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Railroad Secondary Boycotts: Railway Labor Act Versus Norris-LaGuardia

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RAILROAD SECONDARY BOYCOTTS: RAILWAY LABOR ACT VERSUS NORRIS-LAGUARDIA

Defendant union struck the Florida East Coast Railroad in a dispute over work rules, and began picketing plaintiff railroad terminal company which serviced the Florida East Coast and other railroads. Defendant's picketing was designed to stop plaintiff from servicing trains of the struck railroad which were being operated by replacement crews. The district court, holding the Norris-LaGuardia Act inapplicable, enjoined the picketing on the theory that it interfered with obligations owed by plaintiff terminal company to the railroad arising from an agreement, a previous injunction,[1] and the Interstate Commerce Act.[2] On appeal, the Fifth Circuit Court of Appeals reversed. *Held*: The scope of the Norris-LaGuardia Act is determined by "traditional economic self-interest justification concepts" which forbid enjoining a secondary boycott when the union has an economic interest in the activities of the secondary employer because of his relationship with the primary employer. *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd per curiam by equally divided court*, 385 U.S. 20 (1966).

The Norris-LaGuardia Act,[3] enacted to prevent over-zealous federal courts from restraining union activities, limits the issuance of injunctions in cases involving or growing out of labor disputes. Courts have generally construed the act in a manner consistent with its broad

versus business and ordinary versus capital considerations to their usual limits. Proposed Treas. Reg. § 1.162-5, 31 Fed. Reg. 9276 (1966):

> Educational expenses which are personal or capital in nature will not be deductible. Expenditures will not be considered capital or personal if the education maintains or improves skills required by the taxpayer's present employment, unless the education will qualify the taxpayer for a new trade, business, position or specialty.

Congress, in viewing the proposed regulations as a potentially dangerous shift in national policy, has initiated legislation which would remove educational expenses from the business expense quagmire. H.R. Con. Res. 26, 90th Cong., 1st Sess. (1967); H.R. 326 & H.R. 451, 90th Cong., 1st Sess. (1967). The first bill would grant to individuals a credit against income tax for certain expenses incurred in obtaining a higher education, allowing up to certain amounts, costs of tuition, fees, books, supplies, but not room and board. The second bill would allow individuals a deduction for all higher education costs, including room and board away from home.

[1] A preliminary injunction was issued in Florida East Coast R.R. v. Jacksonville Terminal Co., Case No. 63-16, M.D. Florida, Jan. 30, 1963. The injunction, ordering the plaintiff terminal company to continue servicing FEC trains, was issued on the bases of an "Operating and Guaranty Agreement" between the parties and of duties imposed by the Interstate Commerce Act. The injunction purported to bind the union even though it was not a party to the suit. See Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 651 (5th Cir. 1966).

[2] See Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 652 (5th Cir. 1966).

[3] 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1964).

scope,[4] but they have never applied it to secondary boycotts where all involved parties were in the railroad industry. Although the Norris-LaGuardia Act is directed to all industries, it has been accommodated to the Railway Labor Act when applied to the railroad industry.[5] The principal case represents the question of this accommodation in relation to secondary boycotts.

In the principal case, the court of appeals recognized that a primary labor dispute over work rules existed between the railroad (FEC) and union,[6] but its inquiry concerned only the secondary dispute between the terminal company and defendant union. The contention that Norris-LaGuardia should be subordinated to the Railway Labor Act was rejected, presumably because all review procedures under the latter act had been exhausted. The court determined the key question to be whether the phrase "case involving or growing out of any labor dispute," a provision in the Norris-LaGuardia Act,[7] included secondary labor boycotts. Thus limiting its review, the court conceded that a literal interpretation of the act would include secondary boycotts in this provision, but nonetheless relied upon "traditional economic self-interest justification concepts" to determine the act's scope.[8] The court found that the union employees had an economic interest in halting services performed by the terminal company, which had aligned itself with the primary employer in "some substantial manner." This brought the picketing within the act and prohibited an injunction.

Application of the Norris-LaGuardia Act to secondary boycotts is consistent with current labor law concepts.[9] However, the court's view that "traditional economic self-interest justification concepts" determine the act's scope is a substantial deviation from orthodox

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[4] "Congress made the [Norris-LaGuardia] definition broad because it wanted it to be broad. There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted." Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330, 335 (1960); United States v. Hutcheson, 312 U.S. 219, 235-36 (1941).

[5] The Railroad Labor Act contains comprehensive procedures to facilitate settlement of disputes. Thus Norris-LaGuardia has been held not to apply to railroads while RLA procedures are pending. See, *e.g.*, Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30 (1957).

[6] 362 F.2d at 650 (5th Cir. 1966).

[7] 47 Stat. 70 (1932), 29 U.S.C. § 104 (1964).

[8] 362 F.2d at 654 (5th Cir. 1966). According to the court this is a fact question.

[9] FORKOSCH, LABOR LAW 380 (2d ed. 1965); GREGORY, LABOR AND THE LAW 194 (2d rev. ed. 1961); CCH, LABOR LAW COURSE ¶ 4302 (14th ed. 1963); Kovarsky, *The Supreme Court and the Secondary Boycott*, 16 LAB. L.J. 216, 219 (1965). *Contra*, Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 656-57 (5th Cir. 1966) (dissenting opinion).

interpretations.[10] The only complete discussions of an "economic self-interest" test are by Professors Gregory and Wollett.[11] Professor Gregory describes it as "the maxim that the intentional infliction of harm on others is actionable, unless justified, taking a broad view of justification and including within it a conception of competition which covered all uses of concerted economic coercion for self-advancement and self-protection."[12] Although Professor Gregory refers to the concept as a "test,"[13] he uses it more as an analytic tool[14] in applying the common law,[15] and also in analyzing Norris-LaGuardia.[16] While some concept of economic self-interest may have been part of the rationale for an anti-injunction act,[17] it does not necessarily follow that it was intended to determine the scope of the act. The "test" is not traditional,[18] it was not intended as a statutory standard, and it may in fact deviate from the statutory standard as enacted.[19] It is unfortunate

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[10] The usual test simply compares the conduct with the language of the statute. See, *e.g.*, Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365 (1960); Brotherhood of Locomotive Firemen v. Florida East Coast Ry., 346 F.2d 673 (5th Cir. 1965); Amalgamated Ass'n of Street Employees v. Dixie Motor Coach Corp., 170 F.2d 902 (8th Cir. 1948).

[11] GREGORY, LABOR AND THE LAW, (2d rev. ed. 1961); Wollett, *Another Look at Picketing in Washington*, 26 WASH. L. REV. 169, 192-93 (1951).

[12] GREGORY, *op. cit. supra* note 11, at 82.

[13] *Id.* at 156-57.

[14] *Id.* at 140 *passim.*

[15] *Id.* at 157.

[16] *Id.* at 194-98.

[17] FRANKFURTER & GREENE, THE LABOR INJUNCTION 215 (1930); Sayre, *Labor and the Courts*, 39 YALE L.J. 682, 701 (1930).

[18] See note 10 *supra.*

[19] An "economic self-interest justification" test is hopelessly vague as a statutory standard. First, there is a problem with determining the type of relationship which constitutes economic self-interest. The court seeks to answer this in the principal case by referring to the relationship between the primary employer and the terminal company which "bears substantially on the case." 362 F.2d at 650. There is economic self-interest because the terminal company has *aligned* itself with the primary employer by providing essential service. 362 F.2d at 655. But the question of alignment is equally vague. The court footnotes two cases to illustrate the limits of alignment. 362 F.2d at 655 n.9. Alignment is present when a grocery store buys apples from the primary employer and the union engages in product picketing, NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58 (1964), but is absent when an owner of a construction site hires a non-union contractor, and the union pickets the owner's business, Carpenters Union v. Ritter's Cafe, 315 U.S. 722 (1942). Neither case involved the Norris-LaGuardia Act or mentioned either alignment or economic interest. The diverse fact patterns make it exceedingly difficult to isolate the elements of alignment.

A second difficulty with the test is defining who has to have an economic self-interest. The court noted that the test was met "from not one, but two viewpoints": that of the striking employees and that of the responding employees. 362 F.2d at 655. The implication is that only one viewpoint is sufficient to invoke the act. Yet Professor Gregory, on whom the court relies, states that *all* concerned parties must have an economic interest. Gregory, *op. cit. supra* note 11, at 194-95.

The third problem is the role of the term "justification" in applying the test. "Justification" suggests a balancing, as do the two cases footnoted. Yet the court was mute on what standards will govern the "balance." By using the term "fairly direct

that the court introduced an inappropriate standard to support a decision already adequately supported by the statute itself.

Regardless of the appropriateness of the economic self-interest test, the result in the principal case is consistent with the views of most courts and writers. The Norris-LaGuardia Act was intended to overrule, legislatively, Supreme Court decisions which had limited the anti-injunction provisions of the Clayton Act to direct employer-employee disputes.[20] Particularly in section 13 of Norris-LaGuardia,[21] Congress sought to obviate this limitation by, first, defining a labor dispute as any controversy over conditions of employment or representation, regardless of whether an employer-employee relationship existed, and secondly, by extending the act's coverage to both labor disputes and cases growing out of labor disputes. Section 13(a) defines labor dispute in terms of the persons involved. If the persons involved are engaged in the same industry or have direct or indirect interests in the same industry, the controversy is covered by the act. This subsection, read in conjunction with section 13(c) which makes the employer-employee relationship irrelevant, indicates that the act was intended to apply to secondary boycotts.[22] This interpretation is further buttressed when it is recalled that one of the cases prompting passage of the Norris-LaGuardia Act was *Duplex Printing Co. v. Deering*,[23] wherein an injunction was granted against secondary boycotting.

Further support for the result in the principal case is found in the broad interpretations given the Norris-LaGuardia Act by the courts. Three courts of appeals have applied the act to secondary boycotts,[24]

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economic interests" in a footnote, the court also raised the possibility of attempting to measure directness. 362 F.2d 654 n.6.

The absence of any definitive answer to these problems illustrates the difficulty of using the concept as a statutory standard and the danger inherent in substituting it for the relatively clear statutory language.

[20] Those decisions occurred as follows: Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); American Steel Foundaries v. Tri-City Central Trades Council, 257 U.S. 184 (1921); Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n, 274 U.S. 37 (1927); United States v. Hutcheson, 312 U.S. 219, 235-36 (1941); Milk Wagon Drivers Union, Local 753 v. Lake Valley Farm Prods., 311 U.S. 91 (1940). See GREGORY, *op. cit. supra* note 11, at 184-85; Christ, *The Federal Anti-Injunction Bill*, 26 ILL. L. REV. 516, 523 (1932); Norris, *Injunctions in Labor Disputes*, 16 MARQUETTE L. REV. 157, 164 (1932).

[21] 47 Stat. 73 (1932), 29 U.S.C. § 113 (1964).

[22] See note 9 *supra*.

[23] 254 U.S. 443 (1921).

[24] Amalgamated Ass'n of Street Employees v. Dixie Motor Coach Corp., 170 F.2d 902 (8th Cir. 1948); East Texas Motor Freight Lines v. International Bhd. of Teamsters, 163 F.2d 10 (5th Cir. 1947); Lee Way Motor Freight Inc. v. Keystone Freight Lines, 126 F.2d 931 (10th Cir. 1942); Taxi-Cab Drivers, Local 889 v. Yellow Cab Operating Co., 123 F.2d 262 (10th Cir. 1941). *Contra*, Lakefront Dock & R.R.

and the Supreme Court seems tacitly to have agreed.[25] None of the cases, however, involved secondary boycotts exclusively in the railroad industry.

The Railway Labor Act establishes the National Railroad Adjustment Board to handle disputes "growing out of grievances or out of the interpretation ... of agreements."[26] NRAB procedures are invoked when one or both parties petition the Board. The Board conducts a hearing, makes findings, and publishes a binding award. The award is enforceable in federal district court.[27]

On the other hand, whenever a dispute arises concerning changes in the bargaining agreement itself, or when a dispute arises not involving the NRAB,[28] a party may invoke the services of the National Mediation Board. The NMB attempts to mediate the dispute and if that fails, the parties are induced to arbitrate. If agreement is still not reached, the NMB may recommend that the President appoint an Emergency Board.[29]

It is arguable that the principal case is not effectively governed by the Railway Labor Act. The RLA procedures presuppose a period of bargaining and conciliation by disputants who normally function in a bargaining relationship. This relationship does not exists between the parties in the principal case because the union's members do not work for the terminal company. Moreover, the terminal company has no control over the primary employer's policies, the basic source of the dispute.[30] In view of these facts it would be futile to force the terminal company to submit to NMB procedures. There is simply no machinery in the act for settling controversies between a carrier and employees of other employers subject to the RLA.[31]

Applying Norris-LaGuardia in such cases would create an anomo-

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Terminal Co. v. International Longshoremen's Ass'n, 333 F.2d 549 (6th Cir. 1964); Erie R.R. v. International Longshoremen's Ass'n, 117 F. Supp. 157 (W.D.N.Y. 1953); Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry., 85 F. Supp. 65 (D. Minn. 1949), *dismissed as moot*, 181 F.2d 812 (8th Cir. 1950).

[25] See Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365 (1960). *Cf.* Bakery Sales Drivers Union v. Wagshal, 333 U.S. 437, 442 (1948); Milk Wagon Drivers Union, Local 753 v. Lake Valley Farm Prods., 311 U.S. 91, 99-100 (1940).

[26] 44 Stat. 577 (1926), as amended, 45 U.S.C. § 153 *First* (i) (1964).

[27] 44 Stat. 577 (1926), as amended, 45 U.S.C. § 153 *First* (1964).

[28] 44 Stat. 577 (1926), as amended, 45 U.S.C. § 155 *First* (1964).

[29] 44 Stat. 577 (1926), as amended, 45 U.S.C. § 160 (1964).

[30] Brief for Petitioner, pp. 30-34.

[31] *Id.* at 31 n.15. It is contended that the terminal company could not bargain over an embargo of the primary employer's trains because that would violate their duty under the Interstate Commerce Act. *Id.* at 32, 59-64. An alternative rationale is that there is no "breathing room" for negotiation and conciliation which underlie the efficacy of RLA procedures. See Chicago & Ill. M. Ry. v. Brotherhood of R.R. Trainmen, 315 F.2d 771, 777-78 (7th Cir. 1963) (dissenting opinion).

lous situation: although the intricate procedures of the RLA must be exhausted before there can be a strike arising out of a dispute between a carrier and its employees, a strike may occur immediately without the necessity of exhausting these procedures if the dispute is not between parties in this relationship.[32] A possible solution is to construe the scope of the Norris-LaGuardia Act as identical to the "effective" scope of RLA when applying Norris-LaGuardia to railroad disputes, *i.e.*, as limited to employer-employee controversies.[33]

On the other hand, a contrary approach is possible. The RLA procedures have been exhausted in the dispute between the primary employer and the union, and strikes, although involving an interruption of commerce, are permissable. Picketing of the terminal company is well within traditional union objectives: publicizing a labor dispute to persuade others to cease performing work for the primary adversary.[34] Norris-LaGuardia protects this activity,[35] including railroad disputes when the parties have fully complied with RLA procedures.[36] Even if the present dispute does not conform to the RLA dispute definition, thus eliminating the possibility of settlement under RLA, this does not foreclose application of the broad terms of Norris-LaGuardia because the RLA does not exclusively control railway labor disputes.[37]

The Supreme Court considered these arguments on certiorari and affirmed the lower court decision by a 4-4 split among the justices.[38] In light of prior decisions indicating that Norris-LaGuardia is applicable to secondary boycotts,[39] the Supreme Court's division on this issue in the principal case can be explained on the ground that a majority of the Court was not willing to recognize Norris-LaGuardia application to railroad secondary boycotts.[40]

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[32] *Id.* at 32-33.
[33] *Id.* at 36-40.
[34] Brief for Respondent, pp. 30-31.
[35] *Id.* at 40-47
[36] *Id.* at 49-50.
[37] *Id.* at 55-56.
[38] Mr. Justice Fortas did not participate.
[39] See note 25 *supra.*
[40] An alternative rationale for reversing the lower court could have been based upon alleged conflict with the Interstate Commerce Act. The Interstate Commerce Act imposes a duty to provide traffic interchange and through routes. Interstate Commerce Act, 49 U.S.C. § 1(4), 3(4) (1964). However, this would involve rejecting the principle that Norris-LaGuardia will not be accommodated to non-labor legislation. Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960); Brotherhood of Locomotive Firemen v. Florida East Coast Ry., 346 F.2d 673 (5th Cir. 1965). Even if this principle is rejected, Norris-LaGuardia would apply unless a mandatory provision of the Interstate Commerce Act was violated. Here there is no such provision unless the 1963 district court injunction in the principal case is

The Court may have been willing to curtail Norris-LaGuardia because of potential havoc to interstate transportation caused by unrestrained secondary boycotts on railroads. The bases for this conjecture lie in the nature of railroads and the history of their regulation. The Railway Labor Act was passed to "avoid any interruption to commerce"[41] because of labor difficulties in the railroad industry. When enforcement of RLA procedures requires an injunction which is forbidden by the Norris-LaGuardia Act, a balance must be made which best effectuates the policies of both acts. A strike may be enjoined in cases pending before the NRAB or where RLA mandatory provisions would be contravened, notwithstanding conflicting Norris-LaGuardia Act provisions.[42] On the other hand Norris-LaGuardia will be applied in major disputes between the primary parties at least if RLA procedures have been exhausted[43] so that the

so construed. Florida East Coast Ry. v. Jacksonville Terminal Co., Case No. 63-16, M.D. Florida, Jan. 30, 1963. Because that injunction rested on factors other than the Interstate Commerce Act, see 362 F.2d at 651, it would be difficult to consider it a mandatory order.

[41] 44 Stat. 577 (1926), as amended, 45 U.S.C. § 152 (1964).

[42] Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30 (1957). This reasoning has been followed (and extended) in Brotherhood of Locomotive Engineers v. Louisville & N. R.R., 373 U.S. 33 (1963); Manion v. Kansas City Terminal Ry., 353 U.S. 927 (1957) *(per curiam);* New York Cent. R.R. v. Brotherhood of Locomotive Firemen, 355 F.2d 503 (7th Cir. 1966); Brotherhood of R.R. Carmen, Local 429 v. Chicago & N.W. Ry., 354 F.2d 786 (8th Cir. 1965). *Contra,* Brotherhood of R.R. Trainmen v. Central of Ga. Ry., 229 F.2d 901 (5th Cir.), *vacated as moot,* 352 U.S. 995 (1956); Chicago & Ill. M. Ry. v. Brotherhood of R.R. Trainmen, 315 F.2d 771 (7th Cir.), *vacated as moot,* 375 U.S. 18 (1963), which seems to say Norris-LaGuardia will not be applied if application would violate the *purpose* of RLA.

[43] Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960). The Court had previously indicated that "the Norris-LaGuardia Act has been held to prevent the issuance of an injunction in a railway labor case involving a 'major dispute.'" Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 42 n.24 (1957), citing Brotherhood of R.R. Trainmen v. Toledo, P. & W. R.R., 321 U.S. 50 (1943). This was followed in Butte, A. & Pac. Ry. v. Brotherhood of Locomotive Firemen, 268 F.2d 54, *cert. denied,* 361 U.S. 864 (1959). However, Norris-LaGuardia was applied in *Toledo,* not because the § 4 absolute prohibition was violated, but because the employer's refusal to arbitrate violated the § 8 "clean hands" provision of Norris-LaGuardia.

It is not clear whether *Telegraphers* requires exhaustion of RLA procedures in major disputes before Norris-LaGuardia can be applied. In that case the parties did not commence bargaining. Other cases, however, seem to require exhaustion. Missouri-Ill. R.R. v. Order of Ry. Conductors, 322 F.2d 793 (8th Cir. 1963); Pennsylvania R.R. v. Transport Workers Union, 202 F. Supp. 134 (E.D. Pa. 1962); American Airlines Inc. v. Air Line Pilots Ass'n, 169 F. Supp. 777 (S.D.N.Y. 1958). See Brotherhood of Ry. Clerks v. Florida East Coast Ry., 384 U.S. 238 (1966); Brotherhood of Locomotive Eng'rs v. Baltimore & O. R.R., 372 U.S. 284 (1963); Eastern Airlines Inc. v. Flight Eng'rs Ass'n, 340 F.2d 104 (5th Cir. 1965); Pan American World Airways v. Flight Eng'rs, 306 F.2d 840 (2d Cir. 1962); Chicago, R.I. & Pac. R.R. v. Switchmen's Union, 292 F.2d 61 (2d Cir. 1961), *cert. denied,* 370 U.S. 936 (1962); Aaron, *The Labor Injunction Reappraised,* 10 U.C.L.A.L. REV. 292, 307-09 (1963); Schwartz, *The Railway Labor Act and the Airlines,* N.Y.U. 12th Conference on Labor 155, 164-67 (1959); Comment, *Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes,* 60 COLUM. L. REV. 381, 387-90 (1960).

parties are free to strike or otherwise invoke economic self-help.[44] Further, Norris-LaGuardia will not be subordinated to non-labor legislation.[45]

The principal case involves a secondary boycott instituted after the exhaustion of RLA procedures in the primary dispute. Because of this, Norris-LaGuardia application cannot be suspended without contravening the principles stated above. That four justices of the Supreme Court voted to reverse thus indicates that some countervailing factor was considered by them to be determinative. It thus becomes important to discern what that factor is and to speculate whether it will become persuasive to a majority of the court in the future.

It is difficult to dispute the railroad's contention that the RLA does not extend to disputes between one employer and the employees of another employer.[46] RLA procedures would seem ineffective when the disputants are parties who are not normally in a negotiating relationship, as the controversy being negotiated must be one which both parties are free to alter. In the principal case, the terminal company had no control over the basic issues of the controversy—the primary employer's work rules.[47] In short, RLA procedures are predicated on existence of a bargaining relationship formed to discuss a dispute. This predicate does not exist in the principal case.

Thus, RLA application to the principal case, if it applies at all, must depend upon incorporation of the secondary dispute into the primary dispute. If the secondary dispute is simply a manifestation of the primary dispute, the union must refrain from picketing while

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But see Northwest Airlines, Inc. v. Transport Workers Union, 190 F. Supp. 495 (W.D. Wash. 1961).

[44] Brotherhood of Ry. Clerks v. Florida East Coast Ry., 384 U.S. 238 (1966); Brotherhood of Locomotive Eng'rs v. Baltimore & O. R.R., 372 U.S. 284 (1963) *per curiam.*

> When there is an impasse and procedures have been exhausted, the Railway Labor Act forces neither arbitration or acquiescence and parties are free to invoke self help....[W]hen the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each.

Florida East Coast Ry. v. Brotherhood of R.R. Trainmen, 336 F.2d 172 (5th Cir. 1964), *cert. denied,* 379 U.S. 990 (1965).

[45] Order of R.R. Telegraphers v. Chicago & N. W. Ry., 362 U.S. 330, 339 (1960); United States v. Hutcheson, 312 U.S. 219 (1941); Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc., 311 U.S. 91, 103 (1940); Texas & N. O. R.R. v. Brotherhood of R.R. Trainmen, 307 F.2d 151 (5th Cir. 1962).

[46] See Brief for Petitioner, pp. 30-34. Lakefront Dock & R.R. Terminal Co. v. International Longshoremen's Ass'n, 333 F.2d 549 (6th Cir. 1964); Chicago & Ill. M. Ry. v. Brotherhood of R.R. Trainmen, 315 F.2d 771, 777-78 (7th Cir.) (dissenting opinion), *vacated as moot,* 375 U.S. 18 (1963).

[47] See note 31 *supra.*

the case is pending.[48] The theory of this approach is that secondary boycotts should be avoided, not by injunctions, but by settling the primary dispute with traditional procedures. While this would bring secondary boycotts within the purview of the RLA, Norris-LaGuardia application still is not avoided because RLA procedures in the primary dispute have been exhausted.[49] Thus, whichever way the dispute is viewed, the RLA does not apply to the problem in the principal case.

It would seem that labor legislation regulating the railroad industry is incomplete. There are no provisions in RLA, Norris-LaGuardia, or any other act expressly concerning railroad secondary boycotts. While new legislation may be in order,[50] courts must resolve controversies in the interim. Two approaches are presently available: Secondary boycotts may be considered to be (1) within the scope of the RLA policy to "avoid any interruption to commerce,"[51] even though not included in its specific provisions, and thus unaffected by Norris-LaGuardia; or (2) outside the scope of the RLA and subject to general labor law legislation, including the Norris-LaGuardia Act. The first approach implements the view that Congress, had it considered the problem, would have intended to free railroads from excessive shutdowns due to labor disputes.[52] The second approach adopts the notion that the RLA constitutes an exception to the desirable norm of non-intervention by courts in labor disputes and should be limited to cases where it clearly applies, particularly where the act would be extended to cover an unforeseen situation which might be better handled in some other way.

This latter approach seems to have an analytically sounder basis. If the technique of applying the RLA to secondary disputes by considering them part of the primary dispute is used, Norris-LaGuardia applies at least when all RLA procedures are exhausted. Conversely, if the secondary dispute is deemed independent of the primary dispute, Norris-LaGuardia could preclude an injunction at *any* stage without conflicting with the RLA procedures.[53] The difficulty with this vari-

[48] See note 43 *supra*.
[49] 362 F.2d at 650.
[50] See Aaron, *The Labor Injunction Reappraised*, 10 U.C.L.A.L. REV. 292 (1963). The need to amend the Railway Labor Act has also been noted. S. 2797, 89th Cong., 2d Sess. (1966); A.B.A. Comm. Rep., Section of Labor Relations Law, 270, 339 (1966).
[51] See note 41 *supra*.
[52] 75 Cong. Rec. 5499 (1932) (remarks of Congressman LaGuardia).
[53] This is not necessarily true. It would be possible to view the secondary dispute independently of the primary and require compliance with all RLA procedures in the secondary dispute as well. See discussion at text following note 52 *supra*. If the primary employer could be persuaded to intervene, the procedures would force the

ation is that it provides a blanket prohibition of injunctions without reference to settlement of the primary dispute.

If, on the other hand, Norris-LaGuardia application to secondary boycotts is precluded in the railroad industry, the RLA policy of avoiding interruption of commerce is furthered. However, precluding application of Norris-LaGuardia forecloses the possibility of examining the secondary character of boycotts. Characterizations of boycotts according to the specific facts have been recognized under the Taft-Hartley Act[54] and should also be recognized under railroad legislation.

The ultimate question is whether preclusion or allowance of Norris-LaGuardia application best complies with the concept that a union should be free to utilize economic pressure to pursue aims that are consistent with the public interest. It is difficult to consider this question objectively when the specter of a total railroad shutdown is presented. The nation's economy and well-being are inextricably tied to a smoothly functioning railroad system.[55] Applying Norris-LaGuardia to secondary boycotts after RLA exhaustion could deprive whole areas of the country of rail service with no alternative but to await settlement by the primary parties.[56] In addition, since enactment of section 8(b)(4) of the Taft-Hartley Act,[57] there is arguably a "national labor policy" discouraging secondary boycotts. Although Taft-Hartley does not apply to railroad disputes, it would seem incongruous to disallow secondary boycotts in industries less crucial to the economic health of the United States than railroads, and yet allow them in railroad disputes. Finally, Norris-LaGuardia may not reflect

parties to bargain over the same issues that precipitated the primary dispute. Of course, if the parties resisted settlement when the procedures were initially applied, it would be unrealistic to expect a settlement the second time, unless the threat of a secondary boycott was decisive. However, by requiring a repeat of the procedures in the secondary dispute the determination whether to recommend an Emergency Board could be reviewed again with the secondary boycott as a relevant factor lacking in the first instance. That added factor might make a difference or at least allow a determination with *all* relevant factors available. This procedure is only possible, however, if the NMB and the parties accede to the primary employer's intervention and are willing to discuss the primary issues. There is little likelihood of this.

[54] See, *e.g.*, NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58 (1964); NLRB v. General Drivers, Local 968, 225 F.2d 205 (5th Cir.), *cert. denied*, 350 U.S. 914 (1955); Masters, Mates & Pilots Union, 136 N.L.R.B. 1175 (1962); Warehouse Workers Union, Local 688, 121 N.L.R.B. 1229 (1958); Sailors Union of the Pac., 92 N.L.R.B. No. 93 (1950).

[55] See Brotherhood of Ry. Clerks v. Florida East Coast Ry., 384 U.S. 238, 245 (1966).

[56] Specially enacted emergency legislation is possible. See Siegal & Lawton, *Stalemate in "Major" Disputes Under the Railway Labor Act—The President and Congress*, 32 GEO. WASH. L. REV. 8 (1963).

[57] 49 Stat. 452 (1947), as amended, 29 U.S.C. § 158 (b)(4) (1964).

the realities of labor disputes as clearly today as it did in 1932. Perhaps its application should be less vigorous.[58]

In view of the foregoing arguments, it is perhaps surprising that a majority of the Supreme Court justices did not vote to reverse the decision in the principal case. The answer may lie in its peculiar facts. The terminal company was run as a cooperative with the primary employer holding one quarter interest jointly with other railroads who were joined as plaintiffs,[59] and the union professed only to picket the primary employer's trains and services in the terminal.[60] If NLRB standards of what constitutes a secondary boycott are used, the union's activities might not have been so characterized.[61] Thus it may be that in a future case where these mitigating factors are absent, a majority of the Court will find Norris-LaGuardia inapplicable to railroad secondary boycotts regardless of RLA procedures.

MEETING COMPETITION EXCEPTION TO SALES BELOW COST PROHIBITION

On August 14, 1963, defendant's officials determined that they would advertise and sell fryer chickens at twenty-nine cents per pound during the upcoming Labor Day weekend. Defendant's invoice cost was thirty and one half cents per pound. Competing stores had sold at twenty-nine cents on July 24, August 14 and August 16. Before it established the Labor Day weekend selling price, defendant made no investigation to determine the legality of its competitors' prices, but

[58] See Northwest Airlines, Inc. v. Transport Workers Union, 190 F. Supp. 495 (W.D. Wash. 1961) (dictum); Gregory, *op. cit. supra* note 11, at 551; Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635, 645-46 n.39 (1959); Loeb, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 11 LAB. L.J. 473 (1960); Stewart, *No-Strike Clauses in the Federal Courts*, 59 MICH. L. REV. 673, 677-78 (1961); Note, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 HARV. L. REV. 354, 363 (1958), views the *Chicago River* case as an indication of this trend.

[59] Brief for Respondent, pp. 12-15. The Court did not hesitate to disregard form for substance in Butte, A. & Pac. Ry. v. Brotherhood of Locomotive Firemen, 268 F.2d 54, 59, *cert. denied*, 361 U.S. 864 (1959), saying:

> [T]he carrier is the wholly-owned subsidiary of the shipper—Anaconda. The two have common principal officers and the unified purpose of serving the ultimate best interests of the shipper. Under these circumstances, the act of Anaconda ... must be regarded as the act of the carrier.

[60] Brief for Respondent, pp. 19-20, 65-67.

[61] See United Steelworkers v. NLRB, 376 U.S. 492, 498 (1964). Of course, the only reason to apply NLRB standards is to make use of "national labor policy" regarding secondary boycotts. The RLA provides no standard at all.