

this phrase to include an "equal right . . . to nominate *whomever he desires*" would be a case of improper legislation by judicial interpretation. During floor debate on the Bill of Rights section, the proponent stated that "under this Bill of Rights title, a union member will be protected, as he should be protected, in his rights to *participate in all union activities*. He will be insulated against discriminatory treatment."²⁰ (Emphasis added.)

Thus the protection of section 101(a)(1) seems to be limited to a member's right to participate in the nomination procedure, and not the right to nominate a particular person. The *Harvey* court found that the implicit classification of the membership was discriminatory treatment, and it would seem that in the future the court will not find such violation of section 101(a)(1) unless the complainant states that through some act of the union he or a group of his fellow members were unable to participate as nominators. The court in *Jackson v. Int'l Longshoremen's Ass'n*, in speaking of another right guaranteed by section 101(a)(1), found that "Title I of the act does not, of course, guarantee . . . the right to vote for a specific person, but guarantees only the right to vote for a duly nominated and qualified candidate."²¹ The same statement, replacing "vote" with "nominate," seems to be equally applicable to section 101(a)(1).

Section 401(e), as mentioned above, states with a great deal more detail the safeguards a union must provide to its members in the nomination and election procedure. It not only seems to cover the provisions of section 101(a)(1), but also governs complaints about the eligibility to be nominated. Where it does conflict with section 101(a)(1), as it did in the present case, the court correctly found that because of the importance Congress attached to the provisions of section 101, Congress could not have meant the remedies provided by section 402 to be exclusive. The very name of the section "Bill of Rights" implies the emphasis Congress placed upon it (though perhaps duplicating section 401) in its effort to guarantee union members their rights "just as the rights of the American people are set forth in the Bill of Rights of the Constitution of the United States."²²

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Labor Law—Railway Labor Act—Jurisdiction of National Mediation Board Over Striking Employees of an Airline Employed at a Government Nuclear Research Station.—*Pan American World Airways, Inc. v. United Bhd. of Carpenters & Joiners*.¹—In 1963, Pan American World Airways contracted with the Atomic Energy Commission to perform "house-keeping" and general support services at the Commission's Nuclear Research Development Station, located in Jackass Flats, Nevada. The Station is devel-

²⁰ Remarks of Sen. Kuchel in 2 Legislative History of LMRDA of 1959 at 1373 (1959).

²¹ 212 F. Supp. 79, 82 (E.D. La. 1962).

²² Remarks of Sen. McClellan, *supra* note 20, at 1104.

¹ 324 F.2d 217 (9th Cir. 1963), cert. denied, 32 U.S.L. Week 3340-41 (U.S. March 31, 1964) (No. 725).

oping a nuclear rocket engine to propel space vehicles. The work was performed by employees of Pan American, and involved the preventive maintenance of electrical, electronic and ventilation equipment and such technical functions as the storage and use of liquids, fuels and gases. These latter functions were performed by employees represented by the Brotherhood of Carpenters, who went on strike. Pan American sought an injunction in the United States District Court, to restrain the employees from striking, picketing, and otherwise interfering with the Nuclear Station operations.² The Airline argued that the employees were covered by the Railway Labor Act³ and thus the no-injunction provisions of the Norris-LaGuardia Act⁴ could not be invoked by the Union. The district court and, on appeal, the United States court of appeals refused to include the striking employees within the terms of the Railway Labor Act, and consequently, refused to issue an injunction. **HELD:** The employees of Pan American working at the government research station, though performing work similar to that performed by other Pan American employees at its airline locations,⁵ were not employees of a carrier within the scope of the Railway Labor Act, since their activities bore no relation whatsoever to transportation.

Among the general purposes of the Railway Labor Act (RLA) are "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein;" and also "(4) To provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions."⁶

² Fed. R. Civ. P. 65.

³ 44 Stat. 577 (1926), as amended 45 U.S.C. § 151 (1958) (railroads); 49 Stat. 1189 (1936) 45 U.S.C. § 181 (1958) (airlines).

⁴ 47 Stat. 70 (1932), 29 U.S.C. § 101 (1958). Generally, under the Norris-LaGuardia Act, the federal courts have no jurisdiction to enjoin a strike arising out of a labor dispute. An exception to this limitation is a strike by employees of a railroad, or an airline, covered by the RLA. Although the RLA does not specifically grant the courts jurisdiction to enjoin strikes and other troublesome activities by employees as well as employers, the courts have implied such equitable powers from the general mandates and purposes of the Act. *Virginian Ry. Co. v. System Fed. No. 40*, 300 U.S. 515, 549-53 (1937) (enforced duty of employer to bargain with employee representative under 45 U.S.C. § 152); the Supreme Court, in the *Virginian* case, said that the "Railway Labor Act . . . cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act." *Supra*, at 563; *Pan American*, *supra* note 1, at 218.

⁵ The "similarity of work" idea results from the fact that airline employees are organized on a craft basis. Oliver, *Labor Problems of the Transportation Industry*, 25 *Law & Contem. Prob.* 3, 4 (1960); "This is the same sort of maintenance work which is done at Pan American's airport and hangar facilities in the world-wide Pan American airlines system. . . ." Brief for Appellant, p. 5, *Pan American*, *supra* note 1; "With the exception of a few positions, the duties of which are peculiarly related to the fueling and launching of guided missiles, the work performed by these employees is basically similar to that performed by the mechanical and ground service personnel of Pan Am at its common carrier air terminals." Representation of Employees of the Pan American World Airways, Inc., N.M.B. File No. C-2505 (1956) (quoting brief for IAM, p. 3); "The employees involved include painters, carpenters, electricians, plumbers, laborers, janitors, mechanics, welders, millwrights, metal workers and others closely connected therewith in the performance of such work. The kind of work the employees perform is identical with the work performed by other employees of the same craft at the regular established bases of Pan American World Airways." Pan American World Airways, Inc., N.M.B. File No. C-2202 (1956) (related to C-2505, *supra*).

⁶ 48 Stat. 1186 (1934), 45 U.S.C. § 151(a) (1958).

The importance of such objectives was recently emphasized in an address to Congress by the late President Kennedy,⁷ when he said, "[T]he cost to the national interest of an extended nation-wide rail strike is clearly intolerable."⁸ Strikes are a serious problem in transportation in general and in airlines in particular.⁹ Not only are airline strikes costly, but they are frequent.¹⁰ Indeed, even the mere threat of a strike may have seriously damaging effects.¹¹ Realizing these effects of a strike on transportation, Congress sought to limit the strike power of certain employees by providing alternative dispute settling machinery. Thus, Congress in the RLA provided for the inclusion of "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) . . ."¹² But the seeming absurdity of the RLA covering, for example, an employee working in an airline shoe factory,¹³ especially in light of the purposes of the statute, would indicate that Congress left "room for an interpretation of the statutes which will produce a reasonable, and not a merely arbitrary result."¹⁴

How necessary to the achievement of the RLA's goal of unhampered transportation are a carrier's employees, if they are not involved in transportation work, but merely perform work similar to that of other employees working in the airline's transportation operations? The position of the Carpenter's Union is that each employee situation must be examined to determine whether the work done bears more than a tenuous, remote, or negligible relationship to the carrier's activity. If the relationship is only tenuous, remote or negligible, it is the Union's view that the Congress could not have intended such employees to come within the scope of the RLA. The Union's "tenuous, remote or negligible" test is basically one of causation, that is, the effect of the employees' work on transportation. The Union urges the court to examine the nature of the work performed by the employees and itself determine if a

⁷ July 22, 1963.

⁸ 53 L.R.R.M. 29, 31.

⁹ "Strikes are especially crippling to the airlines." Wisheart (Gen. Att'y Am. Airlines), *The Airlines' Recent Experience Under the Railway Labor Act*, 25 Law & Contem. Prob. 22 (1960).

¹⁰ "Most of the major American airlines have been shut down by strikes of one group or another in the recent past." Oliver, *supra* note 5, at 3 (citing *Traffic World*, Dec. 6, 1958, pp. 15, 42; *id.*, Jan. 17, 1959, p. 21).

¹¹ "Repeated strike threats to a single company, not a rare occurrence, can prove more damaging financially to that company in some instances than an actual strike of limited duration." Henzey, *Labor Problems in the Airline Industry*, 25 Law & Contem. Prob. 43, 55 n.54 (1960).

¹² 44 Stat. 577 (1926), as amended 45 U.S.C. § 151, Fifth (1958).

¹³ *Supra* note 1, at 220, 221. The NMB has said,

The principle question is whether the employees . . . are engaged in activity so remote from the activity of the employer, as a carrier by air, that it may reasonably be said that the purposes of the Railway Labor Act will be achieved in the event such employees are excluded from the jurisdiction of the Act.

Pan American World Airways, Inc., N.M.B. File No. C-2202 (1956); see related Files Nos. C-2505 (1956) and C-2564 (1957), all aff'd in *Biswanger v. Boyd*, Civil No. 4496-56 (D.D.C. 1957), 32 CCH Labor Cases ¶ 70,840. The instant court misleadingly quotes the Board out of context and infers that "all" people paid wages by a carrier will be included under the Board's interpretation of "employee," regardless of the type of work performed or the employees' effect on the carrier's transportation operations. *Supra* note 1, at 222.

¹⁴ *Supra* note 1, at 221.

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strike by these employees would so affect the airline's transportation work—presumably by encouraging unrest or similar strikes by the transportation employees—that coverage by the RLA is required.¹⁵

The argument of Pan American Airways is more akin to that of the Union than the voluminous briefs seem ready to admit. The Airline does not really deny the validity of a causal relationship test, but urges the court to accept the finding of the National Mediation Board (established by the RLA) that a strike by airline employees at a government research station may well have the required effect on transportation.¹⁶ Indeed, the ultimate bone of contention appears to involve the method of proving causation. Should the court make its own finding of fact, or rely on the "expert" opinion of the National Mediation Board (NMB)?

The instant court rejected the NMB's determination of causation and appeared to go beyond the position taken by the Union. The Union argued that the work performed at the Nuclear Research Development Station was tenuous, remote, and negligible. The court found that "We do not have here a problem of determining whether the relationship of these employees to transportation is 'tenuous,' 'remote' or 'negligible.' In our case the relationship is nonexistent."¹⁷

The court, in its decision, relied heavily on *Northwest Airlines v. Jackson*.¹⁸ There the issue was whether airline employees, who were performing modification work on airplanes in aid of the war effort, were entitled to overtime pay under the Fair Labor Standards Act¹⁹ or under the RLA. The court found the employees not to be within the scope of the RLA. The *Northwest* court applied the "tenuous, remote or negligible" test and decided that "The relationship of the modification work to the airline operation, not the similarity of the types of work done, is what creates the required relationship."²⁰ Not only did the similarity between the work done for the government and that performed for the airlines fail to convince the *Northwest* court that the "required relationship" existed, but the additional fact that "the modification was done . . . at the . . . Airport (St. Paul) where . . . defendant main-

¹⁵ Answering Brief of Appellees, Building & Construction Trades Council, pp. 57-68, *Pan American*, supra note 1.

¹⁶ An ironic and embarrassing sidelight on the case is the fact that in the analogous earlier dispute at the Florida Missile Base, the positions taken by employer and employee were reversed.

The carrier said: "The operation which Pan American is conducting at Cocoa under contract with the United States Air Force bears so remote a relationship to our regular business as an international air transportation carrier that we are convinced, in view of the holding of the United States Circuit Court of Appeals, Eighth Circuit in the case of *Northwest Airlines v. Jackson*, 185 F.2d 74, that it is not subject to the provisions of the Railway Labor Act."

Representation of Employees of the Pan American World Airways, Inc., N.M.B. File No. C-2505 (1956). Much to its frustration, Pan American lost in both instances. *Biswanger v. Boyd*, supra note 13; *Pan American*, supra note 1.

¹⁷ Supra note 1, at 221.

¹⁸ 185 F.2d 74 (8th Cir. 1950), affirming, 70 F. Supp. 501 (D. Minn. 1947), cert. denied, 342 U.S. 812 (1951).

¹⁹ 52 Stat. 1060 (1938), 29 U.S.C. § 201 (1958).

²⁰ 70 F. Supp. 501, 512 (D. Minn. 1947).

tained repair and overhaul shops for its own planes and also its general offices for the airlines"²¹ likewise had no influence on the court's decision.

In the instant case, although the disputed work was not done on airplanes, it was connected with the "development of a nuclear rocket engine to be used for the propulsion of space vehicles."²² Also the work was performed away from areas where normal airlines' work took place. Thus, if anything, the relationship to transportation—at least in terms of similarity and physical proximity—of the work in *Northwest* was closer than in the instant case. As a result, the *Pan American* court seems justified in using the *Northwest* case as authority for the application of the "tenuous, remote or negligible" test. But this conclusion still leaves unanswered the propriety of the way in which the two courts have applied the test.²³

Bearing in mind that the overriding consideration appears to be the effect that the government station employees' work has on the airline's transportation operations, why did the instant court find that the performance of work similar to that performed by transportation employees did not even remotely affect transportation? The answer lies in the route of causal connection followed by the court from the Nuclear Research Station employees to the airport operations. The court seems to determine the effect of the employees on transportation in terms of their direct contribution to the day to day commercial operations of the airline. As the court said, "Pan American's operation at the Nuclear Research Development Station . . . had nothing to do with transportation"²⁴ The *Northwest* opinion, relied upon by the instant court, found that

defendant's commercial airline operations were not dependent upon the modification project's continued activity Neither the work performed nor the bombers upon which it was performed were intended for use on defendant's airlines, or to aid its operations They were for a purpose which was entirely separate and unrelated to the carrying on of defendant's airline business.²⁵

The NMB, however, has taken a less direct route and felt that employees

²¹ Id. at 509.

²² Supra note 1, at 220.

²³ The Supreme Court has applied a "tenuous, remote, or negligible" test in the case of *Virginian Ry. Co. v. System Fed. No. 40*, supra note 4, at 556. In *Virginian Ry.*, the Court found that a railroad's "back shop" employees did not bear such a remote relationship to interstate transportation that Congress had no power to regulate them under the Commerce Clause. The inapposite nature of the *Virginian Ry.* case, however, as the *Pan American* court noted, renders an application of its test to the facts of the instant case somewhat inappropriate. In addition, the Union in the instant case did not challenge the "power" of Congress to regulate the government research station employees. Nor does the fact that "back shop" employees have more than a remote tie with transportation mean that government station employees do not. The relation of certain employees to transportation for purposes of determining congressional "power" to regulate them is different from their relation to transportation for purposes of determining congressional "intent" to regulate them. The extent of congressional power may be greater or less than the extent of congressional intent and therefore the length of the measuring stick may vary in each case.

²⁴ Supra note 1, at 219.

²⁵ Supra note 20, at 510.

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of an airline may affect the company's transportation operations even though they themselves are not engaged in transportation work. Such an effect might result because certain labor union activities (e.g., strikes, picketing) by the non-transportation workers might cause labor unrest among the workers who perform similar work, particularly since airline employees are organized on a craft basis.²⁶ This unrest among the transportation employees may well interrupt the airline's operations. As the Board earlier hypothesized:

[S]uppose that sometime hereafter a labor dispute arises between such [Missile Base] employees and their employer, the Pan American World Airways, and a strike is threatened with attendant picket lines. If picket lines were then to be established, it is reasonable to suppose that the main offices and air bases would be picketed. What effect would such picketing have upon the function of Pan American World Airways as a common carrier of persons or property?²⁷

Fearful of the possibility of such a chain of causation resulting in an interruption of transportation, the NMB, while not rejecting the "tenuous, remote or negligible" test applied in the instant case, concluded that "the relationship of employees performing the functions that are performed for Pan American at Cocoa, Florida, Missile Base by its employees is not so tenuous and remote as to remove them from the jurisdiction of the Railway Labor Act."²⁸

Determination of the relationship of missile base employees to transportation by reference to labor dispute problems was not mentioned by the instant court, but appears to have been rejected as a general rule by the *Northwest* court:

Because a strike in one branch of a company may create difficulty in another branch does not seem to require universal application of the Railway Labor Act. The difficulty arises because the same union represents both branches of one company, not because of the effect and relationship of the modification work to the airline activities.²⁹

If, as the instant court noted, under the RLA "strikes or other labor activities imperiling this continuity of transportation . . . could be enjoined,"³⁰ what difference should it make that the striking employees imperiled transportation by inciting other employees to strike, rather than by themselves depriving the airlines of needed services?³¹

²⁶ Oliver, *supra* note 5, at 4. "Under this Board's policy which has been in existence for many years and is well known, *all* employees of a common carrier, either rail or air, who perform similar work on that carrier constitute a single craft or class for representation purposes under the Act." Representation of Employees of the Pan American World Airways, Inc., N.M.B. File No. C-2505 (1956).

²⁷ Pan American World Airways, Inc., *supra* note 13, at File No. C-2202.

²⁸ *Ibid.*

²⁹ *Supra* note 20, at 513.

³⁰ *Supra* note 1, at 219.

³¹ The NMB has said that the "controlling factor is the nature of the work performed by these employees, not the 'functional' reasons for which the base at Cocoa was established." Representation of Employees of the Pan American World Airways, Inc., *supra* note 26.

As was suggested at the outset, the real question involves the method of proof. The National Labor Relations Board has deferred to the judgment of the NMB as to the NMB's jurisdiction:

[W]e have in this case, as in other cases in the past, requested the National Mediation Board, as the agency primarily vested with jurisdiction under the Railway Labor Act over air carriers and which has primary authority to determine its own jurisdiction, to . . . determine the applicability of the Railway Labor Act³²

Courts will not interrupt an NMB proceeding to determine the Board's jurisdiction.³³ But courts will review a final determination of the NMB as to its jurisdiction.³⁴ Where, as in the instant case, the determination of jurisdiction (i.e., applicability of the RLA) depends upon the impact of striking workers on transportation, how much weight should courts give to the NMB's finding that a significant impact threatens? If the NMB is given jurisdiction, no guarantees of uninterrupted transportation should be expected.

The existing dispute-settlement procedure prescribed by the Railway Labor Act has not been notably successful as translated to the airline industry, although the use of emergency boards under the authority of the Act has apparently sometimes shortened strikes.³⁵

These failures have been due to staff and procedural problems, lack of co-operation between airlines and unions, and the differences between air and rail transportation, which were not considered when the RLA was first enacted by Congress.³⁶

On the other hand, the serious problem of strikes and strike threats to the airlines industry should perhaps persuade the courts to give the NMB wide latitude in its efforts to "avoid"³⁷ any interruption in air transportation, even if it means enjoining a strike by missile base employees of a carrier, which strike "may"—according to the findings of the NMB—encourage labor unrest among the carrier's employees who are actually engaged in transportation operations.³⁸

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³² Interior Enterprises, Inc., 122 N.L.R.B. 1538, 1544, 43 L.R.R.M. 1338, 1341 (1959); Pan American World Airways, Inc., 115 N.L.R.B. 493, 495, 37 L.R.R.M. 1336-37 (1956).

³³ Southern Pac. Co. v. Mediation Bd., 54 L.R.R.M. 2657, 2658 (D.C. Cir. 1963).

³⁴ Air Line Dispatchers v. Mediation Bd., 189 F.2d 685, 687-89 (D.C. Cir. 1951), cert. denied, 342 U.S. 849 (1951).

³⁵ Henzey, *supra* note 11, at 56.

³⁶ Oliver, *supra* note 5, at 7. "It is respectfully submitted that a much more sensible solution would be to let the [President's] Missile Sites Commission take care of missile and space sites' problems and to let the NMB and RLA Emergency Boards take care of railway and aircraft carrier problems, as Congress intended." Answering Brief of Appellees, *supra* note 15, p. 62.

³⁷ *Supra* note 6.

³⁸ The Mediation Board, in *Pan American*, *supra* note 27, stated:

If these employees are deemed to be excluded from the Act, then in the face of a serious labor dispute, the National Mediation Board would not be in a position to proffer its mediatory services under Section 5 of the Railway Labor Act;