

1967

## Transportation Strikes: A Proposal for Corrective Legislation

A. Sydney Herlong, Jr.

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

A. Sydney Herlong, Jr., *Transportation Strikes: A Proposal for Corrective Legislation*, 36 Fordham L. Rev. 175 (1967).

Available at: <https://ir.lawnet.fordham.edu/flr/vol36/iss2/2>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## Transportation Strikes: A Proposal for Corrective Legislation

### Cover Page Footnote

United States Representative from the Fourth District of Florida; member of the Florida Bar.

# TRANSPORTATION STRIKES: A PROPOSAL FOR CORRECTIVE LEGISLATION

A. SYDNEY HERLONG, JR.\*

## INTRODUCTION

SINCE 1886<sup>1</sup> Congress has been troubled intermittently with the problems encountered in dealing with emergency labor disputes. The passage of time, which often finds the resolution of such difficulties, has neither resolved nor lessened the impact of these conflicts; on the contrary, the situation has gradually become more and more serious. In the rail and air transportation industries, which today more than ever are critical elements in our economy, this problem, instead of diminishing has reached an acute stage. This is an area where the public interest requires a forward-looking solution.

### I. THE NEED FOR A REMEDY

It has been almost universally recognized that corrective action should be taken. However, little effective progress has been made. The President, in his State of the Union Message in 1966, indicated that he would recommend appropriate legislation to deal with such situations;<sup>2</sup> however, no suggestions have been forthcoming. The President has appointed a task force, headed by Undersecretary of State Katzenbach to investigate the problem and submit a report. However, this group has not yet made public any report. Similarly, resolutions have been introduced in Congress which would require the Secretary of Labor to submit a proposal for dealing with national emergency strikes.<sup>3</sup> These too have given rise to little encouragement.

Despite all the articles which have been written by men prominent in this area,<sup>4</sup> all the studies which have been conducted by the various Committees of Congress and all the action which has been taken by Congress, to date,<sup>5</sup> nothing in terms of a continuing solution has been accomplished.

---

\* United States Representative from the Fourth District of Florida; member of the Florida Bar.

1. H.R. Rep. No. 7479, 49th Cong., 1st Sess. (1886).

2. 1966 State of the Union Address, January 12, 1966, Weekly Compilation of Presidential Documents, January 17, 1966 at 30.

3. S.J. Res. 9, 90th Cong., 1st Sess. (1967); S.J. Res. 195, 89th Cong., 2d Sess. (1966).

4. E.g., K. Braun, *Labor Disputes and Their Settlement* (1955); H. Kaltenborn, *Governmental Adjustment of Labor Disputes* (1943); L. Lecht, *Experience Under Railway Labor Legislation* (1955); C. Updegraff & W. McCoy, *Arbitration of Labor Disputes* (1946).

5. E.g., Hearings on H.R. 701, H.R. 704, H.R. 706 Before Subcomm. on Transportation

Although a number of solutions have been suggested, it will be the purpose of this article to review only the principal measures presently pending in Congress. The relative merits of these pieces of proposed legislation will be viewed in light of H.R. 8320, 90th Cong., 1st Sess., which represents the position of the author. The frame of reference of this article will be limited to railroad and airline disputes so that the much-debated question of what constitutes a genuine "emergency" dispute will thereby be narrowed. That a strike affecting vital rail transportation facilities does indeed constitute a crisis requiring congressional intervention is attested to by the enactment in 1963 of Public Law 88-108<sup>6</sup> to avoid the strike then threatened by the railroad operating brotherhoods in the *National Work Rules Case*,<sup>7</sup> and the recent enactment on July 17, 1967 of Public Law 90-54 to stop the strike of railroad shop workers then in progress. The President, in his message on the threatened railroad strike, stated succinctly the reason why this nation cannot tolerate a nationwide rail strike.

The purpose of this message and of this proposal is to impress upon the parties and to make clear to the Nation what is at stake here.

The cost of a nationwide railroad strike would be incalculable. I urge you to consider these facts:

On the first morning of the strike three-quarters of a million rail commuters in New York, Chicago, and Philadelphia alone would be unable to take their trains to work.

Shipments of perishable foodstuffs to many major cities would be halted at once.

Actual food shortages could soon occur in several cities.

Some health hazards would develop. For example, supplies of chlorine used to purify community water supplies would grow short.

The coal-mining industry, with 140,000 workers, would cease operations almost at once.

Many other industries which rely heavily on the railroads—such as metal mining, steel, chemicals—would be badly crippled and soon begin to close down.

For a week or more most factories could operate from their inventories. Soon, shortages and bottlenecks would begin to curtail production drastically. A spreading epidemic of lost production and lost jobs would sweep through the Nation.

. . . .

In short, a railroad strike would affect every man, woman, and child in this Nation. It would increase the cost of living. Each day the strike continued would bring pyramiding losses in goods, services, and income—losses which can never be fully

---

and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 89th Cong., 1st Sess. (1965).

6. 77 Stat. 132 (1963).

7. For an historical account of the case see *Brotherhood of Ry. Trainmen v. Akron & B.B.R.R.*, — F.2d — (D.C. Cir. 1967).

regained. A prolonged strike could well break the back of the Nation's stable prosperity for some period to come.<sup>8</sup>

Although a nationwide airline strike would not, at the present time, be as disastrous as a nationwide railroad strike, and although the nation did survive the airline strike of 1966, it is clear that some means should be devised to avoid the enormous burdens imposed on the public by such a strike.

## II. PROPOSED REMEDIES

The remedies which have been suggested, while varying in detail, generally fall into one of three categories: seizure, arsenal of weapons or governmental adjudication (usually referred to, at least by those who oppose it, as compulsory arbitration).

### A. *Seizure*

Various proposals for seizure-type legislation have been advocated for many years. One such proposal was introduced in its present form on April 6, 1967 as S. 1456. This measure would empower the President to direct the Attorney General to petition a federal district court for appointment of a receiver to take possession of essential facilities which are struck or threatened with a strike and to operate them "in the interests of the United States."<sup>9</sup> An essential element of compulsion would be involved in authorizing such receiver to put into effect, for the duration of his retention of control of a facility, any rates of pay, rules or working conditions recommended by a board of inquiry or an emergency board.<sup>10</sup> The receivership would last until the dispute was resolved, when the property would be returned to its rightful owners.<sup>11</sup> While a facility would be operated "for the account of" its owners, operations would be permitted only to the extent required by the necessities.<sup>12</sup> If an owner were unhappy with the financial arrangements, a petition for payment of "just, fair, and reasonable compensation" could be filed with the President.<sup>13</sup> Not only would the President then resolve the compensation question, but in making his decision, he would be directed to consider the value of the seized facility as though it were shut down or threatened with a shutdown by labor difficulties.<sup>14</sup> An owner dissatisfied with the Presi-

---

8. 113 Cong. Rec. S4771 (daily ed. April 10, 1967).

9. S. 1456, 90th Cong., 1st Sess., at 3 (1967).

10. *Id.* at 5.

11. *Id.*

12. *Id.* at 6.

13. *Id.*

14. *Id.*

dent's decision could file suit against the United States in the Court of Claims or any district court.<sup>15</sup>

It is felt by many that seizure is not a remedy at all. Being more in the nature of a punishment, by itself it solves or settles nothing. Only when coupled with some form of governmental prescription of rates of pay, rules or working conditions does it move in the direction of settlement, and the more it moves in that direction the less value can be ascribed to the "remedy" of seizure standing alone.

### B. *Arsenal of Weapons*

Perhaps the most popular approach, at least in academic circles, is that which would vest in the President an "arsenal of weapons" among which he could pick and choose, depending on the situation confronting him at any given time. Professor Archibald Cox<sup>16</sup> is credited with being the architect of this type of plan.<sup>17</sup> It would put at the President's disposal fact-finding boards to serve as mediators and to make recommendations, boards of inquiry to urge voluntary arbitration, means of "blaming" publicly those deemed at fault, temporary injunctions, "limited" seizures and, finally, the authority to do nothing.<sup>18</sup> The theory of this remedy is that if the parties are kept off balance through uncertainty as to what the President might or might not do, they will be compelled in their own interests to reach some form of agreement to avoid or stop a strike.

A thoughtful form of the "arsenal of weapons" approach is reflected in the present Congress by H.R. 5683, introduced on February 16, 1967. Unlike most forms which this remedy usually takes, however, this particular "arsenal" bill includes governmental adjudication as one of its "weapons."

The bill is a step in the right direction, but it shares the infirmities of all forms of the "arsenal of weapons" approach. In the first place, the theory that uncertainty as to what course may be followed will result in new pressures on the parties to reach agreement overlooks the fact that this same element of uncertainty will extend to the public. But the public demands, and is entitled to, not uncertainty but assurances that there will be no interruption of vital rail and air transportation services by strikes. Secondly, vesting in the President authority to exercise one or another of several possible courses of action necessarily imposes on him

---

15. *Id.* at 7.

16. Professor of Law, Harvard Law School, formerly Solicitor General of the United States.

17. Cox, *The Uses and Abuses of Union Power*, 35 *Notre Dame Law.* 624 (1960).

18. *Id.* at 635.

a duty to select which course will be taken. This would inevitably expose him to enormous and conflicting economic and political pressures whenever the necessity arose for exercising his judgment in this respect. He should be protected from these as much as possible. In connection with rail and airline labor disputes Congress can and should insulate him by prescribing itself precisely what course is to be followed. Finally, the available evidence indicates that, with one exception, there is no reason to expect the "arsenal of weapons" remedy, as embodied in H.R. 5683 or in any other form yet recommended, to be any more effective than what we already have in the Railway Labor Act.<sup>19</sup> The Act today includes negotiation,<sup>20</sup> mediation,<sup>21</sup> proffer to voluntary arbitration,<sup>22</sup> emergency board investigations,<sup>23</sup> reports<sup>24</sup> and recommendations<sup>25</sup> and, presumably through publication of the latter, public "blame" for the stubborn party. These constitute a formidable arsenal and, as shall shortly be pointed out in more detail, are effective in all but a few cases.

This leaves the exceptional case as the heart of the problem, and the prospects of resolving that case would not be enhanced by a slight alteration in the form of the "arsenal of weapons" unless governmental adjudication were added, as is proposed in H.R. 5683. Thus, the only part of the proposal that would help would be governmental adjudication, leaving the rest as nothing more than a reshuffling or rearrangement of what we already have. It is the opinion of this author that governmental adjudication is what is needed; we should go right to it and leave the rest of the Act substantially intact.

Another important pending bill is S. 176, introduced on January 11, 1967. It is more in the nature of an "arsenal of weapons" plan than anything else, although, for reasons which will shortly be obvious, it is also in part a governmental adjudication measure. This measure would apply to all industries engaged in interstate commerce,<sup>26</sup> not just those subject to the Railway Labor Act. It is intended to reach all labor disputes which result in, or threaten to result in, strikes which "will adversely affect the public interest of the Nation to a substantial degree."<sup>27</sup> As the ultimate means of resolving such disputes, it would create a "United

---

19. 44 Stat. 580 (1926), as amended, 45 U.S.C. § 155 (1964).

20. *Id.*

21. *Id.*

22. *Id.*

23. 44 Stat. 586 (1926), as amended, 45 U.S.C. § 160 (1964).

24. *Id.*

25. 44 Stat. 584 (1926), as amended, 45 U.S.C. § 158(k) (1964).

26. S. 176, 90th Cong., 1st Sess. at 3 (1967).

27. *Id.* at 5.

States Court of Labor-Management Relations"<sup>28</sup> consisting of five judges appointed by the President by and with the advice and consent of the Senate.<sup>29</sup>

The mechanics of getting the merits of a dispute before the court would be somewhat involved. First, if the President believed that a threatened or actual strike "affecting an entire industry or a substantial part thereof" would, if not stopped, "adversely affect the public interest of the Nation to a substantial degree," he would be authorized, but not required, to appoint a "board of inquiry" to "inquire into the issues involved in the dispute and . . . make a written report . . . within such time as he shall prescribe."<sup>30</sup> The report of the board, which apparently could be rendered with or without public or private hearings, would include a statement of the facts, together with each party's statement of its position,<sup>31</sup> but would not include any recommendations. It would be filed with the United States Conciliation Service and would also be made public.<sup>32</sup>

Having received such report, and if he believed that the strike or threatened strike would "adversely affect the public interest of the Nation to a substantial degree," then the President would have the option of directing the Attorney General to petition the Court of Labor-Management Relations to have the strike enjoined.<sup>33</sup> Indeed, that is the only way in which the jurisdiction of the court could be invoked—by the Attorney General when directed to do so by the President. The court would then be required to second-guess the President. It could issue injunctive relief only if it first found that the strike involved all or a substantial part of an industry<sup>34</sup> and, if not stopped, would "adversely affect the public interest of the Nation to a substantial degree."<sup>35</sup> For the first eighty days after a strike was enjoined, the court would assist the parties in further conciliatory and mediatory efforts to reach a voluntary settlement.<sup>36</sup> If those proved unavailing, the court would continue the injunction in force on its own motion and "set the matter down for immediate hearings and final determination . . . on the merits of the dispute. . . ."<sup>37</sup>

---

28. *Id.* at 3.

29. *Id.*

30. *Id.* at 11-12.

31. *Id.* at 12.

32. *Id.*

33. *Id.* at 5.

34. *Id.* at 5-6.

35. *Id.* at 6.

36. *Id.* at 6-7.

37. *Id.* at 7.

The jurisdiction of the court would extend both to grievance-type cases and to disputes over changes in rates of pay, hours and conditions of work.<sup>38</sup> Its decisions would be final and binding on the parties.<sup>39</sup> Rates of pay and conditions of employment established by it would have to be "fair and equitable" and rates of pay "must be within the employer's ability to pay."<sup>40</sup> It is further provided that "[i]n all cases, the court must consider, as a primary factor, the national and public interest involved in a fair and just settlement which will promote, to the greatest extent possible, fair, equitable, and workable industrial relations between the parties in the future."<sup>41</sup> A limited form of direct judicial review by the United States Supreme Court is prescribed.<sup>42</sup> The grounds for review are that decisions of the court "are arbitrary and capricious or are violative of a right conferred by the Constitution of the United States."<sup>43</sup>

There are a number of objections to the plan embodied in this bill. In the first place, no need has been demonstrated for extending such legislation to all industries engaged in interstate commerce. Experience to date limits the justification for Congress to intrude further in the labor relations field at this time to the railroad and airline industries. The suggestion that there be a permanent labor court involves serious problems. There would be continuing pressures on the President, especially from organized labor, to appoint partisans. Since it would not be a tripartite court—and hardly could be in view of the variety and complexity of problems which might reach it from our diverse industrial enterprises—there would be serious risks of practical errors. Tripartite boards, with experienced representatives of management and labor, are essential to insure practical and realistic decisions. Certainly no justification has been shown for a permanent court. Not only would such a body tend to perpetuate its own errors, but it very likely would not have enough to do except possibly in the grievance field. To establish a court to deal mostly with grievances would be tantamount to Congress establishing a Federal Small Claims Court.

The Senate bill, like H.R. 5683, would continue the element of uncertainty inherent in all "arsenal of weapons" plans, although, as mentioned above, the public interest demands certainty that there will be no interruptions in vital transportation services because of strikes. Finally,

---

38. *Id.* at 9.

39. *Id.* at 10-11.

40. *Id.* at 9.

41. *Id.*

42. *Id.* at 10-11.

43. *Id.* at 10.

as H.R. 5683, the Senate bill would expose the President to unwarranted political and economic pressures.

C. *Governmental Adjudication — H.R. 8320*

To resolve the problem, the author introduced H.R. 8320.<sup>44</sup> This bill has been designed to accord the necessary certainty required by the shipping and traveling public, to protect the President from the economic and political pressures inherent in any "arsenal of weapons" and to utilize the advantages of ad hoc tripartite boards. The bill takes the form of an amendment to Section 10 of the Railway Labor Act, leaving the rest of the Act untouched. Experience has indicated that the provisions of the Act for negotiation, mediation and proffer of arbitration have worked a good deal better than critics of the Act would have us believe.<sup>45</sup> It is when these fail to produce agreement that crises result; and, while the number of crises in relative numbers may be comparatively small, they are of critical consequence because the public cannot afford any.

In its present form, Section 10 provides for the now familiar Emergency Boards.<sup>46</sup> It states that in the event of a threatened strike, which in the judgment of the National Mediation Board would "interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," the Board "shall notify the President, who may thereupon, in his discretion, create a board to investigate and report . . ." <sup>47</sup> A report is required within thirty days of the appointment of a board,<sup>48</sup> and strikes are forbidden from the time a board is named until thirty days after it has rendered its report.<sup>49</sup> While not in terms required or directed in Section 10, these Emergency Boards customarily have returned specific recommendations for settlement of disputes referred to them.<sup>50</sup>

Congress did not intend that Emergency Board reports be treated by the parties as advisory only. While Congress did not explicitly so provide, such reports were meant to be final and conclusive, and the force of public opinion was relied on to make them binding on the parties.<sup>51</sup> It has not

---

44. H.R. 8320, 90th Cong., 1st Sess. (1967).

45. See *Administration of the Railway Labor Act by the National Mediation Board 1934-1957*, at 44-45 (1958).

46. 44 Stat. 586 (1926), as amended, 45 U.S.C. § 160 (1964).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Administration of the Railway Labor Act by the National Mediation Board 1934-1957* at 44 (1958).

51. L. Lecht, *Experience Under Railway Labor Legislation 53* (1955).

worked out as planned, however. While they have proven to be conclusive on the railroads, Emergency Board Reports have come to serve only as floors for further bargaining insofar as railroad unions are concerned.<sup>52</sup> This has resulted in one-sided governmental adjudication in disputes under Section 10 of the Act.

H.R. 8320 would carry out the original intention of Congress when it enacted that section and would remedy the manifest inequity in the present section by specifically requiring governmental adjudication binding on all parties to railroad and airline labor disputes which threaten interruptions of continued transportation service. Existing provisions of the Act for handling "major" disputes over changes in agreements respecting rates of pay, rules and working conditions would be retained, and the mandatory requirements of good faith bargaining in direct negotiations, mediation and proffer of voluntary arbitration would be preserved.<sup>53</sup> Section 10 alone would be revised, and it would, as now, become applicable only when the preceding processes of the Act fail to produce agreement—that is, when the procedures for voluntary collective bargaining are exhausted without settlement.

It cannot be emphasized too strongly that there is no purpose or intent to supplant collective bargaining as the preferred process for resolving labor disputes. The importance of the bargaining process would, on the contrary, be given even greater emphasis. Governmental adjudication would be provided only as a last-ditch means of avoiding a ruinous strike and would be utilized only when bargaining has failed completely.

Section 10, First(a), of H.R. 8320 would empower either party to a "major" dispute which threatens to erupt into a work stoppage to request the Mediation Board to notify the President of the situation.<sup>54</sup> The Board must give such notice on request,<sup>55</sup> and the President is required on receipt of notice to create a "Presidential Board" to "investigate and decide such dispute."<sup>56</sup> A separate Presidential Board would be created for each dispute<sup>57</sup> and would be tripartite in composition, with not less than five members. A majority of a Presidential Board would represent the public, with the remaining members divided equally between representatives of the parties. Section 10, First(b), of the bill directs that a Presidential Board shall promptly hold public hearings and report in writing its find-

---

52. *Id.* at 6.

53. 44 Stat. 580 (1926), as amended, 45 U.S.C. § 155 (1964).

54. H.R. 8320, 90th Cong., 1st Sess. at 2 (1967).

55. *Id.*

56. *Id.*

57. *Id.* at 3.

ings, conclusions and decisions on each issue involved within sixty days after appointment.<sup>58</sup> The President is authorized to extend the period within which a Board must report.<sup>59</sup> In proposed Section 10, Third, it is provided that rates of pay, rules and working conditions prescribed by a Board shall be "just and reasonable" and shall continue in effect until changed in accordance with the procedures of the Act, unless set aside in judicial proceedings thereafter provided for or changed by voluntary agreement of the parties.<sup>60</sup> In order to meet the problem of disputes over the meaning of any part of its decision, Section 10, Fifth, states that on application of a party a Presidential Board shall reconvene and, with or without further hearing, issue a clarification report.<sup>61</sup> Section 10, Sixth, would make decisions of Presidential Boards "conclusive and binding on the parties and enforceable by appropriate proceedings" in the federal district courts.<sup>62</sup> A very limited form of judicial review is provided by Section 10, Seventh.<sup>63</sup> A new Section 10A, proscribing specific types of strikes and lockouts, would be added to the Railway Labor Act by H.R. 8320, with civil and criminal sanctions provided for violations.<sup>64</sup> An unlawful strike or lockout would specifically be subject not only to injunctive relief but to suits for damages as well.<sup>65</sup>

Before responding to the standard objections to a bill such as this, it should be pointed out again that the real question is not whether, but what kind of a remedy is needed. All would prefer collective bargaining to work or crises to disappear. But collective bargaining does not always work and crises do arise, as recent experience so clearly teaches. As already stated, the "arsenal of weapons" approach is not satisfactory for at least two reasons—it does not accord the public the assurance of protection needed against railroad and airline strikes and it exposes the President to undesirable economic and political pressures in times of crisis. And as between the two remaining alternatives, seizure and governmental adjudication, governmental adjudication, in this author's opinion, is the only palatable answer.

### 1. Constitutional Considerations

One no longer hears very loud claims that a statute such as that proposed by H.R. 8320 would contravene the Constitution of the United

---

58. *Id.*

59. *Id.*

60. *Id.* at 5.

61. *Id.*

62. *Id.* at 5-6.

63. *Id.* at 6-7.

64. *Id.* at 9.

65. *Id.* at 10.

States. For the benefit of those who might raise the question, the pertinent cases can be briefly reviewed. In 1916, Congress averted a railroad strike by enacting the Adamson Act settling the industry's eight-hour day controversy.<sup>66</sup> That act was sustained in the face of a constitutional attack in *Wilson v. New*.<sup>67</sup> In 1963, P.L. 88-108<sup>68</sup> was passed at the eleventh hour to avoid an imminent strike by railroad operating employees in the dispute over elimination of firemen from diesel locomotives and other proposed changes in the composition of train crews. This statute directed that the controversy be resolved by final and binding arbitration.<sup>69</sup> The constitutionality of that statute was affirmed in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Burlington & Quincy R.R.*<sup>70</sup> As a matter of fact, in that litigation counsel for the unions admitted in argument<sup>71</sup> that Congress does have constitutional authority to enact a law such as P.L. 88-108, requiring governmental adjudication of a labor dispute.<sup>72</sup>

## 2. Impact on Collective Bargaining

The objection to governmental adjudication most frequently heard is that it would "destroy collective bargaining."<sup>73</sup> This has been repeated so often that a substantial number of otherwise responsible people accept it as gospel. In truth, it is a myth contradicted both by experience and by the considered judgment of the best-informed persons in the railroad labor field.<sup>74</sup> The theory is that if the parties know a board exists to write an agreement or reach a settlement for them they—one or the other, or both of them—will not be disposed to engage in genuine bargaining, preferring to leave the matter to a board. In the abstract, this makes little sense. Human nature being what it is, the parties would always prefer to make their own settlement if humanly possible. If they know that there is a board to make an agreement for them when they are unable to resolve their differences themselves, the availability of such a board would put even greater pressure on them than there would be in its absence.

Consider, for example, the experience of our courts which exist to

---

66. 39 Stat. 721, 722 (1916).

67. 243 U.S. 332 (1917).

68. 77 Stat. 132 (1963).

69. *Id.*

70. 225 F. Supp. 11 (D.D.C. 1964), *aff'd*, 331 F.2d 1020 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 918 (1964).

71. 225 F. Supp. at 22.

72. *Id.*

73. See J. Kaufman, *Collective Bargaining in the Railroad Industry*, 164 (1954); H. Northrup, *Compulsory Arbitration and Government Intervention in Labor Disputes*, 51 (1966).

74. See generally H. Roberts, *Compulsory Arbitration: Panacea or Millstone?* 87 (1965).

render final and binding decisions on questions put to them by litigants. It is a matter of common knowledge that only a very small percentage of cases filed in court are tried to judgment; most are settled out of court.<sup>75</sup> If the theory of the objection, that the availability of governmental adjudication would destroy collective bargaining in railroad and airline labor disputes by removing the incentive to bargain, were sound, most court cases would be tried rather than settled. The reason they are not is that the parties prefer the relative certainty of their own settlements to the uncertainty of carrying their cases to a conclusion. A similar practice would be followed in labor disputes under similar circumstances. The validity of this analogy is attested to by the experience of the railroads both in "minor" and "major" disputes. For more than thirty years we have had a system of governmental adjudication of "minor" disputes of the grievance type over the interpretation or application of existing collective agreements. The National Railroad Adjustment Board sits to settle such disputes which the unions and the railroads are unable to resolve themselves. While the dockets of certain of its four divisions have been overcrowded,<sup>76</sup> it is nonetheless a fact that most grievances are resolved through conference negotiation and never reach the Adjustment Board. Therefore, its availability does not appear to have acted to deter the bargaining process.

Experience in the "major" dispute field has been similar. For many years prior to the Award of Arbitration Board No. 282, appointed pursuant to Public Law 88-108 in 1963, the railroads had sought to reduce the size of train and yard crews through the collective bargaining process.<sup>77</sup> They had been unable to secure any meaningful adjustments. Then, Board 282 provided in its award a series of guidelines for making reductions in the size of those crews. These guidelines were to be used, first, in local negotiations by the parties in attempts to reach agreement and, in the event of failure of such negotiations, by special arbitration boards.<sup>78</sup> The results were illuminating. Once the unions were confronted with the fact of a terminal procedure, their former attitude of uncompromising resistance changed to a more realistic one of accepting, although reluctantly, the facts of change. During the two years the award was in effect a substantial number of reductions were made in firemen's

---

75. For a discussion of this trend see Franklin, Chanin & Mark, *Accidents, Money and the Law*, 61 *Colum. L. Rev.* 1 (1961); 72 *Harv. L. Rev.* 1314 (1959).

76. Lecht, *supra* note 51, at 5.

77. Thirtieth Ann. Rep. of the Nat'l Mediation Bd. for Fiscal Year Ending June 30, 1964, at 2.

78. *Id.* at 15.

positions and also in positions of road, train and yard service crews by the application of the procedures outlined in the award<sup>70</sup>—a sharp contrast with the preceding 62 years which had produced virtually no agreements even though every public body which had investigated the matter had found the railroads encumbered by too many employees.

### 3. Impact on the "Right" to Strike

Related to the complaint that governmental adjudication of railroad and airline labor disputes, when all else is unavailing, would destroy collective bargaining is the charge, almost equally popular, that it would deny employees their right to strike. This charge, however, exaggerates the status of the "right" to strike. While there may be such a "right" in an abstract sense, it is not a constitutional right.<sup>80</sup> It has been subject to limitation in various circumstances in which the interests of the public have been found to outweigh the selfish interests of employees. Familiar examples are laws forbidding strikes by public employees, including the one enacted by Congress in 1947 which determined that the public interest in uninterrupted continuation of government services required that strikes by federal employees be prohibited.<sup>81</sup> In 1916, Congress passed a special law authorizing the President, in time of war, to seize transportation companies when necessary to insure their continued operation.<sup>82</sup> That law was utilized on several occasions by Presidents Roosevelt and Truman to keep the railroads from being strike-bound.<sup>83</sup>

Public Laws 88-108 in 1963<sup>84</sup> and 90-54 in 1967,<sup>85</sup> enacted specifically to stop railroad strikes in "major" disputes, in addition to the provisions of the Railway Labor Act, which have been construed and are regularly applied to prohibit strikes in "minor" disputes,<sup>86</sup> not only illustrate further restrictions which Congress has placed on the "right" to strike

79. Thirty-second Ann. Rep. of the Nat'l Mediation Bd. for Fiscal Year Ending June 30, 1966, at 13.

80. *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926); cf. *NLRB v. Erie Registor Corp.*, 373 U.S. 221, 233-34 (1963); *Lincoln Union v. Northwestern Iron & Steel Co.*, 335 U.S. 525, 536-37 (1949).

81. Act of June 23, 1947, ch. 120, § 305, 61 Stat. 160 (1947), as amended, 18 U.S.C. § 1918 (1966).

82. Army Appropriation Act of 1916, 10 U.S.C. §§ 4742, 9743 (1964), formerly 39 Stat. 619, 645 (1916).

83. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 621-27 (1952) (concurring opinion of Mr. Justice Frankfurter, app. II).

84. 77 Stat. 132 (1963).

85. 81 Stat. 122 (1967).

86. *Brotherhood of Locomotive Eng'rs v. Louisville & H.R.R.*, 373 U.S. 33 (1963); *Brotherhood of R.R. Trainmen v. Chicago River & I.R.R.*, 353 U.S. 30 (1957).

but raise the question whether, in the usual sense, such "right" is part of the larger right of railroad employees to organize and bargain collectively. The answer to that question seems plainly to be in the negative—railroad employees are not free to strike in the same manner as employees in other industries because their "right" to engage in economic warfare is outweighed by the public interest in the continuation of transportation service.

There is no inequity in this; railroads are common carriers and as such have a duty to provide transportation service. This restricts, if, indeed, it does not deny, any freedom in the railroads to "lock out" their employees. In other industries that freedom or right is regarded as management's "weapon" to offset labor's right to strike. If railroads do not have an unlimited right to lock out, why should their employees have an unlimited right to strike? When one applies for and is given employment by a railroad, he should be taken to have assumed a part of the railroad's obligations as a common carrier and to have forfeited any claim to an unrestricted right to strike.

#### 4. Impact on Other Industries

In the past, spokesmen for industries outside the transportation field have generally opposed governmental adjudication of any labor disputes.<sup>87</sup> Their attitude has been reflected in the views of a number of members of Congress.<sup>88</sup> This hostility is a product of the fear that governmental adjudication, once adopted on a permanent basis for the railroads and airlines, would then spread to other industries. There is evidence, however, that this opposition is abating as it becomes increasingly apparent that the railroads and airlines are sufficiently unique that any arrangement adopted for resolving their particular labor disputes would not constitute a persuasive authority for extension of a similar arrangement to other industries.<sup>89</sup> It should be remembered that there has been in effect for many years under the Railway Labor Act a plan for governmental adjudication of "minor" disputes of a grievance character. Yet there has never been any serious suggestion that the same should be carried over to industries subject to the National Labor Relations Act.

The spectre of price regulation haunts some of those who fear that any plan of governmental adjudication adopted under the Railway Labor Act

---

87. See Roberts, *supra* note 74, at 109.

88. *Id.*

89. J. Kaufman, *Logic and Meaning of Work Rules on the Railroads*, Proceedings of the Fourteenth Annual Meeting, Industrial Research Association, 378-88 (1961).

would spread to other industries and bring governmental price-setting with it. What is overlooked, however, is that railroad and airline rates are, and for years have been, regulated by the federal government acting in the public interest.<sup>90</sup> Thus, should not the government be obligated to act in the public interest to regulate railroad and airline rates of pay, rules and working conditions when the processes of collective bargaining fail to do so?

A realistic appraisal of the entire situation has led representative groups, speaking for a cross-section of our economy, to carve out an exception for the railroads and airlines and to express support for at least the principle of H.R. 8320. The Chamber of Commerce of the United States has adopted this declaration of policy:

Arbitration should, as a general rule, be wholly voluntary and should only be used as an adjunct to free collective bargaining. Where fact finding boards are prescribed by law and where recommendations or awards of such boards have in practical effects become binding on one party to the dispute, the recommendations should be made legally binding on both parties to the dispute or the use of fact finding boards should be discontinued.<sup>91</sup>

The Board of Directors of the Transportation Association of America, representing not only transportation management but also users, adopted the following resolution on July 26, 1966—in the middle of the airline strike then in progress: “[T]he Railway Labor Act should be amended to provide for final and binding adjudication by a Presidential Board, of disputes involving rates of pay, rules and working conditions, preferably on a permanent basis.”<sup>92</sup>

#### CONCLUSION

The need for insurance against interruptions of essential rail and air transportation services by strikes is clear. While there are many forms it might take, the provisions for governmental adjudication proposed by H.R. 8320 would serve the interests of all concerned—the public, transportation management and organized labor. While it would give the public the protection against strikes which is needed, it would enhance rather than detract from the role of collective bargaining. It would be the most equitable solution because its obligations would fall equally on labor and management and would substitute familiar principles of decision by impartial third parties for trial by economic combat. At the same time, it

---

90. 54 Stat. 911, 912 (1954); 72 Stat. 788 (1958).

91. Chamber of Commerce of the United States: Policy Declaration 1967-68, 63.

92. Transportation Ass'n of America, Report at 3 (August 19, 1966).

would shield the President from unwarranted economic and political pressures. Limited to the railroad and airline industries, it would pose no threat of further governmental intervention in the labor affairs of others.