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The Railway Work Rules Dispute - A Precedent for Compulsory Arbitration

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the courts in the past, and that it does not seem probable that the time will come when "aesthetics" standing alone will be accepted by the courts as an effective doctrine.[74]

Martin Roth

[74] The writer confesses his disappointment in his inability to investigate the intriguing question of why the courts will only uphold "aesthetics" through the exercise of the police power as opposed to developing some objective standard which will allow "aesthetics" to stand on its own, and thereby directly please the community pressure groups without creating any legal fictions.

THE RAILWAY WORK RULES DISPUTE—A PRECEDENT FOR COMPULSORY ARBITRATION

Collective bargaining is the process in the jurisprudence of the American workplace by which industrialist and worker have created bodies of private law vital to our free enterprise system.[1] Compulsory arbitration has been recognized as the antithesis of free collective bargaining,[2] and has been the object of almost universal condemnation.[3] Against this general background and the specific fact that "the railroad industry has been a pioneer in the development of American collective bargaining"[4] we can deduce that only the most extraordinary chain of events could have led Congress, on August 28, 1963, to the extraordinary enactment of Public

[1] Collective bargaining is applauded by divergent interest groups. *E.g.*, comments of President Kennedy, White House Statement, June 15, 1963, Office of the White House Press Secretary, reprinted in *Hearings before the Senate Committee on Commerce on S.J. Res. 102*, together with Report No. 459, 88th Cong., 1st Sess., ser. 24, App. A-3, at 21 (1963) (hereinafter referred to as *Hearings*); President Eisenhower, Address in San Francisco, August 26, 1956, in COLE, THE FUTURE ROLE OF GOVERNMENT IN INDUSTRIAL RELATIONS (Steiber ed. 1958); remarks of George Meany, President of AFL-CIO, *Hearings* 608; remarks of Senator Goldwater, 109 CONG. REC. 15970 (1963); and the findings of an independent study group for the Committee for Economic Development in The Public Interest in National Labor Policy (1961).

[2] *Cf.* Wolff Co. v. Court of Industrial Relations of Kansas, 262 U.S. 522 (1923).

[3] The Congress of American Industry and the National Association of Manufacturers, for example, in the platform of their joint 1937 convention, stated that "compulsory governmental arbitration . . . is contrary to American principles." NATIONAL ASSOCIATION OF MANUFACTURERS, COMPULSORY ARBITRATION OF LABOR DISPUTES (1938); also, FRANCE, THE COMPULSORY ARBITRATION FALLACY, Pub. 31 (1959) (a pamphlet published by the American Federation of Labor and Congress of Industrial Organizations, Industrial Union Department); Teller, A Labor Policy for America, pp. 254–262, 1945).

[4] REPORT OF THE PRESIDENTIAL RAILROAD COMMISSION 4 (established by Exec. Order 10891, Rifkind, Chairman, 1963), hereinafter referred to as RAILROAD COMMISSION, citations to unbound edition.

Law 88-108.[5] This Statute, requiring the compulsory arbitration of the key issues of the railway work rules dispute, is the outgrowth of a duel which caught the American people in its crossfire. Railroad management and railroad labor have forced an indelible precedent on the statute books. It will be regrettable, indeed, if this precedent becomes a snake-oil remedy liberally taken for any and all labor-management headaches. Because enactments of compulsory arbitration laws could surely "infect . . . the whole institution of collective bargaining,"[6] we should approach such a precedent with extreme caution. Perhaps a brief review of the law involved and a record of the events that led up to and resulted from the passage of Public Law 88-108 will provide us with a valuable yardstick for the future.

At the outset, compulsory arbitration must be distinguished from voluntary arbitration of labor disputes. Compulsory arbitration is first, the prohibition of strikes and lockouts, and then, the establishment of a panel of impartial arbitrators, vested with authority to decide disputes arising between labor and management.[7] The decision of the panel is binding, subject only to judicial review.[8] Voluntary arbitration is also the submission of a controversy to an impartial panel for binding decision. Here, however, the submission is not initiated by government, but is agreed to by both of the parties to the employment contract. Though voluntary arbitration may be agreed to *ad hoc*, as disputes arise, it is usually written into the terms of the collectively bargained contract that grievances arising out of the interpretation of that existing contract shall be submitted to voluntary arbitration.[9] Such arbitrations are quite common,[10] but it is rare, indeed, that the parties will agree to delegate the power to create a new contract to an arbitration board.[11]

[5] Act of Aug. 28, 1963, 77 Stat. 132, 45 U.S.C. § 157 (Supp. V 1963).

[6] Testimony of Secretary of Labor W. Willard Wirtz, *Hearings* 44.

[7] *Accord,* Dorchy v. Kansas, 264 U.S. 286 (1924).

[8] Provision for judicial review of arbitration rulings has been a means of preserving the constitutionality of these laws from claims of denial of due process. Ferro v. Railway Express Agency, 296 F.2d. 847 (C.A. 2, 1961); Parker v. Illinois Cent. Ry. Co., 108 F.Supp. 186 (N.D. Ill. 1952); Washington Terminal Co. v. Boswell, 124 F.2d 235 (C.A. D.C. 1941). Recognizing the expertise of the arbitrator and the intent of the legislator, courts have been hesitant to reverse the rulings. Hargis v. Wabash R.R. Co., 163 F.2d 608 (C.A. 7, 1947); Futhey v. Atchison, T. & S. F. Ry. Co., 96 F.Supp. 864 (N.D. Ill. 1951); *Accord,* Union Pacific R.R. Co. v. Price, 360 U.S. 601 (1959); Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 305 (1943) (dictum).

[9] *E.g.,* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

[10] It has been estimated that ninety-five per cent of labor contracts in existence in the United States provide for voluntary arbitration of disputes concerning the existing agreement. France, *op. cit. supra* note 3.

[11] See, Shulman, *Reason, Contract and Law in Labor Relations,* 68 HARV. L. REV. 999, 1001 (1955). See generally, *id.* at 999–1024.

Debate in the Capitol reveals the legislator's cognizance of the truth that the institution of governmental super-boards is an encroachment into the economic processes whereby free trade unions and free employers interact.[12] There are critics, however, who suggest that a permanent compulsory arbitration law for key industries would prevent costly work stoppages. Ignoring for a moment the accompanying theoretical debilitation to collective bargaining and free enterprise, the practice of compulsory arbitration may be viewed pragmatically. It is soon discovered that it is not at all a panacea for the healing of labor-management abrasions. In an economy as interdependent as our own, complications attend the very attempt to define "vital services" or "key industries."[13] Even if it were possible to define key industries, difficulties arise. While it is highly unlikely that an arbitration board knowingly would be unfair, in its very efforts to seek compromise and be judicious such boards may simply "split the differences" without coming to the best decision.[14] There is, of course, the further issue of whether a panel existing outside an industry can fully acquaint itself with the peculiarities of tradition and personality that often weigh heavily in these conflicts. The propriety of equitable enforcement of awards resulting from compulsory arbitration has been questioned.[15] Other nations have sought industrial peace by employing compulsory arbitration laws[16] and have found only extensive regulation of private industry.[17] In Senate debate, Senator Wayne Morse quoted Will Davis, former Chairman of the National War Labor Board and later Director of Economic Stabilization, as saying that "The determination of a controversy between free citizens by the edict of Government is not a peaceful

[12] 109 CONG. REC. 15953 (1963) (remarks of Senator Pastore); 109 CONG. REC. 15896 (1963) (remarks of Senator Magnuson); 109 CONG. REC. 15970 (1963) (remarks of Senator Goldwater); 109 CONG. REC. 15910, 15976 (1963) (remarks of Senator Morse); 109 CONG. REC. 16123 (1963) (remarks of Congressman Fulton of Pennsylvania); 109 CONG. REC. 16121 (1963) (remarks of Congressman Brown of Ohio).

[13] COMMITTEE FOR ECONOMIC DEVELOPMENT, COLLECTIVE BARGAINING: HOW TO MAKE IT MORE EFFECTIVE (1947).

[14] FRANCE, *op. cit. supra* note 3.

[15] See Virginian Ry. Co. v. System Federation, 300 U.S. 515, 549 (1937); Red Cross Line v. Atlantic Fruit Company, 264 U.S. 109 (1924).

[16] Both Australia and New Zealand have long histories of compulsory arbitration, New Zealand's statute being created in 1894, and Australia's beginning in New South Wales in 1906. Witte, *Experience with Strike Legislation Abroad,* in COMPULSORY FEDERAL ARBITRATION OF LABOR DISPUTES (Johnson ed. 1947); also in 248 Annals 138 (1946). It is reported, however, that in both New Zealand and Australia, strikes have been as frequent as in Canada and Great Britain where collective bargaining has prevailed. See FRANCE, *op. cit. supra* note 3.

[17] COMMITTEE FOR ECONOMIC DEVELOPMENT, COLLECTIVE BARGAINING: HOW TO MAKE IT MORE EFFECTIVE (1947).

thing, and it is not a settlement. It is an enforced termination of warfare, and it settles nothing."[18]

Important pieces of legislation provide machinery for the encouragement of the collective bargaining process,[19] for Congress certainly recognizes the deleterious effects of a strike-plagued economy. The extensive power of Congress to regulate interstate commerce most certainly includes the authority to facilitate the amicable settlement of labor disputes which threaten its free flow,[20] and Congress's authority to enter into the solution of labor-management discords on the nation's railroads has been affirmed by the Supreme Court.[21] But, because of our basic free enterprise philosophy, and Government's timidity in dictating terms to labor and management, compulsory arbitration in this country has been minimal.[22]

To be meaningful, any analysis of the railroad work rules dispute must include the unique history of the industry.[23] The growth of railroading, from 40 miles of line in 1830 to 32,000 miles in 1861,[24] parallels the growth

[18] 109 CONG. REC. 15977–78 (1963) (remarks of Senator Morse).

[19] *E.g.*, Labor Management Relations Act, 29 U.S.C. 141 (1958).

[20] Texas & New Orleans R.R. Co. v. Brotherhood of Ry. & Steamship Clerks, 281 U.S. 548 (1930); Virginian Ry. Co. v. System Federation, 300 U.S. 515 (1937).

[21] Wilson v. New, 243 U.S. 332 (1917). This case arose when President Wilson was faced with an impending rail strike. Congress averted the crisis by enacting a law, ch. 436, 39 Stat. 721 (1916), which set the eight-hour workday that was the main issue of the controversy.

[22] The Railway Labor Act, for example, provides for compulsory arbitration by the National Railroad Adjustment Board on petition of a party to a dispute, 45 U.S.C. 153(i), (m) (1958). The Board, however, is empowered to hear only those minor grievances arising under the interpretation of an existing contract. Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945); Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R. Co., 373 U.S. 33 (1963); Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R. Co., 353 U.S. 30, *rehearing denied*, 353 U.S. 948 (1957). During World War II, Congress instituted the National War Labor Board under the War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943) primarily to maintain harmony so that wartime production would be uninterrupted. Though it performed its functions, the experience proved that compulsory arbitration "has a narcotic effect on private bargainers, that they turn to it as an easy–and habit forming–release from the obligation of hard, responsible bargaining." Wirtz, *The Challenge to Free Collective Bargaining*, in LABOR ARBITRATION AND INDUSTRIAL CHANGE (Sixteenth Annual Meeting, National Academy of Arbitrators, 1963). A member of the War Labor Board recalls that he felt "an awareness of the dangers to collective bargaining . . . arising from government control, and a desire to minimize those dangers and to 'get out of business' as soon as possible." Feinsinger, *Role of Government in Labor Disputes*, in COMPULSORY FEDERAL ARBITRATION OF LABOR DISPUTES (Johnson ed. 1947); also in 7 LAW. GUILD REV. 19, 20 (1947).

[23] So extensive is the writing on the development of the American railroad that John Stover, in his book AMERICAN RAILROADS (1962), notes, in the bibliography, that in recent years the Library of Congress has been acquiring new books on railroads and railroad history at a rate of over two hundred titles per year.

[24] RICHARDSON, THE LOCOMOTIVE ENGINEER 1863–1963, at 91 (1963).

of this nation. The workers in the railroad industry were among the first laborers to organize in unions.[25] Their organization followed strict craft lines,[26] a fact which has complicated railroad employment relations to the present day.[27] Understanding the complexity of railroad labor relations also requires a recognition of the geographically scattered facilities, continuous and irregular operations, complex inter-railroad services, safety demands, multiplicity of skills and tasks required, and the extraordinary duty to the public found in railroading.[28]

Because of its unique significance, the railroad industry "has historically been given special and separate treatment by the Congress."[29] In its attempts to prevent interruptions of commerce by keeping the trains operating, the Government took its first steps into legislation dealing with disputes, gradually developing laws designed to ease relations and encourage bargaining.[30] The product of these efforts is the Railway Labor Act of 1926[31] which is the basic railway labor law today.[32]

In addition to statutes, there evolved over a period of more than a century, the complex, elaborate, and venerable "common law" which governs the relations of railway management and labor.[33] This "common law" is the product of long-established practices, habits, collective bargaining, court decisions, federal and state legislation, and acts of the Director Gen-

[25] The Brotherhood of Locomotive Engineers, organized in 1863; The Order of Railway Conductors, 1868; The Brotherhood of Railroad Firemen and Enginemen, 1873; The Brotherhood of Railroad Trainmen, 1883. Stover, *op. cit. supra* note 23, at 119.

[26] Shils, *Industrial Unrest in the Nation's Rail Industry*, 15 LAB. L.J. 81 (1964).

[27] There are five operating Brotherhoods, the "Big Four" (listed in note 25 *supra*) and The Switchmen's Union of North America. The "Big Four" are independent, autonomous organizations unaffiliated with the AFL-CIO. There are also twenty-five non-operating unions, that is, unions whose members do not actually control the movement of the train. These unions are generally affiliated with the AFL-CIO and traditionally represent the same kinds of workers in other industries. *Ibid.*

[28] RICHARDSON, *op. cit. supra* note 24, at 15–17.

[29] *Hearings;* U.S. CODE CONG. & AD. NEWS, 88th Cong., 1st Sess., at 837 (1963).

[30] Federal labor legislation had its start with the Arbitration Act of 1888, ch. 1063, 25 Stat. 501 (1888), which provided for non-compulsory arbitration and investigation. This act was used in the famous Pullman Strike of 1894. The Erdman Act, ch. 370, 30 Stat. 424 (1898), prohibited "yellow dog" contracts and initiated Government mediation and conciliation, and the Newlands Act, ch. 6, 38 Stat. 103 (1913), established a permanent mediation and conciliation board. See, COHEN, LABOR LAW 139 (1964); RICHARDSON, *op. cit. supra* note 24 at 281–82.

[31] 45 U.S.C. 151–88 (1958).

[32] The National Labor Relations Act, 29 U.S.C. 151–68 (1958), was influenced by the Railway Labor Act. Railroading (and aviation) have never been brought under its jurisdiction, but are governed by the Railway Labor Act.

[33] RICHARDSON, *op. cit. supra* note 24, at 15–17.

eral of Railroads during World War I, and governs, among other things, the manning of trains, the assignment of tasks to employees, and the intricate formulas under which they are paid.[34] These labyrinthine principles and patterns of behavior so imbedded in the industry are collectively called "work rules."

During the early days of the industry, the work rules concerning firemen were first established. The task of the early fireman was to select and load fuel into the wood-burning locomotive.[35] Work rules continued in force with the coal-burning locomotive which also required manual labor.[36]

In the late 1920's the diesel locomotive began to appear on American railroads.[37] Beginning in 1933, the Brotherhood of Locomotive Firemen and Enginemen negotiated with individual carriers for the continued employment of firemen-helpers. The Brotherhood and substantially all of the railroads negotiated the National Diesel Agreement of 1937 providing for the employment of firemen-helpers on practically all diesel-powered trains.[38] When that agreement was signed, an industry representative estimated that its provisions would increase annual payroll costs by approximately $445,000, and the Brotherhood judged that it would mean the employment of some seven hundred additional firemen-helpers on locomotives then being operated by one man.[39] Whatever the carriers' dissatisfaction, the terms of this agreement were preserved in later contracts, the last dated May 17, 1950.[40] While the work rules regarding the manning of firemen on diesels firmly established themselves, the railroad industry, from 1937 to 1962, had become almost one hundred per cent "dieselized."[41] Not seven hundred, but in excess of thirty thousand firemen were employed on the diesel by 1962.

[34] RAILROAD COMMISSION, *supra* note 4, at 3.

[35] So difficult was the maintenance of sufficient steam pressure that it was not uncommon in those infant days "to see the train stopped while the passengers and crew gathered brush and wood from around the countryside. . . ." RICHARDSON, *op. cit. supra* note 24, at 93.

[36] Mr. J. E. Wolfe, Chairman of the National Railway Labor Conference, described the task of the fireman on the coal locomotive, saying, "it was truly a job to fire a large locomotive with a big firebox . . . and you did it with the working end of a scoop shovel." *Hearings* 365.

[37] Horowitz, *The Diesel-Firemen Issue—A Comparison of Treatment,* 14 LAB. L.J. 694 (1963).

[38] Testimony of Mr. H. E. Gilbert, President of the Brotherhood of Locomotive Firemen and Enginemen, *Hearings* at 482.

[39] Horowitz, *supra* note 37.

[40] Testimony of Mr. H. E. Gilbert, President of the Brotherhood of Locomotive Firemen and Enginemen, *Hearings* at 482.

[41] Between 1937 and 1961, the steam locomotive declined in number from 43,624 to 100, in contrast to the rise of the diesel from 218 to 28,150. By 1956, "88 per cent of

The first hint of an attempted work rules change came in 1956 when the carriers proposed that the terms of the National Diesel Agreement be amended so that management could determine the employment of firemen. The carriers withdrew this proposal as part of the negotiations of a contract which included a moratorium of three years on work rules changes.[42] The operating Brotherhoods, particularly the Brotherhood of Railroad Firemen and Enginemen, could breathe freely for another three years, but the threat to the long-established ways in a long-established craft was clear to those who would face it.[43]

The firemen work rules problem may be treated as one unique factual situation arising out of a singular industry if one ignores the larger problem which faced the firemen and which will face men in so many other endeavors. The new technology, automation, is "a public blessing,"[44] but it will force the shocking truth of human obsolescence onto certain employees. In a manner typical of our traditions, those adversely affected will look to law to salve their wounds. The only legislative precedent is the 1963 compulsory arbitration statute; so this statute, born out of desperation, has the potentiality of setting a pattern wherever automation threatens the laborer. Certainly, solutions to problems incident to technological change should be reached through the collective bargaining process,[45] but, whatever the approach, there is no hint that a single job should be maintained that is no longer required,[46] nor is there any implication that technology should be arrested to protect employment.[47]

Automation has been particularly dynamic in the railroad industry where the rise of such competing forms of transport as the automobile and truck, airplane, and pipeline have acted as catalysts. The extensive incorportation of the diesel which achieves higher speeds, carries heavier loads, operates with greater flexibility, and requires less maintenance, obviously affects rail employees other than firemen. However, the diesel has been

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the freight, 91 per cent of the passenger and 93 per cent of the yard service had been dieselized." Horowitz, *supra* note 37, at 695.

[42] *Id.*

[43] In Canada, The Kellock Commission was studying the need for firemen on diesels in freight and yard service. In December, 1957, it published its report recommending dismissal. Horowitz *supra* note 37.

[44] RAILROAD COMMISSION at 134.

[45] *Id.* at 12.

[46] Testimony of Secretary of Labor W. Willard Wirtz, *Hearings* at 45.

[47] President Kennedy said, "[W]cannot stop progress in technology or arrest economic change in transportation or any other industry—nor would we want to." 109 CONG. REC. 13004, 13007 (House of Representatives); 109 CONG. REC. 13095, 13098 (Senate) (message to Congress, President Kennedy).

only one of many automated developments in this industry,[48] which had undergone an industrial revolution while the employee was left undisturbed, lulled in the false security of the old work rules which he believed to be immutable.

By 1959, the carriers were firmly dedicated to the principle that the work rules would be revised to adhere to the new work patterns. Major and secondary issues were taking shape.[49] The primary issue was the employment of firemen. The work rules generally required that there be two men (an engineer and a fireman) in the cab of all passenger, freight, and yard diesel locomotives. The carriers sought the right to remove firemen in all but passenger service. The Brotherhoods, on the other hand, contended that the presence of firemen was essential for safe and efficient operation, for the relief of engineers, and for the training of future engineers.[50] The other major issue, "crew consist," concerned the manning of road and yard train service crews. While the carriers sought the unrestricted right to determine appropriate "crew consist," the Brotherhoods wanted a national rule establishing minimum crew requirements.[51]

By letter dated February 10, 1959, Daniel Loomis, President of the Association of American Railroads, invited the organizations to join with the carriers in seeking a presidential commission to draw up "sound new work standards for the railroad industry. . . ."[52] When the organizations rejected this proposal, the railroads unilaterally requested President Eisenhower to institute such an investigative board. In correspondence, President Eisenhower rejected this request, stating: "The appointment of a Commission at this time could interfere with normal collective bargaining

[48] Cohen, *New Technologies and Changing Manpower Requirements in Canadian Railroads*, 14 LAB. L.J. 685 (1963). Just a few of the major improvements are centralized traffic control, mechanization of ways and structures work, electronic data processing, the humpyard, integrated merchandise services including "piggy-back," and containerization. Cohen, *supra;* see generally, SHILS, AUTOMATION AND INDUSTRIAL RELATIONS 140, 256–57, 316 (1963).

[49] The secondary issues arose out of the following situations in which the carriers sought to exercise unrestricted discretion: the manning of motor cars and self-propelled vehicles used in maintenance, repair, construction, and inspection; the establishment of interdivisional runs, those runs which extend over territories where seniority rights may conflict; assignment of road and yard work. Other issues concerned both the railroads' and unions' efforts to modernize the methods of compensation. The unions proposed employment security plans for members displaced by automation, merger, and consolidation, and requested apprentice programs for certain classes of workers. Report to the President in Railroad Rules Dispute, requested by President Kennedy July 10, 1963, of his Advisory Committee on Labor-Management Policy, Chairman W. Willard Wirtz, Vice-Chairman, Luther H. Hodges. *Hearings* at 15; U.S. CODE CONG. & AD. NEWS, 88th Cong., 1st Sess., 1544 (1963).

[50] *Id.*

[51] *Id.*

[52] Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co., 372 U.S. 284, 285 (1963).

processes, and such a result would, in my judgment, not be in the public interest. Accordingly, without expressing any opinion on the merits of your proposal, I cannot consider it at this time."[53]

The carriers, being left to the standard procedures, served notices (pursuant to the provisions of the Railway Labor Act[54]) which enumerated their intended changes in the work rules. The notices, served November 2, 1959,[55] initiated correspondence and meetings between the parties. The carriers' determination and the Brotherhoods' stubborn desire to maintain the status quo rendered these meetings unproductive. There could be no meaningful collective bargaining.[56]

The sparring continued[57] and management and labor finally agreed to request the creation of a presidential commission to investigate and make recommendations.[58] The Presidential Railroad Commission was appointed and embarked on the most extensive review of the railroads ever made.[59] By February 28, 1962, the Commission was able to submit a thorough report to the Chief Executive. The report concluded that bargaining had failed to dispel the anachronism of traditional work rules attached to modern technology. Certain basic considerations governed the thinking of the Commission, namely, that the country is entitled to safe and efficient rail transport; that management should be able to take advantage of the new technology; that employees should receive fair compensation and work in efficient and safe conditions; and that where automation adversely affects employees, provision should be made for their welfare.[60] On the major issues, significant over-manning of firemen was found and it was suggested

[53] This letter is reprinted in *Hearings* at 188.

[54] 45 U.S.C. 156 (1958).

[55] Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co., 372 U.S. 284, 286 (1963).

[56] 109 CONG. REC. 15905 (1963) (remarks of Senator Morse).

[57] By September 7, 1960, the organizations sent notices asking for negotiation on wage structure, "crew consist," and employee protection plans, among other matters. *Hearings*, Appendix B-2 at 28.

[58] This agreement was executed October 17, 1960, under the auspices of the Secretary of Labor. Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co., 372 U.S. 284, 286 (1963).

[59] The committee, composed of five public members, five members represented labor and five represented management, conducted hearings and compiled a record of more than 15,000 pages of testimony and 20,000 pages of exhibits. Observation trips were made, based on the itineraries laid out by both labor and management. Several Government agencies, including the Bureau of Labor Statistics, the Railroad Retirement Board, and the Interstate Commerce Commission, contributed their efforts. RAILROAD COMMISSION at 29; Arnow, *Labor on United States and Canadian Railroads—Findings of the Presidential Railroad Commission*, 14 LAB. L.J. 677 (1963).

[60] RAILROAD COMMISSION, *supra* note 4, at 18.

that the carriers cease hiring and terminate the employment of firemen with less than ten years of service. A schedule of allowances was drawn up, based on length of service, for those firemen who were to be dismissed. On the question of crew-consist, the Commission found that since individual rail operations had individual problems separate reviews should be made to discover over-manning.[61] The report declared: "We do not believe that the questions in dispute should be removed from the scope of collective bargaining,"[62] but, published with strong dissents by labor members,[63] it tended further to freeze the combatants into unyielding positions.

National conferences were resumed[64] until the then Secretary of Labor, Arthur Goldberg, persuaded the parties to place the matter before the National Mediation Board.[65] Being unable to unite the parties the Board suggested that the matter be submitted to arbitration. The Brotherhoods refused.[66]

Once again the carriers served notices, dated July 26, 1962, stating that the findings of the Commission would be effectuated on August 16, 1962. The Brotherhoods filed suit claiming that there had been no collective bargaining on the matters in the July notices and that they were thus premature. Management then withdrew these notices and replaced them with the original, November 2, 1959, promulgations. Still the Brotherhoods claimed that the collective bargaining required by the Railway Labor Act had not occurred.[67] When the District Court found that the parties had exhausted the Railway Labor Act procedures and could resort to self-help, the Brotherhoods appealed.[68] The Court of Appeals affirmed, as it found that the record of meetings and mediation fulfilled the broad de-

[61] *Id.* at 109. [62] *Id.* at 12.

[63] Commissioner Phillips opposed the report, stating that the fireman was a necessary lookout, that he passes signals, maintains and restores locomotive power and is present to relieve the engineer. *Id.* at 345.

[64] Conferences ran from April 2, 1962 to May 17, 1962. Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co., 372 U.S. 284, 287 (1963).

[65] Application was made to the National Mediation Board on May 21, 1962, pursuant to 45 U.S.C. § 155 (First) (1958).

[66] From May 25 to June 22, 1962, the Board conducted more than thirty meetings. Having failed in its efforts it terminated its services on July 16, 1962. Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co., 372 U.S. 284, 287–288 (1963).

[67] 45 U.S.C. 152 (1958); Virginian Ry. v. System Federation, 300 U.S. 515 (1937); California v. Taylor, 353 U.S. 553 (1957).

[68] The Brotherhoods succeeded in enjoining the carriers from effectuating the promulgations during the pendency and appeal of the suit as the carriers failed in their contention that the Norris–La Guardia Act, 29 U.S.C. 101 (1958), applied to management as well as labor in prohibiting the granting of injunctive relief. Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co., 310 F.2d 513 (C.A. 7, 1962); *Accord,* Brotherhood of R.R. Trainmen v. Central of Ga. Ry. Co., 229 F.2d 901 (C.A. 5, 1956).

scription of collective bargaining and that management was free to carry out the work rules revisions set forth in their promulgations.[69] The organizations filed a petition for a Writ of Certiorari claiming, *inter alia*, that the Court of Appeals had failed to recognize that by its decision it was "placing it in the employer's discretion whether to permit union participation at all. . . ."[70] The Supreme Court cited *Elgin J. & E. Ry. v. Burley*[71] in support of the proposition that the compulsion of the Railway Labor Act is only to insure that the procedures set forth in it are exhausted before the parties resort to self-help. Finding no bad faith on either side, the Court merely concluded that the parties had done all they were required by the law to do and that the parties were free to resort to self-help.[72] The menace of a nationwide strike hung heavily in the air.

In order to forestall a strike, President Kennedy established an Emergency Board[73] pursuant to the Railway Labor Act.[74] After the Board dissolved without progress, the President appealed to the parties to maintain the status quo for the short period until July 10, 1963.[75] On July 9, President Kennedy again tried to persuade the Brotherhoods to submit the matter to arbitration voluntarily. As an arbitrator, he selected the Associate Justice of the Supreme Court, Arthur Goldberg, assuring the parties that the Justice would disqualify himself from any decisions arising out of the dispute.[76] The Brotherhoods refused to submit the matter to Justice Goldberg.[77]

[69] Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co., 310 F.2d. 503 (C.A. 7, 1962).

[70] Brotherhoods' Petition for a Writ of Certiorari in the above case, note 69, at 32.

[71] 325 U.S. 711 (1945).

[72] Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co., 372 U.S. 284 (1963).

[73] The board was established on April 3, 1963. U.S. CODE CONG. & AD. NEWS, 88th Cong., 1st Sess., at 835 (1963).

[74] 45 U.S.C. 160 (1958).

[75] White House statement, June 15, 1963, Office of the White House Press Secretary, reprinted in *Hearings*, App. A-3, at 21.

[76] President Kennedy said: "Although the use of a member of the High Court for additional duties has been and should be reserved for extraordinary situations—such as the Nuremberg trials and the Pearl Harbor inquiry—I believe this situation is extraordinary in terms of its impact on collective bargaining, its relationship to the whole problem of technological unemployment and the potential effects of a nationwide rail strike on our economy, our defense effort, and our citizenry." White House statement, July 9, 1963, Office of the White House Press Secretary, reprinted in *Hearings*, App. A-2, at 20–21.

[77] Senator Morse considered this refusal to be a most serious mistake. In debate on the Senate floor he admonished the organizations, saying, "You parked your brains outside the White House the day you walked in and refused to accept the President's proposal to have Mr. Justice Goldberg arbitrate the case." 109 CONG. REC. 15906 (1963).

On July 22, 1963, the President addressed Congress.[78] He warned that a rail stoppage would rapidly affect all aspects of the economy and do serious harm to the national defense.[79] The President recommended that Congress legislate to transmit the matter to the Interstate Commerce Commission for an arbitration decision of a two-year tenure.[80]

The Commerce Committee began its hearings on July 23, and meeting in evenings and on Saturday received 740 pages of testimony.[81] Statements were made by Secretary Wirtz, George Meany, and many others influential in labor-management affairs. Still, efforts persisted to achieve a settlement by collective bargaining. But the Commerce Committee was forced to move rapidly because at 12:01 A.M. on August 29, if Congress had not acted, the work stoppage would begin.

With Congress "up against the gun in an hour of crisis,"[82] and with no acceptable alternative,[83] it was forced to enact the compulsory arbitration law. It was written to apply only to the present crisis[84] and established a special arbitration board[85] which was to make binding decision on the two key issues,[86] the decision to govern for two years.[87] On August 29, 1963,

[78] Text of President Kennedy's message. 109 CONG. REC. 13004 (House of Representatives); 109 CONG. REC. 13095 (Senate); U.S. CODE CONG. & AD. NEWS, 88th Cong., 1st Sess., at 1537 (1963).

[79] The Department of Defense, for example, moved 7.2 million tons of freight by rail in the United States in 1963, on government bills of lading. This figure would be multiplied if it included the tonnage moved on commercial bills of lading for contractors of the Department. It is estimated that the total rail passenger traffic of the Department during fiscal 1963, in the United States, amounted to 388 million passenger miles. Letter of August 9, 1963, from J. McNaughton, General Counsel, Department of Defense, to the Senate Commerce Committee, reprinted in U.S. CODE CONG. & AD. NEWS, 88th Cong., 1st Sess. at 842 (1963).

[80] Text of President Kennedy's message, *supra* note 78.

[81] *Hearings*.

[82] 109 CONG. REC. 15890 (1963) (remarks of Senator Magnuson).

[83] The alternative of seizure of the railroads was recommended, 109 CONG. REC. 15898 (1963) (remarks of Senator Javits), as this was not without precedent. See War Labor Disputes Act, ch. 144, Sec. 3, 57 Stat. 163 (1943). The amendment to this end failed to pass (Yeas 3, Nays 88, Not Voting 9). 109 CONG. REC. 15966 (1963). See also Siegel & Lawton, *Stalemate in "Major" Disputes under the Railway Labor Act—The President and Congress*, 32 GEO. WASH. L. REV. 8 (1963).

[84] Act of Aug. 28, 1963, 77 Stat. 132, 45 U.S.C. § 157, Sec. 1 (Supp. V 1963).

[85] Act of Aug. 28, 1963, 77 Stat. 132, 45 U.S.C. § 157, Sec. 2 (Supp. V 1963). The representatives of labor spoke vigorously against submitting the dispute to the Interstate Commerce Commission. Testimony of A. F. Zimmerman, Assistant Grand Chief Engineer, and Max Malin, Economic Counsel, Brotherhood of Locomotive Engineers, *Hearings* at 430, 450–51.

[86] Act of Aug. 28, 1963, 77 Stat. 132, 133, 45 U.S.C. § 157, Sec. 3 (Supp. V 1963).

[87] Act of Aug. 28, 1963, 77 Stat. 132, 133, 45 U.S.C. § 157, Sec. 4 (Supp V 1963).

President Kennedy signed the law and the immediate crisis was averted, but the precedent of compulsory arbitration was imprinted in our laws.

Again there were hearings, witnesses, and exhibits, and on November 26, 1963, the Board ruled, among other things, that nearly two hundred railroads could eliminate ninety per cent of the firemen's jobs in freight and yard service and set forth a procedure for dismissal and attrition. Allowances based on length of service were adopted from the Washington Job Protection Agreement of 1936. The award was accompanied by a statement of the carriers' representatives complaining of "unduly and unnecessarily burdensome" protective provisions for displaced workers. This statement, however, fell far short of a dissent. On the other hand, the Brotherhoods, through R. H. McDonald and H. E. Gilbert, dissented strongly both on questions of fact and on the contention that the Board had far exceeded its authority.[88]

Shortly after the special arbitration board's award, the organizations sued to impeach it, arguing both that the award did not conform to the requirements of the statute, and that the statute itself was unconstitutional. The District Court decision[89] unqualifiedly affirmed the arbitration board's creation and award saying, "The statute is clearly constitutional as being within the power of the Congress. . . . [A]nd the board acted lawfully within the orbit of the authority delegated to it."[90] The United States Supreme Court denied the unions' petition for Certiorari.[91] Problems continue to this date to arise out of the award, not the least of which is the matter of implementation in states that have conflicting "full crew" laws.[92] Questions concerning the award's interpretation and its application to individual workers are not completely answered.[93]

Still outstanding were the questions concerning the wage structure, paid holidays, self-propelled machines, and the other matters that had come to

[88] Award of Arbitration Board No. 282, November 26, 1963; 87 MONTHLY LABOR REV. 36 (Jan. 1964) and material supplementary thereto; see Shils, *supra* note 26.

[89] Brotherhood of Locomotive Firemen and Enginemen v. Chicago, Burlington & Quincy R.R. Co. 225 F.Supp. 11 (D. D.C. 1964).

[90] *Id.* at 23.

[91] 377 U.S. 918 (1964).

[92] These measures have been criticized as uneconomical and unnecessary in operating with modern equipment. They have, however, been upheld in the courts. Missouri Pacific R.R. Co. v. Norwood, 283 U.S. 249 (1931), and are still prevalent. *E.g.*, ARIZ. REV. STAT. ANN. § 40-881 to § 40-885; CAL. LABOR CODE §§ 6901-906; IND. ANN. STAT. § 55-1326 to § 55-1338; N.Y. RAILROAD LAW § 54-b. See generally, *Work Rules Controversy in Perspective*, 87 MONTHLY LABOR REV., p. III (March 1964).

[93] The Arbitration Board reconvened to consider and decide certain questions relating to the meaning or application of its award. Questions were submitted by the parties and answers were published May 17, 1964. Still grievances of individual workers continue to plague the Board.

be known as secondary issues.[94] Now the so-called secondary issues were presenting another rail crisis. The Brotherhoods had always engaged in industry-wide bargaining, but a change in strategy prompted them to consult separately, in early March, 1964, with the Louisville and Nashville and the Southern Pacific Roads.[95] The carriers stated that they would go ahead with proposed changes on April 10, 1964, and a strike was called.[96] The White House quickly responded, but a team of mediators[97] was making little progress as the parties were as intractable as before. In fact, some observers felt that the parties were waiting for Congress to act on its precedent and pass another compulsory arbitration law.[98] President Johnson, however, was unwilling to foster another such law.[99] Both the prestige and pressure of the White House roused the parties to legitimate bargaining and the completion of a memorandum of agreement.[100] On April 22, 1964, the President declared on nationwide television that collective bargaining had succeeded. He said, "This agreement is American labor and American business operating at its very best–at the highest levels of public responsibility."[101] Clashes have arisen as to certain terms of the memorandum of agreement and on May 7, 1964, mediators Dr. George Taylor and Theodore Kheel issued a clarification. But this collectively bargained contract and those that have followed are the product of union and management sitting down together, and indicate, hopefully, that the parties are at last prepared to face the grave responsibilities ahead.

Automation, the new technology, means greater productivity and increased prosperity, and it is the natural creation of a dynamic economy. But with automation, industry, shop, and factory will be faced with chal-

[94] Secondary issues listed *supra* note 49.

[95] Work Rules Controversy in Perspective, *supra* note 92. On April 8, 1964, a strike against the Illinois Central brought a shutdown of operations on 6,500 miles of track. *Another Strike, Another Truce–Why the Rail Dispute Goes On,* U.S. News and World Report, April 20, 1964 p. 77.

[96] *Another Strike, Another Truce . . . , supra* note 95.

[97] The mediators included Secretary of Labor, W. Willard Wirtz, Assistant Labor Secretary, James Reynolds, and Chairman of the National Mediation Board, Francis O'Neill. The President added the services of George Taylor of the University of Pennsylvania, and Theodore Kheel, another prominent arbitrator.

[98] *Johnson Swings a Red Lantern,* Business Week, April 18, 1964, p. 25.

[99] President oJhnson said, "I am not here to bury collective bargaining, I am here to preserve it." *Johnson Swings a Red Lantern, supra* note 98.

[100] It provided for pay raises for about 100,000 workers, seven paid holidays (the union men had never had paid holidays), allowances for away-from-home expenses, and manning of repair vehicles in addition to other articles. In combination with the earlier arbitration award, the railroads estimated their savings at $300,000,000 a year. N.Y. Times, April 23, 1964, p. 1, col. 1; N.Y. Times, April 26, 1964, sec. 4, p. 2, col. 3.

[101] N.Y. Times, April 23, 1964, *supra* note 100.

lenges not far different from those which confronted the railroads. Does this mean that the parties will shrug off their responsibilities and look to Congress to act as it acted in the work rules crisis? In the thick of debate on Public Law 88-108, a Congressman asked, "Where is this industry, this free enterprise that has said, 'Let me handle management affairs without Government interference . . .'? Where is this brave new world of free enterprise . . . ?"[102] It is true that automation presents issues that go deeper and hurt more. It is delusion to minimize the task of the union negotiator who may one day go to his people and say "I negotiated so that 10,000 of you will lose your jobs."[103] But, is the burden of these complex problems so heavy that the combatants will surrender them gratefully to Government?

On August 28, 1963, the parties to the work rules dispute dealt an incalculable blow to free collective bargaining. To insure against their lapsing back into this precedent, disputants must renew their dedication, fully recognizing their duty to bargain collectively in good faith.[104] Surely they have come a long way since Cyrus Eaton suggested as a prelude to labor-management harmony that "We will have to begin by . . . recognizing, and sincerely regretting, that there is bad feeling on both sides. For every corporation officer who characterizes a union official as a crook there is a labor leader willing to label an industrialist a bandit. Our next step ought to be full and ungrudging acceptance of labor as human beings and as our partners who do the work."[105] But, there is a long way to go. Recalling the words spoken by the Honorable Arthur J. Goldberg when he served as Secretary of Labor will lead to a redoubling of this effort. He said, "It is imperative to freedom that collective bargaining work in America, that it remain the center of economic decision and the agency to which employees, managers, and the public can look with full expectation of justice and fairness."[106] The industrialist and the worker must resolve their own disputes, for the American people, for the enterprise system, and as stewards of the free bargaining tradition.

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[102] 109 CONG. REC. 16123 (1963) (remarks of Congressman Fulton of Pennsylvania).

[103] 109 CONG. REC. 15894 (1963) (remarks of Senator Magnuson).

[104] H. J. Heinz Co. v. National Labor Relations Board, 311 U.S. 514 (1941); National Labor Relations Board v. Insurance Agents' International Union, 361 U.S. 477 (1960); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

[105] Eaton, *A Capitalist Looks at Labor*, in COMPULSORY FEDERAL ARBITRATION OF LABOR DISPUTES (Johnson ed. 1947); also in 14 U. CHI. L. REV. 332, 333 (1947).

[106] Goldberg, *Collective Bargaining and the Public Interest*, in COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE 229, 233 (Fifteenth Annual Meeting, National Academy of Arbitrators, 1962).