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# Labor Law—Railway Labor Act—Carrier's Duty to Bargain During a Representation Dispute. —Pan American World Airways, Inc. v. International Bhd of Teamsters

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an admirable awareness of the federal system regulating labor disputes, has followed such an approach by instructing a lower court to seek an advisory opinion where it was not clear what the Board's decision would be.<sup>35</sup> Such an approach achieves the two-fold objective set out above and assimilates desirable aspects of both the Pennsylvania and the California rules.

WILLIAM A. RYAN, JR.

**Labor Law—Railway Labor Act—Carrier's Duty to Bargain During a Representation Dispute.—*Pan American World Airways, Inc. v. International Bhd. of Teamsters.***<sup>1</sup>—In 1946, the Brotherhood of Railway Airline Clerks (BRAC)<sup>2</sup> was certified by the National Mediation Board (NMB) as the collective-bargaining agent for the clerical and related employees of Pan American World Airways, Inc. (Pan Am). Several collective-bargaining agreements were executed between the carrier and the union, the last of which became effective January 1, 1965, and was to continue in effect until March 16, 1967, or thereafter, unless notice of intended change were given 30 days prior to March 16, or any date thereafter.

In August, 1965, the International Brotherhood of Teamsters (IBT) filed a petition with the NMB claiming to represent a majority of the clerical employees at Pan Am. The NMB ordered a representation election, but the BRAC refused to allow its name to appear on the ballot, taking the position that the IBT's failure to obtain more than 50 percent of the eligible votes would leave the BRAC as bargaining agent.<sup>3</sup> This first election was set aside by the NMB before it was completed, when the BRAC called the Board's attention to fraudulent practices in the campaign. Another election was ordered, and the BRAC again refused to appear on the ballot. The IBT won

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diction over the particular labor dispute. However, there has been some comment that takes a pessimistic view toward the practical success of the latter procedure. Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 *Harv. L. Rev.* 1086, 1096 (1960). The writer suggests that state courts and agencies are hardly apt to defer to the opinions from the NLRB when those courts and agencies are deciding the question of their jurisdiction to give relief in a labor dispute.

In one recent case a judge displayed the attitude that Professor Aaron anticipated. Dissenting in *Cox's Food Center, Inc. v. Retail Clerks, Local 1653*, 420 P.2d 645 (Idaho 1966), the judge stated that "the majority improperly dilutes the judicial authority of the district court below in directing that it seek the Board's advisory opinion . . ." *Id.* at 659. The dissenter adds that such a requirement "seems unbecoming the district court below, or any court in this state." *Id.* at 660.

<sup>35</sup> *Cox's Food Center, Inc. v. Retail Clerks, Local 1653*, 420 P.2d 645 (Idaho 1966). See note 17 *supra*.

<sup>1</sup> 275 F. Supp. 986 (S.D.N.Y. 1967).

<sup>2</sup> Then known as the Brotherhood of Railway and Steamship Clerks.

<sup>3</sup> This contention seems untenable in view of the fact that the NMB construes an election in which fewer than a majority of employees participate as a vote against any representation, since there is no space on the ballot for marking "no union." See *Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 668-71 (1965). If a majority of the eligible employees vote for some representative, a majority of those voting will decide the issue. See *Virginian Ry. v. System Fed'n* No. 40; 300 U.S. 515; 559-61 (1937).

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a vast majority of the votes cast, though not a majority of the eligible votes, and the BRAC again protested the election on a variety of grounds not here relevant.

While the NMB was reviewing the second election, the BRAC, on February 14, 1967, served upon Pan Am, as required by the agreement, a 30-day notice of demand for renegotiation. The airline refused to bargain, maintaining that for it to do so with either union, before the NMB had completed the representation proceedings, would be unlawful. Pan Am contended that such bargaining would amount to interference with, or influence on, its employees' choice of a representative; conduct which is forbidden by the Railway Labor Act (RLA).<sup>4</sup>

On August 24, 1967, there occurred a work stoppage by some of Pan Am's clerical employees, supporters of the IBT, at Kennedy Airport, in protest against the long delay in certification proceedings. Pan Am commenced this action against both unions, requesting a declaratory judgment that the work stoppage was illegal. The airline argued that under the RLA, the NMB, and not the carrier, has exclusive jurisdiction to settle the representation dispute, so that the pressure exerted against the airline was unjustified. Pan Am also requested injunctive relief against the IBT only. A temporary restraining order was issued.

In September, before any final determination of this suit, the NMB decided that, according to its own procedures, it had erred in not requiring the BRAC either to participate in the election or to abandon affirmatively its claim to representation. The second election was therefore set aside, and a third ordered. The BRAC then renewed its demand for renegotiation with Pan Am. Upon the carrier's refusal, the BRAC called a strike. Pan Am filed a supplemental complaint requesting a declaratory judgment that its negotiating a contract with either union, before the NMB had certified one or the other, would violate the RLA's prohibitions against carrier interference with, or influence on, the employees' choice of a representative. The airline also asked injunctive relief against the BRAC. The United States District Court HELD: The court has jurisdiction both to hear the case<sup>5</sup> and to issue an injunction.<sup>6</sup> The RLA forbids Pan Am to bargain collectively with the BRAC because the union is a party to a representation dispute pending before the NMB and such bargaining would be likely to influence the results of an election.<sup>7</sup>

The initial hurdle faced by the court was the BRAC's contention that the district court was without jurisdiction to decide the case, since Section 2, Ninth of the RLA<sup>8</sup> gives the NMB the exclusive power to decide representation contests. The BRAC claimed that questions of carrier interference in elections are inseparably bound with the NMB's duty to conduct free and fair elections, and hence these issues are beyond the jurisdiction of the court. Judge Bryan noted, however, that section 2, Ninth, imposes upon the NMB

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<sup>4</sup> 45 U.S.C. §§ 151-88 (1964), as amended, 45 U.S.C. §§ 153, 154 (Supp. II 1965-66).

<sup>5</sup> 275 F. Supp. at 996.

<sup>6</sup> *Id.* at 1000.

<sup>7</sup> *Id.* at 999.

<sup>8</sup> 45 U.S.C. § 152, Ninth (1964).

only the duty to supervise the election to insure that it is free from carrier interference, coercion or influence; the only adjudicative power the NMB exercises in this regard is to determine whether a carrier has, in fact, influenced an election, and, if so, to void the election. The court pointed out that the Board's own view is that it has no authority to declare, *prior to an election*, whether or not a given course of conduct will amount to influence or interference.<sup>9</sup>

The issue that Pan Am raised was not whether its conduct *had* influenced an election, but whether its bargaining with the BRAC would amount to influence or interference with its employees' right of free choice of a representative—conduct forbidden by Sections 2, Third, Fourth, of the Act.<sup>10</sup> It is clear that the RLA does not give the NMB authority to decide whether a carrier has violated sections 2, Third or Fourth.<sup>11</sup> Thus, the court felt constrained to fill this vacuum, and determine Pan Am's duty.

[E]ither Pan Am is faced with a coercive strike by the Clerks Union, or if it changes its position because of pressure so exerted, it is subject to charges by the rival Teamsters of interference, influence or coercion in the election. . . . In addition the carrier might be subject to criminal penalties under § 2, Tenth.<sup>12</sup>

The court did not discuss the possibility that section 2, Tenth,<sup>13</sup> might be relevant in another sense, *i.e.*, if Pan Am had negotiated with the BRAC, and the airline or its officers *had* been criminally charged, the court would, of necessity, have jurisdiction to decide the issue.

The court treated the question presented for a declaratory judgment, whether the RLA required Pan Am to refrain from bargaining with the BRAC, as one of first impression. However, an early case, although not directly on point, did consider the general question of the carrier's duties during a representation dispute. In *Railway Employees' Co-op. Ass'n v. Atlanta, B. & C.R.R.*,<sup>14</sup> not cited in the instant case, the carrier recognized and executed an agreement with the plaintiff union. While this agreement was

<sup>9</sup> NMB Affidavit, quoted in *Air Line Pilots Ass'n v. National Mediation Bd.*, 220 F. Supp. 730, 732 (D.D.C.), remanded, 323 F.2d 305 (D.C. Cir. 1963).

<sup>10</sup> 45 U.S.C. §§ 152, Third, Fourth (1964). The paragraphs provide:  
Third. . . .

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. . . .

Fourth. . . .

. . . No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees. . . .

<sup>11</sup> There is no provision in the RLA comparable to § 10 of the National Labor Relations Act, 29 U.S.C. § 160, which gives the National Labor Relations Board power to investigate and prevent unfair labor practices.

<sup>12</sup> 275 F. Supp. at 995.

<sup>13</sup> 45 U.S.C. § 152, Tenth (1964).

<sup>14</sup> 22 F. Supp. 510 (D. Ga. 1938).

still in effect, the carrier recognized another union as bargaining agent for the same employees. The carrier did not give the original union the 30-day notice of intended change in the contract that is required by Section 6 of the RLA.<sup>15</sup> The first union requested the NMB to investigate the dispute as to which organization was the authorized representative of the employees. The carrier then executed a contract with the second union. The United States District Court, in holding that the carrier could not change rates of pay or working conditions without 30-days notice to the employees' representative, stated that if there is a dispute as to who the representatives are, "the carrier must await the finding of the Mediation Board, and cannot treat with any other representative of the employees than the one designated by the Mediation Board."<sup>16</sup>

The court in *Railway Employees* based this language, not in terms of whether the carrier's recognition of one of the unions would influence the employees' choice, but rather on its view of the sequence of events described in section 2, Ninth. Once the services of the NMB have been requested, the Board is charged to investigate the dispute, and to certify to both unions, and to the carrier, the identity of the true representative of the employees. The carrier shall treat with the certified representative "upon receipt of such certification . . ."<sup>17</sup> (Emphasis added.)

In *Railway Employees*, however, the original union had not previously been certified by the NMB, so that the only factor evincing its status as representative of a majority of employees was the carrier's recognition. In *Pan American*, the BRAC had been certified by the NMB, and thus at one time was clearly the majority representative. Since it retains its status as certified bargaining agent until the NMB rules otherwise,<sup>18</sup> the BRAC was, in the language of *Railway Employees*, "the one designated by the Mediation Board."<sup>19</sup> *Railway Employees* thus leaves the duty of a carrier in the instant situation unclear, and, therefore, the question must be resolved in terms of whether negotiations with the BRAC would be likely to influence an impending election.

In holding that Pan Am's negotiating would constitute such interference, the court in the instant case relied heavily upon analogy to cases decided under the National Labor Relations Act (NLRA).<sup>20</sup> In effect, the court adopted the *Midwest Piping* doctrine of the National Labor Relations Board (NLRB).<sup>21</sup> The doctrine holds that, once a rival union has filed a representa-

<sup>15</sup> 45 U.S.C. § 156 (1964).

<sup>16</sup> 22 F. Supp. at 514.

<sup>17</sup> RLA § 2, Ninth, 45 U.S.C. § 152, Ninth (1964). The court in *Railway Employees* buttressed its holding with an argument that RLA § 6 requires that no change in rates of pay, working conditions or rules be made when the NMB's services have been invoked or proffered, and the NMB has not yet finally acted on the dispute. 45 U.S.C. § 156 (1964). It is submitted, however, that § 6 refers only to disputes between a carrier and its employees, when the NMB's mediation services, as described in RLA § 5, are concerned, and does not specifically refer to situations involving representation disputes, when the Board is acting to settle a dispute between two unions.

<sup>18</sup> Letter from the NMB to the BRAC quoted in 275 F. Supp. at 991 n.6.

<sup>19</sup> 22 F. Supp. at 514.

<sup>20</sup> 29 U.S.C. §§ 151-68 (1964).

<sup>21</sup> *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060 (1945).

tion petition with the NLRB, the employer commits an unfair labor practice if he bargains with either union, regardless of whether one of the unions is an incumbent.<sup>22</sup> The doctrine is based on Sections 8(a)(1), (2) of the NLRA,<sup>23</sup> which closely parallel Sections 2, Third, Fourth of the RLA.

The basis for the *Midwest Piping* Doctrine was the NLRB's view that the employer's bargaining with either union during a representation dispute would be likely to influence the vote of the employees by conferring unwarranted prestige upon the union bargained with.<sup>24</sup> The court in *Pan American* shared the NLRB's feeling: "It can scarcely be supposed that employees who are soon to cast a representation ballot will not give considerable weight to the fact that the carrier is currently bargaining with one of the rival unions . . . ."<sup>25</sup>

In view of rather harsh criticism levelled at the *Midwest Piping* doctrine by some writers, however, it may be useful to consider the propriety of its adoption by the court under the RLA. The doctrine has been accused of depriving employees of collective-bargaining benefits, fostering ill-will, and, when one of the competing unions is an incumbent, of depriving that union of the prestige it deserves by virtue of its incumbency.<sup>26</sup> In short, the critics argue that the *Midwest Piping* doctrine promotes instability in labor-management relations.<sup>27</sup>

Supporters of the doctrine stress the importance of the employees' choice being free from any hint of employer influence or interference.<sup>28</sup> A "bird-in-the-hand" contract might well persuade an employee to vote for an incumbent union with which he is dissatisfied, rather than risk losing the benefits already gained by voting for a new union whose bargaining skill is an unknown factor.<sup>29</sup> Since the employer must continue to deal with the incumbent as to grievances arising under the old contract, it is argued that the incumbent is not deprived of any deserved advantage; it should have to rely on its past

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<sup>22</sup> William D. Gibson Co., 110 N.L.R.B. 660 (1954), excepted an employer who bargains with an incumbent union from the *Midwest Piping* rule. *Gibson* was overruled, however, in *Shea Chem. Corp.*, 121 N.L.R.B. 1027 (1958).

<sup>23</sup> 29 U.S.C. §§ 158(a)(1), (2) (1964). The paragraphs provide that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of . . . rights guaranteed in section 157 [free choice of representatives]; (2) to dominate, or interfere with the formation of any labor organization or contribute financial or other support to it . . ." The RLA's prohibition may be said to be even stronger, since that Act uses the word "influence" as well as "interfere" and "coerce." See note 10 *supra*.

<sup>24</sup> 63 N.L.R.B. at 1071.

<sup>25</sup> 275 F. Supp. at 998.

<sup>26</sup> Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 117-23 (1964); Getman, *The Midwest Piping Doctrine: An Example of the Need for Reappraisal of Labor Board Dogma*, 31 U. Chi. L. Rev. 292, 299-300 (1964); Samoff & Summers, *The Eternal Triangle in Labor Relations*, 4 Lab. L.J. 318, 327 (1953); Note, *The Employer's Duty of Neutrality in the Rival Union Situation: Administrative and Judicial Application of the Midwest Piping Doctrine*, 111 U. Pa. L. Rev. 930, 935 (1963).

<sup>27</sup> Samoff & Summers, *supra* note 26, at 327; Note, *supra* note 26, at 933-34.

<sup>28</sup> See Bok, *supra* note 26, at 119; Note, *supra* note 26, at 934.

<sup>29</sup> Note, *supra* note 26, at 937-39.

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performance, not on what it can gain in the confusion of a representation dispute.<sup>30</sup>

At any rate, much of the criticism of the *Midwest Piping* doctrine seems to be aimed at a strict construction of the doctrine,<sup>31</sup> which may well have the effect of increasing instability. But the NLRB has lessened the possibility of such instability by insisting that, before an employer is justified in refusing to bargain, the question concerning representation must be a "real" one.<sup>32</sup> The employer in the first instance must make the determination whether a "real question" exists. He must determine whether the rival union's petition was accompanied by evidence of the requisite employee support (usually in the form of authorization cards signed by the employees). Except in cases with "special factors," the rival must show designations from 30 percent of the employees.<sup>33</sup> Another consideration in determining whether a "real question" exists, is the certification year rule. The NLRB holds that no "real question" can exist if the rival's petition was filed within one year of the incumbent's certification.<sup>34</sup> In addition, the contract-bar doctrine generally will hold ineffective any petition filed during the first two years of an existing, valid collective-bargaining agreement between the employer and the incumbent.<sup>35</sup>

The NLRB seems to view the *Midwest Piping* doctrine as a fairly rigid rule, to be applied unless one of the exceptions (certification year, contract bar or insufficient showing of interest) apply.<sup>36</sup> In practice, however, the rule has been applied somewhat more flexibly, so that if the employer has substantial and reliable evidence that one union in fact has majority support, the employer is free to bargain with that union.<sup>37</sup> It has held, however, that authorization cards alone are not reliable evidence of majority support.<sup>38</sup>

In like manner, the NMB refuses to entertain a representation petition filed within two years of the incumbent's certification, "except in unusual or extraordinary circumstances."<sup>39</sup> However, there is no contract-bar doctrine under the RLA, although the petitioning union is required to present a greater number of authorization cards where there is an existing agreement.<sup>40</sup> The absence of a contract-bar rule is not the result of a policy decision by the NMB, but is due to that body's view that the RLA gives it no authority to make such a rule.<sup>41</sup> In the instant case, the IBT filed its petition only eight

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<sup>30</sup> *Id.*

<sup>31</sup> See Samoff & Summers, *supra* note 26, at 327.

<sup>32</sup> William Penn Broadcasting Co., 93 N.L.R.B. 1104 (1951).

<sup>33</sup> 29 C.F.R. § 101.18(a) (1967).

<sup>34</sup> Shea Chem. Corp., 121 N.L.R.B. 1027, 1029 (1958). See 29 U.S.C. § 159(c)(3) (1964).

<sup>35</sup> 121 N.L.R.B. at 1029. See National Sugar Ref. Co., 10 N.L.R.B. 1410 (1939). For a general discussion of the contract-bar rules, see Freidin, *The Board, The "Bar," and The Bargain*, 59 Colum. L. Rev. 61 (1959).

<sup>36</sup> See Getman, *supra* note 26, at 311; Note, *supra* note 26, at 941.

<sup>37</sup> Note, *supra* note 26, at 941.

<sup>38</sup> *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060, 1070 n.13 (1945).

<sup>39</sup> 29 C.F.R. § 1206.4(a) (1967).

<sup>40</sup> Where there is an incumbent and a valid existing agreement, a challenging union must present authorizations from a majority of the employees. If there is no incumbent, 35% is required. 29 C.F.R. §§ 1206.2(a), (b) (1967).

<sup>41</sup> N.M.B. Case No. R-39, Nov. 30, 1934, CCH Lab. L. Rep. ¶ 2595.092 (1966).

months after the latest contract between Pan Am and the BRAC became effective. In such a situation, under the NLRA, the employer would still be obligated to negotiate with the incumbent regarding a contract renewal, since the IBT's petition would not have been considered.

There would seem, then, to be greater possibility of increased instability in the airline and railway industries, covered by the RLA, if the *Midwest Piping* doctrine is to be adopted under that Act, since the NMB feels that it is unable to use the contract-bar doctrine as a check against harassing petitions by raiding unions.

Since Section 2, Ninth, of the RLA confers on the NMB the authority to settle disputes as to representation, the Board also has the power to determine initially whether the dispute is sufficiently substantial so as to warrant an election. It has exercised this power by requiring a rival to show sufficient interest in the form of authorization cards. It has also raised a presumption, rebutted only by "unusual or extraordinary circumstances," that no dispute exists for two years following a prior certification. It is submitted that it would be no more arbitrary to presume that there is no dispute for two years after the employees have ratified a collective-bargaining agreement negotiated by the incumbent. The decision whether to employ the contract-bar doctrine as a check on instability in labor relations could then be made on policy grounds by the NMB.

Assuming, however, that the NMB does not reverse its position on this issue, the question of the employer's duty to bargain during a representation dispute will remain one for the courts. Even if the contract-bar doctrine is not available as a rein on possible instability, the court in *Pan American* did not require the carrier to refrain from bargaining when a petition has little support among the employees:

The question to be passed on is whether under the *particular facts and circumstances of this case* it is unlawful for Pan Am to negotiate with the Clerks Union regarding a new collective bargaining agreement. It is *not* whether negotiation by a carrier with an incumbent union while representation proceedings are pending is unlawful under any and all circumstances.<sup>42</sup>

While this caveat, taken literally, may be read into any case, it indicates that the court is not adopting the *Midwest Piping* doctrine as an inflexible rule required by the language of the RLA, but rather one to be applied on a case-by-case basis, depending upon whether, in the particular situation, the carrier's bargaining is likely to influence the results of an election (*i.e.*, whether or not there exists a "real question concerning representation").

The *Pan American* court distinguished a recent case, *Ruby v. American Airlines Inc.*,<sup>43</sup> which allowed a carrier to negotiate with a petitioning union, on the grounds that there was no real dispute in that case. The petitioning union in *Ruby* was a group of pilots employed by American Airlines, Inc., who had been the negotiating committee representing the national incumbent union at American. The negotiating committee reached agreement with the

<sup>42</sup> 275 F. Supp. at 996.

<sup>43</sup> 323 F.2d 248 (2d Cir. 1963), cert. denied, 376 U.S. 913 (1964).



airline, but the national union refused to give their approval. The committee then decided to break from the national union and form their own. They filed a representation petition and the NMB ordered an election. The new union then presented the carrier with evidence that it was supported by 90 percent of the pilots at American; the airline recognized the new union and signed the agreement. The court held that American was free to sign the contract, despite the representation proceedings, because it had been presented with overwhelming evidence that the new union represented a majority of its pilots.<sup>44</sup> In other words, there was in fact no real question as to who the representatives were.

Despite its previous certification, there was no such evidence in the instant case that the BRAC still enjoyed majority support. In fact, the second election, while of no effect, would seem to indicate a great deal of support for the IBT.<sup>45</sup> Therefore, Pan Am's bargaining with the BRAC might well have influenced the choice of the employees, and would thus be prohibited by the RLA.

The court's opinion, however, fails to provide carriers with any guidelines for future determination of whether they must refrain from bargaining. Since the carrier must make the initial determination, if the incumbent demands negotiation before the NMB has acted on the rival's petition, the carrier is confronted with the prospect of a strike if it refuses to bargain and there is found to have been no substantial dispute or "real question concerning representation." If it agrees to bargain, and there is a "real question," the carrier faces the possibility of charges under section 2, Tenth, for violation of sections 2, Third, Fourth. In addition, the representation proceedings may be delayed, further adding to the instability and ill-will, which is bound to be detrimental to both carrier and employees.

The NMB will in most cases decide within 30 days whether or not to hold an election.<sup>46</sup> It is submitted that once the Board has made this determination, its decision should control. In situations where a union demands negotiation before the NMB has acted, the carrier should refrain if the rival's petition satisfies the requirements of the NMB, *i.e.*, there has not been a certification within the past two years, and the petitioner has amassed the requisite number of authorization cards. There is still the possibility that, where a petition has been filed within two years of a prior certification, that the NMB will find that there are "unusual or extraordinary circumstances" that will require an election to be held. In such a situation, the carrier which, relying upon the two-year rule, bargains with the incumbent before the NMB orders the election should not be found to have violated Sections 2, Third, or Fourth, of the RLA. The carrier should be able to presume that the two-year certification bar negates the existence of a real dispute as to representation,

<sup>44</sup> 323 F.2d at 254.

<sup>45</sup> Of 6936 eligible employees, 3556 voted. Of these, 3091 voted for the IBT. 275 F. Supp. at 990.

<sup>46</sup> National Mediation Board, Administration of the Railway Labor Act by the National Mediation Board, 48-49 (1957). The requirement of § 2, Ninth, that the NMB certify within 30 days was held directory rather than mandatory in *System Fed'n No. 40 v. Virginian Ry.*, 11 F. Supp. 621 (E.D. Va. 1935), *aff'd*, 84 F.2d 641 (4th Cir. 1936), *aff'd*, 300 U.S. 515 (1937).

and thus should be able to leave questions of special circumstances to the NMB.

The *Ruby* case presents a possible exception to the proposed rule, regardless of whether the NMB has as yet made its determination whether to hold an election. When the carrier has clear and reliable evidence that one union enjoys majority support, then for the sake of stability it should be allowed to bargain with that union. In *Ruby*, however, the evidence upon which the airline relied was authorization cards,<sup>47</sup> which the NLRB has held are not reliable due to the possibility of duplications.<sup>48</sup> This unreliability was assuaged in *Ruby* by the fact that 90 percent of the employees had authorized one of the unions, since, even if some employees authorized both unions, it is unlikely that 40 percent would sign two cards. Unless there is this overwhelming percentage, however, authorization cards should not be relied upon as an accurate indication of the support that a union enjoys.

LAWRENCE T. BENCH

**Trade Regulation—Section 5 of the Federal Trade Commission Act—TBA Sales Commission Plans an Unfair Method of Competition.—*Texaco, Inc. v. FTC.***<sup>1</sup>—In 1956 the Federal Trade Commission (FTC) instituted three separate proceedings against several major oil companies and rubber companies<sup>2</sup> alleging that their sales commission method of distributing tires, batteries and accessories (TBA) was an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.<sup>3</sup> Under the sales commission plans, the rubber companies paid commissions to the oil companies on sales of the rubber companies' TBA to the oil companies' dealers. One of the proceedings paired Texaco, Inc. with B.F. Goodrich Company. The Texaco distribution system was composed of some 30,000 dealers constituting 16.5 percent of all the service stations in the United States. Texaco controlled the supply of oil and gas to its dealers and bore the heavy cost of constructing and maintaining the service stations through the use of loans, short term leases and equipment financing. Texaco's policy with regard to TBA sales was to require its salesmen to become familiar with the sponsored product, yet at the same time to "render equal assistance to all dealers . . . regardless of the brand of merchandise handled."<sup>4</sup> Its policy statement provided: "Our dealers, consignees and distributors are independent businessmen, and instructions that no undue influence is to be

<sup>47</sup> 323 F.2d at 252.

<sup>48</sup> See note 38 *supra*; see generally 1966-1967 Annual Survey of Labor Relations Law, 8 B.C. Ind. & Com. L. Rev. 771, 801-08 (1967).

<sup>1</sup> 383 F.2d 942 (D.C. Cir. 1967), cert. granted, 390 U.S. 979 (1968).

<sup>2</sup> B.F. Goodrich Co., No. 6485 (FTC Jan. 11, 1956); Goodyear Tire & Rubber Co., No. 6486 (FTC Jan. 11, 1956); Firestone Tire & Rubber Co., No. 6487 (FTC Jan. 11, 1956).

<sup>3</sup> 15 U.S.C. § 45 (1964). Section 5 provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

<sup>4</sup> *Texaco, Inc. v. FTC*, 383 F.2d 942, 948 n.12 (D.C. Cir. 1967).