The Patco Dispute - A Need for Change in Public Employee Labor Settlements

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COMMENTS

THE PATCO DISPUTE—A NEED FOR CHANGE IN PUBLIC EMPLOYEE LABOR SETTLEMENTS

INTRODUCTION

During the period of March 25, 1970 to April 14, 1970 air travel in the United States was crippled by a labor dispute between the Federal Aviation Administration (FAA) and the Professional Air Traffic Controllers Organization (PATCO). The work stoppage caused inconvenience in travel and resultant pecuniary losses to airline companies flying in the United States. Particularly significant in the dispute was the fact that controllers, as civil service employees of the United States, have never been given the right to strike. Hence, strike conduct exercised on their part subjects them to possible loss of employment and criminal prosecution.

The purpose of this comment, is to examine in detail the labor dispute between the FAA and PATCO members which occurred in early 1970, and thus to illustrate the dangerous results of public sector labor-management neglect in the field of American aviation. This illustration coupled with a few words about public employees at the conclusion of the comment hopefully shall show the need for reform which, when reaching maturity, will enable further aviation growth without continued employee dissatisfaction.

THE FAA

As a necessary part in the continual development of aviation, the air traffic control function was born, nurtured and concomitantly expanded. From its inception in the United States as an airport area control device, it has blossomed into a highly sophisticated nationwide control system.

In the 1930’s, when relatively large scale commercial aviation began, the major airlines experienced severe airport area congestion. To alleviate these conditions Trans World Airlines, American Airlines, Eastern Air-

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1. The Airline Transportation Association, the association of the Airlines Industry, claimed $100,000,000 in damages resulting from the PATCO “sick-out.” See PATCO Newsletter, Sept. 14, 1970, at 1, col. 1.
lines and United Airlines created and funded the "Air Traffic Control Corporation." Later, in 1936, the government acquired the corporation and placed it under the auspices of the Department of Commerce. There it suffered from a lack of organization, an absence of leadership and an insufficiency of funds.

Today, via the Department of Transportation Act incorporating the farsighted 1938 Civil Aeronautics Act and the 1958 Federal Aviation Act, responsibility for management of the air traffic control function is placed clearly on the FAA. In this regard the Department of Transportation Act provided in part that

[1] The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable air-space; and assign . . . or order the use of navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. . . . The Administrator is authorized, within the limits of available appropriations made by Congress, (1) to acquire, establish, and improve air-navigation facilities wherever necessary; (2) to operate and maintain such air-navigation facilities; (3) to arrange for publication of aeronautical maps and charts necessary for the safe and efficient movement of aircraft in air navigation . . . and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic. . . . The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft . . . including rules for the prevention of collisions between aircraft.

Thus, according to this Act, the Administrator of the FAA has the duty of planning and administering rules and regulations for the safe and efficient use of airspace through the operation and maintenance of control facilities.

To effectuate these goals the FAA requires tests for airmen and aircraft and provides guidance for airport planning. As a part of this control, it provides systems of navigation aids (navaids) installed, operated and maintained by the Administration's own personnel. The directives for the implementation of FAA safety regulations emanate from eighteen area managers who have their regional headquarters in New York, At-

4. Id.
9. See the pamphlet published by the FAA entitled: FAA—WHAT IT IS—WHAT IT DOES ( ).
lanta, Kansas City, Fort Worth, Los Angeles, Anchorage and Honolulu and from the FAA's National Headquarters in Washington D.C.  

FAA headquarters, noting the increase in air traffic, has recently reinstated personnel training at the Oklahoma City, Oklahoma Center. This training, it is hoped, will help to achieve the goal of an even safer system of air traffic control. As a result of training programs such as this, the FAA has developed its most valued possession—trained personnel. Of the 43,000 men working for the FAA almost 40 per cent work on the control of air traffic.  

**FAA SYSTEMS AND THE CONTROL OF AIR TRAFFIC**  

The need for strict control to insure safe and efficient flight operations can be seen when it is realized that the thousands of aircraft in the air at any given moment, ranging from supersonic military jets to small private airplanes, are concentrated around cities and along the 175,000 miles of aerial highways. The responsibility to maintain these clear airways falls on the air traffic controllers. The job is a demanding one in that "on the average, throughout the air traffic control system, an aircraft takes off or lands every second, twenty-four hours a day, 365 days a year."  

These landings and take-offs are operated under one of the two FAA flight rules. V.F.R., "see and be seen," visual flight rules, impose a great duty on the pilot; I.F.R., instrument flight rules, requiring the use of extensive ground equipment, impose a great responsibility on the air traffic controller whether he works in the Airport Traffic Control Tower, Air Route Traffic Control Center or Flight Service Station.  

The Airport Traffic Control Towers operated by the FAA render an information and guidance service. In high density traffic centers, these towers operate twenty-four hours a day. The tower service begins when the pilot calls in from fifteen to twenty miles away if under V.F.R. and if under I.F.R., when the center transfers him to the tower. After the tower controller establishes contact with the aircraft, he provides the pilot with landing information including altimeter settings and wind vectors. Ultimately the pilot is given a landing sequence, that is, the plane he is to

10. *Id.*  
11. *Id.*  
12. *Id.*  
14. *Id.*
follow "in," and any taxiing information required. Separation during the landing sequence is accomplished by aircraft routing and rerouting procedures thus insuring the maintenance of separate altitude and approach speeds for each aircraft.

Pilot to tower communication is accomplished by the extensive use of radio equipment. Other necessary information concerning the aircraft is passed to the tower by telephone and radar installations capable of determining the identity and direction of flying aircraft.

Air Route Traffic Control Centers are also operated by the FAA. When the aircraft moves beyond the range of the smaller airport area radar installations, it then becomes the responsibility of other FAA controllers stationed in the twenty-one air route traffic control centers to monitor and guide the pilot along the airways. These twenty-one centers divide the sky into twenty-one irregularly shaped areas, each of which is under the supervision of the center in that area. The function of the centers is to insure that safety regulations regarding separation of inflight I.F.R. aircraft are followed. Their function is carried out by the use of prescribed distance and time separations for aircraft, thus providing each aircraft with a block of moving airspace of its own.

As the aircraft moves through the area assigned to the center, the pilot reports to the controller both his present position and an estimated time of arrival over the next reference point. It is the responsibility of this controller to maintain a flight progress slip on the aircraft while it is in his sector—a journey of as much as five-hundred miles. Communication and control is maintained with the pilot via voice radio until the aircraft is from twenty to thirty miles from its destination whereupon the aircraft is transferred to airport area control. This airport control may either be the tower, or, where high density I.F.R. flights are found, a special approach control installation. The importance of these centers can only be gauged by the volume of aircraft they handle. Each year the centers control more than twelve million aircraft.

The FAA offers other services through its Flight Service Stations. Besides inflight guidance the FAA maintains three-hundred flight service

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15. Id.
16. Id. These installations are capable of making the determinations mentioned from a distance of up to sixty miles.
17. Id.
18. Id.
19. Id.
20. Id.
stations, each of which cover an area with a radius from one-hundred
to two-hundred miles. Specialists at the station, virtual experts on area
weather, airports and flight planning, provide valuable pre-flight and in-
flight data to the pilot. More than 300,000 non-airline pilots constituting
ninety-five per cent of all active civil pilots can make use of these services.

Connecting the entire network of FAA installations are 950,000 miles
of communication lines. This extensive system insures the rapid and
accurate dissemination of all aircraft information. Thus it facilitates the
continued smooth and efficient maintainance of all areas involved in air-
flight control and operation.

While the achievements of the FAA to date are truly impressive, its
goals are even more laudable, for in a FAA publication it has been stated:
Together, man and equipment epitomize the goal of the Federal Aviation [Admin-
istration]—to achieve the highest degree of safety in the air, as well as to maintain
world leadership for the United States in the field of civil aviation.

Unfortunately, not everyone in the system feels that these great aspirations
and goals are being fulfilled, or at least approached, in the proper manner.
These great dissenters are the air traffic controllers themselves.

THE AIR TRAFFIC CONTROLLER

There are approximately ten thousand air traffic controllers on a non-
supervisory level working with microphones and radar equipment.
Ninety per cent of these controllers are between the ages of twenty-eight
and forty years old; the average age of the tower controllers is thirty-four
and the average age of control center controllers is thirty-seven. The
youth of these controllers is not accidental. As the controller approaches
fifty years of age he experiences vocational "burn out," a form of ex-
haustion, which is manifested in a decline in quantity and quality of work
production.

21. Id. The service makes maps, charts and reports available to the pilot and
thus helps him choose a safe and efficient air route.

22. Id.

23. Id.

24. Id. The achievement of these goals to date is evidenced by the ever de-
creasing aircraft—accident ratio in both commercial and private aviation. See

25. Besides the approximately 10,000 air traffic controllers working at the FAA
facilities there are between 4,000 and 5,000 men working on the developmental as-
pects of Air Traffic Control. Interview with Richard Shaftic, Chairman of PATCO
Chicago—O'Hare Tower Branch, in Chicago, March 13, 1971.


27. When the controller passes forty years of age, his performance deteriorates
THE TRAINING OF AN AIR TRAFFIC CONTROLLER

The controller is a civil service employee. He starts at a salary range between $6,938 and $10,470 per year depending on the extent of his experience. His first six months are spent as a GS-6 (Government Service Pay Rating). The first five weeks of training consist of in classroom preparation in the academic phases of Air Traffic Control including the study of the various procedures and functions of facilities found in the overall system. The last portion of his first half year of training is spent in familiarization of “his” installation—its geography, weather, and operational procedures.

From the seventh to the eighteenth month the trainee, now a GS-8, performs a communication function. He transmits aircraft clearance, flight plans, departure times, and other routine information between towers and center installations. After eighteen months, and generally to his thirtieth month, now a GS-10, he is trained in radio contact with aircraft on the ground. During this period he begins twelve months of “on the job training.”

In the period between thirty and forty-two months after being hired, the trainee, now a GS-11 is considered qualified to control the pilot through the taxiing phase of takeoff whereupon he is schooled in transferring the aircraft to local radar control. In the final six months of this period, although unable to communicate with airborne aircraft, the qualified trainee may serve as an Associate Radar Controller working as an assistant to Radar Controllers. If the trainee proves himself capable, he becomes a fully qualified GS-12 Radar Controller at the end of this period. This intensive program of study and work experience prepares the candidate to assume his role as a functionary air traffic controller at the facility for which he was recruited. Significantly, the period of training lasts three and one-half years.

As a GS-12, the journeyman controller could earn between $15,040 rapidly and by his mid-fifties he is “burned-out.” The controller loses his confidence and what used to take him five seconds now takes him twenty. PATCO Newsletter, id. at 59, col. 1.


29. See McIntyre, Situation Critical, PATCO Journal, May-June 1968, at 15. Although generally a correct restatement of the process of training, Richard Shaftic feels the training period usually ends up being somewhat shorter. Interview with Richard Shaftic, Chairman of PATCO Chicago-O’Hare Branch, in Chicago, Mar. 13, 1971.
and $19,549 per year for a forty hour week. If employed in high density locations (those handling a million or more traffic movements) the controller is eligible to reach GS-13 status which encompasses a $17,761 to $23,089 per year range.

THE QUALITIES OF AN AIR TRAFFIC CONTROLLER

Besides the training which the FAA requires the controller candidate to have, it demands the ability:

1. [to] speak rapidly, clearly, and distinctly;
2. [to] adjust quickly to different assignments, changing conditions, and workload fluctuations;
3. [to] arrive quickly at well-reasoned solutions to complex problems;
4. [to] remain calm and controlled during and after long periods of tension and fatigue;
5. [to have] the judgment to select and take the safest and most effective course of action from among several available choices;
6. [to] act decisively under stressful situations and to maintain alertness over sustained periods of pressure.

The abilities required reflect the need for good judgment in selecting the safest alternative to dangerous and complex aerial problems.

These qualities have been recognized and noted by a recent Department of Transportation Committee looking into the Air Traffic Controller career. It stated in part:

The Committee is impressed with the fact that air traffic controllers constitute a unique professional group within the Federal establishment. While many other categories of employees must possess some of the talents, and while many other jobs impose some of the exacting responsibilities, few combine as many demands upon the individual as does the job of controller.

The successful controller appears to require—at least—the following special talents and aptitudes:

31. See PATCO Newsletter, April 11, 1969, at 58, col. 2. Salary rates documented here represent current increases. The million movement high density figure quoted here represents ATC Centers high density requirements; for ATC Towers the figure is 350,000 operations. Interview with Richard Shaftic, Chairman of PATCO Chicago-O'Hare Tower Branch, in Chicago, Mar. 13, 1971.
32. U.S. Civil Service Commission, Announcement No. 418, supra note 28, at 2, 3. One through four are demanded of center controllers, five and six are required of tower controllers.
—A highly developed capacity for spatial perception,
—A keenly developed, quick and retentive memory,
—A capacity for articulate and decisive voice communication,
—A capacity for rapid decision making, combined with mature judgment.  

After noting the abilities and qualities of these men, it is no great wonder that on the average they test in the superior range. They are indeed a most important part of the aviation control system.

THE FAA—CONTROLLER DISPUTE

THE FACTORS PRECIPITATING THE UNIONIZATION OF CONTROLLERS

The air traffic controllers are not happy or satisfied, however, with the system within which they work. They cite many inadequacies within the system impairing the safety of the flying public.

The controllers claim they are grossly understaffed and independent statistics seem to verify their charges. In 1963 there was a “freeze” put on training new controllers. During this period, due to the virtual doubling of air traffic, controllers had to handle almost twice the old traffic volume with the same force. This freeze was due primarily to the massive expenditure cutback initiated by President Johnson which had a devastating impact on the FAA. In 1967, for example, the Transportation Department asked the White House for a budget for somewhere between a minimum of $25 million and a maximum of $135 million; they were given $7 million. This type of problem was felt throughout the system. Chicago Tower, for example, in 1965 was allocated seventy-five fully qualified controllers but had only forty-four qualified controllers employed; the personnel eventually increased to eighty but, for a time during the

35. Dr. W. Sands, in a paper submitted to the American Psychiatric Association, found the controller's intelligence was at a level equivalent with that of doctors, lawyers, writers and senators. See PATCO Newsletter, Dec. 3, 1969, at 1.
36. Controllers claim that dangers exist when ill controllers are used; when controllers are required to man more than one position while helping trainees; when controllers are required to work at scopes for longer than a six hour sitting; when less than minimum separations for aircraft is used; and when controllers are required to use substandard equipment. See The Safety Committee Report of the PATCO Miami Convention, May 26, 1969, at 2.
37. PATCO Newsletter, supra note 26, at 59, col. 1.
38. See Human Problems in Air Traffic Control (Part II), 86 Aviation Week and Space Technology 100 (1967).
In the whole of the Los Angeles System in September of 1964, 296 men were employed and in September of 1966 this figure decreased to 285 while the number of operations grew from 39,626 to 56,594 in that same time period.  

This growth in air traffic worsened the effect in the loss of personnel. Our country has experienced great growth in air traffic during the last two decades making greater demands on controllers whose numbers are not growing as fast. It has been estimated that enplaned passengers will grow from 69.5 million in 1965 to 370.6 million in 1980. This is a 433 per cent increase. It has been stated that in five years from 1962 to 1967 general aviation flying increased 40% causing a 75% increase in A.T.C. workloads. If this trend continues, by 1977 the pressure on A.T.C. will be 450% greater than it is today.  

Clearly, this system employing fewer men who are being forced to handle a greater workload can not function adequately for long. Controllers have been hard pressed and to the question of how have they done it, a typical answer has been, "[w]e did it by cutting lots of corners and staying on this ragged edge of minimums." Controllers imply that minimum landing and take-off procedures have been followed, and often violated; and, in times of great congestion, three mile limits have been shortened and planes have been cleared for landing before aircraft on the runway have taken off.  

The FAA is not oblivious to this problem. Jerry Biron, their head of the manpower section in 1969, has said that the situation can be blamed on everyone's underestimation of the growth of aviation.  

This underestimation has hampered intelligent planning for an adequate system. Forecasting problems have been common in aviation systems since shortly after World War II.  

Although limited by money and training facilities, the FAA has been limited by money and training facilities, the FAA has been...
making efforts to provide more men to fill controller ranks. These efforts are a start, but the controllers feel that this very important aspect of the vocation is being grossly mismanaged. Presently, trainees are sent to the education center at Oklahoma City where they are taught techniques on recognition and radar familiarization. Later they are sent to different areas of the United States where they are engaged in an "on the job training" type of program. Journeyman controllers feel that this is a dangerous practice. One controller voiced a common complaint in stating that "these trainees are assigned a veteran controller who keeps an eye on them but at peak periods, when everyone is busy and he really needs you, how can you help?"47 On March 4, 1969 one such incident involved a Plinair Heron which crashed with nineteen aboard into a mountain near San Juan.48 It was being monitored by a trainee who vectored it on a low altitude into the mountain-side while his instructor was busy doing his own job as a coordinator.

Controllers feel that each inexperienced, new man assigned to an installation is a double liability. The trainee has difficulty in doing his own job and also cuts into the efficiency of the rest of the crew because of the amount of time and help experienced controllers must devote to him.

Controllers seek to radically change this system by instituting training procedures similar to those demanded of trainee pilots. They suggest extensive use of simulation for instructional purposes; video tapes of controller situations which can be used in conjunction with classroom discussion offered at public institutions or ATC facilities are proposed.49

Controllers suggest adoption of extensive medical and psychological testing procedures in addition to a more honest approach in recruiting new men into the service.50 In this way, they hope to combat the attrition rate of approximately sixty per cent which have been experiencing.51

The controllers also feel that a gradual promotion up to high density areas like New York and Chicago, where new controllers are "in over their heads" and consequently leave the service, might cut down the wash out rate.52 Based on a man's performance and ability, he would be qualified to move up to higher traffic demands and salary benefits as he obtained

47. Shaftic, supra note 39.
48. See PATCO Newsletter, Mar. 21, 1969, at 54.
49. See PATCO—Chicago Terminal Area Branch, Recommendations to the Corson Committee at 1, 2, 3.
50. Shaftic, supra note 39.
51. Shaftic, supra note 39.
52. Shaftic, supra note 39.
experience; correspondingly, older controllers, those in their early forties, would be gradually phased down to the less demanding jobs in lighter traffic areas.

Dr. W. W. Sands, in May of 1970, in his study on controllers found that many psychosomatic complaints . . . mental lapses (losing the picture), were a common and fearful part of the controller's job. . . . Anxiety states, depression and marital difficulties were abundant. Men involved in accidents or near misses exhibited severe emotional disturbance and maladjustment. In general, the symptoms closely resembled the type of fatigue found in combat military personnel.53 Controllers hope that their suggested job mobility procedures would help to combat medical disorders related to the vocational stress described in the Sands' Report by placing a man according to his ability to do the job and ability to weather the strain.

These demands on the controller, both physical and emotional, tend to contribute to the deterioration of the controller's performance which occurs normally in his early fifties; consequently, in order to protect them in these later years, controllers are advocating twenty year retirement annuity benefits as are accorded to other government employees working in high stress vocations.54 These benefits, through government and employee contribution, would assure retirement protection, make the job more attractive, and promote controller morale.

In order to help high density traffic areas, where controller shortages are the most acute, controllers desire higher pay for higher density control. They also advocate that five years of high density control be a consideration in promotion to supervisory advancement.55

All the conditions presently existing, controllers feel, contribute to a system racked with danger. Former FAA Administrator, W. F. McKee, recognizes that dangers exist and has stated that "statements have been made . . . that a high level of safety can be maintained with current FAA funding levels. . . . This is simply not so."56 Clearly, increases in funds for hiring controllers and modernizing safety equipment must be made to keep up with the greater demands of increased aircraft volume and development if safety standards are to be maintained. In 1968,

55. See PATCO Chicago Terminal Area Branch, Recommendation To The Corson Committee, at 6.
FAA investigative teams looked into mid-air near misses. The teams found 2,239 near misses but indicated that when unreported cases were added the number would be four times that high.\textsuperscript{57} Thus, these results fully demonstrate the urgency of the problem.

The FAA is aware of the problems and the dangers that the controllers cite. To help overburdened controllers the FAA has authorized the hiring of 2,400 new controllers per year for the period between 1969 and 1973.\textsuperscript{58} Further, FAA planning documents call for a $2,000,000,000 expenditure in the next ten years to combat obsolete facilities and equipment shortages.\textsuperscript{59} While these plans are a start, the need for higher funding levels is the major obstacle to the system's modernization. Estimates on revamping the system just so it works adequately for the present, without regard to tomorrow's problems, run as high as $100,000,000.\textsuperscript{60}

The friction between the controllers and the FAA, caused by the lack of substantial appropriations, has lead a committee (The Corson Committee), appointed in 1969 by Transportation Secretary Volpe to study the controller problem, to publish these findings:

1. extreme staffing shortages exist especially at those facilities controlling the bulk of air traffic;
2. inadequacy of control equipment caused by the lack of funds;
3. poor training techniques;
4. inadequate recruiting practices
5. leading to a conclusion that demoralization and unrest are apparent among a substantial number of controllers.\textsuperscript{61}

The Corson Committee findings, verifying controller complaints about equipment and training and recruitment technique yielding staffing shortages, highlighted the dissatisfaction among controllers and set it before the FAA. This dissatisfaction, the committee found, has been aggravated in part by poor managerial techniques. It recommended that the FAA "re-evaluate and revise existing communications policies and procedures in order to build a more effective interchange between F.A.A. management

\textsuperscript{57} See Kohler, The Great Deception, PATCO JOURNAL, October 1969 at 6, 7. The FAA in 1968 granted controllers immunity from reprisals for near misses if controllers reported them. See PATCO Newsletter, Jan. 14, 1969, at 32. This program has been extended through December 31, 1971. See PATCO Newsletter, Dec. 14, 1969 at 2.

\textsuperscript{58} See Wilson, Faced with Deepening ATC Needs, FAA Academy Takes It Back, PATCO JOURNAL, June 1969, at 24.

\textsuperscript{59} See PATCO Newsletter, May 8, 1969 at 68.

\textsuperscript{60} See supra note 3, at 290.

and employees.\textsuperscript{62} Clearly, its recommendations indicated that the controller and the FAA were not communicating—a major technique of employer-employee orderly problem-solving was not available to either side.

The total lack of communication and the problems inherent in the job have encouraged controllers to organize. Controllers have joined three labor organization: 1) the National Association of Government Employees (NAGE) which represents many different types of government workers; 2) the Air Traffic Controller Association (ATCA), headed by retired chiefs of the FAA Air Traffic Service and composed of military and civilian controllers, many of whom are supervisory personnel; and 3) PATCO.

THE PATCO EFFORT TO ORGANIZE CONTROLLERS

PATCO has been the most militant of the three. It has criticized NAGE for its representation of nonprofessionals and ATCA for its close association with the FAA. PATCO was formed on January 11, 1968 in New York. The organizers, noting the anonymity of the controller, sought to make the organization nationally known by securing "name personalities." F. Lee Bailey served as the first Acting Executive Director until April of 1970.\textsuperscript{63} Since PATCO's inception, it has also secured Arthur Godfrey, Paul Burke, Arnold Palmer, Bill Lear, Susan Oliver, Herb Orlowitz, and Johnny Carson as its trustees.\textsuperscript{64}

PATCO's efforts initially were directed toward organizing non-supervisory controllers in terminals and centers; to them it granted full membership. Supervisory controllers were eligible for associate membership, lacking the right of organization, management and decision making.

Gradually, it became apparent that the attempts by PATCO to organize the controller were unsuccessful.\textsuperscript{65} Verification of this could be seen in the negative recognitional response to the Corson Report:

No authoritative data as to the membership strength of each of these organizations is available. But the secondary data available to the committee and the impres-


\textsuperscript{64} See PATCO JOURNAL, October 1969, at 2. See also PATCO JOURNAL, May-June 1969, at 2.

sions formed in the course of extensive field visits, have lead to the conclusion that P.A.T.C.O. probably represents a majority of the center and tower controllers.\textsuperscript{66} Thus, an FAA committee had, in a way, recognized that PATCO was the majority representative of controllers. In spite of this fact the FAA was unwilling to recognize PATCO as the representative of the controllers. PATCO, therefore, armed with FAA information indicating that NAGE represented 2,000, ATCA represented 2,150, and it represented 7,100 of the journeymen controllers, began through the machinery of Executive Order 11491 to seek national recognition. It also began examining more closely its rights and obligations as a representative of government employees.\textsuperscript{67}

THE ABSENCE OF THE RIGHT TO STRIKE—THE HEART OF THE DISPUTE

Controllers, since they are federal employees, are governed by Executive Order 11491, operative January 1, 1970.\textsuperscript{68} This order provides that workers are allowed to join labor organizations defined as:

"Labor organization" means a lawful organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with agencies concerning grievances, personnel policies and practices, or other matters affecting the working conditions of their employees; but does not include an organization which . . . asserts the right to strike against the Government of the United States or any agency thereof, or to assist or participate in such a strike, or imposes a duty or obligation to conduct, assist or participate in such a strike.\textsuperscript{69}

Clearly, under the Order, while membership in a labor organization is permissible, the organization's activities concerning the right to strike are prohibited. The Order further states that it shall be an unfair labor practice on the part of the union to " . . . call or engage in a strike, work stoppage, or slowdown; picket an agency . . . or condone any such activity by failing to take affirmative action to prevent or stop it."\textsuperscript{70} This Order thus gives the right to federal employees to unionize but does not allow the union to engage in strike activity. The violation of these rules would subject the organization to the loss of its recognition. Unfair labor practice charges could also be filed by the government against the union.

Similarly, the right to strike is denied to individuals in federal employment. The law provides:

\begin{itemize}
\item \textsuperscript{66} PATCO Newsletter, Feb. 13, 1970, at 6, col. 1.
\item \textsuperscript{67} PATCO Newsletter, Aug. 13, 1969, at 1.
\item \textsuperscript{68} Executive Order No. 11491 is, in reality, a modification of Executive Order No. 10988 instituted by President Kennedy in 1962. The modification added more "teeth" into its administration.
\item \textsuperscript{69} Exec. Order No. 11491, 34 C.F.R. 17605, § 2e (1970).
\item \textsuperscript{70} Id. § 19b-4.
\end{itemize}
An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—(1) advocates the overthrow of our constitutional form of government; (2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government; (3) participates in a strike or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or (4) is a member or an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.\(^\text{71}\)

By this section, the law prohibits any individual who holds a position with the Government to strike or assert the right to strike. The violation of this section is made a crime by the following provision:

Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—(1) advocates the overthrow of our constitutional form of government; (2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government; (3) participates in a strike, or asserts the right to strike against the Government of the United States or the government of the District of Columbia; or (4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia; shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both.\(^\text{72}\)

Thus by the foregoing section, the law imposes a possible fine and imprisonment for those who engage in strike action against the Government \textit{qua} employer.

This punishment extends not only to federal employees who engage in a strike but also those who urge them to strike. The following section punishes the latter as if they were principals:

(a) whoever commits an offense against the United States or aids, abets, counsels, commands, includes or procures its commission, is punishable as a principal. (b) whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.\(^\text{73}\)

From the preceding sections it would appear that employees, or others, either as individuals or as members of a labor organization, neither have the “right to strike” nor the “right to assert the right to strike” under penalty of law. This, however, is not necessarily the case. A three judge United States District Court decision rendered in October of 1969, struck

\(^{71}\) 80 Stat. 609, 89-554 (Sept. 6, 1966).


down the federal provision prohibiting the assertion of the right to strike. The court found that the law was an "unconstitutional restriction on first amendment rights," and declared that it exercised a "chilling effect" on guaranteed rights of free speech and petition to Congress. The court, in rejecting the government argument that the word "assert" meant only conduct "designed to incite others to strike," said that the view did not correspond with the dictionary definition of the word.

THE EVE OF THE DISPUTE

PATCO soon after its inception found that it would be less than an easy task to gain, for its members, truly meaningful status as a bargaining unit. As often happens in labor disputes of this sort, animosities were building outside of the "real issues". Intolerance was displayed by both sides. The following list, far from noting all such uncalled for incidents, was indicative of the breach between labor and management:

1. FAA refusal to follow regular procedure in not allowing PATCO organizers leaves of absence to organize the group; 2. Bailey's suggestion to controllers that they refuse to follow plane separation criteria ordered by supervisors if controllers feel those orders are dangerous; 3. FAA sponsored psychological tests of Bailey determining "his role in life is to slay 'Goliaths,' he is cut from the same cloth as Joe McCarthy, Father Coughlin and Huey Long, he is a man bent on destroying authority wherever he found it;" 4. controller refusal to take psychological suitability tests; 5. a statement of the PATCO Board of Directors that "Administrator John Shaffer was a detriment to air traffic control and had so frequently indulged in misrepresentation in the past, that there was no reasonable possibility that he could ever be a respected or effective leader;" 6. an FAA determination that PATCO was responsible for a June eighteenth to twentieth 1969 slowdown and, therefore, would lose its check-off privileges and that the FAA would no longer recognize PATCO; 7. a PATCO decision that they would no longer recognize

75. Id.
76. Id.
78. See PATCO Newsletter, Mar. 21, 1969, at 1.
80. See PATCO Newsletter, Nov. 18, 1969, at 1.
the FAA, and a letter from Bailey to FAA Administrator Shaffer suggesting that Shaffer was incompetent and overpaid and that PATCO may soon start choosing their own supervisors at the facilities. These instances including the attacks upon the prominent figures involved did nothing toward solving the real issue of the dispute—aviation safety—but, rather, did much toward making solutions infinitely more difficult to attain.

This was the background—an underpaid and overworked controller versus an underfunded FAA, both working hard to promote safe, efficient travel but disagreeing in approach. These disagreements could, when burdened with interpersonal friction and animosity, erupt into open rebellion if a proper catalyst were found. Such a catalyst was provided in September of 1969 when the FAA sought to transfer James Sparks, James McCurnin, Perry Taylor and James Henson, four energetic PATCO organizers, from the Baton Rouge, Louisiana tower.

THE DISPUTE BEGINS

These transfers immediately became the issue upon which the following events were based. In a PATCO membership newsletter the organization stated:

Baton Rouge now looms as the acid test for controller unity over the country. F.A.A. has sought to use the involuntary transfer as a new major disciplinary device. . . . Again F.A.A. . . . has shown a serious lack of understanding, not only of controller unity and intestinal fortitude, but of intelligence. Looking at Baton Rouge, any man in A.T.C. can see that tomorrow it might be him at his facility. . . . Thus the P.A.T.C.O. Board has given highest priority to the four men at Baton Rouge. This organization will simply not tolerate that they be transferred/punished.

From the tenor of this statement it can readily be seen that PATCO felt the involuntary transfer was being used unfairly as a disciplinary device and, in order to stop any further exploitation, all controllers must organize and resist its use. The FAA’s position was that the transfers were necessitated to correct some operational shortcomings being experienced at the Baton Rouge Air Traffic Control Tower. Thus, the FAA’s

83. See PATCO Newsletter, Nov. 4, 1969, at 2.
84. Id. at 3.
85. See PATCO Newsletter, Oct. 2, 1969 at 3. One of the four, Perry Taylor, sought to be transferred to Ft. Smith, Texas, where his father, sick with cancer, resided. The FAA granted the request and so the fight continued for the remaining three. See PATCO Newsletter, Nov. 18, 1969, at 6.
86. PATCO Newsletter, Oct. 20, 1969, at 1, 2.
87. See Government Employees Relation Report No. 370, Oct. 12, 1970, at G-2,
concluded that it could and would transfer controllers in order to improve air traffic control service.

Rather than summarily accepting the rationale given for the transfers, PATCO saw these actions as an attempt to destroy the viability of its organization. Hence, passive reaction on the part of the controllers could jeopardize the entire organization and place it in grave danger of being silenced. The Board of Directors of PATCO, therefore, sent a "strongly worded letter" addressed to FAA Administrator Shaffer saying that, if the involuntary transfers were not stopped, a nationwide controller demonstration on behalf of the men would be held. . . . 88 The FAA responded to PATCO Chairman, Mike Rock: "This will acknowledge receipt of your latest letters. You can expect individual replies in due course." 89 It does appear that the concern of the FAA was but slight and, as will be shown, almost disastrous in its effect.

In this aura of rising friction, the controllers who had been involuntarily transferred began to pursue an administrative appeal of the FAA order. On October 28, 1969, an examiner was appointed to resolve the issue. His conduct of the hearing gave rise to numerous and flagrant violations of procedural due process, which was to be afforded in this type of proceeding. 90

The conduct of the hearing examiner eventually resulted in a suit brought by counsel for the controller-petitioners to enjoin the proceedings. A temporary injunction was granted, but the request for a permanent injunction was denied. In so doing the federal district court held that it could not interfere with the FAA hearing and its procedures, until the controllers involved could show requisite "irreparable harm" and "immediate damage" emanating from the lack of record. 91 Thus, only an adverse decision by the hearing examiner could provide a possible basis for injunctive relief.

The decision by the examiner was duly postponed on three occasions from November 12 to November 26 and, finally, to December 8, where

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col. 1. PATCO disputes this claim. PATCO presented, at the FAA hearing, ratings for individual controllers at Baton Rouge showing that they ranged from "qualified" to "outstanding." See PATCO Newsletter, Jan. 19, 1970 at 2.


90. See Government Employee Relation Report No. 370, Oct. 12, 1970, at G-2 col. 1. Among the errors committed by the examiner were: 1) withholding the names of FAA witnesses to petitioners; 2) examining witnesses in secret; 3) denying to petitioners the right to cross-examination; and 4) denying petitioners the right to a record of the proceedings.

—upon that date the transfers were sustained. The decision became final on January 14, 1970, when the FAA approved the order.93

From January 23 through 25, 1970, the Directors of PATCO were called into an emergency session to examine what was to be its course of action in the light of the final order of transfer entered by the FAA. As a result of that meeting, a telegram was sent to Secretary of Transportation Volpe, which stated that

as of February 15, 1970 all optional air traffic service rendered by our membership above and beyond those that they are required to perform by their contract and by regulation will be withdrawn, especially including the services of the many controllers who are in a present condition of fatigue and who are medically entitled to a period of respite for the preservation of their own health.98

While what PATCO had said correctly declared their rights as employees, it did, more importantly, imply a threat. Other portions of the statement made reference to the Baton Rouge situation and proposed talks to air those grievances, which though not expressed in the message, founded the basis necessitating its existence. The telegram was answered by FAA Administrator Shaffer cautioning that concerted action such as withholding services would constitute an illegal strike.94 He urged immediate reconsideration by PATCO of its present position, saying that employees engaged in such activity are subject to penalty under the laws and standards of conduct of employees. This matter-of-fact restatement of the law contained no conciliatory tone of suggestion of compromise.

THE CONTROLLER "SICK-OUT"

Subsequent to these events there began extensive activity on the part of PATCO officers. F. Lee Bailey spoke to PATCO western leaders urging them that a "sick-out" demonstration was necessary and in a news conference on February thirteenth Bailey said he "would anticipate as one who has talked with controllers from Honolulu to New York that there would be an impact on the system, and it will occur on Sunday the 15th day of February."95 Bailey had made the implication to the world that there would be a strike.

Prior to the demonstration, however, the FAA and PATCO agreed to meet on February fifteenth to the seventeenth to discuss the Baton Rouge situation. The meeting was continued on February twenty-seventh and on March thirteenth the decision was made to affirm the transfers.

92. Id.
Out of these meetings came more PATCO dissatisfaction. They claimed *bad faith* on the part of the FAA and the Department of Transportation negotiators. PATCO Chairman, Mike Rock, claimed the announcement to transfer "was in direct violation of an express agreement between the Professional Air Traffic Controllers' Organization, the Federal Aviation Administration, [and] the Department of Transportation . . . [which was] struck during negotiations" in order to avert the February fifteenth disruption.\(^9\) PATCO concluded, therefore, that its agreement was patently breached by the actions of the FAA.

On March twenty-fourth PATCO published a press release reading: "Airlines, airtravellers, and the flying public are hereby notified that swift, severe dissipation of air traffic services will commence throughout the country at approximately 0800 EST on Wednesday, March 25, 1970."\(^9\) Thus, the warning that there would be some "impact on the system" was made to both the traveller and the FAA alike. On March 25, 1970, the warning became a reality when instead of the usual absenteeism rate of 4 per cent it was 19.8 per cent.\(^9\)

On March 26, 1970, both Bailey and Rock went on a nationally televised press conference to discuss the demonstration.\(^9\) Bailey stated that the understaffed controllers left at the towers and those inexperienced trainees pressed into service created a safety problem and, thus, the whole system should be closed down. In answering a question of a reporter directed to the nature of the controllers actions, Bailey stated that this was not a strike, but rather, a "walk-out." Thus, he attempted, though futilely, to circumvent the sanctions which could be imposed upon the controllers because of their actions.

On April 3, 1970, Bailey, after meeting with representatives from the Justice Department, urged the men back to work but added that since the problems precipitating the "walk-out" were as yet unresolved, the controllers probably would not return to their jobs. In fact telephone messages sent to controllers prior to April 3, 1970, told them to ignore Bailey's "plea."\(^10\) The prophecy of Bailey was fulfilled, for absenteeism gradually increased to a high of 30.4 per cent until April 14, 1970, when it returned to normal.\(^10\) The total impact had lasted from March 25, 1970 to April 14, 1970.

\(^9\) Id. at G-4 col. 1.
\(^7\) Id. at G-4 col. 1.
\(^8\) Id. at G-5 col. 1, n. 6.
\(^9\) Id. at G-5 col. 2.
\(^10\) Id. at G-7 col. 2.
\(^10\) Id. at G-7 col. 1.
THE ROLE OF THE JUDICIARY IN THE DISPUTE

During the controller "sick-out," the Government began legal action to require either that the men return to work or present proof that they were ill.\(^{102}\) The FAA through various federal district courts obtained temporary restraining orders which were subsequently converted into preliminary injunctions.\(^{103}\) Government legal action, although successful in that it required the controllers to return to work, was not completely successful in four major cities. In New York, Denver, and Chicago the federal district courts gave the controllers return to work protection, in that the FAA was prevented from taking any disciplinary action against the men in those jurisdictions who were obeying the court orders and going back to work. In Cleveland, though no opinion was written, the judge orally warned the FAA that, if extensive disciplinary action were taken, he would not hesitate to issue an order similar in terms to those of New York, Denver, and Chicago.\(^{104}\)

Government appeal followed the district court rulings in the Seventh, Tenth and Second Circuits. In the Seventh Circuit, which encompasses the city of Chicago, the United States Court of Appeals unanimously affirmed the district court's decision to restrain any FAA disciplinary action until the case was decided on its merits. In the Second Circuit, which encompassed the city of New York, the United States Court of Appeals, reversing the district court, found that no ban on FAA disciplinary action should be imposed. In a 2-1 decision the United States Court of Appeals for the Tenth Circuit, which encompasses the city of Denver, in the case of United States v. Robert D. Moore, and in a companion case United States v. Clinton H. Abnet affirmed the district court ruling.\(^{105}\) The Circuit Court here reasoned that the order was that of a trial court in aid of its jurisdiction. Therefore, the fact that the defendants had not exhausted their administrative remedies did not prevent the court from maintaining the status quo as of March 25, 1970, at least until the determination was made as to whether or not an illegal strike had existed.\(^{106}\) Judge Breitenstein, in his dissent, stated, however that he was unaware of any precedent which supported judicial action enjoining the executive branch in an administrative matter.\(^{107}\) With this decision favoring the

103. Id.
104. Id.
105. 427 F.2d 1020 (10th Cir. 1970).
106. Id.
107. Id.
controllers' actions, they felt that a significant battle had been won in their quest for effective representation.

THE AFTERMATH OF THE DISPUTE

Following the rather hollow victory won by the controllers, the situation was deteriorating rapidly for PATCO and its membership. As of October, 1970, fifty-five controllers, virtually all of them PATCO officers, had been fired from the service and hundreds of suspensions were levied.\(^{108}\) Even through and after the "alleged strike," PATCO, following the procedures of Executive Order 11491, applied for recognition but was challenged by NAGE, ATCA and the FAA; further, NAGE lodged an unfair labor practice charge against PATCO.\(^{109}\)

To resolve both issues, the United State Department of Labor appointed Louis Libbin as Hearing Examiner. PATCO produced evidence showing that a recent FAA report determined that NAGE represented 2,000, ATCA 2,150 and PATCO 7,100 of the non-supervisory journeyman controllers.\(^ {110} \)

The FAA produced evidence indicating that PATCO had engaged in an illegal strike. It showed: (a) PATCO on January twenty-fifth sent a telegram to Secretary Volpe indicating that all optional services would be terminated on February fifteenth and proposing a meeting; (b) Bailey made a speech to PATCO western members on February second expressing the necessity for affirmative action; (c) Bailey said in his February thirteenth press conference that he anticipated an impact on the system on February fifteenth; (d) at a PATCO membership meeting on February twenty-third a PATCO board member, Biava, told the members that the reason that the proposed "sick-out" was not called on February fifteenth was that PATCO had entered into talks with various heads of the FAA; (e) PATCO telephoned messages to workers not to report on March twenty-fifth; (f) PATCO issued a news release on March twenty-fourth indicating that service would be severely diminished at eight o'clock on March 25, 1970; (g) abnormal absenteeism (five times as high as the norm began) on March 25, 1970; and (h) Bailey in his March twenty-sixth press conference urged men to "walk-out" due to the danger to the flying public caused by so few a number of controllers working.\(^ {111} \)

\(^{108}\) Bartsch, supra note 102.


foregoing are representative of the facts upon which Examiner Libbin based his decision. In total, the facts found by him consumed six pages of the Labor Department Report. These facts presented a continuing portrait of the controllers' guilt of strike activity.

After reviewing the facts before him, Examiner Libbin concluded:

I find, upon consideration of all the previously detailed evidence as a whole, that P.A.T.C.O. called the controller's strike, assisted and participated therein during its duration, and condoned it by failing to take affirmative action to prevent or stop it. . . .112

Further:

I find by these acts, considered singly and collectively, P.A.T.C.O. asserted the right to strike against an agency of the United States Government, or to assist or participate in such strike. . . . I therefore find that at least during that period P.A.T.C.O. was disqualified as a labor organization within the meaning of that Section of the Order.113

Finally, Examiner Libbin stated:

As I have found that P.A.T.C.O. called the controller's strike, assisted and participated therein, and condoned it by failing to take affirmative action to prevent or stop it, I find that P.A.T.C.O. committed unfair labor practices.114

The examiner had found against PATCO on all issues. He found conclusively that PATCO did strike and therefore was guilty of an unfair labor practice.

In hearing Examiner Libbin's conclusion he recommended: (1) that PATCO cease and desist from asserting the right to strike; (2) that PATCO's application for recognition be withheld for a sixty day period; and (3) that PATCO for sixty consecutive days post notice that they were guilty of an unfair labor practice.115 Clearly, responsibility for the strike had been placed on PATCO.

Whatever the decision made on who caused the strike, there was little doubt about which party had suffered the most damage. The controller strike caused nearly $100,000,000 in damages to the airline industry.116 After the strike, the Airline Transportation Association (ATA), the airline industry's spokesman, instituted suit against PATCO for this amount.117

112. Id. at G-9, col. 1.
113. Id. at G-9, col. 2.
114. Id. at G-10, col. 1.
115. Id. at G-14, col. 1, 2.
117. Id.
THE NEW PATCO: CURRENT PROBLEMS-FUTURE OUTLOOK

Even as this suit was being filed and the Government was petitioning for reconsideration of the disciplinary action it sought to take, PATCO began an internal renovation in its hierarchy. F. Lee Bailey ceased active participation in PATCO affairs. In a September 1970 newsletter, PATCO told the membership:

Many mistakes were made over the past 2½ years, along with the creation of many good ideas. In the post-sick-out era P.A.T.C.O. made some major changes. Not only in our posture, leadership, and organization but in our very outlook as well. With the press we keep quiet. This in itself was a radical departure from our past actions. We advertised "conciliation rather than confrontation." . . . The field of labor relations and subtle persuasions have become the key in attempting to get concrete results for the controller.\textsuperscript{118}

PATCO had changed its outlook. It prepared to adopt a new approach. The changes which PATCO began implementing went so far as to reach the election of a new president and an affiliation with the Marine Engineers Benevolent Association (MEBA).\textsuperscript{119} During the PATCO-FAA problem MEBA had been helpful to PATCO offering mediators and $50,000 in loans to counteract the FAA cancellation of check-off privileges.\textsuperscript{120} Further, MEBA, with its long success in labor negotiations and the respect it commanded in Washington D.C. would provide much needed power in dealing with the FAA and Congress. Finally, MEBA, because it has never asserted the right to strike, could do but good to PATCO's new image.\textsuperscript{121}

With new leadership PATCO began new programs—one such program was the initiation of talks with ATA. These meetings played a most important role in reaching a settlement that terminated the multi-million dollar law suit previously filed against PATCO.\textsuperscript{122} In that agreement PATCO consented to the issuance of a permanent federal injunction against work stoppages in consideration for the ATA dropping the suit. The settlement helped the organization immeasurably. A statement accompanying it expressed a hope on each side that future relations between the two organizations would improve.

The new PATCO was still concerned with the Government's legal action. In response to the Government's petition for reconsideration, appellate courts in the tenth and seventh Circuits, the last areas restraining

\textsuperscript{118} Id. at 2, col. 1.
\textsuperscript{119} See PATCO Newsletter, June 28, 1970, at 1, col. 1, at 3, col. 1.
\textsuperscript{120} Shaftic, \textit{supra} note 39.
\textsuperscript{121} Shaftic, \textit{supra} note 39.
\textsuperscript{122} See PATCO Newsletter, Sept. 14, 1970 at 1.
FAA disciplinary action, reversed their earlier rulings, thus, leaving the controllers unprotected from employment suspension and termination. The courts indicated that the FAA was the proper forum to dispose of agency problems.

Thus the courts of the United States have denied the controllers protection from the FAA sanction. PATCO, having to date been judicially defeated is, at present, preparing its appeal to the United States Supreme Court. The appeal will focus on the issue of whether United States district courts have the discretion to restrain an administrative agency's disciplinary action as a condition precedent to the issuance of an injunction requiring the men to return to work.

While New York controllers, because this appeal is founded upon the adverse decision of the Second Circuit, are not suffering from FAA disciplinary action, the rest of the system is feeling the effect. At Chicago Center Control, for example, nearly one-hundred letters of suspension have been sent to controllers and fifty more are expected. At O'Hare International Airport fourteen have been sent and twelve more are expected. To date PATCO has thus been unable to stop FAA action even the three men at Baton Rouge over whom the strike began have been fired.

While PATCO has, to date, lost its legal fight to protect the controllers who struck, and has not yet been able to gain exclusive recognition to represent controllers, there have been some successes, as exemplified by its affiliation with MEBA and the settlement agreement with the ATA.

Also as a result of the successful FAA legal action, PATCO has lost many of its more militant leaders. The stance of the organization has changed accordingly. PATCO has become more cooperative with the FAA as is evidenced by its relative inactivity and conciliatory posture toward the ATA. An example of the latter circumstance is the "no-strike" promise in the court settlement. In common parlance, PATCO has, to some extent, "been taught a lesson."

PATCO's recent change of stance into a less vocal organization, while representing a somewhat genuine change of philosophy, may very well be motivated, in part, by the position of the organization in the eyes of the Labor Department. This conclusion reaches significant proportions when viewed in the light of the decision reached on January 29, 1971, by the Department concerning the findings of hearing examiner, Libbin,

123. Bartsch, supra note 102.
124. Interview with Richard Shaftic, Chairman of PATCO at O'Hare Tower, in Chicago, Mar. 4, 1971.
that PATCO had been found guilty of committing an unfair labor practice.\textsuperscript{125} The Department of Labor's decision adopted the finding that PATCO violated Executive Order 11491 by leading a controller strike but modified Libbin's remedy. Instead of the sixty day period during which PATCO's petition for national, exclusive recognition would be held in abeyance, the period was made a sixty day minimum conditioned upon PATCO's continued demonstration of compliance to the decision and adherence to the provisions of the Executive Order in the future. PATCO officials claimed they were elated over this modification.\textsuperscript{126} They would be ill advised to engage in any activity which would endanger a result which they consider so favorable.

PATCO for the present, at least until the Labor Department decides to forego further surveillance and issue a recognition order, will no doubt remain quiet. Thereafter, the organization may very well return to its more militant stand.

It is the opinion of this writer, however, that, influenced by the events herein related, PATCO will show more professionalism in its organizational affairs. It will not be led into a strike by "big-name" attorneys nor will it air its grievances with the FAA in so devastating a manner. At this point it is reasonable to believe that the PATCO which called the "sick-out" of 1970 has died and probably shall never rise again. In its place a new, "professional group of professionals" has risen and while it will be a quieter group, it will still be concerned with the important issues raised in those stormy days of early 1970.

\textbf{THE PATCO DISPUTE IN THE LIGHT OF THE RIGHT OF PUBLIC EMPLOYEES TO STRIKE}

This chronicle of events leading to the controller "sick-out" is not an isolated incident in public employment relations. The problems of employee-management relations, illustrated by the PATCO-FAA confrontation, are important ones continually compounded by the increase of individuals holding government employment.

In 1969 there were twelve million public employees. This figure has doubled since 1950 and it is estimated that by 1975 one out of every five employees will work for the government.\textsuperscript{127} These workers, as their numbers grow, are organizing as PATCO did and are demanding a greater

\textsuperscript{126} Id.
voice in employee-management relations. This growth in government employees' numbers and interest has been manifested in almost a sixty percent increase in union membership from 1956 to 1968, the year PATCO was organized.\(^\text{128}\)

While, generally, public employees, like air traffic controllers, do not have the right to strike, work stoppages are on the increase. In 1950, there were 28 government work stoppages; by 1966, the number had increased to 142.\(^\text{129}\) In 1967, public employee work stoppages grew to 181.\(^\text{130}\)

Federal Government labor legislation has expressly recognized the right of private sector employees to strike.\(^\text{131}\) While no such general affirmation of the right to strike has been granted to employees in the public sector, some states have begun passing governmental employee legislation.

In Minnesota, for example, disputes concerning maximum hours and minimum wages of employees of charitable, non-profit hospitals, if a petition is made, must be submitted to arbitration.\(^\text{132}\) In Nebraska, arbitration for dispute settlement is allowed at the request of either party.\(^\text{133}\) In Pennsylvania, policemen and firemen or their public employer, after an impass in collective bargaining has been reached, may seek arbitration.\(^\text{134}\) Perhaps the most radical departure from the norm has occurred in Hawaii, where the right to strike has been granted to all public employees with the only caveat being that the strike can be curtailed if it endangers public safety.\(^\text{135}\) Hawaii's legislation further provides for "cool off" periods and mediation and arbitration procedures.

While in these few instances, some legislative action has been taken, the right of public employees to strike, has almost uniformly been denied. Two common reasons for this conclusion have been that the state is a sovereign and a citizen-worker cannot deny its authority\(^\text{136}\) and, that to

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\(^{130}\) Zack, Dispute Settlement In The Public Sector, 14 N.Y.L. FORUM 249, 251 (1968).


\(^{132}\) See MINN. STAT. ANN. § 179.38 (1966).

\(^{133}\) See NEBR. REV. STAT. § 48-824 (1968).

\(^{134}\) See 43 PENN. STAT. ANN. § 217.1 (1968).

\(^{135}\) See Government Employee Relation Report No. 356, July 6, 1970, at B-13 wherein a discussion of the implementing Board is given. The statute was signed into law on June 29, 1970.

\(^{136}\) Norwalk Teachers Ass'n v. Board of Educ., 138 Conn. 269, 276, 83 A.2d 482, 485 (1951) is a typical illustration.
allow public employees to strike would inflict a great hardship on the public at large.\textsuperscript{137}

Questions on these two justifications for the denial of the right to strike come to light upon even casual observation. These questions yield defects suggesting need for reevaluation. The denial of sovereignty rationale does not correspond with reality. The history of strikes in the United States indicates that they are principally motivated by economic and not political considerations. "The sovereignty argument was originally proposed in a political context. While strikes often have political overtones, their basic motivation is economic."\textsuperscript{138} Certainly in our country the strike is an economic grievance procedure not to be equated with a political denial of sovereignty. One court has stated, in a suit for tort claims that, "[i]t would seem somewhat anamolous that American courts should have adopted the sovereign immunity theory in the first place since it was based on the divine right of kings."\textsuperscript{139} It is difficult to believe that when controllers, for example, strike, their thoughts stray from the improvement of their jobs to the political sovereignty of the United States of America.

The other often quoted reason—the protection of the health and safety of the public—has validity to a point, but it must differentiate between those services against which strike activity would and those against which strike activity would not result in public danger. While it is obvious that a police or firemen's strike would endanger the public, can one make the same claim of all other government employees?

To establish a logical and workable rule for labor-management dispute settlement, a brief examination of the three types of settlement procedure—unilateral employer decision, third party intervention, and bargain and negotiation between the parties—will be made.

In the public sector, unilateral employer decision has been the rule, as has been exemplified by the FAA activity in its dispute with the air traffic controllers. Evidence showing the increase of public union membership and the number of work stoppages indicate the inadequacies of the present system. The failure of the present system suggests the need for change.

The second procedure, third party intervention, has some inherent constitutional limitations. Any third-party decision granting monetary increases could run afoul of United States constitutional provisions granting

\textsuperscript{137} City of Manchester v. Manchester Teacher's Guild, 100 N.H. 507, 131 A.2d 59 (1957) presents the rationale.

\textsuperscript{138} Supra note 129, at 399.

\textsuperscript{139} Holz v. City of Milwaukee, 17 Wis. 2d 26, 30-31, 115 N.W.2d 618, 620 (1961).
exclusive power of the control of money by the Congress. "Here the question of a threatened taxpayers suit" arises based on the idea that such action is "depriving the representatives and therefore the public of control over the administration, and the funding of government."140

The third procedure is the allowance of bargain and negotiation techniques between the parties. This procedure of necessity must include the "right to strike"—labor's most potent weapon. It is the author's opinion that under the "equal protection clause" of the fourteenth amendment, public and private employees, without some rational basis, should not be treated differently with respect to the right to strike. Thus, these workers should be enabled to engage in strike activity in an effort to solve their labor problems. Government vocations, not involving the health or safety of the nation, provide no rational reason for denying such a right. While public inconvenience would no doubt develop, this climate would generate, in like manner, enough healthy political pressure to insure rapid strike settlement.

Other governmental vocations, those involving the health and safety of the nation, do provide a rational basis for the denial of the right to strike. To such a vocation, like those of the air traffic controllers, other avenues for dispute settlement must be made available. Clearly, unilateral employer decision-making has not proved successful in such cases.

CONCLUSION

Thus, in the final analysis, for those government employees engaged in public health and safety related functions, new labor dispute settlement techniques must be suggested. The right to strike cannot be allowed for the welfare of the nation; unilateral employer decision has not prevented strikes; and the problems illustrated in this comment were born from the futility of the present system. The only feasible alternative is third party intervention. Those employees who are not to be afforded the right to strike should be allowed direct appeal to a congressional committee arbitrator. Such a procedure would insure quick labor dispute settlement without constitutional violation.

Since rapid labor dispute settlement must be the objective of all those who advocate safe and efficient aviation development, and since aviation development cannot continue successfully if the dangers and damages resulting from the type of dispute described in this work are allowed to re-occur, query, what does the future hold for management-labor relations

140. Supra note 130, at 265.
at this level? The answer rests not in idealism or speculation, but simply in the recognition that further delay in solving the problems causes but additional problems to be solved.

James A. Calabrese