The Jurisdictional Shadowland Between the NLRB and the National Mediation Board: Who's in Charge?

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Abstract: The National Labor Relations Act exempts all persons subject to the Railway Labor Act (RLA) from its jurisdiction. As a result, for over fifty years the National Labor Relations Board (NLRB) has referred challenges to its jurisdiction based on the RLA to the National Mediation Board, the RLA’s administering agency. In 1995, however, the NLRB’s decisions in Federal Express Corp. and United Parcel Service, Inc. cast doubt on this policy. Even though the Court of Appeals for the District of Columbia then affirmed the NLRB’s decision in United Parcel Service, the question of whether the NLRB has the authority to decide questions of RLA jurisdiction is still an open one. This Comment traces the treatment of this problem by both the NLRB and federal courts and identifies the analytical shortcomings in each of these decisions as they relate to the question of who has authority to determine jurisdiction between the NLRB and the Mediation Board. Based on these shortcomings, this Comment concludes that the NLRB should refer all arguable claims of RLA jurisdiction to the Mediation Board for an initial determination.

“You’ve seen the ads on television: flying delivery trucks speeding packages across the skies. Is the delivery service an airline or is it a trucking company?” The question is more than one of semantics because this distinction could mean a difference as to which labor law applies to the delivery service and which federal agency will administer that law. Complicating matters, doubts exist as to which of two agencies, the National Labor Relations Board (NLRB or Board) under the National Labor Relations Act (NLRA) or the National Mediation Board (NMB or Mediation Board) under the Railway Labor Act (RLA), should decide which of these laws applies. Because their jurisdictions are mutually exclusive, resolving whether the NLRB or the NMB has authority to decide this jurisdictional question can have a great bearing on whether the “flying truck” is an airline or a trucking company. For express delivery companies that straddle the line between air carriers and trucking companies, this uncertain regulatory future has the potential to threaten their competitiveness.

This problem stems from conflicting language in the NLRA and the RLA. The NLRA excludes from its jurisdiction employers and

employees covered by the RLA while the RLA covers railroads, air carriers, and other employers who provide services in connection with the transportation and handling of property transported by the railroad or air carrier. Thus, even though airlines generally are covered by the RLA while trucking companies are excluded from it, difficulties arise for the NLRB when a company operates both aircraft and trucks. For example, should the NLRA or the RLA regulate the employment of persons who unload packages from an airplane and place them on a truck? What about dispatchers who coordinate package transfers from truck to plane or plane to truck? Do these employees work for the airline or trucking division? To which division are they more integral? More importantly, when a labor union files a representation petition or grievance with the NLRB concerning such a company, how should the NLRB resolve the question of jurisdiction? Should it matter whether the union or employer makes an arguable claim that the RLA and not the NLRA covers their employment situation? Does the NLRB in determining the scope of its own statute have authority to define the limits of the RLA, or has Congress assigned that role exclusively to the Mediation Board?

For the past fifty years, the NLRB has referred challenges to its jurisdiction based on the RLA to the Mediation Board for determination. Nevertheless, in 1995, the NLRB retreated from this long-standing policy by ruling that henceforth it would refer only those jurisdictional questions it deemed doubtful or that raised difficult questions of interpretation under the RLA. Two decisions, Federal Express Corp. and United Parcel Service, Inc., mark this break from the past.

In both cases the NLRB examined the relationship between the airline and trucking divisions of the company in question before announcing whether it had authority to address the threshold question of jurisdiction. Treating the two corporations differently, the NLRB retained jurisdiction in United Parcel Service and determined itself whether United Parcel Service, Inc. (UPS) should be covered by the NLRA or the RLA, while in Federal Express, it referred the jurisdictional claim to the Mediation Board.

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4. 29 U.S.C. § 152(2); see infra note 16 and accompanying text.
6. See infra note 17 and accompanying text.
8. Id.
Board. Each agency ruled in favor of its own jurisdiction. As a result, two fierce competitors in the express delivery business are now governed by different labor laws, administered by different agencies, who promote different labor policies.\textsuperscript{10}

These two cases highlight a growing interagency conflict over who should decide the respective scope of both the NLRA and the RLA. NLRB and Mediation Board representatives have discussed the need for a solution.\textsuperscript{11} Thus far, their talks have produced nothing and frustrated parties such as UPS have threatened to ask Congress for a solution.\textsuperscript{12}

The central question addressed in this Comment is whether the language of the NLRA excluding RLA subjects from its coverage authorizes the NLRB to resolve questions of RLA jurisdiction in the course of deciding the scope of the NLRA. This Comment traces the treatment of this problem by both the NLRB and federal courts with particular emphasis on the cases of Federal Express and United Parcel Service. Part I offers an overview of the different policies underlying the NLRA and the RLA and then discusses the NLRB’s historic handling of this jurisdictional quandary. Part I ends with a description of Federal Express and United Parcel Service. Part II critically analyzes these two opinions, while part III reviews the recent court of appeals decision in United Parcel Service, Inc. v. NLRB,\textsuperscript{13} which affirmed the NLRB’s earlier ruling. Based on a critical analysis of these opinions, this Comment concludes that the NLRB should refer all arguable claims of RLA jurisdiction to the Mediation Board for an initial determination.

\textsuperscript{10} The NLRB has not dismissed the petition involving Federal Express. It is possible that the NLRB could repudiate the Mediation Board's determination and assert jurisdiction itself. See infra note 91 and accompanying text.


\textsuperscript{12} Id. Federal Express took steps in 1996 to ensure its continued placement under the RLA's jurisdiction by successfully lobbying Congress to add the term "express company" back into the RLA. See Robert Burns, Clinton Signs Air-Safety Bill Despite Misgivings By Labor, Seattle Times, Oct. 9, 1996, at A11; Mead Jennings, FedEx Fred is top dog, Airline Bus., Nov. 96, at 82; William Roberts, Loss of Two Words Stirs Fears at FedEx, J. Com., June 10, 1996, at 1A. The term "express company" was dropped from the RLA when Congress abolished the Interstate Commerce Commission in late 1995. See ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995). This language, however, was in effect when Federal Express and United Parcel Service were decided by the NLRB. Interestingly, UPS argued it was an express company. United Parcel Serv., 318 N.L.R.B. at 782. Federal Express did not. The NLRB decided the express company question in United Parcel Service rather than referring the matter to the Mediation Board, just as it decided whether UPS was an RLA carrier. Id. at 782–83. Consequently, this issue presents the same jurisdictional question as does whether the NLRB has authority to interpret the RLA to determine if UPS is an RLA carrier. This Comment, however, focuses only on the latter issue.

\textsuperscript{13} 92 F.3d 1221 (D.C. Cir. 1996).
I. DETERMINING JURISDICTION BETWEEN THE NLRB AND THE MEDIATION BOARD

When a union files a representation petition or unfair labor practice charge with the NLRB, both the union and employer have the right to challenge the Board's jurisdiction under section 2(2) of the NLRA. It reads:

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Unlike the other exemptions listed in section 2(2), Congress created a broad exclusion for all parties subject to the RLA. Consequently, to determine whether an employer is subject to the NLRA, the RLA must be consulted. RLA section 151, First defines "carrier," the equivalent of "employer" under the NLRA, to include:

[A]ny express company . . . and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad.

14. The NLRB is responsible for enforcing the labor practices set forth in the NLRA as well as overseeing representational matters such as establishing bargaining units and conducting elections. William B. Gould, A Primer on American Labor Law 30 (3d ed. 1993). The Board consists of five members appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 153(a) (1996).


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In 1936 Congress extended this definition to encompass "[e]very common carrier by air engaged in interstate or foreign commerce."

Congress has never granted the NLRB power to interpret this or any other provision of the RLA. The question thus becomes whether the NLRB itself can resolve jurisdictional questions implicating the RLA or whether it must refer such issues to the Mediation Board. Neither the agencies acting in concert, the courts, nor Congress has resolved this issue. Consequently, this question is the focus of a continuing debate.

A. Policy Differences Between the NLRA and the RLA

Questions of jurisdiction between the NLRB and the Mediation Board are critical because the RLA and the NLRA embody distinctly different labor policies. The RLA's primary goal is "to avoid any interruption to commerce or to the operation of any carrier engaged therein." Congress intended to achieve this by requiring disputing parties to engage in an "almost interminable" bargaining and mediation process. The Mediation Board has wide discretion to control the duration and format of mediation. The Mediation Board forbids such pressure tactics as strikes and lockouts unless it concludes that further negotiations are futile. Even then, the Mediation Board imposes an

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23. Beatrice M. Burgoon, Mediation of Railroad & Airline Bargaining Disputes, in The Railway Labor Act at Fifty 71, 74-80 (Charles M. Rehmus ed., 1976). The collective bargaining process is highly structured under the RLA. Parties are required to submit written notices of proposed rates of pay, rules, and working conditions before initiating negotiations. Collective bargaining then follows a specific time schedule. If the parties are unable to reach an agreement, either party or the NMB, sua sponte, may initiate mediation. Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378 (1969).
additional thirty-day cooling-off period. This cooling-off period is usually accompanied by a final NMB-initiated attempt to mediate. As a result, negotiations and mediation under the RLA are often protracted. The Mediation Board’s goal is to ensure that negotiations continue until the parties reach an agreement.

By contrast, the NLRA downplays government involvement in collective bargaining. Section One emphasizes the right of self-organization with the goal of achieving equality of bargaining power between employers and employees. The NLRB does not mediate negotiations; rather, it regulates conduct by protecting each party’s rights. Thus, where the RLA seeks solutions through mediation and discourages self-help, the NLRA encourages self-help as a persuasive tactic so long as each party’s behavior meets certain norms.


28. Rissetto, supra note 24, at 1; see 29 U.S.C. § 151 (1996). In this respect, the NLRA recognizes that unions are essential to the bargaining process. See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) (“National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.”); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 16 (1937) (explaining that “theory of the act is that free opportunity for negotiation... may bring about the adjustments and agreements which the act in itself does not attempt to compel”).

29. Rehmus, supra note 20, at 8, 16.

30. The NLRB will step in if one party alleges an unfair labor practice such as refusing to bargain, dismissing employees for union activity, employer support of a company union, secondary boycotts by unions, and entering into “hot” cargo clauses. 29 U.S.C. § 160 (1996). If one or both of the parties become disheartened by the other, section 13 of the NLRA recognizes the right to strike: “Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.” 29 U.S.C. § 163 (1996). However, if a strike or lockout “will imperil... the national health or safety” the President may temporarily enjoin the action. 29 U.S.C. § 176 (1996). A party must give 60 days notice to the Federal Mediation and Conciliation Service before terminating collective bargaining. 29 U.S.C. § 158(a)(4)(a) (1996); Rissetto, supra note 24, at 1.
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The RLA requirement of nationwide unionization in contrast to locally-formed bargaining units allowed under the NLRA is also a critical difference between the two statutes.\(^3\) Because unionization is easier among local groups of workers, employers and employees may perceive the NLRA as protecting labor interests while viewing the RLA as imposing obstacles.\(^2\)

B. The NLRB’s Approach to Questions of RLA Jurisdiction

From 1943 to 1995 the NLRB followed a policy whereby it referred most jurisdictional questions concerning the RLA to the Mediation Board.\(^3\) The NLRB recognized the exclusive authority of the Mediation Board to determine its own jurisdiction.\(^3\) This referral policy was based on the NLRB’s decision in *Pan American World Airways*,\(^3\) the seminal decision on questions of jurisdiction between it and the Mediation Board.

I. Pan American

*Pan American* involved a representation dispute between two unions representing employees at Pan American’s Guided Missile Range Division. One union objected to the NLRB’s jurisdiction, claiming that

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31. See Rehmus, *supra* note 20, at 16; see, e.g., International Association of Machinists & Aerospace Workers, 7 N.M.B. 162, 164 (1979) (noting that unlike LMRA, RLA requires “crafts or classes [to be] carrier-wide, without division because of geography”).


33. Occasionally, the Board has refused to refer questions of RLA jurisdiction to the NMB. See *infra* text accompanying note 45.

34. See, e.g., *Pan Am. World Airways*, 115 N.L.R.B. 493 (1956); *Northwest Airlines, Inc.*, 47 N.L.R.B. 498 (1943). Congress did not grant the Mediation Board explicit authority to interpret the RLA; nevertheless, the Mediation Board and federal courts recognize that Congress did vest the NMB with such implicit and exclusive authority including the power to interpret the definition of “carrier.” See, e.g., *United Transportation Union v. United States*, 987 F.2d 784, 790 (D.C. Cir. 1993); *International Longshoremen’s Association v. North Carolina State Ports Auth.*, 370 F. Supp. 33, 39 (E.D.N.C. 1974), *aff’d*, 511 F.2d 1007 (4th Cir. 1975); *In re Employees of Northwest Airlines*, 2 N.M.B. 19, 20 (1948) (acknowledging absence of explicit statutory language in RLA granting it power to determine who is employee, but ruling it had jurisdiction by necessary implication). In addition, the Mediation Board has noted the absence of any statutory basis, explicit or implicit, to support the contention that Congress has authorized another agency to decide such questions especially when that agency “on the face of its own statute, has no jurisdiction over air carriers or their employees.” *Id.* at 25–26.

35. 115 N.L.R.B. 493 (1956).
Pan American's missile operation was subject to the RLA. The NLRB agreed and declared:

"[I]n view of the provisions of Section 2(2) of our Act, excluding any person from our jurisdiction who is subject to the Railway Labor Act, "it should be clear that the National Mediation Board, the agency primarily vested with jurisdiction by the terms of the Railway Labor Act, has declined to assume jurisdiction over the operations here involved."\(^{37}\)

The NLRB then referred its record to the Mediation Board for review.\(^{38}\) After conducting its own analysis, the Mediation Board asserted it had jurisdiction over the employees at issue.\(^{39}\) The NLRB then dismissed the union's petition, reaffirming its earlier holding in *Northwest Airlines, Inc.*\(^{40}\) that "unless the National Mediation Board definitely declines to assume jurisdiction over such disputed airline employees, this Board will not assert jurisdiction."\(^{41}\) Thus, under Pan American's "definitely declines" test, determinations by the Mediation Board were conclusive on the NLRB.

Pan American's recognition of the Mediation Board's authority to determine its own jurisdiction may have been due, in part, to the U.S. Supreme Court's decision that same year in *Local 25, International Brotherhood of Teamsters v. New York, New Haven & Hartford Railroad Co.*\(^{42}\) The Court was asked to determine whether a railroad company is entitled to protection under the NLRA in circumstances unrelated to its employer-employee relations. The Court said the railroad could file an unfair labor practice with the NLRB, but cautioned the NLRB that "[n]either [the NLRA] [n]or [the Labor Management Relations Act] was intended to tread upon the ground covered by the Railway Labor Act."\(^{43}\)

Since Pan American, the NLRB has continued to acknowledge that the Mediation Board, and not itself, is the proper agency to address

\(^{36}\) Id. at 494.

\(^{37}\) Id. at 495 (quoting *Northwest Airlines, Inc.*, 47 N.L.R.B. at 498).

\(^{38}\) Id.

\(^{39}\) Id.

\(^{40}\) 47 N.L.R.B. 498 (1943).

\(^{41}\) Id.

\(^{42}\) 350 U.S. 155, 159 (1956).

\(^{43}\) Id. (emphasis added).
questions of RLA jurisdiction. Even so, the NLRB has rejected any suggestion that it cannot act before the Mediation Board "definitely declines" jurisdiction. In place of this test, the NLRB typically has referred RLA jurisdictional questions to the Mediation Board by stating:

Because of the jurisdictional nature of the question presented here, we have in this case, as in other similar 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 having primary authority to determine its own jurisdiction, to study the record in this case and to determine the applicability of the Railway Labor Act to the Employer.44

Thus, although the rationale for referring questions of RLA jurisdiction to the Mediation Board has changed from one of conclusive to primary authority, the NLRB's recognition of the Mediation Board's role in determining the RLA's scope did not change until 1995.

In a few situations the NLRB resolved RLA jurisdictional questions itself when it found referral to be either "unnecessary or unjustified."45 For instance, the NLRB has declined to refer questions of RLA jurisdiction where it has either previously exercised uncontested jurisdiction over the employer,46 or has found that the employer's situation was factually consistent with a prior Mediation Board determination declining RLA jurisdiction.47 The NLRB's recent


46. See Local 287, International Brotherhood of Teamsters (Emery Air Freight/Airborne Express), 304 N.L.R.B. 119 (1991) (arguing that where NLRB has previously asserted jurisdiction over employer, NLRB jurisdiction is presumed unless party attacking jurisdiction can show that employer's operations have changed or that it has become air carrier); Hot Shoppes, Inc., 143 N.L.R.B. 578 (1963). In 1996, the NLRB removed any reference to the word "uncontested." See D & T Limousine Serv., Inc., 320 N.L.R.B. 859, 859 (1996).

47. See E.W. Wiggins Airways, 210 N.L.R.B. 996 (1974); Air Cal., 170 N.L.R.B. 18 (1968); cf. Tri-State Aero, Inc., 9 N.M.B. 356 (1982) (referring RLA jurisdictional question despite previous Mediation Board determination declining jurisdiction where employer argued its operations had altered sufficiently to render it common carrier subject to RLA). But see Holiday Airlines, 216 N.L.R.B. at 19 (referring jurisdictional question to Mediation Board even though Mediation Board had previously declined to assume jurisdiction over employer). The NLRB has also declined to refer jurisdictional questions to the Mediation Board when the party alleging RLA coverage had failed to demonstrate any connection between the employee's work and an activity involving airline
decisions in *Federal Express* and *United Parcel Service*, however, raise the possibility that the NLRB has broadened these exceptions, or, at a minimum, that it will decide many of the jurisdictional questions it previously referred to the Mediation Board.

2. Federal Express

*Federal Express* arose when certain of its ground service employees filed a representation petition with the NLRB seeking to conduct an election under the NLRA.48 These employees claimed Federal Express's operations had changed enough to bring them under the NLRA.49 They asked that the NLRB, and not the Mediation Board, make the initial determination of jurisdiction.50 Federal Express moved to dismiss, reminding the NLRB of its air carrier status and the language of section 2(2), which the Board had interpreted in *Pan American* as requiring referral.51

Characterizing petitioner's jurisdictional claim as "doubtful," the NLRB referred the issue to the Mediation Board for an advisory opinion.52 Unlike its statements in the past, however, the NLRB explicitly retained the option to overrule the Mediation Board in the event it disagreed with the result.53 In part, the Board premised its decision on section 2(2) of the NLRA.54 The Board explained that section

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49. Lee, supra note 5. When Federal Express was created in 1973, it described itself as "an air freight carrier principally engaged in operating an interstate air express service." *Federal Express*, 23 N.M.B. at 36. By 1978, it began acquiring tractor-trailers to carry the goods initially moved by air. *Id.* Petitioners argued that Federal Express's increased use of trucks and the introduction of an "Express Saver" takes their matter out of the NMB's jurisdiction. See *id.* at 45.

50. See *Federal Express*, 317 N.L.R.B. at 1155.

51. *Id.* The NLRB initially referred Federal Express's claim of RLA jurisdiction to the Mediation Board for an advisory opinion. After the Union moved to reopen the record to add new evidence, the NLRB asked the Mediation Board to return the record. The Mediation Board acquiesced before completing its review of Federal Express's claim. *Id.*

52. *Id.*

53. *Id.* at 1156 n.6.

54. *Id.* at 1155.
2(2) acted only as a guide and did not mandate referral.\textsuperscript{55} It did note, however, that referral was the better policy, particularly when "very difficult questions of interpretation under the RLA" were involved.\textsuperscript{56} To do otherwise would diminish the benefits achieved through referral.\textsuperscript{57} The Board then explained that referral in this case was beneficial because it: (1) discourages forum shopping; (2) promotes stability; and (3) furthers the NLRA goal of providing orderly and peaceful procedures in connection with labor disputes affecting commerce.\textsuperscript{58}

NLRB Chair William Gould dissented. He claimed that the practice of referral was an abdication of the Board's obligation to administer and enforce the NLRA.\textsuperscript{59} According to Gould, the NLRB had the authority and responsibility to decide matters involving its own jurisdiction because sections 2(2) and 2(3) merely restrict the NLRB from expanding its jurisdiction at the expense of the Mediation Board.\textsuperscript{60} Consequently, addressing employment situations "in the shadowlands which lie on either side of the boundary between the NLRA and the RLA," he argued, does not offend this exclusionary language.\textsuperscript{61} Gould also claimed that the NLRB's prior exceptions to referral were "actually representative of the Board's general practice with respect to jurisdictional claims involving the interpretation of other statutes or the decisions of other administrative agencies."\textsuperscript{62} As an example, Gould noted that the NLRB has interpreted and applied section (3)(f) of the Fair Labor Standards Act (FLSA)\textsuperscript{63} to determine which individuals fit the definition of "agricultural laborer" under section 2(3) of the NLRA.\textsuperscript{64} Gould thus found nothing to prevent

\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 1156.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 1158 (Gould, dissenting). In support, Gould noted that the NLRB has never disagreed with the Mediation Board's determination of jurisdiction. Id. at 1156 (Gould, dissenting). The Board's opinion countered this statement by noting that the NMB had responsibly discharged its duties, rendering any further action by the NLRB unnecessary. Id. at 1156. Gould later concurred in United Parcel Service stating, "I would eliminate the Board's general practice of referring cases involving RLA jurisdictional claims to the NMB for an initial ruling." United Parcel Serv., Inc., 318 N.L.R.B. 778, 783 (1995).
\textsuperscript{60} See Federal Express, 317 N.L.R.B. at 1158 (Gould, dissenting) (construing Local 25, International Brotherhood of Teamsters v. New York, New Haven & Hartford R.R., 350 U.S. 155, 159 (1956)).
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 1156 (Gould, dissenting).
\textsuperscript{64} Federal Express, 317 N.L.R.B. at 1157 (Gould, dissenting).
the NLRB from "applying and interpreting the RLA, its legislative history, and NMB decisions to the extent necessary to decide whether the Board or the NMB has jurisdiction over a particular employer or employee." Accordingly, he regarded the doctrine of primary jurisdiction, mentioned by the majority, as inapplicable to situations involving interagency relationships and saw no reason for the NLRB to defer to any agency.

3. United Parcel Service

United Parcel Service parallels Federal Express with one exception, the result. Instead of referring an open question of RLA law to the Mediation Board, the NLRB decided the threshold issue of jurisdiction itself.

The case arose when a union accused United Parcel Service, Inc. (UPS) of an unfair labor practice. UPS objected to the NLRB's jurisdiction and asked the NLRB to refer the dispute to the Mediation Board. UPS argued that changed circumstances, particularly UPS Co.'s new status as an NMB certified carrier, required referral. Ordinarily, once the Mediation Board determines that an employer is a carrier,

65. Id.

66. Primary jurisdiction defines the relationship between courts and administrative agencies. Id. at 1156 (citing Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise 271 (3d ed. 1994)). Generally, "primary jurisdiction in an administrative agency exists when the agency has specialized policy responsibilities or expertise which should be applied to the dispute." 1 Henry H. Perritt, Jr., Employee Dismissal Law and Practice § 2.40, at 176 (3d ed. 1992).


69. UPS was accused and later found guilty of "maintaining and enforcing an overbroad restriction on off-duty employee access to its premises." Id. at 783.

70. See id. at 795. Like UPS, Inc., UPS Co. is a subsidiary of United Parcel Service of America, Inc. Id. at 778. The Federal Aviation Administration issued UPS Co. an air carrier's operating certificate in 1988. Id. The NMB then found that UPS Co. was a common carrier by air subject to the RLA. United Parcel Serv. Co., 17 N.M.B. 77 (1990). UPS, Inc. specializes in the ground transportation of packages. United Parcel Serv., 318 N.L.R.B. at 778 (noting that 92% of packages picked up, processed, and delivered by UPS, Inc.) travel by ground only whereas remaining 8% are time sensitive packages requiring some travel by air). UPS Co. depends upon UPS, Inc. to deliver 85% of its time sensitive packages. Id. at 778–79. The remaining air packages move exclusively by ground transport. Id. at 779.

71. In its post-oral argument brief, UPS also argued that it was an "express company" and therefore an RLA carrier under section 151, First of the RLA. Id. at 782. The NLRB decided this question itself instead of referring the issue to the Mediation Board. Id. at 782–83; supra note 12.
jurisdiction under the RLA is presumed. In support, UPS cited two NMB opinions, O/O Truck Sales and Florida Express Carrier, Inc. The administrative law judge (ALJ) agreed that referral was warranted, resting his decision primarily on the breadth of the language in O/O Truck Sales and Florida Express Carrier. Because of this breadth, the ALJ reasoned that UPS's interpretation of these two cases was not unjustified and thus should be heard by the Mediation Board. The ALJ also found the rationale of Pan American persuasive.

The NLRB overruled its ALJ, noting that UPS, Inc. had never before contested its jurisdiction. As a result, the NLRB placed UPS within an exception to its referral policy. In support, the NLRB claimed that departure from its general practice of referring questions of RLA jurisdiction to the Mediation Board in this instance was necessary to prevent an “interruption in commerce.” In doing so, the NLRB addressed the same case law as its ALJ and held that UPS, Inc. was subject to the NLRA.

UPS appealed. The U.S. Court of Appeals for the District of Columbia affirmed, holding that UPS did not fall within the scope of the RLA. The court deferred to the NLRB’s practice of referral, including

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73. 21 N.M.B. 258 (1994).
74. 16 N.M.B. 407 (1989).
75. United Parcel Serv., 318 N.L.R.B. at 797. Both O/O Truck Sales and Florida Express set forth the two-part test used by the NMB to determine whether an employer is a carrier under section 151, First. See O/O Truck Sales, 21 N.M.B. at 266; Florida Express, 16 N.M.B. at 409–10. Under this test, the NMB first determines whether the nature of the work performed is that traditionally done by rail or air carrier employees. It then determines whether a common carrier exercises direct or indirect ownership or control of the employer. O/O Truck Sales, 21 N.M.B. at 266. Both parts must be satisfied before the NMB can assert jurisdiction over the employer. Id. at 268. Even if the test is satisfied, an employer may be excluded from RLA coverage if it falls within the “trucking exception” to section 151, First. To survive this exception, an employer must show that its trucking activity is integrally related to the rail or air transportation activity. Id at 269; see also Northwest Airlines v. Jackson, 185 F.2d 74, 77 (8th Cir. 1950) (“[T]he [RLA] was intended to apply only to transportation activities and that work which bears more than a tenuous, negligible and remote relationship to the transportation activities.”).
76. United Parcel Serv., 318 N.L.R.B. at 795. Even though the ALJ decided referral was necessary, he nevertheless distinguished O/O Truck Sales and Florida Express on their facts and claimed that UPS was subject to the NLRA. Id. at 797.
77. Id. at 780; see supra note 46 and accompanying text.
78. United Parcel Serv., 318 N.L.R.B. at 781.
79. Id. at 778–79. At the same time, the Board reaffirmed that referral was a beneficial policy. See id. at 780.
exceptions, stating the court could interpret but not invent new rules of law on this issue. Thus the court concluded that the NLRB was under no obligation to refer UPS’s claim of RLA jurisdiction to the Mediation Board.

II. FEDERAL EXPRESS AND UNITED PARCEL SERVICE: A CRITIQUE

A. Is the NLRB’s Referral Policy in Transition?

Federal Express and United Parcel Service represent a change in the NLRB’s referral policy. The NLRB addressed these two cases together in oral argument so that it could consider whether and under what circumstances it should continue to refer arguable claims of RLA jurisdiction to the Mediation Board. Although the NLRB reaffirmed its general support for referral by rejecting Gould’s proposal to eliminate the Mediation Board’s role in resolving these jurisdictional questions, the NLRB departed from the Pan American standard of referral. Federal Express and United Parcel Service have set the stage for a more limited referral policy and in doing so have left employers, unions, and courts alike scrambling to discern what criteria will control the NLRB’s future referral policy. This section identifies those portions of Federal Express and United Parcel Service that evince a change in the Board’s referral policy. It also questions whether the NLRB’s rationale for exempting some RLA jurisdictional issues from Mediation Board review is consistent with the congressionally designed statutory scheme for labor relations.

1. The NLRB’s Mixed Position Concerning the Mediation Board’s Primary Authority To Resolve Questions of RLA Jurisdiction

The most significant indication of a change was the Board’s statement in Federal Express that the Mediation Board may not have primary jurisdiction to resolve questions of RLA jurisdiction. Before Federal Express, the NLRB had always maintained that the Mediation Board had

81. Id. at 1225–28.
82. Id. at 1228. UPS did not appeal this decision to the U.S. Supreme Court.
84. Id. at 1155–56.
either conclusive or primary authority to decide its own jurisdiction.\textsuperscript{85} Hence, the NLRB referred arguable claims of RLA jurisdiction to the Mediation Board. In \textit{Federal Express}, however, the NLRB retreated from this and said it had not and would not resolve whether the Mediation Board has primary jurisdiction to decide questions of RLA jurisdiction.\textsuperscript{86} Similarly, the Board declared in \textit{Federal Express} that section 2(2) of the NLRA did not compel it to refer all questions of RLA jurisdiction to the Mediation Board.\textsuperscript{87} In \textit{Pan American}, the Board had premised its rationale for referring such questions to the Mediation Board, in part, on the language of section 2(2).\textsuperscript{88} Thus, the Board’s statements in \textit{Federal Express} conflict with those made in \textit{Pan American} and its progeny\textsuperscript{89} and strike at the core of those decisions.\textsuperscript{90}

More troubling is the effect of the NLRB’s conclusion that it has no obligation to refer questions of RLA jurisdiction to the Mediation Board. Read literally, the NLRB has demoted the Mediation Board to the status of an advisory board by implying that it has more expertise than the Mediation Board in resolving RLA jurisdictional claims.\textsuperscript{91} This suggestion is not only inconsistent with statements in \textit{Pan American}, but with judicial declarations finding that the NLRA and the RLA were intended to be “independent and mutually exclusive labor schemes.”\textsuperscript{92}

2. \textbf{New Terminology To Describe When the NLRB Will Refer RLA Jurisdictional Questions to the Mediation Board}

In \textit{Federal Express} and \textit{United Parcel Service}, the NLRB introduced a variety of terms to describe those instances where it claims referral is warranted. As a result, it is unclear whether the Board will continue to follow \textit{Pan American} by referring most arguable claims of RLA jurisdiction to the Mediation Board. In addition to citing \textit{Pan American}
favorably, the NLRB said it would refer jurisdictional questions to the Mediation Board when faced with (1) very difficult questions of RLA interpretation, 93 (2) doubtful claims of NLRA jurisdiction, 94 or (3) de novo constructions of the RLA. 95 Because the Board has not defined these conditions, it is difficult to know whether they were intended merely as examples of arguable claims of RLA jurisdiction, or meant to replace the Pan American standard, thereby limiting the circumstances when the NLRB will refer RLA jurisdictional questions to the Mediation Board.

The uncertainties created by the NLRB's explanation of its standards for referral even confused the U.S. Court of Appeals for the District of Columbia in United Parcel Service, Inc. v. NLRB. 96 Instead of applying the analysis set forth in Pan American or its progeny, the court created a new two-part test based on Federal Express for determining the appropriateness of referral. Under this new test, UPS was required to show not only that jurisdiction under the NLRA was doubtful, but the presence of a very difficult question of interpretation under the RLA. 97 Indeed, the court never mentioned Pan American or the policy of referring "arguable" claims of RLA jurisdiction to the Mediation Board. Consequently, the court's interpretation of Federal Express strongly suggests that Pan American no longer represents the NLRB's referral policy.

3. Inconsistency Between United Parcel Service and Federal Express

An inconsistency between Federal Express and United Parcel Service further indicates that the Board's referral policy is in transition. This inconsistency pertains to the NLRB's support for referral in general. In both cases the NLRB declared that it neither wanted to address difficult questions of RLA law nor make law under the RLA because to do so would undercut the advantages of referral. 98 Yet, the NLRB proceeded to do just that in United Parcel Service after the Board decided to resolve

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93. Federal Express, 317 N.L.R.B. at 1155.
94. Id.
95. Id. at 1156; see United Parcel Serv., Inc., 318 N.L.R.B. 778, 781 (1995).
96. 92 F.3d 1221 (D.C. Cir. 1996).
97. Id. at 1226. The court also noted that the NLRB had never asserted jurisdiction over Federal Express whereas it routinely had asserted jurisdiction over UPS for many years. Id. at 1221.
98. United Parcel Serv., 318 N.L.R.B. at 781; Federal Express, 317 N.L.R.B. at 1156. These advantages include obtaining the Mediation Board's expertise on RLA matters and avoiding conflicting agency decisions. See supra text accompanying note 58.
the jurisdictional question itself. At issue was whether UPS fell outside the trucking exception to the RLA. Under this exception, an employer that otherwise qualifies as a carrier can be excluded from coverage under the RLA. The Mediation Board has held that an employer can escape the trucking exception by showing that its trucking services are integral to its air transportation services. The Mediation Board had not, however, addressed the factual situation posed by UPS. Consequently, the NLRB’s ALJ concluded UPS had presented an arguable claim of RLA jurisdiction under the exception. The full Board rejected the ALJ’s conclusion and decided this question of first impression itself. As a result, the NLRB construed Mediation Board cases in a way that may differ from the Mediation Board’s interpretation of them, leading to a potential conflict in construing the trucking exception under the RLA.

B. Exempting Certain RLA Jurisdictional Questions from Referral to the Mediation Board Is Flawed

Moreover, the NLRB’s decision to eliminate referral in any case where it had previously exercised jurisdiction, uncontested or not, is flawed. Adherence to past practice has the potential to treat similarly structured employers differently and increases the potential for conflicting agency determinations in direct contradiction to the NLRB’s stated desire to minimize such conflicts. Similarly structured employers are those who compete in the same industry and engage in similar

100. Id. at 781–82, 796–97. The trucking exception is contained within the definition of “carrier.” See supra text accompanying note 17.
101. In UPS, Inc.’s case, it had to show that its trucking services were integral to the air transportation services provided by UPS Co., the UPS airline. United Parcel Serv., 318 N.L.R.B. at 781; see supra note 75. A showing of “integral” requires only that the services performed by the ground company be “essential” to the operation of the airline. See O/O Truck Sales, 21 N.M.B. 258, 269 (1994); Florida Express Carrier, Inc., 16 N.M.B. 407, 409 (1989); see also Federal Express Corp., 23 N.M.B. 32, 74 (1995) (“Without the functions performed by the employees at issue, Federal Express could not provide the on-time express delivery required of an air express delivery service.”). The Mediation Board has also stated that ritualistic adherence to past determinations is not necessarily prudent when contemporary conditions require otherwise. Seaboard Sys. R.R.-Clinchfield Line, 11 N.M.B. 217, 225 (1984).
102. United Parcel Serv., 318 N.L.R.B. at 797. The NMB’s decisions in O/O Truck Sales and Florida Express present the closest analogy to the facts presented by UPS. See supra note 75.
103. United Parcel Serv., 318 N.L.R.B. at 778 (adopting ALJ’s original opinion in lieu of ALJ’s supplemental decision recommending referral to Mediation Board). The NLRB never addressed its administrative law judge’s supplemental opinion where the ALJ expressed concern over the indeterminate nature of the case law.
104. See, e.g., id. at 780.
practices. UPS and Federal Express are examples. If an employer similar to UPS were to come before the Mediation Board, the NMB would have the opportunity to further explain its holdings in Florida Express and O/O Truck Sales and decide whether companies such as UPS warrant RLA coverage. Because the NLRB and the Mediation Board are empowered to achieve different policy goals, the potential for disagreement concerning resolution of RLA jurisdictional issues exists. Consequently, the Board’s exceptions appear to contradict the intent of Congress to create separate and independent labor boards for different industries. Without the designation of one agreed gatekeeper to determine which agency has jurisdiction, the likelihood of consistent decisions decreases while the possibility of forum shopping increases.

III. UNITED PARCEL SERVICE ON APPEAL: THE D.C. CIRCUIT’S FLAWED ANALYSIS

When UPS appealed the NLRB’s decision in United Parcel Service, Inc. it asked the D.C. Circuit to review two questions: (1) whether the NLRB had authority to decide if a case raises an issue of RLA jurisdiction; and (2) whether the NLRB properly concluded that UPS was an employer under the NLRA rather than an RLA carrier. The court found no error with the NLRB in either instance and thereby validated the NLRB’s practice of excluding certain RLA jurisdictional questions from its referral policy. The court’s decision in United Parcel Service, Inc. v. NLRB, however, is flawed for several reasons. First, the court applied the wrong standard of review when it determined that the NLRB had authority to bypass its referral policy and resolve questions of RLA jurisdiction itself. Second, the court placed too much emphasis on an earlier Sixth Circuit decision concerning the NLRB’s scope of authority. Third, the court ignored a relevant U.S. Supreme Court decision that discussed the relationship between the NLRA and the RLA.

As a prelude to answering the question of whether the NLRB had authority to resolve RLA jurisdictional questions without input from the Mediation Board, the D.C. Circuit generally addressed whether the

105. See International Association of Machinists & Aerospace Workers, 7 N.M.B. 162, 166 (1979) (noting that NLRB uses different criteria in deciding cases than Mediation Board).
106. See infra notes 121, 136.
107. This Comment does not dispute the court’s decision that UPS is an employer covered by the NLRA. Instead, it asks whether the court properly addressed the NLRB’s authority to make such determinations.
Mediation Board had primary jurisdiction\textsuperscript{109} to resolve all questions concerning the RLA’s scope. According to UPS, because the Mediation Board is the RLA’s administering agency, it should have primary jurisdiction to decide challenges to the NLRB’s jurisdiction based on the RLA. The court rejected this argument, claiming that any extension of the doctrine of primary jurisdiction to agency-agency relationships would be contrary to the policy reasons underlying primary jurisdiction because it was designed solely to prevent the judiciary from rendering policy decisions best left to the political branch and agencies.\textsuperscript{110} The court also said that primary jurisdiction does not require a federal agency to respect the policy choices of another agency.\textsuperscript{111}

Although the court’s description was technically correct, the court neglected to examine whether the principles furthered by the doctrine would be equally applicable to agency-agency relationships.\textsuperscript{112} These principles are reflected in the NLRB’s stated advantages for referral and include avoiding conflicting determinations and obtaining assistance on matters within the agency’s expertise. If the court had looked beyond the definition of primary jurisdiction to these rationales, it might not have dismissed UPS’s argument so quickly. As demonstrated by the NLRB’s own opinions prior to \textit{Federal Express} and \textit{United Parcel Service}, the NLRB routinely recognized the Mediation Board’s primary authority to decide its own jurisdiction.\textsuperscript{113} Consequently, unlike the D.C. Circuit’s assertion to the contrary, the NLRB, as a federal agency, has found reasons to respect the policy choices of another agency.

\textbf{A. The Court’s Improper Standard of Review}

UPS asked the D.C. Circuit to determine if the NLRB acted arbitrarily when it declined to refer the question of whether UPS was an RLA carrier within the meaning of section 151, First.\textsuperscript{114} This was a pure question of law and accordingly should have been reviewed de novo. Instead, the court assumed without discussion that it should defer to the

\begin{footnotesize}
\textsuperscript{109} Primary jurisdiction is not the same as primary authority. As the D.C. Circuit made clear, primary jurisdiction is a judicial doctrine used to describe the relationship between the courts and agencies only. \textit{See supra} note 66.
\textsuperscript{110} \textit{United Parcel Serv.}, 92 F.3d at 1225.
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{See} United Parcel Serv., Inc. 318 N.L.R.B. 778, 780 (1995); \textit{supra} text accompanying note 59.
\textsuperscript{113} \textit{See supra} note 44 and accompanying text.
\textsuperscript{114} \textit{United Parcel Serv.}, 92 F.3d at 1222.
\end{footnotesize}
NLRB’s determination of this question. The court, thus, recognized the NLRB’s primary jurisdiction over this issue. In doing so, the court used the NLRB’s practice of excepting certain RLA jurisdictional questions from its referral policy as evidence that the court should not confront the difficult question of whether the NLRB can unilaterally resolve questions of RLA jurisdiction without exceeding its statutory authority.

As a general matter, judicial deference to an agency determination is guided by two principles: the importance of obtaining superior expertise in the area in question and the need for uniform statutory and regulatory interpretations on a subject Congress has entrusted to an agency. If the question before the court touches one of these principles, deferral is necessary. If the question is not within the reach of the agency’s expertise, however, then judicial deference is not warranted. Underlying the rule of deference is the assumption that a single administrative agency has primary responsibility over a regulatory scheme. Hence, if a court faces a potential conflict between two agencies, the proper approach is for the court to determine de novo which agency Congress intended to resolve the issue.

In *United Parcel Service, Inc. v. NLRB*, UPS challenged the NLRB’s authority to exclude questions of RLA jurisdiction from its referral policy. The question posed a pure question of law implicating not only the jurisdiction of the NLRB, but that of the Mediation Board. Consequently, the D.C. Circuit faced an unresolved conflict between the NLRA and the RLA that required the court to define the outer boundaries of the NLRA and its relationship with the RLA. Asking whether the

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115. *See id.* at 1225.
116. *See id.*
119. *See ABA Section on Admin. Law, A Restatement of Scope-of-Review Doctrine*, 38 Admin. L. Rev. 235, 236 (1986) (explaining that courts and not agencies have primary authority over issues of law); *see also* Caiola v. Carroll, 851 F.2d 395, 399 (D.C. Cir. 1988) (arguing that where regulation was written and promulgated by three agencies, possibility of inconsistent interpretations weakens case for deference).
120. There is some debate about whether *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that courts must defer to agency’s construction of its governing statute if congressional intent is unclear), requires courts to defer to an agency’s construction of a statute
Jurisdiction Between the NLRB and the NMB

NLRB’s treatment of this issue was arbitrary was in error because it allowed the NLRB to speak on an issue that it was not created to resolve.

In essence, UPS asked the court to determine the meaning of the relevant exclusionary language in section 2(2) as it relates to the overall statutory scheme for labor relations created by Congress. That statutory scheme is reflected in the language of the NLRA and the RLA. Both the plain language of the NLRA as well as the separate existence of the NLRA and the RLA themselves imply that Congress intended for the NLRB to defer to the Mediation Board when RLA jurisdictional questions are at issue. Otherwise, the creation of a separate labor statute for rail and air carriers would have been unnecessary. Moreover, the language excluding employers and employees subject to the RLA from the NLRA is a tangible reminder that rail and air carriers represent a distinct area of labor law that Congress not only carved out of the Labor Management Relations Act, but provided, by the RLA, techniques peculiar to those industries. Determinations of this sort should not be delegated to administering agencies for it is the “province and duty” of the judiciary to say what the law is, and “if two laws conflict with each other, the courts must decide on the operation of each.” Consequently,

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1. See Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 381 (1988) (Scalia, J., concurring) (arguing that rule of deference applies even to agency’s interpretation of its own statutory authority “because there is no discernible line between an agency’s exceeding its authority and an agency’s exceeding authorized application of its authority”); accord Dole v. United Steelworkers of America, 494 U.S. 26, 53 (1990) (White, J., dissenting). But see Mississippi Power, 487 U.S. at 387 (Brennan, J., dissenting). This debate is inapposite to the situation here because it assumes that an agency’s interpretation of its governing statute will not impact the jurisdiction of another agency. Cf. ACLU v. FCC, 823 F.2d 1554, 1567 (D.C. Cir. 1987) (arguing that courts should perform “close and searching analysis of congressional intent” when agency’s assertion of power into new arenas is questioned). The question before the D.C. Circuit required a determination of how two agencies should resolve jurisdictional conflicts between them in circumstances where Congress has indicated that each agency’s jurisdiction was distinct from the other. See Local 25, International Brotherhood of Teamsters v. New York, New Haven & Hartford R.R., 350 U.S. 155, 159 (1956) (recognizing that NLRA was not intended to overlap with RLA); Pan Am. World Airways, Inc. v. United Brotherhood of Carpenters & Joiners, 324 F.2d 217, 221 (9th Cir. 1963) (quoting California v. Taylor, 353 U.S. 553, 565–66 (1957), and noting that LMRA is distinct and separate statute from RLA).

121. 121. Pan Am., 324 F.2d at 221 (quoting Taylor, 353 U.S. at 565–66). See also United States v. Davidoff, 359 F. Supp. 545 (E.D.N.Y. 1973), where the court noted that although the Labor Management Relations Act was enacted after the RLA, it was not intended to impinge upon or cover the same ground as the RLA. Consequently, the court explained, Congress carved out the exceptions to the definitions of “employer” and “employee” in the NLRA. Id. at 547.

122. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803); see Packard Motor Car Co. v. NLRB, 330 U.S. 485, 493 (1947) (determining whether NLRB acted within terms of NLRA is question of law to be determined de novo); cf. Bureau of Alcohol, Tobacco & Firearms v. FLRA,
the court abdicated its responsibility by deferring to the NLRB’s decision on this crucial point.

This pure question of law, whether the NLRB has authority to resolve conflicts between itself and the Mediation Board by assuming the authority to resolve questions of RLA jurisdiction conclusively, is distinguishable from cases where the courts have examined the NLRB’s decisions to interpret another statute in order to carry out the mandates of the NLRA. In the former instance, the NLRB is not merely borrowing the definition of “carrier.” Rather, any decision by the NLRB directly affects the ability of the Mediation Board to carry out its duties under the RLA. Consequently, despite Gould’s arguments to the contrary in his Federal Express dissent, the NLRB’s treatment of agricultural laborers is not analogous because Congress has not ordered the NLRB to interpret the RLA. Borrowing the definition of “agricultural laborer” does not implicate the jurisdiction of the Department of Labor, the agency that administers the FLSA. In large part, this is due to a congressional directive ordering the NLRB to determine jurisdictional issues involving agricultural laborers in a specific manner. Accordingly, the U.S. Supreme Court has held that it must respect NLRB interpretations of the FLSA. It did so, however, in the context of this congressional mandate. Congress therefore has forced the NLRB not only to determine who qualifies as an “agricultural laborer,” but to use the FLSA when doing so.

By contrast, Congress has not directed the NLRB to interpret the RLA. Instead, Congress has exempted employers and employees subject to the RLA from the NLRA. Because questions of jurisdiction necessarily affect the substantive application of the RLA, it is unlikely


123. See, e.g., Bayside Enters., Inc. v. NLRB, 429 U.S. 298, 302 (1977) (examining NLRB’s decision to borrow definition from NLRA in terms of its reasonableness).

124. See supra text accompanying note 63.

125. Since 1946, Congress has attached riders to the Appropriations Acts for the Board, tying the definition of “agricultural laborers” in section 2(3) of the NLRA to section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(f) (1996).

126. See Bayside Enters., 429 U.S. at 302.

127. See supra text accompanying note 16.
that Congress intended to include their resolution solely within the jurisdiction of the NLRB.\textsuperscript{128}

\textbf{B. The Court's Misplaced Reliance on Dobbs Houses, Inc. v. NLRB}

The D.C. Circuit's misplaced reliance on \textit{Dobbs Houses, Inc. v. NLRB}\textsuperscript{129} may have caused it to apply the wrong standard of review. Dobbs Houses appealed to the Sixth Circuit from an NLRB decision rejecting its claim of coverage under the RLA. On appeal, Dobbs Houses renewed its primary argument that it was subject to the RLA, not the NLRA. It also claimed that the NLRB should have let the Mediation Board make the initial determination of jurisdiction.\textsuperscript{130} The Sixth Circuit devoted most of its attention to the first argument and barely considered the question of whether the NLRB or the Mediation Board has jurisdiction to determine which of the two agencies can resolve RLA jurisdictional questions.\textsuperscript{131} Indeed, the Sixth Circuit's entire coverage of this point was contained in one sentence, where it said: "Concededly, there is no statutory requirement that this question of jurisdiction be submitted for an answer first to the National Mediation Board."\textsuperscript{132} The Sixth Circuit cited no authority and offered no explanation for this conclusion. Consequently, when the D.C. Circuit relied on \textit{Dobbs Houses} to show that UPS had identified no sound basis on which to order the NLRB to refer RLA jurisdictional questions to the Mediation Board,\textsuperscript{133} the court neglected its responsibilities in the same manner as the Sixth Circuit: it failed to examine the question of which agency should first decide the jurisdictional issue. In doing so, the D.C. Circuit never explained why the NLRB would have more authority or expertise in this area than itself and thus did not justify its decision to defer to the NLRB.\textsuperscript{134}

\begin{itemize}
\item \textsuperscript{128} See supra text accompanying note 43.
\item \textsuperscript{129} 443 F.2d 1066 (6th Cir. 1971).
\item \textsuperscript{130} Id. at 1067.
\item \textsuperscript{131} See id. at 1067–72.
\item \textsuperscript{132} Id. at 1072.
\item \textsuperscript{133} United Parcel Serv., Inc., v. NLRB, 92 F.3d 1221, 1225 (D.C. Cir. 1996).
\item \textsuperscript{134} See Cass R. Sunstein, \textit{Constitutionalism After the New Deal}, 101 Harv. L. Rev. 421, 467 (1987) (arguing that deference to administrators' decisions regarding scope of their own jurisdiction violates separation of powers principles).
\end{itemize}
C. The Court Failed To Examine International Brotherhood of Teamsters

More importantly, the D.C. Circuit ignored the U.S. Supreme Court’s admonishment in Local 25, International Brotherhood of Teamsters v. New York, New Haven & Hartford Railroad Co., that “[n]either [the NLRA] [n]or [the Labor Management Relations Act] was intended to tread upon the ground covered by the Railway Labor Act.”135 This warning compels the NLRB not to construe the NLRA in such a way as to limit the RLA’s scope. Whenever the NLRB faces a situation where a party claims it is covered by the RLA, the NLRB must ensure that it does not constrict the RLA. Merely because the NLRB is the forum where this question arises, does not mean it is any more a question of the NLRB’s jurisdiction than of the Mediation Board’s. It is a debate about the boundaries between two independent and mutually exclusive jurisdictions.136 Thus, if the NLRB determines an RLA jurisdictional issue without input from the Mediation Board, the NLRB, in effect, assumes duties assigned to the Mediation Board and treads upon the RLA. The D.C. Circuit’s failure to reconcile this U.S. Supreme Court mandate with the NLRB’s refusal to refer some arguable claims of RLA jurisdiction to the Mediation Board is an abdication of the court’s responsibility.137

In addition to examining International Brotherhood of Teamsters, the D.C. Circuit should have considered the legislative histories of both the NLRA138 and the RLA, the problems associated with and the possibility


136. Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 377 (1969) (explaining that NLRA and RLA were intended to be “independent and mutually exclusive labor schemes”). Similarly, the Court noted in International Brotherhood of Teamsters that “neither railroads nor their employees may carry their grievances with one another to the N.L.R.B. for resolution,” and thus indicated that the NLRB does not have the authority to resolve labor disputes between RLA carriers and their employees. 350 U.S. at 159.

137. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803) (stating that courts are obligated to say what law is).

138. The NLRA’s legislative history contains support for UPS’s contention that the Board must refer RLA jurisdictional claims to the Mediation Board. After explaining that the NLRB was designed to act as the “supreme labor board” over all existing labor boards, former NLRB Chair, Lloyd R. Garrison, testified that the Railroad Labor Board, the precursor to the National Mediation Board, was the exception and should remain free from the NLRB’s reach. A Bill to Promote Equality of Bargaining Power Between Employers and Employees, to Diminish the Causes of Labor Disputes, to Create a National Labor Relations Board, and for Other Purposes, Hearings on S. 1938 Before the Senate Comm. on Educ. & Labor, 74th Cong. 134 (1935), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act 1514 (1949).
of conflicting agency determinations if one gatekeeper is not recognized, and whether Gould’s proposal to eliminate the Board’s policy of referral would be permissible in light of International Brotherhood of Teamsters. Although not conclusive individually, together these considerations provide strong reasons for a narrow reading of the NLRA’s exclusion of parties covered by the RLA. Consequently, the D.C. Circuit’s claim that there was no “legal or logical basis” for it to order the NLRB to refer RLA jurisdictional questions to the Mediation Board was not only rash, but suspect.

As a result of the D.C. Circuit’s omissions in United Parcel Service, Inc. v. NLRB and the NLRB’s current referral policy, employers or unions who raise RLA jurisdictional claims before the NLRB face substantial uncertainty. Nevertheless, the D.C. Circuit’s reasoning leaves so many questions unanswered that the next court to address them may well be justified in limiting United Parcel Service, Inc. v. NLRB to its facts and undertaking the full consideration this question deserves. Barring that, frustrated companies will likely resort to Congress.

IV. CONCLUSION

As illustrated by United Parcel Service, Inc. v. NLRB, de novo judicial review of NLRB determinations of RLA jurisdictional questions is essential in order to prevent the NLRB from arrogating duties assigned to the Mediation Board. This solution, however, is not ideal because it fails to address the underlying issue of whether the NLRB must be afforded an opportunity to speak on matters of RLA jurisdiction that are presented to the NLRB. Even if a court invites the Mediation Board to file an amicus curiae brief, the NMB’s voice has been marginalized. “Friends of the court” are simply not accorded the same respect or procedural opportunities as parties. In light of the U.S. Supreme Court’s

139. For a comprehensive discussion about the effect of deference upon interagency conflicts, see Weaver, supra note 118, at 35.
140. United Parcel Serv., Inc. v. NLRB, 93 F.3d 1221, 1228 (D.C. Cir. 1996).
141. Even NLRB Chair William Gould addressed the U.S. Supreme Court’s warning in his Federal Express dissent. He argued that the Court’s admonishment means only that the NLRB may not expand its jurisdiction at the expense of the Mediation Board. See Federal Express Corp., 317 N.L.R.B. 1155, 1158 (1995) (Gould, dissenting). Interpreting the RLA for purposes of determining jurisdiction between the two agencies, according to Gould, does not cross that line. Id.
142. See supra note 12.
143. Ordinarily, amici cannot submit reply briefs or participate in oral argument. See Fed. R. App. P. 29 (noting that motion to participate in oral argument by amicus curiae will only be granted for extraordinary reasons); 16A Charles Alan Wright et al., Federal Practice and Procedure §§ 3975, 3975, 265
declaration in *International Brotherhood of Teamsters* that the NLRA is not to tread upon the RLA, it seems unlikely that Congress intended for the NLRB to decide unilaterally RLA jurisdictional issues. Consequently, the NLRB should refer all arguable claims of RLA jurisdiction to the Mediation Board for an initial determination. If the NLRB disagrees with this determination, then the court of appeals should resolve the matter de novo upon receiving a petition for review by one of the parties.

This approach eliminates the gatekeeper problem by allowing both the NLRB and the Mediation Board to participate in determining their respective jurisdictions. Moreover, it recognizes that any disagreement between the two agencies represents an unsettled question of law about the boundaries between two independent labor schemes that the federal courts are best designed to resolve.

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3975.1 (1996) (stating that Rule 29 has no provision permitting amicus curiae to file reply or supplemental briefs and that amicus curiae have no standing to seek review by U.S. Supreme Court of any judgment adverse to its interests, even if brief is accepted by court of appeals); see also Alexander Wohl, *Friends with Agendas*, A.B.A. J., Nov. 1996, at 46, 46 (arguing that amicus curiae briefs are over used and consequently, have lost much of their persuasive power). Amici, thus, are placed at a procedural disadvantage.