

## SECTION 9



## **LABOR LAW**

## A. INTRODUCTION

Although most transit systems do not operate heavy rail systems, we begin our discussion with the Railway Labor Act of 1926 (RLA).<sup>1</sup> The RLA was the first comprehensive body of labor law promulgated by Congress. The RLA encompasses many of the foundational concepts of collective bargaining and dispute resolution in the labor/management context.<sup>2</sup> Concepts such as unfair labor practices and the union's duty of fair representation, for example, are treated similarly by courts whether they arise under the RLA or subsequent labor legislation.

If the transit system has an interstate rail component, the RLA is likely to govern. But one must be cognizant of the fact that if the transit system is a state or local governmental agency, its employees are likely to be governed by state labor law or civil service requirements. If the transit workers are private sector employees, the National Labor Relations Act (NLRA)<sup>3</sup> will usually apply.

Many other laws are relevant in the labor and employment context, including civil rights laws, civil service regulations, and regulation by state human resources agencies. Further, all FTA recipients must adhere to the labor protective requirements established by Section 13(c) of the Federal Transit Act.<sup>4</sup>

## B. THE RAILWAY LABOR ACT

### 1. Introduction

Title III of the Transportation Act of 1920<sup>5</sup> created a new agency, the U.S. Railroad Labor Board (RLB), which attempted to avoid interruptions to commerce by negotiating disputes. Title III was designed to deal with the sometimes violent confrontations between labor and management in the railroad industry.<sup>6</sup> Prior legislation, including the anemic Arbitration Act of 1888, the Erdman Act of 1898, and the short-lived Newlands Act of 1913, had failed to eliminate the conditions that gave

rise to strikes. A national strike in 1922 revealed that the 1920 Act still was not the solution, leading Congress in 1926 to promulgate the RLA,<sup>7</sup> the first legislation to force management to recognize and bargain with employee representatives.<sup>8</sup>

The RLA is administered by the three-member National Mediation Board (NMB), each member of which is appointed for a 3-year term by the President with the advice and consent of the Senate. During their terms, board members may be removed only for "inefficiency, neglect of duty, malfeasance in office, or ineligibility." No more than two of the three members may be affiliated with the same political party.<sup>9</sup>

Three broad issues are governed by the RLA:

1. Union representation;
2. Collective bargaining; and
3. Grievances.

The latter two are also described as major and minor disputes, respectively.

### 2. Applicability of the RLA

Railroad and airline labor relations are governed by the RLA.<sup>10</sup> Certain transit authorities that provide rail service are classified as "common carriers" subject to the jurisdiction of the STB, and are thereby also subject to the Railway Labor Act and other railway labor legislation.<sup>11</sup> The Railway Labor Act defines "carrier" to include "any railroad subject to the jurisdiction of the Surface Transportation Board, any express company...and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad...."

But the RLA provides that the term "carrier" does not include "any street, interurban, or suburban electric railway unless such railway is operated as a part of a general steam [or other motive power]-railroad system of transportation...."<sup>12</sup> Courts have generally deferred to the administrative determination (originally by the ICC and since 1995 by its successor agency, the STB) as

<sup>1</sup> Pub. L. No. 69-257, 44 Stat. 577 (1926).

<sup>2</sup> For example, the labor protective provisions (LPPs) developed under the RLA served as the model for LPPs developed for the transit industry imposed under Section 13(c), described below.

<sup>3</sup> 29 U.S.C. § 152.

<sup>4</sup> 49 U.S.C. § 5333(b).

<sup>5</sup> Pub. L. No. 66-152, 41 Stat. 456 (1920).

<sup>6</sup> See generally WILLIAM WITHUHN, RAILS ACROSS AMERICA: A HISTORY OF RAILROADS IN NORTH AMERICA 49 (SMITHMARK 1993); RON CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. 201-02 (Random House 1998); William G. Mahoney, *The Interstate Commerce Commission/Surface Transportation Board as Regulator of Labor's Rights and Deregulator of Railroads Obligations: The Contrived Collision of the Interstate Commerce Act with the Railway Labor Act*, 24 TRANSP. L.J. 241, 245 (1997); RUSSELL BOURNE, AMERICANS ON THE MOVE: A HISTORY OF WATERWAYS, RAILWAYS AND HIGHWAYS 100, 109 (Fulcrum 1995).

<sup>7</sup> Pub. L. No. 69-257, 44 Stat. 577 (1926).

<sup>8</sup> For a review of this history, see Mahoney, *supra* note 6, at 241, 245-51 (1997).

<sup>9</sup> 45 U.S.C. § 154.

<sup>10</sup> See generally WILLIAM THOMS & FRANK DOOLEY, THE RAILWAY LABOR ACT AND AVIATION AFTER DEREGULATION, AIRLINE LABOR LAW (1990).

<sup>11</sup> A number of states and their subdivisions operate commuter rail services. See, e.g., CAL. GOV'T CODE § 14304 (2014); CONN. GEN. STAT. § 13b-212c (2014); MD. TRANSP. CODE ANN. § 7-208 (2014); MINN. STAT. § 174.90 (2014).

<sup>12</sup> 45 U.S.C. § 151 First. The STB may, and upon request of the NMB or complaint of any party shall, hold a hearing to determine whether any line operated by electric power falls within the RLA. *Id.* A similar exemption exists under the Railroad Unemployment Insurance Act. 45 U.S.C. §§ 351-369. The Railroad Unemployment Insurance Act is the railroad counterpart to state unemployment compensation laws.

to the scope of the electric railway exception.<sup>13</sup> Among the criteria that have been deemed relevant in determining whether the exemption applies are whether the commuter line is connected to the general rail system, whether it is used to connect traffic over that system, whether the commuter line handles freight, and the contractual understandings between the commuter and freight railroads.<sup>14</sup> The RLA is also applicable to certain commuter rail operations, including those operated by Amtrak.<sup>15</sup> But most transit systems do not want to be subject to RLA jurisdiction and go to great lengths to avoid it. Other than railroads and airlines, in most industries labor/management relations are governed by the NLRA. But many transit systems are state or local agencies, and their employees are not subject to NLRA. They are subject to state law, with possibly a civil service component. The law of many states or localities prohibits strikes by governmental employees.<sup>16</sup>

<sup>13</sup> See, e.g., *Railway Labor Executives' Ass'n v. ICC*, 859 F.2d 996, 998 (D.C. Cir. 1988).

<sup>14</sup> DOUGLAS LESLIE, *THE RAILWAY LABOR ACT 71* (BNA 1995).

<sup>15</sup> Congress has declared that, "Amtrak shall provide intercity and commuter rail passenger transportation that completely develops the potential of modern rail transportation to meet the intercity and commuter passenger transportation needs of the United States." 49 U.S.C. § 24101(b). Amtrak is given authority to "acquire, operate, maintain, and make contracts for the operation and maintenance of equipment and facilities necessary for intercity and commuter rail passenger transportation...." 49 U.S.C. § 24305(a). Under the Northeast Rail Service Act of 1981, Pub. L. 97-35, 95 Stat. 643, as amended (1981) and Pub. L. 98-377 (Dec. 21, 1982), certain northeast corridor Conrail commuter operations were transferred to Amtrak Commuter and specified regional commuter authorities. For a list see 45 U.S.C. § 1104(3): "Commuter authority means any State, local, or regional authority, corporation, or other entity established for purposes of providing commuter service, and includes the Metropolitan Transportation Authority, the Connecticut Department of Transportation, the Maryland Department of Transportation, the Southeastern Pennsylvania Transportation Authority, the New Jersey Transit Corporation, the Massachusetts Bay Transportation Authority, the Port Authority Trans-Hudson Corporation, any successor agencies, and any entity created by one or more such agencies for the purpose of operating, or contracting for the operation of, commuter service." Congress has declared that, "Modern and efficient commuter rail passenger transportation is important to the viability and well-being of major urban areas and to the energy conservation and self-sufficiency goals of the United States." 49 U.S.C. § 24101. Commuter service is defined as "short-haul rail passenger service operated in metropolitan and suburban areas, whether within or across the geographical boundaries of a State, usually characterized by reduced fare, multiple-ride, and commutation tickets, and by morning and evening peak period operations." 45 U.S.C. § 1104(4).

<sup>16</sup> Extensive legal battles were fought in the 13(c) arena to establish the principle that 13(c) does not create a federal body of labor law applicable to transit workers; state law controls and disputes are to be resolved in state court—not federal court—applying state law. If transit workers do not have the right to binding interest arbitration, a meaningful dispute

Two federal courts have held that the RLA is applicable only to those employees who perform work related to the carrier's rail or air operations.<sup>17</sup> This would suggest, for example, that a transit operator's bus drivers would not fall under the RLA, though its rail workers might. However, the NMB has taken the position that the RLA is not limited to those employees directly engaged in rail or air operations, but "extends to virtually all employees engaged in performing a service for the carrier so that the carrier may transport passengers or freight."<sup>18</sup> Thus, a transit operator providing commuter rail operations could potentially find its entire workforce under the RLA.

### 3. Purposes

The purposes of the RLA are:

1. To avoid any interruption to commerce or to the operation of any carrier engaged therein;
2. To forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization;
3. To provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of the Act;
4. To provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; and
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.<sup>19</sup>

The principal purpose of the RLA is to avoid industrial strife between employers and employees so as to avoid disruptions to commerce.<sup>20</sup>

### 4. Union Certification

The NMB supervises the election of, and certifies the exclusive bargaining representative for, the employees; it also oversees the collective bargaining process.<sup>21</sup> Unlike the NLRA, bargaining under the RLA is done on a "craft" basis, by an occupational group of railroad or airline employees (e.g., engineers, firemen, machinists,

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resolution mechanism, such as fact finding or the right to strike, suffices for 13(c) purposes.

<sup>17</sup> *Northwest Airlines v. Jackson*, 185 F.2d 74 (8th Cir. 1950); *Pan American World Airways, Inc. v. United Bhd. of Carpenters & Joiners of America*, 324 F.2d 217 (9th Cir. 1963). LESLIE, *supra* note 14, at 63.

<sup>18</sup> *Federal Express Corp.*, 23 NMB 32 (1995).

<sup>19</sup> 45 U.S.C. § 151a.

<sup>20</sup> PAUL DEMPSEY ET AL., 2 AVIATION LAW & REGULATION § 15.12 (1992).

<sup>21</sup> The largest airline unions are the Air Line Pilots Association, the International Association of Machinists, and the Association of Flight Attendants, all members of the AFL-CIO.

dispatchers, pilots, or flight attendants),<sup>22</sup> even when the employees are geographically disbursed.<sup>23</sup> The RLA provides, “Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class....”<sup>24</sup> Since its creation in 1934, the NMB has consistently held that a union may be certified only on a system-wide basis—one which includes all members of that craft or class, regardless of their work location.<sup>25</sup>

To determine what constitutes a “craft” or “class,” the NMB examines the following criteria:

- Functional integration;
- A work-related community of interest;
- Work classifications;
- Common terms and conditions of employment;
- Common salary and fringe benefit packages;
- History of representation;
- Seniority issues; and
- Industry boundaries.<sup>26</sup>

Where a craft or class is unrepresented, the NMB usually requires that a union seeking to gain recognition as the bargaining representative submit an application to investigate a dispute (Form NMB-3), accompanied by authorization cards signed by at least 35 percent of the craft or class employees.<sup>27</sup> If the craft or class is already represented, authorization cards must be submitted by a majority of the craft or class.<sup>28</sup>

The RLA provides that the NMB “shall designate who may participate in the election and establish the rules to govern the election....”<sup>29</sup> Once the Board receives the NMB-3 application, it appoints a mediator to investigate the dispute. The mediator determines whether there is a sufficient showing of interest to hold an election and assesses the validity of the cards sub-

mitted.<sup>30</sup> If the mediator concludes there are an insufficient number of eligible cards, the case is dismissed., but if a sufficient number of cards has been filed to warrant an election, another union may petition to put itself on the ballot by filing cards from 35 percent of eligible employees.<sup>31</sup> In 1999, the NMB issued a revised standard ballot for conducting representative elections. Usually the NMB conducts a representation election by mail ballot, though it may conduct a ballot box election.

Many cases concern the lawfulness of carrier activities directed at employees attempting to dissuade organization of a union.<sup>32</sup> The RLA guarantees the right to organize and select a collective bargaining representative without interference, influence, or coercion by the carrier.<sup>33</sup> This means that a “free election atmosphere,” and the laboratory conditions essential to representation elections, must not be tainted.<sup>34</sup> “Laboratory conditions” are required once the carrier first learns of the organizing drive.<sup>35</sup>

The carrier may not deny, question, influence, coerce, or interfere in any way with the right of its employees to join or organize a union of their choice.<sup>36</sup> Generally speaking, the carrier may not engage in surveillance,<sup>37</sup> polling,<sup>38</sup> or interrogation,<sup>39</sup> or discharge, transfer, or withhold benefits from an employee for his participation in union or organizing activities.<sup>40</sup> Management’s conferring or withholding of a benefit during the organizing effort may be deemed improper carrier interference.<sup>41</sup> Management threats or predictions that unionization will eliminate jobs or cause the carrier to

<sup>30</sup> In order to determine their validity, the carrier is asked to provide an alphabetical list of all employees eligible to vote—those on the carrier payroll on the last payroll period prior to the receipt of the NMB-3 application. *LESLIE, supra* note 14, at 111.

<sup>31</sup> *LESLIE, supra* note 14, at 115. Eligibility to vote is limited to “employees and subordinate officials.” Under the RLA, an employee includes “every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work as defined as that of an employee or subordinate official...,” as defined by the Surface Transportation Board. 45 U.S.C. § 151 Fifth.

<sup>32</sup> *LESLIE, supra* note 14, at 157. For a representative list of activities that the NMB has concluded to constitute carrier election interference, see *LESLIE, supra* note 14, at 165, 169–71.

<sup>33</sup> 45 U.S.C. § 151, Fourth.

<sup>34</sup> See *Cape Air*, 37 N.M.B. 35 (2009); *Union Pacific Railroad*, 34 N.M.B. 21 (2006).

<sup>35</sup> *Stillwater Central RR*, 33 N.M.B. 100 (2006); *Metro-North Commuter RR*, 29 N.M.B. 458 (2000).

<sup>36</sup> 45 U.S.C. § 152 Fourth.

<sup>37</sup> *Union Pacific R.R.*, 34 N.M.B. 21 (2006).

<sup>38</sup> *Machinists v. Continental Airlines*, 754 F. Supp. 892 (D.D.C. 1990).

<sup>39</sup> *Key Airlines*, 16 N.M.B. 296 (1989).

<sup>40</sup> *Conrad v. Delta Airlines*, 494 F.2d 914, 918 (7th Cir. 1974); *Adams v. Federal Express*, 470 F. Supp. 1356, 1367 (W.D. Tenn. 1979).

<sup>41</sup> *LESLIE, supra* note 14, at 167.

<sup>22</sup> Among the railroad unions are the Brotherhood of Locomotive Engineers, Brotherhood of Maintenance of Way Employees, Brotherhood of Railroad Signalmen, the Transportation Communications Union, and Transport Workers Union of America.

<sup>23</sup> *AMERICAN BAR ASS’N, THE RAILWAY LABOR ACT 29* (BNA Supp. 2001). For a list of the well-recognized railway crafts, see *LESLIE, supra* note 14, at 98–99.

<sup>24</sup> 45 U.S.C. § 152 Fourth.

<sup>25</sup> *LESLIE, supra* note 14, at 91. See *Aircraft Service Int’l Group*, 31 N.M.B. 131 (2004); *Airtran Airways*, 28 N.M.B. 603 (2001).

<sup>26</sup> National Mediation Board, Representation Manual § 9.1. See *Continental Airlines*, 37 N.M.B. 121 (2010); *Southwest Airlines*, 35 N.M.B. 139 (2008).

<sup>27</sup> The NMB maintains confidentiality as both to the identity and number of card signers in support of a representative election. *AMERICAN BAR ASS’N, supra* note 23, at 42.

<sup>28</sup> Douglas Leslie, *The Railway Labor Act* 109 (BNA 1995).

<sup>29</sup> 45 U.S.C. § 151, Ninth.

liquidate the company are considered by the NMB to be an unlawful interference with election conditions.<sup>42</sup> Nor may an employer regularly question employees about whether they have received their ballots or about what they have done or intend to do with them.<sup>43</sup> Carriers are also prohibited from requiring prospective employees to sign any agreement to join or not to join a labor organization.<sup>44</sup>

Isolated incidents are insufficient, however, to find a case of taint. There must instead be a “pattern” or a “systematic” effort to interfere with or improperly influence the election.<sup>45</sup> As the U.S. Supreme Court noted, “Influence’ in this context plainly means pressure, the use of authority or power of either party to induce action by the other in derogation of what the statute calls ‘self-organization.’”<sup>46</sup> Courts also have held that a carrier has a First Amendment right to communicate its general views about unionism and its specific views about a particular union, so long as it does not threaten a reprisal or promise a benefit.<sup>47</sup> The carrier also has the right to make objective predictions as to the impact it believes unionization will have on the company. Small meetings with employees are not improper unless coercive, or they increase in frequency during an election. During an election, however, one-on-one meetings with employees where management expresses anti-unionization opinions may be deemed coercive.

If the employer taints the laboratory conditions the NMB seeks to create for an election, the NMB has broad discretion to impose a remedy “to eliminate the taint of interference on the election,”<sup>48</sup> including gauging employee sentiment via means other than a secret ballot election or conducting rerun elections.<sup>49</sup> Remedies “are fashioned in accordance with the extent of carrier interference found.”<sup>50</sup> Moreover, one who is wrongfully discharged for pursuing union activities may bring an action against the employer seeking reinstatement, back pay, restored benefits, punitive damages, and/or restored seniority.<sup>51</sup> There are instances, albeit rare, in

which union actions invalidated elections; unions, while having far fewer restrictions than carriers, also do not operate on an unrestricted basis. It may, for example, require a rerun election,<sup>52</sup> or in egregious cases, use the certification cards alone to certify a union.<sup>53</sup> The NMB has discretion to extend the voting period.

A majority of all eligible employee must cast valid ballots approving union representation.<sup>54</sup> The union with the majority of votes cast is certified as the collective bargaining representative.<sup>55</sup> If a union requests an election and less than a majority vote for representation, or if a union renounces representation, the craft or class will become unrepresented.<sup>56</sup> A carrier may voluntarily recognize a union prior to its certification,<sup>57</sup> but it is under no obligation to recognize one that has not been certified by the NMB.<sup>58</sup>

When a prior election has been held, absent “unusual or extraordinary circumstances,” the NMB may impose a qualified bar on a new election of the same craft or class of employees of the same carrier from 1 year on the date on which: (1) less than a majority of eligible voters participated in the prior election; (2) the Board dismissed the application on grounds that no dispute existed; or (3) the Board dismissed the application after the applicant withdrew it.<sup>59</sup> The NMB may also impose a 2-year certification bar from the date of certification of a representative covering the same craft or class of employees.<sup>60</sup> In some instances, the existence of a collective bargaining agreement (CBA) bars a representation election during the duration of the agreement.<sup>61</sup>

Prior to 2010, if a union requested an election and less than a majority of the class or craft voted for representation, or if a union renounced representation, the craft or class became unrepresented. The Obama Administration’s NMB promulgated a rule requiring that only a majority of votes cast is necessary to establish a union, irrespective of whether a majority of employees cast votes.

Generally speaking, federal courts do not have jurisdiction to review the discretionary actions of the NMB

<sup>42</sup> AMERICAN BAR ASS’N, *supra* note 23, at 114. NLRB v. Gissell Packing Co., 395 U.S. 575, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969); Adams v. Federal Express, 470 F. Supp. 1356, 1367 (W.D. Tenn. 1979).

<sup>43</sup> AMERICAN BAR ASS’N, *supra* note 23, at 115.

<sup>44</sup> 45 U.S.C. § 152 Fifth.

<sup>45</sup> See Cape Air, 37 N.M.B. 35 (2009); Delta Airlines, 35 N.M.B. 271 (2008); Union Pacific Railroad, 34 N.M.B. 21 (2006).

<sup>46</sup> Texas and New Orleans R.R. v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548, 567, 50 S. Ct. 427, 433, 74 L. Ed. 1045 (1930).

<sup>47</sup> American Bar Ass’n, *The Railway Labor Act* 59 (BNA Supp. 2000).

<sup>48</sup> *Federal Express Corp.*, 20 NMB 7, 44 (1992).

<sup>49</sup> AMERICAN BAR ASS’N, *supra* note 23, at 129–30.

<sup>50</sup> *Federal Express Corp.*, 20 NMB 7, 44 (1992).

<sup>51</sup> LESLIE, *supra* note 14, at 159–60. Federal courts are split as to the right to a jury trial, or whether an employee can recover punitive damages in a wrongful discharge case.

AMERICAN BAR ASS’N, *supra* note 23, at 107. However, a carrier may permit an employee to confer with management during working hours without loss of time, or provide free transportation to employees while engaged in the business of a labor organization. *Id.*

<sup>52</sup> *Cape Air*, 37 N.M.B. 35 (2009).

<sup>53</sup> *Sky Valet*, 23 N.M.B. 276 (1996).

<sup>54</sup> LESLIE, *supra* note 14, at 125.

<sup>55</sup> LESLIE, *supra* note 14, at 126; AMERICAN BAR ASS’N, *supra* note 23, at 64.

<sup>56</sup> LESLIE, *supra* note 14, at 135.

<sup>57</sup> *Summit Airlines v. Local 295 Teamsters*, 628 F.2d 787, 795 (2d Cir. 1980).

<sup>58</sup> LESLIE, *supra* note 14, at 197.

<sup>59</sup> 29 C.F.R. § 1206.4.

<sup>60</sup> 29 C.F.R. § 1206.4(a). See *Fox River Valley Railroad*, 20 N.M.B. 251 (1993).

<sup>61</sup> LESLIE, *supra* note 14, at 116–17.

unless there is prima facie evidence of a Constitutional violation or a gross violation of the RLA.<sup>62</sup>

### 5. Duty of Fair Representation

The union has a “duty of fair representation” toward its employees. This duty is a judicially created doctrine designed to protect individual employees against discriminatory treatment by their union.<sup>63</sup> The requirement is a counterbalance to the union’s position as the employee’s sole bargaining representative.<sup>64</sup> Thus, an employee’s union must pursue meritorious grievances in good faith, and pursue the interest of all employees fairly in negotiating a new contract.<sup>65</sup> It must not favor one group of employees over another in bargaining with management.<sup>66</sup> It must bargain fairly on behalf of minority union members by not negotiating a contract that excludes them from certain positions.<sup>67</sup> But, because a union has to satisfy the collective needs of a diverse group of employees, it enjoys a certain amount of discretion in pursuing their interests, and breaches the “duty of fair representation” only when its conduct toward an employee is arbitrary, discriminatory, or in bad faith.<sup>68</sup> A union breaches its duty of fair representa-

tion when it fails to act with complete good faith and honesty.<sup>69</sup>

### 6. Duty to Bargain in Good Faith

Under the RLA, both the union and management have a duty to engage in collective bargaining in good faith—they are obliged to meet, confer with, and make reasonable efforts to achieve written agreements resolving labor-management disputes. The RLA explicitly commands that it is the duty of labor and management

to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes [whether arising inside or outside of those agreements] in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and [its] employees....<sup>70</sup>

The U.S. Supreme Court has held that the terms “rates or pay, rules and working conditions” are to be interpreted broadly.<sup>71</sup> Absent the carrier’s bad faith in negotiating the initial CBA, the union may not engage in self-help<sup>72</sup> prior to exhaustion of the RLA’s mandatory collective bargaining procedures.<sup>73</sup> Management may not go around the designated employee representatives and attempt to bargain directly with its members.<sup>74</sup>

The CBA constitutes more than just the explicit terms contained in the written agreement between the company and its employees. It also includes a broad range of implied terms “arising from practice, usage and custom.”<sup>75</sup>

### 7. Dispute Resolution

#### a. Types of Disputes

Disputes under the RLA fall into one of three major categories: representation disputes, major disputes, and minor disputes.<sup>76</sup> Each is handled under a different

<sup>62</sup> *Brotherhood of Railway and Steamship Clerks v. Non-Contract Employees*, 380 U.S. 650, 85 S. Ct. 1192, 14 L. Ed. 2d 133 (1965); *District 6 v. NMB*, 139 F. Supp. 2d 557 (S.D.N.Y. 2001); *Ass’n of Flight Attendants v. Delta Airlines*, 879 F.2d 906 (D.C. Cir. 1989). On representation disputes generally, see Roland Wilder, Jr. & Stephen Feinberg, *Representation Issues Under the Railway Labor Act*, ALI-ABA 15 (Apr. 2010).

<sup>63</sup> *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202, 65 S. Ct. 226, 89 L. Ed. 173 (1944); *Maher v. N.J. Transit Operations*, 593 A.2d 750, 761 (N.J. 1991).

<sup>64</sup> *Hines v. Anchor Motor Freight*, 424 U.S. 554, 564, 96 S. Ct. 1048 (1976).

<sup>65</sup> The union must act without hostility or discrimination, and in complete good faith and honesty to avoid arbitrary conduct. *Parker v. Metropolitan Transp. Auth.*, 97 F. Supp. 2d 437 (S.D. N.Y. 2000).

<sup>66</sup> For a transit case in which the court found the union had engaged in unlawful racial discrimination, see *Allen v. Amalgated Transit Union, Local 788*, 554 F.2d 876 (8th Cir. 1977).

<sup>67</sup> *Steele*, 323 U.S. 192.

<sup>68</sup> *Ford Motor Co. v. Hoffman*, 345 U.S. 330, 338, 73 S. Ct. 681, 97 L. Ed. 1048 (1953); *Vaca v. Sipes*, 368 U.S. 171, 190, 87 S. Ct. 903, 916, 17 L. Ed. 2d 842, 857 (1967). For a transit case in which the employee failed to prove the union’s actions were arbitrary, discriminatory, or in bad faith, see *Masy v. N.J. Transit Rail Operations, Inc.*, 790 F.2d 322 (3d Cir. 1986), and *Butler v. WMATA*, 1990 U.S. Dist. Lexis 10631 (D. D.C. 1990). For a contrary case, see *Allen v. Amalgated Transit Union Local 788*, 554 F.2d 876 (8th Cir. 1977). The failure of a union to seek arbitration on behalf of an employee does not constitute a breach of the duty of fair representation, absent proof that the union’s conduct toward its member was arbitrary, discriminatory, or in bad faith. *Burning v. Niagara Frontier Transit Metro Sys.*, 273 A.D. 830, 710 N.Y.S.2d 276 (2000).

<sup>69</sup> *Graham v. Trans World Airlines*, 688 F. Supp. 1387 (W.D. Mo. 1988).

<sup>70</sup> 45 U.S.C. § 152 First.

<sup>71</sup> *Order of Railroad Telegraphers v. Chicago & N.W. R.R.*, 362 U.S. 330, 338, 80 S. Ct. 761, 4 L. Ed. 2d 774 (1960).

<sup>72</sup> Work slow-downs, sick-outs, or strikes are unlawful activities prior to exhaustion of the RLA’s procedural requirements.

<sup>73</sup> AMERICAN BAR ASS’N, *supra* note 23, at 159–60 (BNA Supp. 2001). But the exceptions to the exhaustion requirement are set forth in *Sisco v. Consol. Rail Corp.*, 732 F.2d 1188 (3d Cir. 1984), and elsewhere in this Section.

<sup>74</sup> LESLIE, *supra* note 14, at 186.

<sup>75</sup> *Hawaiian Airlines v. Norris*, 512 U.S. 246, 264, 114 S. Ct. 2239, 2250, 129 L. Ed. 203, 219 (1994); *Sturge v. Nw. Airlines*, 658 F.3d 832 (8th Cir. 2011).

<sup>76</sup> One treatise also refers to resolution of statutory disputes. LESLIE, *supra* note 14, at 7. *Statutory disputes* are disputes for which the RLA creates an enforceable right or obligation, but does not commit its enforcement exclusively to one of the administrative processes. The principal category of

statutory dispute resolution procedure and has differing obligations regarding maintenance of the *status quo*; hence the categorization of the dispute may affect its ultimate outcome.<sup>77</sup> The U.S. Supreme Court has observed that the “RLA subjects all railway disputes to virtually endless ‘negotiation, mediation, voluntary arbitration, and conciliation.’”<sup>78</sup> Often, the courts are called in to decide whether a dispute is major or minor.<sup>79</sup>

### b. Representation Disputes

*Representation disputes* involve the selection of the employee’s representatives for purposes of collective bargaining. Exclusive jurisdiction over this issue is vested in the NMB,<sup>80</sup> which may define the scope of the carrier, define the appropriate “craft or class” for bargaining, specify the rules for conducting elections, and designate bargaining representatives.<sup>81</sup>

Within 30 days after request of either party to a dispute as to which union shall represent a craft or a group of employees, the NMB shall investigate and certify the individuals that have been designated and authorized to represent the particular employees. The NMB may take a secret ballot or utilize any other appropriate method of designating the employee representatives, in whatever manner shall ensure that the certified representatives have been chosen without the interference, influence, or coercion of the carrier.<sup>82</sup>

One area of disputes arises where carriers merge or acquire carriers or other entities. If the two companies are deemed to be a “single carrier,”<sup>83</sup> then a union representing the workers of one entity often will attempt to assert representation of the workers of the other, even if the other is not unionized.<sup>84</sup> The question often becomes: Which union represents the employees? If a union voluntarily transfers certification to another union, the NMB views the transfer as an internal issue, not subject to its intervention.<sup>85</sup> The fact that two carriers are not commonly owned may be outweighed by the

degree of control management exercises over them.<sup>86</sup> The NMB has virtually plenary power to resolve representation disputes.<sup>87</sup>

### c. Major Disputes

*Major disputes* involve formation or modification of collective bargaining agreements (e.g., wages, work rules, working conditions).<sup>88</sup> They are disputes with respect to “the formation of collective agreements or efforts to secure them.”<sup>89</sup> A major dispute focuses on the terms an agreement should contain.<sup>90</sup> These disputes are designed to be resolved through collective bargaining between the labor unions and management. The statutory process requires a meet and confer process, with good faith negotiations, mediation, nonmandatory arbitration, and if all else fails, intervention by a Presidential Emergency Board. Until these procedures are exhausted, neither party may upset the *status quo* by engaging in self-help or “economic warfare.”<sup>91</sup> A central purpose of the RLA is to avoid “any interruption to commerce or to the operation of any carrier engaged therein.” Describing the *status quo* maintenance requirement as “an almost interminable process,” the U.S. Supreme Court has observed:

The Act’s *status quo* requirement is 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 lockout.<sup>92</sup>

As a union contract approaches expiration, labor and management typically begin negotiations for a new contract by exchanging proposals. If they cannot negotiate a settlement, the party seeking to change the existing contract (e.g., rates of pay, rules and working condi-

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statutory disputes involves employee rights arising under Section 2 of the RLA. However, this is not a term that has caught on in the courts. *Independent Ass’n of Continental Pilots v. Continental Airlines*, 155 F.3d 685, 690 (3d Cir. 1998).

<sup>77</sup> LESLIE, *supra* note 14, at 1.

<sup>78</sup> *Detroit and Toledo Shore Line v. United Transp. Union*, 396 U.S. 142, 148–49, 90 S. Ct. 294, 298, 24 L. Ed. 2d 325, 332 (1969); *Burlington N. Ry. Co. v. Brotherhood of Maintenance Way Employees*, 481 U.S. 429, 444 107 S. Ct. 1841, 1850, 95 L. Ed. 2d 381, 397 (1987).

<sup>79</sup> LESLIE, *supra* note 14, at 7.

<sup>80</sup> LESLIE, *supra* note 14, at 89.

<sup>81</sup> LESLIE, *supra* note 14, at 1–2.

<sup>82</sup> 45 U.S.C. § 152 Ninth.

<sup>83</sup> *Delta Air Lines v. Ass’n of Flight Attendants*, 720 F. Supp. 2d 213 (E.D.N.Y. 2010).

<sup>84</sup> *See, e.g., Intl Brotherhood of Teamsters v. Frontier Airlines*, 628 F.3d 402 (7th Cir. 2010).

<sup>85</sup> *Southern Air*, 37 N.M.B. 139 (2010).

<sup>86</sup> *Delta Airlines/Northwest Airlines*, 36 N.M.B. 36 (2009). *See* Roland Wilder, Jr. & Stephen Feinberg, *Representation Issues Under the Railway Labor Act*, ALI-ABA 15 (Apr. 2010).

<sup>87</sup> Harry Risetto & Thomas Reinert, Jr., *Overview of the Railway Labor Act*, ALI-ABA 1 (Apr. 2010); *Western Airlines v. Int’l Brotherhood of Teamsters*, 480 U.S. 1301, 107 S. Ct. 1515, 94 L. Ed. 2d 744 (1987).

<sup>88</sup> *United Transp. Union v. Southeastern Pa. Transp. Auth.*, 23 F. Supp. 2d 557 (E.D. Pa. 1998).

<sup>89</sup> *Elgin, Joliet & Eastern R.R. Co. v. Burley*, 325 U.S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945); *Consolidated Rail Corp. v. Railway Labor Executives’ Ass’n*, 491 U.S. 299, 302 109 S. Ct. 2477, 2480, 105 L. Ed. 2d 250, 261 (1989).

<sup>90</sup> *United Transp. Union v. Southeastern Pa. Transp. Auth.*, 23 F. Supp. 2d 557 (E.D. Pa. 1998).

<sup>91</sup> LESLIE, *supra* note 14, at 8. Such self-help on the part of the union might include a sick-out, or strike; self-help on the part of management might for example include a unilateral reduction in wages, or a lock-out.

<sup>92</sup> *Detroit & Toledo Short Line R.R. v. United Transp. Union*, 396 U.S. 142, 150, 90 S. Ct. 294, 299, 24 L. Ed. 2d 325, 332 (1969).

tions) may post a “Section 6 notice” 30 days prior to any intended change, which triggers the collective bargaining process of the RLA. Within 10 days of receipt of such notice, representatives of labor and management must agree on a time and place for such negotiations.<sup>93</sup> The conference must begin within the 30 days, and the carrier may not change existing rules, working conditions, or pay during this period.<sup>94</sup> No time limits dictate the length of negotiations. Management and labor may negotiate for as long as they wish, and the *status quo* remains undisturbed during the entire period (i.e., the existing contract governs, and neither party may engage in “self-help” economic warfare).<sup>95</sup> But if bargaining is terminated, a 10-day *status quo* period begins. If, during this period, neither side requests NMB mediation, nor does the NMB *sua sponte* offer mediation, then at the end of this period, either side may engage in self-help.<sup>96</sup>

Because the RLA attempts to preserve the status quo during negotiations, injunctions have been issued against unions attempting to encourage their members to engage in a work slowdown to put pressure on management during negotiations for a new CBA.<sup>97</sup>

If either party perceives an impasse, it may so inform the NMB, which ordinarily attempts to mediate the dispute or recommends tripartite arbitration. Negotiation and mediation can last years. If, at its discretion, the NMB declares that the parties have reached an impasse, the parties enter a 30-day “cooling off” period, after which either side may engage in self-help—the union may strike, and/or management may unilaterally impose lower wage/work rules and permanently lock out<sup>98</sup> and replace any strikers.<sup>99</sup> Once a strike has begun, management is free to hire replacements and is under no duty to displace the new worker once the strike is over.<sup>100</sup> But because the RLA’s dispute resolution procedures are “almost interminable,” this reality

often brings the parties to compromise and settlement without strikes or lockouts.<sup>101</sup>

In emergency situations (where a threatened strike or lockout would “deprive any section of the country of essential transportation service”), the NMB must notify the President, who may call an Emergency Board to investigate the facts.<sup>102</sup> The Emergency Board shall submit its report to the President within 30 days after its creation. Neither party may engage in self-help until 30 days after the President receives the Board’s report<sup>103</sup>—in effect giving the parties an additional 60-day cooling-off period beyond the aforementioned requirements. While common in major railroad strikes, the creation of Emergency Boards has been an uncommon response to airline strikes. Congress has occasionally legislated solutions to railway strikes.

If a strike occurs, management may not fire a striking worker who subsequently decides to return to work if a position is available for him or her (after conclusion of the strike, management is not obliged to lay off newly hired workers who crossed the picket line). While returning workers are given their vested seniority rights, thereby putting them ahead of the newly hired “scabs,” they return at the unilaterally dictated lower wages and working conditions, unless management and labor expressly negotiate a different arrangement. Because common carriers constitute both a service industry and have high fixed costs, carriers cannot take either a prolonged strike or labor acrimony without suffering deleterious service, cost, and revenue consequences. Thus, even in the post-deregulation era, unions have significant leverage in protecting existing wages and work rules.

One issue that sometimes arises is the permissible degree of influence a governmental institution can exert in labor-management collective bargaining negotiations of its contractors. One case involved a situation in which the state of New Jersey subsidized a private bus line under a statute authorizing it to contract with bus lines “in imminent danger of terminating all bus services or all rail transit services provided...to insure the continuance of that portion of the bus and rail transit services which is essential.” During the midst of negotiations between the private bus company and its unions on successor agreements, New Jersey officials announced that the state would no longer assist any transit company that entered into a collective bargaining agreement that included a cost of living clause. The union filed suit, seeking declaratory and injunctive relief on the theory that the state policies were a type of regulation destroying free negotiations, which were preempted by federal statutes creating the right of col-

<sup>93</sup> 45 U.S.C. § 156.

<sup>94</sup> *Id.*

<sup>95</sup> LESLIE, *supra* note 14, at 213.

<sup>96</sup> 45 U.S.C. § 156.

<sup>97</sup> *See, e.g.*, U.S. Airways v. U.S. Airline Pilots Ass’n, 813 F. Supp. 2d 710 (W.D.N.C. 2011).

<sup>98</sup> A lock out is the temporary withholding of work from employees by shutting down the operation in order to bring pressure on the employees or their bargaining representative to accept the employer’s terms of settlement of a labor dispute. MICH. COMP. LAWS SERV. § 423.201 (2014).

<sup>99</sup> *See generally* DEMPSEY ET AL., *supra* note 20 § 15.

<sup>100</sup> NLRB v. Mackay Radio & Telegraph, 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381 (1938); Trans World Airlines v. Independent Federation of Flight Attendants, 489 U.S. 426, 109 S. Ct. 1225, 103 L. Ed. 2d 456 (1989). However, the company may not confer super-seniority rights upon the newly hired employees. NLRB v. Erie Resistor, 373 U.S. 232, 83 S. Ct. 1132, 1147, 10 L. Ed. 2d 308, 317 (1963).

<sup>101</sup> Detroit & Toledo Short Line R.R. v. United Transp. Union, 396 U.S. 142, 149, 90 S. Ct. 294, 299, 24 L. Ed. 2d 325, 332 (1969). LESLIE, *supra* note 14, at 215.

<sup>102</sup> *See, e.g.*, Burlington N. R.R. v. Brotherhood of Maintenance of Way Employees, 481 U.S. 429, 107 S. Ct. 1841, 95 L. Ed. 2d 381 (1987).

<sup>103</sup> 45 U.S.C. § 160.



lective bargaining. The court dismissed the suit, finding that the state had merely established conditions as to how it would spend its own money.<sup>104</sup> Thus, efforts by state officials to influence their contractors' collective bargaining agreements in order to save the state's money are permissible.<sup>105</sup>

#### *d. Commuter Rail Major Dispute Procedures*

In response to the June-July 1980 PATH strike by the Transportation Communications Union-Railway-Carmen in the New York metropolitan area, as well as the debate over whether the RLA applied to former Conrail commuter services, Congress established significantly more rigorous procedural requirements for publicly funded and operated rail commuter carriers (including Amtrak commuter services).<sup>106</sup> If the labor-management dispute is not adjusted, and the President does not create an Emergency Board in the manner described above, then the Governor of any state through which the commuter services operate, or any party to the dispute, may request that the President create an Emergency Board. Upon such request, the President is obligated to do so. Absent an agreement, the *status quo* must be maintained by the parties for 120 days after the Emergency Board is created.<sup>107</sup> Within 60 days after its creation, the NMB must conduct a public hearing at which each party shall appear and explain why it has not accepted the recommendations of the Emergency Board for settlement.<sup>108</sup>

If no settlement has been reached after 120 days from creation of the Emergency Board, either party or the Governor may request the President to establish another Emergency Board, and he shall be obligated to do so.<sup>109</sup> Within 30 days of its creation, the parties shall submit their final offers for settlement of the dispute to the Board.<sup>110</sup> Within 30 days of the submission of these final offers, the Board shall submit a report to the President identifying the offer it considers the most reasonable.<sup>111</sup> Neither party may engage in self-help during the 60 days following the issuance of this report.<sup>112</sup> After this period, if the Board designated the carrier's final offer as the most reasonable, striking employees shall be denied benefits under the Railroad Unemployment Insurance Act.<sup>113</sup> If the Board has designated labor's final offer as the most reasonable, then

the carrier shall be denied the benefit of any work stoppage agreement among carriers.<sup>114</sup>

As an example, President Clinton called two Emergency Boards to deal with a dispute between several unions and Metro-North Commuter Railroad, the nation's second largest commuter railroad, over the unions' demands of pay parity with the Long Island Railroad, one of several transportation companies operated by New York MTA. On September 29, 1995, the panel recommended that all of the labor unions' final offers be accepted, except for those of the Teamsters (representing the maintenance-of-way employees), and the Electrical Workers (representing electrical supervisors), and in these areas accepted Metro-North's final offers. The Board recommended a 3-year agreement, with 3 percent wage increases in both July 1995 and January 1996 and 4 percent in January 1997, and life insurance benefits of \$28,000 effective in 1996. It also made a number of other recommendations addressing issues such as skill differentials, sick leave, personal days, holidays, and work rule changes dealing with work force scheduling, part-time employees, swing time, meal time, extra lists, break periods, and road pay.<sup>115</sup> President George W. Bush also exerted his authority to call an Emergency Board to avoid a threatened strike at United Airlines.

#### *e. Minor Disputes*

While major disputes seek to create contractual rights, *minor disputes* (also known as *grievance disputes*) seek to enforce them.<sup>116</sup> Minor disputes are over grievances arising from interpretation and application of existing contract provisions, usually involving rates of pay, rules, or working conditions.<sup>117</sup> They are disputes with respect to an existing (or implied) agreement that relate "either to the meaning or proper application of a particular provision with respect to a specific situation or to an omitted case."<sup>118</sup> A dispute is minor if the contested action is "arguably justified" by the CBA or not "obviously insubstantial."<sup>119</sup> A minor dispute's dis-

<sup>114</sup> 45 U.S.C. § 159a(j).

<sup>115</sup> *Labor Management Bargaining in 1995*, 119 MONTHLY LAB. REV. 25 (Jan. 1996).

<sup>116</sup> *Parker v. Metropolitan Transp. Auth.*, 97 F. Supp. 2d 437, 446 (S.D. N.Y. 2000). For recent litigation involving interpretations of CBAs in a transit context, see *Niagara Frontier Transit Metro System, Inc. v. Amalgamated Transit Union Local Union 1342*, 103 A.D.3d 1146, 960 N.Y.S.2d 566 (N.Y.A.D. 4 Dept. 2013); *Subway Surface Sup'rs Ass'n v. N.Y. City Transit Auth.*, 102 A.D. 3d 532, 959 N.Y.S.2d 30 (N.Y.A.D. 1 Dept. 2013); *Greer v. Metro. Council*, Slip Copy, 2013 U.S. Dist. LEXIS 17801 (D. Minn. 2013).

<sup>117</sup> 45 U.S.C. § 153 First (i).

<sup>118</sup> *Elgin, Joliet & Eastern R.R. v. Burley*, 325 U.S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945).

<sup>119</sup> *Consolidated Rail Corp. v. Railway Labor Executives' Assoc.*, 491 U.S. 299, 306, 109 S. Ct. 2477, 2482, 105 L. Ed. 2d 250, 264 (1989); *Maher v. N.J. Transit Operations*, 593 A.2d 750, 758 (N.J. 1991). "A minor dispute concerns the meaning and application of the provisions of the negotiated agreement that has been hammered out at the bargaining table. Minor

<sup>104</sup> *Amalgamated Transit Union v. Byrne*, 568 F.2d 1025 (3d Cir. 1977).

<sup>105</sup> Alan Hyde, *Beyond Collective Bargaining: The Politicization of Labor Relations Under Government Contract*, 1982 WIS. L. REV. 1 (1982).

<sup>106</sup> LESLIE, *supra* note 14, at 61. 45 U.S.C. § 159a(a).

<sup>107</sup> 45 U.S.C. § 159a(c)(1).

<sup>108</sup> 45 U.S.C. § 159a(d).

<sup>109</sup> 45 U.S.C. § 159a(e).

<sup>110</sup> 45 U.S.C. § 159a(f).

<sup>111</sup> 45 U.S.C. § 159a(g).

<sup>112</sup> 45 U.S.C. § 159a(h).

<sup>113</sup> 45 U.S.C. § 159a(i).

tinguishing feature is that it may be conclusively resolved via application and interpretation of the agreement.<sup>120</sup> The burden of proving a dispute is minor is a light one.<sup>121</sup> However, if the challenge is not to the CBA, but the discriminatory manner in which it was applied to the plaintiff, the dispute is not minor, and is subject to judicial review.<sup>122</sup>

Minor disputes are “adjusted,” submitted to compulsory arbitration through the railroad’s internal grievance machinery, if necessary, all the way through the carrier’s System Board of Adjustment<sup>123</sup> (e.g., the National Railway Adjustment Board (NRAB) for railroads),<sup>124</sup> which is final and binding on the parties in most cases.<sup>125</sup> Congress intended to keep minor disputes out of the courts.<sup>126</sup> These procedures are exclusive, subject to a few exceptions: (1) where the employer repudiates the private grievance machinery; (2) where resort to administrative remedies would be futile; or (3) where the employer is joined in a “duty of fair representation” claim against the employee’s union.<sup>127</sup> Minor disputes do not provide a lawful basis for strikes or work disruptions. In contrast, after a lengthy mediation process, major disputes can be subject to strikes and lockouts.

## 8. Labor Protective Provisions

“Labor protection” is a term of art referring to the mitigation of the effect of carrier mergers and consolidations on employees. Labor Protective Provisions (LPPs) are usually imposed in the context of a carrier merger or acquisition. LPPs usually provide for integration of seniority lists; wages and benefits; for displacement, dismissal, and relocation allowances; and for arbitration of disputes.

To understand LPPs, one must be acquainted with their historical evolution. This is not merely an idle

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disputes include disputes about the existence or extent of provisions established or implied into the agreement by usage, practice or custom.” *United Transp. Union v. Southeastern Pa. Transp. Auth.*, 23 F. Supp. 2d 557, 559 (E.D. Pa. 1998).

<sup>120</sup> *United Transp. Union v. Se. Pa. Transp. Auth.*, 23 F. Supp. 2d 557 (E.D. Pa. 1998); *Ass’n of Flight Attendants v. Mesa Air Group*, 567 F.3d 1043 (9th Cir. 2009).

<sup>121</sup> *McQuestion v. N.J. Transit Rail Operations, Inc.*, 30 F.3d 388 (3d Cir. 1994).

<sup>122</sup> *Carmona v. Sw. Airlines*, 536 F.3d 344 (5th Cir. 2008).

<sup>123</sup> In the rail industry, System Boards of Adjustment usually consist of three members—a railroad member, a labor member, and a neutral chair. LESLIE, *supra* note 14, at 283. As to carrier boards of adjustment generally, *see Airline Pilots Assn v. U.S. Airways Group*, 609 F.3d 338 (4th Cir. 2010).

<sup>124</sup> *See LESLIE, supra* note 14, at 278.

<sup>125</sup> *Adams v. N.J. Transit Rail Operations*, 2000 U.S. Dist. Lexis 2154 (S.D. N.Y. 2000).

<sup>126</sup> *Masy v. N.J. Transit Rail Operations*, 643 F. Supp. 1145 (Sp. Ct. R.R.R.A. 1986).

<sup>127</sup> *Sisco v. Consol. Rail Corp.*, 732 F.2d 1188 (3d Cir. 1984); *Masy v. N.J. Transit Rail Operations*, 790 F.2d 322, 326 (3d Cir. 1986).

intellectual stroll through history, however. As noted, certain rail commuter providers have found themselves under the jurisdiction of the RLA. For rail employees, Congress has mandated that LPPs be no less generous than those conferred prior to 1976, and explicitly referred back to LPP legislation it passed in 1940. For transit employees, Section 13(c) also builds on that 1940 legislation and regulatory interpretations thereof; 13(c) was the model embraced by Congress for Amtrak as well and its governing statute also references that 1940 legislation. Hence, LPP benefits conferred today can be no less generous than those established by Congress in 1940.<sup>128</sup> Thus, the historical regime has tremendous relevance in the contemporary law.

Since the 1930s, employees in railroads subject to mergers and consolidations have enjoyed a level of job protection unrivaled by any other industry. The Emergency Railroad Transportation Act of 1933 (ERTA) was the first statute to protect railway employees affected by railroad consolidations.<sup>129</sup> Before ERTA expired, labor and management negotiated what became the prevailing basis of railroad labor protection—the Washington Job Protection Agreement of May 1936 [the *Washington Agreement*]. Eighty-five percent of the nation’s carriers signed the *Washington Agreement*. Its major benefits included:

- For an employee deprived of employment (“displaced”), 60 percent of the employee’s average monthly salary (less earnings from other railroad employment) for up to 5 years, depending on length of service, or a lump sum payment of up to 12 months’ pay, depending on length of service.

- For an employee whose position was worsened (employee forced to hold a lower-paying job), a “displacement allowance” guaranteed the same pay earned prior to the merger for up to 5 years, depending on length of service.

- For any employee required to move, reimbursement of moving expenses, including any loss suffered in the sale of a residence for less than its fair market value.

- For all employees, retention of fringe benefits enjoyed in previous employment.<sup>130</sup>

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<sup>128</sup> However, as explained below, legislation promulgated in 1995 that sunset the I.C.C., exempts mergers of two Class III railroads (those having annual operating revenue of less than \$25 million), and imposes less generous LPP requirements on mergers between Class II (those with operating revenue of less than \$258 million but more than \$25 million) and Class III railroads.

<sup>129</sup> ERTA required that no carrier could reduce the number of its employees below that prevailing in May 1933, and that the carrier must pay all moving expenses and property losses incurred by employees forced to move as a result of the consolidation.

<sup>130</sup> PAUL DEMPSEY & WILLIAM THOMS, *LAW AND ECONOMIC REGULATION IN TRANSPORTATION* 302 (Quorum 1986). Until the U.S. Supreme Court’s decision in *United States v. Lowden*, 308 U.S. 225 (1939), it was unclear whether the Interstate

In 1940, Congress added Section 5(2)(f) to the Interstate Commerce Act to require the ICC to impose LPPs in rail mergers, consolidations, acquisitions, line abandonments, and related transactions. The Act provided that in the case of a railroad merger, the employees would be placed in no worse position in relation to their employment after the merger had been consummated. Such protection was to extend not less than 4 years from the ICC decision approving the merger.<sup>131</sup>

The ICC first prescribed LPPs under this provision in the *New Orleans Union Passenger Terminal Case*.<sup>132</sup> The *New Orleans Conditions*, as they came to be known, provided employee protection from the effects of a rail merger or acquisition for at least 4 years from the effective date of the ICC's order approving the transaction. During that period, an employee deprived of employment as a result of the merger or acquisition received monthly compensation equivalent to that formerly received by him or her. An employee retained in service, but downgraded to a lower paying job as a result of the transaction, received a monthly displacement allowance equivalent to the difference between his or her old and new salaries. The employee was also eligible for reimbursement for moving expenses and losses incurred in the sale of a home. After the 4-year period, the adversely affected employee could continue to receive the benefits available under the *Washington Agreement*.<sup>133</sup>

In Section 13(c) of the Urban Mass Transportation Act of 1964 [Section 13(c)] (discussed in detail below in Section 9.300), Congress gave transit employees protections no less beneficial than those conferred under Section 5(2)(f), but added five additional protections, only one of which was specifically set forth in the Interstate Commerce Act:

1. Preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
2. Continuation of collective bargaining rights;
3. Protection of employees against a worsening of their positions with respect to their employment;
4. Assurance of employment to employees of acquired mass transportation systems and priority of reemployment for employees terminated or laid off; and

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Commerce Commission held jurisdiction to require labor protective provisions as a condition of approving a rail merger. Lowden concluded that the ICC did indeed have such authority. Thereafter, the ICC imposed LPPs modeled on the Washington Agreement.

<sup>131</sup> 49 U.S.C. § 11347 (1994).

<sup>132</sup> 282 I.C.C. 271 (1952).

<sup>133</sup> DEMPSEY & THOMS, *supra* note 130, at 302–03. A number of mergers consummated in the 1960s included LPPs voluntarily agreed to by labor and management. Several carriers agreed to reduce jobs only by attrition—in effect giving employees lifetime jobs. William Thoms & Sonja Clapp, *Labor Protection in the Transportation Industry*, 64 N.D. L. REV. 379 (1988).

## 5. Paid training or retraining programs.<sup>134</sup>

With the enactment of the Rail Passenger Service Act of 1970 (RPSA), Congress created Amtrak. In it, Congress adopted language substantially similar to the LPP language of Section 13(c). It provided that a “railroad shall provide fair and equitable arrangements to protect the interests of employees affected by discontinuance of intercity rail passenger service...,” and that such “protective arrangements shall include, without being limited to, such provisions as may be necessary” to accomplish the five specified objectives, listed above, set forth in Section 13(c). Like Section 13(c), RPSA Section 405 provided, “Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established to Section 5(2)(f) of the Interstate Commerce Act.”

In 1971, the Secretary of Labor certified an LPP under Section 405 of the Amtrak Act that became known as “Appendix C-1.” It essentially included the *New Orleans Conditions*, with the upgrading of monthly compensation guarantees by general wage increases during the protective period, and increasing of the protective period to 6 years (for employees with 6 years of service) from the date the employee was adversely affected. Thereafter, ICC-imposed LPPs under the *Oregon Short Line* and *New York Dock*<sup>135</sup> provisions did not materially differ from the *Appendix C-1* provisions.<sup>136</sup>

In February 1976, Congress promulgated the Railroad Revitalization and Regulatory Reform Act [4R Act].<sup>137</sup> It amended former Section 5(2)(f) of the Interstate Commerce Act by adding the following language: “Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565).”<sup>138</sup> Rail labor law expert Bill Mahoney has observed:

[The amendments] for the first time expressly incorporated into the Interstate Commerce Act the five specific requirements for the protection of bargaining agreements, representation, retraining and employment rights as established by the Secretary of Labor under the Amtrak statute.... As minimum protection for employees, the amendments required the Commission to combine the more beneficial employee protections contained in the New Orleans conditions with those provided in Appendix C-1.<sup>139</sup>

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<sup>134</sup> 49 U.S.C. § 5333(b).

<sup>135</sup> *New York Dock R.R. v. United States*, 609 F.2d 83 (2d Cir. 1979).

<sup>136</sup> DEMPSEY & THOMS, *supra* note 130, at 303.

<sup>137</sup> Pub. L. No. 94-210, 90 Stat. 31 (1976).

<sup>138</sup> 4R Act § 402(a).

<sup>139</sup> William G. Mahoney, *The Interstate Commerce Commission / Surface Transportation Board as Regulator of Labor's Rights and Deregulator of Railroad's Obligations: The*

At this writing, the Act requires that before a rail consolidation, merger, or acquisition of control may be approved, the railroad must

provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under section 5(2)(f) of the Interstate Commerce Act before February 5, 1976.... [The arrangement] must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the [Surface Transportation Board, successor to the ICC].<sup>140</sup>

So, LPPs must be at least as generous as those imposed prior to the 4R Act. As explained above, the 4R Act referred to the RPSA, which embraced Section 13(c), and was summarized in *New York Dock*.

Prior to 1980, virtually all cases involving sales of rail lines were between two existing railroad carriers and arose under section 11343 of the Interstate Commerce Act, which required the involved carriers to agree, as a condition of ICC approval, to an arrangement that would protect the economic interests and collective bargaining agreement rights of employees affected by the sale.<sup>141</sup> But in 1982, the ICC declined to impose labor-protective provisions in the sale of lines by major railroads to noncarriers.<sup>142</sup> This abstention was expanded in 1985 when the ICC promulgated regulations formally exempting short line<sup>143</sup> sales from virtually all regulation.<sup>144</sup> The class exemption effectively relieved the selling railroad of any obligation to compensate the employees for the loss of their jobs as a result of the sale, and relieved the short line or regional railroad successor of an obligation to employ the displaced workers.<sup>145</sup> The ICC concluded that if it could

eliminate the requirement of employee protection (*i.e.*, if it could essentially "deregulate" employee protection), the sales of short lines would soar. Thus, the ICC decided to employ another provision in the Act—Section 10901—dealing with the acquisition of a railroad line by "a person other than a rail carrier."<sup>146</sup> By using this provision, the ICC declined to protect employee interests in approving applications for acquisition.<sup>147</sup>

As a matter of practice and procedure, the ICC virtually withdrew from the regulatory arena where short lines are concerned. With its creation of a "class exemption" in 1985, the ICC significantly reduced the requirements for acquiring small railroads or rail lines.<sup>148</sup> Today, unless the annual revenue of the carrier to be created by the transaction exceeds \$5 million, an applicant need merely file a 7-day notice of intent to purchase a line.<sup>149</sup> At the end of the 7-day period, approval of the sale is automatic, absent a stay. If the annual revenue exceeds \$5 million, the applicant must post a notice of intent 60 days before the effective date of the exemption.<sup>150</sup> The notice is void *ab initio* if it contains false or misleading information.<sup>151</sup> The filing of a notice permits the noncarrier to proceed without any further action on the part of the STB.<sup>152</sup> Under the class exemption, the noncarrier has no obligation to make offers of employment to the employees of the selling carrier, nor does the selling carrier have any obligation to provide compensation for those of its employees who lose employment as a result of the sale. In order to seek any compensatory protections, the displaced employees must file an after-the-fact "petition to revoke" the exemption for purposes of providing benefits for employees.<sup>153</sup> In order for a trunk line carrier to transfer a line to another entity, the two parties need only agree on a sale or lease arrangement and the transferee or lessee then need only file written notice to that effect.

Since beginning its permissive approach on these issues, the ICC has imposed labor protective provisions in only one case. In *Fox Valley & Western, Ltd.—Exemption, Acquisition & Operation*,<sup>154</sup> the ICC ruled that the sale was subject to Section 11343 (requiring

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*Contrived Collision of the Interstate Commerce Act with the Railway Labor Act*, 24 TRANSP. L.J. 241, 259 (1997).

<sup>140</sup> 49 U.S.C. § 11326(a).

<sup>141</sup> 49 U.S.C. §§ 11343, 11347.

<sup>142</sup> *Knox & Kane R.R. Co., Petition for Exemption*, 366 I.C.C. 439 (1982).

<sup>143</sup> Short line railroads are of varying sizes. Some operate over several thousand miles of track. In the aggregate, approximately 500 short line railroads operate over about 50,000 of rail trackage in the United States.

<sup>144</sup> See *Ex Parte 392*, 1 I.C.C.2d 810, 811 (1985); see also Frank Wilner, *Labor Protection Moves Seen Stunting Growth of Short Lines*, TRAFFIC WORLD, vol. 209, Dec. 29, 1986, at 61; William Thoms, Frank J. Dooley, Denver D. Tolliver, *Railroad Spin-Offs, Labor Standoffs, and the P&LE*, 18 TRANSP. L.J. 57, 75 (1989). The decision of the U.S. Supreme Court in *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 491 U.S. 490 (1989), is distinguishable from most short line sales because the sale there was not a true short line spin-off, but the sale of an entire railroad. The seller was not maintaining any contractual or other relationship with the new company and the unions had not requested the ICC to issue labor protective provisions. *Id.* at 83.

<sup>145</sup> Further, the class exemption effectively emasculated all potential opposition by shippers concerned about a potential loss of service.

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<sup>146</sup> 49 U.S.C. § 10901.

<sup>147</sup> At first, the ICC held that it would not impose employee protective conditions in such cases unless adverse effects upon employees were significant. But when such proof was presented in a case involving the sale of virtually all of what had been the Gulf, Mobile, and Ohio Railroad before its merger with the Illinois Central (involving over 700 miles of line), the ICC refused to impose employee protective conditions, holding it would do so only in "unusual circumstances." For a discussion of employee protective conditions, see *Oregon Short Line R.R. Abandonment*, 354 I.C.C. 584 (1978).

<sup>148</sup> 49 C.F.R. §§ 1150.31 to .35.

<sup>149</sup> *Id.* § 1150.32.

<sup>150</sup> 49 C.F.R. §§ 1150.32(e), 1150.42(e).

<sup>151</sup> 49 C.F.R. §§ 1150.32(c), 1150.42(c).

<sup>152</sup> 49 C.F.R. § 1150.31 to .35.

<sup>153</sup> 49 C.F.R. § 1150.32(c).

<sup>154</sup> 9 I.C.C. 2d 209 (1992).

labor protection), because the sale was of an entire railroad rather than a short line. In 1992, the ICC unanimously imposed labor protection on former workers of the Fox River Valley and Green Bay & Western Railroads, whose companies were acquired by the Wisconsin Central Limited (WCL), a 2,500-mile rail system.<sup>155</sup> In *Fox Valley & Western Limited v. Interstate Commerce Commission*,<sup>156</sup> Judge Posner upheld the decision, concluding:

In a section 11343 transaction, the Commission is required, as a condition of its approval, to make the carrier protect the workers affected by the transaction. The required protections are those the Commission prescribed in New York Dock Railway, and include paying workers made surplus by the transaction and unable to find another railroad job up to six years' wages. In contrast, in a section 10901 transaction, the Commission "may" require labor protection, but need not. It is a matter of discretion, and the Commission has ruled that only in exceptional circumstances will it exercise its discretion in favor of requiring labor protection in 10901 cases.<sup>157</sup>

The Interstate Commerce Commission was "sunset" on December 31, 1995, and its responsibilities were transferred to the new STB, a nascent "independent" agency within DOT.<sup>158</sup> With the promulgation of the ICC Termination Act of 1995,<sup>159</sup> Congress amended the statutory LPP provisions for employees of a merged Class II and one or more Class III<sup>160</sup> to 1 year of severance pay, reduced by rail earnings during the 12-month period.<sup>161</sup> Under the amendments, a merger of Class III railroads does not trigger mandatory LPPs.<sup>162</sup>

<sup>155</sup> See *Wisconsin Cent. Transp. Corp. Continuance in Control*, Fin. Docket No. 32036, 1992 ICC LEXIS 279, at 31–32 (Dec. 4, 1992). Portions of this section were adapted from Paul Dempsey & William G. Mahoney, *The U.S. Short Line Railroad Phenomenon: The Other Side of the Tracks*, 21 TRANSP. L.J. 383 (1993).

<sup>156</sup> 15 F.3d 641 (7th Cir. 1994).

<sup>157</sup> *Id.* at 644 [citations omitted]. Posner continued, "By interpreting section 10901 broadly and exempting transactions under it from the duty of labor protection, the Commission has fostered the creations of new, unregulated short-line railroads to take over lines formerly operated by regulated railroads." Paul Stephen Dempsey & William G. Mahoney, *The U.S. Short Line Railroad Phenomenon: The Other Side of the Tracks*, 24 U. TOL. L. REV. 425 (1993). *Id.* See also *Brotherhood of R.R. Signalmen v. Interstate Commerce Comm'n*, 63 F.3d 638 (7th Cir. 1995), in which Judge Posner reaffirmed his earlier holding.

<sup>158</sup> The STB has authority to overturn an arbitration decision under the RLA under certain circumstances. See *United Transp. Union v. Surface Transp. Bd.*, 114 F.3d 1242 (D.C. Cir. 1997).

<sup>159</sup> Pub. L. No. 104-88, 109 Stat. 803 (1995).

<sup>160</sup> A Class I railroad has annual operating revenue in excess of \$258 million; a Class II railroad has operating revenue less than \$258 million but more than \$25 million. Class III railroads fall below that threshold.

<sup>161</sup> 49 U.S.C. § 11326(b).

<sup>162</sup> 49 U.S.C. § 11326(c).

## 9. Whistleblower Protections

Whistleblower cases have arisen in the transit context. For example, in *DeVilleville v. Regional Transit Auth.*,<sup>163</sup> a transit employee alleged that his employment was terminated in retaliation for his complaint to the USDOT Office of Inspector General regarding alleged management of Regional Transit Authority financial issues. In order to establish a § 1983 violation, the court held that the plaintiff must prove: (1) that he was deprived of a right or interest secured by the Constitution or laws of the United States and (2) that the deprivation occurred under color of state law. Further, to prevail on a claim of employment retaliation under § 1983, he must prove that: (1) he suffered an adverse employment decision, (2) his speech involved a matter of public concern, (3) his interest in commenting on matters of public concern outweighed the employer's interest in promoting efficiency, and (4) causation.

The Federal Rail Safety Act (FRSA) was amended in 2007 to include anti-retaliation measures. It incorporates by reference the rules and procedures of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21) applicable to whistleblower cases. Pursuant to the FRSA, a rail carrier "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part" to the employee's engagement in a protected activities.<sup>164</sup> To prevail, an employee must show that "(1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action."<sup>165</sup> Once the employee establishes a prima facie case, the burden shifts to the employer to demonstrate, "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior."<sup>166</sup>

## C. RAILROAD EMPLOYMENT LAWS

### 1. Retirement and Unemployment Compensation

The Railroad Retirement Act<sup>167</sup> established a system of annuity, pension, and death benefits for STB-regulated railroad employees.<sup>168</sup> Former Conrail com-

<sup>163</sup> *DeVilleville v. Regional Transit Auth.*, 2008 U.S. Dist. LEXIS 4842 (E.D. La. 2008).

<sup>164</sup> 49 U.S.C. § 20109(a).

<sup>165</sup> *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475–76 (5th Cir. 2008).

<sup>166</sup> 49 U.S.C. § 42121(b)(2)(B)(ii). See *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152 (3d Cir. 2013); *Barati v. Metro-North R.R. Commuter R. Co.*, 939 F. Supp. 2d 143, 2013 (D. Conn., 2013); *Houston v. Township of Randolph*, 934 F. Supp. 2d 711 (D. N.J. 2013).

<sup>167</sup> 75 Pub. L. No. 162, 50 Stat. 307 (1937).

<sup>168</sup> See, e.g., *Santa-Maria v. Metro North Commuter R.R.*, 81 F.3d 265 (2d Cir. 1996).

muter services and interstate commuter rail services fall under the Railroad Retirement Act and Federal Employers Liability Act (FELA), though noncommuter services of a transit agency do not.<sup>169</sup> Under it, the Railroad Retirement Board (RRB) adjudicates claims of eligible employees for various types of benefits created under the Act, including unemployment insurance benefits.<sup>170</sup> The Railroad Retirement Act of 1974<sup>171</sup> is the railroad industry's counterpart to Social Security, and the Railroad Unemployment Insurance Act<sup>172</sup> provides unemployment compensation to railroad employees.

A transit agency that acquires a freight rail line may find itself subject to these laws. However, transit employers have a strong incentive to avoid being classified as a rail carrier subject to the Railroad Retirement Act, for it imposes significantly higher retirement and disability taxes than does Social Security. The Railroad Retirement Act requires employers to pay taxes and withhold taxes under two tiers. Tier I is the railroad equivalent of Social Security, and is set at the Social Security rate. Tier II requires an additional 4.9 percent tax on employees and 16.10 percent tax on employers over and above what they would pay were they under the Social Security system.<sup>173</sup>

The Railroad Retirement Act applies to any carrier subject to the jurisdiction of the STB.<sup>174</sup> The statutory provisions regarding applicability of the Railroad Retirement Act are nearly identical to those described in this Section above regarding the applicability of the RLA. A transit system acquiring a rail line may inadvertently find itself a rail carrier subject to the jurisdiction of the STB, and therefore under the Railroad Retirement Act. In order to avoid doing so, the transit provider should structure the transaction to ensure that it does not obtain the right to provide or control freight operations over the line, and seek a jurisdictional determination that it is not a rail carrier<sup>175</sup> from the STB prior to closing.<sup>176</sup> The transaction can be structured so that the right to provide freight service or control freight operations is retained by the seller or conveyed to a third party (such as by excepting an easement for freight operations from the purchase of the rail line or

specifying it has no control over the freight railroad's abandonment of freight operations over the line or its frequency of service).<sup>177</sup>

Even if a transit system finds itself subject to STB jurisdiction, it still may avoid applicability of the Railroad Retirement Act, for the RRB has created a classification for a "non-operating carrier" to which the Railroad Retirement Act does not apply. It has held that a rail carrier subject to STB jurisdiction will be presumed to be subject to the Railroad Retirement Act unless:

- the railroad line owner does not have for-profit railroad activities as a primary business purpose;
- the railroad line owner does not operate (or retain the capacity to operate) the railroad line; and
- the operator of the line is (or will be) covered by the Railroad Retirement tax and unemployment insurance laws.<sup>178</sup>

Thus, in order to be classified a non-operating carrier, the transit provider should: (1) avoid engaging in for-profit railroad activities; (2) avoid operating (or retaining the capacity to operate) the rail line; and (3) ensure the freight operator on the line is subject to the Railroad Retirement Act.<sup>179</sup> In any event, before acquiring a rail line, the transit lawyer must acquaint himself or herself with the implications of being deemed a rail carrier subject to the Railway Labor Act, the Railway Retirement Act, and other railroad specific legislation, and if he or she does not want to subject the transit agency to such laws, so structure the transaction to avoid them.

## 2. Railroad Hours and Overtime Laws

Congress passed the Hours of Service Act of 1907<sup>180</sup> to promote safety by limiting the number of consecutive hours various types of railroad employees could work.<sup>181</sup>

<sup>177</sup> Spear & Sheys, *supra* note 173.

<sup>178</sup> *Railroad Ventures, Inc.*, B.C.D. 98-48.

<sup>179</sup> The RRB assumes an entity that owns a rail line solely to preserve passenger or freight services satisfies the first prong of the test. It also assumes that an entity that leases a line is not operating it if it does not have control over day-to-day operations of the line. The transit provider also improves its chances of avoiding application of the Railroad Retirement Act if it limits its service to passenger operations. Spear & Sheys, *supra* note 173.

<sup>180</sup> 45 U.S.C. § 61-64b. In 1994, these sections were recodified as 49 U.S.C. §§ 20102, 21101, and 21103.

<sup>181</sup> The term "railroad" in 49 U.S.C. § 20102(1):

(A) means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including—  
(i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads;

<sup>169</sup> *Felton v. South Eastern Pa. Transp. Auth.*, 952 F.2d 59 (3d Cir. 1991).

<sup>170</sup> *Railroad Retirement Board et. al. v. Duquesne Warehouse Co.*, 326 U.S. 446, 66 S. Ct. 238, 90 L. Ed. 192 (1946).

<sup>171</sup> Pub. L. No. 93-445, 88 Stat. 1304 (Oct. 16, 1974).

<sup>172</sup> 45 U.S.C. § 351.

<sup>173</sup> Tracie Spear & Kevin Sheys, Staying "On" Social Security (unpublished paper, 2001), [http://www.klgates.com/files/tbl\\_s48News/PDFUpload307/6170/railroadretirement.pdf](http://www.klgates.com/files/tbl_s48News/PDFUpload307/6170/railroadretirement.pdf).

<sup>174</sup> 45 U.S.C. § 231(a)(1)(3).

<sup>175</sup> 49 U.S.C. § 10102.

<sup>176</sup> Spear & Sheys, *supra* note 173. See *State of Maine Dep't of Transportation—Acquisition & Operation Exemption—Maine Central Railroad*, 8 I.C.C.2d 835 (1991).

The Adamson Act of 1916<sup>182</sup> mandated that 8 hours is the standard workday of railroad employees. State law regarding the hours and overtime of railroad employees is preempted by federal law.<sup>183</sup>

## D. THE FEDERAL TRANSIT ACT

### 1. Introduction

Congressional concern with the deterioration of urban mass transportation led to the promulgation of the Urban Mass Transportation Act of 1964 [the UMTA Act]<sup>184</sup>. In the decade prior to its enactment, 243 private transit companies were sold and 194 were abandoned. The number of revenue passengers carried by intracity buses and rail had declined by 22 percent between 1956 and 1960. With rising costs and declining patronage, transit companies (most of which were private companies) were forced to raise fares, cut service, and defer maintenance, leading to a downward spiral in which service deterioration forced by economic considerations—and the growing prevalence of the automobile—in turn led to declining passenger demand for transit. As the private sector transit companies disappeared or downsized, transit employees suffered a corresponding decline in wages, working conditions, and employment.<sup>185</sup>

The UMTA Act was passed at a time when many private transit companies had disappeared and others were in precarious financial condition. The statute was designed to allow local governments to step in and purchase such companies so that communities would not lose transit services. Congress was faced with the reality that the disappearance of private sector transit companies would leave many localities with little or no transit service, and that local government was the transit provider of last resort.

Congress also recognized that many state laws prohibited collective bargaining by public employers, and “was aware that public ownership might threaten existing collective-bargaining rights of unionized transit workers.” Therefore, Congress included Section 13(c) in

the UMTA Act “to prevent federal funds from being used to destroy the collective-bargaining rights of organized workers.”<sup>186</sup>

The 1964 legislation was designed to arrest the downward financial spiral by providing federal funding through grants and loans to finance the capital facilities and equipment necessary to preserve and expand the nation’s public transit systems. To address concerns raised by organized labor during the debate of the UMTA Act, Congress included a requirement that specific labor protective provisions be in place<sup>187</sup> as a condition of receiving federal financial assistance.<sup>188</sup>

Labor protective provisions for transit employees were originally included in Section 13(c) of the UMTA Act.<sup>189</sup> Even though the statute has been recodified as Sections 5333(b) of the Federal Transit Act, many attorneys and much of the literature still refer to it as Section 13(c). The purpose of the labor protections was to protect employees who might be adversely affected by industry changes arising as a result of public authorities taking over private transit operations, or through technological advances. Section 13(c) includes several major requirements:

- Before the FTA may release federal funds to a grant recipient, the U.S. Department of Labor (DOL) must certify that labor protective arrangements (a/k/a “Section 13(c) arrangements”) exist to protect the interest of employees affected by the assistance. Under Section 13(c), “fair and equitable arrangements” must be in place to protect “the interest of employees affected by such [federal] assistance.”<sup>190</sup> Hence, a transit agency’s failure to provide protection to the satisfaction of DOL results in a loss of federal funds.<sup>191</sup>

- Protective arrangements must be included in five areas:

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but (B) does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

<sup>182</sup> 45 U.S.C. §§ 65-66.

<sup>183</sup> *Erie R.R. v. N.Y.*, 233 U.S. 671, 34 S. Ct. 756, 58 L. Ed. 1149 (1914); *R.J. Corman R.R. Co. NY/Memphis Line v. Palmore*, 999 F.2d 149 (6th Cir. 1993).

<sup>184</sup> Congress enacted UMTA to respond to “the increasingly precarious financial condition of a number of private transportation companies across the country” because “it feared that communities might be left without adequate mass transportation.” *Jackson Transit Auth. v. Local Div. 1285*, 457 U.S. 15, 17, 102 S. Ct. 2202, 2204, 72 L. Ed. 2d 639, 642 (1982).

<sup>185</sup> G. KENT WOODMAN, JANE SUTTER STARKE & LESLIE D. SCHWARTZ, *TRANSIT LABOR PROTECTION—A GUIDE TO SECTION 13(C) OF THE FEDERAL TRANSIT ACT* (Transit Cooperative Research Program, Legal Research Digest No. 4, Transportation Research Board, 1995).

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<sup>186</sup> *Jackson Transit Auth. v. Local Division 1285*, Amalgamated Transit Union, 457 U.S. 15, 102 S. Ct. 2202, 72 L.2d 639 (1982). “At the same time, however, Congress was aware that public ownership might threaten existing collective-bargaining rights of unionized transit workers employed by private companies.” *Id.* In response, Congress included § 13(c) in UMTA “[t]o prevent federal funds from being used to destroy the collective-bargaining rights of organized workers.” *Id.*

<sup>187</sup> Section 13(c) does not impose the conditions, nor does it require that labor and management agree. Section 13(c) provides that the specified protective arrangements must be found by the Secretary of Labor to be sufficient, and they must be in place, before federal funds can be released.

<sup>188</sup> WOODMAN ET AL., *supra* note 185.

<sup>189</sup> 49 U.S.C. § 1609(c) (1964). This provision was amended by TEA-21 to be a part of the Federal Transit Act. 49 U.S.C. § 5333(b).

<sup>190</sup> *Id.* DOL has interpreted this requirement to cover all employees of established systems whose interests may be adversely affected by programs pursued under the Act.

<sup>191</sup> Charles Chieppo, *The T Contract Truth—Federal Transit Act Derails Competition*, BOSTON HERALD, Dec. 24, 2000, at 17.

1. Preservation of rights, privileges, and benefits under existing collective bargaining agreements;
2. Continuation of collective bargaining rights;
3. Protection of employees against worsening of their positions;
4. Assurance of employment;
5. Paid training or retraining.<sup>192</sup>

• Such arrangements must “include provisions protecting individual employees against a worsening of their positions, with respect to their employment which shall in no event provide benefits less than those established pursuant to Section 5(2)(f) of this title” (described above).<sup>193</sup>

The contract granting federal funds must “specify the terms and conditions of the protective arrangements.” In summary, the Federal Transit Act can be viewed as both a transit funding and a labor protection act.<sup>194</sup> Today, the three largest transit unions are the Amalgamated Transit Union, Transport Workers Union, and United Transportation Union.<sup>195</sup>

SAFETEA-LU codified streamlined labor protection arrangements already used by DOL in certifying FTA grants for purchase of like-kind equipment or facilities and for non-material grant amendments.<sup>196</sup> It also codified existing practices applicable to the changing of a contractor through competitive bidding. The use of a special warranty also has been written into the law.<sup>197</sup> Awards under two new programs, New Freedom and Alternative Transportation in Parks and Public Lands, will not be required to be certified by DOL.

In 2008, DOL revised its procedures for processing FTA grants and the imposition of labor protective provisions therein. The rule provides streamlined warranty procedures for Section 5311 and Over-the-Road Bus programs, and a new Unified Protective Arrangement to replace the former separate Operating and Capital Assistance arrangements. The regulations also provide a streamlined process for certifying many grant amendments without referral, confirms that DOL certification is not required for budget revisions as defined by FTA, and establishes a streamlined process for certifying like-kind replacements and grants that have no material impact on existing labor protections without referral.

## 2. Section 13(c) Certification Procedures

Section 13(c) of the Act requires that, before federal funds may be awarded by the FTA, the Secretary of Labor must certify that the transit authority has made “fair and equitable” labor protective arrangements that include, among other things, provisions ensuring employees of “the continuation of collective bargaining rights.”<sup>198</sup> DOL is the agency tasked with 13(c) certifications under 49 U.S.C. 5333(6), and not the NMB. “As a condition of financial assistance [for an entity seeking federal funding for transportation projects],...the interests of employees...shall be protected under arrangements the Secretary of Labor concludes are fair and equitable.”<sup>199</sup> At minimum, the interests protected include “the preservation of rights, privileges, and benefits under existing collective bargaining agreements, the continuation of collective bargaining rights, the protection of individual employees against a worsening of their positions related to employment, assurances of employment to employees of acquired mass transportation systems, priority of reemployment, and paid training or retraining.”<sup>200</sup> The Secretary of Labor must find that all of the provisions of Section 13(c) have been fulfilled before he or she can issue a certification.<sup>201</sup> If the

<sup>192</sup> Section 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. App. § 1609(c) (now 49 U.S.C. § 5333(b)).

<sup>193</sup> Section 5(2)(f) of the Interstate Commerce Act is now 49 U.S.C. § 11326 (formerly § 11323). It provides a variety of monetary benefits to employees of railroads whose companies are merged or consolidated, including compensation to offset the loss of jobs or earnings, unusual expenses, and other equalizing compensation up to 5 years from the date of change. DEMPSEY & THOMS, *supra* note 130, at 307.

<sup>194</sup> WOODMAN ET AL., *supra* note 185. See also 49 U.S.C. § 5311. Special Warranty for the Nonurbanized Area Program agreed to by the Secretaries of Transportation and Labor, dated May 31, 1979, U.S. DOL implementing procedures.

<sup>195</sup> Transit Labor, <http://www.kclabor.org/transit.htm> (visited Apr. 16, 2013).

<sup>196</sup> 49 U.S.C. § 5333(b).

<sup>197</sup> 49 U.S.C. § 5311.

<sup>198</sup> 49 U.S.C. § 5333(b). Section 13(c) “sets forth minimal standards that a [governmental] transit authority must satisfy before it may receive federal funding.” *Burke v. Utah Transit Auth.*, 462 F.3d 1253, 1258 (10th Cir. 2006). It requires that “the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable.” 49 U.S.C. § 5333(b)(1).

Such arrangements must include six specified types of provisions, including provisions for the continuation of collective bargaining rights and provisions protecting employment rights. *Id.* § 5333(b)(2). ...Each time a governmental body seeks financial assistance from the FTA under UMTA, the DOL must certify to the FTA that § 13(c) is satisfied. *City of Colo. Springs v. Solis*, 589 F.3d 1121, 2009 (10th Cir. 2009).

<sup>199</sup> 49 U.S.C. § 5333(b).

<sup>200</sup> *Id.* Guidelines § 5333(b), Federal Transit Law, 60 Fed. Reg. 62,964, 62,964 (1995) (hereinafter “Guidelines”).

<sup>201</sup> *Amalgamated Transit Union Int’l v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985).



parties disagree as to the protective arrangements, the Secretary of Labor can impose them.

The DOL's certification procedure begins with its receipt of an FTA grant application filed by the FTA grant recipient. The application is forwarded to DOL's Office of Labor-Management Standards, Division of Statutory Programs, which examines the application for its completeness. If the application is incomplete, DOL notifies FTA, requesting the missing information, and suspends processing of the application. When the application is complete, DOL recommends the employee protection terms and conditions that will apply to the grant,<sup>202</sup> and usually sends them both to the relevant labor unions and the grant applicant for review.<sup>203</sup> This point in time signals the beginning of DOL's 60-day target for completion of processing the application.<sup>204</sup> It is important to keep in mind FTA's quarterly grant processing cycle, under which FTA commits to process a grant received on the first day of the calendar quarter by the end of the calendar quarter, as well as the processing of 13(c) certification by DOL. As a practical matter, two agencies are involved, with the FTA having little substantive influence on DOL. The FTA Section 13(c) Guidelines are not binding on DOL.

In 1995, DOL issued regulations to assist the parties in Section 13(c) negotiations.<sup>205</sup> The Guidelines establish a step-by-step procedure for assuring that the interests of employees are protected by "fair and equitable" conditions of employment.

Once an application for funding is filed, DOL assesses whether a previous Section 13(c) agreement exists that has been certified as "fair and equitable" in a prior grant application.<sup>206</sup> When such a prior agreement exists, the parties have 15 days to submit objections to the agreement's terms.<sup>207</sup> Either party may submit objections. For example, a transit agency can object "where it believe[s] that existing protections include provisions that are no longer legally required or that are burdensome."<sup>208</sup> The applicant or the unions may file an objection to the DOL recommended employee

protection terms and conditions, and DOL will rule on such objections.<sup>209</sup> Between 1996 and 2000, union or applicant objections accounted for 12 to 16 percent of all referrals.<sup>210</sup> If DOL determines the objections are invalid, it will issue a certification based on its recommended terms and conditions. If DOL determines the objections are valid, the parties are accorded additional time to resolve the differences.

If the objections raise material issues that require alternative employee protections or raise concerns regarding changes in legal or factual circumstances that materially affect the rights or interests of employees, DOL considers the objections are deemed to be "sufficient" and the parties are directed to begin negotiations on the objections.<sup>211</sup> Where appropriate, DOL provides mediation assistance.<sup>212</sup> If the objections are deemed "insufficient," DOL certifies the grant application under the existing agreement.<sup>213</sup> If the parties are unable to come to an agreement, DOL may impose an interim "Section 13(c) arrangement."<sup>214</sup> The interim Section 13(c) arrangement is "based on terms and conditions determined by the Department which are no less protective than the terms and conditions included" in the previously-certified Section 13(c) agreement.<sup>215</sup> If the parties are still unable to come to agreement, DOL imposes a final Section 13(c) arrangement within 60 days.<sup>216</sup>

Union referral may not be required if (1) there is no union in the service area of the proposed project, (2) the project is a routine replacement of equipment and/or facilities of like kind and character with no potential material effect on employees, or (3) the project is an amendment or revision to a previously approved project and there is no change in scope of the project.<sup>217</sup> But these circumstances are quite rare; as a practical matter, almost every federal grant application goes through the Section 13(c) process. DOL tends to err on the side of caution, taking the position of "if in doubt, send it out" to the parties.

If no union referral is required, the DOL certification process allows for "fast tracking" of the application. DOL instead imposes the "nonunion warranty," a two-page document incorporating the more detailed rights and benefits set forth in the Appendix C-1 or Amtrak protections, requiring the grantee to agree to provide specific labor protection for employees in the "mass

<sup>202</sup> Standard Transit Employee Protective Arrangements are set forth in U.S. DOL guidelines, "Section 5333(b), Federal Transit Law," 29 C.F.R. pt. 215.49 U.S.C. § 5333(b).

<sup>203</sup> U.S. DOL Guidelines, "Section 5333(b), Federal Transit Law," 29 C.F.R. pt. 215.

<sup>204</sup> DOL established this target in January 1996. As of April 2000, DOL had met the 60-day target for processing applications 98 percent of the time. However, the DOL's 60-day period does not begin to run until it has reviewed the application for completeness and recommended terms and conditions to the grant applicant and the union. It does not include the period between receipt of the application and a determination that the application is complete. Suspended applications are not subject to the 60-day target. U.S. GENERAL ACCOUNTING OFFICE, GAO/T-RCED-00-157, TRANSIT GRANTS: DEPARTMENT OF LABOR'S CERTIFICATION PROCESS (2000).

<sup>205</sup> 29 C.F.R. § 215.3.

<sup>206</sup> 29 C.F.R. § 215.3(b).

<sup>207</sup> 29 C.F.R. § 215.3(d)(1).

<sup>208</sup> *Id.*

<sup>209</sup> Guidelines, 60 Fed. Reg. at 62,965.

<sup>210</sup> U.S. GENERAL ACCOUNTING OFFICE, *supra* note 204.

<sup>211</sup> 29 C.F.R. § 215.3(d)(3).

<sup>212</sup> 29 C.F.R. § 215.3(d)(6).

<sup>213</sup> 29 C.F.R. § 215.3(d)(5).

<sup>214</sup> 29 C.F.R. § 215.3(d)(7).

<sup>215</sup> *Id.*

<sup>216</sup> See 29 C.F.R. § 215.3(e)-(g). *City of Colorado Springs v. Chao*, 587 F. Supp. 2d 1185 (D. Colo. 2008).

<sup>217</sup> U.S. GENERAL ACCOUNTING OFFICE, *supra* note 204.

transportation industry” in the service area of the project.<sup>218</sup>

### 3. Protected Employees

An individual is entitled to Section 13(c) protection when: (1) the employee is engaged in mass transportation services; and (2) the employee is the type of employee entitled to Section 13(c) protection.

The FTA defines mass transportation as: (1) service that is open to access by and for the benefit of the general public, and under the control of the provider; (2) service that typically interconnects with and has transfer points to other mass transportation services; and (3) service that operates on a regular schedule (as opposed to on an as needed, irregular basis), engages in advertising, and has a printed schedule. On the other hand, DOL has defined mass transportation by what it is not: (1) it is not exclusive ride taxi service; and (2) it is not service to individuals or groups that excludes use by the general public.<sup>219</sup>

In answering the second question (whether the individual is the type of employee entitled to Section 13(c) protection), DOL has proceeded on a case-by-case basis, examining the position, duties, and responsibilities of the individual to ascertain his “relative position in the hierarchy of management.” In so doing, DOL has focused primarily on the extent to which the claimant affects management policy, and whether he or she exercises independent judgment and discretion in a way commonly associated with top-level management. DOL has construed the word “employee” broadly to encompass all but top-level individuals in policymaking positions.<sup>220</sup> Transit systems have successfully argued in certain cases that employees were not entitled to 13(c) protections because they were not adversely affected by federal financial assistance.<sup>221</sup> This is important; an adverse effect by federal financial assistance is a prerequisite to triggering 13(c) protections.

### 4. Standard 13(c) Agreements

Agreements concluded by labor and management under Section 13(c) typically include similar provisions. Some are mandated by the Federal Transit Act, and others have been adopted as part of the Section 13(c) “custom and usage,” while still others owe their origin to the national Model Section 13(c) Agreement.<sup>222</sup> Among typical such provisions are the following:

<sup>218</sup> WOODMAN ET AL., *supra* note 185.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> “[T]he contention that a public transit authority must grant collective bargaining rights whenever it receives federal assistance was considered and rejected by Congress....” *United Transp. Union v. Brock*, 815 F.2d 1562,1565 (D.C. Cir. 1987). *See also* *Local Division No. 714, Amalgamated Transit Union v. Greater Portland Transit District of Portland Maine*, 589 F.2d 1 (1st Cir. 1978); *Division 587, Amalgamated Transit Union v. Municipality of Metro. Seattle*, 663 F.2d 875 (9th Cir. 1981).

<sup>222</sup> WOODMAN ET AL., *supra* note 185.

*Definitions*—The term “project” is usually not limited to the particular activity receiving federal funds, but includes any operational, organizational, or other change occurring as a result of federal assistance. There is substantial disagreement as to the “duration of the project.” This is an important point because Section 13(c) protections continue throughout the “duration of the project.” Transit unions contend that 13(c) protections last so long as the capital asset purchased with federal grant funds remains in use or service (e.g., the entire useful life of the building or transit vehicle). Transit systems historically have contended that Section 13(c) protections last only until the federal funds are expended, or, at the outside, at the expiration of the planned useful life of the capital asset.<sup>223</sup>

*Preservation of Rights, Privileges, and Benefits under Existing Collective Bargaining Agreements*—This is a statutory requirement. Existing rights and benefits must be preserved and continued, though they may be modified through the process of collective bargaining.

*Continuation of Collective Bargaining Rights*—This is a statutory requirement, discussed in greater detail below. It guarantees that employees will continue to have the right to bargain collectively with their employer concerning the terms and conditions of their employment.

*Notice of Proposed Changes*—The grantee must ordinarily give the union 60-days advance notice of any change that may adversely affect employees. After such notice, the parties must meet to negotiate an implementing agreement. However, a work rule change does not necessarily require 60-days notice prior to implementation, nor does Section 13(c) require that management negotiate an implementing agreement over matters that are inherent management rights.

*Section 13(c) Benefits*—Employees must be protected against a worsening of their position, including a displacement allowance, dismissal allowance, lump sum separation allowance, moving expense, and home sale protection. However, Section 13(c) does not guarantee perpetual employment or preservation of an existing job position. It merely protects covered transit workers from a worsening of their condition by the use of federal funds. If causes other than the use of federal funds worsen an employee’s position, or if an employee is displaced without the use of federal funds (e.g., a downsizing due to a budget crisis), no Section 13(c) implications arise.<sup>224</sup>

*Resolution of Section 13(c) Disputes*—There are two types of arbitration—interest arbitration and grievance arbitration. Interest arbitration involves the terms and conditions of a collective bargaining agreement. Each Section 13(c) certification must contain an impasse resolution procedure. The impasse resolution procedure may be fact finding, the right to strike, the permissive right to strike under a state statute, binding interest arbitration, or some other mechanism. Section 13(c)

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

does not by its terms require binding interest arbitration; for almost 20 years DOL's position and practice has been that DOL will not impose binding interest arbitration upon an unwilling recipient (or, stated differently, DOL will include binding interest arbitration in a 13(c) certification only if the transit system agrees). Only rarely is the impasse resolution mechanism binding interest arbitration.<sup>225</sup> Grievance arbitration is used as the final step to resolve 13(c) grievances.

*Claims Procedure*—This clause specifies time limits for bringing a Section 13(c) claim, and establishes a process for its presentation and resolution. The 13(c) certification is not a substitute for the collective bargaining agreement. Claims under 13(c) are resolved under the 13(c) grievance procedure; claims under the collective bargaining agreement are resolved through whatever grievance or dispute resolution mechanism is contained in the CBA.

*Resolution of Interest Disputes*—This provision provides a process for resolving “interest disputes” (the making or maintenance of a collective bargaining agreement or terms to be included in it). The process may include a right to strike, binding interest arbitration, or factfinding. The process must be “meaningful,” and requires certain elements (e.g., publicity of the fact finder's conclusions in a manner designed to bring pressure upon the recalcitrant party).<sup>226</sup>

*Priority of Reemployment*—The statute requires that dismissed employees be entitled to priority in reemployment to fill any vacant position reasonably comparable to the employee's previous position. If retraining is necessary, it must be done at the employer's expense.

*First Opportunity for Work Clause*—Some agreements provide employees with the right to the first opportunity for any new jobs created as a result of the project.

*Duplication of Benefits*—Most agreements prohibit the duplication of pyramiding of employee protection benefits.

*Successor Clause*—Most agreements provide that successors or assigns of the parties are obligated to honor all its terms and conditions.<sup>227</sup>

## 5. Continuation of Collective Bargaining Rights

As noted above, Section 13(c) requires that the Secretary of Labor certify that “fair and equitable arrangements are made...to protect the interests of employees affected by such assistance,” and that protective arrangements must include “provisions as may be necessary for...the continuation of collective bargaining rights.” Some courts have ruled that “the Secretary is not free to certify an agreement that does not provide

for the continuation of collective bargaining rights.”<sup>228</sup> Several courts have held that the Secretary's decision of whether or not to certify a 13(c) agreement as “fair and equitable” is “committed to agency discretion” under the APA,<sup>229</sup> and therefore not reviewable by the courts.<sup>230</sup>

Other courts have concluded certification is reviewable as to the issue of the Secretary's abuse of discretion. *Amalgamated Transit Union International v. Donovan*<sup>231</sup> addressed the issue of whether a public transit authority seeking federal assistance may abrogate existing collective bargaining rights upon acquisition of a private firm. In *Donovan*, mass transportation in Atlanta, Georgia, was provided by the Atlanta Transit System (ATS) prior to 1971. The Amalgamated Transit Union (ATU) represented ATS's employees, and concluded a series of collective bargaining agreements with ATS governing wages, hours, and other conditions and terms of employment under the NLRA. In 1965, the Georgia legislature created MARTA as a public corporation authorized to purchase and operate the ATS mass transit system. In 1971, ATU and MARTA concluded a 13(c) agreement that was certified as fair and equitable by the Secretary of Labor. Following the receipt of federal funds, in 1972, MARTA purchased the assets, property, and facilities of ATS.<sup>232</sup>

During the ensuing decade, MARTA applied for and received additional federal transit funds. In each case, the Secretary of Labor certified the 13(c) agreement between the parties as fair and equitable. When a collective bargaining agreement expired in 1981, before a new collective bargaining agreement could be concluded, and during interest arbitration, MARTA ceased paying cost of living adjustments required under the expired collective bargaining agreement. Shortly thereafter, the Georgia legislature passed a statute limiting MARTA's authority to bargain with United Transportation Union (UTU) over the assignment of employees, discharge and termination of employees, subcontracting of work, fringe benefits for part-time employees, and overtime, and changed the procedures for interest arbitration. Among other things, the statute required that the arbitrator be a resident of Georgia, familiar with government finance, and state in his or her award the extent of any increase in fares or decrease in service resulting from his or her award. Not wanting to jeopardize federal funding, the parties agreed to support the Secretary of Labor's certification of the 1977 Section 13(c) agreement to authorize release of pending federal transit funds, with each side free to litigate the legality

<sup>228</sup> *Greenfield & Montague Transp. Area v. Donovan*, 758 F.2d 22 (1st Cir. 1985).

<sup>229</sup> Pub. L. No. 79-404, 60 Stat. 237 (June 11, 1946).

<sup>230</sup> See, e.g., *Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth.*, 667 F.2d 1327, 1343 (11th Cir. 1982); *Kendler v. Wirtz*, 388 F.2d 381, 383-4 (3d Cir. 1968); *City of Macon v. Marshall*, 439 F. Supp. 1209 (1977).

<sup>231</sup> *Amalgamated Transit Union Int'l v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985).

<sup>232</sup> *Id.* at 941-2.

<sup>225</sup> The ATU Constitution requires locals to offer binding interest arbitration prior to going out on strike.

<sup>226</sup> For a more detailed explanation of these provisions, see WOODMAN ET AL., *supra* note 185.

<sup>227</sup> *Id.*

of the state law limitation on interest arbitration. In 1982, the Secretary of Labor certified the agreement as fair and equitable.

In *Donovan*, the D.C. Circuit Court of Appeals concluded that several provisions of the state statute were “completely antithetical to the concept of collective bargaining under section 13(c)” and that therefore the Secretary’s certification of the agreement was improper.<sup>233</sup> The Secretary of Labor is not free to approve an agreement that fails to guarantee the continuation of collective bargaining rights.<sup>234</sup> Section 13(c)’s requirement that labor protective agreements provide for “the continuation of collective bargaining rights” means that where employees enjoyed collective bargaining rights before public acquisition of the transit system, they are entitled to continue to be represented in meaningful, “good faith” negotiations with their employer over wages, hours, and other terms and conditions of employment. Meaningful collective bargaining does not exist if an employer possesses unilateral power to establish wages, hours, and other conditions of employment without the consent of the union or without at least bargaining in good faith to impasse over disputed issues.<sup>235</sup>

But what if the collective bargaining agreement has lapsed before the public entity acquires the transit facility? Such a situation arose in *United Transportation Union v. Brock*.<sup>236</sup> Prior to its public acquisition, transit service in Greenville, South Carolina, was provided by a private firm, Greenville City Coach Lines, Inc. In 1975, the firm notified the city of Greenville that it was forced to discontinue its service on grounds of unprofitability. The city formed the Greenville Transit Authority to fill the void. Though the Authority hired several of the Coach Lines’ employees, it did not acquire any of its assets, and provided service without federal assistance until 7 years after beginning service. When the Authority applied for federal assistance, the UTU informed the Authority that UTU had a sufficient number of signed employee authorization cards designating UTU as their bargaining representative. The Authority refused to recognize UTU as the bargaining representative on grounds that the Authority was a public entity outside the jurisdiction of the NLRA, and because it was prohibited by state law from bargaining with the union.<sup>237</sup>

In *Brock*, Judge Bork, writing for the U.S. Court of Appeals for the District of Columbia Circuit, interpreted the Section 13(c) requirement of the “continuation of collective bargaining rights” as being required “only when the transit employees had collective bargaining rights that could be affected by the federal assistance.”<sup>238</sup> On these facts, Judge Bork found that the

transit employees had no collective bargaining rights that could be affected by transit assistance; those rights were lost 7 years before the Authority applied for federal transit assistance.<sup>239</sup>

## 6. Arbitration

In promulgating Section 13(c), Congress neither protected the right to strike nor required interest arbitration as a condition of federal transit aid.<sup>240</sup> Congress made it clear that the right to strike is not to be preserved pursuant to federal law and that binding interest arbitration will not be required. Yet, Congress did mandate the continuation of collective bargaining. Prior to the U.S. Supreme Court’s unanimous decision in *Jackson Transit Auth v. Local Division 1285, Amalgamated Transit Union*,<sup>241</sup> several federal appellate courts issued injunctions ordering a local transit provider to submit to interest arbitration of a new CBA pursuant to the terms of a Section 13(c) agreement.<sup>242</sup> *Jackson Transit* held that the UMTA Act did not create a federal body of labor law applicable to transit workers; rather, state law controls, and labor disputes are to be decided under state law in state courts, not federal courts. The end result is that Section 13(c) requires protection of the *process* of collective bargaining. So long as the right of collective bargaining is protected, no 13(c) violation occurs if a particular outcome results from collective bargaining.<sup>243</sup>

## E. FEDERAL VS. STATE JURISDICTION

Congress has never exercised its power to occupy the entire field of labor law.<sup>244</sup> The U.S. Supreme Court decision in *Jackson Transit* is the seminal case identifying the role of federal courts and federal law *vis-à-vis* state courts and state law in reviewing collective bargaining impasses asserted under Section 13(c) of UMTA, and civil rights claims under Section 1983. In 1966, the city of Jackson, Tennessee, applied for federal aid to convert a failing private sector bus company into a public entity, the Jackson Transit Authority. In order to secure federal funding, the Authority entered into a Section 13(c) agreement with the ATU guaranteeing,

<sup>239</sup> *Id.*

<sup>240</sup> See *Local Division 1285, Amalgamated Transit Union AFL-CIO v. Jackson Transit Auth.*, 650 F.2d 1379, 1392 (6th Cir. 1981) (“Section 13(c) does not require protection of interest arbitration...”); *Local Division No. 714, Amalgamated Transit Union v. Greater Portland Transit Dist.*, 589 F.2d 1, 6-7 (1st Cir. 1978) (statute does not command that interest arbitration be provided), overruled in part on other grounds, *Local Division 589, Amalgamated Transit Union v. Commonwealth of Mass.*, 666 F.2d 618 (1st Cir. 1981).

<sup>241</sup> 457 U.S. 15, 102 S. Ct. 2202, 72 L. Ed 2d 639 (1982).

<sup>242</sup> See *Division 587, Amalgamated Transit Union v. Municipality of Metro. Seattle*, 663 F.2d 875 (9th Cir. 1981), and cases cited therein.

<sup>243</sup> See WOODMAN ET AL., *supra* note 185.

<sup>244</sup> *Maher v. N.J. Transit Rail Operations*, 125 N.J. 455, 593 A.2d 750, 755 (1991).

<sup>233</sup> *Id.* at 951–3.

<sup>234</sup> *Id.* at 955.

<sup>235</sup> *Id.* at 950. See also *Railway Labor Executives’ Ass’n v. United States*, 987 F.2d 806, 814 (D.C. Cir. 1993).

<sup>236</sup> 815 F.2d 1562 (D.C. Cir. 1987).

<sup>237</sup> *Id.* at 1564.

<sup>238</sup> *Id.* at 1565.

*inter alia*, the preservation of transit workers' collective bargaining rights. The Secretary of Labor certified the agreement as "fair and equitable," and the Authority received several hundred thousand dollars in federal transit aid.

A series of CBAs between the Authority and ATU were concluded thereafter. But 6 months after signing a 3-year CBA in 1975, the Authority announced it believed it was no longer bound by the contract. ATU filed suit in federal court seeking damages and injunctive relief. Concluding that, "Congress intended that labor relations between transit workers and local governments would be controlled by state law,"<sup>245</sup> the U.S. Supreme Court held that Section 13(c) does not provide a federal cause of action for alleged breaches of Section 13(c) agreements; instead, these disputes must be settled in state court according to state law.<sup>246</sup>

Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local government entities and transit workers. Section 13(c) would not supersede state law, would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations.<sup>247</sup>

Hence, Section 13(c) CBAs are governed by state law applied in state courts.<sup>248</sup> In *Jackson Transit*, the Supreme Court went on to hold that no Section 1983<sup>249</sup> federal cause of action may be pursued by an aggrieved union. Hence, state law controls the relationship between transit systems and transit workers; Section 1983 cannot be used to bootstrap a claim that properly falls within state court into federal court. In so holding, the court emphasized the congressional intent that state law should apply.<sup>250</sup>

Duties imposed under the RLA on carriers and their employees are binding and their breach is redressable

<sup>245</sup> *Id.* at 23.

<sup>246</sup> See also *Greenfield and Montague Transp. Area v. Donovan*, 758 F.2d 22, 25 (1st Cir. 1985), and *Nieto-Santos v. Fletcher Farms*, 743 F.2d 638 (9th Cir. 1984). But see *City of Independence Mo. v. Bond*, 756 F.2d 615 (8th Cir. 1985), holding that because the matter at issue called for the construction of a federal statute, federal question jurisdiction does exist.

<sup>247</sup> *Jackson Transit*, 457 U.S. at 20, 21 [footnotes omitted].

<sup>248</sup> See also *Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth.*, 667 F.2d 1327 (11th Cir. 1982).

<sup>249</sup> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

<sup>250</sup> *Jackson Transit*, 457 U.S. at 29.

in federal court.<sup>251</sup> If the complaint alleges a violation of the RLA, then original federal jurisdiction is conferred.<sup>252</sup> Typically, federal courts determine at the outset whether the dispute is major or minor.<sup>253</sup> However, a state cause of action is preempted by the RLA where an RLA employee's claim requires an interpretation of the CBA,<sup>254</sup> but if the claim involves rights and obligations that exist independent of the CBA, the state action is not preempted.<sup>255</sup> For example, courts have found that state whistleblower laws are not preempted by the RLA.<sup>256</sup>

Section 301 of the Taft-Hartley Act<sup>257</sup> provides that suits to enforce CBAs are within the original jurisdiction of federal courts and therefore removable if filed in state court.<sup>258</sup> If the transit workers are governed by the NLRA, jurisdiction lies with the NLRB (with judicial review.) As one court noted, "when a state law claim is substantially dependent on analysis of a collective bargaining agreement, a plaintiff may not evade the preemptive force [of a federal labor law] by casting the suit as a state law claim."<sup>259</sup> In most such instances, however, the employer is a private sector firm and not public sector transit agency. Moreover, labor relations between governmental transportation providers and their employees enjoy a specific legislative exemption from the application of the NLRA.<sup>260</sup> Government employees explicitly are excluded from the application of the NLRA.

<sup>251</sup> See, e.g., *Virginian Ry. Co. v. System Fed'n*, 300 U.S. 515, 545, 57 S. Ct. 592, 598, 81 L. Ed. 789, 798 (1937); *Steele v. Louisville & N.R. Co.*, 323 U.S. 193, 65 S. Ct. 226, 89 L. Ed. 173 (1944).

<sup>252</sup> 28 U.S.C. § 1337.

<sup>253</sup> *LESLIE*, *supra* note 14, at 7.

<sup>254</sup> Four exceptions have been identified when an employee may sue in federal court, obviating the need to resolve the minor dispute before an adjustment board: (1) when the employer jettisons the private grievance machinery; (2) when resort to administrative remedies would be futile; (3) when the employer is joined in a duty-of-fair representation claim against the union, or (4) when because of the union's breach of its duty of fair representation, the employee has lost the right to press his grievance before the Board. *Childs v. Pa. Fed'n Bhd. of Maintenance Way Employees*, 831 F.2d 429, 437 (3d Cir. 1987).

<sup>255</sup> *Hawaiian Airlines v. Norris*, 512 U.S. 246, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994); *Parker v. Metropolitan Transp. Auth.*, 97 F. Supp. 2d 437 (S.D. N.Y. 2000).

<sup>256</sup> *Maher v. N.J. Transit Rail Operations*, 593 A.2d 750 (N.J. 1991).

<sup>257</sup> 29 U.S.C. § 185.

<sup>258</sup> 28 U.S.C. § 1441. See *Graf v. Elgin, Joliet & Eastern Ry. Co.*, 697 F.2d 771, 774 (7th Cir. 1983).

<sup>259</sup> *Barousse v. Paper, Allied-Industrial*, 2000 U.S. Dist. Lexis 16370 (E.D. La. 2000). *International Bhd. of Elec. Workers v. Heckler*, 814 F.2d 697 (1987).

<sup>260</sup> 29 U.S.C. § 152(2).

## F. THE NATIONAL LABOR RELATIONS ACT

### 1. Introduction

As noted above, Congress explicitly exempted public transit providers from the application of the NLRA.<sup>261</sup> Nonetheless, private transportation firms (other than rail and air common carriers subject to the RLA) fall under the jurisdiction of NLRA.

Congress enacted the NLRA in 1935 to ensure collective bargaining between employers and employees.<sup>262</sup> The NLRB consists of five Board members appointed by the President, with the advice and consent of the Senate, for 5-year, staggered terms, removable from office only for cause. In promulgating the NLRA, Congress "sought to find a broad solution, one that would bring industrial peace by substituting...the rights of workers to self-organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established."<sup>263</sup> The NLRA gives employees the right to organize; to form, join, or assist any union; to bargain collectively through representatives of their own choosing; to act together for mutual aid or protection; or to choose not to engage in any of these protected activities.<sup>264</sup>

### 2. Representation

A petition for a representation election can be filed by employers, employees, or unions. The petition must be supported by 30 percent of the employees in the bargaining unit designated by the petition, usually in the form of signed and dated "authorization cards." The NLRB staff will investigate and authenticate the cards. The regional director will seek to achieve agreement between the union(s) and the employer for a consent election; failing that, he will order an employee of the regional office to conduct a representation election by secret ballot of the employees.

There are many things an employer may not lawfully do. For example, it may not unilaterally recognize a union that has not attained majority status as the exclusive bargaining representative of its workers, for such action conflicts with the right of self-organization.<sup>265</sup> Nor may an employer dismiss or punish employees for encouraging others to join a union.<sup>266</sup> Threats of discharge, plant closings, loss of benefits or

other reprisals; threats against strikes; surveillance of union leaders; promises of inducements; employee interrogation and polling; and other coercive activities may be unlawful.<sup>267</sup> Where the NLRB determines that the employer has engaged in unfair labor practices, it may issue a "Gissel bargaining order"<sup>268</sup> requiring the employer to recognize and bargain with the union even though the union has not won a majority in a representation election.<sup>269</sup> Moreover, some of the empirical literature suggests that "dirty" elections (involving unlawful campaigning) have no more effect on election outcomes than "clean" elections,<sup>270</sup> so there is little practical reason to engage in coercive activities.

### 3. Collective Bargaining

An NLRB-designated union has the exclusive right to represent its employees in collective bargaining negotiations with management. The employer may not ignore a designated union and attempt to bargain directly with employees.<sup>271</sup>

Free collective bargaining is the cornerstone of the structure of labor-management relations ordained by NLRA.<sup>272</sup> No state or its governmental institutions may, for example, coerce a local transportation provider into settling a labor management dispute by threatening to deny renewal of an operating franchise. State interference with a company's labor relations is enforceable under Section 1983<sup>273</sup> in an action for compensatory damages.<sup>274</sup>

<sup>267</sup> Joel Rogers, *Divide and Conquer: Further Reflections On the Distinctive Character of American Labor Laws*, 1990 WIS. L. REV. 1, 127-28 (1990).

<sup>268</sup> *National Labor Relations Bd. v. Gissel Packing Co.*, 395 U.S. 575, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969).

<sup>269</sup> *Victoria Johnson, Did Old MacDonald Have a Farm? Holly Farms Corp. v. National Labor Relations Board*, 69 U. COLO. L. REV. 295 (1998).

<sup>270</sup> Julius G. Getman, Stephen B. Goldberg & Jeanne B. Herman, *Union Representation Elections: Law And Reality* 160, N.Y. Russell Sage Foundation (1976); Charles Jackson & Jeffrey Heller, *Promises and Grants of Benefits Under the National Labor Relations Act*, 131 U. PA. L. REV. 1 (1982).

<sup>271</sup> *Medo Photo Supply Corp. v. National Labor Relations Bd.*, 321 U.S. 678, 64 S. Ct. 830, 88 L. Ed. 1007 (1944).

<sup>272</sup> *Golden State Transit v. City of L.A.*, 440 U.S. 608, 106 S. Ct. 1395, 89 L. Ed. 2d 616 (1986); *N.Y. Tele. Co. v. N.Y. Dep't of Labor*, 440 U.S. 519, 99 S. Ct. 1328, 59 L. Ed. 2d 553 (1979).

<sup>273</sup>

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

<sup>274</sup> *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989).

<sup>261</sup> *Id.*

<sup>262</sup> *Phoenix Eng'g, Inc., v. MK-Ferguson of Oak Ridge Co.*, 966 F.2d 1513, 1519 (6th Cir. 1992).

<sup>263</sup> *National Labor Relations Bd. v. Hearst Publications*, 322 U.S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944).

<sup>264</sup> *Duke Univ. and Amalgamated Transit Union*, 315 NLRB 1291 (1995).

<sup>265</sup> Sandra L. Nunn, *Are American Businesses Operating Within the Law? The Legality of Employer Action Committees and Other Worker Participation Plans*, 63 U. CIN. L. REV. 1379 (1995).

<sup>266</sup> Terry A. Bethel & Catherine Melfi, *The Failure of Gissel Bargaining Orders*, 14 HOFSTRA LAB. L.J. 423 (1997).

The scope of collective bargaining principally concerns wages, hours, and other terms and conditions of employment. There are many cases as to what constitutes a mandatory subject of collective bargaining (e.g., assignment of overtime, contracting work to employees outside the established bargaining unit)<sup>275</sup> and a permissive subject of bargaining (e.g., inclusion of a binding interest arbitration clause in the next CBA, or sub-contracting).<sup>276</sup>

#### 4. Arbitration

In 1960, the U.S. Supreme Court handed down its decisions in what has become known as the *Steelworkers Trilogy*,<sup>277</sup> which culminated the process of federalization of the law of CBAs in grievance arbitration that began with promulgation of the Labor Management Act of 1947 (Taft-Hartley Act). Noting that the grievance machinery is at the very heart of industrial self-governance, the court held that grievances are presumed to be arbitrable, and parties to a CBA are deemed compelled to arbitrate unless it can be concluded that the agreement withdrew the matter from arbitration; a court should also enforce an arbitration award so long as it draws its essence from a CBA.<sup>278</sup> The obligation to arbitrate derives from either the agreement of the parties—usually a collective bargaining agreement or a statute. Absent agreement or a statute, a party cannot be forced into arbitration.

#### 5. Unfair Labor Practices

A party alleging an employer or union has engaged in an unfair labor practice must file a "charge" with the NLRB within 6 months of the alleged violation.<sup>279</sup> After

investigation, the regional director decides whether to issue a "complaint," which triggers prosecution of the employer in a hearing before an NLRB administrative law judge (ALJ), unless the regional director is able to negotiate a settlement. If a hearing is held, the ALJ will issue a recommended decision and order, which, if exceptions are filed, is appealed to the full NLRB, which may issue a written decision and order, usually on the basis of the written briefs and the record developed by the ALJ. In addition, the matter can be referred to General Counsel for advice before the regional director issues his/her decision.

The NLRA declares it an unfair labor practice for an employer "by discrimination in regard to...tenure of employment...to...discourage membership in any labor organization."<sup>280</sup> Prohibited activities include refusing to hire employees because of their union affiliation,<sup>281</sup> interrogating employees about their union activities, threatening employees with plant closing and other reprisals if they unionize, suspending employees because of their union activities, and soliciting grievances or promising to relieve grievances to influence employee union activities.<sup>282</sup> The U.S. Supreme Court has interpreted the NLRA to forbid "a discharge...in any way motivated by a desire to frustrate union activity."<sup>283</sup> The Court held that to prove an unfair labor practice, the NLRB General Counsel need only demonstrate a *prima facie* case of bad motive. For example, the NLRB might prove that the employer knew of the employee's union activities, and that circumstances surrounding the discharge suggest the existence of a "bad" motive. The NLRB may then shift the burden of proof to the employer to prove that it would have fired the employee anyway, even in the absence of the union activity.<sup>284</sup>

<sup>275</sup> National Labor Relations Bd. v. Centra, Inc., 954 F.2d 366 (6th Cir. 1992); Fibreboard Paper Products Corp. v. National Labor, 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964).

<sup>276</sup> Furniture Rentors of America v. National Labor Relations Bd., 36 F.3d 1240 (3d Cir. 1994).

<sup>277</sup> United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960).

<sup>278</sup> Martin H. Malin, *Symposium on Labor Arbitration Thirty Years After the Steelworkers Trilogy*, 66 CHI-KENT L. REV. 551 (1990). See also DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 168, 103 S. Ct. 2281, 2292, 76 L. Ed. 2d 476, 491 (1983).

<sup>279</sup> Amalgamated Transit Union, Local Union No. 1433 (Phoenix Transit System), 2001 NLRB Lexis 765 (2001). However, the equitable doctrine of fraudulent concealment may toll the statute of limitations. Benfield Electric Co., 331 NLRB No. 590 (2000). The statute of limitations does not begin to run until the employee knows or has reasons to know that an unfair labor practice has been committed. Land Air Delivery, Inc. v. NLRB, 862 F.2d 354 (D.C. Cir. 1988). Lacking a specific statute on the subject, the U.S. Supreme Court has extended this 6-month limitation to suits against both employers and unions. DelCostello, 462 U.S. 151; Trial v.

Atchison, Topeka & Santa Fe Rwy., Co. 896 F.2d 120 (5th Cir. 1990).

<sup>280</sup> Proof is usually required of antiunion animus. National Labor Relations Bd. v. Great Dane Trailers, Inc., 388 U.S. 26 (1967). But some conduct is so inherently destructive of employee interests that it will be deemed to be unlawful even without proof of antiunion purpose. NLRB v. Erie Resistor Corp., 373 U.S. 221, 83 S. Ct. 1139, 10 L. Ed. 2d 308 (1963); NLRB v. Centra, Inc., 954 F.2d 366 (6th Cir. 1992).

<sup>281</sup> Shortway Suburban Lines, Inc., 286 NLRB 323 (1987). See also NLRB v. Burns Int'l Security Service, 406 U.S. 272, 92 S. Ct. 1571, 32 L. Ed. 2d 61 (1972), where the U.S. Supreme Court held that an employer who hires a sufficient number of the predecessor's employees so that they constitute a majority of the work force, and conducts essentially the same business as the predecessor, has a duty to bargain with their collective bargaining representative. The employer may not decline to hire the predecessor's employees solely because they are members of a union.

<sup>282</sup> Tuskegee Area Transp. System, 308 NLRB 251 (1992); Capitol Transit, Inc., 289 NLRB 777 (1988).

<sup>283</sup> National Labor Relations Bd. v. Transportation Management Corp., 462 U.S. 393, 103 S. Ct. 2469, 7 L. Ed. 2d 667 (1983).

<sup>284</sup> See also NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666 (1st Cir. 1979).

It is also an unfair labor practice to refuse to bargain collectively on rates of pay, wages, hours, and other terms and conditions of employment with the duly elected and certified bargaining representative of the employees.<sup>285</sup> The duty of collective bargaining embraces the obligation of an employer and union to meet at reasonable times and confer in good faith on matters of wages, hours, and other terms and conditions of employment.<sup>286</sup>

A union, too, may be held to have engaged in an unfair labor practice. For example, a union may not, over the objection of a dues-paying nonmember, spend dues on activities not related to collective bargaining, contract administration, or grievance adjustment.<sup>287</sup> The NLRB has also held that a union's breach of its duty of fair representation is an unfair labor practice.<sup>288</sup>

## 6. Judicial Review

A party seeking to challenge an NLRB decision in the courts must first exhaust its administrative remedies. Only final orders are reviewable, and only by the U.S. Court of Appeals.<sup>289</sup> The NLRB itself may also defer consideration of the dispute, first requiring exhaustion of the CBA grievance procedures before it will entertain an appeal.<sup>290</sup> Courts too, may require an aggrieved employee to exhaust his or her internal union

procedures before entertaining a suit against the union for unfair labor practices.<sup>291</sup>

The period prior to the promulgation of the NLRA was marked by judicial hostility to the economic weapons utilized by labor in its efforts to unionize. Courts would often enjoin unionizing efforts if they deemed them having "unlawful objectives" or using "unlawful means." Critics alleged the courts were striking unionization actions down not because they were unlawful, but because the courts disapproved of them. The Wagner Act of 1935 created the NLRB partially in response to this widely acknowledged judicial hostility toward unions. Faced with a congressional policy of promoting unionization and collective bargaining, courts began to accord such efforts greater deference.<sup>292</sup> Such deference included upholding the NLRB's decision whenever the record contained any substantial evidence to support it, without regard to the weight of the countervailing evidence.

In *Universal Camera Corp. v. National Labor Relations Board*,<sup>293</sup> the U.S. Supreme Court reined in such discretion. Contrary to the findings of its ALJ, who found insubordination as the cause of an employee's removal, the NLRB concluded that the employee was removed in retaliation for his testimony in a Board hearing to determine the represented class. The Supreme Court found that in reviewing NLRB decisions, the courts were obliged—in considering the substantiality of evidence—to take into account whatever in the record fairly detracts from its weight. Justice Frankfurter, writing for the court, held:

[T]he Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past....Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds....The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment of matters within its special competence or both.<sup>294</sup>

The Court went on to hold that the evidence may be less substantial when the ALJ, who has heard the witnesses and "lived the case," has drawn conclusions different from the Board, particularly in cases where witness credibility is in issue.<sup>295</sup> This is consistent with the well-established tenet that on matters involving the

<sup>285</sup> *School Bus Services, Inc., and Amalgamated Transit Union*, 312 NLRB 1 (1993). It is also an unfair labor practice to withdraw recognition from a union without having reasonable grounds for doubting its majority status. *Furniture Renters of America v. NLRB*, 36 F.3d 1240 (3d Cir. 1994).

<sup>286</sup> *NLRB v. Centra, Inc.*, 954 F.2d 366 (6th Cir. 1992).

<sup>287</sup> *Communications Workers of America v. Beck*, 487 U.S. 735, 108 S. Ct. 2641, 101 L. Ed. 2d 634 (1988); *Transport Workers of America*, 1999 NLRB Lexis 722 (1999).

<sup>288</sup> *Miranda Fuel Co.*, 140 NLRB 181 (1962); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983).

<sup>289</sup> 29 U.S.C. § 160(e), (f). Narrow exceptions exist to the exhaustion requirement, where there is an agency violation of a plain and unambiguous statutory command or prohibition, or where there is a plain violation of a constitutional right. *Zipp v. Geske & Sons, Inc.*, 103 F.3d 1379 (7th Cir. 1997). *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 89 S. Ct. 548, 21 L. Ed. 2d 519 (1969).

<sup>290</sup> *See, e.g., Hammontree v. NLRB*, 925 F.2d 1486 (D.C. Cir. 1991). The NLRB has ruled deferment is appropriate where (1) there is a long-standing bargaining relationship between the parties; (2) there is no enmity by the employer toward the employee's exercise of his rights; (3) the employee exhibits a willingness to arbitrate; (4) the CBA's arbitration clause covers the matter at issue; and (5) the contract and its meaning are central to the dispute. *Collyer Insulated Wire*, 192 NLRB 837 (1971). Moreover, courts have held that employees must exhaust their dispute resolution procedures under their CBAs before bringing a suit alleging their violation under the Labor Management Relations Act. *See, e.g., Schwarz v. United Automobile Workers Union*, 837 F. Supp. 530 (W.D. N.Y. 1993); *Hines v. Anchor Motor Freight*, 424 U.S. 554, 96 S. Ct. 1048, 47 L. Ed. 2d 231 (1976).

<sup>291</sup> *Garner v. UAW*, 800 F. Supp. 706, 714 (S.D. Ind. 1991).

<sup>292</sup> STEPHEN BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & ADRIAN VERMULE, *ADMINISTRATIVE LAW & REGULATORY POLICY* 218 (Aspen Pub., 4th ed. 1999).

<sup>293</sup> 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed 456 (1951).

<sup>294</sup> *Id.*

<sup>295</sup> *See NLRB v. Universal Camera Corp. (II)*, 190 F.2d 429 (2d Cir. 1951), where Judge Learned Hand wrote, "we are not to be reluctant to insist that an examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded."



credibility of witnesses, a reviewing court should not substitute its judgment for that of the tribunal who heard and observed the manner and demeanor of the witnesses first hand.

And what of the NLRB's interpretation of its statute? Is the NLRB's interpretation of the NLRA entitled to deference by a reviewing court, and if so, what level of deference? At issue in *NLRB v. Hearst Publications*<sup>296</sup> was whether the NLRB's conclusion that newsboys (who sell papers on the street) were "employees" of newspapers within the meaning of the NLRA, for whom collective bargaining is required. The U.S. Supreme Court was extremely deferential to the NLRB's expertise in interpreting the NLRA:

Everyday experience in the administration of the [NLRA] gives the [NLRB] familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question of who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, "belongs to the usual administrative routine" of the Board....

Undoubtedly, questions of statutory interpretation...are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute....But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited....[T]he Board's determination that specified persons are "employees" under [the NLRA] is to be accepted if it has "warrant in the record" and a reasonable basis in law.<sup>297</sup>

Though Congress subsequently amended the definition of "employee" in the NLRA to exclude "an individual having the status of an independent contractor,"<sup>298</sup> judicial deference to NLRB statutory interpretations has been relatively widespread.<sup>299</sup>

<sup>296</sup> 322 U.S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944).

<sup>297</sup> *Id.*

<sup>298</sup> 29 U.S.C. § 152(3).

<sup>299</sup> If the NLRB's "construction of the statute is reasonably defensible, it should not be rejected merely because the courts prefer another view of the statute." *Ford Motor Co. v. National Labor Relations Bd.*, 441 U.S. 488, 497, 99 S. Ct. 1842, 1849, 60 L. Ed. 2d 420, 428 (1979). However, the courts will not defer to the NLRB's statutory interpretation when its construction is inconsistent with the statutory language. *National Labor Relations Bd. v. Insurance Agents*, 361 U.S. 477, 499, 80 S. Ct. 419, 432, 4 L. Ed. 2d 454, 470 (1960); *National Labor Relations Bd. v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951). Sometimes, the court substitutes its judgment for the NLRB's when the question involves statutory interpretation. *See, e.g., Office Employees Int'l Union v. NLRB*, 353 U.S. 313, 77 S. Ct. 799, 1 L. Ed. 2d 846 (1957). These standards of judicial review of agency interpretation of its statutes were refined in *Chevron, Inc., v. Natural Resources Defense Council*, 467 U.S.

## 7. Federal Preemption

Not all efforts of state governments to take over transit operations have been successful. At issue in Division 1287 of the *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Missouri*,<sup>300</sup> was a decision of the Governor of Missouri, acting under a Missouri statute, to seize and operate a striking transit company, Kansas City Transit, Inc.. The U.S. Supreme Court held that the state statute authorizing seizure of the transit company was invalid under the Supremacy Clause of the U.S. Constitution as making unlawful a peaceful strike in conflict with Section 7 of the NLRA,<sup>301</sup> which guarantees the right to bargain collectively and the right to strike. The Court pointed out:

...[T]he State's involvement fell far short of creating a state-owned and operated utility whose labor relations are by definition excluded from the coverage of the National Labor Relations Act. The employees of the company did not become employees of Missouri. Missouri did not pay their wages, and did not direct or supervise their duties. No property of the company was actually conveyed, transferred, or otherwise turned over to the State. Missouri did not participate in any way in the actual man-

837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), where the Supreme Court held:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.... If, however, the court determines Congress has not directly addressed the precise questions at issue, the court does not simply impose its own construction on the statute.... Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute....

If Congress has explicitly left a gap for the agency to fill...[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

*Id.* at 842-44 [citations and footnotes omitted]. But in *Immigration and Naturalization Service v. Cardoza Fonseca*, 480 U.S. 421, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987), the Supreme Court may have circumscribed the reach of *Chevron*, reserving the right to use traditional tools to decide pure questions of statutory construction in determining whether two statutory provisions are equivalent. In *NLRB v. United Food Workers Union*, 484 U.S. 112, 108 S. Ct. 413, 98 L. Ed. 2d 429 (1987), the Court held that under both *Chevron* and *Cardoza Fonseca*, "on a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' If we can do so, then that interpretation must be given effect.... However, 'where the statute is silent or ambiguous with respect to the specific issue,'" then *Chevron*-type deference is appropriate. *Id.* at 123, citations omitted. Noting its traditional deference to NLRB decisions, in *United Food Workers*, the Court upheld a regulation permitting its General Counsel to approve settlements, not subject to Board approval, and therefore not subject to judicial review.

<sup>300</sup> 374 U.S. 74, 83 S. Ct. 1657, 10 L. Ed. 2d 763 (1963).

<sup>301</sup> 29 U.S.C. § 157.

agement of the company, and there was no change of any kind in the conduct of the company's business.<sup>302</sup>

The Supreme Court's opinion underscores the conclusion that Section 13(c) protects the *process* of collective bargaining, regardless of whether the transit workers are employed by a governmental entity or a private sector entity. State antitrust law has also been held preempted where the allegedly anticompetitive agreement concerning wages and working conditions fell within the terms of a CBA negotiated under the NLRA.<sup>303</sup> Finally, state and local efforts to supplement the penalties for violation of the NLRA have been deemed preempted by federal law. Thus, the efforts by the BART to debar a steel provider from doing further business with it because of alleged violations of the NLRA was held beyond the power of state and local governments.<sup>304</sup> The preemption extends to activities "that the NLRA protects, prohibits, or arguably protects or prohibits."<sup>305</sup>

## G. MINIMUM WAGE LAWS

### 1. The Davis-Bacon Act

Employees of contractors and subcontractors involved in a construction contract in excess of \$2,000 funded by a federal loan or grant for a public building or public works project<sup>306</sup> must be paid wages not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor.<sup>307</sup> The Davis-Bacon Act, enacted in 1931 while the nation was mired in the Great Depression, established the \$2000 threshold. The threshold has to date not been amended or adjusted for inflation. Thus, virtually every construction contract funded by or supported by a federal grant

(such as an FTA grant) is subject to the Davis-Bacon Act.<sup>308</sup>

Davis-Bacon is essentially a minimum wage statute.<sup>309</sup> The purpose of the Act is to protect employees from substandard earnings by fixing a floor under wages on government projects.<sup>310</sup> This is accomplished by a determination of the "prevailing wage" in the locality for each trade and craft, including apprentices. It protects local wages by preventing contractors from basing their bids for federally-funded construction projects on wages lower than those prevailing in the area.<sup>311</sup> The Act applies to FTA-funded construction projects, which are not federal construction projects; they are local construction projects supported with federal financial assistance in the form of an FTA grant or loan. Davis-Bacon compliance is assured by the FTA through contracting "flow-down" provisions under the FTA MA and its procurement regulations.<sup>312</sup> FTA requires grantees to insert Davis-Bacon requirements in its third-party contracts with contractors.<sup>313</sup>

The DOL determines minimum wage rates and fringe benefits prevailing in the community at or about the time of execution of the construction contract.<sup>314</sup> This establishes the minimum wages to be paid to workers under a federally-funded project. In addition to payment of a base hourly wage to workers, Davis-Bacon also ensures payment of an hourly fringe benefit component directly with the wages or in the form of a contribution to an employee benefit plan, such as a pension plan.<sup>315</sup> The Secretary of Transportation may approve a federal grant or loan under DOT's jurisdiction only af-

<sup>302</sup> Div. 1287, 374 U.S. at 81 [footnotes omitted].

<sup>303</sup> Local 24 of the International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Oliver, 358 U.S. 283 (1959), 79 S. Ct. 297, 3 L. Ed. 2d 312 (1959).

<sup>304</sup> CF&I Steel v. Bay Area Rapid Transit District, 2000 U.S. Dist. Lexis 13810 (N.D. Calif. 2000).

<sup>305</sup> Wisconsin Dep't of Industry Labor and Human Relations v. Gould, 475 U.S. 282, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986), *citing* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773 (1959).

<sup>306</sup> A "public works" project has been interpreted to include fixed works contracted for public use such as railroads and roads. 38 Op. Att'y Gen. 418 (1936).

<sup>307</sup> See 49 U.S.C. § 5333(a), the Davis-Bacon Act, 40 U.S.C. §§ 276a–276a(7), and U.S. DOL regulations, "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction." 29 C.F.R. pt. 5. In fiscal year 1995, the Department of Labor completed approximately 100 prevailing wage surveys, gathering wage and fringe benefit data from more than 37,000 employers. At the dawn of the 21st century, the average wage determinations in predominantly nonunion counties were about 7 years old, on average.

<sup>308</sup> Davis-Bacon applies to "construction, alteration and/or repair...of public buildings or public works" and extends to "all mechanics and laborers employed directly upon the site of the work." 40 U.S.C. § 276a. The work site has been defined by DOL to include "material or supply sources, tool yards, job headquarters, etc., in the site of the work only where they are dedicated to the covered construction project and are adjacent or virtually adjacent to the location where the building or work is being constructed." Not covered is the off-site transportation of materials, supplies, and tools, "unless such transportation occurs between the construction work site and a dedicated facility located 'adjacent or virtually adjacent' to the construction site." 29 C.F.R. pt. 5.

<sup>309</sup> Associated Builders & Contractors of Texas Gulf Coast v. United States Dep't of Energy, 451 F. Supp. 281 (S.D. Tex. 1978).

<sup>310</sup> United States v. Binghamton Constr. Co., 347 U.S. 171, 74 S. Ct. 438, 98 L. Ed. 594 (1954).

<sup>311</sup> L.P. Cavett Co. v. United States Dep't of Labor, 101 F.3d 1111 (6th Cir. 1996).

<sup>312</sup> FTA Circular 4220.1F (at I–4, I–5, IV–6, IV–12, IV–20, IV–25, IV–26, VI–7, App. A–1, A–2, A–4, and A–6).

<sup>313</sup> FTA MA § 24, <http://www.fta.dot.gov/documents/18-Master.pdf> (visited July 2014). The flow-down language is also mandated by DOL regulations, 29 C.F.R. § 5.

<sup>314</sup> Bushman Constr. Co. v. United States, 164 F. Supp. 239 (Ct. Cl. 1958).

<sup>315</sup> Kenney v. Roland Parson Contraction Corp., 790 F. Supp. 12 (D. D.C. 1992).

ter being assured that the required labor standards will be observed on the construction work.<sup>316</sup> Where federal funding is anticipated, Davis-Bacon applies, irrespective of whether such funding had not been formally applied for or approved.<sup>317</sup> The recipient is responsible for making certain that the Davis-Bacon determinations are obtained prior to work commencing on the project. This is important because it is an administrative step that must be completed. The construction contractor will base its bid upon certain wage rates, and if the Davis-Bacon determinations as to "prevailing wages" come in higher on one or more crafts or trades, the construction contractor may seek a Construction Change Order from the recipient to cover the increased cost.

The Davis-Bacon Act was intended to be a "general prohibition or command to a federal agency."<sup>318</sup> It was not intended to create a private cause of action for employees,<sup>319</sup> and it does not authorize a suit for back wages.<sup>320</sup> An employee of a federal contractor does not have a private right of action under Davis-Bacon for back wages.<sup>321</sup> Disputes as to whether workers are properly classified,<sup>322</sup> for example, must be referred to the Secretary of Labor for determination.<sup>323</sup> DOL has sole responsibility for resolving employee classification disputes under the Act.<sup>324</sup> For example, an appellate court has held that the Secretary of Labor's determination that separate wage schedules were appropriate for highway and transit projects was held within his discretion under Davis-Bacon.<sup>325</sup> The correctness of DOL's conclusion as to the prevailing wages in a particular area under Davis-Bacon is not subject to judicial attack.<sup>326</sup> But the legality of the procedures used by DOL

is subject to judicial review,<sup>327</sup> as is the issue of whether a finding by the DOL Wage Appeals Board that Davis-Bacon is applicable to a particular contract.<sup>328</sup>

However, the Secretary of Labor has the right to pursue an action on behalf of underpaid employees.<sup>329</sup> The government may withhold payment to an FTA recipient where a contractor underpays its employees under Davis-Bacon.<sup>330</sup> Moreover, even if a project does not fall under Davis-Bacon application, the contractor can still bind itself to pay Davis-Bacon wages by contract.<sup>331</sup>

Various courts have held that federal statutes do not preempt state prevailing wage laws.<sup>332</sup> The Davis-Bacon Act provides that it will "not be construed to supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates,"<sup>333</sup> but is silent with regard to state statutes. Some courts have denied contractor's efforts to strike down such state laws on grounds of preemption by Davis-Bacon.<sup>334</sup> However, at least one court has held that Davis-Bacon preempts state prevailing wage laws.<sup>335</sup>

<sup>316</sup> 49 U.S.C. § 5333(c).

<sup>317</sup> *North Ga. Bldg. and Constr. Trades Council v. Goldschmidt*, 621 F.2d 697 (5th Cir. 1980).

<sup>318</sup> *Univs. Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 101 S. Ct. 1451, 67 L. Ed. 2d 662 (1981).

<sup>319</sup> *Operating Eng'rs Health and Welfare Trust Fund v. JWW Contracting Co.*, 135 F.3d 671 (9th Cir. 1998). Private litigation would introduce significant uncertainty into government contracting, undercutting the administrative scheme created to bring consistency into the administration and enforcement of the Act. *Univs. Research Ass'n*, 450 U.S. 754.

<sup>320</sup> *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 74 S. Ct. 438, 98 L. Ed. 594 (1954); *Rapid Transit Advocates, Inc. v. Southern Cal. Rapid Transit District*, 752 F.2d 373, 376 (9th Cir. 1985); *Operating Eng'rs and Welfare Trust Fund v. JWW Contracting Co.*, 135 F.3d 671, 675 (9th Cir. 1998).

<sup>321</sup> *University Research Ass'n v. Coutu*, 450 U.S. 754 (1981).

<sup>322</sup> See *Tennessee Roadbuilders Assoc. v. Marshall*, 446 F. Supp. 399 (M.D. Tenn. 1977).

<sup>323</sup> *United States v. Dyncorp, Inc.*, 895 F. Supp. 844, 852 (E.D. Va. 1995).

<sup>324</sup> *Id.*

<sup>325</sup> *Commonwealth of Va. ex rel. Commissioner, Va. Dep't of Highways & Transp. v. Marshall*, 599 F.2d 588 (4th Cir. 1979).

<sup>326</sup> *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 74 S. Ct. 438, 98 L. Ed. 594 (1954).

<sup>327</sup> *Commonwealth of Va. ex rel. Commissioner, Va. Dep't of Highways & Transp. v. Marshall*, 599 F.2d 588 (4th Cir. 1979); *Tenn. Roadbuilders Assoc. v. Marshall*, 446 F. Supp. 399 (M.D. Tenn. 1977).

<sup>328</sup> *North Ga. Bldg. & Constr. Trades Council v. Goldschmidt*, 621 F.2d 697 (5th Cir. 1980). If it questions the applicability of the Davis-Bacon Act, the contractor must contact the Wage and Hour Administrator.

<sup>329</sup> *Irwin Co. v. 3525 Sage St. Assoc.*, 37 F.3d 212 (5th Cir. 1994).

<sup>330</sup> *Unity Bank & Trust Co. v. United States*, 5 Cl. Ct. 380 (1984), *aff'd*, 756 F.2d 870 (1985). The government pays the contractor on a federal project such as a federal courthouse, but the government does not pay the contractor on a FTA-funded construction project. The government will withhold grant funds from the recipient of an FTA-funded project if the contractor violates the Davis-Bacon requirements.

<sup>331</sup> *Vulcan Arbor Hill Corp. v. Reich*, 81 F.3d 1110 (D.C. Cir. 1996).

<sup>332</sup> See, e.g., *Burgio & Campofelice, Inc. v. N.Y. State DOL*, 107 F.3d 1000 (2d Cir. 1997) (ERISA does not preempt prevailing state wage law); *General Electric Co. v. N.Y. State Dep't of Labor*, 698 F. Supp. 1093 (S.D. N.Y. 1988) (state wage laws not preempted by federal retirement acts or federal labor relations laws).

<sup>333</sup> 40 U.S.C. § 276a-3.

<sup>334</sup> *Siuslaw Concrete Constr. Co. v. State of Wash., Dep't of Transp.*, 784 F.2d 952 (9th Cir. 1986).

<sup>335</sup> *Southern Cal. Labor Management Operating Eng'rs Contract Compliance Comm. v. Lloyd W. Aubry, Jr.*, 54 Cal. App. 4th 873, 63 Cal. Rptr. 2d 106, 1997 Cal. App. LEXIS 347 (1993). California courts have also held that ERISA preempts state wage laws. *Division of Indus. Relations v. Nielsen Constr. Co.*, 51 Cal. App. 4th 101, 59 Cal. Rptr. 2d 785, 1996 Cal. App. LEXIS 1185 (1996).

## 2. The Service Contract Act

The McNamara-O'Hara Service Contract Act of 1965<sup>336</sup> requires that federally assisted projects pay the minimum prevailing wage. This is important to a transit agency that purchases a great deal of integrated services.

Specifically, the Service Contract Act provides that every contract in excess of \$2,500, the principal purpose of which is to provide services to the federal government through the use of service employees, shall contain specific provisions addressing minimum wages, fringe benefits, and working conditions, as approved by the Secretary of Labor.<sup>337</sup> Wages may not be lower than those specified in the Fair Labor Standards Act (FLSA),<sup>338</sup> described below. Fringe benefits shall include medical care, retirement pensions, death benefits, compensation for injuries or illness, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, and apprenticeship costs.<sup>339</sup> Working conditions shall not expose service employees to unsanitary, hazardous, or dangerous conditions.<sup>340</sup>

DOL has promulgated regulations creating a number of exemptions from the Service Contract Act. Examples include prime contracts or subcontracts for the maintenance, calibration, or repair of automated data processing and word processing equipment, scientific equipment, and office and business machines.<sup>341</sup> Also exempt are certain vehicle maintenance services, financial services, hotel and motel lodging, common carrier transportation, real estate services, and relocation services.<sup>342</sup>

## 3. The Fair Labor Standards Act

The FLSA of 1938<sup>343</sup> requires that employers pay the minimum hourly wage, as established periodically by Congress, and that they shall not require more than 40 hours of work per week unless the employees are paid one and one half times their normal hourly wage.<sup>344</sup> These requirements are also imposed in federally financed or assisted projects or government contracting under the Contract Work Hours and Safety Standards Act.<sup>345</sup>

Congress created an FLSA Administrator, who has the power to seek injunctions attempting to restrain FLSA violations. The Administrator also issues interpretive bulletins and informal rulings. The U.S. Supreme Court has given such interpretations of the application of the FLSA significant weight.<sup>346</sup>

FLSA has been the subject of an interesting conflict between the Commerce Clause and the Tenth Amendment of the U.S. Constitution. Originally, FLSA's wage and overtime provisions did not apply to employees of state and local governments. In 1961, the Act's minimum-wage coverage was extended to employees of any private mass transit carrier with annual gross revenue of more than \$1 million.<sup>347</sup> In 1966, Congress extended FLSA coverage to state and local government employees by withdrawing the exemptions from, *inter alia*, transit carriers whose rates and services were subject to state regulation; Congress also eliminated the overtime exemption for public transit employees other than drivers, operators, and conductors.<sup>348</sup> In 1974, Congress repealed the remaining overtime exemption for transit employees and extended FLSA to virtually all state and local governmental employees.<sup>349</sup> *Garcia v. San Antonio Metropolitan Transit Authority*<sup>350</sup> was the landmark U.S. Supreme Court decision holding that governmental employees were subject to overtime.<sup>351</sup>

In 1976, in *National League of Cities v. Usery*,<sup>352</sup> the U.S. Supreme Court held that the Commerce Clause of the U.S. Constitution<sup>353</sup> does not empower Congress to enforce minimum wage and overtime pay provisions of the FLSA against the states in areas of traditional gov-

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also U.S. DOL regulations on Prevailing Wage and Overtime Requirements—"Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction (also Labor Standards Provisions Applicable to Non-construction Contracts Subject to the Contract Work Hours and Safety Standards Act)," 29 C.F.R. pt. 5.

<sup>346</sup> As the Supreme Court noted in *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944):

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its...pronouncements, and all those factors which give it power to persuade, if lacking power to control.

<sup>347</sup> Fair Labor Standards Amendments of 1961, Pub L. No. 87-30, 75 Stat. 65.

<sup>348</sup> Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830-844.

<sup>349</sup> Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55.

<sup>350</sup> 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985).

<sup>351</sup> Following *Garcia*, there were several lawsuits in which transit workers requested overtime. The defense was that *Garcia* should be applied prospectively, not retroactively. See *Bester v. Chicago Transit Auth.*, 887 F.2d 118 (7th Cir. 1989).

<sup>352</sup> 426 U.S. 833 (1976), 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976).

<sup>353</sup> U.S. CONST. ART. 1, § 8.

<sup>336</sup> Pub. L. No. 89-286, 79 Stat. 1034 (Oct. 22, 1965).

<sup>337</sup> 41 U.S.C. § 351 (2002).

<sup>338</sup> 29 U.S.C. § 201 *et seq.*

<sup>339</sup> 41 U.S.C. § 351(a)(2).

<sup>340</sup> 41 U.S.C. § 351(a)(3).

<sup>341</sup> 29 C.F.R. § 4.123(e)(1). The exemptions apply if conditions specified in the regulations are met.

<sup>342</sup> 29 C.F.R. § 4.123(e)(2).

<sup>343</sup> Fair Labor Standards Act, as amended, 29 U.S.C. §§ 206 and 207.

<sup>344</sup> 29 U.S.C. § 207(a)(1).

<sup>345</sup> Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. §§ 327 through 334. Nonconstruction Labor/Wage and Hour—Section 102 of the Contract Work Hour and Safety Standards Act, 40 U.S.C. §§ 327 through 332. See

ernmental functions, and that instead, such powers are reserved to the states under the Tenth Amendment.<sup>354</sup> The Court [held that the 1974 Amendments were invalid “insofar as they operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions.”<sup>355</sup>

Four months later, the San Antonio Metropolitan Transit Authority (SAMTA) notified its employees it would no longer honor the FLSA overtime obligations. SAMTA was a public mass transit authority organized on a county-wide basis, a successor to a private mass transit firm that ceased operations in 1959.

But in 1979, the Wage and Hour Administration of the DOL ruled that SAMTA's operations “are not constitutionally immune” from FLSA under *Usery*. SAMTA filed suit seeking a declaratory judgment that *Usery* precluded the application of FLSA's overtime and record keeping requirements. The federal district court held that the municipal ownership and operation of a transit system was a traditional governmental function under *Usery*, and therefore immune from federal wage and overtime requirements. On appeal, the U.S. Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>356</sup> overruled *Usery*, concluding that there was nothing in the FLSA, as applied to SAMTA, that was destructive of state sovereignty or violative of any constitutional provision. SAMTA was subject to nothing more than the same minimum wage and overtime requirements that hundreds and thousands of other public and private employers must satisfy.<sup>357</sup> *Garcia* made clear that transit employees were covered under FLSA, and that they could enforce their claims in suits brought in federal or state court.<sup>358</sup>

To ameliorate the difficulties caused by these conflicting Supreme Court decisions, Congress then amended FLSA to eliminate retroactive liability for functions categorized as “traditional.” However, non-traditional functions, such as transit systems, were deemed unaffected by the 1985 FLSA amendments.<sup>359</sup>

Another congressional response to Supreme Court interpretations of FLSA was the Portal-to-Portal Act,<sup>360</sup> passed to limit a decision of the Supreme Court construing FLSA as requiring compensation for activities such as walking from the factory gate to the workbench, and changing into work clothes.<sup>361</sup> Thus, for example, a federal court has held that a transit authority is not required to compensate a transit police canine handler for

the time spent commuting to and from work accompanied by the dog entrusted to him.<sup>362</sup>

However, where the USDOT has authority under the Federal Motor Carrier Safety Act to establish the maximum number of hours an employee can work, DOT jurisdiction supersedes DOL's authority under the FLSA.<sup>363</sup>

## H. STATE LABOR LAW

Intrastate public transit employees not subject to the RLA or NLRA are instead subject to state law. Both the RLA and NLRA exclude from their coverage employees of political subdivisions of the state,<sup>364</sup> which many transit authorities are. While in many states the labor statutes are similar in scope and application to the federal laws,<sup>365</sup> in others there are significant differences between the state and federal schemes.<sup>366</sup> Hence, federal decisions are not binding on state courts where federal laws are inapplicable.<sup>367</sup>

States have their own statutory procedures governing public employers and employees in such areas as union certification, collective bargaining,<sup>368</sup> dispute resolution,<sup>369</sup> and unfair labor practices,<sup>370</sup> and differing common law treatment on labor issues such as employment-at-will.<sup>371</sup> A few require transit agencies to engage in limited privatization by contracting out the provision of a portion of bus service to private firms.<sup>372</sup>

<sup>362</sup> Reich v. N.Y. City Transit Auth., 45 F.3d 646 (2d Cir. 1995).

<sup>363</sup> United Transp. Union v. Ozark Newark Elizabeth Bus, Inc., 111 F. Supp. 2d 514 (D. N.J. 2000).

<sup>364</sup> 29 U.S.C. § 152.

<sup>365</sup> See, e.g., CAL. PUB. UTIL. CODE § 25051 (2014), which established a collective bargaining and arbitration scheme similar to the federal system.

<sup>366</sup> See, e.g., Communications Workers of America v. Western Elec. Co., 551 P.2d 1065 (Colo. 1976).

<sup>367</sup> Hoff v. Amalgamated Transit Union, 758 P.2d 674 (Colo. 1987).

<sup>368</sup> See, e.g., CAL. PUB. UTIL. CODE § 25051 (2014); MICH. COMP. LAWS SERV. §§ 423.201, 423.215 (2014); N.Y. CONSOL. LAWS SERV. CIV. 2 § 200 (2014).

<sup>369</sup> See, e.g., N.Y. City Transit Auth. v. Amalgamated Transit Union, 284 A.D. 2d 466, 726 N.Y.S.2d 694 (2001). Arbitration appears to be favored in many states, with state court deference to the arbitrator's decision a common feature. See, e.g., Southwest Ohio Regional Transit Auth. v. Amalgamated Transit Union, 91 Ohio St. 3d 108, 742 N.E.2d 630 (2001). However, a court may not enforce an arbitration whose decision is contrary to public policy, such as the duty of common carriers to ensure the safety of their passengers. Greater Cleveland Regional Transit Auth. v. Amalgamated Transit Union, 141 Ohio App. 3d 33, 749 N.E.2d 817 (2001).

<sup>370</sup> See, e.g., MICH. COMP. LAWS §§ 423.201–423.216 (2014).

<sup>371</sup> For example, in Georgia, a public employee has no vested right to employment absent a property interest vested by local ordinance or by implied contract. Dixon v. MARTA, 242 Ga. App. 262, 529 S.E.2d 398 (2000).

<sup>372</sup> For example, the State of Colorado required Denver's RTD to contract out 35 percent of bus service to private

<sup>354</sup> *Nat'l League of Cities*, 426 U.S. at 852.

<sup>355</sup> *Id.*

<sup>356</sup> 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985).

<sup>357</sup> *Garcia*, 469 U.S. at 554.

<sup>358</sup> *Welch v. State Dep't of Highways and Public Transp.*, 780 F.2d 1268 (5th Cir. 1986); *Mineo v. Port Auth. of N.Y. and N.J.*, 779 F.2d 939 (3d Cir. 1985).

<sup>359</sup> See *Bester v. Chicago Transit Auth.*, 887 F.2d 118, 122 (7th Cir. 1989), and cases cited therein.

<sup>360</sup> 29 U.S.C. § 251.

<sup>361</sup> *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946).

But perhaps the most significant difference is that in many states, public employees can be denied the right to strike.<sup>373</sup> For example, in Utah,

Employees of any public transit system...shall have the right to self-organization, to form, join, or assist labor organizations and to bargain collectively through representatives of their own choosing, provided, however, that such employees and labor organizations shall not have the right to join in any strike against such public transit system.<sup>374</sup>

In New York, “No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage or condone a strike.”<sup>375</sup> In Colorado, within 20 days of filing a notice of intent to strike by a labor union, the Director of the State Department of Labor shall assess whether such a strike “would interfere with the preservation of the public peace, health and safety,” and if so, issue an order denying the strike and setting the dispute for mediation and mandatory arbitration.<sup>376</sup> In Missouri, the Governor was given authority to take possession of any public utility whose “lockout, strike or work stoppage” in his opinion “threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare.”<sup>377</sup>

As public employees, many transit workers enjoy state or municipal civil service status, with its myriad of job protection requirements.<sup>378</sup> State civil service laws govern issues as diverse as employment qualifications, examinations, promotion, job classification, salary grades, retirement, collective bargaining, grievances, suspension, removal and other disciplinary action, dispute resolution, hearings, appeals, and judicial review.<sup>379</sup> For example, in Ohio, employees of a county transit provider are deemed employees of the county itself who can avail themselves of seniority provisions, vacation, holiday and sick leave privileges, and the re-

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operators, as measured by vehicle hours driven. COLO. REV. STAT. § 32-9-119.5 (2)(a) (2014).

<sup>373</sup> See, e.g., MICH. COMP. LAWS SERV. § 423.201 (2014). Persons operating a street railway system have been deemed public employees within the meaning of the act. The absolute right to strike is guaranteed neither by the common law nor the 14th Amendment. *City of Detroit v. Amalgamated Ass’n of Street, Elec. R.R. & Motor Locals Employees of America Employees*, 51 N.W.2d 228 (Mich. 1952). However, it may be conferred by statute or a CBA.

<sup>374</sup> UTAH CODE ANN. § 17A-2-1031 (2001).

<sup>375</sup> N.Y. CLS Civ. S § 210(1) (2004).

<sup>376</sup> COLO. REV. STAT. 8-3-113 (3) (2014). *Regional Transp. District v. Colo. Dep’t of Labor*, 830 P.2d 942 (Colo. 1992) (upholding the constitutionality of the statute).

<sup>377</sup> MO. REV. STAT. § 295.180. However, as noted above, this provision was deemed unconstitutional in *Amalgamated Ass’n of Street, Elec. Ry. & Motor Coach Employees v. Mo.*, 374 U.S. 74, 83 S. Ct. 1657, 10 L. Ed. 2d 763 (1963).

<sup>378</sup> See, e.g., N.Y. CIV. SERV. LAW § 1 (Consol. 2001).

<sup>379</sup> See, e.g., WASH. REV. CODE § 41.56.100 (2014); N.Y. CIV. SERV. LAW §§ 20, 50, 52, 56, 61, 75, 76, 80, 121, 131, 209 (2014). N.Y. RETIRE. & SOC. SEC. LAW § 2 (2014).

irement system.<sup>380</sup> Some establish a civil service commission or personnel board.<sup>381</sup> Transit lawyers would be well advised to check the labor laws of their local jurisdiction to determine the respective rights and duties of employers and employees.

## I. MISCELLANEOUS FEDERAL STATUTES

Other federal laws impact labor and employment. Some address ethics, including the Copeland Act<sup>382</sup> (which prohibits kickbacks). Others focus on employee safety, including the Occupational Safety and Health Act,<sup>383</sup> and the Contract Work Hour and Safety Standards Act.<sup>384</sup> Still others address civil rights, such as Title VII of the Civil Rights Act of 1964 (which prohibits employment discrimination based on race, sex, national origin or religion),<sup>385</sup> the Age Discrimination in Employment Act<sup>386</sup> (which protects employees against age

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<sup>380</sup> OHIO REV. CODE ANN. § 306.04 (2014).

<sup>381</sup> See, e.g., WASH. REV. CODE § 41.56.100 (2001).

<sup>382</sup> Prohibition against Kickbacks—Copeland “Anti-Kickback” Act —18 U.S.C. § 874 and 40 U.S.C. § 276c; U.S. DOL regulations prohibiting “kickbacks”—“Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States,” 29 C.F.R. pt. 3.

<sup>383</sup> Safety at Worksite—U.S. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590, Dec. 29, 1970. See also Occupational Safety and Health Administration, U.S. DOL, regulations on safety standards, 29 C.F.R. pts. 1900—1910.1000. Occupational Safety and Health Administration, U.S. DOL regulations, Safety and Health Regulations for Construction, 29 C.F.R. pt. 1926. See [http://www.osha.gov/pls/oshaweb/owasrch.search\\_form?p\\_doc\\_type=STANDARDS&p\\_toc\\_level=1&p\\_keyvalue=1910](http://www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=STANDARDS&p_toc_level=1&p_keyvalue=1910) (visited July 2014).

<sup>384</sup> Safety Standards at Worksite—Section 107 of the Contract Work Hour and Safety Standards Act, 40 U.S.C. § 333, and U.S. DOL regulations, Safety and Health Regulations for Construction, 29 C.F.R. pt. 1926. See [http://www.osha.gov/pls/oshaweb/owasrch.search\\_form?p\\_doc\\_type=STANDARDS&p\\_toc\\_level=1&p\\_keyvalue=1926](http://www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=STANDARDS&p_toc_level=1&p_keyvalue=1926) (visited Apr. 16, 2013).

<sup>385</sup> 42 U.S.C. §§ 2000e-17. See also U.S. DOL regulations, Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor, 41 C.F.R. pts. 60 *et seq.*; See [http://ecfr.gpoaccess.gov/cgi/t/text/textidx?sid=183f3991579c1d2bee331ca14de35e80&c=ecfr&tpl=ecfrbrowse/Title41/41cfrv1\\_02.tpl#6000](http://ecfr.gpoaccess.gov/cgi/t/text/textidx?sid=183f3991579c1d2bee331ca14de35e80&c=ecfr&tpl=ecfrbrowse/Title41/41cfrv1_02.tpl#6000) (visited July 2014).

<sup>386</sup> The Age Discrimination in Employment Act, 29 U.S.C. § 621-34, protects employees who are at least 40 years old from discrimination on the basis of their age. The purpose of the statute is to protect older employees on the basis of their abilities, rather than their age. To establish a *prima facie* case, a plaintiff must prove: (1) he or she belongs to a protected class (age 40 or older); (2) he or she was qualified for his or her position; (3) he or she was terminated from employment; and (4) he or she was replaced by a younger person. If the plaintiff proves these elements, the burden of proof shifts to the employer to prove the plaintiff’s discharge was the result of “some legitimate, nondiscriminatory reason.” If the defendant proves this, the burden shifts again to the plaintiff to prove that the reasons proffered by the defendant for discharge were

discrimination); the Rehabilitation Act of 1973<sup>387</sup> (which prohibits federal agencies and recipients from discriminating against disabled persons); and the ADA of 1990<sup>388</sup> (which prohibits private entities from discriminating against the disabled). These statutes will be addressed elsewhere in this book, specifically in Section 6—Ethics, Section 7—Safety, and Section 10—Civil Rights, respectively.

Revoking the previous prohibition on the use of project labor agreements (PLAs) in projects receiving FTA financial assistance, in 2009, President Obama signed an Executive Order, encouraging federal agencies and their grant recipients to consider the use of PLAs on large-scale construction projects.<sup>389</sup> A PLA identifies the terms and conditions that govern the employment of labor on a project for the duration of that project.<sup>390</sup>

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merely a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987).

<sup>387</sup> Section 504 of the Rehabilitation Act of 1973 prohibits the federal government and recipients of federal funds from discriminating against people with disabilities in employment. It provides that, "No otherwise qualified individual...shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

<sup>388</sup> The Americans with Disabilities Act of 1990, 42 U.S.C. § 12112, extends to private employers the prohibition against employment discrimination against people with disabilities. An employer of 15 or more individuals may not discriminate against any "otherwise qualified" individual on the basis of mental or physical disability. A qualified individual is one "with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position...and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m). 2012).

<sup>389</sup> Use of Project Labor Agreement, Executive Order 13502 (Feb. 6, 2009).

<sup>390</sup> FTA has published guidance on its Web site at [www.fta.dot.gov/laws/leg\\_reg\\_7211.html](http://www.fta.dot.gov/laws/leg_reg_7211.html) (last visited July 2014).