (D.C. Cir. 1961), cert. denied, 368 U.S. 936 (1962).

proach to the general problem of craft or class delineation, the Board has remained reluctant to take any positive action in cases involving conflicts between labor organizations over the right to represent various groups of employees. In fact, the Board has been quoted as saying that its authority does not extend to a "jurisdictional dispute as such."\textsuperscript{50} Such disputes, however, have been recurrent throughout the history of the railroad labor movement.

The conclusion of the Board that it was without authority to adjudicate jurisdictional disputes seems to be based less on congressional mandate than on a simple desire of the Board not to get involved. As the Board itself has admitted:

Differences of this kind have frequently made it necessary for the Board to make special investigations, hold formal hearings, prepare findings of fact, and make definite rulings, all of which has proved time consuming and diverted the efforts of the Board from the mediation of labor disputes. . . .

The time consumed by the Board in disposing of these disputes, coupled with the ill-will engendered by them, as well as their bad effect on the morale of the service, has prompted the Board upon several occasions to urge that the parties involved in such disputes exert every effort to adjust them at home and among themselves instead of bringing them to the Board.\textsuperscript{51}

This statement disregards the Supreme Court's holding in \textit{General Committee of Adjustment v. Missouri-Kansas-Texas Railroad}.\textsuperscript{52} In that case, the Court stated that "[i]t is clear from the legislative history of § 2, Ninth that it was designed . . . to resolve a wide range of jurisdictional disputes between unions and between groups of employees."\textsuperscript{53} Immediately after finding that the Board possessed broad powers, however, the Court declared that this agency action was not subject to judicial review, thus precluding, to a great extent, the possibility of a judicial determination of the extent of these powers. The Court did, however, reserve the question as to whether "judicial power may ever be exercised to require the Mediation Board to exercise the 'duty' imposed upon it under § 2, Ninth, and, if so, the type or types of situation in which it may be invoked . . . ."\textsuperscript{54}

Additionally, the Supreme Court ruled that the Board had the authority to decide "the point where the authority of one craft ends

\textsuperscript{50} Brotherhood of Locomotive Eng'rs v. NMB, 284 F. Supp. 344 (D.D.C. 1968).
\textsuperscript{52} 320 U.S. 323 (1943).
\textsuperscript{53} Id. at 336.
\textsuperscript{54} Id. at 336 n.12.

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and the other begins or of the zones where they have joint authority." More recently, a lower court chose to apply this same theory to a case involving a dispute between two air transport unions, the Air Line Pilots Association (ALPA) and the Flight Engineers' International Association (FEIA), over the qualifications of flight engineers. In addition, courts have explicitly held that the Mediation Board may decide the precise line of demarcation between the bargaining jurisdiction of two unions with respect to rates of pay, rules and working conditions, and to what extent a carrier may bargain with one union with respect to training to be given the members of another organization.

These decisions, however, do not resolve the dilemma. If the jurisdictional dispute underlies a broader dispute and the Board declines to assume the responsibility of determining union authority, there is no orderly method for settling any of the issues. Although the lack of judicial competence in this area does not compel the conclusion that the NMB must assume this responsibility, the Board's recognized duty to assist in the maintenance of labor peace cannot be ignored. In a related case, the Supreme Court recently ruled that the National Railroad Adjustment Board must decide which of two unions claiming they had contracted with the carrier for the same work was actually entitled to the work. Although it may be argued that there is a distinction between jurisdiction to bargain and jurisdiction of work resulting from bargaining, the necessity of resolving both disputes cannot be questioned. Either the courts or the Board perf orce must assume this responsibility.

C. Recognition of the Bargaining Representative

The National Mediation Board has taken the position that its function under the RLA is to promote the unionization of employees. To support this stand, the Board has argued that "the act does not contemplate that its purposes shall be achieved, nor is it clear that they can be achieved, without employee representatives — that is to say, by carriers treating separately with each employee." To accomplish this representation objective, the Board has completely

55. Id. at 323 n.11.
denied the rights of employers to participate in representation proceedings, and has severely restricted the rights of employees who do not wish to be represented.

The Mediation Board has interpreted the reference in Section 2, Ninth to representation disputes involving “a carrier’s employees” narrowly, denying the interests of the employer in the certification process. Although the carrier is not excluded completely from representation proceedings, only employees can initiate a representation petition or be a formal party to such a hearing. Occasionally, carriers have been invited to participate in public hearings at which they have been permitted to produce factual data, to cross-examine witnesses, and to state positions on certain issues. Even on those occasions, however, the carriers have been forced to remain passive, taking only those actions allowed by the hearing officer. Thus, the carrier, as a nonparty, must sit idly by while the union campaigns among the carrier’s employees. Since there is no proscription, as in section 8(b)(7)(c) of the NLRA, to limit the length of the organizational campaign prior to petitioning for certification, the union’s organizing efforts can continue without restriction. If two or more labor organizations attempt to organize the same group of employees, the resulting warfare may be continued while the carrier is powerless to intervene. This again is in contrast to the provisions of the NLRA.

Unions have further been given an unwarranted advantage in that the Board has chosen to ignore the intent of Congress that employees be free to refrain from selecting a bargaining representative, effectively assuring that, regardless of which union represents the employees, they will indeed be represented by a union rather than no union at all. The legislative history of the Railway Labor Act and its amendments supports the view that employees have the right to accept or reject collective representation. The 1934 House Report on Bill H.R. 9861 to amend the 1926 statute states:

It [H.R. 9861] provides that employees shall be free to join any labor union of their choice and likewise be free to refrain from joining any union if that be their desire and forbids

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61. 29 U.S.C. § 158(b)(7)(c) (1970) provides for the filing of a petition for certification under section 159(c) “within a reasonable period of time not to exceed thirty days” from the commencement of picketing, when the object of such picketing is to force or require an employer “to recognize or bargain with a labor organization as the representative of his employees,” or to force or require the employees “to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees.”

62. 29 U.S.C. § 159(c)(1)(b) (1970) allows the employer to file a petition to have the NLRB clarify the representation status of the union requesting recognition.
interference by the carrier's officers with the exercise of said rights.68

Although the NMB has never explicitly disregarded the prevailing consensus of opinion at the time of the 1934 amendments by overtly denying employees the full right to refrain from unionization, the effect of two Board policy decisions employed in concert made this right illusory at best. First, the Board chose to certify unions on the basis of a majority of the votes cast (providing a majority of those eligible to vote do so), rather than on the basis of a majority of those eligible to vote. As may be seen, this policy makes it mathematically possible for a union to be certified if it receives the approval of any number exceeding twenty-five per cent of all those employees eligible to vote. This policy was sanctioned by the Supreme Court in Virginia Ry. v. System Federation No. 40,64 wherein the carrier questioned the exact meaning of the word "majority." There, the Supreme Court affirmed the decision of the Court of Appeals for the Fourth Circuit,65 based on the reasoning that such a majority is all that is required in governmental elections in which the public participates.66

This phenomenon has been further accentuated by the Board's second decision, manifesting its constant refusal to include provisions on employee ballots to vote for no union. Ballots used in Board elections include spaces for voting for named unions or individuals, or for "others," but a ballot marked "no representation" is considered invalid. Employees desiring not to be represented are able to indicate their choice only by not voting. Applying mathematics again, it may be seen that, while it only takes something over twenty-five per cent of the eligible voters to certify a union, it takes over seventy-five per cent of the voters abstaining to provide that there will be no


No, it does not require collective bargaining on the part of the employees. If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why that, of course, is left open to them, or it should be.

Hearings on H.R. 7650 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 57 (1934). Likewise, when the bill reached the Senate, Senator Robert P. Wagner, future author of the NLRA, indicated his belief that employees retained the right to reject representation:

I didn't understand these provisions compelled an employee to join any particular union. I thought the purpose of it was just the opposite, to see that men have absolute liberty to join or not to join any union or to remain unorganized.


64. 300 U.S. 515 (1937).


66. 300 U.S. at 560.
union. The Supreme Court recently held in *Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees*,\(^67\) that the choice of these election procedures did not exceed the Board’s authority. While stating that the form of the ballot is a matter for Congress and the NMB rather than for the courts, and in venturing “no opinion as to whether the Board’s proposed ballot will best effectuate the purpose of the Act,”\(^68\) the Court did imply that the NMB could put an end to the confusion. In addition, the Court stated in a footnote that those who favor no representation are, in fact, aided by the Board’s policies since all votes uncast are counted as being against representation.\(^69\)

The error in the NMB election procedures is in the implicit assumption that all the employees voting for some form of representation would prefer representation by any union rather than being unrepresented. As has been noted, under the Board’s policies, a union obtaining 26 per cent of the eligible employees will be certified so long as 51 per cent of the eligible employees vote. Thus, the assumed disposition of a clear majority of the eligible voters, those not voting, will be ignored. Such an election recently occurred. In an election held to determine the representative of the employees of Aeronautical Radio, Inc., the Air Line Dispatchers Association (ALDA) received 74 votes, the International Brotherhood of Teamsters (IBT) obtained 147 votes, while 179 employees did not vote or submitted void ballots. The IBT was certified, and the company sought to set aside the certification in the district court.\(^70\) The action was dismissed for lack of jurisdiction. In affirming, the court of appeals stated: “[S]ince a majority of the employees obviously had voted for some representation, the union which became the choice of a majority of those thus voting should be certified.”\(^71\) While the Supreme Court may be correct in arguing that counting all uncast or invalid ballots as votes against representation inflates the actual sentiment for such an outcome, the NMB negates this effect by implicitly applying less weight to such votes.

The NLRB recognized the inherent inequity in such procedures soon after the *Virginian* decision\(^72\) by changing its ballot to allow employees to vote “No Union.” In making this change, the NLRB

\(^67\) 380 U.S. 650 (1965).
\(^68\) Id. at 671.
\(^69\) Id. at 669 n.5.
\(^70\) The district court opinion was unreported and was affirmed on appeal. Aeronautical Radio, Inc. v. NMB, 380 F.2d 624 (D.C. Cir.), cert. denied, 389 U.S. 912 (1967).
\(^71\) 380 F.2d at 626–27.
\(^72\) Virginian Ry. v. System Fed’n, 84 F.2d 641 (4th Cir. 1936), aff’d, 300 U.S. 515 (1937).
stated that "[w]e see no advantage in forcing employees who disapprove the nominees to adopt the rather ambiguous method of expression involved in casting a blank ballot, when their choice can be clearly indicated by providing a space therefor." Given this background, the NMB cannot have failed to realize the full implications of their choice.

Once a representative is certified, there is no way for employees to reject representation. Decertification procedures may be desirable where the employee complement has been altered over a period of time, or where extensive changes have resulted from technological change. In the air transport industry this is particularly true for those certifications which were granted when the industry was still in its infancy. The Court of Appeals for the District of Columbia Circuit expressed this view in a recent decision:

[I]t is inconceivable that the right to reject collective representation vanishes entirely if the employees of a unit once chose collective representation. On its face, that is a most unlikely rule, specifically taking into account the inevitability of substantial turnover of personnel with the unit.

The NMB has yet to give recognition to this inequity.

D. Statistical Record, 1935–1969

Despite the general recognition of union representatives for most crafts and classes at the time the Railway Labor Act was amended, the number of representation cases submitted to the NMB has remained high. Since 1934 the Board has disposed of an average of 117 cases annually. Over 80 per cent of these cases resulted in the certification of a bargaining representative. In the remaining disputes the petitions were withdrawn, typically because of inadequate evidence that a representation issue existed, or were dismissed, if the petitioner was unwilling to seek a withdrawal.

It is the general policy of the National Mediation Board to conduct an election in cases in which two or more labor organizations seek the right to represent the workers in the designated unit. There is, however, no legislative mandate that an election must be held in a representation dispute. The RLA states simply that the Board is authorized "to take a secret ballot . . . or to utilize any other appropriate method" to ascertain employee choice. In those cases

75. See p. 266 (Table 2) infra.
involving only one organization, the Board will certify merely by tallying the number of authorization cards given the union by the employees. Certification has been granted on this basis in 17 per cent of the cases since 1934. These cases, however, have typically involved very small groups of workers, as is demonstrated by the fact that this procedure was only used to determine the representative for less than 5 per cent of the workers involved in representation disputes.

When a valid contract already exists between an employee representative and a carrier, any labor organization seeking to replace the incumbent union must submit authorization cards from at least a majority of the craft or class involved. If the employees are not presently represented, authorization cards from at least 35 per cent of the employees must be submitted. Mediation Board rules state that authorization cards must be signed in the employee’s own handwriting or “witnessed mark.” Signed cards serve as a valid authorization for a period of one year following the date of the signature, after which time the union must submit new cards.77

Although there have only been a few cases in the past decade involving railroad employees seeking initial certification of a representation, the number of cases in which an incumbent union was “raided” by another organization has remained surprisingly high. During the period 1960 to 1969, the NMB issued certifications in 350 railroad cases. Raids by competing unions accounted for 236 or 67.4 per cent of these cases. Moreover, challenging unions were successful in winning certification in 152 cases — over half the total.78

Raiding has been more frequent in the railroad industry than in industries under the jurisdiction of the NLRB.79 Historically, the contests among the standard railroad unions have been long and bitter, particularly among the operating organizations. For a long period of time many of the rail unions remained unaffiliated with the AFL and therefore were free to add to their respective jurisdictions with impunity. Although “no-raiding” agreements were occasionally negotiated between unions, they were generally of brief duration. The shopcraft unions were able to consummate such an agreement in 1958 which is still controlling.80 The operating unions, on the

77. This information was gathered from a series of interviews with the NMB during the summer of 1970. In this area, the Board makes its own policy, and there are no pertinent statutory provisions.
78. Compiled from NMB, ANNUAL REPORTS Table 6 of each annual report (1960–1969).
other hand, with the Conductors and Engineers remaining independent of the AFL-CIO, continued to experience bitterly contested elections. Now that four of the operating unions have merged, only the rivalry between the former Brotherhood of Locomotive Firemen and the Engineers continues.

### TABLE 2
**Disposition of Representation Cases, 1935-1969**

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<tbody>
<tr>
<td>Total Cases</td>
<td>4,081</td>
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<tr>
<td>Elections</td>
<td>2,621</td>
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<tr>
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<td>688</td>
<td>16.8</td>
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<td>Investigation</td>
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<td>Withdrawn before</td>
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<td>Investigation</td>
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Note: Data include both railroad and air transport representation cases. The National Mediation Board did not differentiate between the two industries until 1954.

### IV. Unit Configurations in the Air Transport Industry

Placing the airlines under the RLA effectively determined the type of bargaining units which would develop. When Congress voted to include the industry under the purview of the Act, the only significant labor organization in this new field was the Air Line Pilots Association, and, by virtue of its coverage under separate wage and hour legislation, that union did not press for a labor agreement until 1939. The Board reported that, as of one year after coverage had been extended, only four contracts, covering mechanics and radio operators, had been negotiated. Although by 1945 only ninety-eight contracts had been filed for the entire industry, this number was to increase rapidly, largely as a result of a series of NMB deci-

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81. The Brotherhood of Locomotive Firemen & Enginemen, the Order of Railway Conductors, the Brotherhood of Railroad Trainmen and the Switchmen’s Union of North America merged to form the United Transportation Union.

82. NMB, *The Railway Labor Act and the National Mediation Board* 41 (Table 10) (1940).
sions commencing at that time.\textsuperscript{83} That organizational activity which took place prior to the end of the war was restricted to pilots and mechanics.

Since unionization had been virtually nonexistent in the air transport industry, it was quite natural for the NMB to apply the policies and procedures developed from experience with the railroad industry. As in the railroad industry, the Board remained reluctant to take any affirmative action in determining the appropriate units for representation until organizational patterns began to emerge. The congressional mandate to follow craft or class boundaries predetermined the basic policies the Board was to follow. This policy was stated initially in a 1945 decision:

\begin{quote}
It . . . seems quite clear that it is the duty of the National Mediation Board to determine the representation desires of airline employees \textit{on the basis of craft or class}, rather than on the basis of an over-all industrial type of unit combining many occupations which might in some instances be preferred for various reasons by certain organizations and managements.\textsuperscript{84}
\end{quote}

Although the Board noted in the decision that air transport employees "fall naturally" into two main divisions — "the employees who man the airlines in flight, or . . . the 'operating' group; and . . . all other ground employees, or the 'nonoperating' group" — precedential decisions rendered in the post-war period fragmented the industry's bargaining system along occupational lines.

Each of the airborne occupations — pilot, flight engineer, navigator and stewardess — was accorded a separate craft designation. Similarly, undisputed designations were made for several of the supportive ground service occupations. Significantly, definitive jurisdictional divisions have never developed among airline mechanics as they have among the railroad shopcrafts; "airline mechanic" is an omnibus title covering employees capable of performing most required maintenance. The Mediation Board chose to include all maintenance personnel, including plant maintenance employees, in a single unit, thus avoiding many of the problems present in the railroad industry. Given the craft or class constraint imposed by Congress, "these categories leave little room for serious disagreement."\textsuperscript{85}

\textsuperscript{83} NMB, \textit{Fifteen Years Under the Railway Labor Act, Amended and the National Mediation Board, 1934-1949}, at 49 (Table 9) (1950).

\textsuperscript{84} In the Matter of Representation of Employees of the American Airlines, Inc. — Airline Mechanics, Fleet Service Personnel, Stores Department Personnel and Plant Maintenance Personnel, 1 N.M.B. 394 (1945).

\textsuperscript{85} Heisler, \textit{Inconsistencies of the National Mediation Board in its Interpretation and Definition of the Terms: Craft or Class}, 35 J. Air L. & Com. 410 (1969).
On the other hand, the heterogeneous group of air transport employees subsumed under the classification "clerical, office, stores, fleet and passenger service" was inexplicably designated as a single bargaining unit. Although the Board ostensibly rejected an argument submitted by the Brotherhood of Railway Clerks that the amendments to the RLA indicated an intention to carry over railroad bargaining units to the air transport industry and thus provide the Clerks with a distinct advantage in organizing these generally non-manual occupations, the Mediation Board stated in its decision:

While the operational problems of airlines are vastly different from those on the railroads, both are branches of the transportation industry . . . . Although [the unit in question] includes employees of varying skills and abilities ranging from the highest type of technical clerical workers down the scale to janitors and laborers, experience [in the railroad industry] has shown the craft or class to provide a basis of stable labor relations.

Few groups of employees have undergone greater substantive job content change since World War II than this unwieldy bargaining unit. The introduction of the computer, automated baggage handling equipment, innovative food preparation techniques, and the developing glamor of air transport occupations has drastically changed the nature of these jobs. Although the Board has gradually separated stock and stores personnel on a case-by-case basis from the office, clerical, fleet and passenger service occupations, it has only recently undertaken the re-examination of the general principles established in this case. The conflicting importance of occupational identity in bargaining unit determinations is nowhere more evident.

V. Overview

Clearly it would have been difficult, and perhaps impossible in light of the political power of the standard railroad unions, to restructure the system of bargaining units in the railroad industry in the mid-

87. Id. at 438–39.
88. The NMB is presently holding hearings on the appropriateness of this unit designation, at the request of the International Association of Machinists and the Transport Workers' Union, who claim that the "craft or class groupings . . . present an illogical and unnecessary deterrent to their organizing efforts." This is the first time that the NMB has consented to review a unit designation, and if the traditional unit is split, these unions may expect to win many of the representation elections which will be necessitated by the split. Daily Labor Report No. 176, Sept. 10, 1971, at A-15.
1930's. Those Mediation Board decisions which affected previously unorganized employees have had little direct impact on the railroad labor relations system. If blame is to be placed for the structural problems of the system, it must be placed upon the Railroad Administration during World War I. Until that time only the four largest operating brotherhoods were strongly entrenched in the industry. By recognizing the jurisdictional claims of the standard railroad unions, the Railroad Administration effectively established the present system of bargaining units.

The National Mediation Board has, however, acted all too frequently to enhance the position of these dominant unions, often taking position detrimental to the stated rights of employees to choose their representative freely. Board decisions adversely affecting the standard unions are conspicuously absent. It would have been unrealistic to expect the Board to act to the contrary. The primary function of the Mediation Board under the RLA is the mediation of labor-management disputes. This is clear both from the statute and from the repeated pronouncements of the Board. The Board not only regards the resolution of representation disputes as a secondary function, but, as noted previously, it has repeatedly called attention to the disturbing effect of the latter duty on mediation work. Effective mediation necessarily requires harmonious relationships between the mediator and the parties with whom it deals. The Board has been unable to perform the adjudication function in unit determination and, at the same time, the conciliatory function in mediation. This failure is inherent in the conflicting responsibilities delegated to the NMB by the Act. It is understandable why the Board "does not consider that the purposes of the Railway Labor Act are best served by permitting these [representation disputes] to acquire sufficient magnitude to make it necessary to refer them to the Board for adjudication."

89. See Northrup, supra note 30, at 267–69.
91. Id. at 26.