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To promote collective bargaining and to facilitate industrial peace,[1] the Railway Labor Act[2] (RLA or Act) enumerates the rights and duties of labor and management in the rail[3] and airline[4]

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1. "The federal interest that is fostered [by the Railway Labor Act] is to see that disagreement about [working] conditions does not reach the point of interfering with interstate commerce." Terminal R.R. Ass'n v. Brotherhood of R.R. Trainmen, 318 U.S. 1, 6 (1942).

2. 45 U.S.C. §§ 151-188 (1976).

3. The Act applies to any railroad carrier subject to the Interstate Commerce Act, any express company, sleeping car company, and any company directly or indirectly owned or controlled by a rail carrier that performs services in connection with the transportation, receipt, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad. *Id.* § 151 First. The Act has been held to cover state owned and operated railroads engaged in interstate commerce, *see* California v. Taylor, 353 U.S. 553 (1957); a state port authority operating a terminal railroad at a seaport, *see* International Longshoremen's Ass'n v. North Carolina Ports Auth., 463 F.2d 1 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); a package express company, *see* Itasca Lodge 2029, Ry. Clerks v. Railway Express Agency, Inc., 391 F.2d 657 (8th Cir. 1968); a public authority operating a railroad and elevators on harbor docks, *see* United Indus. Workers of the Seafarers Int'l Union v. Board of Trustees of Galveston Wharves, 351 F.2d 183 (5th Cir. 1965); and a wholly owned subsidiary of a railroad performing loading, unloading, and highway services in connection with trailer on flat car service by the railroad, if that subsidiary is not certificated as a motor carrier under the Interstate Commerce Act, *see* Holston Land Co., 5 N.M.B. 307 (1975).

4. In 1936, the RLA was amended to cover "common carrier[s] by air engaged in interstate or foreign commerce" and "carrier[s] by air transporting mail for or under contract with the United States Government." 45 U.S.C. § 181 (1976). The Act has been applied to foreign flag air carriers operating in the United States, *see* Burke v. Compania Mexicana de Aviacion, S.A., 433 F.2d 1031 (9th Cir. 1970), and to a company operating, servicing, and storing aircraft at a county airport, *see* International Aviation Serv. of N.Y., Inc., 189 N.L.R.B. 15 (1971). The evolution of commercial and operational relationships in today's transportation marketplace has resulted in the extension of carrier status by the National Mediation Board to companies supplying services to traditional rail and air carriers where the work performed by those companies traditionally has been considered to be integral to rail and air transportation. *See* Ground Serv., Inc., 8 N.M.B. No. 35 (1980); Delpro, Inc., 8 N.M.B. No. 2, *aff'd*, 8 N.M.B. No. 16 (1980); Missouri-Illinois Cent. Indus., Inc., 7 N.M.B.

industries. The Act imposes mutual obligations on both labor and management not to resort to economic action until each has complied with the Act's detailed procedures. Labor thus has a duty not to strike,[5] and management may not lock out employees or unilaterally change rates of pay, rules, or working conditions.[6]

To protect labor's rights, the courts have awarded compensatory damages to unions and employees for a carrier's violation of the Act.[7] Management, on the other hand, rarely has been awarded damages for a union's violation of the Act. During the fifty-four years since the RLA was enacted, the courts have failed to develop a clear framework for awarding damages to carriers injured by unlawful strikes, partly because the Act lacks an express remedy for damages.[8]

The deregulation of the rail and air transportation industries may result in market-induced displacements in these industries.[9]

No. 256 (1980); Boeing Airport Equipment, Inc., 7 N.M.B. No. 193 (1980).

5. "The strike, which has been described abstractly as a form of collective . . . action, may be more specifically characterized as a concerted and temporary suspension of function, designed to exert pressure upon others within the same social unit — industrial, political, or cultural . . . . From this collective nature the strike derives its power of coercion." E. HILLER, THE STRIKE: A STUDY IN COLLECTIVE ACTION 12 (1928).

6. A carrier's obligation to bargain under § 6 of the RLA extends to "rates of pay, rules, and working conditions," 45 U.S.C. § 156 (1976), as compared to the obligation of an employer under § 8(d) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(d) (1976), to bargain over "wages, hours and other terms and conditions of employment." Although similar, the scope of bargaining under the RLA has been considered more extensive than that under the NLRA. *See* Order of R.R. Telegraphers v. Chicago & Nw. Ry., 362 U.S. 330, 338 (1960); Brotherhood of R.R. Trainmen v. Akron & B.B. R.R., 385 F.2d 581, 601 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968); Weber, *Public Policy and the Scope of Collective Bargaining*, 13 LAB. L.J. 49, 68 (1962). *But see* Japan Air Lines v. IAM, 538 F.2d 46 (2d Cir. 1976); Norfolk & W. Ry. v. Brotherhood of Locomotive Eng'rs, 459 F. Supp. 136 (W.D. Va. 1978).

7. *See, e.g.*, Bangor & A. R.R. v. Brotherhood of Locomotive Firemen & Enginemen, 442 F.2d 812 (D.C. Cir. 1971) (violation of § 6, 45 U.S.C. § 156 (1976)); Burke v. Compania Mexicana De Aviacion, S.A., 433 F.2d 1031 (9th Cir. 1970); United Indus. Workers of the Seafarers Int'l Union v. Board of Trustees of Galveston Wharves, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969); Adams v. Federal Express Corp., 470 F. Supp. 1356 (W.D. Tenn. 1979) (violations of § 2 Third and Fourth, 45 U.S.C. § 152 Third, Fourth (1976)).

8. Suits to enforce collective bargaining agreement no-strike clauses negotiated under the NLRA may be brought in federal courts pursuant to § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 (1976). See text accompanying notes 145-54 *infra*. Section 301 does not apply to collective bargaining agreements negotiated under the RLA. *See, e.g.*, Brotherhood of Locomotive Firemen v. United Transp. Union, 471 F.2d 8, 9 (6th Cir. 1972); Corbin v. Pan American World Airways, Inc., 432 F. Supp. 939, 942 (N.D. Cal. 1977).

9. Labor opponents to airline deregulation characterize it as an "unsettling factor" in

These displacements may strain labor-management relations and cause labor to resort to economic pressure to preserve threatened job security. The availability of a damages remedy to carriers under the RLA thus probably will have special importance in the near future.[10]

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labor management relations, focusing on the alleged "irreparable harm" to employee job security resulting from anticipated predatory actions by stronger carriers forcing weaker carriers out of particular markets, or out of business altogether. Labor foresees massive layoffs and domination of the industry by a few giant carriers. *See* Kahn, *Airlines*, in COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE 320, 337-38 (G. Sommers ed. 1980) [hereinafter cited as Kahn]; Deregulation Impact on Labor Management Relations, [1979] 102 LAB. REL. REP. (BNA) 15-17. Employee protection provided by statute and regulation, see note 10 *infra*, is described as inadequate because the threshold for qualification is too high (reduction of 7½% in a carrier's full-time workforce within a 12 month period) and because airlines can avoid unionization and collective bargaining by transferring operations into new markets and by contracting out work. Deregulation Impact on Labor Management Relations, [1979] 102 LAB. REL. REP. (BNA) 15-17.

Deregulation of the rail industry may present similar job security issues as excess capacity in the industry is eliminated. Railroads may withdraw from particular markets by abandoning lines or increasing rates to better cover costs, thereby possibly diverting traffic to rail, truck, water, or air transport competitors. *See id. See generally Hearings Before the Senate Comm. on Commerce, Science, and Transportation on S. 1946*, 96th Cong., 1st Sess. 536-44 (1979) (statement of J.R. Snyder, Chairman, Legislative Committee, Railway Labor Executives Association). Rail labor will seek to avoid these adverse effects through hard bargaining and through traditional governmental protection schemes. Deregulation Impact on Labor Management Relations, [1979] LAB. REL. REP. (BNA) 15-17.

10. Certain aspects of economic regulation of the air transportation industry were removed from the control of the Civil Aeronautics Board by the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified at scattered sections of 49 U.S.C.). The Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, similarly extended some pricing flexibility and freedom to enter or exit particular markets to the rail industry. The Airline Deregulation Act provides for the first time a comprehensive system of earnings protection and job security for airline employees who are adversely affected by major contractions in the industry. *See* S. REP. No. 95-631, 95th Cong., 2d Sess. (1978); H.R. REP. No. 95-1211, 95th Cong., 2nd Sess. (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 3737, 3762; H.R. REP. No. 95-1779, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 3733. *See also* 44 Fed. Reg. 19,146 (1979) (proposed regulations). The Act passed despite opposition from organized labor. Kahn, *supra* note 9, at 337-38. Employee protection has been commonplace in the railroad industry since 1936 and has been provided for by the Civil Aeronautics Board in airline consolidations from time to time. *See generally* Davis, Sherwood & Jones, *An Estimate of Labor Protection Cost in Selected Railway Consolidations*, 43 ICC PRAC. J. 56 (1975); Lieb, *A Review of the Federal Role in Transportation Labor Protection*, 45 ICC PRAC. J. 333 (1978); Murray, *A New Look at Rail Employee Merger Protection, Norfolk & W. R.R. v. Nemitz: An Assessment*, 24 CASE W.L. REV. 103 (1972); Ris, *Government Protection of Transportation Employees: Sound Policy or Costly Precedent?*, 44 J. AIR. L. & COM. 509 (1979); Comment, *Protection for Employees Adversely Affected by Railway Mergers: Norfolk and Western Railway Co. v. Nemitz*, 13 ARIZ. L. REV. 703 (1971).

For a discussion of the volatility of rail and air industrial relations, see Kahn, *supra* note 9. *See generally* H. LEVINSON, C. REHMUS, J. GOLDBERG & M. KAHN, COLLECTIVE BAR-

This Article examines the courts' enforcement of the no-strike duties of the RLA and concludes that a damages remedy should be implied in the Act to ensure remedial balance between the carrier's no-strike expectation and labor's reciprocal expectation of stable working conditions.[11] An application of the judicially developed test for implying a damages remedy for violation of a federal statute to the Act's no-strike provisions demonstrates the propriety of allowing damages to carriers under the Act. By fostering mutual responsibility in labor-management relations, and thereby promoting the goals of collective bargaining legislation, a damages remedy is consistent with national labor policy. If a damages remedy is not available to carriers, the statutory right to uninterrupted operations, a cornerstone of the congressional scheme, may prove to be illusory.

The Railway Labor Act's No-Strike Obligation

A major purpose of the RLA is to provide a statutory procedure to prevent strikes.[12] The "General Purposes" of the Act in-

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GAINING & TECHNOLOGICAL CHANGE IN AMERICAN TRANSPORTATION (1971).

11. This Article articulates an analytical framework for implying a damages remedy on behalf of rail and air carriers but does not discuss the standards by which labor union liability is to be measured, either with respect to actions by union officers or agents, *see* Ramsey v. UMW, 401 U.S. 302, 309 (1970); UMW v. Gibbs, 383 U.S. 715, 741 (1966); United Bhd. of Carpenters v. United States, 330 U.S. 395, 401 n.4 (1947); with respect to the international, regional, or local nature of the activity, *see* Carbon Fuel Co. v. UMW, 444 U.S. 212, 217-18 (1979); or with respect to the mass action of its members, *see* United States Steel Corp. v. UMW, 598 F.2d 363 (5th Cir. 1979); Carbon Fuel Co. v. UMW, 582 F.2d 1346 (4th Cir. 1978), *aff'd*, 444 U.S. 212 (1979); Republic Steel Corp. v. UMW, 570 F.2d 467 (3d Cir. 1978); Wagner Elec. Corp. v. Local 1104, 496 F.2d 954 (8th Cir. 1974). Also beyond the scope of this Article is whether damages may be recovered from individual employees, an issue of some present controversy under the LMRA, which the Supreme Court may soon review. *See* Complete Auto Transit, Inc. v. Reis, 614 F.2d 1110 (6th Cir.), *cert. granted*, 49 U.S.L.W. 3263 (1980). *See also* Certain-Teed Corp. v. United Steelworkers, Local 37A, 484 F. Supp. 726 (M.D. Pa. 1980); Alloy Cast Steel Co. v. United Steelworkers, 429 F. Supp. 445 (N.D. Ohio 1977).

12. *See* Texas & N.O. R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548, 565 (1930). *See also* Detroit & T.S. R.R. v. United Transp. Union, 396 U.S. 142, 148 n.13 (1969).

Congress described the no-strike obligation as the employer's chief incentive to enter into, and primary advantage to be gained from, a collective bargaining agreement. *See* S. REP. No. 105, 80th Cong., 1st Sess. 16 (1947) (accompanying the Labor Management Relations Act of 1947). *Accord*, Eazor Express, Inc. v. International Bhd. of Teamsters, 520 F.2d 951, 960 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1976); Spelfogel, *Enforcement of No Strike Clause by Injunction, Damage Actions and Discipline*, 7 B.C. INDUS. & COM. L. REV. 239 (1966). According to Professor Feller, although the right to uninterrupted operation is indeed important, it is not the only important benefit gained by an employer through a

clude the following goals:

> (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.[13]

To prevent strikes by securing the voluntary resolution of disputes, the Act imposes various reciprocal obligations upon rail and air carriers, their employees, and the employees' representatives. The first obligation, imposed by section 2 First of the Act, requires labor and management to "exert every reasonable effort to make and maintain agreements . . . in order to avoid any interruption to commerce or to the operation of any carrier engaged therein."[14] The Supreme Court has construed this obligation to impose a no-strike duty on labor until all efforts at settlement have been exhausted.[15]

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collective bargaining agreement. The employer also gains a system for the formulation and administration of rules to govern the business enterprise, which Feller describes as a prerequisite for the management of an industrial concern. *See* Feller, *A General Theory of the Collective Bargaining Agreement,* 61 CALIF. L. REV. 663, 764-71 (1973) [hereinafter cited as Feller]. This observation is particularly appropriate in the rail and air transportation industries because the no-strike duty, the obligation that management and labor "exert every reasonable effort to make and maintain agreements," and the mechanism for the interpretation or application of agreements, including governmentally funded arbitration, already are mandated expressly in the Act. See notes 24-29 *infra.* For a theoretical discussion of the role of rules in managing an industrial organization, see J. DUNLOP, INDUSTRIAL RELATIONS SYSTEMS (1958).

13. 45 U.S.C. § 151(a) (1976).

14. *Id.* § 152 First.

15. *See* Detroit & T.S. R.R. v. United Transp. Union, 396 U.S. 142, 151-52 (1969). This duty, characterized by the Court as "the heart of the Railway Labor Act," Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 377-78 (1969), is similar to the obligation under the NLRA to bargain in good faith, *see* 29 U.S.C. § 158(d) (1976), but has been construed as imposing a *higher* standard than merely good faith bargaining by management and labor. Japan Air Lines v. IAM, 389 F. Supp. 27, 34 (S.D.N.Y. 1975), *aff'd,* 538 F.2d 46 (2d Cir. 1976). The RLA does not compel agreement between labor and management, but "does command those preliminary steps without which no agreement can be reached." Virginian Ry. v. System Federation No. 40, 300 U.S. 515, 548 (1937). Compliance with § 2 First is measured by the "whole of the party's conduct at the bargaining table," Japan Air Lines v. IAM, 389 F. Supp. at 34, and may include evaluation of the historical experience and context of collective bargaining between the parties. Atlantic C. R.R. v. Brotherhood of R.R. Trainmen, 262 F. Supp. 177 (D.D.C.), *aff'd in part, rev'd in part,* 383 F.2d 255 (D.C. Cir. 1967), *cert. denied,* 389 U.S. 1047 (1968). Violations of § 2 First include maintaining an abrasive bargaining posture, *see* Erie Lackawanna Ry. v. Lighter Captains, Local 996, 338 F. Supp. 955 (D.N.J. 1972); discussion of procedural rather than substantive

The general obligation imposed by section 2 First to exert reasonable efforts to make and maintain agreements is made specific by the Act's provisions dealing with the making and administering of agreements. First, a no-strike obligation arises out of the major dispute procedures of the Act, under which agreements governing rates of pay, rules, and working conditions are negotiated.[16] Economic action, such as a strike, is unlawful until those procedures of the Act calling for negotiation, mediation, voluntary arbitration, and possible presidential intervention through an Emergency Board, have been exhausted.[17] Although these procedures have been characterized as "almost interminable,"[18] they "are purposely long and drawn out, based on the hope that reason and practical

issues at the bargaining table, *see* Atlanta & W.P. R.R. v. United Transp. Union, 307 F. Supp. 1205 (N.D. Ga. 1970), *aff'd*, 439 F.2d 73 (5th Cir.), *cert. denied*, 404 U.S. 825 (1971); and utilization of union policies to disrupt negotiations, *see* Piedmont Aviation, Inc. v. Air Line Pilots Ass'n, 416 F.2d 633 (4th Cir. 1969), *cert. denied*, 397 U.S. 926 (1970).

16. 45 U.S.C. §§ 152, 155, 156, 157, 160 (1976).

17. *See* Detroit & T.S. R.R. v. United Transp. Union, 396 U.S. 142, 151-52 (1969). The major dispute procedures of the RLA are well summarized in Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378 (1969): "A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10." Maintenance of the "status quo" requires that neither labor nor management make any changes in the current rates of pay, rules, or working conditions. The carrier may not unilaterally promulgate new rates of pay, work rules, or other conditions of employment. Labor may not engage in any economic action in support of its bargaining goals, including strikes. *Id.*

In summarizing the industrial relations theory of the major dispute procedures, the Supreme Court described the RLA's status quo requirement as "central to its design. . . . Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or a lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce." Detroit & T.S. R.R. v. United Transp. Union, 396 U.S. 142, 150 (1969).

18. Detroit & T.S. R.R. v. United Transp. Union, 396 U.S. 142, 149 (1969).

considerations will provide in time an agreement that resolves the dispute."[19] These procedures, however, are intended only to preserve the status quo until negotiation has failed. Resort to economic warfare thus is postponed, not eliminated.[20]

The duty imposed by section 2 First to exert every reasonable effort to resolve disputes and avoid interruptions to a carrier's operation also is made specific in the procedures of section 2 Ninth[21] for designation of representatives by the National Mediation Board. These procedures are exclusive; economic action to secure recognition or to organize employees is proscribed by the Act[22] regardless of whether the Mediation Board's procedures have been invoked.[23]

A no-strike obligation also arises under section 3 of the Act, which requires compulsory adjustment or arbitration of all grievances or other minor disputes arising out of the interpretation or application of agreements.[24] "Minor disputes" generally are considered to be controversies over the meaning of an existing collective bargaining agreement or employment practice in a particular fact

19. Brotherhood of Ry. Clerks v. Florida E. Coast Ry., 384 U.S. 238, 246 (1966). See note 17 *supra*.

20. *See* Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 379 (1969). *See also* Brotherhood of Locomotive Eng'rs v. Baltimore & O. R.R., 372 U.S. 284 (1963) (the carrier may make unilateral changes after exhaustion of the Act's major dispute procedures). The rule of *Baltimore* is not unlimited, *see* Brotherhood of Ry. Clerks v. Florida E. Coast Ry., 384 U.S. 238 (1966), although the scope of self-help allowed management or labor under the Act is unclear. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 391 (1969).

During the 1950's and 1960's, commentators criticized the procedures of the RLA as insufficient to accomplish industrial peace, in large part because parties had failed to negotiate seriously until the Presidential Emergency Board issued its report. Various proposals, including mandatory interest arbitration, were suggested. *See generally* COMMITTEE FOR ECONOMIC DEVELOPMENT, THE PUBLIC INTEREST IN NATIONAL LABOR POLICY 104-06 (1961); Curtin, *National Emergency Disputes Legislation: Its Needs and Its Prospects in the Transportation Industries*, 55 GEO. L.J. 786 (1967); Wisehart, *Transportation Strike Control Legislation: A Congressional Challenge*, 66 MICH. L. REV. 1697 (1968); Emergency Public Interest Protection Act of 1971, Message from the President, 117 CONG. REC. 1536 (Feb. 3, 1971). Although the Act remained unchanged, the 1970's were relatively free from major interruptions to commerce. In addition, recent Presidential Emergency Boards have taken an activist role in negotiating settlements between the parties, after issuing recommendations. *See* ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD (1978); ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD (1977).

21. 45 U.S.C. § 152 Ninth (1976).

22. *See* Summit Airlines, Inc. v. Teamsters Local 295, 628 F.2d 787, 795 (2d Cir. 1980).

23. *Id.*

24. 45 U.S.C. § 153 (1976). *See* Brotherhood of R.R. Trainmen v. Chicago River & I. R.R., 353 U.S. 30, 39 (1957).

situation. If labor and management fail to resolve these disputes, in the rail industry they must be submitted to the National Railroad Adjustment Board (NRAB) for "final and binding determination;"[25] these disputes are resolved by system or regional boards of adjustment in the airline industry.[26] In contrast, "major disputes" involve attempts to secure new conditions of employment through the collective bargaining process.[27] At first, the courts held that

25. Section 3 First of the RLA, 45 U.S.C. § 153 First (i) (1976), provides that "minor disputes" are to be handled in the ordinary course up to and including the chief operating officer assigned to review and resolve the dispute. If the dispute is not successfully resolved, it may be submitted by the employee, his or her representative, or the rail carrier to the NRAB for a "final and binding determination." *Id.* § 153 First (m). If the appropriate division of the NRAB is unable to adjust the dispute, it is submitted to a neutral "referee" selected by the division or the National Mediation Board. *Id.* § 153 First (k), (*l*), (n).

The NRAB was hailed as a great advance in the resolution of railroad labor disputes. *See generally* Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency,* 46 YALE L.J. 567 (1937). The NRAB docket became so crowded in later years that, in 1966, Congress amended § 3 Second to establish "public law boards" to relieve the congestion at the NRAB. *See* Pub. L. No. 89-456, §§ 1-2, 80 Stat. 208. The two bodies are virtually identical in jurisdiction as public law boards are empowered "to resolve disputes otherwise referable to the [NRAB]." 45 U.S.C. § 153 Second (1976).

In addition to being statutorily required, grievance arbitration in the rail industry is unique in that the costs of arbitration are underwritten by the United States Government, a factor that some commentators contend has resulted in overuse of arbitration and a consequent lack of discipline on the part of both labor and management in the grievance adjustment process. *See* THE RAILWAY LABOR ACT AT 50 ch. IX (C. Rehmus ed. 1976); Northrup, *The Railway Labor Act: A Critical Reappraisal,* 25 INDUS. & LAB. REL. REV. 3, 21-22 (1971).

26. Although § 3 of the RLA does not extend to the airline industry, the courts have construed the 1936 amendment of the Act, which provides for system or regional boards of adjustment for that industry, to prescribe mandatory arbitration of minor disputes. *See* IAM v. Central Airlines, Inc., 372 U.S. 682 (1963). For a discussion of minor dispute adjustment in the airline industry, see Hill, *Looking Back at Airline Grievance Procedures and System Boards: A Critical Appraisal,* 35 J. AIR L. & COM. 338 (1969); Kahn, *Airline Grievance Procedures: Some Observations and Questions,* 35 J. AIR L. & COM. 313 (1969); Schwartz, *Grievance and Adjustment Board Procedures in the Airline Industry as a Reasonable Alternative to Strikes,* 35 J. AIR L. & COM. 324 (1969).

27. The Supreme Court has distinguished the two types of disputes as follows: "The first [major disputes] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past. The second class [minor disputes], however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal inju-

there was an implied duty not to strike only while a minor dispute was pending before the NRAB.[28] Later, some courts extended the no-strike duty implied in section 3 to prevent strikes over any minor dispute, regardless of whether it had been submitted for adjustment or arbitration,[29] or whether an award had been issued.[30]

The courts have yet to define the lawful boundaries of other forms of economic action such as sympathy strikes, area standards picketing, and secondary pressure. Assessing the propriety of such conduct under the RLA requires balancing the Act's interest in continuous transportation services with the employees' right to secure improved working conditions through self-help.[31]

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ries. In either case the claim is to rights accrued, not merely to have new ones created for the future." Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 722-24 (1945). *See also* McGuinn, *Injunctive Powers of the Federal Courts in Cases Involving Disputes Under the Railway Labor Act,* 50 GEO. L.J. 46 (1961).

28. *See* Brotherhood of R.R. Trainmen v. Chicago River & I. R.R., 353 U.S. 30 (1957).

29. *See, e.g.,* Manion v. Kansas City Terminal Ry., 353 U.S. 927 (1957); Itasca Lodge 2029 Ry. Clerks v. Railway Express Agency, 391 F.2d 657 (8th Cir. 1968); Brotherhood of R.R. Carmen v. Chicago & Nw. Ry., 354 F.2d 786 (8th Cir. 1965); Louisville & N. R.R. v. Brown, 252 F.2d 149 (5th Cir.), *cert. denied,* 356 U.S. 949 (1958). The Supreme Court's decision in *Chicago River,* implying a no-strike obligation in a statutory mandatory arbitration provision, was extended in 1962 to matters governed by the NLRA when the Court implied a no-strike obligation in a collective bargaining agreement arbitration provision, enforceable by a suit for damages for breach of contract under § 301 of the LMRA, 29 U.S.C. § 185 (1976), Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962), and in 1974 to a corrollary mandatory arbitration requirement in a collective bargaining agreement no-strike clause. Gateway Coal v. UMW, 414 U.S. 368 (1974).

The Supreme Court has accepted the proposition that arbitration is the *quid pro quo* for labor's relinquishment of the right to strike, rather than merely an alternative form of litigation. Feller, *supra* note 12, at 714 n.252. This form of contractual consideration also was present in 1934 when labor and management negotiated the amendment of the RLA to provide for compulsory adjustment of minor disputes under § 3. *See* Brotherhood of R.R. Trainmen v. Chicago River & I. R.R., 353 U.S. 30, 34-39 (1957).

30. *See* Brotherhood of Locomotive Eng'rs v. Louisville & N. R.R., 373 U.S. 33 (1963).

31. For a discussion of sympathy strikes, compare Trans Int'l Airlines, Inc. v. International Bhd. of Teamsters, ___ F.2d ___ (9th Cir. 1980), *cert. denied,* 49 U.S.L.W. 3515 (1981), with Northwest Airlines, Inc. v. Air Line Pilots Ass'n Int'l, 442 F.2d 251 (8th Cir. 1971), *cert. denied,* 404 U.S. 871 (1971); Northwest Airlines, Inc. v. International Ass'n of Machinists, 442 F.2d 244 (8th Cir. 1970); Seaboard World Airlines, Inc. v. Transport Workers, 425 F.2d 1086 (1970), *reaff'd,* 443 F.2d 437 (2d Cir. 1971); and Chicago Transp. Co. v. Brotherhood of Ry. Clerks, 99 L.R.R.M. 3072 (N.D. Ill. 1978). For a discussion of secondary pressure, see Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969); Western M. R.R. v. System Bd. of Adjustment, 465 F. Supp. 963 (D. Md. 1979); Southern Ry. Co. v. Brotherhood of Ry. Clerks, 458 F. Supp. 1189 (D.S.C. 1978); Terminal R.R. Ass'n v. Brotherhood of Ry. Clerks, 458 F. Supp. 100 (E.D. Mo. 1978); Chicago Transp. Co. v. Brotherhood of Ry. Clerks, 99 L.R.R.M. 3072 (N.D. Ill. 1978); Consolidated Rail Corp. v. Brotherhood of Ry. Clerks, 99 L.R.R.M. 2607 (W.D.N.Y. 1978); Alton & S. Ry. v. Brotherhood of Ry. Clerks, 99 L.R.R.M. 2323 (D.D.C. 1978). All of these cases involve accommodat-

Enforcement of the No-Strike Obligation

The RLA, with a few minor exceptions,[32] does not provide an express right of action to enforce its substantive provisions. The courts thus were compelled to imply a private right of action on behalf of labor and management to enforce the Act's duties and obligations.[33] Once the courts established this implied right of ac-

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ing the anti-injunction provisions of the Norris-LaGuardia Act with the RLA dispute resolution procedures and policies. For further discussion of this accommodation principle, see note 52 *infra*.

32. Section 2 Tenth, 45 U.S.C. § 152 Tenth (1976), provides for criminal enforcement of a willful violation of § 2 Third, Fourth, Fifth, Seventh, or Eighth. Section 3 First (q), *id.* § 153 First (q), provides for enforcement of Adjustment Board awards. Section 7 Third (h), *id.* § 157 Third (h), prescribes enforcement of the subpoena power of interest arbitration boards. Section 9, *id.* § 159, provides for enforcement of interest arbitration awards.

33. The first case to present this issue to the Supreme Court was Texas & N.O. R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548, 565 (1930). Although the Court did not clothe its discussion of judicial enforceability of RLA duties in terms of a private right of action, it observed later that that is what it meant. *See* Davis v. Passman, 442 U.S. 228, 239 n.17 (1979); Cannon v. University of Chicago, 441 U.S. 677, 690-93 & n.13 (1979). The Supreme Court may have misconstrued the procedural posture of *Texas & New Orleans Railroad Co.* when it referred to its action in that case as implying a private right of action. *Texas & New Orleans Railroad Co.* was a suit in equity, brought before the merger of law and equity in the federal courts. See note 39 *infra*. The concept of a right of action founded upon a statutory violation has its origin in the common law rather than in equity. *See* Texas & P. Ry. v. Rigsby, 241 U.S. 33, 39 (1916). As will be discussed, the merger of law and equity gives such distinctions limited utility.

In Cort v. Ash, 422 U.S. 66 (1975), the Supreme Court concluded that several factors were relevant in determining whether a private right of action is implied in a federal statute which fails expressly to provide for one: "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law . . . ." *Id.* at 78 (citations omitted). The Supreme Court recently refined these criteria. In Cannon v. University of Chicago, 441 U.S. 677 (1979), the Court concluded that whether an implied private right of action exists is a matter of statutory construction. Relying on a number of RLA cases, the Court concluded that the "right" or "duty" creating language of the statute has been the *most accurate* indicator of whether a private right of action should be implied. *Id.* at 690-93 & n.13. A private right of action will be implied where the language of the statute confers a right directly on a class of persons that includes the plaintiff in the case. *Accord,* Touche Ross & Co. v. Redington, 442 U.S. 560, 568-69 (1979). Furthermore, where a private right of action is necessary, or at least helpful to accomplishing the statutory purpose, the Supreme Court will be "decidedly receptive" to its implication under the statute. 441 U.S. at 703.

Frequently, federal statutes will not be clear on their face regarding the availability of private rights of action, and the courts must look beyond the mere language of the statute. In those cases, the Supreme Court has held that congressional intent is the dispositive inquiry. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979). If it is clear

tion, they had to determine what remedies should be available to enforce that right.[34] As the Court stated in *Davis v. Passman*,[35] "the question of whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive."[36]

The courts were first presented with the question of what remedies should be available to enforce the Act quite soon after its enactment. In *Texas & New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks*,[37] the carrier argued that the Act provided no penalties for violating section 2 Third, which prohibits an employer from interfering with the employee's selection of representatives,[38] and therefore that the provision was unenforceable. The Court summarily dismissed this contention, reasoning:

> The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards and the prohibition of change in conditions pending the investigation and report of an emergency board, but in each instance *a legal obligation is created and the statutory re-*

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that Congress did not intend to create a private cause of action, the *Cort v. Ash* factors will not be applied. *Id. Accord,* Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979).

34. "The law of judicial remedies concerns itself with the nature and scope of relief to be given a plaintiff once he has followed appropriate procedures in court and has established a substantive right. The law of remedies is thus sharply distinguished from the law of substance and procedure." D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 1.1 (1973) [hereinafter cited as DOBBS].

35. 442 U.S. 228 (1979).

36. *Id.* at 239. Justice Brennan described the separate inquiries involved in this determination: "Thus it may be said that *jurisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case; . . . *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction; . . . *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and *relief* is a question of the various remedies a federal court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the 'preconditions' for such equitable remedies." *Id.* at 239-40 n.18 (citations omitted).

37. 281 U.S. 548 (1930).

38. 45 U.S.C. § 152 Third (1976).

quirements are susceptible of enforcement by proceedings appropriate to each. The same is true of the prohibition of interference or coercion in connection with the choice of representatives. *The right is created and the remedy exists.*[39]

The remedial scheme by which the judiciary enforces the RLA's no-strike duties includes the power to issue injunctions against labor,[40] notwithstanding the prohibitions of the Norris-LaGuardia Act.[41] The judiciary's desire for remedial flexibility also

39. 281 U.S. at 569-70 (emphasis added). The "arbitral awards" to which the Supreme Court was referring are the result of voluntary interest arbitration under § 7 of the RLA, 45 U.S.C. § 157 (1976), enforceable in the courts pursuant to §§ 8 and 9, *id.* §§ 158-159, as opposed to grievance arbitration under § 3. The judicial enforceability of grievance arbitration awards under § 3 was not added to the Act until 1934, *see* Brotherhood of R.R. Trainmen v. Chicago River & I. R.R., 353 U.S. 30 (1957), and therefore was not part of the Supreme Court's consideration of the case in *Texas & New Orleans Railroad Co.* in 1930. The history of interest arbitration under the Act is detailed in THE RAILWAY LABOR ACT AT 50, ch. V (C. Rehmus ed. 1976). For a discussion of the enforceability of interest arbitration awards under § 7, see Brotherhood of R.R. Trainmen v. Akron & B.B. R.R., 385 F.2d 581 (D.C. Cir. 1967), *cert. denied,* 390 U.S. 923 (1968); Brotherhood of R.R. Trainmen v. Chicago, M., St. P. & Pac. R.R., 380 F.2d 605 (D.C. Cir.), *cert. denied,* 389 U.S. 298 (1967); Brotherhood of R.R. Trainmen v. Terminal R.R. Ass'n of St. Louis, 380 F.2d 584 (D.C. Cir.), *cert. denied,* 389 U.S. 940 (1967); Rutland Ry. v. Brotherhood of Locomotive Eng'rs, 307 F.2d 21 (2d Cir. 1962), *cert. denied,* 372 U.S. 954 (1963); Order of Railway Conductors v. Clinchfield R.R., 278 F. Supp. 322 (E.D. Tenn. 1967), *rev'd on other grounds,* 407 F.2d 985 (6th Cir.), *cert. denied,* 396 U.S. 841 (1969).

Texas & New Orleans Railroad Co. arose prior to the merger of law and equity in the federal courts, and the relief sought and awarded therein was limited to an injunction. The question of damages, a remedy traditionally available only "at law," was not an issue. *See generally* DOBBS, *supra* note 34. Nevertheless, the Court employed broad language embracing all remedies necessary to enforce RLA obligations and did not distinguish between remedies for actions at law or equity.

40. With respect to § 2 First and the major dispute resolution procedures of §§ 2, 5, 6, and 10, see Chicago & Nw. Transp. Co. v. United Transp. Union, 402 U.S. 570, 573 (1971). See also Japan Air Lines Co. v. IAM, 389 F. Supp. 27 (S.D.N.Y. 1975), *aff'd,* 538 F.2d 46 (2d Cir. 1976). With respect to minor disputes, see Railroad Trainmen v. Chicago River & I. R.R., 353 U.S. 30, 33 (1957). See also cases cited at note 29 *supra.* With respect to recognitional disputes, see Summit Airlines, Inc. v. Teamsters Local 295, 628 F.2d 787, 795 (2d Cir. 1980).

41. 29 U.S.C. §§ 101-115 (1976). The Norris-LaGuardia Act generally limits the power of a federal court to issue an injunction in any case arising out of a labor dispute as defined by that Act. It does not, however, deprive the federal courts of jurisdiction to enjoin noncompliance with the various mandates of the RLA. The two Acts must be harmonized because each was adopted as part of a pattern of national labor legislation. IAM v. Street, 367 U.S. 740, 772-73 (1961). *See also* Chicago & Nw. Transp. Co. v. United Transp. Union, 402 U.S. 570, 581-82 (1971). If no RLA duty has been breached, however, the Norris-LaGuardia Act may preclude injunctive relief. *Compare* Federal Express Corp. v. Teamsters Local 85, 617 F.2d 524 (9th Cir. 1980), *with* Seaboard World Airlines, Inc. v. Transport Workers Union, 425 F.2d 1086 (2d Cir. 1970), *reaff'd,* 443 F.2d 437 (2d Cir. 1971). For a discussion of the accommodation principle and the policy of the two acts, see Perritt, *Am I My Brother's*

has resulted in damages awards to employees when, for example, the carrier denies representation rights under section 2 Third and Fourth[42] or union shop protection under section 2 Eleventh.[43]

Damages also have been awarded against unions in cases in which employees seek redress for a union's violation of its duty of fair representation. In both *Steele v. Louisville & Nashville Railroad Co.*[44] and *Turnstall v. Locomotive Firemen, Ocean Lodge 76*,[45] the Supreme Court held that union members whose interests had not been represented fairly by their unions could seek the "usual judicial remedies of injunction and award of damages, where appropriate."[46]

Little precedent exists, however, to support recovery of damages by carriers against unions. In *Brotherhood of Railroad Trainmen, Enterprise Lodge 27 v. Toledo, Peoria & Western Railroad Co.*,[47] the Supreme Court refused to uphold a district court's injunction against a strike because the major dispute resolution procedures of the Act had been exhausted.[48] The Court, however, rejected the carrier's contention that failure to approve injunctive relief left the carrier without remedy, noting in dicta that "[o]ther means of protection remain. Suits for recovery of damages still may be brought in the federal courts, when federal jurisdiction is shown to exist."[49] The Court also seemed implicitly to recognize

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Keeper? Secondary Picketing Under the Norris-LaGuardia Act, 68 GEO. L.J. 1191 (1980).

42. 45 U.S.C. § 152 Third, Fourth (1976). *See* Burke v. Compania Mexicana de Aviacion, S.A., 433 F.2d 1031 (9th Cir. 1970); Brady v. Trans World Airlines, Inc., 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969); Adams v. Federal Express Corp., 470 F. Supp. 1356 (W.D. Tenn. 1979).

43. 45 U.S.C. § 152 Eleventh (1976). *See* Brady v. Trans World Airlines, Inc., 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969). Section 2 Eleventh permits union shop provisions in collective agreements under the RLA whereby all employees in a craft or class must become members of the organization certified to represent that craft or class. The section limits the remedies for the certified representatives to discharge from the carrier's employ only for employee nonpayment of dues. *See also* Burke v. Compania Mexicana de Aviacion, S.A., 433 F.2d 1031, 1034 (9th Cir. 1970); Brady v. Trans World Airlines, Inc., 244 F. Supp. 820, 822-23 (D. Del. 1965), *aff'd*, 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969). *Accord*, Adams v. Federal Express Corp., 470 F. Supp. 1356, 1361-62 (W.D. Tenn. 1979).

44. 323 U.S. 192 (1944).

45. 323 U.S. 210 (1944).

46. Steele, 323 U.S. at 207. *See also* Turnstall, 323 U.S. at 213-14.

47. 321 U.S. 50, 63 (1944).

48. *Id.* at 63-65. The Norris-LaGuardia Act barred injunctive relief because the RLA procedures were not being enforced by the Court.

49. *Id.* at 63.

the availability of damages for the carrier to remedy a violation of the minor dispute no-strike duty under section 3 of the Act in *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen,*[50] which upheld a judgment for damages entered by the district court judge against a labor union for a strike.[51] Only a venue issue was appealed to the Supreme Court, and, therefore, the Court did not address squarely whether damages was an appropriate remedy under the Act. The Court did discuss the background of the case prior to proceeding to the venue question, however, and therefore, it is likely that the Court was aware that the lower court found the strike illegal and that damages had been awarded based on the carrier's lost traffic. The Court's failure to comment on the lower court's award of damages thus arguably may be considered an implicit acceptance of the principle that the courts should enforce obligations of the RLA with whatever means are appropriate on a case by case basis.[52]

The United States Court of Appeals for the Fifth Circuit was the first court to address specifically whether a carrier may secure damages for a strike in violation of sections 2 First and 3 of the Act. In *Louisville & Nashville Railroad Co. v. Brown,*[53] the court refused to allow the carrier to recover damages after a cursory review of the Act's express terms:

> Where Congress sought to set up a right of action for damages for breach of duty in other management labor situations, it enacted a statute expressly spelling out the nature of the right of action. See 29 U.S.C.A. Section 187, and so also in creating a right of action in the civil rights field. 42 U.S.C.A. §§ 1983, 1985, 1986. We do not think that Congress here intended to or did create a new statutory right of action for damages [under the RLA].[54]

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50. 387 U.S. 556 (1967).

51. *See* 58 L.R.R.M. 2568 (D. Colo. 1966).

52. See text accompanying notes 32-46 *supra.*

53. 252 F.2d 149 (5th Cir.), *cert. denied,* 356 U.S. 949 (1958).

54. 252 F.2d at 155. The court of appeals did permit tort claims against individual employees who participated in the unlawful strike to proceed on two state law theories—inducement of breach of contract and conspiracy to prevent the employer from carrying on its lawful business. *Id.* at 155-56. The current vitality of *Brown* is suspect in view of recent cases preventing the bypass of the minor dispute procedures of the RLA by filing complaints sounding in tort. *See* Andrews v. Louisville & N. R.R., 406 U.S. 320 (1972); Magnuson v. Burlington N., Inc., 413 F. Supp. 870 (D. Mont. 1976), *aff'd,* 576 F.2d 1367 (9th Cir. 1977), *cert. denied,* 439 U.S. 930 (1978). Also, state courts must apply federal law when considering cases arising under the RLA. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380-82 (1969).

Following *Brown* under the principle of stare decisis, a Florida district court in *National Airlines, Inc. v. Airline Pilots Association, International*,[55] held that an award of compensatory damages was beyond "the permissible scope of Section 2 First remedies."[56] The court reasoned:

> [T]o create a right of action in favor of an employer against a union and its collective bargaining representatives for the losses the former incurs in the course of the collective bargaining process, would, in effect, give the employer a weapon with which to keep the unions and their agents "in line."[57]

For a number of compelling reasons, the Fifth Circuit's refusal to allow damages to carriers for union violation of sections 2 First and 3 does not withstand close scrutiny. First, the court ignored the implication of a damages remedy for breach of the RLA's duty of fair representation, notwithstanding the lack of such a remedy in the statute.[58] Second, a major underpinning of the rationale set forth in *Brown* has been eliminated. The court's reliance upon the analogous unavailability of damages in the civil rights context has been largely undercut, if not eliminated, by the Supreme Court's later holding that all remedies are available in the courts to redress deprivation of civil rights.[59] Third, the court's reliance on the absence of any provision in the RLA correlative to section 303 of the LMRA,[60] which authorizes employer damages for injuries caused by secondary pressure, is misplaced. The court ignored section 301 of the LMRA which grants jurisdiction in the state and the federal courts to enforce collective bargaining agreements negotiated pursuant to the NLRA. Although section 301 does not specify appro-

55. 431 F. Supp. 53 (S.D. Fla. 1976).

56. *Id.* at 54.

57. *Id.* The district court was of the opinion that the policy considerations underlying *Brown* continued to be valid. The volatility of labor-management relations made it inequitable for management to take advantage of labor by collecting damages for unlawful conduct. The district court opinion is inconsistent with national labor policy, however, because that policy favors mutual responsibility at the bargaining table. See text accompanying notes 138-40 *infra*.

58. See notes 32-33 & accompanying text *supra*.

59. *See* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). For a discussion of *Sullivan*, see text accompanying notes 83, 85 *infra*.

60. 29 U.S.C. § 187 (1976). Section 303 authorizes suits for the recovery of damages to be brought in federal courts for injuries sustained as a result of secondary pressure unlawful under § 8(b)(4) of the NLRA. For a general discussion of secondary pressure and its regulation by national labor laws, see Perritt, *Am I My Brother's Keeper? Secondary Picketing Under the Norris-LaGuardia Act*, 68 GEO. L.J. 1191 (1980).

priate remedies in such actions, the courts have implied the availability of all remedies, including damages, necessary to enforce the section. The rationale for doing so is substantially similar to that used to imply all such remedies to enforce the RLA.[61] Finally, one of the premises of *Brown* and *National Airlines* was that to allow a new type of recovery might upset a perceived fragile economic balance between labor and management.[62] As labor has grown stronger, however, particularly in the rail and airline industries, a new damages remedy might in fact restore an economic balance between the two. Thus, the only cases to consider expressly the damages remedy, *Brown* and its offspring, *National Airlines,* now may be of dubious analytical value. The cases that seem to support the availability of damages did not discuss the basis for that remedy. A framework for the award of damages for breach of the Railway Labor Act's no-strike duty has yet to be constructed.

Mutual Obligations as the Basis for Mutual Remedies

In contrast to the result in *Brown,* the Fifth Circuit has had little trouble implying damages under the RLA in favor of unions and their members. In *United Industrial Workers of the Seafarers International Union v. Board of Trustees of Galveston Wharves,*[63] the court awarded damages in the form of back pay because the carrier changed the status quo prior to having exhausted the major dispute procedures of the Act. The Fifth Circuit reasoned that such a remedy was the only "fair and practicable" remedy to return the employees to the same position that they would have been in if the carrier had not violated the Act.[64] The District of Colum-

61. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957). See also notes 147-50 & accompanying text *infra.*

62. 431 F. Supp. at 54 (discussing the policy considerations underlying *Brown).*

63. 400 F.2d 320 (5th Cir. 1968), *cert. denied,* 395 U.S. 905 (1969).

64. 400 F.2d at 326. *Accord,* Mungin v. Florida E. Coast Ry., 416 F.2d 1169 (5th Cir. 1968). *See also* United Transp. Union v. Florida E. Coast Ry., 586 F.2d 520 (5th Cir. 1978). The court in *United Transportation* granted the defendant's motion for summary judgment in an action for damages and injunctive relief brought against the carrier for an alleged breach of a collective bargaining agreement. Despite holding for the defendant, the court in dicta implied that *Galveston Wharves* was a sound decision, stating: *"Galveston Wharves* did not create a 'cause of action.' It merely expanded the scope of relief which could be awarded for violations of the Act. . . . While prior case law made it appear unlikely that money damages could be recovered, it did not preclude a prayer for money damages, nor bar any other relief plaintiff may have been entitled to. If the contrary were so, the *Galveston*

bia Circuit also has upheld a damages remedy for unlawful changes of the status quo by the carrier. In *Bangor and Aroostook Railroad v. Brotherhood of Locomotive Firemen and Enginemen,*[65] the court, without discussing *Brown,* awarded damages to a labor union in the form of lost dues for the carrier's change in conditions of employment prior to exhausting the major dispute procedures of the RLA.[66]

Ironically, in sidestepping the broad language of *Brown,* the Fifth Circuit advanced the argument for implying a damages remedy for the carrier.[67] Although in *Galveston Wharves* and *Bangor and Aroostook Railroad,* damages were recovered by employees or labor unions, rather than carriers, the awards were based on the carrier's duties imposed by the RLA, duties which are reciprocal to the employees' obligation not to strike.

The Supreme Court has observed that the reciprocal nature of these RLA obligations is central to the design of the Act and is necessary to make the Act's procedures work.[68] In *Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union,*[69] the Court held that the reciprocal status quo obligation extended beyond written agreements to include all working conditions.[70] Al-

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Wharves case could not have been decided." *Id.* at 528. It is not certain whether the court was approving damages for a mere breach of the collective bargaining agreement, in which case the minor dispute procedures of the Act may oust the court of jurisdiction, or because that breach was an unlawful change in the status quo under § 6 of the Act. *See id.* at 525-26.

65. 442 F.2d 812 (D.C. Cir. 1971).

66. The carrier had reduced unilaterally the staffing of its trains. The court found that if proper staffing had taken place, the carrier would have had to hire additional employees. Because of the "union shop" provision in the collective bargaining agreement, the lost dues were the damages sustained by the plaintiff union which the court granted to make the union whole. *Id.* at 822-23.

67. To a lesser extent the same is true of the District of Columbia Circuit, although *Brown* was not discussed by the court in *Bangor & Aroostook Railroad.* See notes 64-66 & accompanying text *supra.*

68. *See* Detroit & T.S. R.R. v. United Transp. Union, 396 U.S. 142, 150-53 (1969); Brotherhood of R.R. Trainmen v. Chicago River & I. R.R., 353 U.S. 30, 34 (1957). The industrial relations theory underlying the status quo duty, as described by the Supreme Court, is set forth at note 17 *supra.*

69. 396 U.S. 142 (1969).

70. *Id.* at 150-53. Labor and management have reciprocal obligations not to change "those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Id.* This duty has been extended to working conditions of sufficient standing to constitute "practices" between the parties. *See* United Transp. Local 31 v. St. Paul Union Depot Co., 434 F.2d 220 (8th Cir. 1970); District 146, IAM v. Taca Int'l Airlines, 467 F. Supp. 441 (S.D. Fla. 1979).

though the controversy in *Toledo Shore Line* arose out of the carrier's unilateral change in working conditions, the court's construction of the status quo obligation applied expressly to both labor and management.[71] If the status quo obligation and the corresponding rights it extends to both labor and management is reciprocal and coterminous, it should be similarly enforced against both labor and management. Without a balanced enforcement scheme, the rights of labor and management contained in the status quo obligation lose their reciprocity with consequential adverse effects on the labor policy that underlies the obligation.

The adverse effects of an unbalanced remedial structure on the enforcement of reciprocal obligations were examined when the Supreme Court discussed the appropriateness of injunctive relief to enforce a no-strike clause in a collective bargaining agreement. Under the LMRA, collective bargaining agreement no-strike and arbitration clauses impose coterminous obligations upon labor and management.[72] In the early case of *Sinclair Refining Co. v. Atkinson,* however, the Supreme Court held that the Norris-LaGuardia Act precluded a federal district court from enjoining a strike in breach of a collective bargaining agreement no-strike clause, even though the reciprocal arbitration obligation was enforceable against management by that remedial device.[73] Eight years later the Court reviewed the remedial structure for enforcement of collective agreement no-strike and arbitration obligations in *Boys Markets, Inc. v. Retail Clerks Local 770.*[74] Because the remedial imbalance in favor of labor had created an unsatisfactory environment for labor relations,[75] the Supreme Court approved using the

71. 396 U.S. at 153.

72. *See* Gateway Coal Co. v. UMW, 414 U.S. 368, 381-82 (1974); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 105-06 (1962); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 449 (1957); Delaware Coca-Cola Bottling Co. v. Teamsters Local 326, 624 F.2d 1182 (3d Cir. 1980). *Cf.* W-I Canteen Serv., Inc. v. NLRB, 606 F.2d 738 (7th Cir. 1979) (explaining that the parties can alter coterminous obligations by contract). *See also* Feller, *supra* note 12, at 755-60. In fact, one obligation is implied from the other. *See* Gateway Coal Co. v. UMW, 414 U.S. 368, 381-82 (1974); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 105-06 (1962).

73. 370 U.S. 195, 198 (1962).

74. 398 U.S. 235 (1970).

75. The Court's earlier holding in Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962), reduced employer incentive to secure no-strike clauses in collective agreements. These incentives had "devastating implications" for the federal labor policy of encouraging peaceful adjustment of industrial disputes according to voluntarily agreed to procedures. 398 U.S. at 247-49.

injunction to enforce a no-strike clause in a collective agreement. The Court sought to encourage negotiation of no-strike clauses and to promote the peaceful adjustment of industrial disputes by consensual procedures,[76] notwithstanding the anti-injunction provisions of the Norris-LaGuardia Act.[77] Thus, the courts approved the general proposition that reciprocal rights deserve reciprocal remedies, at least in the context of granting injunctions.

In a sense, the *Galveston Wharves, Bangor and Aroostook,* and *Florida East Coast Railway* courts did not have such a formidable hurdle as the Norris-LaGuardia Act to surmount when approving the award of damages to employees and unions under the RLA, yet each court recognized the reciprocal nature of the status quo duty under the Act and its importance to the statutory scheme.[78] Just as the no-strike and arbitration obligations of the LMRA, the reciprocal status quo obligation of the RLA deserves a remedial structure capable of sustaining the reciprocal rights contained in that obligation. If damages are unavailable to a carrier when such a remedy is available to its employees and their representatives, this asymmetry may frustrate the proper exercise of duties and responsibilities by management and labor and may undermine collective bargaining, as was observed in *Boys Markets.*[79]

Judicial Implication of a Damages Remedy for Breach of Federal Statutory Duties

Because of the inconclusive nature of the judicial treatment of

76. 398 U.S. at 252-53. *Accord,* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 407 (1976).

77. 398 U.S. at 252. The Court applied the accommodation principle first announced in *Chicago River* to give effect to later expressions of national labor policy. See note 41 & accompanying text *supra.*

78. *See* United Transp. Union v. Florida E. Coast Ry., 586 F.2d 520, 525-26 (5th Cir. 1978); Bangor & A. R.R. v. Brotherhood of Locomotive Firemen, 442 F.2d 812, 822-23 (D.C. Cir. 1971); United Indus. Workers of the Seafarers Int'l Union v. Board of Trustees of Galveston Wharves, 400 F.2d 320, 326-27 (5th Cir. 1968), *cert. denied,* 395 U.S. 905 (1969).

79. 398 U.S. at 247-49. See note 75 & accompanying text *supra. See also* IBEW v. Foust, 442 U.S. 42, 52 (1979). Professor Feller has commented that failure by the courts to understand fully the role of collective bargaining and labor-management relations has resulted in the courts fashioning inappropriate remedies for breaches of duties arising out of the collective bargaining process. *See* Feller, *supra* note 12, at 665, 772-73. Collective bargaining properly may be considered as encompassing all aspects of labor-management interaction, including negotiation of basic labor agreements, grievance procedure, and day to day dialogue. W. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 6 (1971).

the issue of the availability of damages for strikes in violation of the RLA, general principles for implying a damages remedy under a federal statute must be examined to resolve the question whether a damages remedy is available to carriers under the RLA. In *Bell v. Hood*,[80] the Supreme Court implied a remedy for damages in a suit against federal officials for violations of the fourth and fifth amendments, relying in part upon *Texas & New Orleans Railroad Co.*[81] The court in *Bell* held:

> Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, *federal courts may use any available remedy* to make good the wrong done.[82]

Subsequently, in *Sullivan v. Little Hunting Park Inc.*,[83] the Court used broad language in permitting both an injunction and recovery of damages for violations of the Civil Rights Act of 1867.[84] The Court relied in part upon *Texas & New Orleans Railroad Co.'s* construction of the RLA for its conclusion that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies."[85]

Recently in *Davis v. Passman*,[86] the Supreme Court tempered this broad statement, reasoning that because Congress establishes statutory rights, Congress may regulate both who may enforce statutory rights and the manner by which these rights may be enforced.[87] The Court in *Davis* emphasized that the failure of Con-

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80. 327 U.S. 678 (1946).

81. See notes 38-39 & accompanying text *supra*.

82. 327 U.S. at 684 (emphasis added).

83. 396 U.S. 229 (1969).

84. 42 U.S.C. § 1982 (1976).

85. 396 U.S. at 239 (citing Texas & Pac. R.R. v. Rigsby, 241 U.S. 33, 39 (1916)). *Accord*, J.I. Case Co. v. Borak, 377 U.S. 426, 433-35 (1964). *See generally* 2A D. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 55.03 (4th ed. 1973).

86. 442 U.S. 228 (1979).

87. *Id.* at 241 (implied right of action and remedy of damages under fifth amendment for employment discrimination by a United States Congressman). *Accord*, Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 15-16 (1979).

Once a court assumes jurisdiction over a cause of action, it possesses the inherent judicial power to fashion and afford effective relief. Baker v. Carr, 206 F. Supp. 341, 349 (M.D. Tenn.), *on remand from* 369 U.S. 186 (1962). *Accord*, Hamilton v. Nakai, 453 F.2d 152, 156 (9th Cir. 1971); United States v. Field, 193 F.2d 92, 96 (2d Cir. 1951), *cert. dismissed*, 342 U.S. 908 (1952). This power, however, is limited by Congress' powers under article III, § 1 of

gress expressly to consider a particular remedy for violation of a statute is not inconsistent with an intent to make such a remedy available. The intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment.[88]

The Supreme Court thus has tended to allow the enforcement of federal rights through any appropriate remedy, unless there is afforded some special immunity[89] or express congressional expression to the contrary.[90] Characterizing the implication of remedies under *Bell* as "established law,"[91] the Court in *Davis* described damages as a "remedial mechanism normally available in the federal courts."[92] If congressional intent is not clear, the Court held

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the Constitution to regulate the jurisdiction and remedies available in the federal courts, other than the Supreme Court. Lockerty v. Phillips, 319 U.S. 182, 187 (1943). For an example of this regulation in the context of a labor dispute, see the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1976), which severely restricts the remedy of an injunction in the federal courts. *See* Lauf v. E.G. Shinner & Co., 303 U.S. 323, 329-30 (1938). Congress' authority to regulate the jurisdiction of the lower federal courts in turn is limited by constitutional due process limitations. Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948). *See also* Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975).

88. Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 18 (1979).

89. In *Davis*, the Court observed that the Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1, may restrict judicial review of congressional employment decisions. 442 U.S. at 235 n.11 & 246.

90. In Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979), the Supreme Court considered whether a private litigant could recover damages under the Investment Advisors Act of 1940, 15 U.S.C. §§ 806-1 to -21 (1976). In examining whether damages may be awarded for statutory violations, the Court stated that the *dispositive inquiry* "is whether Congress intended to create [such a] private remedy." 444 U.S. at 15. Analyzing the indicia of congressional intent, the Court held that a private action for damages was not available because, in light of the comprehensive enforcement scheme of the Investment Advisors Act of 1940, it was "highly improbable" that Congress forgot to provide a remedy for damages. *Id.* at 20. Moreover, the Court noted the express provision for private suits for damages under other securities regulation statutes, concluding that Congress did not intend the Investment Advisors Act of 1940 to add to the panoply of remedies. *Id.* at 20-21. In contrast, there is no corresponding statutory or regulatory scheme under the RLA labor-management relations scheme.

91. 442 U.S. at 295.

92. *Id.* at 248. *See also* Bivens v. Six Unknown Named Agents of the FBI, 403 U.S. 388, 397 (1971) (implied private right of action and damages remedy for violation of fourth amendment by federal agents).

In a concurring opinion in *Bivens*, Justice Harlan rejected the contention that a damages remedy should not be available absent express congressional authorization, reasoning that whenever a federally protected interest is involved, the federal courts have the inherent power and ability to determine which of the "traditionally available" judicial remedies, including damages, is necessary to effectuate the substantive provisions of the federal statutes.

that the inquiry in determining whether to imply a damages remedy is whether that remedy is appropriate to the legal principle at issue.[93] The appropriateness of damages depends on three factors: (1) whether they historically have been awarded in situations of the type before the court;[94] (2) whether awarding damages is "judicially manageable;"[95] and (3) whether equitable relief alone would be insufficient to enforce the statutory right.[96] Once each of these inquiries have been answered affirmatively, the plaintiff may recover damages upon proving his or her case.[97]

Congressional Intent to Provide a Damages Remedy

An examination of the legislative history is the first step in determining whether a damages remedy should be implied. This inquiry is important, if not dispositive,[98] in ascertaining whether

Id. at 402-03 n.4 (Harlan, J., concurring). Remedies are merely the means of carrying into effect a substantive legal principle and should be fashioned to match the policy inherent in the principle at issue. *See generally* DOBBS, *supra* note 34, § 1.2. *See also* Note, *Federal Jurisdiction in Suits for Damages Under Statutes not Affording Such Remedy*, 48 COLUM. L. REV. 1090 (1948); Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 297-98 (1963).

93. 442 U.S. at 245.

94. *Id.*

95. *Id.* With respect to whether damages are "judicially manageable," the Court was concerned that there be no difficult questions of evaluation or causation, a traditional inquiry with respect to damages. *See generally* DOBBS, *supra* note 34, § 3.1 -.3.

96. 442 U.S. at 245. *See* Bivens v. Six Unknown Named Agents of the FBI, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). *See also* Wheeldin v. Wheeler, 373 U.S. 647, 662 (1963) (Brennan, J. dissenting) (damages awarded for breach of statutory duty where it affords the only practicable remedy to redress the wrong).

97. One may speculate that Justice Harlan would have agreed with this proposition, with the addition that damages may be awarded by the courts for violation of statutory duties when they are "necessary and appropriate" to effectuate statutory policy. *See* Bivens v. Six Unknown Named Agents of the FBI, 403 U.S. 388, 406 (1971) (Harlan, J., concurring). Justice Harlan's analysis is remarkably similar to the Court's later description of its general role in administering the RLA "to implement a remedial scheme that will best effectuate the purposes of the Railway Labor Act, recognizing that the overarching legislative goal is to facilitate collective bargaining and to achieve industrial peace." IBEW v. Foust, 442 U.S. 42, 47 (1979). This concept of congruity between the right and remedy is not explicitly discussed in the majority opinions in *Bivens* and *Davis*.

98. *See, e.g.*, Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 17-18 (1979). In *Transamerica*, congressional intent was dispositive on the issue of availability of damages. In *Davis*, there was a presumption that a damages remedy exists, absent congressional expression to the contrary. This difference may be explained by the fact that the *Transamerica* Court was considering federal statutory rights, while the *Davis* Court was considering federal constitutional rights. In *Davis*, the court was mindful of the traditional role of the judiciary to safeguard constitutional rights based on its inherent judicial power, including fashioning appropriate relief among traditional judicial remedies. 442 U.S. at 241-42. See

damages are available for breach of federal statutory duties.

The legislative history of the RLA indicates that Congress was not totally silent concerning the mechanisms for enforcement of the obligations imposed by the Act. In its report on the RLA, the House Committee on Interstate and Foreign Commerce commented: "[t]here are also *legal obligations* which would be *accepted by and imposed upon* the the parties by the proposed law [to be enforced by the] *judicial power of the government* in the settlement of industrial controversies . . . ."[99]

The legislative history also indicates that rail labor expressly anticipated that the judicial power to enforce the RLA would be exercised in whatever fashion was necessary and appropriate. Donald R. Richberg, a spokesman for rail labor at the congressional hearings on the bill in 1926, addressed the remedies issue a number of times during his testimony.[100] With respect to the duty imposed by section 2 First, Mr. Richberg stated:

> [s]o far as this law stated duties imposed upon the parties by act of Congress, if they failed to live up to their duties, and there was any action which a court could take consistent with the judicial powers and its limitations, to compel the enforcement of that duty as a legal obligation, it would be subject to enforcement. *But the law for such enforcement or compulsion should be developed in the courts, according to the old common law theory of letting the court develop the law after the obligations are clearly understood, rather than to write into the law a specific line of penalties and writs of enforcement.*[101]

Rail labor thus anticipated that judicial enforcement could include sanctions.[102] Mr. Richberg, discussing the remedies for alter-

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note 87 *supra*.

99. H.R. REP. No. 328, 69th Cong., 1st Sess. 1-2 (1926) (emphasis added).

100. Although the courts view testimony warily in ascertaining legislative intent, the Supreme Court often has acknowledged that the RLA was an agreement worked out between labor and management, and ratified by Congress and the President. As such, statements of the spokespersons for those parties are entitled to considerable weight in the construction of the Act. *See* Chicago & Nw. Ry. v. United Transp. Union, 402 U.S. 570, 576 (1971); Detroit & T.S. R.R. v. United Transp. Union, 396 U.S. 142, 151 n.18, 152 n.19, 153 n.20. (1969).

101. *Hearings Before the House Comm. on Interstate and Foreign Commerce on H.R. 7180*, 69th Cong., 1st. Sess. 40 (1926) (statement of Donald R. Richberg) (emphasis added). *See also id.* at 91 (further discussion of the availability of common law remedies).

102. "I do not think that the courts have held . . . that when Congress imposes the duty in the interests of the public that a party can go out and arbitrarily violate that duty just because Congress does not always fix a penalty of fine or imprisonment. . . . I think that a duty imposed by law is enforceable by judicial power." *Id.* at 85.

ing the status quo prior to exhausting the major dispute procedures of the RLA, stated that such changes in the status quo "would be subject to the strongest form of judicial compulsion to prevent any such action."[103]

The legislative history thus indicates that the framers of the RLA intended to leave development of remedies to the courts in the same way that remedies had developed at common law.[104] This could include an award of damages, a traditional common law remedy. The use of the word "compulsion"[105] in the legislative his-

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103. *Id.* at 45. Other statements in the legislative history also support the conclusion that all remedies, including damages, were assumed by Congress to be available to enforce the no-strike provisions of the RLA. At the House Hearings, the following interchange took place:

"Mr. Hoch [member of the House Committee]: I am trying to get your interpretation as a possible guide to the interpretation by the court, if the situation should arise.

"Mr. Richberg: I am trying to meet that . . . . Now, I have said very clearly, and I want to repeat it, that I have no question but that [the Railway Labor Act] imposes the obligation not to carry on any strike movement, not to call a strike — that is, not to have the men suspend work . . . ." *Id.* at 277.

Earlier in the same hearing, Mr. Richberg stated: "[I]nasmuch as the enforcement of any legislation rests with the courts, it can hardly be held, particularly as no specific provision is made in here for judicial enforcement — it can hardly be held that this legislation in any way coerces the court, inasmuch as it simply puts upon the court . . . the obligation to carry out, *so far as it is possible,* a public policy declared by Congress." *Id.* at 75 (emphasis added).

These expressions of legislative intent were not limited to the House of Representatives. During Senate consideration of the Railway Labor bill, Senator William C. Bruce of Maryland noted that labor's right to strike, while postponed until exhaustion of procedures, was preserved, "subject, of course, to the rights of the courts to address any abuses involving violations or what not resulting from strikes . . . ." *See Hearings Before the Senate Comm. on Interstate Commerce on S. 2306,* 69th Cong., 1st. Sess. 25 (1926).

The Supreme Court relied upon Mr. Richberg's testimony in Chicago & Nw. Ry. v. United Transp. Union, 402 U.S. 573 (1971), in which the Court concluded that § 2 First of the Railway Labor Act was enforceable by the courts "by whatever appropriate means may be developed on a case-by-case basis." *Id.* at 576-77. The legislative history reveals similar treatment was intended for the minor dispute resolution procedures of the Act. *See* Brotherhood of R.R. Trainmen v. Chicago River & I. R.R., 353 U.S. 30, 36-40 (1957).

104. *See generally* DOBBS, *supra* note 34, §§ 3.1-.9 (1973). *See also* Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916).

105. Compulsion at common law connoted forcible inducement to the commission of an act. BLACK'S LAW DICTIONARY 260 (5th ed. 1979). *See also* United States v. Kimball, 117 F. 156, 163-64 (S.D.N.Y. 1902). In ecclesiastical procedure, a *compulsory* was a kind of a writ compelling the attendance of a witness to undergo examination. BLACK'S LAW DICTIONARY 260 (5th ed. 1979). The framers of the RLA, however, intended to make compliance with the Act's procedures compulsory rather than voluntary, as had been the case in earlier legislative attempts to regulate industrial relations in the rail industry. See note 106 *infra.* The framers also may have been influenced by common law treatment of agreements to arbitrate as revocable at any time. *See* DOBBS, *supra* note 34, § 12.27.

tory, however, may undercut this assumption. In the historical context of the RLA, where labor and management were seeking to impose legally enforceable duties on each other for the first time,[106] one might conclude that "the compulsion" contemplated was injunctive relief alone. There is no express suggestion in the legislative history, however, that compliance with the RLA procedures could be effected solely by injunctions. Rather, the framers favored the multiple remedial approach available at common law. The remedial device of sanctions to secure compliance with the Act's obligations was anticipated specifically by rail labor. Thus, on balance, it is appropriate to conclude that labor and management were willing to leave enforcement of the Act to the courts on a case by case basis, according to commonly accepted legal principles.[107]

The Appropriateness of a Damages Remedy

In addition to passing muster under an inquiry into legislative intent to determine whether damages are available for violating the RLA's no-strike duties, a court must inquire whether such a remedy is "appropriate." To be considered appropriate, damages traditionally must have been awarded in this context. This requirement appears to have been met. In the one case awarding damages to a carrier, damages were awarded for the carrier's lost traffic dur-

106. The RLA was not the first attempt at enacting legislation to govern industrial relations in the railroad industry. The progression of legislation began with the Arbitration Act of 1888, ch. 1063, 25 Stat. 501 (repealed ch. 370, § 12, 30 Stat. 428 (1898)), and continued with the Erdman Act of 1898, ch. 370, 30 Stat. 424 (repealed ch. 6, § 11, 38 Stat. 108 (1913)); the Newlands Act of 1913, ch. 6, 38 Stat. 103 (repealed ch. 347, § 14, 44 Stat. 587 (1926)); the Adamson Act of 1916, ch. 436, 39 Stat. 721 (current version at 45 U.S.C. §§ 65-66 (1976)), and the Transportation Act of 1920, ch. 91, § 300-16, 41 Stat. 469 (repealed ch. 347, § 14, 44 Stat. 587 (1926)). Each of these Acts offered various forms of governmental mediation or recommendation, and voluntary arbitration for the adjustments of disputes between labor and management and avoidance of interruption to commerce. The hallmark of each, however, was reliance on public opinion to enforce compliance. This proved to be insufficient and, coupled with the determination by the Supreme Court that the decisions of arbitration boards established under the Transportation Act of 1920 were not enforceable by the courts, *see* Pennsylvania R.R. Sys. No. 90 v. Pennsylvania R.R., 267 U.S. 203, 216-17 (1925); Pennsylvania R.R. v. United States R.R., 261 U.S. 72, 84 (1923), was the bellweather for the RLA, through which labor and management agreed to judicially enforceable duties and obligations. For more on this historical development, see IAM v. Street, 367 U.S. 740, 755-58 (1961); General Comm. of Adjustment of the Bhd. of Locomotive Eng'rs v. Missouri-Kansas-Texas R.R., 320 U.S. 323, 328 n.3 (1943); Loomis, *Railway Labor Law—Practices and Problems,* 16 I.C.C. PRAC. J. 747 (1949). For an historian's description of the early days of rail industry labor relations, see G. EGGERT, RAILROAD LABOR DISPUTES (1967).

107. See notes 101-03 & accompanying text *supra.*

ing the unlawful strike.[108] Damages have also been awarded to labor for breaches of other RLA duties.[109]

Examination of federal law in analogous areas also is helpful in testing the appropriateness of a damages remedy.[110] Under section 301 of the LMRA, suits for breach of collective bargaining agreements negotiated under the NLRA may be brought. In these cases, damages have been awarded to employers for strikes in violation of collective bargaining agreement no-strike obligations.[111] In addition, under the Labor Management Reporting and Disclosure Act (LMRDA), the courts have developed a damages remedy for union members injured by a union's violation of the members' "bill of rights."[112] Damages have been awarded under a compensatory theory, allowing recovery of all damages proximately flowing from the union's wrongful conduct.[113]

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108. Denver & R.G.W. R.R. v. Brotherhood of R.R. Trainmen, 58 L.R.R.M. 2568 (D. Colo. 1965).

109. See notes 101-03 & accompanying text *supra.*

110. *See, e.g.,* Davis v. Passman, 442 U.S. 228, 245 (1979) (Supreme Court looked to remedies under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1976), in determining that damages could be awarded for sex discrimination in violation of the fifth amendment).

111. See notes 116-20 & accompanying text *infra.*

112. *See* LMRDA, §§ 101-102, 29 U.S.C. §§ 411-412 (1976). Section 102 created a right of action in federal courts for "such relief (including injunction) as may be appropriate." *Id.*

113. *See, e.g.,* Simmons v. Local 713, Textile Workers, 350 F.2d 1012 (4th Cir. 1965); International Bhd. of Boilermakers v. Rafferty, 348 F.2d 307, 315 (9th Cir. 1965); McCraw v. Plumbing Indus., 341 F.2d 705, 709 (6th Cir. 1965); Farowitz v. Associated Musicians Local 802, 241 F. Supp. 895, 905-09 (S.D.N.Y. 1965). Labor unions also may be liable for punitive damages under the LMRDA for actual malice or reckless or wanton indifference to the rights of its members. Bise v. Electrical Workers Local 1969, 618 F.2d 1299 (9th Cir. 1979), *cert. denied,* 49 U.S.L.W. 3226 (1980).

The NLRB's principal concern in fashioning remedies for unfair labor practices has been the public's interest in effectuating labor law policies, rather than the wrong done. *See* Vaca v. Sipes, 386 U.S. 171, 182 n.8 (1967). *Accord,* IBEW v. Foust, 442 U.S. 42, 49 n.12 (1979). Therefore, historically the Board has been reluctant to exercise its remedial authority to award damages to unions and employers. Recent decisions, however, suggest a new attitude on the part of the Board may be developing. A union may recover organizing costs upon proof of a sufficient nexus between the employer's illegal conduct and an extraordinary increase in the union's organizing expenses. *See* Tiidee Prod. Inc., 194 N.L.R.B. 1234, 1236 (1972), *enforced as modified,* International Union of Electrical Workers v. NLRB, 502 F.2d 349, 361 (D.C. Cir. 1974). *See also* NLRB v. Food Stores Employees Local 347, 417 U.S. 1, 8 (1974); Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1045 (8th Cir. 1976). Also, a union may recover lost dues attributable to an employer's wrongful refusal to execute an agreement containing union security and check-off provisions. *See* Cheese Barn, Inc., 222 N.L.R.B. 418, 421 (1976). Recovery of dues under the RLA was approved in Bangor & A. R.R. v. Brotherhood of Locomotive Firemen, 422 F.2d 812, 822-23 (D.C. Cir. 1971).

To meet the appropriateness standard, an award of damages also must be judicially manageable; there must be no insurmountable problems of judicial evaluation or ascertainment. In *Denver & Rio Grande Western Railroad v. Brotherhood of Railroad Trainmen,*[114] the district court used as the appropriate measure of damages the revenue from traffic lost to the carrier.[115] Under section 301 of the LMRA, damages for breach of collective bargaining agreement no-strike obligations include all losses that are the natural, direct, and proximate consequences of the breach.[116] These damages may be determined by the court through just and reasonable inferences derived from the evidence presented.[117] Specific items that may be recovered under section 301 include overhead costs to which productive labor was not allocated because of the

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In Graphic Arts Int'l, Local 280, 235 N.L.R.B. 1084 (1978), *enforced,* 596 F.2d 904 (9th Cir. 1979), the union failed to bargain in good faith by unlawfully inducing the employer to withdraw from a multiemployer bargaining unit, to the employer's financial detriment. The Board ordered that the employer be made whole for any financial expenditures made under the individual labor agreement which it would not have had to make under the multiemployer contract.

The authorities are split as to whether public employers may recover damages for unlawful strikes by public employees. *Compare* Pasadena Unified School Dist. v. Pasadena Federation of Teachers, Local 1050, 72 Cal. App. 3d 100, 140 Cal. Rptr. 44 (1977) (damages awarded) *and* Missouri v. Kansas City Firefighters, 585 S.W.2d 94 (Mo. App. 1979) (same) *with* Lamphere Schools v. Federation of Teachers, 400 Mich. 104, 252 N.W.2d 818 (1977) (damages remedy rejected as inconsistent with the exclusive state statutory remedy of discharge). The *Lamphere* court cited National Airlines, Inc. v. Airline Pilots Ass'n Int'l, 431 F. Supp. 53, 54 (S.D. Fla. 1976), as support for its conclusion that a damages remedy is extraordinary and may inflame labor-management relations. 400 Mich. at 132, 252 N.W.2d at 131. The court therefore concluded it should not be implied without a clear expression of legislative intent. As discussed above, however, the decision in *National Airlines,* a product of *Louisville & Nashville Railway Co. v. Brown,* stands on questionable analytical grounds. See notes 55-62 & accompanying text *supra.*

In a strike context, public entities also may have available to them common law tort suits for damages, at least when the injury sustained arises out of water pollution caused by an unlawful strike. *See* State v. City and County of San Francisco, 94 Cal. App. 3d 522, 156 Cal. Rptr. 542 (1979); Caso v. District Council 37, 43 A.D.2d 159, 350 N.Y.S.2d 173 (1974).

114. 58 L.R.R.M. 2568 (D. Colo. 1965).

115. *Id.* at 2570.

116. *See* Eazor Express, Inc. v. International Bhd. of Teamsters, 520 F.2d 951, 967 (3d Cir. 1975); Wilson & Co. v. United Packinghouse Workers, 181 F. Supp. 809, 820-22 (N.D. Iowa 1960). The *Eazor* court observed that strikes are intended to cause economic injury to employers. 520 F.2d at 969.

117. *See* Wagner Elec. Corp. v. Local 1104, Elec. Workers, 496 F.2d 954, 957 (8th Cir. 1974); Operating Eng'rs Local 653 v. Bay City Erection Co., 300 F.2d 270, 272-73 (5th Cir. 1962); United Elec. Workers v. Oliver Corp., 205 F.2d 376, 389 (8th Cir. 1953); W.L. Mead, Inc. v. Teamsters Local 25, 129 F. Supp. 313, 317 (D. Mass. 1955), *aff'd,* 230 F.2d 576 (1st Cir.), *cert. denied,* 352 U.S. 802 (1956).

strike, including salaries of idle workers,[118] goodwill,[119] and lost profits.[120] Thus, in strike situations, quantification of carrier damages is not a barrier to implication of such a remedy for breach of a statutory duty.

The Sufficiency of Equitable Relief

The next inquiry in the determination of whether to imply a damages remedy is whether equitable relief would be inadequate to protect the injured party's rights.[121] Application of this criterion brings mixed results, but, on balance, it appears that injunctive relief alone is insufficient to safeguard the carrier's rights to continued operations.

Injunctive relief against an unlawful strike may sufficiently protect the carrier's right to continue operations if the strike is short and the employees return to work upon notice or service of the injunction.[122] A brief strike would be inconvenient, but perhaps no more so than any delay caused by mechanical difficulties or ad-

118. United Elec. Workers v. Oliver Corp., 205 F.2d 376, 387-88 (8th Cir. 1953); Structural Steel & Ornamental Iron Ass'n v. Local 545, Bridge Workers, 172 F. Supp. 353, 362 (D.N.J. 1959); W.L. Mead, Inc. v. Teamsters Local 25, 129 F. Supp. 313, 317 (D. Mass. 1955), *aff'd,* 230 F.2d 576 (1st Cir.), *cert. denied,* 352 U.S. 802 (1956); Alcoa S.S. Co. v. Conerford, 17 Lab. Cas..¶ 65,480 (S.D.N.Y. 1949).

119. Plumbers Local 598 v. Dillon, 255 F.2d 820 (9th Cir. 1958); W.L. Mead, Inc. v. Teamsters Local 25, 129 F. Supp. 313 (D. Mass. 1955), *aff'd,* 230 F.2d 576 (1st Cir.), *cert. denied,* 352 U.S. 802 (1956).

120. Eazor Express, Inc., v. International Bhd. of Teamsters, 520 F.2d 951, 968 (3d Cir. 1975); Blue Diamond Coal Co. v. UMW, 436 F.2d 551, 561 (6th Cir. 1970); United Steelworkers v. CCI Corp., 395 F.2d 529, 533 (10th Cir. 1968), *cert denied,* 393 U.S. 1019 (1969); Plumbers Local 598, 255 F.2d 820 (9th Cir. 1958); W.L. Mead, Inc. v. Teamsters Local 25, 129 F. Supp. 313 (D. Mass. 1955), *aff'd,* 230 F.2d 576 (1st. Cir.), *cert. denied,* 352 U.S. 802 (1956). For an excellent general discussion of compensatory damages recoverable in a § 301 suit, see California Trucking Ass'n v. Teamsters Local 70, 94 L.R.R.M. 2981, 3000 (N.D. Cal. 1977).

Commentators have suggested that employer losses on account of strikes traditionally have been underestimated and should include prestrike damages from productivity loss and poststrike damages in the form of overtime expense and lost customers. *See* J. HUTCHINSON, MANAGEMENT UNDER STRIKE CONDITIONS 56-60 (1966) [hereinafter cited as HUTCHINSON]; Imberman, *Strikes Cost More than You Think,* HARV. BUS. REV., May/June, 1979, at 133.

121. Davis v. Passman, 442 U.S. 228, 245 (1979). This requirement appears to be the converse of the traditional test for injunctive relief—lack of an adequate remedy at law. *See generally* DOBBS, *supra* note 34, § 2.5.

122. Rule 65(d) of the Federal Rules of Civil Procedure obligates obedience to a court injunction upon notice of its terms, even though proper service may not have been effected. *See generally* Regal Knit Wear Co. v. NLRB, 324 U.S. 9 (1945); EEOC v. International Longshoreman's Ass'n, 541 F.2d 1062 (4th Cir. 1976).

verse weather conditions.[123] Moreover, a brief strike may have a salutary effect on labor-management relations, as labor is able to deliver a message to management, yet management may rely on the legal authority of the court for vindication of its right to continue operations.[124] Acknowledging such a principle, however, might involve misuse of the judicial process and may breed benign contempt for the Act's no-strike duties. Employees and unions may feel free to engage in some unlawful conduct because the sanctions are no greater than a back-to-work order. Under established law, the same would not be true for the carrier. When the carrier must pay compensatory damages as part of restoring the status quo, injured parties may recover from the date the unlawful change in the status quo occurred.

Most importantly, equitable relief is insufficient where the unlawful strike is prolonged or where obedience to an an anti-strike injunction is delayed. An extended carrier shut-down brings all the consequential damages traditionally suffered by businesses which cannot operate in strike situations.[125] If labor does not respond promptly to an injunction, the carrier's only legal recourse is to seek contempt penalties from the court.[126] Courts have been reluctant, however, to issue contempt penalties in labor disputes in the absence of egregious conduct.[127] In any event, contempt usually is

123. This may not be true of frequent or systemwide strikes or where the carrier plays an integral role in a finely tuned industrial production "line." For example, an automobile manufacturer may depend upon regular rail or air transportation service between a manufacturing plant of component parts and an assembly plant. Without a large inventory, even a brief strike could result in the idling of one or two shifts, injuring not only the manufacturer but also the carrier's long-term standing as a dependable provider of transportation services. *See* N. CHAMBERLAIN & J. SCHILLING, THE IMPACT OF STRIKES 156-59, 248-49 (1954); Kahn, *supra* note 9, at 352. *See also* Ashley, D. & N. Ry. v. United Transp. Union, 625 F.2d 1357, 1361 (8th Cir. 1980). Also, a rail carrier may be liable in damages to shippers for breach of its duty to provide transportation upon request and adequate car service under the Interstate Commerce Act, even if beset by labor difficulties. *Id.* at 1370-71.

124. Professor Imberman suggests that poor communication between an employer and its workforce has been a prime cause of noneconomic strikes. *See* Imberman, *Strikes Cost More than You Think,* HARV. BUS. REV., May/June, 1979, at 133. *See also* E. HILLER, THE STRIKE: A STUDY IN COLLECTIVE ACTION 25-30, 266-77 (1928).

125. See text accompanying notes 114-20 *supra.*

126. Contempt penalties may be in the form of compensatory fines for the plaintiff carrier, criminal fines, or incarceration to vindicate the authority of the court. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 443 (1911); Latrobe Steel Co. v. United Steelworkers, 545 F.2d 1336, 1342-47 (3d Cir. 1976); Brotherhood of Locomotive Firemen v. United States, 411 F.2d 312 (5th Cir. 1969).

127. For examples of what conduct courts consider as justifying a contempt citation, see Longshoreman Local 129 v. Philadelphia Marine Trade Ass'n, 389 U.S. 64 (1967);

not a viable remedy because the contumacious party may cleanse himself or herself of contempt by complying with the injunction.[128] Consequently, the employees may interrupt the carrier's operations for several days at a time without sanction, so long as the back-to-work order eventually is obeyed. In the interim, the carrier may have incurred a serious and uncompensated loss of traffic, profits, and good will, as well as continued overhead expenses for which no productive labor has been contributed. Thus, injunctive relief alone does not adequately protect the carrier's rights to uninterrupted operations and is insufficient to foster respect for and use of RLA procedures.[129]

Restitutionary remedies also are insufficient to safeguard a carrier's right to uninterrupted operations. Restitution normally prevents unjust enrichment to the wrongdoer.[130] Although restitution may include monetary relief, that monetary recovery is mea-

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United States Steel Corp. v. Fraternal Ass'n of Steel Haulers, 601 F.2d 1269 (3d Cir. 1979); Black Diamond Coal Mining Co. v. Local 8460, UMW, 597 F.2d 494 (5th Cir. 1979); Cedar Coal Co. v. UMW, 560 F.2d 1153 (4th Cir. 1977); Southern Ohio Coal Co. v. UMW, 551 F.2d 695 (6th Cir.), *cert denied,* 434 U.S. 877 (1977); Latrobe Steel Co. v. United Steelworkers, 545 F.2d 1336 (3d Cir. 1976); Windsor Coal Co. v. District 6, UMW, 530 F.2d 312 (4th Cir. 1976); Brotherhood of Locomotive Firemen v. Bangor & A. R.R., 380 F.2d 570 (D.C. Cir.), *cert denied,* 389 U.S. 970 (1967); United States v. Brotherhood of R.R. Trainmen, 96 F. Supp. 428 (N.D. Ill. 1951).

Even when contempt penalties have been issued they often are insufficient to compensate for the entire loss. *See, e.g.,* Peabody Coal Co. v. Local 1734, UMW, 543 F.2d 10, 13 (6th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977) (fine of $13,000; damages estimated at $400,000); Long Island R.R. v. Brotherhood of R.R. Trainmen, 298 F. Supp. 1347 (E.D.N.Y. 1969) (fine of $100,000; losses estimated at $409,000).

128. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).

129. Under § 8(d) of the NLRA, 29 U.S.C. § 158(d) (1976), a participant employee in an unlawful strike loses his or her "protected" status under that Act and may be replaced should the employer wish to continue operations. There is no corresponding provision under the RLA, although in arbitration under the Act, participation in an unlawful strike is cause for discipline, including discharge. *See* Brotherhood of Ry. Clerks v. REA Express, N.R.A.B. (3d Div. 1974) (Eischen, Arb.); Brotherhood of Ry. Clerks v. Penn Central Transp. Co., N.R.A.B. (3d Div. 1973) (Brent, Arb.); IBEW v. Illinois Central Gulf Ry., N.R.A.B. (2d Div. 1968) (Ives, Arb.); Machinists v. Chesapeake & O. Ry., N.R.A.B. (2d Div. 1972) (McGovern, Arb.). *See also* F. ELKOURI & A. ELKOURI, HOW ARBITRATION WORKS 644-45 (3d ed. 1973).

Replacement of unlawful strikers under the RLA may not be viable because time-consuming collective bargaining agreement discipline procedures may have to be complied with prior to the time an employee may be discharged. Replacement of strikers also has been criticized for its adverse effect on ongoing labor-management relations and on collective bargaining in general. *See* Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 248 n.17 (1970) (citing the A.B.A. LABOR RELATIONS LAW SECTION, REPORT OF THE SPECIAL ATKINSON-SINCLAIR COMMITTEE §§ 226, 242 (1963)).

130. *See generally* DOBBS, *supra* note 34, § 1.1. *See also* Janingan v. Taylor, 344 F.2d 781, 786 (1st Cir. 1965).

sured by the wrongdoer's gain, rather than by the injured party's loss.[131] Monetary restitution thus does not substitute for a damages remedy. In the context of a labor dispute, restitution conceivably might be measured by the economic gains achieved by labor through an unlawful strike. The future gains, however, probably are too speculative. Moreover, restitution could not compensate for carrier losses suffered from the strike itself.[132] Therefore, restitution is not a proper remedy to "obviate the harm" resulting from the interruption to the carrier's operations.

National Labor Policy and Carrier Recovery of Damages

The labor union in American legal history has developed from a "criminal conspiracy" of limited influence to an established and powerful social institution.[133] Similarly, national labor policy has developed from imposing sanctions against labor to promoting labor unions as combinations for the regulation of work conditions through collective bargaining.[134] The role of the courts has been to enforce the labor laws in a manner reflecting the realities of industrial life.[135] The reality today—that labor unions are established,

131. *See* DOBBS, *supra* note 34, § 1.1; RESTATEMENT OF RESTITUTION §§ 4, 150 (1936).

132. The courts in United Indus. Workers of the Seafarers Int'l Union v. Board of Trustees of Galveston Wharves, 400 F.2d 320, 323-25 (5th Cir. 1968), *cert. denied,* 395 U.S. 905 (1969), and Bangor & A. R.R. v. Brotherhood of Locomotive Fireman & Enginemen, 442 F.2d 812, 820-22 (D.C. Cir. 1971), considered restitutionary relief for the union, but rejected it as insufficient to restore the employees and the union to the position they would have been in had the carriers not breached their status quo obligations. Compensatory damages were necessary to accomplish that end.

133. *See generally* D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY (1970); R. SMITH, L. MERRIFIELD & T. ST. ANTOINE, LABOR RELATIONS LAW 1-53 (1974). For a description of the development of rail and air unions, see H. LEVENSON, C. REHMUS, J. GOLDBERG & M. KAHN, COLLECTIVE BARGAINING & TECHNOLOGICAL CHANGE IN AMERICAN TRANSPORTATION pts. II, IV (1971). The great advance of labor unions in workplace dominance is underscored by an industrial relations specialist's recent observation of management attitudes on lawful strikes: "It is the employers in coal, steel, and electrical equipment who now insist on their right to 'take a long strike' as a way of cutting the union down to size." J. BARBASH, *Commentary,* in COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE 581 (G. Sommers ed. 1980).

134. *See generally* D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY (1970); R. SMITH, L. MERRIFIELD & T. ST. ANTOINE, LABOR RELATIONS LAW (1974).

135. *Compare* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 479-89 (1920) (Brandeis, J., dissenting) *with* NLRB v. International Longshoremen's Ass'n, 48 U.S.L.W. 4765, 4769-70 (1980); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580-83 (1960); *and* Pennsylvania R.R. v. Day, 360 U.S. 548, 552-53 (1959).

powerful institutions—is reflected in the development of labor policy from mere protection of labor organizations to encouragement of collective bargaining and administrative techniques for peaceful resolution of industrial disputes,[136] particularly where those techniques are undertaken voluntarily by the parties.[137] Perhaps the most persuasive reason for implying a damages remedy on behalf of carriers that suffer loss because of unlawful strikes therefore is the compatibility of that type of relief with national labor policy as found in the RLA and elsewhere. In *IBEW v. Foust,*[138] the Court recently underscored the appropriateness of that inquiry by stating that the function of the judiciary is to implement a remedial scheme that will best facilitate collective bargaining and achieve industrial peace.[139] This includes awarding monetary damages when appropriate. Although this inquiry, and the inquiry into the appropriateness of a damages remedy, may appear to overlap, examination of national labor policy requires inquiry beyond merely determining whether damages have been awarded by the courts in the past. The remedy must be tested not only by the existence of judicial precedent but by its place in the framework for collective bargaining set by the RLA.

Courts often look to other federal labor laws for assistance in interpreting the obligations of parties under the RLA because the general "penumbra of protected conduct" is substantially the same.[140] In evaluating what remedies should be awarded by the

136. *See* Boys Market, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 251 (1969).

137. *Id.* at 252-53.

138. 442 U.S. 4 (1979).

139. *Id.* at 47. The Supreme Court often has endorsed considering the policy of the RLA in determining the "extent and nature" of the legal consequences of duties imposed under the Act. *See* IAM v. Central Airlines, Inc., 372 U.S. 682, 690-91 (1963); Turnstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 213 (1944); Dietrick v. Greaney, 309 U.S. 190, 200, 201 (1940). *Accord,* Brady v. Trans World Airlines, 401 F.2d 87, 102 (3d Cir. 1968). The purpose and context of collective bargaining also merits "special heed" in the enforcement of obligations under the LMRA. *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960). *See also* NLRA, § 101, 29 U.S.C. § 151 (1976); LMRA, § 1, 29 U.S.C. § 141 (1976).

For Justice Harlan and Professor Feller, matching the remedy to the policy of the statute is uniquely within the province of the judiciary and is the most important inquiry in the determination of whether a remedy should be implied. See notes 79, 92 *supra.*

140. *See* Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 384 (1969) (Court discussed secondary pressure under the RLA). The *Jacksonville Terminal* Court described the NLRA as "the only existing congressional expression as to the permissible bounds of economic combat." In the law developed under that Act resides the "relevant corpus of 'national labor policy.'" *Id.* at 383. *See also* Pan American World Airways, Inc. v.

courts to promote the policy of the RLA and national labor policy, it is instructive to refer to the law developed under the LMRA. In *Galveston Wharves*, for example, the court referred to analogous situations under the LMRA to support an award of damages for carrier violation of the major dispute procedures of the RLA.[141] Similarly, in *Foust*, the Court, in measuring the compatibility of a punitive damages remedy for breach of the duty of fair representation with national labor policy, relied on treatment of that issue by both the NLRB in unfair labor practice situations and by the courts under section 303 of the LMRA.[142] Finally, the law developed under section 301 of the LMRA[143] is helpful in considering the propriety of awarding damages for violations of RLA obligations.[144]

The legislative history of section 301 reveals that Congress intended to promote the stabilization of industrial relations by making collective bargaining agreements enforceable in the federal and state courts. Congress was particularly concerned with the enforcement of "no-strike" clauses in collective agreements, because it had concluded that effective collective bargaining depended upon imposing mutual responsibility on both labor and management. Section 301 was added to the national labor laws to subject labor organizations that made collective agreements with employers to the same judicial remedies and processes for violations of agreements as those applicable to all other citizens.[145]

International Bhd. of Teamsters, 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd*, 404 F.2d 938 (2d Cir. 1969) (court held that the NLRA provides a "cogent analogy" for interpretation of obligations under the RLA). The *Jacksonville Terminal* Court did not endorse wholesale importation of NLRA precedent into interpretation of the RLA, however, noting that because of the many differences between the two statutes, "even rough analogies" must be drawn with care. 394 U.S. at 383.

141. 400 F.2d at 323, 326.

142. 442 U.S. at 52.

143. 29 U.S.C. § 185 (1970) (providing access to the courts to enforce collective bargaining agreements).

144. After reviewing the history of judicial enforcement of collective bargaining agreement duties and obligations, Professor Feller concluded: "The [Supreme] Court has created and defined a set of substantially identical remedies and limitations under both [the RLA and § 301 of the LMRA]." Feller, *supra* note 12, at 716-18. This discussion was limited to breaches of duties under § 3 of the RLA. Later, Professor Feller stated that the issue of whether damages are available for strikes in violation of the RLA was a matter of statutory construction. *Id.* at 800.

145. *See* S. REP. No. 105, 80th Cong., 1st. Sess. 15-18 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407 (1948). The Senate Committee noted that employers were frustrated in enforcing collective bargaining

Section 301 itself, however, does not authorize damages actions against labor unions. It merely grants jurisdiction in the federal courts over suits for breach of contract between labor and management. As described earlier, the questions of jurisdiction, right of action, and remedies are separate and distinct inquiries for the courts.[146] The courts nonetheless have construed section 301 as authorizing the development of federal substantive law to govern actions under section 301.[147] When first considering cases arising under section 301, the courts faced challenges similar to those presented in the first cases arising under the RLA because section 301 did not provide remedies for suits brought under that section. Not surprisingly, the courts implied whatever remedies, including damages, that were necessary and appropriate to vindication of the congressional scheme.

In *Textile Workers Union v. Lincoln Mills,*[148] the Supreme Court, mindful of the federal labor policy that Congress intended to foster by the LMRA, concluded that Congress intended that sanctions be applied for breaches of collective bargaining duties, notwithstanding the lack of express remedies in the statute. The Court concluded that common law principles should be applied by the federal courts under section 301.[149] Just as it had concluded in *Texas & New Orleans Railroad Co.*, the Court noted that federal

agreements because of the many state laws making it difficult, if not impossible, to sue effectively and to recover a judgment against an unincorporated voluntary association, such as a labor union, that in many jurisdictions lacked jural existence. The Senate Committee, and later the Congress, concluded that it was not enough to permit the parties to invoke the processes of the NLRB; Congress wanted to give the parties a right of action in federal court: "statutory recognition of the collective bargaining agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace." *Id.* at 17.

See also H.R. REP. No. 510, 80th Cong., 1st Sess. 66, *reprinted in* [1947] U.S. CODE CONG. & AD. NEWS 1135; H.R. No. 245, 80th Cong., 1st. Sess. 6, 8, 46 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR RELATIONS MANAGEMENT ACT, 1947, at 292 (1948). *See also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 450-56 (1957); Association of Westinghouse Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 443-49 (1955). Recently, the intent of § 301 was characterized as the restoration of "equilibrium" in industrial relations. Delaware Coca Cola Bottling Co. v. Teamsters Local 326, 624 F.2d 1182, 1193 (3d Cir. 1980) (Rosen, J., concurring).

146. See notes 34-36 & accompanying text *supra.*

147. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 452 (1957). Agreements negotiated pursuant to the RLA receive similar treatment. *See* IAM v. Central Airlines, 372 U.S 682, 690-92 (1963).

148. 353 U.S. 448 (1957).

149. *Id.* at 456.

labor statutes did not cover all situations and that judicially developed remedies were necessary for proper enforcement of those laws: "Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of legislation and fashioning a remedy that will effectuate that policy. The range of judicial interventiveness will be determined by the nature of the problem."[150] The judiciary has had little difficulty in fulfilling the mandate of *Lincoln Mills* that judicial remedies, including damages under section 301, be determined on a case by case basis.[151]

National labor policy, under both the RLA and LMRA, favors free collective bargaining and the peaceful adjustment of industrial disputes. Each statute preserves the right to engage in economic action when pursuing bargaining objectives. Under the LMRA, the parties are free to resort to economic action at any time, unless that freedom has been restricted by a no-strike or mandatory arbitration provision in a collective bargaining agreement.[152] Such provisions postpone economic action until expiration of the collective agreement. Under the RLA, the timing of the right to resort to economic action emphasizes the Act's policy to prevent undue interruptions to a carrier's operations during efforts to apply the collective agreement and during efforts at modifying the agreement.[153]

150. *Id.* at 457. *See also* Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962). In *Courtney*, the Court, after examining the legislative history of § 301, stated: "Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.'" *Id.* at 513. *Accord,* William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12, 18 (1974).

151. For a discussion of damages, see notes 116-20 & accompanying text *supra. See also* Electrical Workers v. Electrical Serv., Inc., 535 F.2d 1 (10th Cir.), *cert. denied,* 429 U.S. 832 (1976); Bond v. Teamsters Local 823, 521 F.2d 5 (8th Cir. 1975); Tippett v. Liggett & Myers Tobacco Co., 316 F. Supp. 292 (M.D.N.C. 1970). For the fashioning of remedies other than damages, see Gateway Coal Co. v. UMW, 414 U.S. 368 (1974) (injunction); Warehousemen Union v. Standard Brands, Inc., 560 F.2d 700 (5th Cir. 1977) (remedy of specific enforcement); Emmanuel v. Omaha Carpenters Dist. Council, 560 F.2d 382 (8th Cir. 1977) (attorneys' fees); Cannon v. Consolidated Freightways Corp., 524 F.2d 290 (7th Cir. 1975) (remedy of vacation of arbitration award); Brannon v. Warn Bros. Inc., 508 F.2d 115 (9th Cir. 1974) (remedy of accounting); H.K. Porter Co. v. Local 37, Steelworkers, 400 F.2d 691 (4th Cir. 1968) (remedy of specific enforcement); Automobile Transp., Inc. v. Ferdnance, 420 F. Supp. 75 (E.D. Mich. 1976) (remedy of reinstatement). The citation of these cases is not exhaustive, but merely illustrative of the remedies that have been thus far awarded by the courts under § 301.

152. *See* NLRA, § 13, 29 U.S.C. § 163 (1976). *See also* Gateway Coal Co. v. UMW, 414 U.S. 368 (1974).

153. See text accompanying notes 16-20 *supra.*

Notwithstanding these differences, it appears that the abrogation of the no-strike obligations under each Act merits the award of damages to an injured party. The availability of such an award under the LMRA is contractual because the no-strike obligation normally arises from express terms of a collective agreement, or, in the case of a mandatory arbitration provision, is implied by the courts.[154] Courts have awarded damages for violating no-strike obligations in order to promote greater responsibility and discipline in the collective bargaining process. Although the no-strike obligation under the RLA is statutory, it deserves the same, if not greater, protection as the contractual duty under the LMRA.[155] The award of damages to a carrier to compensate it for a union's failure to comply with RLA obligations[156] would promote the national labor policy of fostering the peaceful adjustment of industrial disputes by discouraging union abrogation of its duties under the Act and thus promote industrial peace by ensuring the carrier's continued operation while disputes are adjusted. The same mutual responsibility in collective bargaining which section 301 seeks to advance, and which the courts have sought to secure by awarding damages for violation of no-strike provisions in collective bargaining agreements, would be advanced if carriers were allowed recovery of damages for strikes violating the RLA no-strike duties.[157]

154. *See, e.g.*, Gateway Coal Co. v. UMW, 414 U.S. 368 (1974).

155. The Supreme Court has endorsed this conclusion with respect to enforcement of the RLA's minor dispute arbitration duty. *See* Andrews v. Louisville & N. R.R., 406 U.S. 320, 323 (1972).

156. National labor policy favors limitations of damages to redress *actual loss* by the injured party. *See, e.g.*, IBEW v. Foust, 442 U.S. 42, 52 (1979). Professor Dobbs describes damages as "substitutionary relief"—monetary recovery to take the place of the loss. *See* DOBBS, *supra* note 34, § 3.1.

157. Early in this century, when labor unions were fighting for recognition, Justice Brandeis contended that financial responsibility for unlawful actions would be in the long-term best interests of labor unions. In an address delivered to the Economic Club of Boston on December 4, 1902, he stated: "The unions should take the position squarely that they are amenable to law, prepared to take the consequences if they transgress, and must show that they are in full sympathy with the spirit of our people, whose political system rests upon the proposition that this is a government of law, and not of men . . . . I can conceive of no expenditure of money by a union which could bring so large a return as the payment of compensation for some wrong actually committed by it. Any such payment would go far in curbing the officers and members of the union from future transgressions of the law, and it would, above all, establish the position of the union as a responsible agent in the community, ready to abide by the law. This would be of immense advantage to the union in all its operations." Address by Louis D. Brandeis to the Economic Club of Boston (Dec. 4, 1902), *quoted in* 93 CONG. REC. 4410 (1947) (remarks of Senator Smith during debate on LMRA). Senator Smith described Justice Brandeis as "one of the greatest defenders of the rights of

Conclusion

This Article has advocated two ways by which the courts may fashion a damages remedy for carriers injured by unlawful strikes under the RLA. First, an analytical framework for awarding damages is provided by the mutual obligations of labor and management to maintain the status quo until the procedures of the RLA have been exhausted. This status quo obligation is reciprocal and coterminous; labor may not strike, and management may not unilaterally change rates of pay, rules, or working conditions. Damages have been awarded to employees and unions for a carrier's breach of its status quo obligation. Because the status quo obligation is reciprocal and coterminous, an award of damages to the carrier for labor's breach of its no-strike obligation should be implied in the Act and should be available to carriers to maintain the symmetry of the status quo obligation.

Second, the propriety of allowing a damages remedy is found in the application of the general judicial test for determining whether a damages remedy is available for breach of a federal statutory duty. Legislative history reveals that both Congress and rail labor anticipated that sanctions would be imposed on any party that violated the RLA. Remedies and sanctions for breach of the Act were left for the courts to develop on a case by case basis. Equitable relief alone is insufficient to safeguard a carrier's right to continue operations. An injunction, restitution, or in aggravated instances, contempt penalties will not adequately compensate for the losses sustained by a struck carrier. Damages for breach of a statutory duty traditionally were available at common law. Damages have been awarded by the courts to unions for breach of contractual no-strike obligations and for breach of other RLA duties. Calculation of the amount of damages is not difficult.

Each of these theories supporting a carrier's right to recover damages is consistent with the national labor policy favoring mutuality of responsibility at the bargaining table. Free collective bargaining requires that labor and management be responsible for their actions, including monetary liability when appropriate. An award of damages to rail and air carriers for labor union breach of

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the working man," and the context of his speech as "trying to bring about a *right relationship* between management and labor." 93 CONG. REC. 4410 (1947) (remarks of Senator Smith) (emphasis added). *See* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1145-46 (1948).

the voluntarily assumed no-strike obligation is consistent with contemporary labor policy recognizing labor unions as mature participants in collective bargaining and with enforcing labor laws to promote peaceful adjustments of industrial disputes according to voluntarily agreed to procedures.

In articulating these theories for a damages remedy to protect a carrier's right to continue operations, damages are not advocated as the "right" or "true" remedy. The development and promotion of appropriate national labor policy is better served by focusing on the proper balance of power between labor and management rather than on vague notions of good and evil.[158] Implying a damages remedy also does not suggest a compromise of labor's cherished right to strike. There is no general federal anti-strike policy.[159] A strike is merely one method of securing agreement between labor and management.[160] The right to strike is preserved by federal labor law; expressly by the LMRA,[161] and by implication under the RLA.[162] These proposals simply seek to articulate an analytical framework for a remedial structure that reflects the proper balance of power between labor and management provided by the RLA.

The Act itself furthers the public interest in continuous transportation services by postponing labor's ability to exercise its right to strike until the Act's procedures are exhausted and, consequently, confers on rail and air carriers a right to uninterrupted operations until those procedures have been exhausted. That public interest, and the RLA's balance of power between labor and management, is threatened, not by lawful strike activity, which is a vital part of the institution of collective bargaining, but by strikes, unlawful under the Act, which disrupt the collective bargaining relationships established by the Act's obligations.

158. St. Antoine, *National Labor Policy: Reflections and Distortions of Social Justice*, 29 CATH. U.L. REV. 535, 536-37 (1980). The Supreme Court also has observed that in particular circumstances, damages may exacerbate poor labor-management relations. Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 248-49 (1970). *Accord*, Gateway Coal Co. v. UMW, 414 U.S. 368, 381-82 n.14 (1974).

159. *See* Buffalo Forge v. Steelworkers, 428 U.S. 397, 409 (1976). *See also* Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 376-77, 384-85 (1969).

160. COMMITTEE FOR ECONOMIC DEVELOPMENT, THE PUBLIC INTEREST IN NATIONAL LABOR POLICY 86-91 (1961); HUTCHINSON, *supra* note 120, at 11. The Committee did conclude, however, that strikes often impede the ability of the parties to consider problems of great complexity with long-term adverse effect on the public interest.

161. 29 U.S.C. § 163 (1976).

162. *See* Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 379 (1969). See also note 20 *supra*.

Strikes, legal or illegal, are inherently coercive.[163] Strikes have effects far beyond the immediate economic impact to the struck enterprise,[164] especially on long term labor-management relations.[165] The coercive effects of illegal strikes are exacerbated if rail and air carriers cannot preserve their right to uninterrupted operations through resort to the courts. Over time, a carrier will become aware of the inadequacies of equitable relief and feel compelled to make concessions to prevent or terminate unlawful strikes for which it will incur losses without hope of compensation. There will be less incentive for labor to avoid striking if concessions can be secured through an unlawful strike without attendant monetary liability. This state of affairs departs from the balance of power between labor and management intended by the RLA's reciprocal, coterminous status quo obligations and its procedures for adjusting disputes. It also interferes with the public interest in continuous transportation service.

A remedial structure to enforce the RLA no-strike obligation should recognize the inherently coercive nature of strikes and contain within it remedies to regulate effectively the conduct of labor and management under the status quo and dispute adjustment obligations. Such an approach would promote collective bargaining and facilitate industrial peace.[166] National labor policy has developed from protection of the nascent labor movement to promotion of techniques for resolution of disputes.[167] A damages remedy will serve the interests of labor and management in responsible collective bargaining and peaceful dispute adjustment.

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163. Eazor Express, Inc. v. International Bhd. of Teamsters, 520 F.2d 951, 967 (3d Cir. 1975). *See also* E. HILLER, THE STRIKE, A STUDY IN COLLECTIVE ACTION 12, 16 (1928); HUTCHINSON, *supra* note 120.

164. *See generally* HUTCHINSON, *supra* note 120. For a description of the effects of strikes in the rail and air transportation industries, see N. CHAMBERLAIN & J. SCHILLING, THE IMPACT OF STRIKES (1954); Cullen, *Strike Experience Under the Railway Labor Act*, in THE RAILWAY LABOR ACT AT 50, ch. VII (C. Rehmus ed. 1976); Kahn, *supra* note 9, at 352.

165. HUTCHINSON, *supra* note 120, at 38-41, 56-57. *See* COMMITTEE FOR ECONOMIC DEVELOPMENT, THE PUBLIC INTEREST IN NATIONAL LABOR POLICY 86-91, 108-10 (1961).

166. Professor St. Antoine, after noting that rights have substance and meaning only insofar as they are backed by effective remedies, suggested that inadequate remedies frustrate full enforcement of the labor laws; recalcitrant employers and unions sometimes view minor penalties as a license fee for certain practices. St. Antoine, *A Touchstone for Labor Board Remedies*, 14 WAYNE L. REV. 1039 (1968). *See also* Feller, *supra* note 12, at 28.

167. Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 251 (1970).