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A Tale of Three Statutes . . . (and One Industry): A Case Study on the Competitive Effects of Regulation

One of the most significant contributions of the law and economics literature has been the analysis of legislative acts as rent-seeking activity, with corresponding winners and losers.¹ A major insight from this literature relates to our understanding of the competitive effects of regulation. Regulatory activity, by Congress, the executive, and even the judiciary, affects markets in non-trivial ways. Some examples are fairly obvious, as when Congress enacts a tariff on imported goods,² or when Congress subsidizes farm products.³ In a case of tariffs on imports, Congress is guarding domestic producers against foreign competition.⁴ In the case of subsidies, Congress is reducing the costs of production of a particular sector of the economy and shifting

* Professor of Law, University of Cincinnati. Part of the research for this article was conducted as part of a joint research project between the Institute for Law and the Workplace at Chicago-Kent College of Law, and the W.J. Usery Center for the Workplace at Georgia State University. Professor Gely acknowledges the contributions of Hank Perritt, Harold Krent and Martin Malin.

¹ See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 21-33 (1991) (reviewing the history of the economic theory of regulation); Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 371 (1983) (describing the legislative process as a system in which "actual political choices are determined by the efforts of individuals and groups to further their own interests").

² See Stephen P. Magee, *Endogenous Protection: The Empirical Evidence*, in *PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK* 526, 526-27 (Dennis G. Mueller ed., 1997) (describing a tariff as the result of the political bargaining among interest groups).

³ See Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83, 105-118 (1989) (analyzing the dairy industry from the public choice perspective).

⁴ See Magee, *supra* note 2, at 527.

those costs to a different sector.⁵

A voluminous literature has developed applying these economic insights.⁶ Rarely, however, have the effects of regulation on members of the same industries been studied. This gap is understandable. First, it will be difficult for Congress to single out a firm within an industry for special treatment in any legislative act. Principles of evenhanded governance require that similar firms operate within the same regulatory environment. Differential regulation presents the flip side of subsidies. Those whom the government regulates the least may stand a better shot in the marketplace. Less efficient firms may benefit. Second, and perhaps more importantly, industry interests tend to be homogeneous, so that a regulatory framework that helps (or hurts) one member has the same effect on all the firms within the industry.⁷

The express package delivery industry (express industry) presents us with a unique research opportunity.⁸ Probably due to historical happenstance, individual firms in the express industry operate under different regulatory regimes in the area of labor law. Congress has regulated the largest, the Postal Service, under the Postal Reorganization Act (PRA);⁹ the National Labor Relations Board (NLRB) has asserted jurisdiction over the next largest, United Parcel Service (UPS), and a number of others under the National Labor Relations Act (NLRA);¹⁰ and then Federal Express and several others are regulated instead under the Railway Labor Act (RLA).¹¹ Indeed, airline employees of UPS and Airborne Express are regulated under the RLA even though most of the companies' other employees fall under the NLRA.

The application of the three different labor relations regulatory regimes to the firms in the express delivery industry has important implications regarding the ability of these firms to compete in the delivery of their services. The three regulatory

⁵ See Miller, *supra* note 3, at 130.

⁶ See FARBER & FRICKEY, *supra* note 1, at 21-31.

⁷ See MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 33-36 (1965) (describing the formation of interest groups).

⁸ The express package industry refers to firms competing in the package delivery service such as the U.S. Postal Service (USPS), United Parcel Service (UPS), Federal Express, DHL, Airborne Express, Emery Worldwide, and Purolator. See *infra* notes 21-35 and accompanying text.

⁹ 39 U.S.C. §§ 101-5605 (1994).

¹⁰ 29 U.S.C. §§ 157-187 (1994).

¹¹ 45 U.S.C. §§ 151-163 (1994).

regimes impose differential costs upon the firms, potentially skewing market competition. Employees' right to strike, the scope of collective bargaining, and the prospects of costly litigation differ across the industry. Firms operating under one regime consequently may gain a competitive advantage over another. For example, some companies within an industry might be advantaged because their ground employees may only organize on a system-wide basis when other companies are vulnerable to being organized on a piece-by-piece basis.¹² In virtually all other industries, application of labor laws to a particular firm has no competitive impact because the same regulatory structure governs all firms within the industry.

By analyzing the cost implications of the three labor law regimes, this Article seeks to contribute to our understanding of the economic effects of regulation. Part I briefly addresses the structure of the express industry to demonstrate the similarity of services provided by the firms.¹³

Part II sketches the contrasting labor-relations regimes that govern the industry.¹⁴ The regulatory differences stem from historical and conceptual premises governing labor relations in the trucking and airline industries that no longer are relevant in today's integrated market. Yet, fundamental aspects of each regulatory regime differ. The right to strike, for instance, constitutes a more central tenet of the NLRA than the RLA, and the right is not protected at all under the PRA. On the other hand, an employer's duty to bargain is far more limited under the NLRA and PRA than under the RLA.

Part III assesses the comparative costs imposed by the different labor relations regimes.¹⁵ The cost implications of strikes loom as one major distinction. Costs arising due to an expanded bargaining obligation form another. The incidence of litigation also varies, as does the cost of administering labor relations under the three regimes.

Part IV discusses the implications of this analysis.¹⁶ Two major implications are developed in this section. The first implication is with regard to the regulation of the express delivery industry.¹⁷

¹² See *infra* notes 93-98 and accompanying text.

¹³ See *infra* notes 21-35 and accompanying text.

¹⁴ See *infra* notes 36-188 and accompanying text.

¹⁵ See *infra* notes 189-307 and accompanying text.

¹⁶ See *infra* notes 308-42 and accompanying text.

¹⁷ See *infra* notes 308-14 and accompanying text.

In the United States, labor relations legislation is a sensitive issue to address from a political standpoint.¹⁸ Although the President and Congress have frequently been willing to intervene on an ad hoc basis in “emergency strikes,” neither of these political branches of government has shown any readiness to undertake fundamental reform of the basic regulatory frameworks through permanent legislation. The probability of moving part or all of the express package industry out from under either of the major private-sector statutes into the framework of the PRA—designed for a public sector entity—is low. Moreover, the likelihood that Congress will create a new labor relations structure solely for the express industry is minimal. Due to the substantially different costs imposed by the labor relations regimes, however, the government may be persuaded to equalize regulatory burdens. Only by leveling the playing field can the government pave the way for an efficient express package delivery market.

The second implication is broader and it relates to the regulatory process that has dominated our experience in the administrative agency era.¹⁹ The basic approach to regulation in the United States has been to adopt one regulatory framework and apply it to a particular problem regardless of the myriad of circumstances experienced by the regulated subjects. This one-size-fits-all approach is clearly a dominant feature of our regulatory framework. The comparison of the three labor regulatory regimes raises an interesting counterexample to the traditional model of regulation. Instead of adopting a one-size-fits-all model, could a regulatory model be conceptualized where a menu of regulatory options is made available to the target population? Under such an approach those affected by the regulatory regime will choose among the various regulatory options and adopt those that better fit their particular situations. Part IV.B develops the basic parameters of this proposal.²⁰ The Article ends with a brief conclusion.

¹⁸ See Leonard Bierman, *Towards a New Model for Union Organizing: The Home Visits Doctrine and Beyond*, 28 B.C. L. REV. 1, 20-23 (1985) (discussing the failed attempts to reform labor law in the 1970s).

¹⁹ See *infra* notes 315-42 and accompanying text.

²⁰ *Id.*

I

THE EXPRESS INDUSTRY

The express industry encompasses the delivery of time sensitive parcels.²¹ There are seven national firms in the industry: the United States Postal Service (USPS),²² United Parcel Service (UPS),²³ Federal Express,²⁴ Airborne Express,²⁵ Purolator,²⁶ DHL²⁷ and Emery Worldwide.²⁸ The express industry has evolved over the course of the last three decades from primarily surface transportation systems to integrated air and ground networks. The proportion of air to ground transportation and parcel and document delivery varies among the firms, but the transportation mode utilized is secondary to the certainty of delivery. The firms' principal focus on express package delivery justifies analyzing the firms as a group. The basic service provided by these firms is very similar in that all involve a combination of air and ground transportation.²⁹

The major difference between the firms in the industry is the proportion of air to ground transportation upon which each rely. UPS, for example, relies primarily on ground transportation.³⁰ Distinctively, Emery Worldwide appears to be structured in a more balanced manner regarding the proportion of air to ground

²¹ See, e.g., *In re* UPS, 318 N.L.R.B. 778 (1995).

²² See <http://www.usps.gov> (last visited Jan. 21, 2002) (containing general company information).

²³ See <http://www.ups.com> (last visited Jan. 21, 2002) (containing general company information).

²⁴ See <http://www.fedex.com> (last visited Jan. 21, 2002) (containing general company information).

²⁵ See <http://www.airborne.com> (last visited Jan. 21, 2002) (containing general company information).

²⁶ See <http://www.purolator.com> (last visited Jan. 21, 2002) (containing general company information).

²⁷ See <http://www.dhl-usa.com> (last visited Jan. 21, 2002) (containing general company information).

²⁸ See <http://emeryworldwide.com> (last visited Jan. 21, 2002) (containing general company information).

²⁹ See, e.g., *UPS v. NLRB*, 92 F.3d 1221, 1223 (D.C. Cir. 1996) (describing the various delivery components of UPS's operations); *In re* Emery Worldwide Airlines, 28 N.M.B. 355, 357 (2001) (describing the operations of Emery Worldwide); *In re* UPS, 318 N.L.R.B. 778 (1995) (describing the mix of ground and air operations of UPS); *In re* Fed. Express Corp., 23 N.M.B. 32, 36-47 (1995) (describing the operations of Federal Express); *In re* DHL Corp., 260 N.L.R.B. 17 (1982) (describing the operations of DHL).

³⁰ UPS, 318 N.L.R.B. at 778 (ninety-two percent of the packages processed by UPS travel exclusively by ground).

transportation.³¹ Federal Express, on the other hand, has relied on air transportation as its main operational approach.³²

Although firms in the express industry vary in terms of the proportion of air to ground transport,³³ they all provide the same critical function of express package delivery.³⁴ Participating firms view themselves as part of a distinct industry, and an entire literature has been spawned monitoring the vicissitude of express package delivery.³⁵

II

CONTRASTING THE DIFFERENT REGULATORY REGIMES

Three major statutes govern the industry: the NLRA,³⁶ the RLA,³⁷ and the PRA.³⁸ These statutes share many common characteristics, but fundamental differences exist in the protection afforded employees' rights to organize, in the scope of collective bargaining, and in their dispute resolution systems.³⁹ This Section compares the three labor law regimes across these various dimensions.

A. *A Brief Introduction to the Historical Origins of the RLA, NLRA and PRA*

The three labor relations statutes applicable to the express delivery industry were enacted at very different time periods. Not surprisingly, they adopt markedly different philosophies regarding the regulation of the labor process.

³¹ *In re Emery Worldwide Airlines*, 28 N.M.B. 216, 236 (2001).

³² *Fed. Express Corp.*, 23 N.M.B. at 36-47.

³³ Firms with a larger proportion of air to ground transport have been regulated under the RLA as opposed to the NLRA. See, e.g., *UPS v. NLRB*, 92 F.3d 1221 (D.C. Cir. 1996); *In re Fed. Express Corp.*, 323 N.L.R.B. 871 (1997).

³⁴ See Lorraine M. Cote & William M. Takis, *The Future of the U.S. Postal Service: An Assessment of Options*, in *MANAGING CHANGE IN THE POSTAL AND DELIVERY INDUSTRIES* 342, 342-43 (Michael A. Crew & Paul R. Kleindorfer eds., 1997) (describing the competitive forces faced by the USPS).

³⁵ See, e.g., MICHAEL A. CREW & PAUL R. KLEINDORFER, *EMERGING COMPETITION IN POSTAL AND DELIVERY SERVICES* (1996). *Transportation and Distribution*, an industry magazine, commonly features articles about industry developments affecting UPS, Federal Express, and other similar carriers.

³⁶ 29 U.S.C. §§ 157-187 (1994).

³⁷ 45 U.S.C. §§ 151-163 (1994).

³⁸ 39 U.S.C. §§ 101-5605 (1994).

³⁹ Because the PRA resembles the NLRA in most respects, this part contrasts the NLRA (and hence PRA) with the RLA, saving a discussion about the PRA to the end.

In the railroad industry, collective bargaining has been an accepted practice since the 1880s.⁴⁰ Government intervention was the exception rather than the rule and occurred on an ad hoc basis.⁴¹ Thus, until World War I, the focus of labor law in the railroad industry was with means to promote voluntary dispute settlement, as for example, the use of alternative dispute resolution processes such as fact-finding, mediation, and arbitration.⁴²

This pattern continued after the war. Management and labor continued to voluntarily bargain collectively over grievances and revisions in pay rates and working rules without a legal framework. Work stoppages were possible constrained only by the parties' bargaining power.

It was against this background that Congress enacted the RLA in 1926. The RLA's legislative history reveals Congress' intent of ratifying the existing private "treaty."⁴³ There were very few enforceable provisions, relying instead on the expectation that "most of the provisions of this bill are to be enforced by the power of persuasion, either exercised by the parties themselves or by the Government board of mediation representing the public interest."⁴⁴ Thus, the RLA was conceptualized in a framework of voluntarism, and against a background of industry practice that accepted a role for union and collective bargaining.

The NLRA evolved in a substantially different manner. Unlike the pre-RLA period, voluntarism—the approach that relied on minimum government intervention—was not working well in the rest of the industrial sector.⁴⁵ It was apparent to Congress

⁴⁰ See Dana Eischen, *Representation Disputes and Their Resolution in the Railroad and Airline Industries*, in *THE RAILWAY LABOR ACT AT FIFTY 1*, 23-25 (Charles Rehmus ed., 1977).

⁴¹ For example, the federal government operated the nation's railways during the World War I effort, and intervened in the operations of national railroads during the 1894 Pullman strike and the 1916 eight-hour dispute. See Dennis A. Arouca & Henry H. Perritt Jr., *Transportation Labor Regulation: Is the Railway Labor Act or the National Labor Relations Act the Better Statutory Vehicle?*, 3 *LAB. L.J.* 145, 148-49 (1985).

⁴² Compare the Arbitration Act of 1888, ch. 1063, 25 Stat. 501, 501-504 (1888); the Erdman Act of 1898, ch. 370, 30 Stat. 424, 424-428 (1898); the Newlands Act of 1913, ch. 6, 38 Stat. 103, 103-106 (1913) (current version at 45 U.S.C. §§ 101-125 (1994)); and the Adamson Act of 1916, ch. 436, 39 Stat. 721-722 (1916).

⁴³ See Arouca & Perritt, *supra* note 41 at 149.

⁴⁴ See 45 U.S.C. §§ 152 para. 10, 157 para. 3, para. 9, para. 10; see also *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 590-91 (1971) (Brennan, J., dissenting).

⁴⁵ See Arouca & Perritt, *supra* note 41, at 150.

that without the force of law behind it, collective bargaining was not likely to develop as the primary mechanism of industrial governance.⁴⁶

Congress first attempted to reach its goal of promoting collective bargaining by legislative means through the enactment of the National Industrial Recovery Act (NIRA) of 1933.⁴⁷ The NIRA failed to provide adequate machinery capable of confronting an openly hostile management sector.⁴⁸ In enacting the NLRA, Congress thus was primarily concerned with the enforcement aspects of the Act. Voluntarism, and reliance on alternative dispute resolution processes were all rejected, and in their place, the focus was placed on the use of administrative machinery and traditional legal processes to implement policy.⁴⁹

The current legal framework governing labor relations in the USPS is the creature of the 1970 strike by postal employees.⁵⁰ The postal strike of 1970 was the first truly national federal strike.⁵¹ The strike began in March 1970 when postal employees in New York City initiated a job action, which quickly spread across the country.⁵² Negotiations between the Secretary of Labor and the postal union failed to produce a settlement and eventually 200,000 postal employees joined in the stoppage.⁵³

Attempts by Congress to deal with labor strife in the postal service were significantly constrained by the circumstances of the moment. On the one hand, there existed intense public pressure to settle the strike by acquiescing to a statutory framework that would satisfy the concerns of labor.⁵⁴ On the other hand, the existing legal framework at the time constrained Congress' ability to determine the subject of negotiations and to define the rights public employees could be granted.⁵⁵

The result of this very political bargain was a statutory framework (the PRA) that embraces key aspects of both the NLRA and the RLA. The PRA adopts the administrative apparatus of

⁴⁶ *Id.*

⁴⁷ 48 Stat. 195 (1933).

⁴⁸ See Arouca & Perritt, *supra* note 41, at 150.

⁴⁹ *Id.*

⁵⁰ See MURRAY B. NESBITT, LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE 386-90 (1976) (describing the origins of the Postal Reorganization Act).

⁵¹ *Id.* at 386.

⁵² *Id.* at 387-88.

⁵³ *Id.* at 388.

⁵⁴ *Id.* at 386-90.

⁵⁵ *Id.*

the NLRA to protect employee concerted activity⁵⁶ and it incorporates the RLA's promotion of mediation and arbitration to prevent strikes.⁵⁷

B. Enforcement Machinery

One of the key differences between the statutory regimes is the structure of the administrative machinery that has developed over the years to enforce the statutes.⁵⁸ The NLRA provides for the creation of an administrative agency, the NLRB, which traditionally has broad authority to elaborate the policy embodied in the NLRA and to flesh out the details of labor policy.⁵⁹ The NLRB operates in a sense as Congress' partner in fleshing out the details of the Act.⁶⁰ The result is an adjudicative system that generates a substantial amount of litigation.⁶¹

The RLA administrative machinery is substantially different.⁶² Unlike the NLRB, the RLA's enforcing agency, the National Mediation Board (NMB) is not involved in articulating the policy of the RLA, or in interpreting statutory provisions.⁶³

This distinction is best illustrated in the enforcement mechanisms used under the statutes. The NLRA defines a series of unfair labor practices (ULPs).⁶⁴ ULPs constitute conduct considered illegal because of their effect on the substantive rights of employees to self-organize, "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."⁶⁵ The NLRA safeguards these rights by prohibiting cer-

⁵⁶ 39 U.S.C. § 1203 (1994).

⁵⁷ *Id.* § 1207.

⁵⁸ See Arouca & Perritt, *supra* note 41, at 150-51.

⁵⁹ 29 U.S.C. §§ 153-156 (1994).

⁶⁰ See Arouca & Perritt, *supra* note 41, at 150-51.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Paradoxically, the NMB plays a much more active role in particular areas of industrial relations. In representation disputes, the NMB mandates details, such as use of election ballots as remedies. See *infra* notes 86-95 and accompanying text. In interest disputes, the NMB exercises far more control over certain aspects of bargaining structure, including the timing of strikes, than the NLRB. See *infra* notes 137-45 and accompanying text. Also under the RLA, governmental, rather than contractual, entities superintend railroad grievance disputes. See *infra* notes 114-28 and accompanying text.

⁶⁴ 29 U.S.C. § 158 (1994).

⁶⁵ *Id.* § 157.

tain employer actions.⁶⁶ The NLRA also outlaws a number of union ULPs.⁶⁷ Developing the content and extent of these ULPs has been the role of the NLRB, and through it, the NLRB has played a significant role in the development of labor policy.⁶⁸ No equivalent mechanism exists under the RLA.⁶⁹ As a consequence, under the RLA courts rather than an agency interpret the governing statute, and there is no administrative adjudication.

Thus, as compared to the NLRA, the RLA is unlikely to generate as much litigation given the limited role that the agency plays under the statutory scheme. This in turn should result in greater consistency across time in the development of the RLA.

C. Organizing Rights

One important measure for comparing the statutes is their approach to the regulation of organizing rights. Organizing rights refer to those provisions in the statute that regulate the rights of employees to choose whether or not to be represented by a labor

⁶⁶ Section 158(a) makes it an unfair labor practice for an employer to:

- (1) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ; (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ; (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act; (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Id. § 158(a).

⁶⁷ Section 158(b) makes it a ULP for labor organizations to:

- (1) restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . ; (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues; (3) to refuse to bargain collectively with an employer . . . ; (5) to negotiate "closed shop" provisions; (6) to negotiate "featherbedding" provisions; and (7) to engage in organizational and recognitional picketing under certain circumstances.

Id. § 158(b). Section 158(e) outlaws "hot cargo" provisions. *Id.* § 158(e).

⁶⁸ See Arouca & Perritt, *supra* note 41, at 151; *cf.* Herbert R. Northrup, *The Railway Labor Act—Time for Repeal?* 13 HARV. J.L. & PUB. POL'Y 441, 503-504 (1990) (arguing that the availability of the ULP mechanism has not played a major role in the development of labor policy).

⁶⁹ Northrup, *supra* note 68, at 503-04.

organization, as well as the regulations regarding the union election and certification processes. Various commentators have noted that the NLRA and the RLA differ markedly in terms of their philosophy towards representational issues.⁷⁰ Generally, the representation process under the RLA appears skewed toward union representation as a premise for collective bargaining and labor peace.⁷¹ The RLA reduces the possibility of representation disputes by acknowledging employees' absolute right to be represented, and by forbidding employer interference in the process.⁷²

One of the major objectives of the RLA is to forbid any limitation upon freedom of association among employees and to provide for the complete independence of carriers and employees in self-organization.⁷³ The RLA provides that representatives shall be designated by the respective parties without interference, influence or coercion by the other.⁷⁴

The NLRA provides a similar set of protections. The NLRA provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, . . . and shall also have the right to refrain from any or all of such activities."⁷⁵

The language of both acts, therefore, appears to be fairly similar. In their application, however, the statutes differ in one significant aspect . . . organizing rights under the RLA have been more intensively protected than under the NLRA.⁷⁶ The RLA's commitment to the protection of organizing rights is evidenced by the availability under the RLA of injunctive relief for the enforcement of organizing rights and the assertiveness and creativity of the NMB in various other aspects of the organizing process. Those two aspects are discussed in turn.

⁷⁰ *Id.* at 478-502.

⁷¹ See Arouca & Perritt, *supra* note 41, at 152.

⁷² *Id.*

⁷³ 45 U.S.C. § 151(a) (1994). As originally enacted in 1926, the RLA did not establish procedures for resolving representation disputes. Amendments in 1934 and 1936 authorized the NMB to determine the employees' choice of representatives in the railroad industry and extended this authority to resolve disputes in the airline industry. See Eischen, *supra* note 40, at 23-69.

⁷⁴ 45 U.S.C. § 152 para. 3 (1994).

⁷⁵ 29 U.S.C. § 157 (1994).

⁷⁶ To be sure, the two statutes differ in other aspects of the representation process. For example, the NLRA, in contrast to the RLA, permits recognition picketing under certain conditions for a period of up to thirty days. *Id.* § 158(b)(7)(c). Under the RLA, however, unions are allowed to exercise secondary pressure. See *infra* notes 298-305 and accompanying text.

Under the RLA, parties rely on the injunctive power of the federal district courts to enforce statutory rights.⁷⁷ Those rights include the prohibitions against carrier interference with the organizational rights of employees.⁷⁸ For example, terminating an employee for union activity is an interference with such rights. It has been argued that the availability of this relatively quick injunctive relief “has had such a strong deterrent effect on carrier conduct that discriminatory discharges to discourage unionization rarely occur under the RLA.”⁷⁹

Although a similar mechanism is available under the NLRA,⁸⁰ courts have been generally reluctant to use injunctions as a way of protecting organizing rights.⁸¹ Instead, the administrative process of the NLRA has been utilized, resulting, in what some argue is a lack of protection for workers attempting to organize collectively.⁸²

An important, yet overlooked, aspect of the differences between the RLA and the NLRA is the manner in which the enforcing agencies regulate the union certification and election processes. Both statutes provide some latitude to the enforcing agencies to enforce the organizing rights of employees. The extent to which the enforcing agency utilizes this flexibility significantly affects the organizing outcomes under both statutes. Again, significant differences are apparent when comparing the NLRB and the NMB.

Somewhat uncharacteristically, the NMB has been much more aggressive in conducting representation elections, as well as in developing creative approaches to remedy violations of the statute. For example, the NMB has refused to give employees an opportunity to vote “no union.”⁸³ Employees who oppose union representation can express their position only by refraining from voting.⁸⁴ The NMB justifies its election on the grounds that such procedure permits employees to secure some form of

⁷⁷ *Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548 (1930).

⁷⁸ 45 U.S.C. § 152 paras. 3-4 (1994).

⁷⁹ See Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and the RLA*, 2 *EMPLOYEE RTS. & EMP. POL'Y J.*, 317, 334 (1998).

⁸⁰ 29 U.S.C. § 160(j) (1994).

⁸¹ See Morris, *supra* note 79, at 334.

⁸² *Id.*

⁸³ See Northrup, *supra* note 68, at 496.

⁸⁴ The NMB, however, will certify a union only when more than fifty percent of those eligible vote. *Id.*

representation.⁸⁵

The NMB has also been innovative in their philosophy towards modifications of ballots to remedy violations of the election process. When the NMB finds carrier interference, it employs a variety of special ballots and notices intended to eliminate the taint of interference on the employees' freedom of choice of representative.⁸⁶ The NMB's methods of determining the employees' choice of representative vary on a continuum determined by the extent of the carrier interference found.⁸⁷

For example, in response to conduct by employers such as soliciting employees to turn in their ballots to an employer's official, increasing wages before the election period, and polling of employees, the NMB has ordered a re-run election using a "Yes" or "No" ballot with no write-in space provided.⁸⁸ Unlike the regular election procedure, under this remedial ballot—known as the Laker ballot—the majority of votes cast determine the outcome of the election.

In cases involving more egregious conduct by the employer, the NMB has employed procedures designed to provide increasing safeguards for employees' freedom of choice of their representative.⁸⁹ The so-called Key ballot is designed with the purpose of certifying the union, unless a majority of eligible voters return votes opposing union representation.⁹⁰

The NLRB has been substantially less aggressive in the use of alternative ballot procedures as a mechanism to respond to em-

⁸⁵ *Id.* The NLRB certifies on the basis of a majority of those voting, even if less than fifty percent of the eligible employees participate in the election. Thus, although the NLRB certifies election results only on the basis of those voting (therefore making it possible that a union might be certified without more than fifty percent of eligible employees voting), it encourages participation in the election by giving those employees who oppose union representation the alternative to vote "no union." *Id.*

⁸⁶ See Ronald C. Henson & Michael J. Gaugh, *Carrier Election Campaigns*, A.L.I.-A.B.A. COURSE OF STUDY MATERIALS, Vol. I, No. SD50, 81, 99 (1999).

⁸⁷ *Id.*

⁸⁸ *In re Laker Airways, Ltd.*, 8 N.M.B. 236 (1981).

⁸⁹ For example in *Key Airlines* the carrier's activities included denying a scheduled pay increase to employees in one craft or class immediately after a representation application was filed, holding meetings for the express purpose of discouraging organization and threatening employees' job security should they vote for representation. The carrier also issued a letter criticizing the organization (International Brotherhood of Teamsters) that included comments such as: "[do] you want to be a partner with an organization that has such a sordid reputation as the Teamsters." *In re Key Airlines*, 16 N.M.B. 296, 303 (1989).

⁹⁰ *Id.* at 296.

employers' interference with the election process. The NLRB does not use any alternative ballots, limiting its remedial powers primarily to re-running elections and in extreme cases (when employers' unfair labor practices are thought to preclude the holding of an election), to issuing bargaining orders.

Curiously, the NMB has taken one position regarding organizing rights that commentators have considered to be less protective of employee rights. Paragraph nine of the RLA requires the NMB to investigate representation disputes and to determine, by secret ballot or other means, which organization or individual, if any, represents a "craft or class."⁹¹ From its inception, the NMB has indicated a strong preference for carrier-wide units of a craft or class.⁹²

Although the NMB has modified its original position pertaining to bargaining units,⁹³ it continues for the most part to insist on certification of bargaining representatives according to historic craft or class lines. This practice continues, despite the changing face of the transportation industry through new technology, new competition, and alteration of industry structure,⁹⁴ and notwithstanding the NMB's clear authority to "regroup, amalgamate or splinter historic bargaining groups . . ." as conditions change.⁹⁵

The NLRA provides for the organization of employees in "a unit appropriate" for the purposes of collective bargaining.⁹⁶ Unlike the NMB, the NLRB has substantial discretion to determine the "appropriateness" of a unit. Under the NLRA, labor

⁹¹ 45 U.S.C. § 152 para. 9 (1994).

⁹² For example, the NMB placed all clerical employees, freight handlers, and station and store employees into one bargaining unit, apparently because this bargaining unit has been previously organized by the Brotherhood of Railway and Steamship Clerks, Freight Handlers and Station and Store Employees. See Eischen, *supra* note 40, at 58-68.

⁹³ *In re* Ground Servs., Inc., 8 N.M.B. 35 (1980); *In re* Union Pac. R.R., 8 N.M.B. 127 (1981).

⁹⁴ See Arouca & Perritt, *supra* note 41, at 162.

⁹⁵ U.N.A. Chapter, Flight Eng'rs' Int'l Ass'n v. Nat'l Mediation Bd., 294 F.2d 905, 908 (D.C. Cir. 1961).

⁹⁶ 29 U.S.C. § 159(a) (1994). Under the NLRA, the primary focus in determining an appropriate bargaining unit is that employees with a community of interest should be grouped together. The NLRB inquires into a number of factors to test the community of interest: extent and type of union organization; bargaining history for the employees involved and in the particular industry at issue; similarity of duties, skills, interests, and working conditions; and structure of the company, and employee desires. See Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353, 383 (1984).

and management can agree to the bargaining unit, although the NLRB is not obligated to ratify any such agreement it believes does not provide for bargaining through an appropriate unit for such purposes.⁹⁷ Thus, the NLRA's policy regarding bargaining unit determinations has resulted, for the most part, in a practice of certifying smaller bargaining units, or at least units in which employees share a common set of experiences (either geographical location, or in terms of skills and functions).

In short, regarding organizing rights, it appears that except for its position regarding the definition of bargaining units, the RLA facilitates the process of forming unions.⁹⁸

D. Collective Bargaining

As in the case of representational issues, the RLA and NLRA statutory language regarding collective bargaining rights is substantially similar. Paragraph one of the RLA establishes "the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes" peacefully.⁹⁹ Similarly, the NLRA imposes a duty to bargain, which means that parties are required to meet and confer in good faith in an attempt to negotiate a collective bargaining agreement.¹⁰⁰ An employer is required to refrain from unilaterally altering those wages, terms and working conditions that are considered "subjects of mandatory bargaining" until impasse has been reached.¹⁰¹ A union must refrain from striking if there is a contractual no-strike clause in effect and the collective

⁹⁷ See Arouca & Perritt, *supra* note 41, at 162.

⁹⁸ The RLA also provides a greater degree of protection for maintaining a union's bargaining representative status. In contrast to the NLRA, which specifically allows for a decertification process, the RLA does not include any such procedure. 29 U.S.C. § 159 (c)(1)(A)(ii) (1994). The lack of a formal decertification process is further evidence of the favorable disposition to union organizing under the RLA, as compared to the NLRA.

⁹⁹ 45 U.S.C. § 152 para. 1 (1994). The process of collective bargaining is defined to include: (1) a written notice thirty days before an intended change of an agreement; (2) a time and place to meet must be agreed upon within ten days after receipt of such notice, and the meeting must occur within thirty days as provided in the notice; and (3) prohibition of unilateral changes in contracts and of strikes and lock-outs during this procedure and the intervention that ensues. 45 U.S.C. §§ 152 paras. 6-7, 156 (1994).

¹⁰⁰ 29 U.S.C. § 158(d) (1994).

¹⁰¹ NLRB v. Katz, 369 U.S. 736 (1962).

bargaining agreement has not expired.¹⁰² In practice, however, the two statutes differ markedly in one key aspect: the scope of the duty of bargaining.¹⁰³

The NLRA imposes on employers and unions a duty to bargain over “wages, hours, and other terms and conditions of employment.”¹⁰⁴ Courts, however, have not been willing to require employers to bargain over all issues that fall within the statutory language.¹⁰⁵ Rather, they have developed a distinction between mandatory subjects of bargaining, which are within the duty to bargain, and permissive subjects of bargaining, which are not.¹⁰⁶ The Supreme Court has defined mandatory subjects as to exclude certain areas that fall within the exclusive control of management.¹⁰⁷ The Court’s reasoning suggests that many other strategic-level corporate decisions are not subject to mandatory bargaining.¹⁰⁸

Under the RLA, in contrast, the scope of the duty to bargain has been viewed traditionally as extremely broad. Courts have

¹⁰² See Katherine Van Wezel Stone, *Labor Relations on the Airlines: The Railway Labor Act and the Era of Deregulation*, 42 STAN. L. REV. 1485, 1495 (1990).

¹⁰³ Various other differences exist. For example, under the RLA, the statute itself imposes an obligation not to strike over interest (major) disputes or rights (minor) disputes until the statutory dispute resolution processes have been exhausted. 45 U.S.C. § 152 para. 1 (1994). Under the NLRA, any obligation not to strike is primarily contractual. See Van Wezel Stone, *supra* note 102, at 1496. In addition, unlike collective bargaining agreements under the NLRA, agreements under the RLA do not have an expiration date. Periodic requests for changes in specific wage rates or rules are made by filing a statutory notice of intent to change the existing agreement under section 6 of the RLA. 45 U.S.C. § 156 (1994). As a result, agreements in the railroad industry include provisions that are decades old, as well as recently negotiated provisions. See Van Wezel Stone, *supra* note 102, at 1495. The NLRA, on the other hand, gives statutory approval to agreements for a fixed term. Under the NLRA a party desiring to change the terms of the collective bargaining agreement must give sixty days advance notice to the opposing side. If the agreement is for a fixed term, the sixty-day notice is not effective until sixty days prior to the date the agreement may be modified or terminated. 29 U.S.C. § 158(d) (1994).

¹⁰⁴ *Id.*

¹⁰⁵ For example, in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Supreme Court held that a company has no duty to bargain over a decision to close a part of its business. The Court justified this limitation on the scope of bargaining by defining certain areas as domains of exclusive management prerogative. *Id.*

¹⁰⁶ *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

¹⁰⁷ *First Nat’l Maint. Corp.*, 452 U.S. at 683-85.

¹⁰⁸ *Id.* (finding no duty to bargain over decision to shut down part of a business); *cf. In re Dubuque Packing Co. (II)*, 303 N.L.R.B. 386, 390-92 (1991) (announcing a new test to determine whether an employer’s decisions to relocate bargaining units work is a mandatory subject).

generally held that the RLA's duty to bargain includes bargaining over all issues that come within the statutory phrase, "rates of pay, rules, and working conditions."¹⁰⁹ Courts interpreting this provision have not incorporated into the RLA the NLRA's mandatory-permissive issues distinction.¹¹⁰ According to the Supreme Court, "the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively."¹¹¹

Thus, for example in interpreting the duty to bargain under the RLA, courts have required the employer to bargain over decisions such as leasing the employer's facilities,¹¹² as well as the closing and moving of operations out of the country.¹¹³

E. Dispute Resolution

In comparing the two statutes on the dispute resolution dimension, it is helpful to distinguish between the statute's approach to the resolution of grievances on the one hand, and the resolution of work stoppages on the other.

¹⁰⁹ 45 U.S.C. § 152 paras. 1-2 (1994).

¹¹⁰ See Van Wezel Stone, *supra* note 102, at 1527.

¹¹¹ Order of R.R. Telegraphers v. Chi. & N.W. Ry. Co., 362 U.S. 330, 338 (1960). The Supreme Court continued to adhere to the view of defining the duty to bargain broadly under the RLA, at least until 1989. In that year the Court issued a decision that challenges the broad construction of the duty to bargain. In *Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 503-04 (1989), the Supreme Court held that the employer did not have an obligation to bargain over a decision to sell its assets. According to the Court, such a decision was a management prerogative, and not a subject about which section 6 bargaining could be required. The Court stated that

the decision to close down a business entirely is so much a management prerogative that only an unmistakable expression of congressional intent will suffice to require the employer to postpone a sale of its assets pending the fulfillment of any duty it may have to bargain over the subject matter of union notices such as were served in this litigation. Absent statutory direction to the contrary, the decision of a railroad employer to go out of business and consequently to reduce to zero the number of available jobs is not a change in the conditions of employment forbidden by the status quo provisions of [section 6].

Id. at 509.

Although this language appears to incorporate the NLRA's mandatory-permissive distinction, there is language in *Pittsburgh & Lake Erie* that seemingly limits the Court's decision. See Van Wezel Stone, *supra* note 102, at 1535.

¹¹² United Indus. Workers v. Bd. of Trs. of Galveston Wharves, 351 F.2d 183 (5th Cir. 1965).

¹¹³ Ruby v. TACA Int'l Airlines, 439 F.2d 1359, 1360 (5th Cir. 1971).

1. *Resolution of Grievances*

For the railroad industry, the RLA establishes an industry-wide grievance apparatus for the resolution of minor disputes.¹¹⁴ This structure, which has developed over the years, provides the contracting parties with various venues to pursue the resolution of grievances.¹¹⁵ Originally the RLA created the National Railroad Adjustment Board and gave it jurisdiction over all “minor disputes” involving railroad carriers.¹¹⁶

In subsequent amendments to the RLA, and in order to alleviate caseload problems, Congress established the Special Boards of Adjustment (SBAs), and the Public Law Boards (PLBs).¹¹⁷ These boards provide alternative fora for the resolution of minor disputes. PLBs and SBAs are different from the NRAB in that their procedures are somewhat more flexible, and are of a more voluntary nature.¹¹⁸

While different in detail, these venues are similar in some important respects. First, not only is the existence of the boards statutorily mandated but also their structure and their jurisdic-

¹¹⁴ A minor dispute “relates either to the meaning or proper application of a particular provision [of a collective agreement] with reference to a specific situation or to an omitted case.” *Elgin, Joliet & E. Ry. Co. v. Burley*, 325 U.S. 711, 713 (1945), *aff’d on reh’g*, 327 U.S. 661 (1946); see also Jonathan Cohen & James Lobsenz, *Grievance Resolution and the System Board of Adjustment*, A.L.I.-A.B.A. COURSE OF STUDY MATERIALS, Vol. I, No. SD50, 357 (1999).

¹¹⁵ These include the National Railroad Adjustment Board, the Special Boards of Adjustment, and the Public Law Boards. *Id.* at 381, 390-94.

¹¹⁶ 45 U.S.C. § 153 para. 1 (1994). The NRAB is formed of four independent divisions, each having jurisdiction over particular crafts. *Id.* § 153(h). The First Division has jurisdiction over disputes involving “engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen and yard-service employees.” *Id.* The Second Division has jurisdiction over the “shop craft” employees. *Id.* The Third Division has jurisdiction over disputes involving clerical, maintenance-of-way, signal, and dispatcher forces. *Id.* The Fourth Division considers disputes involving water transportation employees and any other employees who are not covered by the first three divisions. *Id.* Each division has an equal number of management and union representatives. Recently, the NRAB has handled about fifteen percent of railroad grievances. NAT’L MEDIATION BD., FIFTY-NINE, SIXTIETH AND SIXTY-FIRST ANNUAL REPORTS 39 (1995).

¹¹⁷ 45 U.S.C. § 153 para. 2 (1994). The SBAs operate at the system, group, or regional level, to resolve minor disputes otherwise referable to the NRAB.

¹¹⁸ See Joshua M. Javits, *Grievance Procedures: The Carrier’s Perspective*, A.L.I.-A.B.A. COURSE OF STUDY MATERIALS, Vol. I, No. SD50, 81, 99 (1999). PLBs and SBAs do not provide for individual employee processing of grievances. SBAs require that both parties consent to the submission of the dispute, but, either party can request in writing that the dispute proceed before a PLB. The NMB estimates that approximately twenty-eight percent of the grievances referred to it are handled by SBAs and sixty percent are handled by PLBs. *Id.* at 392.

tion are statutorily provided. Second, they are all publicly financed, substantially reducing the costs to the parties utilizing their services.

The procedure for the airline industry is different. When the airline industry was brought under the RLA, Congress empowered the NMB to establish a National Air Transport Adjustment Board, along the lines of the National Railway Adjustment Board.¹¹⁹ Anticipating a possible delay by the NMB in establishing this new board, Congress imposed an obligation to establish individual carrier system boards of adjustment.¹²⁰ However, Congress left it to the contracting parties to decide the structure as well as the authority granted to the boards. Thus, in the airline industry the RLA leaves the parties with broad flexibility to determine, through the collective bargaining process, the makeup of boards and the procedural powers granted to them.¹²¹

This distinction has had a significant impact on the performance of the various mechanisms under the RLA for the resolution of minor disputes. The caseload of the NRAB has been characterized as exorbitant.¹²² The caseloads of the SBAs and the PLBs have been notoriously high. For example, in fiscal year 1995, PLBs closed 3,474 cases, leaving 6,409 cases pending.¹²³ In the same year, SBAs closed 1,514 cases and left 1,317 cases pending.¹²⁴ Commentators have noted that such a caseload exists in no other industry.¹²⁵ Besides the quantity, it can take several years to decide cases, thus exacerbating the problem.¹²⁶

In contrast to the structure used in the railroad industry, the boards of adjustment in the airline industry are financed by the

¹¹⁹ 45 U.S.C. § 184 (1994).

¹²⁰ See Javits, *supra* note 118, at 383.

¹²¹ *Id.* at 384.

¹²² See Northrup, *supra* note 68, at 474.

¹²³ See NAT'L MEDIATION BD., *supra* note 116, at 40.

¹²⁴ *Id.*

¹²⁵ See Northrup, *supra* note 68, at 474.

¹²⁶ Since 1992, the number of cases received under section 153 has decreased significantly, as has the backlog of cases. According to NMB statistics, in 1992 the number of railroad arbitration cases pending was 11,736. In 1995, the number decreased to 9,661. See NAT'L MEDIATION BD., *supra* note 116, at 24. The NMB attributes this reduction to a number of administrative measures taken over the last few years. For example, the NMB now requires the parties to provide a case number and a subject code identifying the issue for each case pending under section 153. This requirement forces the parties to look at each case and determine at the earliest possible stage if the case has become moot, has settled, or has been abandoned. More recently, the NMB has also been a proponent of expedited boards.

contracting parties. As a result, there is no evidence of any significant arbitration backlogs or delays.¹²⁷ “One need look no further than the airlines to find sufficient proof that the cure for the case load deluge in railroad grievances can be obtained by forcing the parties to pay for their own excessive use of the process.”¹²⁸

The NLRA is completely silent on the issue of the resolution of grievances, leaving it to the parties themselves to devise the proper structure. Grievance procedures exist in almost every union contract covered by the NLRA.¹²⁹ Grievance procedures tend to have the same key features across workplaces, including a definition that limits grievances to claims of contract violations, an emphasis on written processing, a series of ascending steps up to the terminal stage (usually arbitration) and explicit time limits for each stage.¹³⁰

The grievance arbitration process has become firmly embedded in the union-management relationship.¹³¹ Although there is substantial variation across industries on the number of grievances filed per year, grievance filing is a permanent component

¹²⁷ See Northrup, *supra* note 68, at 478.

¹²⁸ *Id.*

¹²⁹ See Peter Feuille, *Dispute Resolution Frontiers in the Unionized Workplace*, in *WORKPLACE DISPUTE RESOLUTION 17* (Sandra Gleason ed., 1997).

¹³⁰ See David Lewin, *Theoretical and Empirical Research on the Grievance Procedure and Arbitration: A Critical Review*, in *EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 137, 145-58* (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999).

¹³¹ The success of the voluntary approach to grievance resolution under the NLRA has been due in part to the strong support the grievance arbitration process has received from the Supreme Court. In 1960 the Supreme Court decided three cases (“the Steelworkers Trilogy”) setting the ground rules for the relationship between the judiciary and the arbitration process. See *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960). Taken together, the three opinions show a clear judicial decision to support the voluntary process of grievance arbitration by putting the force of law behind it. The decisions are highly deferential to arbitration agreements entered into by labor and management and to the decisions of arbitrators pursuant to such agreements. See DOUGLAS E. RAY ET AL., *UNDERSTANDING LABOR LAW 342-45* (1999). Under the Steelworkers Trilogy, courts should enforce a contractual promise to arbitrate (*Am. Mfg. Co.*); and should use a presumption of arbitrability in determining whether the parties agreed to arbitrate a type or class of dispute (*Gulf Navigation Co.*). Courts finding arbitrability should order arbitration without inquiring into the merits of the underlying grievance, and when reviewing the award itself, should enforce the awards so long as it can be said to have “drawn its essence” from the terms of the collective bargaining agreement (*Enter. Wheel & Car Corp.*).

of the industrial relations process under the NLRA.¹³² Grievance procedures under the NLRA appear to operate in an efficient manner. Most grievances are resolved during the early stages of the grievance process, within two months of the filing date.¹³³ These resolutions usually are achieved without outside assistance, so for the typical grievance the processing costs are relatively low. The efficiency with which most grievance procedures dispose of grievances at early stages means that only a small fraction of grievances are arbitrated. Several studies have shown that the arbitration rate in most workplaces is quite low, averaging about ten percent.¹³⁴

2. *Resolution of Work Stoppages*

Economic action is an integral part of our national labor policy, and both statutes reflect this philosophy. The right to strike is protected implicitly under the RLA, and explicitly by the NLRA. The two Acts differ significantly, however, in the extent to which labor and management may control when the right of economic action can be exercised.

Among the major policy objectives of the RLA are the avoidance of any interruption to commerce and the provision of a system for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions.¹³⁵ In accordance with these purposes, the RLA mandates that carriers and employees exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions and to settle all disputes in order to avoid any interruption to commerce.¹³⁶

Under the RLA, the parties may not exercise economic action until the “major dispute” procedures of the Act have been exhausted.¹³⁷ These procedures include negotiation, mediation, and at the option of the President, an emergency board.¹³⁸ These procedures also provide that a party wishing to change rates of pay, rules or working conditions must give thirty days written no-

¹³² See Lewin, *supra* note 130, at 145.

¹³³ See Feuille, *supra* note 129, at 32.

¹³⁴ *Id.* at 33.

¹³⁵ 45 U.S.C. § 151(a) (1994).

¹³⁶ *Id.*

¹³⁷ *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142 (1969).

¹³⁸ 45 U.S.C. § 153 (1994).

tice to parties interested in such changes.¹³⁹ Following this notice, bargaining can commence.¹⁴⁰ If bargaining fails to resolve the dispute, either party may invoke the services of the NMB.¹⁴¹ The NMB assigns a mediator to meet with the parties and attempt to induce an agreement.¹⁴² If mediation fails, the NMB must attempt to obtain the parties' consent to submit the dispute to binding arbitration.¹⁴³

If the parties reject the offer of arbitration, and if the NMB believes that the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," the NMB must notify the President, who may create an emergency board to investigate and report on the dispute.¹⁴⁴ After the Presidential Emergency Board (PEB) report is submitted, a thirty-day cooling-off period begins during which the parties are required to further maintain the status quo.¹⁴⁵ After the thirty-day period, either party may resort to self-help: management may implement its unilateral changes to rates of pay, rules, or working conditions, and unions may strike.

Most important to the major dispute resolution procedures is that during the bargaining and mediation process both parties are subject to a status quo obligation—no changes to rates of pay, rules, or working conditions are permitted. Furthermore, federal courts have the power under the RLA to enjoin status quo violations.¹⁴⁶

Out of more than thirteen thousand mediation disputes be-

¹³⁹ *Id.*

¹⁴⁰ *Id.* § 152 para. 2.

¹⁴¹ *Id.* § 155 para. 1.

¹⁴² 29 C.F.R. § 1203.1 (1990).

¹⁴³ 45 U.S.C. § 155 para. 1(b) (1994).

¹⁴⁴ 45 U.S.C. § 160 (1994). This section requires emergency boards to present their findings to the President within thirty days after their appointment and prohibits the parties to the dispute from changing the status quo (except by agreement) during the board's deliberations and for thirty days thereafter. *Id.* The courts have construed this language to prohibit strikes. *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

¹⁴⁵ 45 U.S.C. § 156 (1994).

¹⁴⁶ Because the status quo provisions of the RLA enable unions to delay implementation of strategic-level corporate decisions, carriers frequently contend that their contested decisions or unilateral actions are not governed by the Act's status quo provisions at all. Rather, they often claim that a dispute is subject to a different dispute-resolution mechanism in the Act, the grievance and arbitration procedures. Such arguments have not received sanction from courts. *See Van Wezel Stone, supra* note 102, at 1500.

tween 1934 and 1999, emergency boards have been appointed 234 times—201 in the railroad industry and thirty-three in the airline industry.¹⁴⁷ On average, boards were used a little over four times each year from 1925 through the 1960s.¹⁴⁸ There was a small decline in the use of emergency boards during the 1960s and 1970s to an average of three emergency boards per year.¹⁴⁹ A sharper decline occurred in the 1980s and 1990s.¹⁵⁰ Emergency boards were appointed in the railroad industry an average of only twice per year, while in the airline industry only one emergency board has been appointed in the last two decades.¹⁵¹

Unlike the RLA, which postpones the right of economic action, the NLRA allows economic pressure except as regulated by section 13 of the Act, or through a collective bargaining agreement.¹⁵² The statutory requirements are fairly minimal, primarily involving notice requirements.¹⁵³ In lieu of any statutory

¹⁴⁷ See Nat'l Mediation Bd., *Frequency of Presidential Emergency Boards in Railroad and Airline Collective Bargaining Disputes under the Railway Labor Act (RLA), 1934-1999*, at <http://www.nmb.gov/mediation/pebchart34-01.pdf> (last visited Jan. 27, 2002).

¹⁴⁸ See Charles Rehmus, *Emergency Strikes Revisited*, 43 *INDUS. & LAB. REL. REV.* 175, 177 (1990).

¹⁴⁹ Beginning with the Nixon Administration, the White House has been reluctant to appoint emergency boards as a matter of course, believing that such routine appointments inappropriately interfere with free collective bargaining. Figures are taken from the *National Mediation Board Annual Report* for various years.

¹⁵⁰ See Rehmus, *supra* note 148 at 177.

¹⁵¹ Only one Airline PEB was established under RLA procedures over the past thirty-three years. Since the mid-1960s, governmental policy has discouraged the use of PEBs in airline labor-management disputes. The emergency board established in the American Airlines-Allied Pilots Association dispute (P.E.B. No. 233) on March 19, 1997, was an exception to this long-standing policy.

Two other trends are worth mentioning regarding the appointment of emergency boards. First, the vast majority of emergency boards have been appointed to deal with disputes involving publicly owned commuter rail operations. See Rehmus, *supra* note 148, at 180. Because the RLA allows for the creation of an emergency board if "any section" of the nation is deprived of essential transportation services, the "national" character of these emergencies is highly questionable. *Id.* Second, since 1963 when President Kennedy sent to Congress a dispute involving the National Railway Labor Conference and the five operating brotherhoods and in which Congress intervened by creating a compulsory arbitration board, congressional action to resolve rail labor disputes has been fairly common. *Id.* at 182-87. In its 1994 report on the future of worker-management relations, the Dunlop Commission noted that out of the seventeen times that Congress has had to intervene in rail disputes, five occurred between 1990 and 1994. See *FACT FINDING REPORT: COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS* 98-103 (1994).

¹⁵² 29 U.S.C. § 163 (1994).

¹⁵³ Section 158(d) requires sixty days advance notice of a party's desire to change the terms of the agreement. If the agreement is for a fixed term, however, the sixty-

constraints, the parties themselves are encouraged to adopt provisions, through collective bargaining, that are intended to regulate the occurrence of economic action. For example, collective bargaining agreements usually contain clauses negotiated by the parties, limiting their ability to engage in economic action.¹⁵⁴ Thus, under the NLRA the parties have a greater opportunity, as compared to the RLA, to affect the timing of economic action.

Similar to the RLA, the NLRA provides for a special procedure in cases involving national emergency disputes. Under the 1947 amendments to the NLRA, a multi-step process is established involving presidential and judicial intervention.¹⁵⁵ First, if the President decides that a threatened or actual work stoppage affects "an entire or substantial part" of an industry or will "imperil the national health or safety,"¹⁵⁶ he may appoint a board of inquiry to conduct hearings into the dispute.¹⁵⁷ The board will issue a report, at which time the President can direct the Attorney General to petition a federal judge to enjoin the strike.¹⁵⁸ If the injunction is granted, the parties to the dispute must attempt to settle their differences with the help of the Federal Mediation and Conciliation Service, and the President must reconvene the board of inquiry. If there is not settlement at the end of a sixty-day period, the board of inquiry must issue another report to the president on the current positions of the parties.¹⁵⁹ Economic action is further delayed until the NLRB certifies that the employees have rejected, by secret ballot, the employer's last offer, whereupon the injunction is vacated.¹⁶⁰ The President may then recommend a resolution of the dispute to Congress.¹⁶¹

day notice of desire to change the agreement is not effective until sixty days prior to the date the agreement may be modified or terminated. 29 U.S.C. § 158(d) (1994). Economic action that occurs before that time has expired is an unfair labor practice, and the employees who take such action lose their statutory rights. Section 158(d), however, does not delay economic action over matters not covered by a collective bargaining agreement, and not otherwise disposed of in negotiations, until the end of the contract term. Only a sixty-day notice is necessary as to those issues.

¹⁵⁴ For example, through the use of "zipper clauses," *In re Radioear Corp.*, 214 N.L.R.B. 362, 363-64 (1974), and arbitration clauses, *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974), the parties can regulate the scope and timing of economic pressure.

¹⁵⁵ 29 U.S.C. §§ 141-197 (1994).

¹⁵⁶ *Id.* § 176.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* § 178.

¹⁵⁹ *Id.* § 179.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* § 180.

The procedure for emergency disputes under the NLRA involves not only a decision by the executive, but also the “approval” of the judicial branch. Case law regarding judicial review of presidential decisions under the NLRA emergency procedure is unsettled, however. In *Steelworkers v. United States*,¹⁶² the Supreme Court confronted a challenge to an injunction granted by the lower court, following President Truman’s decision to invoke the emergency procedure of the NLRA. In responding to a union challenge that the emergency procedures were unconstitutional, the Court acknowledged that no injunction could issue under the Taft-Hartley Act unless the district court finds that a strike or lockout meets the statutory conditions of breadth of involvement and peril to the national health or safety.¹⁶³ The Court found the injunction justified on the ground that the strike’s effect on specific defense projects imperiled the national safety.¹⁶⁴ In so ruling, the Court found it unnecessary to decide between the government’s claim that the statutory term “national health” comprehends general economic well-being of the country, and the union’s claim that only the physical health of the citizenry was intended.¹⁶⁵

In only two other instances have federal courts faced requests by the federal government regarding the NLRA’s emergency disputes procedures. In *United States v. International Longshoremen Ass’n*,¹⁶⁶ a district court denied the government’s request for an emergency strike injunction for the first time since Congress enacted the Act.¹⁶⁷ Finally, in an unreported 1978 decision, a district court refused to renew a temporary restraining order initially issued under the Taft-Hartley emergency dispute proce-

¹⁶² 361 U.S. 39 (1959). *Steelworkers* arose out of a nationwide steel strike, which began on July 5, 1959. President Truman invoked the Taft-Hartley procedure on October 9, and the district court granted an injunction on October 21. The court of appeals affirmed. *Id.* at 40. The Supreme Court decided the case in a short, per curiam opinion due to the necessity for prompt adjudication. Justices Frankfurter and Harlan subsequently wrote a more complete concurring opinion filed December 7, 1959.

¹⁶³ *Id.* at 42.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ 335 F. Supp. 501 (N.D. Ill. 1971).

¹⁶⁷ *Id.* at 505; *see also* *United States v. Portland Longshoremen’s Benevolent Soc’y Local 861*, 336 F. Supp. 504, 505 (D. Me. 1971) (granting Taft-Hartley injunction in similar strike and criticizing Illinois court for examining only events occurring within its jurisdiction).

dures because the statutory standard was not met.¹⁶⁸

These three decisions have produced some degree of uncertainty regarding the standard under which a petition for an injunction will be reviewed. The President needs to consider the likelihood that a district court judge might refuse to grant an injunction. This uncertainty may explain the reduced frequency with which the President has invoked the emergency procedures in recent years.

Similar to the experience of the RLA, the NLRA national emergency provisions were used more intensively in the first few decades after their enactment. In the first twenty-two years following their enactment, the emergency provisions were used twenty-nine times, and never in that period did even two years pass without their initiation.¹⁶⁹ Since 1970, however, they have been used only six times. The last of these episodes involved the 1977-1978 coal strike, in which a federal court refused to grant an emergency dispute injunction on the ground that the strike had not been shown to have resulted in "irreparable harm to the national health or safety." More recently, President Clinton considered but decided against using the emergency dispute procedure in the strike by the International Brotherhood of Teamsters against United Parcel Service. Similarly, various parties sought presidential intervention during the 1994 Major League Baseball strike.

F. *The Special Case of the Postal Reorganization Act*

The PRA is the outcome of the 1970 strike by postal employees.¹⁷⁰ Under the PRA, postal employees were given the right to determine compensation, hours, benefits and terms and conditions of employment through collective bargaining.¹⁷¹ Grievances and adverse actions under the agreement are subject to negotiations.¹⁷² The NLRB alone supervises representation elections and enforces the unfair labor practice provisions contained in the NLRA, as well as determines the appropriate bargaining unit under the same criteria applied in the private sector.¹⁷³ Su-

¹⁶⁸ See John A. Ackermann, *The Impact of the Coal Strike of 1977-78*, 32 *INDUS. & LAB. REL. REV.* 175, 187 (1979).

¹⁶⁹ See Rehmus, *supra* note 148, at 176-78.

¹⁷⁰ 39 U.S.C. §§ 1201-1207 (1994).

¹⁷¹ *Id.* § 1203.

¹⁷² *Id.* § 1206(b).

¹⁷³ *Id.* § 1203.

pervisory and managerial personnel are excluded from the collective bargaining process but are assured pay differentials over their subordinates.¹⁷⁴ Their associations are provided with consultation and participation rights in the planning and development of their pay policies and fringe benefits.

Given the prohibitions against strikes by federal employees, the PRA provides for alternative methods to resolve bargaining impasses.¹⁷⁵ Similar to the NLRA, the PRA requires the party desiring to terminate or modify the agreement to give written notice to the other party no less than ninety days prior to the expiration of the agreement, or from the time it is proposed to make the termination or modification.¹⁷⁶ The party serving the notice must also notify the Federal Mediation and Conciliation Service (FMCS) of the existence of the dispute, if within forty-five days of serving notice the parties have failed to reach an agreement.¹⁷⁷

The PRA then adopts procedures somewhat similar to those of the RLA, by providing fact-finding procedures by the FMCS whenever the parties fail to reach an agreement or to adopt a procedure for binding resolution by the expiration of the agreement.¹⁷⁸ The fact-finding panel is required to issue a report, with or without recommendations.¹⁷⁹ Finally, the PRA goes further than either the NLRA or RLA, by providing for binding arbitration if the bargaining impasse persists for 180 days from the start of negotiations.¹⁸⁰

Postal employees have been relatively successful at negotiating improvements in wages and working conditions.¹⁸¹ Between 1970 and 1977, they increased their salaries by ninety-four percent, compared with forty-seven percent for other federal salaries.¹⁸² The Postal Service and the unions have proceeded to

¹⁷⁴ *Id.* § 1202.

¹⁷⁵ *Id.* § 1207.

¹⁷⁶ *Id.* § 1207(a).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* § 1207(b).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* § 1207(c).

¹⁸¹ See Michael Wachter & Jeffrey Perloff, *A Comparative Analysis of Wage Premiums and Industrial Relations in the British Post Office and the United States Postal Service*, in *COMPETITION AND INNOVATION IN POSTAL SERVICES* 36 (Michael A. Crew & Paul R. Kleindorfer eds., 1991).

¹⁸² *Id.*

arbitration on several occasions.¹⁸³ For example, in 1990 the National Association of Letter Carriers (Letter Carriers) and the American Postal Workers union, in joint negotiations, rejected management demands for a two-tier wage schedule.¹⁸⁴ An arbitration panel awarded a higher wage package than that proposed by the employer, but the decision also established a schedule of wages for new hires significantly below existing entry levels.¹⁸⁵ Thus, both the employer and the unions were forced to accept compromises.¹⁸⁶ More recently, in 1998, bargaining between the Letter Carriers and USPS broke down when four weeks of mediation between the parties failed to produce a new agreement.¹⁸⁷ A three-member arbitration panel convened to resolve the dispute issued an award in September 1999.¹⁸⁸

The PRA therefore embraces key aspects of both the NLRA and the RLA: it adopts the administrative apparatus of the NLRA to protect employee concerted activity; and it incorporates the RLA's promotion of mediation and arbitration to prevent strikes.

III

ASSESSING THE REGULATORY COSTS OF THE THREE REGIMES

A. *Introduction*

The prior section reveals that there exists considerable variation in regulatory approaches under the NLRA, the RLA, and the PRA. Although the three schemes share much in common, their distinctive histories and purposes have bred substantial variation in employer obligations and employee rights as well. This section analyzes those differences in an effort to assess employers' comparative costs of proceeding under the three labor-management frameworks, and thus evaluate the potential competitive advantages and barriers that the regulatory regimes

¹⁸³ See *Postal Service, Four Unions Fail to Reach Pact, Invoking Arbitration*, DAILY LAB. REP. NEWS, NOV. 23, 1990, at A-2.

¹⁸⁴ *Id.*

¹⁸⁵ See *New Postal Service Contract Includes Modest Wage Increases*, DAILY LAB. REP. NEWS, June 13, 1991, at A-3.

¹⁸⁶ *Id.*

¹⁸⁷ See Louis C. LaBrecque, *Postal Workers: Arbitration Panel Settles Contract Dispute with NALC; Award Includes Higher Pay Scale*, DAILY LAB. REP. NEWS, Sept. 21, 1999, at A-2.

¹⁸⁸ *Id.*

imposed on the members of the express package delivery industry.

The analysis focuses on three aspects of the respective regulatory systems: litigation, administration of labor management relations, and the regulation of work stoppages. Although there is no accepted way of characterizing the costs imposed by a labor-relations regime, these three types of costs arguably constitute the most important categories.

B. Litigation Costs

One initial point of comparison among the three statutes relates to the amount of litigation that we should expect to be generated under each statutory regime. Different amounts of litigation should generate different costs—I refer to these as litigation costs. Litigation costs include expenses associated with resolution of grievances as well as court litigation. Litigation costs can be difficult to quantify. Company lawyers do not always keep accurate time sheets, and assessing the cost due to time lost for company personnel to prepare testimony or appear in proceedings is daunting. Nonetheless, even based on payments to outside counsel, litigation costs for a large company reach millions of dollars each year.

Three aspects of litigation costs must be considered: (1) whether parties are as likely to raise disputes under the different legal regimes, (2) whether the different regulatory structures engender the same number of litigable issues, and (3) whether the costs of litigating such issues vary depending upon the particular regime.

1. Culture

In assessing the amount of litigation under the respective regimes, culture plays a surprisingly significant role. History and experience have encouraged a culture of mediation under the RLA.¹⁸⁹ In sharp contrast, the culture developed under the NLRA is based on confrontation.¹⁹⁰ Like the NLRA, the PRA developed in the context of an openly contentious relationship between postal workers and the USPS.¹⁹¹ While aspects of this relationship continue to be less than cooperative, there has been

¹⁸⁹ See *supra* notes 36-44 and accompanying text.

¹⁹⁰ See *supra* notes 45-49 and accompanying text.

¹⁹¹ See *supra* notes 50-57 and accompanying text.

marked improvement.¹⁹² As a consequence of the different histories and practices, the incidence of litigation is likely to be greater under the NLRA than under the other two regimes.

From its origins, the RLA has encouraged a culture of confrontation avoidance. As described earlier, collective bargaining in the railroad industry existed for at least forty years before the enactment of the Act.¹⁹³ Such bargaining occurred in an atmosphere where the resort to litigation was not considered a legitimate bargaining tool.

The political evolution of the NLRA, however, was substantially different.¹⁹⁴ Congress enacted the NLRA against a background of contentious relations between labor and management.¹⁹⁵ Legislative attempts during the preceding years focused on the promotion of collective bargaining, but failed to overcome employers' open defiance.¹⁹⁶ The drafting of the NLRA thus focused on enforcement, with concentration on administrative agency models and on traditional legal processes to implement policy.¹⁹⁷

Congress developed the PRA in direct response to the postal workers strike of 1970.¹⁹⁸ Congress adopted a "quasi" private model, under which postal workers were to be treated as private sector employees under the NLRA, but without the ability to strike.¹⁹⁹ This structure appears to have resulted in a bi-modal culture. Regarding the organizing processes, the parties appear to have reached a culture of accommodation and cooperation.²⁰⁰ This is probably due to the fact that in the public sector there has traditionally been less opposition from employers to union organizing.²⁰¹ Similarly, over the last decade, there has been a lot of experimentation in the postal sector with cooperative programs.²⁰² These experiments have proven to be very successful

¹⁹² *Id.*

¹⁹³ See Arouca & Perritt, *supra* note 41, at 149.

¹⁹⁴ See *supra* notes 47-53 and accompanying text.

¹⁹⁵ See Arouca & Perritt, *supra* note 41, at 150.

¹⁹⁶ *Id.*

¹⁹⁷ See *supra* notes 45-49 and accompanying text.

¹⁹⁸ See *supra* notes 50-57 and accompanying text.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See THOMAS A. KOCHAN & HARRY C. KATZ, *COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS* 438-41 (1988) (discussing the political dimension of the employer (government) in the public sector context).

²⁰² See generally Robert A. Baruch Bush, *Handling Workplace Conflict: Why Transformative Mediation?*, 18 *HOFSTRA LAB. & EMPL. L.J.* 367 (2001).

and have resulted in the development of a culture of trust among the parties.²⁰³ On the other hand, there appears to be a heavy reliance on the use of the NLRB's administrative machinery, which indicates a propensity to litigate at the administrative agency level.²⁰⁴ Thus, the differing backgrounds of the three statutes likely set the framework for greater litigiousness under the NLRA than under the RLA and PRA.

2. *Structure of the Statutes*

The structure of the NLRA and RLA bears out what the historical settings suggest. For a number of reasons, the NLRA anticipates far greater litigation than under the other regime.

First, Congress has included a list of unfair labor practices that can be raised by either employers or employees only under the NLRA and PRA.²⁰⁵ For example, covered employees can assert that management has discriminated against them because of their concerted activity,²⁰⁶ that management has formed or dominated an employee organization,²⁰⁷ and that management has failed to bargain in good faith.²⁰⁸ Employers in turn can charge that the union has coerced the rights of individual employees,²⁰⁹ that the union has engaged in illegal economic activities,²¹⁰ and that the union has refused to fulfill its bargaining duties.²¹¹ All such charges are to be lodged before the NLRB.²¹² If the General Counsel finds probable cause, then a hearing is first held before an administrative law judge, with appeal rights then to the Board itself and subsequently to a federal court of appeals.²¹³ The process is cumbersome, expensive, and lengthy.

In contrast, under the RLA, employers or employees with similar complaints generally only file grievances. Those grievances,

²⁰³ *Id.*

²⁰⁴ For example, in 1997 the number of ULPs per 10,000 employees in the trucking industry was 11.3, while for postal employees the number was thirty-nine ULPs per 10,000 employees. See NAT'L LABOR RELATIONS BD., ANNUAL REPORT (1998).

²⁰⁵ 29 U.S.C. § 158 (1994).

²⁰⁶ *Id.* § 158(a)(1).

²⁰⁷ *Id.* § 158(a)(2).

²⁰⁸ *Id.* § 158(a)(5).

²⁰⁹ *Id.* § 158(b)(1).

²¹⁰ *Id.* § 158(b)(4).

²¹¹ *Id.* § 158(b)(3).

²¹² *Id.* § 159(9).

²¹³ *Id.* § 160.

as long as minor, are then subject to mediation.²¹⁴ No route to an administrative adjudicator or to the federal courts is contemplated.²¹⁵ The NMB has no quasi-judicial authority comparable to the unfair labor practice jurisdiction of the NLRB. The structure of the statutes thus invites far greater incidence of litigation under the NLRA, and in this respect the PRA is structured similarly.

Commentators concur that litigation of unfair labor practice issues is far more costly than resort to the grievance system.²¹⁶ Proceedings are more formalized in litigation, and the need for outside counsel is greater.²¹⁷ Witnesses must be prepared, and briefs must be written.²¹⁸ Moreover, with each additional stage in the administrative process, additional resources must be invested.²¹⁹

Thus, under the NLRA litigation can occur through arbitration and ULP charges. Under the RLA, arbitration is the most likely avenue to challenge contract violations, and it is subject to fairly limited possibility of judicial review.

One way of quantifying the effect of the different regulatory structures is by considering the length of time that it takes to resolve disputes under either regime. In terms of grievance arbitration, the average time in 1997 between the date the grievance was filed and the date of an award was about 311 days.²²⁰ This delay will be experienced under both statutes, because grievance arbitration exists under both. However, under the NLRA, charging parties also have the avenue of filing an ULP. The protracted

²¹⁴ See Arouca & Perritt, *supra* note 41, at 151.

²¹⁵ *Id.*

²¹⁶ See LAURA J. COOPER ET AL., *ADR IN THE WORKPLACE: A COURSEBOOK* 500-02 (2000) (comparing the costs of arbitration and litigation in a judicial forum). The NLRB may defer to the grievance procedure if the contractual procedure is capable of adequately solving the dispute. *In re Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971). This practice will tend to reduce the costs of enforcing statutory rights.

²¹⁷ See COOPER ET AL., *supra* note 216, at 500-02.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ These figures are taken from the 1997 *Annual Report* of the Federal Mediation and Conciliation Service, and thus they do not include arbitration procedures under the RLA. Anecdotal experience suggests that the resolution of grievances takes substantially longer under the RLA than under the NLRA. Some commentators indicate that on average it takes years to resolve grievances that are submitted to one of the boards. See Northrup, *supra* note 68, at 475. There does not appear to be, however, any verifiable data on this regard.

delay in utilizing the required stages for processing an unfair labor practice charge builds in another layer of costs. In 1997, the median period required to process a case from filing the charge to issuance of the Board's order was 557 days. In addition, an enforcement action or an appeal of a Board's order could take an additional one or two years.²²¹

To be sure, employers might welcome these added costs because the NLRA's cumbersome machinery for addressing organizational disputes permits widespread employer flouting or at least aggressive challenging of organization rights.²²² Delay diminishes the employees' interest in efficacious resolution of organizational disputes.²²³ Nonetheless, although at times employers might invite the greater costs of the multi-tiered review process under the NLRA, the fact remains that the statute itself envisions and embraces this costly process.

Furthermore, not only are there more routes to litigation under the NLRA and PRA, but also there is greater likelihood that more disputes will arise because the two statutes rely on standard-like distinctions in setting the parameters for the employer-employee relationship. The contentiousness can be most clearly observed in two key areas: mandatory topics for bargaining, and organizational rights.

By creating a distinction between mandatory and permissive subjects of bargaining, the NLRA and PRA engender considerable disputes that, until recently, have not been present under the RLA. The NLRA and PRA impose on employers and unions a duty to bargain over "wages, hours, and other terms and conditions of employment." However, courts have limited the scope of this duty by developing a distinction between mandatory subjects of bargaining. For instance, in *First National Maintenance Corp. v. NLRB*,²²⁴ the Supreme Court held that a company has no duty to bargain over a decision to close a part of its business.

In contrast, under the RLA "[t]he scope of bargainability is extremely broad."²²⁵ Courts have found that the RLA imposes a

²²¹ See Morris, *supra* note 79, at 338.

²²² See Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1772-73 (1983) (discussing the strategic use by employers of the NLRA).

²²³ *Id.*

²²⁴ 452 U.S. 666 (1980).

²²⁵ *Bhd. of R.R. Trainmen v. Akron & Barberton Belt R.R.*, 385 F.2d 581, 602 (D.C. Cir. 1967).

duty to bargain over all issues regarding “rates of pay, rules, and working conditions.”²²⁶ This means that any issue affecting employees is subject to the bargaining and impasse procedures of section 6 if either side wishes to bargain. Because the scope of bargaining under the RLA has been interpreted to be plenary, the scope of the employer’s bargaining duty has not given rise to significant litigation.²²⁷ The rule-like way in which the Court has construed the RLA minimizes the potential for disputes.

In short, given the broad mandate in the RLA to bargain over every issue, litigation over the employer’s duty to bargain has been kept to a minimum. Accordingly, litigation costs under the RLA should be lower.

In addition to the distinction between mandatory and permissive bargaining subjects, the NLRA and PRA contain more detailed procedures than the RLA for election unit definition and selection of the employee bargaining agent.²²⁸ This structure permits the NLRB more involvement in the regulation, investigation, and adjudication of recognition problems.²²⁹

No comparable process exists under the RLA. The duties and prohibitions that govern conduct under the RLA are enforced in the federal courts through suits brought directly by unions, employees, or carriers.²³⁰

Although this direct access to courts might at first blush appear to open the way to greater litigation, in practice the opposite has proven true. The availability of relatively quick injunctive relief—albeit pursuant to traditional equitable criteria applicable to most preliminary injunctions in the federal courts—has had such a strong deterrent effect on carrier conduct that discriminatory discharges to discourage unionization rarely occur under the RLA.

In a recent study, Professor Charles Morris evaluated the enforcement history of the regulatory regimes protecting employees’ organizational rights.²³¹ Professor Morris found that, since

²²⁶ See Stone, *supra* note 102, at 1527.

²²⁷ *Id.*

²²⁸ See *supra* notes 86-98 and accompanying text.

²²⁹ *Id.*

²³⁰ Employees have primarily relied on the injunctive power of the federal district courts to enforce statutory rights under the RLA. *Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & Steamship Clerks*, 281 U.S. 548 (1930); see also Morris, *supra* note 79, at 335.

²³¹ *Id.*

1926 when the RLA was enacted, there have been only fifteen published court cases involving issues of employee discharge for union activity. In fact, it has been more than ten years since a court decision has been published in this area.²³²

In contrast, litigation concerning employee discharge for organizing activity is a common occurrence under the NLRA. In 1997 alone there were a total of 13,127 charges involving section 8(a)(3).²³³ It is generally accepted that most of the section 8(a)(3) incidents represent discharges that occurred in relation to union organizational activity. And, all such decisions are subject to judicial review.

The RLA's method in dealing with representation disputes is reinforced by the manner in which the RLA deals with the bargaining unit question.²³⁴ The different approaches the three statutes use in defining the bargaining unit impose additional organization costs. Because of the rule-like nature of the RLA's endorsement of craft-wide units, far fewer litigable questions arise.²³⁵

In comparison, the NLRA and the PRA provide for the organization of employees in "a unit appropriate" for the purposes of collective bargaining.²³⁶ Unlike the NMB, the NLRB has substantial discretion to determine the "appropriateness" of a unit.²³⁷ As discussed above, the primary focus in determining an appropriate bargaining unit under the NLRA and the PRA is that employees with a community of interest should be grouped together.²³⁸ The NLRB inquires into a number of factors to test the community of interest: extent and type of union organization; bargaining history for the employees involved in the particular industry at issue; similarity of duties, skills, interests, and working conditions; structure of the company; and employee desires.²³⁹ These fact-bound questions inject uncertainty into the bargaining unit determinations, and present additional fodder for litigation.

Despite the high degree of unionization in both the railroad

²³² *Arcamuzi v. Continental Airlines, Inc.*, 819 F.2d 935 (9th Cir. 1987).

²³³ See *Morris*, *supra* note 79, at 322 tbl.1.

²³⁴ See *supra* notes 86-98 and accompanying text.

²³⁵ See *Eischen*, *supra* note 40, at 32-34.

²³⁶ See *supra* notes 86-98 and accompanying text.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

and airline industries, during the last three decades the NMB has decided only about fifty cases per year involving representation matters.²⁴⁰ A majority of these cases have been in the airline industry, and have involved issues such as mergers and union raiding, as opposed to an active use of litigation as an organizing strategy.²⁴¹

In contrast, the NLRA's more context-specific "community of interest" standard reflects its statutory goal of championing employee voice. This approach, however, has generated some unanticipated consequences. In defining bargaining units so narrowly, the NLRB consciously or unconsciously has sown the seeds for greater litigation both because employees and employers will more likely disagree about the appropriate scope of the bargaining unit, and also because the majority favoring representation in each unit is more unstable.²⁴²

Although direct comparisons between industries covered by the RLA and the NLRA is difficult, the incidence of litigation in each group of industries can be roughly measured by comparing the number of representation cases per employee in industries covered under the RLA and the trucking industry covered under the NLRA. In 1980, for example, representation cases per employee in the trucking industry occurred at a rate of 7.1 cases per 10,000 employees.²⁴³ Under the RLA, the incidence was smaller, with a rate of 1.3 cases per 10,000 employees in 1978.²⁴⁴ This trend appears to have continued in recent years. In 1997, representation cases per employee in the trucking industry was 2.3 cases per 10,000 employees, while the incidence under the RLA was less than one case (0.9) per 10,000 employees.²⁴⁵

Despite the fact that the approach concerning bargaining units under the PRA is the same as that under the NLRA, the experience under the PRA parallels that under the RLA. For example, in 1997 no cases were filed concerning representation rights for postal workers.²⁴⁶ This might be due to the fact that, as a heavily

²⁴⁰ See Northrup, *supra* note 68, at 479.

²⁴¹ *Id.*

²⁴² In 1990, the NLRB for the first time since its creation promulgated a substantive rule defining the employee units appropriate for collective bargaining in a particular line of commerce: acute care hospitals. 29 C.F.R. § 103.30 (1990).

²⁴³ See Arouca & Perritt, *supra* note 41, at 151.

²⁴⁴ *Id.*

²⁴⁵ The figures are calculated using the annual reports of the NLRB and NMB for the respective years.

²⁴⁶ See NAT'L LABOR RELATIONS BD., *supra* note 204.

unionized industry, we should expect to see decreasing organizing activity. Alternatively, public sector employer resistance to organizing rights may have waned, minimizing conflict over representation rights.

3. *Administration of Grievance Machinery*

Despite the fact that more litigable issues arise under the NLRA than under the RLA, greater utilization of the grievance machinery under the RLA might blunt the cost savings from less litigation, particularly if one considers the possibility of a much more lengthy grievance process under the RLA. Thus, in comparing the two statutes is important to consider whether the greater accessibility to a grievance process (as is the case under the RLA) results in an “inefficient” increase in the use of the grievance process. There is evidence suggesting that the grievance machinery in the railroad industry is comparatively inefficient. Overall, however, there is little reason to conclude that the RLA’s preference for grievance resolution over litigation imposes enough costs on employers to come anywhere close to negating the RLA’s substantial advantage in minimizing litigation costs.

First, even though there are incentives for the parties to “abuse” the arbitration machinery, and the mechanisms to resolve grievances under the RLA (NRAB, SBAs, and PLBs) have been criticized for being inefficient, there is no indication, at least in recent years, that the rate of grievance filing under the RLA is significantly different than that of other industries. From 1993 to 1995, the number of grievances submitted to arbitration in the railroad industry average 1.7, 1.99, and 2.02 per 100 employees, respectively. A study of 1980-1982 grievance activity across several private and public organizations found the comparable number to be 1.1 per 100 employees.²⁴⁷

Second, the grievance process utilized by the rail industry is entirely publicly financed.²⁴⁸ This means that employers and unions do not bear the costs associated with establishing the dispute resolution machinery.²⁴⁹

²⁴⁷ See generally DAVID LEWIN AND R.B. PETERSON, *THE MODERN GRIEVANCE PROCEDURE IN THE UNITED STATES* (1988).

²⁴⁸ See *supra* notes 114-18 and accompanying text.

²⁴⁹ As described earlier, the grievance process in the airline industry is financed by the parties themselves. Thus, while the cost savings will be smaller, resort to the grievance process will be more sporadic.

Third, grievances under the RLA are rarely subject to judicial review.²⁵⁰ Under the RLA arbitration boards have exclusive jurisdiction to resolve minor disputes.²⁵¹ Awards are considered to be final and binding, leaving courts with only a limited role in the RLA arbitration process.²⁵² The RLA restricts judicial review to four narrow grounds: failure of the Board to comply with the requirements of the RLA, failure of the Board to conform or confine itself to matters within the scope of its jurisdiction, fraud or corruption by a member of the Board, and violations of public policy.²⁵³ This limited role of judicial review, which parallels that adopted under the NLRA, should at least reduce the possible costs associated with grievance handling to the extent that it increases the finality of the grievance process.²⁵⁴

In sum, resolving grievances is far from cost free. Arguably, the costs incurred under the RLA in resolving grievances are smaller than the savings in litigation costs, particularly for non-unionized firms. Each grievance is far less expensive to resolve, and most are resolved short of arbitration. Moreover, the airline industry has streamlined the process more than in the railroad industry, heightening the disparity in costs between disputes in that industry and under the NLRA.

C. *Labor Relations Costs*

Another dimension over which the three regulatory regimes could be compared are the constraints placed on the ability of employers to operate their businesses. Two aspects of what I referred to as labor relations costs are considered: the effects of organizing rights and cost implications regarding bargaining duties.

1. *Organizational Issues*

As discussed earlier, the RLA, NLRA, and PRA differ in terms of their policies concerning organizing rights. Such differ-

²⁵⁰ See Javits, *supra* note 118, at 394.

²⁵¹ See *supra* notes 114-18 and accompanying text.

²⁵² See Javits, *supra* note 118, at 394.

²⁵³ See, e.g., *Delta Air Lines v. Air Line Pilots Ass'n*, 861 F.2d 665 (11th Cir. 1988).

²⁵⁴ In addition, because of the use of larger, carrier-wide bargaining units under the RLA, an employer can bargain for efficiencies in the grievance arbitration process that cannot be attained under the NLRA, given the use of smaller bargaining units.

ences result in a greater propensity to litigate organizational rights under the NLRA than under the RLA, thereby increasing litigation costs under the NLRA. Regulation regarding two other specific aspects of organizational rights—bargaining unit definition and election rules—may impose differential costs on employers depending on whether the RLA or NLRA applies.

A key difference underlying both statutes with respect to organizational rights is the definition of the bargaining unit. Under the RLA, carrier-wide units of a craft or class have been found to be appropriate. This means that a union would have to obtain authorization cards from thirty-five percent of all employees in a “class” or “craft” (e.g., office and clerical employees) to obtain an election, and over fifty percent to obtain recognition.²⁵⁵ Under the NLRA, a union can seek to represent employees in an appropriate bargaining unit, which has been normally defined as a single location unit.²⁵⁶

There are several cost implications because of this difference. First, a carrier-wide bargaining unit should make it, in theory, more difficult for unions to organize, because the union will have to get the support of a group of employees dispersed over a wide geographical area.²⁵⁷ This should make it easier for an employer under the RLA to oppose unionization, and in that sense decrease the costs of opposing a labor organization’s organizing drive.

In practice, however, it is not clear that these possible economies have been realized. For example, as noted earlier, union density rates under the RLA exceed those under the NLRA by a significant amount, and while union density in the private sector has generally been declining, in the industries covered by the RLA it has actually been increasing.²⁵⁸ Similarly, the carrier-

²⁵⁵ See *supra* notes 86-87 and accompanying text.

²⁵⁶ *Id.*

²⁵⁷ See STEPHEN I. SCHLOSSBERG & JUDITH A. SCOTT, ORGANIZING AND THE LAW 204-06 (1983) (discussing the strategic considerations of the bargaining unit determination).

²⁵⁸ As compared to unionization rates in the United States as a whole, unionization rates in the railroad and airline industries have remained unusually strong. See Morris, *supra* note 79, at 319-20. From 1955 to the 1990s the percent of non-agricultural workers represented by labor organizations has dropped from thirty-three percent to its present level of about 14.1%. *Id.* In industries covered by the RLA, however, between eighty percent and eighty-five percent of railroad employees were represented by unions in 1996, and sixty-five percent to seventy percent for employees of the scheduled airlines in 1997. *Id.* Thus, union density in the industries covered by the RLA actually has been increasing. *Id.*

wide approach to the bargaining unit definition is accompanied, as discussed earlier, by the willingness of courts to issue injunctions against employers that interfere with the organizational rights of employees.²⁵⁹ Another cost implication of the carrier-wide approach relates not to organizing per se, but to the effect that bargaining unit determination has on bargaining power.²⁶⁰ While a larger, carrier-wide unit is more difficult to organize, once in place it could potentially exercise more bargaining power and be more difficult to decertify. Facing a carrier-wide unit, employers would lose some of their ability to isolate labor disputes to particular locales or geographical area.²⁶¹ Further, a work stoppage in a carrier-wide unit could potentially signify the closing of operations for the whole enterprise.²⁶²

The rules regarding election issues also result in different costs under each of the three regimes. As described above,²⁶³ the NMB has utilized different election procedures than has the NLRB, such as the different kind of election ballots (NMB's ballot does not include a "no union") and the NMB's minimum voter participation requirements. The NLRB and the NMB have also differed in their philosophy towards modifications of ballots to remedy violations of the election process.²⁶⁴

The cost implications of the different approaches to elections are somewhat complex. On the one hand, the requirement that a majority of employees vote in favor of a union before granting recognition should make it less likely for a union to be certified under the RLA, since a no-show counts as a vote against the union. On the other hand the willingness of the NMB to use different ballots as an instrument to remedy employers' attempts to interfere with their employees' organizational rights appears to expand the set of protections available to employees as compared to the NLRA.

In short, there is no a priori way to determine whether the RLA or NLRA imposes greater costs on employers due to their different election procedures. To some extent, at least, the RLA as a theoretical manner makes it more difficult for employees to

²⁵⁹ See *supra* notes 77-79 and accompanying text.

²⁶⁰ See SCHLOSSBERG & SCOTT, *supra* note 257, at 204-06.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ See *supra* notes 83-92 and accompanying text.

²⁶⁴ *Id.*

elect union representation, but the NMB has stepped into the fray to ease such burdens.

2. *Bargaining Costs*

In opposition to the RLA's advantage in minimizing litigation costs, bargaining costs under the RLA are steeper. The regulatory structure affects bargaining costs at two different levels. First, the RLA embraces a broader scope of bargaining, imposing on employers a duty to bargain over a broader set of issues as compared to the NLRA. Second, the RLA also provides incentives for protracted bargaining, which not only increases labor relations costs, but perhaps more importantly, serves to prevent the employer from efficiently adopting changes in the workplace. This section discusses these two issues.

a. Effect on Managerial Prerogatives

Although difficult to quantify, one of the most critical costs of any labor-management regulatory regime is the impact on employer flexibility.²⁶⁵ A firm that cannot respond to market opportunities or changes cannot thrive.²⁶⁶ Competitive pressures, technological changes, and unexpected shifts in consumer demand all prompt the need for quick response.²⁶⁷ Such responses take many forms, but may include abandoning certain product lines, closing outmoded plants, contracting out particular functions, or moving tasks offshore.²⁶⁸ Although the gap between the NLRA and RLA in this respect may be narrowing—as we mentioned previously—the NLRA acknowledges and preserves firm flexibility to a far greater extent.

Firms under the NLRA must bargain over mandatory subjects such as wages and hours, but not over managerial prerogatives.²⁶⁹ The *First National Maintenance Corp.*²⁷⁰ decision, and its progeny, carved out from the statutory obligation any bargaining proposal covering such strategic decisions as plant closing or building new plants overseas. Thus, unions may propose terms

²⁶⁵ See generally LABOR LAW AND BUSINESS CHANGE: THEORETICAL AND TRANSACTIONAL PERSPECTIVES (Samuel Estreicher & Daniel G. Collins eds., 1988) (developing a model of the duty to bargain under the NLRA).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ See *supra* notes 104-08 and accompanying text.

²⁷⁰ 452 U.S. 666 (1981).

covering such items, but the employer need not agree to bargain over such proposals, and unions cannot take any protected legal action to protest the employer's intransigence.

In contrast, the RLA has not limited the employer's duty to bargain.²⁷¹ Consequently, unions may propose limitations on the employer's right to contract out, to hire foreign nationals, to close particular plants, and to bargain about the effects of such decisions.²⁷² In cases where the employer refuses to accede to the union's demands, the dispute may ultimately be resolved by an arbitrator. The threat to employer autonomy is apparent.²⁷³

Moreover, an employer under the RLA may not take unilateral action on any major dispute during the pendency of a contract.²⁷⁴ Thus, the employer must afford thirty days notice and bargain to impasse if the union challenges an economic decision as inconsistent with the terms of a collective bargaining agreement during the period covered by the agreement. And, the employer at a minimum—as addressed earlier—must bargain over the effects of all such decisions.

To a financially powerful company, the prospect of bargaining over employer prerogatives may not prove that problematic for a number of reasons. First, if the union has little strength, the potential for bargaining over employer prerogatives may pose little risk because the union's threats are empty.²⁷⁵ Unions will not be able to leverage that capacity to accomplish any significant material gains. Even a weak union, however, can interfere with management prerogatives through the ability under the RLA to delay the implementation of new policies.

Second, if a firm is in a relatively strong financial position, a company may predict that it will not need to revamp its operations so as to necessitate a quick sale or retooling of any of its plants.²⁷⁶ Bargaining over employer prerogatives, and agreeing to limit the firm's discretion, would therefore cause little harm.

Third, a company may believe that it is in the position to allay

²⁷¹ See *supra* notes 109-13 and accompanying text.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ See KOCHAN & KATZ, *supra* note 201, at 53-56 (discussing the concept of bargaining power and its effects on the collective bargaining process).

²⁷⁶ See David Lewin, *Industrial Relations as a Strategic Variable*, in HUMAN RESOURCES AND THE FIRM PERFORMANCE 1, 16-22 (Morris M. Kleiner et al. eds., 1987) (describing the strategic implications of collective bargaining).

the union's interest on such strategic matters by offering significant material benefits in terms of enhanced pay or working conditions.²⁷⁷ A collective bargaining agreement that insulates the company from union challenges over employer prerogatives may suffice. Even there, however, the company may have to promise more in the way of such benefits than it would have otherwise.

Fourth, a company may be confident that the union will not be able to use the arbitral machinery under the Act to impact its strategic decisions materially. It may forecast that arbitrators or courts will be sympathetic to any carefully defended employer claim that dispatch was essential to protect itself in the marketplace.

On balance, the dichotomy under the NLRA between mandatory and permissive subjects of bargaining advantages employers substantially. Most employers recognize that market conditions may suddenly alter to the point where they must change their operations quickly and significantly to avoid precipitous loss in market share. Firms may "pay" unions more to preserve their prerogatives under the RLA. Thus, because the RLA saps the employer's ability to react quickly, employers should strongly prefer regulation under the NLRA in this respect.

b. Protracted Bargaining

Although the RLA, NLRA, and PRA all rely on collective bargaining as the core mechanism to regulate industrial conflict, the statutes are significantly different in terms of the incentives they create for parties to negotiate. The RLA embodies a conception of labor relations in which all existing conditions and practices are presumed to be the product of agreements between management and labor.²⁷⁸

The RLA requires parties to exhaust the Act's dispute procedures before they exercise economic action.²⁷⁹ Thus, the RLA forces labor and management to maintain the status quo for indeterminate periods regardless of their wishes.²⁸⁰ The NMB controls the timing of strike threats by determining when the prospects for successful mediation have been exhausted.²⁸¹ The

²⁷⁷ See PAULA B. VOOS, CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 4-6 (1994) (describing productivity enhancing bargaining).

²⁷⁸ See *supra* notes 40-44 and accompanying text.

²⁷⁹ See *supra* notes 137-43 and accompanying text.

²⁸⁰ *Id.*

²⁸¹ *Id.*

Board often uses this power to coordinate strike dates for different bargaining units, thus exercising significant power over bargaining structure.²⁸²

The RLA's preference for the outcomes of collective bargaining in turn induces a "narcotic effect" which tends to protract collective bargaining negotiations even further.²⁸³ If the parties are unable to settle a dispute by collective bargaining, either party may seek mediation by the NMB, or the Board "may proffer its services in case any labor emergency is found by it to exist at any time."²⁸⁴ Because the Act requires that the status quo remain in force until the Board releases the parties to unilateral action, the Board becomes involved in disputes that are not directly settled by the parties themselves and for which one of the parties finds soliciting intervention advantageous.²⁸⁵

In contrast to the RLA, the NLRA allows economic pressure to play a much larger role in the bargaining process.²⁸⁶ Once parties have complied with their duty to bargain in good faith, a union is free to strike and an employer is free to institute unilateral changes in working conditions.²⁸⁷ As described earlier, only under very specific conditions would the government intervene to delay or stop self-help actions by the parties to the collective bargaining process.²⁸⁸

Given that public employees do not enjoy a right to strike, the PRA provides for mediation and arbitration of interest disputes.²⁸⁹ The PRA provides for fact-finding procedures by the FMCS whenever the parties fail to reach an agreement or to adopt a procedure for binding resolution by the expiration of the agreement.²⁹⁰ The fact-finding panel is required to issue a report, with or without recommendations.²⁹¹ Finally, the PRA goes further than either the NLRA or RLA by providing for

²⁸² *Id.*

²⁸³ The "narcotic effect" phenomenon has been discussed in the context of the arbitration process to identify the tendency of the parties to an arbitration process to rely on the arbitrator's decision instead of engaging in serious negotiations. See KOCHAN & KATZ, *supra* note 201, at 280-81.

²⁸⁴ 45 U.S.C. § 155 para. 1 (1994).

²⁸⁵ See Northrup, *supra* note 68, at 469.

²⁸⁶ See *supra* notes 152-54 and accompanying text.

²⁸⁷ *Id.*

²⁸⁸ See *supra* notes 155-68 and accompanying text.

²⁸⁹ See *supra* notes 170-88 and accompanying text.

²⁹⁰ *Id.*

²⁹¹ *Id.*

binding arbitration if the bargaining impasse persists for 180 days from the start of negotiations.²⁹²

In summary, parties negotiating under the RLA should expect to face longer and more frequent negotiations. Negotiations are prolonged as the parties go through mediation, the appointment of emergency boards, and the so-called “narcotic effect.” Knowing that mediation, and to some extent emergency boards, are fairly likely occurrences in the bargaining process, labor and management are less likely to take negotiations seriously until those steps have occurred. Moreover, labor and management under the RLA have less control over the negotiations, in terms of both their abilities to exert economic pressure on the opposing side and in the conduct of negotiations. The diminished ability to exert economic pressure results from the obligation to maintain the status quo during the course of negotiations and from the greater level of government intervention through mediation. A similar problem could occur under the PRA. Reliance on fact-finding and arbitration appears to have become a common occurrence in postal negotiations under the PRA.

These extra costs in terms of prolonged bargaining sessions and withheld desired changes in the workplace are possibly balanced by the major statutory achievement of the RLA and the PRA: a much greater certainty of labor peace. Thus, while the parties face some increasing costs under the RLA and the PRA, they also enjoy an increasing certainty that bargaining disputes will not be the subject of economic pressure.

Whether this tradeoff is, *ex ante*, more beneficial to labor or management depends on a number of other factors such as bargaining power and business conditions. For example, an employer who is subject to significant cyclical variations in the demand for its product might find it extremely detrimental to maintain the status quo during the course of the various steps preceding the availability of self-help under the RLA. By the time negotiations end, the effect of the inability to respond to the change in demand might prove to be overly burdensome. On balance, therefore, protracted bargaining under the RLA likely disadvantages employers.

²⁹² *Id.*

D. Regulation of Work Stoppages

Strikes are far more likely under the NLRA than under the RLA. As discussed previously, the cooling off mechanisms imposed under the RLA, as well as the mediation mandate, makes the prospect of a strike far more remote.²⁹³ Employees can strike only after exhausting the mediation provisions in the Act, and if a major dispute, only after the protracted and politically intense mechanism of the Presidential emergency boards have been utilized.²⁹⁴ The constraints the RLA imposes on the ability to strike is likely to result in a much lower number of strikes in the railroad and airline industries as compared to industries covered under the NLRA.²⁹⁵ While data on the railroad industry is unavailable, it is possible to compare strike activity in the airline industry, to strike activity in non-RLA industries. The data is suggestive of a much smaller level of strike activity in the airline industry under the RLA, even after considering the overall decline of strike activity throughout the economy.²⁹⁶ There is no

²⁹³ See *supra* notes 137-51 and accompanying text.

²⁹⁴ *Id.*

²⁹⁵

Percent of Working Time Lost to Strikes in the Airline Industry and in Non-RLA Industries

Year	Percent of Working Time Lost to Strikes in Airline Industry	Percent of Working Time Lost to Strikes in Non-RLA Industries
1983	0.003	0.08
1984	0	0.04
1985	0.0002	0.03
1986	0.00006	0.05
1987	0	0.02
1988	0.0006	0.02
1989	0	0.07
1990	0	0.02
1991	0	0.02
1992	0.000003	0.01
1993	0.000003	0.01
1994	0	0.02
1995	0	0.02

The "Percent of Working Time Lost to Strikes in Airline Industry" were calculated using figures taken from the *Annual Report of the National Mediation Board*. Data for 1970-1976 are for fiscal years running from July 1 to June 30. Data for 1977-1992 are for fiscal years running from October 1 to September 30. The "Percent of Working Time Lost to Strikes in Non-RLA Industries" was calculated using figures taken from the *Statistical Abstract of the United States* in 1997.

²⁹⁶ This conclusion is consistent with the results of a 1976 study comparing the proportion of total working time lost through strikes across industries for the period

reason to think that figures for the railroad industry would be materially different. One reason for the lower level of activity may be the NMB's greater involvement in interest disputes. The NMB's virtually unreviewable discretion as to when a carrier and union should be "released" from mediation, and therefore entitled to strike, is virtually unreviewable by the courts.²⁹⁷ This means that the NMB, encouraged by one or both parties, or merely informed by its own industrial relations expertise, can alter the bargaining process.

Moreover, employers under the RLA, as discussed previously, are more likely to benefit from the emergency strike provisions. If the statutory threshold under the RLA is met, then mediation and government intervention diminish the prospect of a strike.²⁹⁸

Although from the employer's perspective, the RLA appears to provide a broader protection against work stoppages, there is one potential wild card: work stoppages related to secondary pressure. Secondary pressure has been essentially prohibited under the NLRA, but largely is available to unions under the RLA.

In *Brotherhood of Railway Trainmen v. Jacksonville Terminal Company*,²⁹⁹ the Supreme Court held that under the RLA once the parties have exhausted the procedures for major disputes resolution, they can "employ the full range of whatever peaceful ec-

between 1956 and 1972, which found that the percentage of working time lost through strikes averaged 0.21 in the railroad industry and 0.60 in the airline industry. These numbers compared favorably to an average of 0.84 for the four most heavily unionized industries under the NLRA. See Donald E. Cullen, *Strike Experience Under the Railway Labor Act*, in *THE RAILWAY LABOR ACT AT FIFTY* 187, 201 (Charles Rehmus ed., 1977).

²⁹⁷ *Int'l Ass'n of Machinists & Aerospace Workers v. Nat'l Mediation Bd.*, 930 F.2d 45, 48 (D.C. Cir. 1991) (rejecting union petition to compel NMB to release union from mediation after fourteen months and noting the narrow standard of review of NMB decisions).

²⁹⁸ The difference in the two statutes' triggering mechanisms, however, should not be overstated. It is important to understand that the framework for addressing emergency strikes under a statute is a mixture of law and politics. What the statute says about the criteria for government intervention in an emergency strike is merely the starting point. Whether the president appoints a board of inquiry under the Taft-Hartley Act or appoints an emergency board under the Railway Labor Act is a political decision. Even when the President appoints a board under either Act, this only delays the right to strike; it does not eliminate it altogether, and it does not ensure a settlement of the dispute. If the dispute is not settled voluntarily under the emergency board or board of inquiry, the matter reverts to Congress. Whether Congress acts to impose a settlement is a purely political decision.

²⁹⁹ 394 U.S. 369, 384-85 (1945).

onomic power they can muster . . . whether characterized as primary or secondary.”³⁰⁰ The Court has continued to adhere to this policy, rejecting carriers’ arguments that “allow[ing] unions to resort to secondary activity is . . . inconsistent with the major purpose of the RLA” to prevent strikes and interruptions to commerce.³⁰¹ According to the Court, although the primary goal of the RLA is to settle strikes and to avoid interruptions to commerce, there is no indication that Congress intended under the RLA to permit federal courts to enjoin secondary activity as a means towards that end.³⁰² Thus, the Court accordingly has allowed unions to picket the facilities of secondary carriers and to ask other carriers’ employees to withdraw from service.³⁰³ The Court has treated secondary pressure in airline disputes under the same standard.³⁰⁴

Under the NLRA, a union having a dispute with an employer must confine its picketing activity to that particular employer. The NLRA prohibits unions from extending the labor dispute to other employers in the hope that pressuring them to cease dealing with the primary employer will facilitate achieving a victory against the primary employer.³⁰⁵ The provision against secondary activity is enforced both through injunctions and awards of monetary damages.³⁰⁶

The RLA thus provides unions with a larger set of weapons to exert economic pressure on the employer outside of the strike context. These weapons, however, are available to the union after a much longer period of negotiations. The NLRA, on the other hand, allows the parties to resort to self-help much more quickly, but limits the kind of tools available to unions to exert pressure on the employer. In assessing the costs associated with these two regimes, employers should calculate the probability of a strike occurring under either regime, times the probability of harm caused by the union’s economic tools (NLRA—limited to primary activity; RLA—primary plus secondary activity).

³⁰⁰ *Id.* at 392-93.

³⁰¹ *Burlington N. R.R. v. Bhd. of Maint. of Way Employees*, 481 U.S. 429, 451 (1987).

³⁰² *Id.*

³⁰³ *Id.* at 433.

³⁰⁴ *Trans World Airlines, Inc. v. Indep. Fed’n of Flight Attendants*, 489 U.S. 426, 442 (1989).

³⁰⁵ 29 U.S.C. § 158(b)(4) (1994).

³⁰⁶ 29 U.S.C. § 160(j) (1994).

E. Summary

Regulatory structures impose costs, and the labor relations regimes covering the express industry are no exception. This section has identified the differing costs under the three regimes arising from litigation, the impact on administering labor-management relations, and the regulation of work stoppages. The chart below summarizes this discussion.

Table 1
Cost Comparison of the RLA, NLRA and PRA

	RLA	NLRA	PRA
Litigation Costs	Low	High	Medium
Likelihood of Employee Organization	High	Medium	Medium
Obstacles to Decertification	High	Medium	High
Impact on Management Prerogatives	High	Low	Low
Impact on Management Flexibility	High	Low	Low
Cost of Administering Statute	Medium	High	High
Risk of Government Meddling in Contract Negotiations	High	Low	High
Risk of Government Meddling in Contract Administration	High	Low	Low
Risk of Strike	Medium	High	Low

Two aspects appear to make the PRA framework the most attractive for employers. First, employers are immunized from strikes, which in most employers' eyes presents an advantage outweighing all other costs involved. The PRA substitutes binding interest arbitration for the right to strike.³⁰⁷ Moreover, the PRA relieves employers of the duty to bargain over the direction and nature of an employer's business. Companies preserve the flexibility to implement change immediately, avoiding the delay attendant upon protracted bargaining.

The comparative cost analysis between the RLA and NLRA is closer, and companies might make different selections depending upon their position in the industry. The RLA promises greater

³⁰⁷ Private sector entities, however, have never been governed by permanent legislation that takes away the right to strike and substitutes interest arbitration. The formula has been used in ad-hoc congressional legislation for railroad and airline disputes occasionally, but the probability that a private entity, even one conducting service as critical as package express service supporting e-commerce, could persuade Congress to enact permanent legislation along the lines of the PRA is extremely low.

security because employees can only take unilateral action after the lengthy mediation process of the Act has been exhausted. In addition, the RLA offers certain efficiencies by embracing craft-wide bargaining units. Finally, disputes under the Act are less likely to result in costly litigation. Requirements under the Act are formulated more as rules than standards, minimizing the opportunity for discord, which reinforces the culture of mediation underlying the Act.

On the other hand, the security and efficiency come at a price—fewer managerial prerogatives are guaranteed. Firms under the RLA must bargain about all conceivable issues even if directly linked to business judgment. Nor can firms take unilateral steps to protect their financial interests in a rapidly changing economic environment. And, the heavy hand of agency mediators may constrain management even further.

IV

IMPLICATIONS

The analysis presented so far has significant implications for the express package delivery industry, which as described earlier,³⁰⁸ is directly affected by this state of affairs. The analysis also has broader implications.

A. Implications for the Express Package Delivery Industry

The analysis developed above raises serious concerns regarding the existing labor regulatory framework that applies to the express package delivery industry. Market competition within the same industry should not be skewed by differential costs imposed by labor-relations regimes. All firms should compete on as level a playing field as possible. Irrespective of the arguable advantages of one regime over the others, firms that provide the same service within the express industry should not be forced into different regulatory modes.

For instance, if strikes pose the greatest threat to market share, there is no sound reason to protect some competitors but not others from the risk. Governmental regulation otherwise would favor certain firms over others, compromising the norm of even-handed regulation. Similarly, comparable burdens of litigation costs should be imposed on all competitors. And, if one firm

³⁰⁸ See *supra* notes 21-35 and accompanying text.

must bargain over its exercises of managerial prerogatives, so should all.

This distinction is of extreme importance to members of the express delivery industry. With the exception of the United States Postal Service, which clearly falls under the Postal Reorganization Act,³⁰⁹ every major firm in the industry has litigated the coverage issue.³¹⁰ Invariably, the disputed issue has been whether a group of employees that seek union representation under the NLRA, are “employees” under the RLA and thus outside the coverage of the NLRA.³¹¹

These cases are troubling to industry members for a couple of reasons. First, it is hard to discern what standard the NMB is applying in these cases,³¹² and when would the NLRB defer to

³⁰⁹ 39 U.S.C. § 101 (1994).

³¹⁰ Regarding UPS, see *UPS v. NLRB*, 92 F.3d 1221 (D.C. Cir. 1996) and *In re UPS*, 318 N.L.R.B. 778 (1995). Regarding Federal Express, see *In re Federal Express*, 323 N.L.R.B. 871 (1997); *In re Federal Express Corp.*, 317 N.L.R.B. 1155 (1995); and *In re Federal Express Corp.*, 23 N.M.B. 32 (1995). Regarding Airborne Express, see *In re ABX Air, Inc.*, 25 N.M.B. 274 (1998). Regarding DHL, see *In re DHL Corp.*, 260 N.L.R.B. 17 (1982). Regarding Emery, see *In re Emery Worldwide Airlines*, 28 N.M.B. 216 (2001) and *In re Emery Worldwide Airlines*, 27 N.M.B. 127 (1999).

³¹¹ 29 U.S.C. § 152(3) (1994). The term employee is defined under the NLRA to “include any employee . . . , but shall not include . . . any individual employed by an employer subject to the Railway Labor Act.” *Id.*

³¹² In deciding whether a particular group of employees fall under the jurisdiction of the RLA, the NMB has focused on a number of issues. In some cases the focus has been on whether the employer is a “common carrier by air.” *ABX Air*, 25 N.M.B. at 281-82; *Fed. Express Corp.*, 23 N.M.B. at 70-71. The term “carrier” includes “any company which is directly or indirectly owned or controlled by or under common control with any carries . . . and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit . . . and handling of property transported by railroad.” 45 U.S.C. § 151 (1994). This language was originally applied only to railroads. 45 U.S.C. § 181 (1994) extended this provision to carriers by air and their employees. In some cases, after having answered this question affirmatively, the NMB ends the inquiry and finds that the employees (whatever their job duties) are employees under the RLA, and thus keeps jurisdiction over the case. *ABX Air*, 25 N.M.B. at 283-84. In other cases, the NMB has inquired further into whether the job duties of the employees are “integrally related” to the normal operations of the carrier. This further inquiry has taken the NMB into discussions regarding the specific job duties of the employees and how do those duties fit into the overall operation of the firm. *Federal Express Corp.*, 23 N.M.B. at 73-75; *Emery Worldwide Airlines*, 28 N.M.B. at 237-40. For example, in a number of cases the NMB has looked in detail the proportion of air to ground transportation used by the carrier, finding that employees fall under the jurisdiction of the RLA where most of transportation activity occurs by air. *Federal Express Corp.*, 23 N.M.B. at 73-75.

the NMB's judgment.³¹³ Second, to the extent that a legal standard can be defined, it imposes on industry members, as well as employees, a fairly inflexible structure that affects their ability to adapt to the specific situations presented by their respective environments.³¹⁴

Principles of competitive equality dictate that the government should not force similarly situated firms into different regulatory modes. The differential costs imposed sap the ability of each firm to compete fairly in the marketplace. Although there might have been, and continue to be some rationale to treat the transportation industry (in fact only the railroads and airlines) differently from the rest of the economy, there does not appear to be any principled rationale to treat firms within the same industry, and that provide an identical service differently. In short, the government should take regulation out of the competitive equation.

B. A New Approach to Labor Law Reform

Heretofore, this article has focused on the justifiability of having Congress imposing differing costs on members of the same industry by forcing them into distinct regulatory regimes. The prior discussion articulates what those cost differences are, pointing out that they are non-trivial. The preceding section suggests that notions of fairness require a revision to the various statutory frameworks to correct this discrepancy.

In this section I turn this question on its head. Instead of inquiring as to appropriateness of subjecting firms within the same industry to different labor relations regimes, I ask whether it will be proper for Congress to present the targets of regulation with a set of regulatory alternatives and let those affected by the regulation choose the regulatory framework that best fits their situation. The analysis here transcends the express delivery industry, and seeks to identify the contours of such a scheme.

The analysis of the express package delivery industry demon-

³¹³ Compare *UPS v. NLRB*, 92 F.3d 1221 (D.C. Cir. 1996) (finding that the NLRB was not required to refer issue of its jurisdiction over trucking corporation to the NMB), with *In re Fed. Express Corp.*, 317 N.L.R.B. 1155 (1995) (deferring to the NMB).

³¹⁴ Both the NMB and the NLRB have been reluctant to reconsider the status of employees of both UPS and Federal Express making strong references to their prior decisions. See, e.g., *Fed. Express Corp.*, 23 N.M.B. at 34 (1995) (stating that the Board repeatedly exercised jurisdiction over Federal Express).

strates that at any time, any one regulatory regime is likely to fail to address the relevant concerns of those who are covered under the regulation.³¹⁵ Changes in technology, labor trends, and market conditions occur too quickly and with enough frequency, that not even the most efficient legislature is able to keep pace. Political sensitivities also make it difficult for Congress to enact legislation, exacerbating even more the problem of regulatory misfit.

Despite these concerns, the traditional regulatory mode, at both the federal and state levels, has been to adopt one statutory framework that governs all members in an industry.³¹⁶ As an alternative, this article will suggest that instead of adopting one regulatory regime which is intended to cover every employer in a particular industry, Congress should adopt a menu of alternative rules regarding the regulation of the labor relations process, and let the stakeholders choose a set of rules that will govern their employment relationship. Congress could adopt some general principles regarding labor relations, akin to the current Section 7 of the NLRA which guarantees the right of individuals to choose to join or not to join and assist a labor organization.³¹⁷ Congress will then adopt (either directly or through the agency) a menu of alternative rules that the parties can then adopt on their own.

The menu of rules adopted by Congress should be detailed enough, as to include regulations on the various components of the labor relations process: organizing, contract negotiations and contract administration. For example, Congress could adopt a set of rules regarding organizing, as now available under the three statutes, or create an entirely new set of choices. From the NLRA, Congress could incorporate the alternative of an appropriate bargaining unit.³¹⁸ From the RLA, Congress could incorporate the option of bargaining units defined by craft or class lines.³¹⁹ Another set of options could be provided regarding the

³¹⁵ See Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111 (2001) (identifying the shortfalls of traditional regulatory schemes in corporate takeover law); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51 (1992) (contrasting the advantages and disadvantages of a single bankruptcy regime and a "choice" regime).

³¹⁶ See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 8-17 (1997) (describing the problems associated with traditional regulatory schemes).

³¹⁷ 29 U.S.C. § 157 (1994).

³¹⁸ See *supra* notes 96-97 and accompanying text.

³¹⁹ See *supra* notes 93-97 and accompanying text.

ability of parties to obtain injunctions in federal court to enforce statutory rights, or to instead rely on administrative procedures.³²⁰ Alternative rules will also be provided regarding issues of contract negotiation and contract administration.

Following issuance of the menu of rules, it will be then necessary for individual firms to adopt a set of rules that will govern their labor relations process. Obviously, at this point, and in the absence of any representation by employees, employers will be more likely to select a set of rules that result in the least interference with managerial rights as possible, and correspondingly, in possible minimal protection of employees' rights.³²¹ To avoid this problem, Congress could mandate that the adoption of the regulatory framework by the firm, be conducted with the input from the employees to be affected by the choice of rules. If employees are currently represented by a labor organization, the process will be relatively straightforward, the current union will represent the employees in the negotiated rulemaking process.³²² If the employees are not represented by a labor organization, the employees could secure the advice of a labor union for these purposes, or for that matter, the advice of any other private group (e.g., law firm, community group).

Once the selection of rules has been made, the employment relationship will be governed by the terms agreed in the negotiated rulemaking process. In the absence of an agreement on an alternative set of rules, the employment relationship will be regulated under the regulatory frameworks available under current law. In a sense, the current regulatory frameworks will serve as a default rule.

Thus in a sense, I am suggesting a two stage bargaining process, the first stage being negotiation over the legal framework under which the parties are to operate and the second stage being negotiations over the terms and conditions of employment (as presently done).

Although the rule-menu approach is radical as applied to the

³²⁰ See *supra* notes 77-82 and accompanying text.

³²¹ See David B. Spence & Lekha Gopalakrishnan, *Bargaining Theory and Regulatory Reform: The Political Logic of Inefficient Regulation*, 53 VAND. L. REV. 599, 625-30 (2000) (describing the strategic aspects of regulated rule-making).

³²² See Richard B. Freeman & Joel Rogers, *Who Speaks for Us? Employee Representation in a Nonunion Labor Market*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 13, 61-66 (1993) (describing the role that labor unions could play under alternative forms of employee representation).

regulation of labor relations, the idea of flexible regulation is hardly new in administrative law literature. Over the last decade there has been a significant amount of activity in the area of flexible regulation.³²³ Flexible regulation refers to the use of collaborative regulatory approaches under which the firms, groups, and individuals who are the subject of regulatory compulsion (stakeholders) engage in designing and enforcing of the rules that dictate their conduct.³²⁴ The basic premise of flexible regulation is that by empowering the stakeholders of regulation, society can achieve more efficient regulatory outcomes.³²⁵ A number of approaches have been adopted on an experimental basis, primarily in the area of environmental regulation: negotiated rulemaking,³²⁶ and the Environmental Protection Agency's Project XL.³²⁷

Three basic problems have been identified in the development of flexible regulation experiments: (1) the problem of adequate

³²³ See Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411 (2000) (describing the flexible regulation experience).

³²⁴ *Id.* at 414-20.

³²⁵ *Id.*

³²⁶ See Freeman, *supra* note 316, at 33-54. The objective of negotiated rulemaking is to get stakeholders involved in the rule-making process as early as possible in the regulatory process. The process involves the appointment, by the appropriate regulatory agency, of a rulemaking negotiating committee. The committee is supposed to include representatives of all the effected stakeholders. If the committee reaches consensus, it reports to the agency which then utilizes the committee's decision as the basis for a proposed rule. This procedure has been available since the mid 1980s. See Seidenfeld, *supra* note 323, at 446-59.

³²⁷ See Freeman, *supra* note 316, at 55-65. Established by the EPA, Projects XL is intended to allow regulated facilities the flexibility to develop alternatives to existing regulatory requirements in order to produce greater environmental benefits at lower costs. See Seidenfeld, *supra* note 323, at 466-85. The process basically entails the regulated facility submitting a proposal to the EPA that identifies possible tradeoffs on pollutants and media on a facility-wide basis. The EPA then negotiates a final proposal with the applicant. As part of the final proposal, the applicant identifies those stakeholders that should be involved in the negotiations. The EPA can reject the proposal on the basis of inadequate stakeholder participation. Under Project XL the mechanism for monitoring compliance with the proposed plan is specified in the final agreement itself. Some plans rely heavily on self-reporting of compliance (the companies prepare reports on compliance and make them available to the public and the agency). Other plans specify more than mere reporting of performance, and provide for additional meetings of stakeholders to evaluate the companies' performance. While participation in the plan relieves the company from fines for failure to meet the agreed standards, the EPA has the option of withdrawing from the project, in which case the facility would have to meet all applicable regulatory standards. *Id.*

group participation; (2) the capture problem; and (3) the continuity problem.

Adequate public participation refers to identifying the proper groups that have a stake in the rule-making process and providing them with the access, resources, and expertise needed to make a meaningful contribution to the regulatory process.³²⁸ Capture or cooption refers to the possibility that either the interest groups that are represented at the bargaining table will disregard the interest of other stakeholders that are not present, or that the leadership of the groups at the bargaining table will compromise the interests of their membership in exchange for some broader political gain.³²⁹ Finally, the continuity problem arises due to the turnover that occurs in the membership of the groups participating in flexible regulation experiments.³³⁰

These problems are somewhat related. To see how they interact consider the following. Principles of fairness and openness suggest as broad participation as possible in the process of enacting a new rule. All groups and individuals with a stake in the regulatory issue should be able to participate in the process leading to the adoption of a new rule or standard.³³¹ Broader participation increases the availability of information and thus furthers the goal of creative and innovative decision-making.³³² Finally, broader participation diminishes the chances of cooption or capture, as it prevents "sweetheart" deals by allowing all possible interests to be represented at the bargaining table.³³³

Opening the door to every imaginable stakeholder, however, raises in turn some practical problems. For example, broad participation will make the negotiation process too lengthy and thus limit the efficiency gains of a flexible approach as compared to traditional rulemaking.³³⁴ Broad participation will also allow fringe groups to highjack the process by introducing extreme demands.³³⁵

Another problem relates to the likelihood that local groups

³²⁸ See Freeman, *supra* note 316, at 77-82.

³²⁹ See Seidenfeld, *supra* note 323, at 421-23.

³³⁰ *Id.* at 484-86.

³³¹ See Freeman, *supra* note 316, at 77-82.

³³² *Id.* at 27.

³³³ *Id.* at 30.

³³⁴ See Seidenfeld, *supra* note 323, at 487-88.

³³⁵ *Id.*

will dominate the negotiation process.³³⁶ On the one hand, this tendency, if it materializes, is not a drawback on itself. Local groups are likely to have better idiosyncratic knowledge, and a greater sense of commitment to solving the problem.³³⁷ On the other hand, local groups are likely to have more extreme views, and might lack the expertise to engage in meaningful negotiations with the opposing side and with the agency.³³⁸

The third problem, lack of continuity, presents another impediment in the use of flexible regulation. A key component of flexible regulation is the presumption that following the adoption of the new rules or standards, there will not be any challenges to the legitimacy of the adopted framework.³³⁹ The parties that participated in the adoption process are expected to continue to be committed to the framework they negotiated, and thus not to challenge the framework's legitimacy.³⁴⁰ However, fringe groups that did not participate are likely to disrupt the process by challenging its legitimacy.³⁴¹

It has been suggested that for flexible regulation to work (that is, to adequately deal with the problems of group inclusion, cooperation and continuity) three conditions have to be satisfied: (1) stakeholders can be divided into discrete groups with clearly identifiable regulatory interests; (2) stakeholders maintain an ongoing relationship with the owner of the regulated facility; and (3) stakeholders have access to expertise and resources to properly negotiate with other interested groups.³⁴²

Are these three conditions likely to materialize in the labor relations area, were we to adopt a flexible regulation approach? This section concludes by suggesting that all of these three conditions could be satisfied given the institutional dimensions of the labor relations process.

First, unlike negotiated rulemaking, the rules-menu approach will only be applicable to a particular firm. Accordingly, it is very easy to identify the groups with a stake in the adoption of a regulatory framework: the employer and the current employees.

³³⁶ *Id.* at 477-80 (noting the apparent lack of interest by national environmental groups to participate in Project XL negotiations).

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ See Seidenfeld, *supra* note 323, at 477-80.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.* at 439-44.

Further, the presence of labor organizations substantially facilitates the implementation of flexible regulation. Local labor organizations are primarily responsive to the interests of the members they represent. However, since they are affiliated with a national organization, which in turn is most likely affiliated with the AFL-CIO, extreme local interests are properly constrained.

Second, labor organizations are also likely to provide some of the continuity that has been lacking under negotiated rulemaking and even under Project XL. The ongoing relationship, however, raises concerns regarding cooption of group leaders. Overall, however, concerns with cooption are maybe less likely in this context. Although the labor movement in the United States has experienced its share of scandals and dubious dealings, there is very little doubt that unions are independent organizations, unlikely to be coopted by the employer.

Finally, the affiliation between local and national unions will provide the locals with the necessary resources, expertise, and information to properly negotiate with employers over the adoption of the regulatory framework.

Overall, the approach outlined here is amenable to the aim of flexible regulation: empowering the groups and individuals that are the subject of the regulatory regime. By allowing employers and employees to, in effect, define the details of their rights and obligations in regard to the labor relations process the rules-menu approach will allow the parties to tailor the regulation to the needs and idiosyncrasies of a particular industry and even a particular firm. This flexibility could be accomplished without compromising the protections currently afforded employees under the various statutes. Employees will have the same voice as the employer in choosing the appropriate set of rules that will govern their employment rights.

CONCLUSION

The express package delivery industry provides us with a unique research opportunity of exploring the impact that regulation has on the ability of firms to compete within a single industry. This Article takes advantage of that opportunity. By comparing the three regulatory regimes regarding labor relations in the express package delivery industry, the Article contributes to our understanding of the competitive effects of regulation.

The Article analyzes the cost implications of having firms within the same industry subject to different labor laws, and identifies the inequities that result from the current frameworks applicable to the express delivery industry.

The Article then turns this weakness into a possible strength by outlining the contours of a new labor law regulatory framework in which firms and employees are allowed to choose the set of labor regulations that will govern their relationship. In the spirit of new experiments with flexible regulation, the framework introduced here relies on the input provided by those that will be affected by the regulatory scheme, to provide a more dynamic and tailored regulatory environment.

