A Basic Overview of Railroad and Airline Labor Law

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1. BASIC RAILWAY LABOR ACT CONCEPTS

Carrier
An entity engaged in common carriage of people or cargo by air or rail. The RLA applies only to carriers by air and by rail, or companies that provide associated services under direct or indirect control of a carrier.

Representatives
Unions or persons or groups of persons authorized to bargain on behalf of a carrier's employees either through an election or voluntary recognition. The RLA requires that representation be designated free of coercion.

National Mediation Board
Government agency responsible for administering the RLA. Handles all representation elections and mediates collective bargaining. Has limited authority to remedy violations of the Act or protect employees whose rights are violated.

Representation Petition
A petition filed with the National Mediation Board by an organization, person or persons seeking to represent a group of the employees. A minimum “showing of interest” is required, equal to at least 35% of the employees of the applicable craft or class if unrepresented or 50% plus one if represented.

System Wide Bargaining
RLA bargaining occurs on a system wide rather than a facility by facility basis.

Craft or Class
A group of employees performing a similar function and considered by NMB as appropriate for bargaining.

The Status Quo
The duty not to take action to change rates of pay, hours and working conditions while an agreement is in place or bargaining is occurring.

Release
Determination by the NMB that parties are at impasse and should be released to strike, impose final offer or otherwise engage in self help.

Proffer of Arbitration
Offer by NMB to the parties to arbitrate dispute rather than engage in self help. If one party refuses arbitration, a thirty-day "cooling off" period kicks off prior to strike.
Major and Minor Disputes
Major disputes involve efforts to establish a new agreement or change an existing agreement, which are subject to the negotiation and mediation provisions of the RLA. Courts also refer to unilateral changes of agreements, in violation of § 2 Seventh of the RLA, as major disputes. A minor dispute is a dispute over interpretation of the agreement and is subject to arbitration.

The Duty to Make and Maintain Agreements
The duty to bargain in good faith to reach and abide by an agreement.

Mandatory and Permissive Subjects of Bargaining
Topics over which the carrier must bargain which directly relate to rates of pay, hours and working conditions, as opposed to topics which the employer may, but is not legally required to negotiate over.

Presidential Emergency Boards (PEBs)
Created, at the President's discretion, if the NMB has determined that a dispute may substantially disrupt interstate commerce, nationally or regionally. PEBs operate as fact-finders, reporting to the President the circumstances surrounding, and negotiating positions taken, in such a dispute, and making recommendations for settlement. Findings of PEBs are not binding on parties.

Collective Bargaining Agreements (CBAs)
Agreements between employers and employee representatives of organized employee groups. Under the RLA, CBAs remain in effect until parties have either modified them by agreement, or (in certain circumstances) parties have undertaken all RLA major dispute resolution procedures and been released to resort to self help.

Self Help
Self help can take several forms, including a strike or slowdown, a lockout (meaning that the company does not allow its workers to work), the hiring of replacement workers, imposition by management of a contract or contract change, or the intervention of Congressional action.

Arbitration
Binding resolution of a dispute by a neutral third party or board. Arbitration can take many forms and utilize various procedures. Under the RLA, minor grievances that cannot be resolved internally are, by statute, subject to resolution through arbitration.

Mediation
Intervention into dispute negotiations by neutral third parties. The key feature of mediation is that it is not binding and effectively requires multilateral commitment of all interested parties. It is required upon a timely request by a carrier or employee representative to the NMB.
2. The Railway Labor Act

The Railway Labor Act (RLA) was the result of joint sponsorship by labor and management in 1926. It was, in effect, a legislated collective bargaining agreement. Although the Act was amended in 1936 to encompass the airline industry, labor relations in the two industries have largely developed along separate and distinct paths.

The RLA is fundamentally distinct from the National Labor Relations Act (NLRA), which governs organized labor relations in most industries. Section 2 of the RLA states its general purpose "to avoid any interruption to commerce or to the operation of any carrier engaged therein ...." By contrast, the NLRA is not explicitly aimed at preserving the flow of commerce, but rather focuses on protecting the right of employees to organize and bargain collectively. The Supreme Court has, accordingly, cautioned against drawing analogies between the two statutes.

Many of the basic functions of the RLA are administered by the National Mediation Board (NMB), described below.

3. The National Mediation Board

The National Mediation Board (NMB) is an independent government agency that performs a central role in facilitating labor-management relations within the railroad and airline industries. The NMB provides an integrated dispute resolution process in an attempt to minimize work stoppages in these industries. These processes are designed to promote three main statutory goals:

- Preserve employee rights of self-organization and determine the appropriate representative for each “craft or class” of employees;
- Prompt and orderly resolution of disputes arising out of the negotiation of new or revised collective bargaining agreements ("major dispute resolution") and
- Prompt and orderly resolution of disputes over the interpretation or application of existing agreements ("minor" dispute resolution) through administrative oversight of the statutory arbitration process.

The NMB also provides training and education in interest-based bargaining and facilitation, mediation, and grievance mediation among other services. The overall goal is to help the parties bring about a positive change in the collective bargaining culture in the railroad and airline industries and achieve a more timely resolution of disputes.

Unlike the National Labor Relations Board, the NMB does not adjudicate allegations of unfair labor practices. Except in those areas where the NMB has exclusive jurisdiction, enforcement of the statutory rights and obligations under the RLA is left to the federal courts, including issues regarding maintenance of the “status quo” and interference with selection of representatives. Where the NMB has jurisdiction, its decisions are subject to only extremely limited review in court.
The NMB’s three basic roles may be summarized as follows:

A. **Representation**

The NMB is responsible for preserving employee rights of self-organization when a representation dispute exists. The goal of the NMB representation process is to peacefully resolve potentially disruptive disputes over who will represent employees for collective bargaining purposes. Unlike the NLRA, recognitional picketing is not permitted under the RLA and is subject to court injunction.

The primary representation dispute responsibilities of the NMB include:

- Investigate representation applications;
- Determine and certify collective bargaining representatives of employees; and
- Ensure that the process occurs without interference, influence or coercion.

Representation issues are discussed in more detail in Part 4 below.

B. **Mediation of Collective Bargaining Disputes**

The purpose of mediation under the RLA is to foster the prompt and orderly resolution of collective bargaining disputes (otherwise known as "major" disputes). When labor and management are unable to resolve collective bargaining disputes through direct negotiations, either party may request the Board's services or the Board may involve itself on its own initiative. The Board may employ a variety of methods, including traditional mediation, interest-based problem solving, or facilitation. The Board views the objective of mediation as assistance to the parties in achieving agreement and sees the role of the mediator as an active participant in the process as a key to that assistance.

The goal of NMB mediation is to reduce disruptions in airline and rail carrier service. According to NMB sources, some 97 percent of all NMB mediation cases have been successfully resolved without interruptions to public service. And, since 1980 only slightly more than 1 percent of cases have involved a disruption of service.

When a disruption of essential transportation services would meet certain standards specified by the RLA, the NMB may recommend that the President of the United States create a Presidential Emergency Board. A Presidential Emergency Board temporarily prevents a work stoppage or a lock out for up to sixty days and provides non-binding recommendations for resolving the dispute.

The major dispute process is discussed below in Part 5.
C. Arbitration

Under the RLA, employee grievances arising under the terms of collective bargaining agreements (otherwise known as "minor" disputes) are subject to compulsory arbitration.

In the railroad industry, NMB administers the process through the following:

- System, group or regional boards of adjustment
- Special Boards of Adjustment (aka Public Law Boards)
- National Railroad Adjustment Board

The NMB’s role in the arbitration process is generally limited to funding and, in some circumstances, assistance with arbitrator selection.

The grievance and arbitration process is discussed below in Part 6.

4. Representation Issues

A. Carrier Interference

The RLA forbids “any limitation” on the right of employees to join a union, and provides for complete independence in matters of self-organization. It is unlawful for a carrier to “deny or in any way question the right of its employees to join, organize or assist in organizing the labor organization of their choice, and …to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization,…..”

B. The NMB’s Role

The NMB is charged with investigating disputes, conducting secret ballot elections, or using “any other appropriate method of ascertaining” the authorized collective bargaining representative.

The determination whether a carrier's or an employee committee's activities constitutes improper interference is a fact-specific inquiry. The NMB has identified several factors, however, that may evidence interference, including:

1. The establishment of an employee committee after the carrier becomes aware of an organizing effort;

2. A material change or carrier representation of such a change during a critical period in the purpose or activities of a pre-existing committee;
3. The use of a pre-existing committee to expand employee benefits during a critical period (status quo as to employee benefits is a prerequisite to a fair election);

4. Carrier campaigns indicating a pre-existing committee is or should be a substitute for an independent collective bargaining representative;

5. Carrier campaigns indicating that selecting an independent collective bargaining representative will lead to the termination of a pre-existing committee.

Examples of interference have included the following:

- Carrier attempted to assist in formation of an in-house employee committee during an election period and encouraged employees to deal directly with management
- Carrier officials encouraged formation of committee as well as encouraged employees to join the committee after union began organization drive even though in-house union was independent and funded by employees
- Carrier suggested the use of a committee as a substitute for independent representation as focal point carrier's campaign
- Carrier portrayed committee it created and supported as a "hybrid" between an in-house labor organization and an employee committee and that it was a substitute for an independent collective bargaining representative
- Carrier granted benefits during an organizational drive since grant reinforced carrier's message that employee committee was responsible for improvements
- Carrier discussed subjects such as grievance handling with other than the certified bargaining representative

Thus, a carrier must be careful in dealing with employee committees during an election period. Creation of such committees or changes in the manner of dealings with a preexisting committee is likely to be found to be carrier interference by the NMB.

The NMB considers interfering with the election process itself, such as by tampering or destroying ballots, as per se carrier interference that will justify a rerun election.

C. Carrier Communications

Carriers have successfully argued that communication of information and carrier positions, arguments and beliefs with respect to representation are protected by the First Amendment to the United States Constitution, so long as such communications do not constitute threats, promises or interrogation.

Conduct found unlawful under this provision of the Act has included:
• Prohibiting wearing of union buttons where there is no general policy prohibiting wearing of buttons or jewelry, and no proof of sound business/safety reason for policy

• Discharging or threatening discharge of employees in whole or in part because of their organizing activities or support

• Coercive interrogation concerning union support or activities

• Surveillance, or giving the impression of surveillance, of organizing activities of the property or during nonworking time

• Granting or promising benefits where intended to undermine support for organizing

• Soliciting employee grievances with express or implied promise that they will be remedied if the employees reject organizing efforts

D. Voter Eligibility

An individual must have been on the carrier's payroll and have had employee-employer relationship as of the "cut-off date" to be eligible to vote in a representation election. The cut-off date is the day the NMB representative receives a list of potential eligible voters from the carrier (this date is also the cut-off date for submitting authorization cards to meet the union's showing of interest).

There are several common eligibility questions in the industry. The protections of the Act apply only to "employees and subordinate officials. The NMB has broad discretion in determining which employees are covered. Low level supervisors often are designated as eligible subordinate officials. The factors the Board considers are set out in the NMB Representation Manual, but the board looks particularly at whether individuals "actually exercise [managerial] authority or effectively recommend actions. If not, they are eligible. Secretaries of carrier officials may be ineligible if they "are so substantially intertwined with the significant managerial responsibilities of those officials that they are effectively the managers' alter ego."

Individuals working for subcontractors are not eligible. Employees on furlough or leave of absence are eligible if they retain an employer-employee relationship and have a reasonable expectation of returning to work, provided they are not presently working for another carrier. Similarly, employees on sick leave, medical leave, or disability are eligible under the same criteria, though permanently disabled employees who have no expectation of returning to work are ineligible.

Terminated employees are not eligible unless they are in the process of appealing their discharge through the applicable grievance process, the courts, or an administrative agency. The NMB generally refuses to look beyond the face of such an appeal, liberally favoring eligibility. Temporary employees are ineligible unless they have a reasonable expectation of continued employment or reemployment. Similarly, only “regular” part time employees are eligible. Also, trainees who have not yet performed regular line work for the carrier are ineligible.
Finally, striking employees may be eligible even if replacement workers have been hired. Employees stationed in foreign countries are ineligible.

**E. Single Carrier Determinations**

A "single carrier" determination by the NMB recognizes the integration of multiple regional carriers with a single major carrier." The determination redefines the "craft or class" comprising previously separate employee groups on multiple carriers as a single unit on one larger carrier, and the affected employees then elect a single representative. Only Labor Organizations can initiate a "single carrier" determination proceeding before the NMB. Procedures for this proceeding in the rail industry have been promulgated by NMB. 17 NMB 44 (1989).

The two main criteria are whether the systems hold themselves out to the public as a single carrier, and whether they have combined managerial and labor relations operations. Factors NMB will consider include:

- is a combined schedule published?;
- how does the carrier advertise its services?;
- are reservation systems combined?;
- are tickets issued on one carriers' stock?;
- do signs, logos and other publicly visible indicia indicate one carrier or more?;
- are personnel with public contact held out as employees of a single carrier?;
- are there indications of separate existence on planes and equipment?;
- are labor relations and personnel functions handled by one carrier?;
- are there common management, common corporate officers, and interlocking Boards of Directors?; and
- are separate identities maintained for corporate and other purposes?

As a rule, the change in representation does not alter or cancel any existing agreements by previous representatives, and changes must be sought under the Section 6 procedures of the RLA.

**4. Major Dispute Resolution Process (Collective Bargaining)**

RLA labor contracts do not expire, but remain in effect until modified by the parties. In the railroad industry, most major railroads and many smaller railroads bargain on a multi-employer basis ("national handling") with one or more unions. The airlines generally bargain individually on a union-by-union basis.

**A. Components of the Major Dispute Resolution Process**

The following list of procedures is prescribed by the RLA for resolving "major" disputes concerning the formation of, or changes to, collective bargaining agreements.

1. A "Section 6 notice," written notice of proposed changes in agreements affecting rates of pay, rules, or working conditions, must be given at least 30 days in advance.
2. Within 10 days of receipt of the Section 6 notice, the parties agree to the time and place for the beginning of conferences (negotiations).

3. The parties engage in direct negotiations in connection with the Section 6 notice. If, during the course of direct negotiations, an agreement is reached (usually subject to ratification by the union’s members) the parties are obliged to execute that agreement, i.e. sign a contract.

4. If no agreement is reached in direct negotiations and bargaining reaches an "impasse," either party may request mediation by the NMB within 10 days of termination of conference. If neither party requests the services of the NMB or the NMB does not proffer mediation, the parties are released to self help.

5. If mediation is invoked, the NMB is required to promptly put itself in communication with the parties and use its best efforts to bring them to agreement.

6. If successful, mediation will lead to a contract.

7. Arbitration may be offered by the NMB if it concludes that a settlement cannot be reached through mediation.

8. If arbitration is refused by one or both parties, the NMB is required "at once" to issue a "release" notifying both parties in writing that its efforts have failed, and advise the parties that for a period of 30 days thereafter, except in certain limited circumstances, the "status quo" must be maintained (30 day "cooling off period").

9. During the 30 day cooling off period the NMB will undertake an economic study and may make a report to the President concerning possible substantial interference with interstate commerce. At the end of the 30 day cooling off period both parties are released to pursue "self help" (e.g. strike, lockout, unilaterally impose a contract) until an agreement is reached.

10. **UNLESS** the President, upon determination that significant interruption may be done to interstate commerce, appoints a "Presidential Emergency Board" (PEB). By statute the PEB has 30 days to investigate the dispute and make a recommendation to the President and the parties. Congress may extend the 30 day time limit.

11. While the PEB investigates the dispute another 30 day status quo period is imposed.\(^1\)

12. At the end of 30 days the PEB makes a report of its findings to the President, Congress and the parties. Another 30 day status quo period is imposed while the Board’s report is

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\(^1\) Additionally, a PEB may be created after the parties have been released from their status quo obligation, thereby requiring the parties to return to the status quo conditions prior to the dispute.
considered. If the findings are accepted by the parties, an agreement is reached and a contract will be signed.

13. If the parties do not adopt the recommendations of the PEB or otherwise reach an agreement, they will be released to pursue self-help until an agreement is reached, OR Congress intervenes and imposes a settlement.

B. Presidential Emergency Board Procedures

The creation of a PEB is dependent on an NMB determination that the dispute threatens "substantially to interrupt interstate commerce," in which case the NMB notifies the President, who has discretion whether to create a board.

Among other things, the NMB considers:

- the effect of a strike or shutdown on the national or regional economy;
- the immediate economic impact on transportation or other industries;
- the effects on military logistics and transportation;
- the particular administration's policies; and
- the likelihood of congressional intervention

The President is not required to create a PEB if notified by the NMB. The President has no authority to create a PEB unless and until the NMB officially notifies the President. The President appoints all members of the PEB.

Once a PEB has been created the status quo must be maintained from its creation through its report 30 days later and for 30 days thereafter. Emergency Boards frequently request, and are granted, extensions beyond 30 days.

A PEB acts as an official fact-finder for the President, who usually releases its Report to the public. PEBs generally hold public hearings and take testimony and evidence from the parties. Such Boards sometimes engage in mediation, but they are not charged with settling disputes and their recommendations are not binding.

PEBs have been more common in the railroad industry than in the airline industry, possibly due to the perception that airline strikes are less likely to pose a substantial threat to interstate commerce.

There are special additional PEB procedures that apply to disputes involving commuter railroads. In those cases, any party to the dispute or the Governor of any State affected may request the President to establish an emergency board if one is not created through the normal procedure. The President is required to create a PEB in this case and the status quo is extended to 120 days after creation of the PEB. If the dispute is not settled within the 120-day period, any party or a Governor of any State affected may request a second emergency board, which the President must grant. Parties then have 30 days in which to submit their final offers for settlement to the second PEB, and the PEB then has 30 days to submit a report to the President recommending the most reasonable offer. Boards have disagreed whether they must recommend one party's
comprehensive offer or whether the Board may select the best offer of a party as to each issue. Parties must maintain the status quo until 60 days after the report, unless by agreement.

In every case (freight railroad, commuter railroad, or airline), Congress may legislate to order emergency boards, extend status quo periods, submit disputes to binding arbitration, and/or impose a final settlement in cases where all RLA procedures have been exhausted.

5. **Minor Dispute Resolution (Grievances)**

The RLA mandates final and binding arbitration of disputes over the application or interpretation of agreements (i.e., grievances and disciplinary appeals), and is designed to eliminate, as far as possible, the authority of the courts as to contract interpretation and enforcement. Section 153 of the Act sets forth requirements for establishing the National Railroad Adjustment Board (NRAB), as well as voluntarily created system, group, or regional boards of adjustment, often called Special Boards of Adjustment (SBAs). The NRAB is divided into four distinct divisions, each having jurisdiction over disputes involving certain classes or crafts of employees. Unlike the NRAB, an SBA may be formed only by consent of both carriers and labor organizations.

The statute provides for mandatory special boards of adjustment, commonly known as Public Law Boards (PLBs), in the railroad industry to reduce a backlog of cases before the NRAB. Either the union or the carrier may request that the dispute proceed before a PLB. Once requested, representatives of each must meet to settle the dispute. If the parties cannot settle the dispute, a neutral member is selected either by mutual agreement or by the NMB. The neutral member is then responsible for establishing the PLB which will hear the dispute and bind the parties.

The power of adjustment boards is exclusive, meaning that courts do not have authority to interpret CBAs under the RLA. Courts lack the power to vacate or set aside arbitration awards in whole or in part except when the Board exceeds its jurisdiction, engages in fraud, or has failed to comply with a specific provision of the RLA.

Employees may, however, still resort to the courts if their claims rest on an independent statutory base such as discrimination laws, workers compensation, or whistleblower statutes.

Because arbitrators have exclusive power to resolve minor disputes, unions governed by the RLA cannot strike over such matters.

Before resorting to boards of adjustment, the employees and the employer must confer to attempt to resolve the grievance internally. This includes “on-property handling,” meaning whatever procedures the parties have established under their CBA.

7. **Job Actions and Related Issues**

   A. **Secondary Picketing, Sympathy Strikes, and Injunctions**

Secondary concerted union activity is directed towards neutral employers so as to exert pressure on a primary employer in negotiating with its employees. The Supreme Court has upheld the
legality of secondary activity as a means of self-help under the RLA. The NLRA prohibition on secondary activity may, however, limit activity by unions governed by the RLA against non-RLA employers.

Sympathy strikes often entail honoring picket lines of striking workers. The Norris-LaGuardia Act, which prohibits injunctions of strikes, has been consistently relied upon to protect workers' rights to honor picket lines. Courts have disagreed whether sympathy striking is permitted under the RLA; some upholding the right to honor picket lines, and others holding that disputes over the right such issues are minor disputes subject to mandatory arbitration.

B. Carrier and Union Status Quo Obligation

Carriers and employees are required to maintain the status quo during negotiations over modification to existing CBAs. Where there is no existing CBA (i.e., during negotiations for an initial CBA), there is some dispute as to the application of the status quo obligation, particularly once collective bargaining has begun and where the carrier is motivated by anti-union animus. Carriers and unions often execute interim partial agreements during this time period addressing a limited number of issues until a final agreement is reached. Such agreements may, however, place a status quo obligation on employers and employees.

If a status quo obligation exists, its scope is not limited to rates of pay, or work rules and conditions in written CBAs. The obligation is to preserve and maintain unchanged actual, objective working conditions and practices, broadly conceived, which were in effect prior to the dispute and which are involved in or related to that dispute. Most courts interpret this to mean that the parties must abide by both written agreements as well as any implied agreements that have arisen from past practice.

C. Partial and Intermittent Strikes

As with all job actions under the RLA, the ability to undertake or enjoin job actions that do not involve complete withdrawal of services depends upon whether the parties have been released from RLA-mandated bargaining, and whether the carrier can show that there is in fact a job action taking place. Proving a partial or intermittent strike can be difficult, requiring analysis of job productivity before and during suspected actions. Intermittent strikes have been upheld in Court, absent proof that the sporadic nature of the job action prevents the carrier from maintaining operations.

Even if such actions may not be enjoined, carriers have been given some latitude by the courts to minimize disruptions by unconventional job actions. For example, the use of permanent replacements, displacing workers engaging in job actions until settlement has been reached, has been upheld. Preemptive lockouts and use of temporary replacements or subcontracting during job actions are other management responses that may be available.