small banks, these banks may have difficulty in securing sufficient capital from stock sales; and as a result, banking services in the community may suffer. Most independent banks are not able to import equity capital from other regions of the nation because, for all but the largest ones, the market for a bank's stock is largely confined to the bank's service area.

Economists who have analyzed bank holding companies have consistently concluded that the subsidiaries of bank holding companies have significant advantages over independent banks in acquiring new capital.[14] The reason is that the stocks of most bank holding companies are traded in active national or regional markets. Thus, if the subsidiary banks are in need of additional capital, the holding company can acquire it by selling its own stock in these markets. It can also be said that holding companies are able to achieve a better allocation of equity capital than independent banks. Through stock sales the holding company is better able to acquire capital from capital-surplus areas and transfer this capital to banks that are located in areas characterized by a shortage of capital.

In addition, holding companies are capable of achieving a more satisfactory distribution of the retained earnings of banks. Under independent banking one might find some banks, especially those in slow-growth areas, building their capital ratios to levels in excess of that which is considered necessary, while other banks in rapidly growing areas may find their capital positions impaired because retained earnings are currently inadequate. The holding company, however, has the ability to allocate the aggregate retained earnings of the bank group in accordance with the needs of the individual banks.[15]

ADDITIONAL BANKING SERVICES TO THE COMMUNITY

The quantity and quality of banking services are somewhat related to the operating results of banks. A more efficient banking organization can offer banking services at a lower price or can offer additional or better services at the same price. However, holding companies also assert that they can provide some services to a community through their subsidiaries that a comparable independent bank cannot provide —services such specialized business loans, special checking accounts, trust services, consumer credit, and so forth, that require highly specialized knowledge. A holding company subsidiary has the advantage of being able to draw upon specialized managerial talents from any of the banks in its bank group. While correspondent banks can assist in the provision of specialized services, it is argued that the holding company arrangement results in closer cooperation among affiliated banks than would be the case with independent correspondent banks. Moreover, the ability to supply specialized banking services still depends to a large extent upon the capabilities of management at the individual bank; and holding companies declare that they are able, for reasons cited above, to supply their banks with better management.

[14] See for example, W. Ralph Lamb, *Group Banking* (1961), pp. 148–51.

[15] The extent to which a bank holding company can achieve a more rational allocation of equity capital is dependent upon the degree of autonomy possessed by the directors and managements of the subsidiary banks. In order to achieve the optimum distribution of equity capital (or of bank credit), the managements of the subsidiary banks must desire to maximize the profits of the *holding company*, not necessarily their own bank's profits. The "carrot approach" to instilling this desire is to grant options on the stock of the holding company to the managements of the subsidiary banks.

BETTER ALLOCATION OF BANK CREDIT

The potential supply of bank credit available to a given community depends in large part upon the income and the wealth of economic units in the community. The availability of bank loans to economic units in the community, however, is largely determined by the types of assets bankers choose to hold. If a bank has relatively large amounts of U.S. Government securities and "due from" balances in its asset structure, it is clear that large amounts of potential bank credit are being transferred away from this community. If there is little loan demand, this is desirable in terms of the optimum allocation of bank credit; but if potential bank credit is being transferred out of the community because the bank's management lacks the ability to make some specialized types of loans or because of restrictions imposed by the bank's lending limit, then the best allocation of bank credit is not being achieved. Holding companies assert that because they can provide management with the requisite skills and can overcome at least some of the limitations imposed by lending limits at individual banks, their banks can more adequately meet the credit needs of the community.

Benefits to the Community

The basic nature of the holding company form of banking organization permits component banks to commit a greater proportion of potential bank credit to the communities in which the subsidiary banks are located. Bank holding companies are generally comprised of banks located in different communities or in different sections of large metropolitan areas. Consequently, the combined portfolios of all of the subsidiaries of the holding company are more diversified than the portfolio of a single bank and, therefore, less risk would be associated with the holding company portfolio. Moreover, each individual subsidiary bank can assume that, should difficulties arise, assistance would be available from its coaffiliates. For these reasons, the risk associated with a given level of loans would be less for a subsidiary bank than it would for a comparable independent bank; hence, with risk preference being equal, a subsidiary bank would have a higher loans/assets ratio than a comparable independent bank.

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[16] If country banks paid fees for correspondent services, the outlying community would gain. The country bank's profit would be unaffected, because the fee paid for the correspondent services is presumably equal to the income that the bank could derive by shifting its excess correspondent balances into earning assets. But the community served by the country bank would have additional credit resources available to it. For a discussion of the fee system and banker reaction to it, see U.S. Congress, House, Banking and Currency Committee, 88th Cong., 2d sess., *Correspondent Relations: A Survey of Banker Opinion* (Oct. 21, 1964), especially p. 63.

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Greater Credit Mobility

Credit mobility is required to meet the credit needs of many communities because (1) some communities will be capital-surplus areas while others will be capital-deficit areas; and (2) some borrowers in a given community will have credit needs that exceed the lending limits of the local banks. Two important arrangements that the banking system in the United States has used to achieve mobility are participation loans and the sale of loan paper from one bank to another and from banks to other financial intermediaries. These arrangements have not been fully available to the subsidiaries of a bank holding company because of certain provisions in the original 1956 Act. Under the original Act the sale of loan paper and the granting of a loan by one banking subsidiary to another bank in the same holding company were prohibited. Because of these restrictions, loan participations between banks in the same group had to be arranged at the time the loan was made. Such restrictions did not, however, apply to transactions between an independent country bank and its city correspondent. Critics of the original Act argued that these restrictions prevented, in some degree, the realization of one of the significant advantages of bank holding companies—greater interregional mobility of bank credit.

Though the provisions of the original Act appeared to place subsidiaries of bank holding companies at a disadvantage to independent banks in terms of making loan participations and of buying and selling loan paper,[19] strong arguments remained in support of a position that greater credit mobility could be achieved via a holding company arrangement than via independent banks linked by conventional correspondent relationships.[20]

The extent to which loan participations are employed clearly depends upon the willingness of small banks to request participation by their city correspondent and upon the willingness of the latter to do so. Small independent banks are often reluctant to seek participations from the large correspondent banks for fear that the customer will be lost to the large bank. This fear is apparently often justified, for in a survey of city correspondents, the large banks

[17] See for example, Governor J. L. Robertson's dissent in the Denver U.S. Bancorporation case. *Federal Reserve Bulletin*, Nov. 1963, p. 1529.

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[19] The restrictions were not so damaging to holding companies as it may at first appear. Although it was not legal for, say, Subsidiary Bank A to purchase loan paper from Subsidiary Bank B (if A and B are subsidiaries of the same holding company), Bank A could increase Bank B's liquidity by making a direct loan to one of Bank B's customers. This loan would enable the customer to repay his loan at Bank B. The final result would be the same as if Bank A had purchased an equivalent amount of loan paper directly from Bank B.

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A holding company subsidiary is less likely to be reluctant to seek loan participation from the lead bank of its group because the holding company would probably prohibit one of its banks from pirating the account of a customer of another of its subsidiary banks. Also, in securing loan participation the small independent bank is in a relatively poor bargaining position with respect to, say, the large money-market banks. A subsidiary of a bank group, given that the banks in the group have substantial interbank balances with a money-market bank, would be in a much better position to bargain for loan participations.

In addition to arranging loan participations, local banks can meet the excess credit demand of the community by selling their existing loan paper to other commercial banks or other financial intermediaries. Despite the prohibition that was placed on the sale of loans to holding company subsidiaries, the holding company arrangement probably enabled a subsidiary bank to dispose of loan paper more easily than a comparable independent bank because the latter could not generate the volume of loans needed to interest institutional buyers of loan paper, such as, life insurance companies and savings and loan associations. The bank holding company, however, can make arrangements with these institutions to purchase the loan paper of all of the subsidiaries in the bank group and thus assure the institution of a steady flow in reasonably large volume. The ability of the holding company to standardize credit procedures further aids in facilitating such transactions.

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Effects of the Amended Act

The restrictions upon loan participations and upon the sale of loan paper between banking subsidiaries of the same holding company were based on section 6 of the original Bank Holding Company Act. This section was repealed by the 1966 amendment; but section 23A of the Federal Reserve Act was amended so that its restrictions on banking affiliates were also applied to the subsidiaries of bank holding companies.[22] These restrictions state that a banking affiliate may not loan or otherwise extend credit to another affiliate or to the holding company if the total amount of loans or extensions of credit to the other affiliate exceeds 10 per cent of the lending affiliate's capital and surplus or if the total amount of loans or extensions of credit to all affiliates (including the holding company) exceeds 20 per cent of the lending affiliate's capital and surplus. (Under the original Act, loans from one banking subsidiary to another or to the holding company, that is, "cross-stream" and "upstream" loans, were prohibited.) However, because the purchase of loan paper without recourse is not considered an extension of credit, it appears that no significant restrictions now exist on the purchase of loan paper by one subsidiary from another or on loan participations between subsidiaries.

The extent to which the restrictions of the original Act prevented holding companies from achieving their desired allocation of bank credit is not known; but whatever the extent, these barriers now appear to have been substantially eliminated.

[22] Under section 23A, a banking affiliate includes any corporation of which a member bank owns or controls more than 50 per cent of the voting shares. In the amended section 23A, affiliate now includes, with respect to any insured bank, any bank holding company of which such bank is a subsidiary as defined by the 1956 Bank Holding Company Act, and any other subsidiary of this bank holding company.

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II

The Case for Bank Holding Companies

The arguments in support of bank holding companies may be classified into four broad categories: (1) improved operating results of individual banks; (2) strengthened capital structure of banks, thereby adding to depositor safety and reducing supervisory problems; (3) additional banking services to the communities served by subsidiaries of these companies; and (4) better allocation of bank credit. In the terminology of the Bank Holding Company Act of 1956 the first two arguments relate to the "banking factors," while the last two relate to the "convenience and needs" of the community. Each argument is considered below.

IMPROVED OPERATING RESULTS

In virtually all applications from bank holding companies for additional acquisitions, it is argued that the operating efficiency of the acquired bank will improve as a result of affiliation. Bank holding company groups, by their very nature, have more possibilities for organizing the production of banking services than independent banks. The latter must produce banking services themselves or "buy" them from correspondents. Banks in a holding company group, however, may produce their own services or may buy them from nonaffiliated correspondents, from the lead bank [12] of the holding company group, from the holding company, or from a nonbanking subsidiary of the holding company. This greater flexibility may enable bank holding companies to use more efficient operating techniques.

For example, it may be more efficient to have the lead bank of a holding company or a nonbanking subsidiary provide computer services to all banks in a bank group than to have the same number of independent banks purchase such services from correspondents or produce the services for themselves.[13] In other words, to the extent that economies of vertical integration exist in banking, a holding company can take advantage of them. Economies of scale are not the relevant consideration here, for if economies of scale exist in the production of banking services, they will exist for the large correspondent bank as well as for the lead bank

[12] Refers to the dominant bank in the group.

[13] The services that a bank might purchase from its holding company or another affiliate—or which a nonaffiliated bank might buy from its correspondent—include check clearing and collection services, investment advice, foreign banking services, purchases of equipment and supplies, employees benefit programs, and many others. For a comprehensive list of services offered by correspondent banks, see U.S. Congress, House, Banking and Currency Committee, 88th Cong., 2d sess., *Correspondent Relations: A Survey of Banker Opinion* (Oct. 21, 1964), pp. 25-26.

of a holding company or a nonbanking subsidiary.

Another potential source of differences in operating efficiency, which is closely related to basic organizational structure, is in the quality of management. One of the major arguments in support of the holding company arrangement is that the holding company can acquire and train, for its affiliates, managers who are superior to the managers of comparable independent banks. This argument may be valid even though large city banks offer training programs to the managements of their small correspondents, because, it is argued, bank holding company systems are able to attract more talented individuals to the banking industry. They are able to do this because such a system can presumably offer greater challenges and opportunities for advancement to capable young men than can the typical independent bank.

Bank holding companies may also contribute to greater labor mobility within the banking industry and thus foster a more efficient allocation of labor resources, particularly management resources. The holding company can allocate its labor resources in a way that maximizes its profits, although not necessarily the profits of a particular subsidiary bank. Thus, while an independent bank is unlikely to suggest the transfer of one of its capable officers to one of its correspondent banks in order to overcome a management problem at the latter, a holding company would effect such a transfer between subsidiaries if the holding company would benefit. Further, common pension plans within a holding company system can assist in overcoming some of the institutional barriers to labor mobility that currently exist in this country.

The above arguments support a position that subsidiary banks are able to operate more efficiently than comparable independent banks. However, improved operating results may also come from larger revenues. There are strong arguments to support a position that holding company subsidiaries are able to earn a greater return on assets. One is that the superior management capabilities of holding companies enable the subsidiary banks to earn a greater return on their investments through better investment management. Another is that subsidiary banks are able to commit a greater proportion of their assets to a high-yielding asset —loans. (This argument is examined in the discussion of bank credit, beginning on page 8.) Thus, the higher loans/assets ratio and the greater return on investments that subsidiaries can presumably achieve enable them to earn a larger return on assets than can comparable independent banks.

STRENGTHENED CAPITAL STRUCTURE

The second category of arguments in favor of bank holding companies is that they strengthen a bank's capital structure. A bank's capital may be increased by the sale of stock and/or the retention of earnings. Banking tradition and the pressures of bank examiners cause banks to maintain relatively conservative capital/deposits, capital/assets, and other capital ratios. Consequently, if a bank is to continue to meet the expanding credit and service demands of its community, it must continually increase its capital. The problem of maintaining capital ratios is particularly acute for banks located in rapidly growing areas.

For additions to capital, the independent bank must rely upon the sale of its own stock and/or upon its own retained earnings. Because no active market exists for the stock of

small banks, these banks may have difficulty in securing sufficient capital from stock sales; and as a result, banking services in the community may suffer. Most independent banks are not able to import quity capital from other regions of the nation because, for all but the largest ones, the market for a bank's stock is largely confined to the bank's service area.

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The potential supply of bank credit available to a given community depends in large part upon the income and the wealth of economic units in the community. The availability of bank loans to economic units in the community, however, is largely determined by the types of assets bankers choose to hold. If a bank has relatively large amounts of U.S. Government securities and "due from" balances in its asset structure, it is clear that large amounts of potential bank credit are being transferred away from this community. If there is little loan demand, this is desirable in terms of the optimum allocation of bank credit; but if potential bank credit is being transferred out of the community because the bank's management lacks the ability to make some specialized types of loans or because of restrictions imposed by the bank's lending limit, then the best allocation of bank credit is not being achieved. Holding companies assert that because they can provide management with the requisite skills and can overcome at least some of the limitations imposed by lending limits at individual banks, their banks can more adequately meet the credit needs of the community.

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How would bank credit be allocated under the holding company form of banking organization? One of the long-standing arguments against bank holding companies is that they drain money capital from rural and suburban areas, the beneficiary being the big city.[17] In rebuttal, the supporters of bank holding companies stress the independence of the directors of the subsidiary banks.[18] Presumably these directors are local leaders who strive to and are able to protect their community's interests. A good case can be developed to support both arguments. However, if the holding company acts to maximize its profits, the loanable funds would be channeled into those areas where the highest net return (after allowance for risk) is available. Such an allocation of bank loans means that potential bank credit would be transferred from communities with relatively little loan demand to communities with high loan demand.

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Sec. 10. AS 06.05.235 is repealed and AS 06. is amended by adding a new chapter 06 Bank Holding Companies to read:

06.06.005 - DEFINITIONS. (a) "Bank holding company" means any company (1) that directly or indirectly owns, controls, or holds with power to vote 10 per centum or more of the voting shares of any bank or of a company that is or becomes a bank holding company by virtue of this chapter or (2) that controls in any manner the election of a majority of the directors of any bank; and, for the purposes of this chapter, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company. Notwithstanding the foregoing, (A) no bank and no company owning or controlling voting shares of a bank shall be a bank holding company by virtue of such bank's ownership or control of shares in a fiduciary capacity, except as provided in paragraphs (2) and (3) of subsection (g) of this section, (B) no company shall be a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of securities if such shares are held only for such period of time as will permit the sale thereof on a reasonable basis, and (C) no company formed for the sole purpose of participating in a proxy solicitation shall be a bank holding company by virtue of its control of voting rights of shares acquired in the course of such solicitation.

(b) "Company" means any corporation, general or limited partnership, joint adventure, business trust or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the

effective date of the trust, but shall not include any corporation the majority of the shares of which are owned by the United States or by the State of Alaska.

(c) "Bank" means any financial institution in this state that accepts deposits that the depositors have a legal right to withdraw on demand.

(d) "Subsidiary", with respect to a specified bank holding company, means (1) any company 10 per centum or more of whose voting shares is directly or indirectly owned or controlled by such bank holding company, or is held by it with power to vote; or (2) any company the election of a majority of whose directors is controlled in any manner by such bank holding company.

(e) The term "successor" shall include any company which acquires directly or indirectly from a bank holding company shares of any bank, when and if the relationship between such company and the bank holding company is such that the transaction effects no substantial change in the control of the bank or beneficial ownership of such shares of such bank.

(f) "Commissioner" means the commissioner of commerce.

(g) For the purposes of this chapter

(1) shares owned or controlled by any subsidiary of a bank holding company shall be deemed to be indirectly owned or controlled by such bank holding company;

(2) shares held or controlled directly or indirectly by trustees for the benefit of (A) a company, (B) the shareholders or members of a company, or (C) the employees (whether exclusively or not) of a company, shall be deemed to be controlled by such company; and

shares
(3)/transferred after the effective date of this act by any bank holding company (or by any company which, but for such transfer, would be a bank holding company) directly or indirectly to any transferee that is indebted to the transferor, or has one or more officers, directors, trustees, or beneficiaries in common with or subject to control by the transferor, shall be deemed to be indirectly owned or controlled by the transferor unless the Commissioner, after opportunity for hearing, determines that the transferor is not in fact capable of controlling the transferee.

06.06.010 - ACQUISITION OF BANK INTERESTS. (a) It shall be unlawful, except with the prior approval of the Commissioner, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank: or (5) for any bank holding company to merge or consolidate with any other bank holding company. Notwithstanding the foregoing this prohibition shall not apply to (A) shares acquired by a bank, (i) in good faith in a fiduciary capacity, except where such shares are held under a trust that constitutes a company as defined in section 5(b) and except as provided

in paragraphs (2) and (3) of section (5) g, or (ii) in the regular course of securing or collecting a debt previously contracted in good faith, but any shares acquired after the effective date of this act in securing or collecting any such previously contracted debt shall be disposed of within a period of two years from the date on which they were acquired; or (B) additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition.

(b) The Commissioner shall not approve

(1) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking, or

(2) any other proposed acquisition or merger or consolidation under this section whose effect may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the Commissioner finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

(c) In every case, the Commissioner shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

(d) No application under this section shall be approved unless the resulting bank holding company or bank holding companies maintains its principal office and conducts its principal operations in Alaska.

06.06.015 - ACQUISITION OF NONBANK INTERESTS. (a) Except as otherwise provided in this Act, no bank holding company shall

(1) after the effective date of this Act acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or

(2) after two years from the effective date of this Act or the date it becomes a bank holding company, whichever is later, retain direct or indirect ownership or control of any voting shares of any company which is not a bank or a bank holding company or engage in any business other than that of banking or of managing or controlling banks or of furnishing services to or performing services for any bank of which it owns or controls 10 per centum or more of the voting shares.

The Commissioner may, upon application by a bank holding company, extend the period referred to in paragraph (2) above from time to time as to such bank holding company for not more than one year at a time, if, in his judgment, such an extension would not be detrimental to the public interest, but no such extensions shall in the aggregate exceed three years.

(b) The prohibitions in this section shall not apply to

(1) shares of any company engaged or to be engaged solely in one or more of the following activities: (A) holding or operating properties

used wholly or substantially by any banking subsidiary of such bank holding company in the operations of such banking subsidiary or acquired for such future use; or (B) conducting a safe deposit business; or (C) furnishing services to or performing services for such bank holding company or its banking subsidiaries; or (D) liquidating assets acquired from such bank holding company or its banking subsidiaries or acquired from any other source prior to the effective date of this Act, or the date on which such company became a bank holding company, whichever is later;

(2) shares acquired by a bank in satisfaction of a debt previously contracted in good faith, but such bank shall dispose of such shares within a period of two years from the date on which they were acquired, except that the Commissioner may upon application by such bank holding company extend such period of two years from time to time as to such holding company for not more than one year at a time if, in his judgment, such an extension would not be detrimental to the public interest, but no such extensions shall extend beyond a date five years after the date on which such shares were acquired;

(3) shares acquired by such bank holding company from any of its subsidiaries which subsidiary has been requested to dispose of such shares by any Federal or State authority having statutory power to examine such subsidiary, but such bank holding company shall dispose of such shares within a period

of two years from the date on which they were acquired;

(4) shares held or acquired by a bank in good faith in a fiduciary capacity, except where such shares are held under a trust that constitutes a company as defined in section 5(b) and except as provided in paragraphs (2) and (3) of section 5(g);

(5) shares which are of the kinds and amounts eligible for investment by national banking associations under federal law;

(6) shares of any company which do not include more than 5 per centum of the outstanding voting shares of such company;

(7) shares of an investment company which is not a bank holding company and which is not engaged in any business other than investing in securities, which securities do not include more than 5 per centum of the outstanding voting shares of any company;

(8) shares retained or acquired with the approval of the Commissioner in any company performing any activity that the Commissioner has determined, after notice and opportunity for hearing, is functionally related to banking in such a way that its performance by a subsidiary of a bank holding company can reasonably be expected to produce benefits to the public that outweigh possible adverse effects;

(9) shares lawfully acquired and owned prior to the effective date of this Act by a bank which

is a bank holding company, or by any of its wholly owned subsidiaries.

06.06.020 - LIABILITY OF BANK HOLDING COMPANIES. A bank holding company is primarily liable for the payment of the debts of its subsidiaries which are banks.

06.06.025 - ADMINISTRATION. (a) Within one hundred and eighty days after the effective date of this Act, or within one hundred and eighty days after becoming a bank holding company, whichever is later, each bank holding company shall register with the Commissioner on forms prescribed by the Commissioner, which shall include such information with respect to the financial condition and operations, management, and intercompany relationships of the bank holding company and its subsidiaries, and related matters, as the Commissioner may deem necessary or appropriate to carry out the purposes of this chapter. The Commissioner may, in its discretion, extend the time within which a bank holding company shall register and file the requisite information.

(b) The Commissioner is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof.

(c) The Commissioner from time to time may require reports to keep him informed as to whether the provisions of this chapter and such regulations and orders issued thereunder have been complied with; and the Commissioner may make examinations of each bank holding company and each subsidiary thereof, the cost of which shall be assessed against, and paid by, such holding company. The Commissioner shall

use available reports of examinations by federal and state supervisory authorities for the purposes of this section.

(d) All administrative proceedings under this chapter shall be conducted in accordance with AS 44.62.330 - 630.

06.06.030 - EXEMPTIONS. This chapter does not apply to bank holding companies which are registered under the Federal Bank Holding Company Act of 1956.

06.06.035 - INJUNCTIONS AND PROSECUTION OF OFFENSES. (a) Whenever it shall appear to the Commissioner, either upon complaint or otherwise, that the provisions of this chapter, or of any regulation prescribed under its authority, have been or are about to be violated, he may, in his discretion, either require or permit any person or company to file with him a statement in writing as to all the facts and circumstances concerning the subject matter which the Commissioner believes to be in the public interest to investigate, and may investigate such facts.

(b) Whenever it shall appear to the Commissioner that any person or company is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any regulation prescribed under its authority, he may in his discretion, bring an action in the Superior Court for the State of Alaska, to enjoin such acts or practices, and upon a proper showing temporary or permanent injunctive relief shall be granted. The Commissioner may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute appropriate criminal proceedings.

06.06.040 - PENALTIES. Any company which willfully violates any provision of this chapter, or any regulation or order issued by the Commissioner pursuant thereto, shall upon conviction be fined not more than $1,000 for each day during which the violation continues. Any individual who willfully participates in a violation of any provision of this chapter, or any regulation or order issued by the Commissioner pursuant thereto, shall upon conviction be fined not more than $10,000 or imprisoned not more than one year, or both. Every officer, director, agent and employee of a bank holding company or a subsidiary who willfully makes false entries in any book, report, or statement of such bank holding company shall upon conviction be fined not more than $10,000 or imprisoned not more than 5 years, or both.

06.06.045 - JUDICIAL REVIEW. Any party aggrieved by an order of the Commissioner under this chapter may obtain judicial review in accordance with AS 44.62.560 - 570.

CAB/TAB HEARINGS

EXHIBIT "B"

EXHIBIT
ATC No. 1

IN THE MATTER OF:

THE ALASKA SERVICE INVESTIGATION

DOCKET 20826

POSITION PAPER

ALASKA TRANSPORTATION COMMISSION

I N D E X

POSITION PAPER

OF

ALASKA TRANSPORTATION COMMISSION

STATE OF ALASKA

The official position of the Alaska Transportation Commission (ATC) in this proceeding, the ALASKA SERVICE INVESTIGATION, can be summarized as follows:

1. That this investigation of primarily-intra-Alaska service should have been initiated by the Civil Aeronautics Board (CAB) as a joint board proceeding (as provided for in 49 USC 1324) thereby combining the regulatory efforts of both the CAB and this Commission in this matter. However, having failed to initiate it as a joint proceeding, the investigation should, nevertheless, be concluded in that vein with a joint decision.

2. That the Alaska Transportation Commission is a state regulatory agency with responsibilities on the state level similar to the responsibilities of the CAB on the federal level; that the limited role of "party" relegated to the Commission, notwithstanding its major function as a decision making body, is highly inappropriate in this proceeding; that this Commission cannot and should not develop recommendations as to specific route authorities, realignments, competitive service, subsidies, mail service, etc., without first having before it all evidence, briefs, etc., of all parties; that further, this Commission cannot and should not make any such specific recommendations without close coordination of its policies and conclusions with the policies and conclusions of the CAB; and that this review and close coordination can only be accomplished at the decisional level of this proceeding.

3. That the standards of performance and adequacy of service being provided by CAB certificated carriers in Alaska bear directly and forcibly upon the issues in this proceeding; that the importance of these questions pervades the entire spectrum of issues; and that fact-finding, public hearings as provided for

in CAB regulations [302.14 and 399.61(c)], are an essential ingredient of this proceeding if an informed decision on the issues is to evolve.

4. That the CAB is completely out of touch with the real operational conduct of its carriers in this State; that that conduct as measured in terms of service, effort, concern, public interest and operational integrity is deplorable; and that these conditions must weigh heavily in the CAB's determination of its future course of action in the exercise of its jurisdiction.

5. That the recent mergers and purchases of CAB-regulated carriers engaged in Alaska air transportation appear to have led to a substantial deterioration of intrastate service to virtually all communities and areas except those major cities where competition exists in fact.

6. That a formal and thorough investigation into matters of rate levels, rate discrimination, other discriminatory practices, accounting practices relating to separation of scheduled air transportation activities from other activities, efficiency, claims and refund practices and other matters of similar nature of Wien Consolidated Airlines and Alaska Airlines should be initiated by the CAB on its own motion as a logical outgrowth of this Service Investigation.

7. That approximately 95 percent of the scheduled intrastate air service in Alaska is being provided directly or indirectly by carriers certificated by the CAB over routes authorized thereto by the CAB and thus far regulated exclusively by the CAB. This situation has outlived its justification and has become a substantial burden on the public of Alaska.

8. That the exercise of regulatory authority by the State of Alaska should be substantially extended (preferably in cooperation with the CAB) over intrastate routes and over all carriers serving such routes. Over those routes where it remains essential or otherwise desirable for the CAB to exercise primary jurisdiction, the

machinery should be established for joint regulation by the CAB and the ATC, or in the alternative, regulation by the CAB upon consultation with the ATC.

9. That the practice whereby CAB-certificated carriers subcontract the scheduled performance of segments of their routes to local state-regulated carriers is not in the public interest. It is the position of this Commission that such subcontracts are unlawful and constitute a usurpation by the CAB carrier of the regulatory jurisdiction of this Commission.

10. That the contractual arrangements for the intrastate transportation of mail are outdated, inadequate and inappropriate. This matter needs a complete review toward the end of providing better service and adequate compensation to the carrier actually performing that service.

11. That matters relating to subsidy needs of, and payments to, carriers engaged in intrastate air service (including mail service) and the use to which such subsidies are put in competitive practices are of major concern to this Commission as well as to the CAB. A realistic and imaginative review should be made of the basis and need for subsidy and the qualifications for and the formulas under which subsidies should be paid.

12. That all carriers which serve Alaska and are regulated by the CAB, including those providing on-line interstate gateway service, should be required by the CAB to file concurrently with the ATC copies of all applications for routes, exemptions, tariff changes, transfers, and all other such documents which relate to Alaskan air commerce and which are filed with the CAB. It is essential that the State of Alaska be adequately and fully apprised of those matters affecting air commerce to and within the State.

13. That there is a serious need for closer cooperation and consultation between the CAB and the ATC. This Commission recognizes that the actions taken by each agency can, and frequently do, have a significant effect on those carriers regulated

by the counterpart agency. The expertise, long experience and competent staff of the CAB could be of great benefit to this Commission. Similarly, this Commission could materially assist the CAB with its need for local information, surveillance and general local contact.

INTRODUCTORY NOTE

The foregoing summary delineates those matters upon which the Commission takes a position at this time. The body of this Position Paper elaborates on the points raised in the summary. It provides in greater specificity some of the more important reasons for stressing those points, and it develops in greater depth some rather compelling considerations involving jurisdiction and cooperation between the CAB and the ATC.

Submitted also are a number of exhibits in three separate series groups. The "100" series is composed of ATC requested or prepared exhibits presented primarily in an informational context. The "200" series contains published economic studies relating to the economy of individual communities or areas. The "300" series consists of statements, etc., pertaining primarily to sufficiency and standard of service.

So as not to unnecessarily burden this proceeding with repetitious evidence pertaining to sufficiency and standard of service, the Commission determined to present rather extensively the views of a single community as representative of prevailing views throughout the State. This approach presupposes, of course, that a substantial identity of view exists among people throughout the State as to compatibility of evidence. Indeed, after an extensive survey, the Commission found that such an identity or view does exist to a substantial degree.

The rather extensive written expressions received from the Bethel area (Exhibits ATC-300-312) are accordingly submitted as representative of views not only throughout the Wien Consolidated route system, but (to a slightly lesser degree) throughout Alaska Airlines' system as well. 1/

These expressions from Bethel form a major part of the ATC-300 series; the remainder of that series consists of a few typical written expressions from various other communities throughout the State. The Common elements in all these expressions will easily be noted.

1/ Views of the people of Anchorage and Fairbanks and their immediate environs were not surveyed and have not been considered in arriving at these conclusions.

The official position of this Commission is expressed in this Paper and comparison of that position with the community expressions in the ATC-300 series will indicate substantial identi y of view. In fact, this Paper will refer hereafter to some of those exhibits as supporting basis for various aspects of the Commission's position. The Commission does not necessarily concur in all of the community and individual views expressed in the ATC-200 and 300 series of exhibits.

THE ALASKA TRANSPORTATION COMMISSION, REGULATORY ARM OF THE STATE

The Alaska Transportation Commission was created as a separate and distinct State regulatory agency in 1966 (Chapter 139 SLA 1966, establishing Chapter AS 42.07). Prior to that time, the Alaska Air Commerce Act of 1960 was administered by the Alaska Public Service Commission. The ATC was substantially reorganized by Chapter 104 SLA 1969 in which a three-man Commission was provided in place of the previous two-man Commission.

The Commission is responsible for the administration and enforcement of the Alaska Air Commerce Act of 1960. As a general proposition, that Act provides for the regulation of air commerce within the State of Alaska in the public interest.

Three general classifications of air carrier are established by the State Air Commerce Act. They are the scheduled carrier, air taxi carrier, and the contract carrier. The Alaska law provides that for a carrier to engage in intrastate air commerce within the State, it must first be certificated by the Alaska Transportation Commission within one of these three general classifications.

In addition to certification, the Commission also regulates in varying degrees (depending upon the classification) the routes, rates, tariffs, safety of operations of aircraft, base of operations, etc., of intrastate air carriers.

The Commission also has the authority to grant exemptions to the certification requirements under specified conditions and for a limited period of time. In all cases, applications for new or revised authority must meet public convenience and necessity tests.

MORE THAN 75 PERCENT OF TOTAL PASSENGER TRAFFIC CARRIED BY CAB CARRIERS BETWEEN ALASKAN POINTS IS INTRASTATE -- THE SUBJECT OF STATE REGULATION

A review of the informational responses of Alaska Airlines and Wien Consolidated Airlines discloses that the vast majority of passengers carried between Alaskan points by CAB carriers is actually moving in intrastate commerce only.

Wien's Exhibit (WC-IR-201) containing O & D information for the month of October, 1969, shows that slightly over 90 percent of all of Wien's passenger load (including on-line and inter-line traffic) was intrastate only. And, if the number of interstate passengers who did not move intrastate beyond the points of entry into Alaska (other than between Juneau and Fairbanks) is subtracted, it can be seen that approximately 96 percent of the passenger movement over Wien's intrastate interior system was in no way involved in interstate commerce.

Similar information is not so easily developed for Alaska Airlines. However, a close examination of the Southeast Alaska network of Alaska Airlines reveals that at least as to that part of its system, the vast majority of the passenger movement between Southeast Alaska communities is strictly intrastate.

With some exceptions, Alaska Airlines did not disclose October, 1969, O & D information for most of its Southeast Alaska bush route system. However, from the information that was provided as well as other information available to this Commission including special O & D information requested by this Commission of Southeast Alaska air taxi subcontractors and other operators, it appears that over 90 percent of the scheduled inter-community passenger movement in Southeast Alaska in October, 1969, was intrastate.

Summer tourist traffic substantially increases the volume of interstate passengers moving between Alaskan points both in the Southeast Alaska system of Alaska Airlines and over the system of Wien Consolidated Airlines. The air tours offered by tour operators and the airlines bring a substantial influx of visitors to the State. The through-intrastate movement of these tourists, however, is generally limited to only the very few points covered in the tours.

It is also true that the summer movement of purely intrastate passengers increases very substantially. It can be seen, for example, in Exhibit ATC-105 that the Third Quarter Air Taxi passenger movement is more than twice that of the Second and Fourth Quarters, and more than three times that of the First Quarter. O & D information submitted by the carriers (to the extent that it can be so broken down) also indicates a much larger intrastate movement in the summer.

Thus the ratio of intrastate to interstate passenger traffic in the summer would probably be not less than 70 percent for the route systems discussed above.

ALL INTRA-ALASKA ROUTES REGULATED BY THE CAB REFLECT A MAJOR CAB-ATC JURISDICTIONAL OVERLAP

In most respects, the responsibilities and objectives of the Alaska Transportation Commission in intrastate air commerce matters are similar to those of the CAB in interstate air commerce matters.

Due to the long-standing and intimate involvement of the CAB in Alaska's air commerce, it would be impossible to draw a fine line between the jurisdiction of the CAB and the jurisdiction of this Commission. This ALASKA SERVICE INVESTIGATION itself epitomizes the jurisdictional overlap in integration of federal and state regulatory practices and policies.

Excluding the Seattle/Portland gateway services, virtually all point to point service and routes being considered in this proceeding are intrastate in nature. With respect to much of this service, interstate commerce is incidental or insignificant compared with intrastate service requirements. It is estimated that carriers regulated primarily by the CAB provide in excess of 95 percent of the scheduled intrastate air service within Alaska. This appears to be a most unusual situation, as well as one of questionable validity, if the CAB jurisdiction is exercised unilaterally.

It follows that in Alaska where air transportation is one of the most important transportation modes and a basic necessity to the entire economy of the State, it is essential that the State exercise major, if not primary, regulatory jurisdiction.

EXCLUSIVE CAB REGULATION OF SPECIFIC INTRASTATE AIR ROUTES AND CARRIERS HAS PROVEN TO BE NON-RESPONSIVE TO THE NEEDS OF LARGE SEGMENTS OF THE STATE

The matter of the exercise of so broad a jurisdiction by the CAB over intrastate routes is not in and of itself the major problem. What is unfortunate, however, is the unresponsiveness of this arrangement to the needs and complaints of the people who are presumably being served. It appears that the remoteness of the CAB from the area of operations of its regulated carriers substantially influences the objectives of the CAB in its regulatory policy as applied to intra-Alaskan services. This remoteness tends to insulate the CAB from operational and service matters (other than those which may be called to its attention by the carriers), the result being that the Board primarily concerns itself about only those problems, such as subsidy payments, which are its direct and exclusive responsibility. It appears that with respect to Alaskan carriers the overriding objective of the CAB is, and has for some time been, the elimination of subsidies with all possible dispatch.

There is little doubt that this primary objective is being achieved. However, it is also quite apparent to anyone familiar with Alaskan air transportation services that this primary objective is being achieved at great sacrifice in public service.

The CAB cannot be totally unaware of the vast deterioration in intra-Alaska air service over the past three or four years. But, it seems certain that the Board does not fully recognize or appreciate the magnitude and implications of these conditions.

THE DOMINANT OBJECTIVE IN THIS PROCEEDING -- REASONABLE ADEQUACY AND PERFORMANCE OF CARRIER SERVICE; THE APPROACH TO ACHIEVING THAT OBJECTIVE -- JOINT INVESTIGATION AND REGULATION

The instigation of the ALASKA SERVICE INVESTIGATION is unquestionably an important and commendable undertaking by the CAB. However, the issues which have been delineated by the Board reflect a continuing and virtually exclusive preoccupation with the subsidy issue and a most unfortunate lack of appreciation for the standards and adequacy of service.

It is the position of this Commission, however, that the adequacy and standards of service dominate as issues and the Board should and must consider them in this proceeding. Assuming the accuracy of this contention, it becomes at once apparent that

there are major deficiencies in the procedures adopted by the CAB in this Service Investigation.

We call the Board's attention to the provisions of the Federal Aviation Act of 1958 (49 USC 1324), titled Cooperation With State Aeronautical Agencies:

> "(b) The Board is empowered to confer with or to hold joint hearings with any State aeronautical agency, or other State agency, in connection with any matter arising under this chapter within its jurisdiction, and to avail itself of the cooperation, services, records, and facilities of such State agencies as fully as may be practicable in the administration and the enforcement of this chapter."

We cannot conceive of a more appropriate occasion for the Board to have implemented the above quoted statute than the instant proceeding. The fact that it did not do so strongly suggests that the Board considered this Service Investigation to be little more than a fairly routine route proceeding. And, perhaps having little more to go on than the carriers' side of the story, the Board could justify that conclusion. However, even if it were routine, the fact that so great a proportion of the routes under investigation are primarily intrastate in nature, should have been sufficient for the Board to have proposed a joint board proceeding. It is elementary that the role of this Commission as simply a party in this proceeding effectively precludes participation by the State in the decisions affecting nearly all scheduled service in intrastate air commerce.

The Commission recognizes that the CAB has not specifically made an issue of the bush route services to those communities listed in Appendix C, but not shown in Appendices A and B, of CAB Order 69-3-68. Nor has the CAB determined to take up the issue of the relative jurisdiction of the CAB and this Commission. However, these issues are necessarily an integral part of this proceeding and, as previously stated, the issue of adequacy and standards of service over the bush route segments of the CAB carriers' authority is one of the dominant issues to be considered. It can be seen that these issues are interrelated. The exclusive regulatory jurisdiction heretofore exercised by the CAB over the Alaska routes has not resulted in reasonably satisfactory or adequate service to most of the communities in the State.

Additionally, the broad assumption of regulatory jurisdiction on an exclusive basis by the CAB seriously subverts effective local regulation. It encourages CAB regulated carriers to avoid state regulation and to look only to the CAB for route changes, tariff changes, etc. (See, for example, Exhibit ATC 104). The State seldom receives timely notice of such requests.

HEARING PROCEDURES ADOPTED BY THE CAB IN THIS INVESTIGATION PRECLUDE AN ADEQUATE EVIDENTIARY RECORD ON DOMINANT ISSUES -- ATC PUBLIC HEARINGS MAY PARTIALLY REMEDY THIS PROBLEM

In a proceeding such as this ALASKA SERVICE INVESTIGATION, where historical carrier performance is a matter of major significance, it is imperative that the consumer public be liberally afforded an opportunity to speak its piece.

Unfortunately, the restriction to a formal hearing process sans less formal public participation effectively thwarts this objective. It is well known that a good cross section of public opinion cannot be obtained in a matter of this sort without holding public, forum-type hearings.

To partially remedy the public participation problem, this Commission belatedly requested and was granted (with concurrence of all other parties) an extension of time in which to conduct open public hearings on its own and outside the CAB record.

During the latter part of February and early March, 1969, the ATC held open, public, forum-type hearings throughout the State and made numerous personal contacts with people throughout the State for the purpose of determining (1) the major concerns and views of the community in regard to air transportation and (2) the manner in which the people of this State may be better served in air commerce.

Hearings were held at the following places: Barrow, Kotzebue, Nome, Unalakleet, Andreafski (St. Mary's), Bethel, Dillingham, King Salmon, Kodiak, Kenai, Cordova, Valdez, Tok, Fort Yukon, Haines, Sitka, Juneau, Petersburg, Wrangell, and Ketchikan. Each of these hearings was conducted by one or more of the three Commissioners. The time, place and nature of these hearings was noticed in advance by public media and individual correspondence although notice was necessarily very short. There were in attendance from a handful to

forty or more people at each hearing. Anyone who desired to speak was permitted to do so. All testimony was recorded and most of these recordings were subsequently reviewed by the Commissioners. Portions thereof were transcribed for further, more detailed review.

People attending these hearings were encouraged to submit their views in writing and a fair representation did so.

Based upon these hearings, letters and numerous other contacts with people throughout the State, the Commission has determined that there are major and inexcusable deficiencies in the service provided by those CAB carriers serving intra-Alaska routes. This is poignantly clear in the so-called bush route areas. Such matters as extreme delays in mail and freight deliveries; inexcusable schedule delays or cancellations; inability to have claims and refunds settled within several months of filing; frequent and unannounced schedule changes; untrained personnel; discriminatory rates and improper charges; commonplace misinformation on flight arrivals and departures; frequent frustration in attempting to make interline connections; substantial failure to meet published departure and arrival times; inability of local people to obtain space on flights to and from tourist centers because all seats booked solid for several days at a time by tour passengers; the frequent unavailability of scheduled flights theoretically being performed by subcontractors, etc., were common complaints throughout the State. Most of these problems are presented in varying forms in Exhibit 300 series statements.

THE ALASKA TRANSPORTATION COMMISSION RECOMMENDS THAT THE ALASKA HEARINGS TO BE CONDUCTED BY THE CAB EXAMINER BE BROADENED IN SCOPE TO INCLUDE A PUBLIC EXPRESSION MISSION

It is the conviction of this Commission that the service conditions previously enumerated do predominate in most areas of the State. However, we do not presume complete agreement by the carriers involved.

Therefore, the ATC strongly urges that the forthcoming hearings to be held by the CAB in Alaska should likewise be of a nature that would allow general public participation and oral testimony.

CARRIER MERGERS AND CONSOLIDATIONS APPEAR TO HAVE LED TO MAJOR DETERIORATION OF INTRASTATE SERVICE THROUGHOUT THE STATE

Within the last three years there have been several mergers and purchases of CAB certificated carriers serving Alaska. In very brief summary, these mergers and consolidations were:

1. Wien Airlines and Northern Consolidated Airlines to form Wien Consolidated Airlines, Inc., April, 1968.

2. Western Airlines purchased Pacific Northern Airlines, July, 1967.

3. Alaska Airlines with Cordova Airlines, and with Alaska Coastal Ellis Airlines, surviving as Alaska Airlines, Inc., February and March, 1968.

There appears to be a direct correlation between the merger of the larger CAB carriers serving Alaska and the deterioration in air service to outlying communities and areas.

Western Airlines, for example, has been systematically ridding itself of what might be properly termed "local service obligations." It has suspended its service to King Salmon, Cordova, and Yakutat. It seeks to rid itself of its route between Anchorage, Kenai, Homer and Kodiak. In essence, it appears that Western's real objective in absorbing Pacific Northern Airlines was to acquire only the high-traffic-density, Seattle/Portland gateway routes to Alaska, and to succeed to the favored position of PNA in its application for Anchorage-Hawaii authority as consolidated in the Trans-Pacific Route Investigation.

Having accomplished these objectives, Western Airlines now shows no interest in the air service needs of the remainder of those communities previously served by PNA.

Alaska Airlines, in its two mergers, has gained access to the Anchorage-Juneau-Sitka-Seattle-Portland market. Ketchikan has not yet been added to this service route by the CAB, but the result of this omission has been the creation of some abnormal and unsatisfactory scheduling and service conditions in the Ketchikan, Juneau, Sitka feeder service from other Southeastern Alaska communities.

In essence, what the CAB has done in Southeast Alaska over the last five years is to substitute in substantial part Alaska Airlines and Wien Consolidated Airlines for Pan American World Airways in the interstate service to Southeast Alaska. This

substitution has never met the approval of the people of this area.

Alaska Airlines inherited by its merger a multiplicity of intra-Southeast Alaska routes. Many of the services previously provided by Alaska Coastal Ellis Airlines have been discontinued by Alaska Airlines entirely. A large number of the remaining point to point routes which Alaska purportedly continues to serve are in fact served by air taxi operators under subcontract with Alaska Airlines (Exhibit ATC-103).

It was anticipated that the merger of Wien Airlines and Northern Consolidated Airlines would provide a materially strengthened carrier which would result in a better service to the public than either carrier was capable of providing individually.

Unfortunately, the emerged carrier, while providing more sophisticated equipment and service to the large competitive markets, has retracted its service to the outlying communities. In markets where Wien Consolidated is not competing with another carrier, its service and performance have deteriorated markedly.

Between 1957 (the first year Northern Consolidated subcontracted out part of its route) and November 1, 1967, Northern Consolidated and Wien Alaska subcontracted a total of 34 points on their routes. Since May 1, 1969, Wien Consolidated has subcontracted thirty additional points (Exhibit ATC-103).

The inverse relationship between mergers and deteriorating service to outlying communities appears to be a very real one. Apparently when a carrier reaches substantial size, gains access to major markets, and places into operation sophisticated jet equipment, it loses its interest and perhaps capability to provide adequate service over marginal routes.

Unfortunately, the bush-level scheduled carriers, which develop from these circumstances, do not inherit any of the better traffic markets because those markets are already occupied by the large carriers.

CAB CARRIER SUBCONTRACTS ARE UNLAWFUL AND CONTRARY TO PUBLIC INTEREST

Wien and Alaska have submitted into the record copies of their agreements with air taxis under which the latter provide

local scheduled service. Exhibit ATC-103 graphically portrays the networks of such service routes. In each case, the subcontractor is a State-certificated air taxi operator. However, only two of the fifteen subcontractors are certificated by the State as scheduled carriers. And, even in those instances where the subcontractor is certificated to provide scheduled service, many of the points listed in his State route authority are different from those he serves under subcontract.

Further investigation also reveals that the subcontractor generally serves the contract points both as a scheduled carrier and as an air taxi operator. In many instances, the volume of traffic carried as an air taxi to such points substantially exceeds the volume carried as the subcontractor. It may be that in many such cases traffic which the subcontractor is carrying under the contract limited to multiple coupon, involving travel over more than one ice leg.

Air taxi operators are required by State law to charge only those rates which have filed with this Commission. It is immaterial whether service is being provided on a trip by trip basis or under a long-term contract.

Thus, for such an operator to comply with the laws of the State of Alaska as to the charges which he may make, he cannot charge the rates and the tariffs of the CAB contracting carrier, unless such rates happen to coincide with those of the air taxi operator which are on file.

Under some of the contracts the operator is paid a flat hourly rate by the mainline carrier irrespective of the number of passengers, volume of freight, etc. The mainline carrier then collects its tariff rates from the sub's passengers and shippers.

Other subcontractors apparently collect and keep as their compensation the published CAB tariff rates of the mainline carrier.

The air taxi operator's tariff normally reflects hourly rates. The cost per passenger would depend on the number of passengers travelling between two given points on the same flight. Thus it would appear that there is only one point in the passenger-time relationship at which the air taxi rate per passenger could be the same as the passenger rate of the scheduled CAB carrier.

This subcontract approach is even further clandestine in that the CAB carrier, rather than this Commission, makes the determination as to which, if any, local Alaska certificated carriers will become scheduled carriers and will be allowed to carry mail for compensation. This leads to an unhealthy control by a major airline of the independent operations of locally-certificated carriers. It also leads to a reduction in competition and service through a mutual arrangement not to compete. Although the CAB regulated carrier remains ultimately responsible for the actions and performance of the subcontractor, they in fact exercise no supervision over the sub, do not know what the sub is doing or not doing, and apparently couldn't care less. With many of the subcontractors, the only scheduled service provided occurs on mail flights (if there is room) and mail is delivered sporadically.

One further point should be made before leaving the matter of subcontracts. There is no assurance that a contract will not be terminated on short notice; or that it will be renewed upon expiration; or that it will not be given to a different local operator; or that the CAB carrier itself will not terminate the contract and initiate the service itself. Thus, the State-certificated operator builds his operation and his capability with no assurance that he may continue to provide that service for any length of time.

The CAB carrier is neither qualified nor authorized to designate local carriers upon which it will bestow operating privileges within this State.

There have been numerous complaints to the effect that some subcontractors of CAB carriers are providing poor, sporadic, inadequate and unsatisfactory service to the people they supposedly serve. These conditions add emphasis to the impropriety of the route subcontracts.

IT APPEARS THAT THE AIR TAXI OPERATORS, PARTICULARLY IN SOUTHEAST ALASKA, NOW PROVIDE THE ONLY DEPENDABLE BUSH ROUTE SERVICE

The Commission has requested confidential O & D information of Southeast Alaska air taxi operators for the months of August and October, 1969. The response to this request was sufficient to indicate that the air taxi operators are now carrying a very

substantial percentage of the passenger traffic between communities presumably being served by Alaska Airlines.

The response to the Commission's request represents about one-third of the total volume of passenger movement by air taxi operators. The information submitted shows a weighted average of approximately 60 percent of the passenger load carried by the responding air taxi operators in the Third Quarter of 1969 as passengers moving between points on Alaska Airlines' scheduled route. It is believed that this average may be somewhat high as a reflection of the total Southeast Alaska air taxi movement. However, even if the percentage was reduced to 44 percent (the lowest of the reporting operators) it would mean that in the Third Quarter of 1969 air taxi operators in Southeast Alaska transported approximately 26,000 passengers between points listed on Alaska Airlines' scheduled route. This matter is well highlighted by the fact that Alaska Airlines in its informational response (IR-AS-1) shows the number of O & D coupon passengers carried by it between Juneau and Hoonah in the month of August, 1969, as 184. However, one air taxi operator alone shows a total of 840 passengers transported between Juneau and Hoonah during the same month.

It is the Commission's belief that these circumstances vividly reflect a virtually-complete abandonment by Alaska Airlines of its responsibilities under its CAB certificate to provide a dependable scheduled service to these outlying communities. In essence, the people of Southeast Alaska must look to the air taxi operator if they are going to receive a modicum of dependable service between the communities of Southeast Alaska.

The extent to which the results of the Commission's survey in Southeastern Alaska can be translated to other areas of the State is not known. However, the Commission has received considerable indication that the ratios may be similar in the Northwest, Southwest, and Interior areas as shown in Exhibit ATC 105.

UNILATERAL DECISION BY THE CAB WOULD BE IMPROPER IN THIS PROCEEDING

As procedural matters now stand, the decision in this Service Investigation is to be made unilaterally by the CAB.

This approach places the Alaska Transportation Commission in a rather unique position (since it is the regulatory body on

the State level). As pointed out earlier in the text of this Paper, the regulatory jurisdiction of the State is at least as substantial as that of the CAB.

Therefore, what the Commission is apparently being asked to do is decide for itself the issues in this proceeding without benefit of the evidentiary record and briefs and thereupon make its recommendations to the CAB as would any other party.

Such an approach, even if it were practical, would serve little purpose. It is essential that the jurisdictional questions be squarely faced and the utmost in cooperative effort be pursued by both the CAB and the ATC. This Commission currently has in its files a substantial number of applications for intrastate scheduled authority. The Commission has deferred consideration of all such applications (upon which hearings have not been held in the past six months) pending the outcome of this ALASKA SERVICE INVESTIGATION. Even where hearings had been held previous to this policy decision, the granting of authority where warranted by the public convenience and necessity has been limited to a one-year period.

It is intended by the Commission to systematically review the scheduled service requirements of limited geographical areas in a series of State area service investigations and to provide for the certificated service so badly needed in many areas of the State.

It would be a complete frustration of regulatory responsibility if the CAB and the ATC failed to integrate their efforts in these matters which so vitally affect the public interest.

DATED at ANCHORAGE, ALASKA, this 14th day of April 1970.

ALASKA TRANSPORTATION COMMISSION

Dennis L. Marvin

Dennis L. Marvin, Commissioner

George L. Benesch

George L. Benesch, Commissioner

James J. Johnson

James J. Johnson, Commissioner

EXHIBIT "C"

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF COMMERCE

ALASKA TRANSPORTATION COMMISSION

750 MACKAY BUILDING
338 DENALI STREET—ANCHORAGE 99501

May 5, 1970

This letter was sent to applicant air carriers representing 13 docketed applications for intrastate scheduled carrier authority.

SUBJECT: Your Application for Scheduled Carrier Authority -- Docket No. _____.

Dear Mr.

The purpose of this letter is to inform you as to the status of your subject Docketed Application for Scheduled Air Carrier authority.

As you may already know the Commission is a party in the ALASKA SERVICE INVESTIGATION of the Civil Aeronautics Board, Docket No. 20826. Upon a close investigation, we believe that the issues in the CAB proceeding touch upon all existing or proposed scheduled service between all points within the State. We have, therefore, taken the position that neither the CAB nor this Commission should act wholly unilaterally in developing an adequate, efficient, feasible and statewide intrastate network of scheduled service

In keeping with this policy the Commission has for the last several months deferred final consideration of all new applications for scheduled service not previously acted upon unless such deferral would create a serious public hardship in a particular case or the application may otherwise be non-controversial. We intend to continue this policy of deferral over the next few months, at least until the direction the AIASKA SERVICE INVESTIGATION is going to take has been demonstrated.

It is the contention of this Commission that much of the intrastate service such as that for which you have applied is and should be regulated by the State. At the same time, the Commission recognizes that a proliferation of numerous intrastate scheduled carriers could significantly affect the operations of the carriers heretofore regulated exclusively by the CAB. We believe the public interest demands that the regulatory efforts

of the Federal and State governments be substantially coordinated to avoid duplication of effort, conflicting decisions and objectives, adverse effects on the carriers and the public, etc.

This Commission has therefore placed itself in a posture whereby such coordination and joint effort can be accomplished. We are assuming, of course, that the CAB is similarly interested in such cooperation and coordination.

At such time as these applications for scheduled service are again considered (hopefully within the next few months) we propose to initiate local area service investigations for the purpose of developing an adequate, viable, feasible network of local carriers. This program will be preceded by a rule-making proceeding for the purpose of adopting guideline regulations and to give the industry and public an opportunity to be heard on the procedure, problems and objectives.

We appreciate your continued patience and understanding in this matter.

Sincerely yours,

George Benesch

George Benesch
Commissioner

EXHIBIT NO. D

An examination by the staff of the Alaska Transportation Commission as of May 4, 1970, shows that the matters set forth below are pending before the Commission.

There follows hereinafter an analysis of these pending matters. The analysis attempts to group the matters so as to reflect the type of issues and problems involved. It further attempts to explain the general nature of each group and seeks to explain the responsibility of the Commission in deciding these matters so that reasonable time factors can be applied to the determination of each group of matters.

1. Contested Matters: This class of cases involves applications for permanent authority to operate air taxi, scheduled carrier, and contract carrier in air commerce; applications for temporary and emergency temporary authority for operation as an air taxi, scheduled carrier, and contract carrier in air commerce; applications for permanent and temporary authority for what are known as common carriers - freight, common carriers - passenger, and contract carrier - freight, in motor carrier commerce. Other classes of cases involve authority to operate air cushion vehicles and water carrier (ferry) vessels. Each of these cases has been protested by one or more individuals or companys and each application will require public hearing estimated to average from 4 to 5 days.

   Contested cases requiring hearing 87

2. Uncontested Matters: This class of cases involves matters in which there have been no formal protests but in which either an informal or formal hearing will be required by the Commission in order to determine whether it is in the public interest to authorize either air, surface, air cushion, or water (ferry) carriage. This class of cases also includes those matters in which formal oral argument is required by the Commission on either or both contested cases (which have been heard) or uncontested cases.

   Hearings on uncontested cases or cases which require argument and Commission decision 66

3. Other Matters: This class of cases involves matters which require Commission study and perhaps additional hearings (not included above). These cases involve such matters as complaints alleging violations of the transportation law, requests for interpretations of the law, review of policy determinations made by prior Commissions, review of the operation and practices of operating carriers in which the public interest is involved.

Cases involving so-called Other Matters 13

4. Pending Decisions: This class of cases involves matters that have been heard by the Commission and cases which have not required a public hearing but which require the study, examination and exercise of judgment and discretion of the Commission. In all cases formally or informally heard by the Commission under the present law it is necessary for each Commissioner to fully study and analyse the record and all exhibits presented before entering into conference for decision.

Cases involving Pending Decisions 6

5. Special Matters:

(a) The Commission during the past several months has held over 20 hearings throughout the state in connection with the Civil Aeronautics Board's Alaska Service Investigation (Air Route Investigation). These hearings have averaged from 2 to 4 days per hearing (including travel time). Upcoming are six hearings within Alaska and at least two hearings in Washington, D.C. (Please see explanation of the nature and scope of these hearings, supra). These hearings are policy making in nature and hearing officers would not be able to attend to these matters nor exercise the discretion and judgment required.

Estimated time for CAB hearings	30 days
Estimated time for briefing and argument	30 days

(b) The transportation industry of Alaska has changed dramatically during the last few years. The industry is no longer a 'small-time' matter. Regulations of the Transporation Commission as they now exist were based on a much smaller and less complicated industry. The regulations have proven to be grossly inadequate and incomplete to meet the needs of our modern and growing industry. This fact is widely known throughout the industry particularly among attorneys practicing within this field. The regulations must be completely revised. Revision of regulations of the transportation industry is a vast and major task. There is no provision under the law for this task to be accomplished by other than the Commission itself. The revision necessary of regulations

governing air, motor carrier (freight and passenger), air cushion vehicles and water (ferry) carriers will require extensive research and study and may take as long as one year. This work must be performed by the Commission because these regulations involve many involved issues of policy, practice and procedure. Work on this revision of regulations which is very immediately necessary will require time that is now devoted to the hearing of cases.

Estimated time for revision of regulations 1 year

(c) In addition to revision of the transportation regulations there is an urgent need for a reclassification of carriers within each of the groups, i.e., air, surface, air cushion and water. The Commission now has planned at least three reclassification hearings. These hearings will involve the taking of testimony from all interested members of the industry, and the public.

Estimated time for reclassification hearings 30 days

EXHIBIT "A"

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

ALASKA SERVICE INVESTIGATION DOCKET 20826

PETITION BY ALASKA TRANSPORTATION COMMISSION

FOR JOINT BOARD PROCEEDING

Communications with respect to this document should be sent to:

G. KENT EDWARDS
ATTORNEY GENERAL
By Shirle A. Debenham
Assistant Attorney General
Attorney for Alaska Transportation Commission
338 Denali St., 750 Mackay Bldg.
Anchorage, Alaska 99501

Anchorage, Alaska

April 28, 1970

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

ALASKA SERVICE INVESTIGATION DOCKET 20826

PETITION BY ALASKA TRANSPORTATION COMMISSION
FOR JOINT BOARD PROCEEDING

COMES NOW the ALASKA TRANSPORTATION COMMISSION (ATC) and petitions the Civil Aeronautics Board to implement the provisions of the Federal Aviation Act of 1958 (49 USC 1324) which authorize the C.A.B. to hold joint hearings and otherwise perform such acts, to issue such orders and to make such procedure as necessary to carry out the provisions of the Act relating to cooperation with State regulatory agencies; and in keeping with the objectives of such provisions, the ATC petitions the C.A.B. to reconstitute the Alaska Service Investigation as a Joint Board proceeding to be conducted and decided jointly by the C.A.B. and the ATC.

In support of its petition, the ATC respectfully states as follows:

I

The ATC is the duly constituted regulatory agency of the State of Alaska as provided by law (Chapter AS 42.07); and as such, is the agency responsible for the regulation of intrastate air commerce under the Alaska Air Commerce Act, Chapter AS 02.05.

II

The ATC is presently a party intervenor in the Alaska Service Investigation and as such is limited to participation on the evidence-producing level and to making recommendations to the C.A.B. without first having benefit of a complete record.

III

Approximately 95 percent of all scheduled intrastate air service in Alaska is provided by air carriers regulated exclusively by the C.A.B.; and between approximately 75 and 95 percent of all traffic moving between points in Alaska is intrastate rather than interstate movement and subject to regulation by the State.

IV

The ATC has conducted informal public hearings throughout Alaska in connection with the Alaska Service Investigation. It has done this as a

response to numerous requests of the public for such hearings and by virtue of the commendable understanding of the Board's Hearing Examiner in the Alaska Service Investigation who granted an extension of time to the Commission for this purpose. (All parties concurred in an extension of time substantially as requested by this Commission.) As a result of such hearings, and the Commission's additional investigations and familiarity with the intrastate air commerce needs of Alaska, the Commission has submitted, as a direct exhibit, a Position Paper directed primarily to the matters of CAB-ATC jurisdiction, regulatory objectives, and essentiality of substantially closer cooperation between the C.A.B. and this Commission. The summary of this Position Paper is attached to this petition and by reference made a part of this petition in support thereof.

V

It is essential that the jurisdictional questions be squarely faced and the utmost in cooperative effort be pursued by both the C.A.B and the ATC. This Commission currently has in its files a substantial number of applications for intrastate scheduled authority. The Commission has deferred consideration of all such applications (upon which hearings have not been held in the past six months) pending the outcome of this Alaska Service Investigation. Even where hearings had been held previous to this policy decision, the granting of authority where warranted by the public convenience and necessity has been limited to a one-year period.

It is presently intended by the Commission to systematically review the scheduled service requirements of limited geographical areas in a series of State regional service investigations and to provide for certificated service as needed in the many areas of the State.

If the C.A.B. and the ATC failed to integrate their efforts in these matters which so vitally affect the public interest, effective regulation would be very substantially frustrated.

The ATC recognizes that these matters and this petition should have been submitted to the C.A.B. at a much earlier stage in the Alaska Service Investigation proceeding (ideally at its inception or at least prior to the prehearing conference).

Unfortunately, this was not possible. The Commission was completely reorganized by repeal and reenactment of the Alaska Transportation Commission Act in May 1969 (Chapter 104, SLA 1969).

The policy developed herein is that of the new three-man Commission which Commission was not complete until January 1970. (Only one of the present three Commissioners was appointed to office prior to the prehearing conference in September 1969.)

It is the Commission's belief, however, that the Alaska Service Investigation proceeding can still be restructured as a Joint Board proceeding even at this less timely stage particularly since no new issues will be added to delay the present proceeding schedule.

WHEREFORE, the Alaska Transportation Commission respectfully requests the Civil Aeronautics Board to reconsider the unilateral nature of the Alaska Service Investigation and to more appropriately in the overall interest of the public, reconstitute it as a Joint Board proceeding by the C.A.B. and the ATC.

Respectfully submitted,

G. KENT EDWARDS
ATTORNEY GENERAL

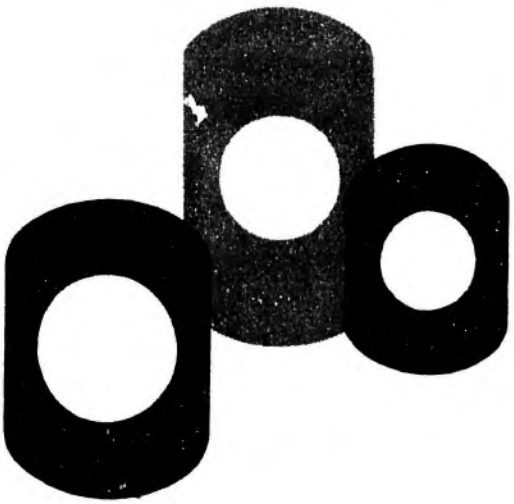
By: Shirle A. Debenham
Assistant Attorney General
Attorney for Alaska Transportation Commission

April 28, 1970.

CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of April 1970 mailed true and correct copies of the PETITION BY ALASKA TRANSPORTATION COMMISSION FOR JOINT BOARD PROCEEDING, properly addressed and postage prepaid to all parties of record in this proceeding.

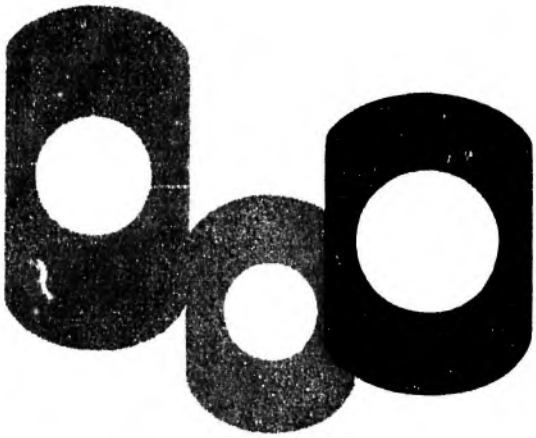
Shirle A. Debenham
Assistant Attorney General
Attorney for Alaska Transportation Commission



CHALLENGES TO COLLECTIVE BARGAINING

Proceedings of Conference

edited by Benjamin C. Sigal



LABOR-MANAGEMENT EDUCATION PROGRAM

Industrial Relations Center
College of Business Administration
and
College of General Studies
University of Hawaii
Honolulu, Hawaii
September 1968

Proceedings of
Conference on

CHALLENGES TO COLLECTIVE BARGAINING

August 11, 1967
Honolulu, Hawaii

edited by Benjamin C. Sigal

LABOR-MANAGEMENT EDUCATION PROGRAM
Industrial Relations Center
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September 1968

SPEAKERS

BENJAMIN AARON	Professor of Law and Director of the Institute of Industrial Relations, University of California, Los Angeles. Labor Arbitrator and Umpire for various industries. Former Public Member of the Wage Stabilization Board.
NATHAN P. FEINSINGER	Professor of Law, University of Wisconsin. Labor Arbitrator. Former Chairman of Presidential Fact-Finding Boards on Steel and Meat Packing Industries and former Chairman, National Wage Stabilization Board.
THEODORE KHEEL	Attorney. Labor Mediator and Arbitrator. Member of many presidential fact-finding and arbitration boards. Executive Director, Foundation Employees Health, Medical Care and Welfare, Inc.; Partner-Battle, Fowler, Stokes and Kheel; former Chairman, New York Regional Board, National War Labor Board.
HAROLD S. ROBERTS	Senior Professor of Economics, and Director of Industrial Relations Center, College of Business Administration, University of Hawaii. Labor Arbitrator and Consultant on personnel problems. Former Chief of Collective Bargaining, Bureau of Labor Statistics, U.S. Department of Labor.
JACK STIEBER	Professor of Economics and Director of the School of Labor and Industrial Relations, Michigan State University. Served as Executive Secretary to the President's Advisory Committee on Labor-Management Policy and as Research Consultant to the International Labour Organization. Consultant to public and private agencies.

PREFACE

The discussions contained in this publication were presented in a Conference on Challenges to Collective Bargaining held in Honolulu, Hawaii on August 11, 1967. The Conference was held under the auspices of the Labor-Management Education Program of the University of Hawaii. Both the Conference and this publication were made possible by funds allotted under Title I of the Higher Education Act of 1965.

The basic theme to which the discussions were directed was that changes are required in our attitudes, our concepts, and our laws, in order to deal effectively with new problems arising in labor-management relations in both the public and private sectors. The material in this volume makes a useful contribution to public understanding of many of the complex issues involved.

Harold S. Roberts, Director
Industrial Relations Center
July 1968

Benjamin C. Sigal, Director
Labor-Management Education Program

TABLE OF CONTENTS

A New Approach to Strikes in Public Employment

Jack Stieber

The U. S. Department of Labor reported 142 work stoppages in public employment last year, involving 105,000 workers who were idled for 455,000 days. This made 1966 the biggest year, by far, for strikes in Government. There were more than three times as many strikes as in 1965 and more than twice as many as in the previous peak year of 1952 during the Korean War. All but nine of the strikes in 1966 were in local government, with schools, sanitation, protection services, and hospitals and other health services, in that order, accounting for close to 90 percent of the total. There were only two stoppages in public transportation, including the celebrated New York City transit strike in January, but they caused more than half of all time lost due to government strikes in 1966. In addition to reported stoppages, which include only those involving six or more workers and lasting at least one day or shift, there were undoubtedly others of a few hours duration, not to mention mass resignations by teachers and nurses, "reporting sick," "work-ins" and other strike substitutes. This article will deal primarily with the strike problem at the local level where it is most pressing.

While still insignificant in number of strikes, workers involved, and days lost, as compared with any other industry, strikes in public employment pose a major problem in labor-management relations in the United States today. There are several reasons why so few strikes should occasion so much concern.

First, all strikes in government are in violation of the law. They are specifically prohibited by the Taft-Hartley Act, by all states which have public employment relations laws, and by numerous court decisions. The willingness of so many otherwise law-abiding citizens to violate and defy the law poses a moral issue as well as a practical problem of how to deal with such stoppages.

Second, many government services are vital to the normal functioning of the community. Strikes by policemen, fire fighters, and prison guards are intolerable and even the organizations to which these employees belong do not assert the right to strike. Strikes in hospitals, sanitation, and public utilities may present a threat to health or safety if they last more than a few days. Public transit, especially in a few large cities, is so important to the convenience and economic well-being of the people that many would classify it as an essential service. And, strikes which close schools disrupt the social, economic and emotional lives of more people than almost any other kind of work stoppage.

Third, strikes in public employment are bound to increase because government is the largest and fastest-growing industry in the United States and public employees are joining unions at a rapid rate. In October 1966 there were 11½ million government employees--2.9 million Federal, 2.2 million state and 6.4 million local. This total is expected to grow to 15 million by 1975 when one out of every five employees will be working in government. In the AFL-CIO, almost the only unions which are growing rapidly are those operating in government. The American Federation of Government Employees, which organizes Federal employees, claims 250,000 members; the State, County and Municipal Employees, 350,000; and the Teachers' Union, 132,000; increases of 300 to 500 percent for each union over the last decade. Equally important are professional associations which, under pressure from union competition, act more and more like unions. The largest and most powerful of these is the million member

National Education Association and its state and local affiliates. To most people, employee organization and strike go together and there is nothing in the record of recent years to dissuade them of this belief.

Actually, concern over the strike issue has overshadowed the great progress that has been made in public employee-management relations in the last few years. The 1960's have already earned a place in labor relations history as the decade of the public employee. Executive Order 10988 signed by President Kennedy in 1962; comprehensive state laws in Wisconsin, Michigan, New York, Connecticut, Massachusetts, Delaware and Minnesota and more limited laws in other states; and municipal ordinances in a number of the largest cities, including New York, Philadelphia and Cincinnati, have finally given government employees rights accorded to private employees thirty years ago: the right to join unions, to have their organizations recognized by employers, and to negotiate over wages, hours and conditions of employment. All the state laws have been passed or substantially liberalized since 1960 and every year finds additional states added to the roster of those with public employment relations laws. However, most states still have no statutes dealing specifically with public employees and a number of others expressly prohibit collective bargaining in government or have declared negotiated agreements to be unenforceable.

Because strikes are prohibited, the states with public employment relations laws have recognized a special responsibility to develop procedures to resolve impasses in negotiations. The principal methods used are mediation and, if that fails, fact-finding with public recommendations. Wisconsin has had the most experience with fact-finding. Between 1962 and 1966, fact-finders were appointed in 38 disputes and their recommendations served as the basis for settlement in 70 percent of the cases. Michigan, whose law was passed in 1965, has resorted to fact-finding in some 50 disputes, with salutary results. Arbitration is provided in most states only at the request of the parties, although a few prescribe compulsory arbitration for disputes involving policemen, fire fighters and public utilities.

Most negotiations in public as in private employment are resolved by the parties with or without the assistance of government mediators. The use of fact-finding--a procedure which is reserved for emergency disputes in private industry but is available in even the smallest and most inconsequential public dispute under most state laws--will result in settlement of all but a few really hard-core disputes. But what about impasses after all efforts to resolve the dispute have failed? Should public employee organizations be denied the ultimate weapon which is available to unions in private industry? What should be done about employees who strike in violation of the law? These questions have aroused great passions among some public employee unions and have led to considerable disagreement among impartial experts in the industrial relations field.

With respect to the second question, the trend is away from laws calling for automatic dismissal or other severe penalties, including re-employment only under extremely harsh conditions, for striking public employees. Experience has shown such laws to be ineffective because elected public officials will almost never invoke them. This was the case in New York under the Condon-Wadlin Act and in Michigan under the old Hutchinson Act. Most states with statutes governing labor relations in public employment do not specify automatic penalties for employees who violate the law by striking. However, the 1965 Michigan law states that a public employer may discipline a striking employee up to and including discharge, and the New York State law, passed in 1967 over bitter union opposition, provides penalties against unions rather than employees. The New York law calls for injunctions to halt public employee strikes and prescribes fines against unions that disobey such court orders, equal to one week's membership dues or $10,000, whichever is less, for each day that the strike continues.

Some of those who oppose a blanket prohibition on strikes in government argue that there cannot be genuine collective bargaining without the right to strike. Take away the strike threat and employers, public and private alike, will realize that they have the upper hand and not engage in real collective bargaining. Unions can cite case after case in which a government employer contended he could not negotiate certain issues but changed his tune quickly when a strike was threatened or actually called. Then, apparently, unsurmountable obstacles to negotiation seemed to fade away and an agreement was reached in short order.

Others consider it illogical and inequitable to deny the right to strike to government employees when it is not denied to employees in private industry doing the same work. Thus, the government, at one level or another, owns and operates printing plants, electric utilities, transit facilities, hospitals, cafeterias, liquor stores and other establishments which are indistinguishable in almost every way from similar facilities in the private sector. In some cases, direct public employment shades over into government-owned but privately-operated enterprises. In atomic installations, for example, collective bargaining modeled on the private sector has been permitted, including strikes, although the operation is wholly financed with public funds. Looking at the problem in another way, one may ask why clerks and office workers in the state capitol or in the highway authority should be prohibited from striking, while electric utility, transit or even hospital employees may strike as long as they work for private employers. Surely, the services supplied by the first group of public employees are less essential to the community than those furnished by the second group of private employees.

Those who support the prohibition against all government strikes do so primarily on three grounds: (1) fear that the principle of sovereignty will be imperilled by legalizing any strikes in government, (2) difficulty in differentiating between essential and non-essential activities, and (3) belief that the strike is an economic weapon which, in government, is not matched by countervailing power normally available in private industry.

The sovereignty doctrine holds that any strike of public employees is an attack upon the state and a challenge to government authority. It has been used for many years and is still cited in some states to deny government employees the right to bargain collectively. However meaningful state sovereignty may be to political scientists, it carries little weight with government employees when it comes to their relationship to the state as employer. Secretary of Labor Wirtz put it succinctly when he said: "This doctrine is wrong in theory; what's more, it won't work." It is interesting to note that other countries do not regard all strikes by government employees as a threat to state sovereignty. Most West European countries limit but do not prohibit all public employee strikes and, in 1966, Canada passed a law which expressly permits Federal employees to strike. The Canadian statute gives unions of government employees a choice between compulsory arbitration or strike action in the event of an impasse in negotiations. The union must indicate which course it will follow at the beginning of each negotiation and may not alter its choice throughout that negotiation.

The essential versus non-essential services approach to government employee stoppages has usually been rejected because of the difficulty of classifying activities in each category. Furthermore, this approach would have to take into account the distribution of employment at the local level, where most all government strikes have occurred. Of the 6.4 million local government employees, more than 3½ million are employed in schools--2.3 million as teachers and 1.2 million in non-instructional activities. An additional 1.6 million are employed in police and fire protection, public welfare, hospitals and health, sanitation, correctional institutions and public utilities. Only 1.3 million are engaged in activities that are clearly non-essential in the sense that interruption of service could be endured for an extended period without posing a threat to the health, safety or welfare of the populace. The employment

distribution will, of course, vary from one community to another. It is clear from these statistics that, if it is to be meaningful, any law which limits the prohibition of strikes to essential government services would have to be narrowly construed and would certainly have to exclude schools, where more than half of all local government employees are concentrated. A law which extended the right to strike only to a small minority of all public employees, most of then unorganized and without the power to carry out a successful strike, would be a hoax.

While the classification of essential and non-essential services would be difficult, I am not convinced that it represents an insurmountable obstacle to legislation which would distinguish between prohibited and permissible stoppages in government employment. This is an administrative problem no more difficult than many others handled by government agencies, and particularly by the National Labor Relations Board in its day-to-day administration of the Taft-Hartley Act.

The third argument against relaxing the prohibition on government strikes is that public employers cannot long withstand stoppages which victimize the community. It is argued that private employers may resort to a variety of weapons to combat strikes: they may lock out their employees; try to operate with other workers; suspend operations, secure in the knowledge that pent-up demand or strike insurance will mitigate economic losses; or even go out of business entirely. The knowledge that potent weapons are available to the opposing sides exerts reciprocal pressures upon the parties to modify their positions to the extent necessary to bring about a settlement. Both unions and employers know from experience that jobs can and have been lost and markets seriously depleted as a result of strikes or settlements leading to non-competitive price increases.

The government employer is in an entirely different position. He cannot lock out his employees or decide to go out of business. Extended suspension of government services is not politically feasible. While government may, in an emergency, call upon the National Guard or the Army to perform certain essential services, this solution does not lend itself, even on a temporary basis, to such public services as education and hospital care. Besides, such action involves political risks which elected officials would be reluctant to take.

The economic and market pressures which operate upon unions and private employers do not usually exist in the public sector. Competitors will not teach children, write relief checks or provide case work services to welfare clients; consumers will not find ready substitutes or learn to do without garbage collection or medical care; excessive settlements will not price most government services out of the market, although the resulting tax increase may drive elected officials out of office.

Certainly there are important differences between strikes in government and work stoppages in private industry. At the same time, strikes by public and private employees have the same economic objectives--the improvement of wages, hours and working conditions. Given the low salaries and poor conditions which often characterize employment in our schools, hospitals, social agencies and other public services, one is loathe to deprive these employees of any legitimate weapon to improve their situation, unless it is clear that irreparable injury may result to the community at large.

The United States has come a long way in dealing with public employee-management relations during the last few years. Future progress will depend, in part, upon how we handle the difficult problem of public employee strikes. What are the lessons of past experience for future policy on this issue?

1. The right to join employee organizations and to negotiate with their employers through representatives of their own choosing should be guaranteed to all public employees at all levels of government, by Federal legislation, if necessary. Government employees in backward states should not be denied these fundamental rights.

2. Governments have a responsibility to promote settlements without interruption of public services. This includes provision for mediation and fact-finding with recommendations in all disputes in which an impasse has been reached in negotiations.

3. Employee organizations and public employers in all government services should be encouraged to develop their own procedures to resolve disputes without interruption of work, including the use of voluntary arbitration. Long experience in private industry has demonstrated that the parties are usually better satisfied with their own solutions than with those imposed from the outside.

4. Regardless of preventive measures or prohibitions and penalties provided by law, strikes in government will occur. Government policy towards such stoppages should take into account the nature of the service provided and the impact upon the public. There is no more reason to treat all strikes in government alike than there is to apply the same yardstick to all stoppages in private industry. Just as a work stoppage on the railroads or waterfront is handled differently from a strike in a widget factory, so should a strike of policemen or fire fighters be regarded differently from an interruption of service in state liquor stores.

5. Public services should be classified into three categories: those which cannot be given up for even the shortest period of time, those which can be interrupted for a limited period but not indefinitely, and those services in which work stoppages can be sustained for extended periods without serious effects on the community.

   –With respect to the first category, which in my opinion would include only police and fire protection and prisons, compulsory arbitration should be used to resolve negotiation impasses but only after all other methods have failed.

   –Strikes in the second group of services, which would include hospitals, public utilities, sanitation and schools, should not be prohibited but should be made subject to injunctive relief through the courts when they begin to threaten the health, safety, or welfare of the community. The courts, in deciding whether or not to issue injunctions, should consider the total equities in the particular case and should utilize their traditional right to adapt sanctions against those violating injunctions to the particular situation, as recommended in the report of the Advisory Committee on Public Employee Relations to Michigan Governor George Romney. The term "total equities" includes not only the impact of a strike on the public but also the extent to which employee organizations and public employers have met their statutory obligations.

   –Work stoppages in government activities which do not fall into either of the above classifications should be permitted on the same basis as in private industry.

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These changes in public policy will come slowly, if at all. Experimentation with different approaches in the states is desirable and should be encouraged. Eventually, however, I believe that laws dealing with employee-management relations in government will tend towards greater uniformity because the nature of public employment differs little among states, and employee organizations, which are national in scope, will insist on equality of treatment for all government employees.

Can Collective Bargaining Deal Effectively with Problems Created by Automation?

Theodore W. Kheel

If anyone in the audience is kind enough to say that he is disappointed that I cannot be with you today, I assure you his distress in no way compares with my own. I looked forward to this conference with great expectations and planned to come early and leave late. I was last in Hawaii 49 years ago and I still have a vivid recollection of its loveliness. I wanted to return to verify the memories I have carried with me all these years.

The beginning of the end of my revisit occurred at 4 a.m. Tuesday, July 18, while I was fast asleep in a hotel in Paris, France. It was 11 p.m., Monday, July 17, in Washington at that hour and President Johnson had just signed the bill ending the railroad strike. I was awakened by the phone ringing in my room and, believe me, had no idea that I would as a result not be able to come to Hawaii. I will leave for reminiscing in smaller groups a description of my first reaction when a man's voice at the other end of the Atlantic Ocean announced that the President was calling. I do not know if I can converse easily with a President under any circumstances. I do know I did not at 4 a.m. on July 18. Of course I said "yes" when the President asked me to serve on the Board to settle the railroad dispute.

I returned the next day, but actually I was on my way back from a conference in Rome on Automation, Full Employment and a Balanced Economy, co-sponsored by the American Foundation on Automation and Employment, Inc., its counterpart in Great Britain, the British Foundation, and the Federations of Swedish Employers and Trade Unions. The American Foundation was formed by labor and management in 1962 to encourage the use of automation by solving the employment problems it creates. The work of the Foundation and the subject matter of the conference are both relevant to the topic assigned to me today.

Full employment is an objective everyone favors, like peace and prosperity. Its attainment was designated a national objective in legislation passed nearly 20 years ago, but it is doubtful if we are any closer to it than we were when that law was passed. Yes, there have been statistical improvements. But we have been measuring our distance from this goal with an index which was, at least until recently, as comparable in precision to our needs, as Galileo's telescope is to modern day radar for measuring the earth's distance from the moon. We now know, for example, that unemployment affects different people in different ways. There are age, sex, color, area, and skill differences, to name merely the obvious. Statistics alone do not and cannot tell the full story.

Until fairly recently, the main drive against unemployment came almost entirely from the labor movement. At the least the riots of this summer have underscored the need for national concern.

Labor's apprehension was most acute in 1963 when the unemployment rate soared over six percent. It has diminished now that shortages have developed, particularly among skilled employees, in many areas of the country. But it still becomes heated when, for example, automation threatens drastically to eliminate jobs in a particular industry.

Collective bargaining can and does help cope with such situations, perhaps not as

fast as employers and others might wish but more significantly than most realize. Adjustments are constantly being made. Moreover, even if labor were disposed to stop automation, it could not succeed. American businessmen have a unique ability to compete. If they are stopped from moving in one way, they invariably devise another. Nor is the labor movement blind to the realities of change, for that is what automation means–dynamic change. Individual leaders may interpose roadblocks at particular times and if they failed to, other leaders would replace them who would. But I find a willingness to explore alternatives, to accept change if its immediate impact can be eased, and to seek to bring the rank and file along on the need for and inevitability of, change. But it doesn't do any good at all if union leadership gets so far ahead of the membership that it cannot help develop and shape worker attitudes.

This is basically the philosophy of the Foundation and it is subscribed to by many unions as well as employers. We not only accept automation as inevitable but welcome it for the benefits it can bring. But we do not shut our eyes to the vast changes it imposes on employees. By seeking to ameliorate those changes, we think automation will encounter less resistance and advance more rapidly.

Most people view automation merely as affecting the blue collar workers and some of the less skilled white collar ones. It is true that they are most obviously affected. But our Foundation made a study of automation's impact on middle management. This study attracted such wide attention that we are now bringing out a second printing. The title is *Automation and the Middle Manager–What Has Happened and What the Future Holds.* I would like to quote to you some of the many conclusions:

> "The computer has already cut deeply into the need for middle managers. But, as a result of our booming economy, there is no evidence of widespread unemployment among middle managers, to date, resulting from installation of computer systems in American Industry. Those displaced have gotten other jobs. Normal attrition thus far has been enough. Nor has there been, as yet, any marked change in the job content of middle management. The job reduction has stemmed mainly from the elimination of clerical functions and the assumption of minor decision-making by the computer.
>
> "The storm signals as well as the potential for the future cannot safely be ignored or overlooked, either by top or middle management or by government planners and manpower specialists. An impressive number of participants in this study have marshalled a persuasive case: The middle manager's job stability in terms of the number and kind of jobs there will be is subject to a far more serious threat and open to greater possibilities than past experience and expected trends in the immediate future would suggest.
>
> 1. While the decisions now being made by computers are characteristically those of employees of lesser rank than middle managers, there are vast areas of middle-management decision-making within the existing capabilities of the computer which are not being realized.
>
> 2. It is not the inherent limitations of computer technology that have prevented a further intrusion by the machines into the traditional preserves of the manager, but the following human deficiencies:
>
>   a. Top management's resistance to change; its skepticism or lack of

orientation to the potentialities of computer systems; and improper use when installed

b. Middle-management hostility to change and conflicts between computer specialists and traditional managers

c. Lack of personnel trained in the programming and operations of computers

d. Failure to structure the work situations of management in ways adaptable to the machine

e. High cost of computer installations.

3. When these difficulties are overcome–and it is a matter of when, not if–it seems clear that the social implications of displacement of managers will not serve as a deterrent to computerization; and that existing industry programs for retraining and early retirement are woefully inadequate to meet the displacement patterns arising as computers approach their maximum utility. Because of the time span involved in removing the human limitations on full computer development, however, there is still the opportunity to (a) recognize the full capability of the machine and (b) plan intelligently for the necessary adjustments in manpower utilization.

"Although there is dissenting opinion as to the foregoing propositions, there is near-unanimous agreement among the company spokesmen interviewed that:

1. There will be a drastic change in the job content of the middle manager: The repetitive tasks will vanish and he will be confronted with a greater variety of information, requiring more rigorous analysis in decision-making. Although his job will be more intellectually demanding, he will find more freedom, more flexibility, and more creativity in it.

2. Middle managers of the future will not be chosen solely from the ranks of computer specialists; among those who remain, there will be a premium on the traditional virtues of leadership, ability to make critical judgments, courage and vision.

3. The corporate structure will contain fewer levels of management responsibility. There will be a greater degree of centralization in the information-gathering, but not necessarily in the decision-making process.

4. Resistance to change by middle managers and hostility between them and computer specialists, though a frequent and sometimes frustrating component of the installation of machine systems, can be minimized by careful top-management planning.

5. There is as yet no radical change in the hiring patterns of middle management; the business administration graduate is still favored over the pure technician, although business-oriented trainees now have had more exposure to scientific disciplines than in the past.

6. The companies surveyed have not introduced, in connection with computerization, programs to retain and upgrade the skills of their middle managers despite their obvious need. Employers and the individual

middle manager have a joint responsibility for remedying potential skill deficiencies through company training programs and self-improvement.

7. American colleges and universities must update and broaden their curricula to meet the future managerial needs of industry. Business schools are under heavy attack for failing to offer either (1)sufficient computer technology or (2) insight into the practical problems of operating an enterprise. But companies are hardly in a position to complain in view of their own training deficiencies.

"The fact is that most managements are not yet prepared for the computer and, in part as a result, the computer has not advanced significantly in the area of middle management. Now is the time for intelligent preparation for the human problems which have delayed the use of the computer and will undoubtedly intensify in the future, for surely the computer will move relentlessly forward as competition and new technology forces its use."

So much for the middle managers.

Let us now examine the impact of automation on collective bargaining, and how collective bargaining is attempting to deal with the problem.

Automation has already profoundly influenced collective bargaining. It has brought the most difficult of bargaining issues--the clash of productivity with job protection--into the forefront of most negotiations. It has contributed materially to the decline in the size of unions and it has placed two expanding groups seemingly beyond the present reach of organized labor: the unemployed and white-collar and technical employees. It has also weakened labor's bargaining strength in certain industries.

All of this has led some observers to conclude that collective bargaining is on the decline or already on the way out. Actually, collective bargaining is working better today than it ever has. There are fewer strikes and more negotiated settlements. Arbitration is being used effectively in settling in-plant grievances. Procedures for inter-union conflicts are being refined. Around-the-year bargaining in joint study committees, such as the Human Relations Research Committee in basic steel, is providing labor and management with new insights and keys to the solutions of their most difficult problems.

Yet the impact of automation on jobs has posed the most critical challenge collective bargaining has ever faced. Because the problems of automation and technological change cannot be solved solely by private parties in collective bargaining, the steps toward constructive answers thus far developed constitute a tribute to the viability of this remarkable institution of voluntary adjustment. I intend to underscore the need for extending rather than contracting the bargaining process as an indispensable adjunct to the mechanics of change.

Organized labor is in effec[illegible]ommitted by policy to the machine and is unwilling as a body to resist industrial progress. Indeed, some unions openly encourage automation. Besides, organized labor knows too well how violently the general public is opposed to "featherbedding" to make this the cornerstone of its policy on automation even if it were inclined to do so. Obviously, there are exceptions. This is not, however, the public view of labor's attitude toward automation. Unfavourable publicity about featherbedding and widespread reporting of a few special situations involving manpower changes have led many to believe that labor is opposed to automation. Thus when George Meany referred to automation as a "curse" at the

biennial convention of the AFL-CIO, in November 1963, his remarks were incorrectly interpreted as opposing automation. But they were more an expression of fear about what automation was going to do and were, in that way, a call for action to cure its consequences. He did not urge, nor has he ever suggested, that automation should be stopped or slowed as a means of avoiding this "catastrophe."

The basic approach of organized labor was best expressed by A. J. Hayes, Co-chairman of the American Foundation on Automation and Employment, in a speech delivered at the University of Portland:

> Properly absorbed and applied, automation can improve the life of workers both on and off the job. It can release millions of human beings from heavy, hazardous, dirty, and monotonous jobs.
>
> More importantly, automation is a means of releasing mankind from the grip of historic scarcity and building a world without want.
>
> Despite our concern, American labor has not reacted to technological change as did the Luddites who roamed the English countryside in the early 19th Century smashing the textile looms that were destroying their jobs. We know that it will not serve society to smash the machines that are today destroying jobs.

Despite the clash of productivity and job security, labor-management relations are maturing and improving. Difficult problems are being solved through collective bargaining, and labor and management are evolving adjustments to the manpower challenge.

The principal methods which private parties have employed to facilitate the adjustment of employees who have been displaced through automation or technological change were listed by Derek Bok. They are:

1. Advanced Notice of Layoff or Shutdown
2. Methods of Avoiding Layoff
   (1) Attrition
   (2) Early retirement
   (3) Retraining
   (4) Transfer
   (5) Relocation allowances
3. Methods of Easing the Burden of Unemployment
   (1) Severance pay
   (2) Supplemental unemployment benefits
   (3) Vesting of pension rights
4. Methods of Facilitating New Employment
   (1) Placement and referral services
   (2) Training for jobs outside the plant
   (3) Union-sponsored training programmes
   (4) Apprenticeship
   (5) Other forms of training
   (6) Antidiscrimination policies

There have been a variety of agreements, many very inventive, designed to reduce the impact of automation. The Kaiser Steel Company–United Steelworkers Long Range Sharing Plan relies on sharing of actual savings in production costs on a month-to-month

basis resulting from improvements in technology and work methods, and also offers several types of employment and income security. The Pacific Coast shipping industry, under an agreement with the International Longshoremen's and Warehousemen's Union, has put up a sum of money to protect employment in West Coast ports.

Basic Ingredient

Intrinsic to these solutions is the use of attrition as the primary ingredient: spare the worker but not the job. As workers leave for one reason or another, or are encouraged to leave through early retirement plans, the existing work force, or as much of it as can be saved, is protected in exchange for the right to introduce new machinery and/or work methods which eliminate jobs. This method of adjustment, of course, does nothing for the unemployed or the new entrant into the job market. Unions naturally concern themselves with the members at hand. They are the dues payers, the ones who attend meetings, who seek job protection from their leaders–with the implied threat of getting other leaders if they do not succeed. The use of attrition has furthered the trend toward reduced employment in unionized industries, and has other consequences as well, such as a constant rise in the average age of the work force. But, whatever its limitations, it is likely to continue.

The reliance on attrition is adversely affecting bargaining by decreasing the number of employees subject to it. This is unfortunate, since experience has shown that collective bargaining is the most effective and efficient method of adjustment employer-employee relations in a democratic society.

Collective bargaining can legally embrace the wages, hours and working conditions of workers represented by a union.

It cannot help those who have not been hired or those who have been let go without reinstatement rights. Obviously, a union's main concern is going to be with the workers on hand who pay dues for representation. But there are some activities which can help those outside the organization who are now in such desperate need. We have not nearly begun to explore the possibilities of labor-management assistance in job training for the unskilled and untrained, constituting so large a portion of the Negro unemployed in ghetto areas.

I like to believe, in addition, that a labor-management organization like our Foundation can also make a substantial contribution. We have recently purchased permanent headquarters in New York City which we call Automation House. We intend to establish there, among other labor-management activities, a Center for Job Training Information. We have found that there is throughout the United States a burgeoning industry of teaching machines, devices, and programs which can materially speed up the learning process for the unskilled and uneducated, especially in equipping them for work. We intend to have on hand there detailed information about these developments with motion pictures, video and audio tapes, slides and brochures to demonstrate how they can be used. Unique devices will be on display and

trained experts will explain their use. We will also conduct lectures and seminars and provide anyone from industry, labor, government or the public generally with information about the latest techniques in job training.

Labor and management will always be antagonists at the bargaining table, and there is nothing wrong with that. But they have many areas of mutual interest. These can be encouraged without diminishing the vigor of the bargaining process. Indeed, it can help. That is what we are trying to do at Automation House through the Foundation.

I regret more than I can say that I could not enjoy the opportunity of telling you of these activities in person. At least I believe I have a valid excuse for not attending. Please accept my very best wishes for a most successful conference.

Thank you.

Labor Relations Law: An Assessment

Benjamin Aaron

Any survey of the present state of labor relations law in the United States must take account, at the outset, of at least four major characteristics which, in this particular combination, distinguish it from that of other industrialized countries. First, despite its common-law origins, in almost all significant details it has been created by statute rather than by the gradual accretion of judicial decisions. Second, it is of relatively recent origin, the oldest significant statute presently on the books being the Norris-LaGuardia Act, which was adopted in 1932. Third, those labor relations laws of the greatest importance are federal laws, and the authority of the several states over labor-management relations has been almost completely eroded by the doctrine of federal preemption. Fourth, although the single most important principle underlying what we choose to call our "national labor policy" is the commitment to "free" collective bargaining in the private sector, the United States has a more comprehensive and bewildering array of restrictive laws regulating the relations between employers and unions than does any other industrialized country.

There are several other significant features of American labor relations law which, if not as unique as those already mentioned, nevertheless have a substantial impact upon collective bargaining in this country. In typically pragmatic fashion each of the several federal statutes was enacted to deal with one or more specific problems; but, unfortunately, almost none of these has taken sufficient account, if any, of the need to accommodate the new law with the policies and procedures of those already on the books. As a result, we have built up, not an integrated and internally consistent body of federal labor relations law, but a collection of individual statutes that are mutually inconsistent in some important particulars, that overlap in others, and that manage, nevertheless, to leave some vital areas of labor-management relations totally uncovered or covered inadequately.

Partly as a consequence of these developments, Congress has assigned much of the task of administering the various labor relations laws to a number of administrative tribunals, independent agencies, and executive departments. The Supreme Court has added to the decentralization of decision-making by construing some statutes as requiring judicial deference to awards rendered by private arbitrators.

In my talk I shall illustrate with appropriate examples the impact of American labor law on collective bargaining. My thesis is that the time has come to review the entire body of this law: to enunciate or redefine policies in certain critical areas, to repeal unnecessary legislation, to reconsider questionable judicial and administrative doctrines, and at least to begin thinking about the possibility of drafting a comprehensive, internally consistent labor code

Federalism and Labor Relations Law

Within the past 30 years, Congress and the Supreme Court have gone a long way toward establishing federal law as the supreme and exclusive instrument for dealing with all but the most minor labor disputes. The constitutionality of that arrangement is now beyond challenge: it rests upon the Supremacy Clause of the United States Constitution and upon the indisputable power of Congress to legislate in respect to conduct "affecting commerce." The manner in which Congress has exercised that power, however, as well as the construction

placed upon its enactments by the Supreme Court, have created serious doubts in the minds of many persons about the wisdom of the resulting policy.

The passage of the Wagner Act in 1935 heralded the end of diverse local controls of labor-management relations and the beginning of a national labor policy uniformly applicable throughout the nation. Whatever doubts may originally have existed concerning the necessity or desirability of a national policy inevitably gave way before the increasing evidence of the impact of local labor disputes on enterprises and activities far removed from the scene of actual conflict. But the extent to which the states are precluded from passing supplementary legislation covering labor-management relations, or to which their courts are barred from affording remedies neither specifically permitted nor prohibited by federal law, has been a subject of continuing debate.

Thus far, however, Congress has refused to abolish an exception to the uniform national policy that it incorporated with the 1947 Taft-Hartley amendments to the NLRA. Section 8(a)(3) of the amended Act permits the voluntary execution of union-shop agreements, with certain safeguards. Section 14(b) provides, however, that states or territories may prohibit the execution or application of agreements requiring membership in a labor organization as a condition of employment. The constitutionality of this provision has been sustained against attacks by labor unions, and the rather mild endorsement by the present Administration of a proposal to repeal Section 14(b) has been insufficient thus far to secure congressional adoption of that amendment.

Apart from the emotional and irrational reactions that public debate of union security clauses invariably engenders, the basic case against Section 14(b) is that it is illogical, untidy, and unnecessary. If a uniform national policy of labor-management relations is desirable, then it makes no sense to exempt from that policy one of the most explosive of all collective-bargaining issues. Moreover, the present rule produces uneven results: a national agreement between a union and a large corporation with plants in many states provides the same basic benefits to bargaining-unit employees in all plants, but denies the union the benefit of a negotiated union-shop and checkoff provision in those states with right-to-work laws. To add to this inequality of treatment, the Railway Labor Act, amended in 1951 to authorize union-security clauses similar to those permitted under the NLRA, contains no provision corresponding to Section 14(b) and supersedes all contradictory state laws applicable to railroad and airline employees. Finally, Section 14(b) provides no real protection to individual workers against abuse of power by their bargaining representative. All it can do is make the union less effective in dealing with the employer.

Equally inconsistent with a national labor policy for rail transportation are state "full-crew" laws requiring interstate carriers to employ a minimum-size engine and train crews operating within their borders. These laws were all enacted many years ago, and have repeatedly been sustained by the Supreme Court against charges that they violated the Fourteenth Amendment and the Commerce Clause. The national interest is not well served, however, by allowing a minority of states to prevent ad hoc adjustments to technological change by Procrustean rules laid down in archaic statutes.

Other reservations of state power in the labor relations field governed by the LMRA are more easily defended. As the Court pointed out in *San Diego Building Trades Council v. Garmon* (1959), states have been permitted "to grant compensation for the consequences, as defined by the traditional law of torts, of conduct [growing out of a labor dispute] marked by violence and imminent threats to the public order." They have also been permitted to enjoin this type of conduct. This is "because the compelling state interest, in

the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." Similarly, power to regulate has not been withdrawn from the states "where the activity regulated was a merely peripheral concern" of the LMRA, or "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction," an inference that Congress had deprived the states of power to act would not be warranted.

However, as Justice Frankfurter observed in *International Association of Machinists v. Gonzales* (1958), "the statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." This process is a continuing one, and it has not always been easy to understand why the Court has permitted the states to act in some areas after having broadly prohibited exercise of state power in others. In the *Garmon* case, in which the doctrine of federal preemption achieved its most luxuriant growth, the Court declared that "when an activity is arguably subject to Sec. 7 or Sec. 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Yet the Court has recently ruled–in *Linn v. United Plant Guard Workers* (1966)–that a state court does not lack authority to entertain an action for defamation arising out of a labor dispute nor to award damages when the complainant can show that the defamatory statements were circulated with malice and caused him damage.

In two other kinds of disputes that are "arguably subject to Sec. 7 or Sec. 8 of the Act," and hence presumably within the primary jurisdiction of the NLRB, the Supreme Court has decided that neither state nor federal courts, nor private arbitrators, "must defer to the exclusive competence" of the Board. Section 301(a) of the LMRA provides that suits for violation of contracts between employees and unions in industries affecting commerce may be brought in an appropriate federal district court without respect to the amount in controversy or to the citizenship of the parties. Some suits based on an alleged breach of contract involve conduct that is also arguably or admittedly an unfair labor practice; for example, the breach may consist of a violation of a contractual provision not to discriminate against employees for privileged union activity. If the accusation of contract violation is also an arbitrable grievance, the aggrieved party may submit the issue to arbitration, rather than file a charge of unfair labor practice with the Board. If the complaint is not arbitrable, the aggrieved party may sidestep the Board and exercise his federal right under Section 301 to sue his opponent in court.

However, as held in *Textile Workers Union v. Lincoln Mills* (1957), disposition of the dispute by arbitration, or its adjudication by a federal or state court, results from the application of a new body of federal substantive law, fashioned by the federal courts, under the guidance of the Supreme Court, in obedience to the congressional mandate inferred from Section 301 of the LMRA. Thus, preexisting state laws that would have left to the state courts the discretion to refuse either to order arbitration of a grievance or to enforce an arbitrator's award, are no longer effective to the extent that they conflict with substantive federal law. By the same token, although state courts may assert jurisdiction over suits for breach of contract brought under Section 301, they must apply federal law.

The statutory scheme under the Railway Labor Act is substantially different. The law creates rights and imposes duties similar to those established by the NLRA, but it does not denominate any conduct by employers or unions as an "unfair labor practice," and neither the National Labor Adjustment Board (NRAB) nor the National Mediation Board (NMB) has functions or powers similar to those of the NLRB in unfair labor practice cases.

Unsettled controversies growing out of the interpretation or application of collective agreements (commonly known as "minor disputes") are referred to the NRAB, which has the powers of a compulsory arbitration board. The parties may, however, establish by mutual agreement their own private arbitration machinery (called a system board of adjustment) as a substitute for the NRAB. With few exceptions, state and federal courts are precluded from entertaining actions for declaratory judgments to construe collective agreements under the RLA.

Still a different arrangement is applicable to airline employees. In 1936 the RLA was extended to include the air transport industry. The one section of the Act not made applicable was that dealing with the NRAB. Instead, Section 204 of the amended Act requires carriers and unions representing their employees to establish boards of adjustment for the settlement of grievances.

The Supreme Court has held in *International Associations of Machinists v. Central Airlines, Inc.* (1963) that a contract executed under Section 204 is to be interpreted and enforced according to federal law; "for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law, or if a contract were struck down though in furtherance of the federal scheme."

In the present state of labor relations law, three questions concerning federal-state relations are paramount: First, is it desirable or possible to develop a broad statutory policy applicable to all the situations previously discussed, that will dispose of most of the line-drawing problems created by preemption doctrine? Second, whether Congress promulgates such a policy or, as is more likely, continues to abdicate its authority in this area in favor of the courts, should the states be accorded more or less power than they presently have to apply their own procedural and substantive laws to labor disputes occurring within their boundaries? Third, is there any justification for differing degrees of federal control over labor-management relations under the LMRA and the RLA? Is there, indeed, a continuing need for two separate statutes?

Meanwhile, it has become increasingly apparent that Congress lacks both the talent and the will to deal with the "formidable intellectual and political difficulties" of allocating power between state and federal governments, and the courts have necessarily had to fill in the gaps and reconcile conflicts in statutory policies on a case-by-case basis. The result is a patchwork quilt of decisional law, with some parts notably out of harmony with others.

Rights of Individual Employees

At common law the individual employee's rights amounted to little more than his largely illusory right of "freedom of contract." Modern statutes have guaranteed him protection against hostile discrimination for union activity or on grounds of race, creed, color, sex, national origin, and age. Even these protections are not uniformly provided, and may be limited or entirely absent in certain industries, occupations, establishments or localities.

The more fundamental protections against arbitrary or unfair treatment in the matter of promotions, remuneration, dismissal, and retirement are provided, however, if at all, by a collective agreement negotiated between the union, as exclusive bargaining representative of all employees in the appropriate unit, and the employer. Section 301 of the LMRA treats these agreements as contracts that may be enforced by the principal parties--

the employer and the union–against each other. But what, if any, rights established by a collective agreement become vested in each individual employee and can be asserted and enforced by him, irrespective of the union's approval or opposition? This question, with its many ramifications, has given rise to some of the most perplexing problems in contemporary labor relations law.

The question also raises a fundamental issue of policy. As we shall see, rights of individual employees have been treated quite differently under the RLA than under the LMRA. It is important to inquire whether these differences are necessary or desirable.

All that can be said with certainty about individual employee rights under either statute is that the law is still far from settled. Starting with the premise that a labor organization which derives from federal law its right of exclusive representation of all employees in the appropriate bargaining unit (NLRA) or craft or class (RLA), and thus owes a duty fairly to represent all employees in the unit, the Supreme Court has enforced that duty in appropriate cases, the majority of which have involved racial discrimination by unions covered by either the NLRA or the RLA. And despite the provisions in both statutes for the referral of disputes arising thereunder to administrative agencies (i.e., the NLRB, the NMB, and the NRAB), the Court has ruled that when these agencies have been unable or have failed to provide the necessary protection against illegal discrimination by unions, or by unions and employers acting in collusion, the affected employees may obtain redress in the form of an injunction or damages directly from the courts.

At the same time, the Court has recognized that in bargaining on behalf of large numbers of employees, many of whom have differing long-term interests and immediate objectives, a union must be allowed to make compromises which, in its judgment, are in the best interests of the majority and which, equally importantly, strengthen its own institutional position. Thus, in *Ford Motor Co. v. Huffman* (1953)the Court has unanimously held that "a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

In the day-to-day administration of the collective agreement, however, and especially in the handling of individual grievances, questions concerning the propriety of union conduct and the rights of employees to the benefits of the agreement assume a baffling subtlety and complexity. Underlying these questions is the still-unresolved issue of the nature of the collective agreement itself. To say that it is, among other things, an enforceable contract does not entirely dispose of the problem. Clearly, the union and the employer have the right to enforce the terms of the agreement against each other; but what of the rights of individual employees? Is it true, as contended by Professor Summers, that "the individual employee has rights under the collective agreement, the enforcement of which are not subject to the union's exclusive control," and that "the union and the employer cannot block the enforcement of these rights by agreeing between themselves that those rights can be compromised or ignored without the individual's consent or authorization"? Is Professor Cox more persuasive in arguing that the union should be given a free hand to evaluate the individual's claim in the collective interest, and therefore must be allowed to refuse to process the grievance, so long as it acts in good faith? Or is it possible to adopt a middle course, as urged by Professor Blumrosen, and permit individual employees to compel unions to process grievances involving only the "critical job interests" of discharge, compensation, and seniority?

Adoption of one of these theories, or perhaps of another, is only the first step

in dealing with the practical problems arising under the collective agreement. To illustrate the nature of these problems, let us consider two hypothetical cases. In the first, suppose that an individual grievance arising out of an allegedly unfair dismissal is rejected by the union, after investigation, on the ground that the discharge was for just cause. Suppose further that the grievant suspects that the union has not represented him in good faith, but has colluded with the employer to secure his discharge for some reason unconnected with union membership or nonmembership. In the second, suppose that the grievant's wage or seniority claim is processed by the union but is dropped or compromised without the grievant's consent and against his wishes, or is handled in an allegedly inept or negligent fashion. What channels of relief, if any, are open to the grievant in each of these situations?

To this question administrative agencies and courts have provided a bewildering array of answers, many of them based on mutual y exclusive theories. Moreover, the law which has developed under the Railway Labor Act is again in some respects entirely different from that which has evolved under the Labor-Management Relations Act.

Let us first consider the situation under the RLA.

Exclusive of claims of unlawful discharge or discipline, the majority of "minor disputes" submitted to the NRAB involve "time claims"–demands for money under the complicated wage payment rules that prevail in the industry. It has long been the practice of the parties to compromise these claims without the prior knowledge or consent of the employees involved. In *Elgin, Joliet & E. Ry. v. Burley* (1945) the Supreme Court held that the bargaining agent must be authorized to act on behalf of an employee "in some legally sufficient way" before it can compromise his claim without his knowledge or permission.

A very high percentage of railroad workers are union members, and most, if not all, railroad unions have authorization provisions in their constitutions and bylaws; thus, in practice, time claims by individual employees are regularly compromised without their prior knowledge or express approval. Accordingly, an employee's chances of upsetting a settlement of a time claim on the ground that his union represented him incompetently or unfairly are virtually nonexistent.

In the discharge case which the union refuses to handle the grievant has a theoretical but wholly illusory right to carry his grievance to the NRAB for final disposition. In practice, however, the grievance is invariably rejected on procedural grounds by the NRAB, because the union and employer representatives on the Board simply reiterate the positions of the employer who discharged the grievant and of the labor organization that refused to handle the grievance. Consequently, the grievant has only one practical course to follow: he may abandon the attempt to secure reinstatement with or without back pay and, instead, sue the employer for damages for wrongful discharge.

In the case of wrongful discharge, the Supreme Court has recognized an exception to rule that the NRAB has exclusive jurisdiction over "minor disputes." In *Moore v. Illinois Central R. R.* (1941) it explained the reason as follows:

> A common-law or statutory action for wrongful discharge differs from any remedy which the [Adjustment] Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court handling such a case must consider some provisions of a collective-bargaining

agreement, its interpretation would of course have no binding effect on future interpretation by the Board.

Even under this reasoning, however, the grievant's chances of securing a court determination of the merits of his case are not certain. The cause of action for wrongful discharge is created by state law, not by the Railway Labor Act. If the state law requires an employee to exhaust his remedies under the contract grievance procedure and the RLA before bringing suit for wrongful discharge, he must comply; and this process might take years. State laws on this question are far from uniform: some do not require exhaustion; others do not; and in at least one an employee may not maintain a cause of action for damages for wrongful discharge under any circumstances.

A final and often insurmountable obstacle in the grievant's path to relief is the doctrine of election of remedies, which holds, in effect, that he may proceed either under the RLA for reinstatement or under state law for damages, but may not do both. Thus, if a state law governing the damage action requires the prior exhaustion of contract-statutory remedies under the RLA, the grievant will automatically be precluded by the election-of-remedies doctrine from bringing the action for damages after he has exhausted the contract-statutory procedures for securing reinstatement.

The law governing these types of cases under the Labor-Management Relations Act has developed differently. Section 9(a) of the NLRA, as amended by the LMRA, provides that a union designated or selected as collective bargaining representative by a majority of employees in the appropriate bargaining unit shall be "the exclusive representative of all employees . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." This plenary authority is limited in the following manner:

> *Provided,* that any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective-bargaining contract or agreement then in effect: *Provided further,* that the bargaining representative has been given opportunity to be present at such adjustment.

The NLRB did not, until quite recently, assert jurisdiction over the employee's complaint unless it involved activity protected by Section 7, in which case the employee could file an unfair labor practice charge against the union, the employer, or both. The relief available to the employee would then be limited to reinstatement with back pay in accordance with the Board's rules. Assuming the Board to be without jurisdiction, the employee could sue the employer for damages for wrongful discharge; sue the union for breach of its duty of fair representation; or sue for an injunction either to compel the employer to arbitrate his grievance or to compel the union itself to appeal the grievance to arbitration.

Here, again, court decisions lack uniformity and are based on conflicting theories. Although individual plaintiffs have been successful in a minority of cases, judgment has generally been in favor of the defendant employer or union. In some instances the employee has relied upon the proviso to Section 9(a) of the NLRA. According to the majority view, however, as expressed by the Second Circuit in *Black-Clawson Co. v. International Association of Machinists* (1962), this proviso does not confer "an indefeasible right upon the individual employee to compel compliance with the grievance procedure up to and

including . . . arbitration"; rather, it merely sets up "a buffer between the employee and his union 'permitting' the employee to take his grievances to the employer, and 'authorizing' the employer to hear and adjust them without running afoul of the 'exclusive bargaining representative' language of the operative portion of section 9(a)."

If the employee relies upon the grievance and arbitration procedure of the collective agreement, rather than on the Section 9(a) proviso, he is likely to be rebuffed in his efforts to compel arbitration on the theory that these procedures usually state that only the union may demand arbitration. Suppose, then, that the employee sues the employer under state law for damages for wrongful discharge. Under the prevailing state laws, employees have also usually been unsuccessful either in suing the employer for wrongful discharge or in bringing an action against the union for breach of its fiduciary duty of fair representation.

These state court decisions have been substantially affected, however, if not rendered completely irrelevant, by recent developments. The first and most important is the rapid growth of case law under Section 301 of the LMRA, which provided the basis for a new body of substantive federal law governing the enforcement of collective agreements. In *Humphrey v. Moore* (1964) the Supreme Court held that an employee may sue his union under Section 301 for violation of his contractual rights. The case was a class action by employees for injunctive relief against implementation of the decision of a union-employer grievance committee, made pursuant to contractual procedure, which deprived the employees of their seniority rights and threatened to result in their discharges. In ruling against the plaintiffs on the merits, however, the Court majority reaffirmed the principle first enunciated in the *Huffman* case and added: "Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes."

In *Smith v. Evening News Association* (1962) the Supreme Court decided that a suit for breach of contract may be brought under Section 301, even though the act complained of is arguably or admittedly an unfair labor practice; but so far as the individual employee is concerned, the barriers to such a suit are as formidable as ever, and perhaps more unyielding than before. In *Republic Steel Corp. v. Maddox* (1965) the Court held that an employee who brought suit for severance pay allegedly due him under a collective agreement, without first exhausting the contract grievance and arbitration procedures, was barred from maintaining the court action. The Court's opinion stated the prevailing rule to be that "unless the contract provides otherwise . . . the employee must afford the union the opportunity to act on his behalf."

Although the Court strongly hinted that the same principle should apply to discharge cases arising under the RLA, it has so far declined to overrule contrary precedents.

A second development that may affect the rights of employees covered by the NLRA, who are discharged or discriminated against for reasons unconnected with union activity, is the doctrine adopted by a majority of the NLRB in *Miranda Fuel Co.* (1962) and explained by them as follows:

> Section 7 [of the NLRA] . . . gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that . . . labor organizations, when acting in a statutory representative capacity, [are prohibited] from taking action against any

employee upon considerations or classifications which are irrelevant, invidious, or unfair.

The case in which this doctrine was first enunciated did not involve racial discrimination, but there is some reason to suppose that the Board majority had that problem uppermost in its mind. Historically, the Board has avoided or temporized with problems of racial discrimination by unions and employers, and Congress has repeatedly refused to proscribe that form of discrimination in labor legislation. Increasing pressure has been put on the Board in recent years to change its policies in this regard, and it has responded affirmatively in a variety of ways. Not long after announcing its decision in the *Miranda* case, the Board in *Hughes Tool Co.* (1964) applied the same doctrine for the first time to a situation involving racial discrimination.

If the *Miranda* doctrine were to become established, it would obviously have a profound effect upon rights of individual employees, as well as on the liabilities of employers and unions, under the NLRA. An employee claiming that his bargaining representative had, for any reason, not represented him fairly in the administration of the collective agreement could file an unfair labor practice charge against the union with the NLRB. Not only would the number of cases coming within the Board's jurisdiction be greatly increased, but the prevailing concept of the union's control of the grievance procedure would almost certainly be revised.

At first it seemed doubtful that the *Miranda* doctrine would prevail. Enforcement of the Board's order in that case was denied by the influential Court of Appeals for the Second Circuit. In *United Rubber Workers, Local 12 v. NLRB* (1966) the Fifth Circuit held, however, contrary to the Second Circuit's ruling in *Miranda*, that a union's failure to represent bargaining-unit employees fairly, by refusing to process grievances based on well-founded charges of racial discrimination, restrained the grievants in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the NLRA. The court also concluded that if an employee's complaint of unfair treatment at the hands of the union is made independently of a charge of contract violation, the issue thus raised falls within the exclusive jurisdiction of the NLRB.

This latter proposition was expressly rejected, however, by the Supreme Court in *Vaca v. Sipes* (1967), which dealt with the question of an employee's remedy after his attempt to exhaust the grievance procedure had been frustrated by the union's decision not to carry the grievance to arbitration. Without approving or disapproving *Miranda*, the Court held that the NLRB does not have exclusive jurisdiction over questions of fair representation; that both state and federal courts have jurisdiction over such cases; but that federal law must be applied. Under that law, the employee must exhaust the contractual grievance procedure, if any, before bringing suit against his employer for breach of contract? and in order to recover damages he must first prove that the union has violated its duty of fair representation.

Individual reactions to all the developments reviewed in this section are apt to depend upon the kinds of assumptions one makes about cases. In some instances the union appears to have exercised its control over the grievance procedure in an almost unbelievably arbitrary way; in others, the employee's claim of unfair treatment seems to have been too flimsy to warrant serious attention. But in most of the cases the relative merits of the competing equities are more evenly balanced, and we are left with a direct and often irreconcilable conflict between the union's institutional objectives and the rights and interests of its individual members or constituents. Despite the desirability of developing a general principle

applicable to all situations of this type, none of those yet suggested is entirely satisfactory.

Employer Responses to Economic Strikes

The typical "economic strike"–so called because it is not provoked by an employer's unfair labor practice–occurs when the parties have bargained to an impasse over the terms of a collective agreement. Traditionally, the battle has not begun until the union has called the employees out on strike; thus, unions have held the initiative, and therefore the advantage in at least the initial phases of economic conflict. They have controlled the timing and, less frequently, the duration of work stoppages; employers, on the other hand, have been limited for the most part to defensive responses. These have usually consisted in simply remaining closed and seeking to outlast the union in a test of economic strength, or in continuing to operate with temporary or permanent replacements. Prior to and in anticipation of a strike, employers have sometimes stockpiled production inventory.

None of these defensive weapons has proved generally satisfactory to employers. Remaining closed for the duration of the strike may impose greater costs on the employer than he can sustain. Hiring replacements may exacerbate the dispute and make settlement more difficult; moreover, replacements may be hard to find and expensive to train. The value of stockpiling depends on a variety of factors, including the nature of the product, the constancy of production and of demand, and the duration of the strike.

In recent years some employers have sought to seize the initiative from unions by locking out employees before the union could call them out on strike. Others have resorted to mutual aid pacts to enhance their financial staying power. Each of these tactics merits some attention.

With few exceptions, the Board has usually held lockouts by individual employers to be unfair labor practices. Recent developments, however, have brought significant changes in the applicable law.

The most common form of lockout today is the multi-employer lockout, which occurs when nonstruck members of the bargaining group lock out their employees in response to a "whipsaw" strike against a single member. In *NLRB v. Truck Drivers Local 449* (1957) the Supreme Court held that in these circumstances the lockout is not an unfair labor practice under the NLRA. The Court reasoned that inasmuch as multiemployer bargaining is lawful under the NLRA, multiemployer lockouts must be permitted to preserve the stability of the unit. Recognizing that "conflict may arise . . . between the right to strike and the interest of small employers in preserving multiemployer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms," the Court declared that "the ultimate problem is the balancing of the conflicting legitimate interests."

In *NLRB v. Brown* (1965) the Court reaffirmed the validity of multiemployer lockouts; but in so doing it appears to have broadened considerably the range of circumstances under which these lockouts were previously thought to be permitted by the *Buffalo Linen* decision. In the *Brown* case the multiemployer bargaining unit consisted of retail food stores. After an impasse had been reached between the employers' group and the union over the terms of a new agreement, the union struck one store and all of the others locked out their employees, on the ground that a strike against one was a strike against all. The unusual feature of the case was that the nonstruck stores continued to operate, through the use of managerial personnel, their relatives, and a few temporary employees. After a new

agreement had been executed and all employees had returned to work, the union charged the employer group with having violated Section 8(a)(1) and (3) of the NLRA.

The NLRB held that the employers had violated the NLRA, not because they had acted either out of hostility toward the union or in reprisal for the whipsaw strike, but because their conduct "carried its own indicia of unlawful intent, thereby establishing, without more, that the conduct constituted an unfair labor practice." A majority of the Supreme Court disagreed, observing that "where, as here, the tendency to discourage union membership is comparatively slight, and the employer's conduct is reasonably adapted to achieve legitimate business ends or to deal with business exigencies, we enter into an area where the improper motivation of the employer must be established by independent evidence. . . ." The Court majority concluded that such evidence was lacking in this case.

The majority approached the problem as a "judgment as to the proper balance to be struck between conflicting interests." Starting from the premise that a single struck employer may lawfully continue operations with temporary or permanent replacements, it reasoned that nonstruck employers will not lock out unless they too may continue to operate; otherwise, they will lose business and patronage to the struck employer. But if the integrity of the multiemployer unit is to be preserved, the nonstruck employers *must* lock out their employees when any member is struck; therefore, continued operation with temporary replacements becomes a necessity.

It is apparent that the Court will now find justification for a lockout that is not in defense of the integrity of a multiemployer unit. *American Ship Building Co. v. NLRB* (1965), decided the same day as the *Brown* case, involved a single employer, who shut down his shipyard following a bargaining impasse over a new contract, claiming this action was necessitated by lack of work due to customers' fears of a work stoppage. The union, which had given assurance that there would be no strike and had offered to extend the existing contract, charged the company with unfair labor practices designed to force the union to abandon its contract demands. The NLRB found, by a divided vote, that the employer had no reasonable fear of a strike, and that his use of the lockout as an "offensive" economic weapon violated the statute. The Supreme Court unanimously reversed, although three justices concurred with the decision for different reasons than those relied upon in the court's opinion. The latter accepted the Board's factual conclusion, but held that "the employer's use of a lockout solely in support of a legitimate bargaining position is [not] . . . inconsistent with the [employees'] right to bargain collectively or with the right to strike," and that a violation of Section 8(a)(3) cannot be predicated on an "intention merely to bring about a settlement of a labor dispute on favorable terms."

The *Brown* and *American Ship Building* cases raise several interesting questions. First, how realistic a balance can be struck between the conflicting legitimate interests involved in lockout cases? If the union must show that the employer lacked both a "legitimate bargaining position" and "an intention merely to bring about a settlement . . . on favorable terms" before the balance is struck in its favor, the act of balancing will be pure formality and the lockout will almost invariably be permitted. If, however, as is suggested in the *Brown* case, the employer's resort to a lockout must be "reasonably adapted to achieve legitimate business ends," there is more leeway for balancing. Finally, if the tendency of the lockout to discourage union membership is also thrown into the balance, and in other cases is regarded more seriously than it was by the Court in the *Brown* case, the balancing of conflicting legitimate interests is likely to be an exercise of considerable delicacy.

Second, who is to do the balancing: the Board or the courts? In the *American Ship Building* case the Court found that the NLRB had "in essence, denied the use of the bargaining lockout to the employer because of its conviction that use of this device would give the employer 'too much power.'" The Court held in this case and in *Brown*, as it has

held before, that the Board lacks "a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power." These precedents, plus the Board's proclivity for developing "per se rules," which have not generally been well received by the courts, suggest that the latter will continue to exercise an independent judgment on these matters.

Finally, to what extent, if any, is the decision in the *Brown* case applicable to concerted activities by employers who are not members of a multiemployer bargaining unit? The problem is illustrated by the case of *Detroit Newspaper Publishers Association v. NLRB* (1965). Two Detroit newspapers, the Free Press and the News, began separate bargaining sessions with the same union. The News obtained a promise from the Free Press that it would not yield on three specific issues; in return, the News agreed to lock out its employees if the Free Press were struck. The Free Press was struck, and the News suspended publication, even though it was still bargaining with the union.

The Board held, prior to the Supreme Court's decisions in the *Brown* and *American Ship Building* cases, that the News had committed an unfair labor practice because the two newspapers did not constitute a multiemployer unit. The Sixth Circuit, acting on the case after the two Supreme Court decisions had been announced, found no proof of unlawful motivation in the form of antiunion animus or avoidance of collective bargaining, and vacated the Board's order. The Supreme Court vacated the judgments of both the Board and the court of appeals, and instructed the latter to remand the case to the Board for further consideration in light of the *American Ship Building* case. What this action by the Court portends nobody knows; but the Court may have felt that the multiemployer lockout doctrine was inapposite in this context.

Historically, the lockout was a classic device to punish employees for concerted activities and to crush unions. In the contemporary context, however, it clearly has its legitimate uses. Of course, any lockout is likely to have a dampening effect on the ardor of some employees in the exercise of their right to engage in concerted activities; but surely this is only one element, and not a very substantial one, to be weighed in the balance of conflicting legitimate interests. Neither the *Brown* nor the *American Ship Building* decisions have dealt crippling blows to unions; rather, they seem to have restored to some employers a limited freedom of action too long denied them.

The *Detroit Newspaper Publishers* case, however, seems clearly distinguishable, even if one ignores the absence of a multiemployer bargaining unit. The secrecy of the pact between the two employers raises a serious issue; for it is highly desirable, if not an essential, aspect of good-faith bargaining, that each party advise the other of what it may do in the event of strike or lockout. Also, the attempt by one employer to affect the wage structure in another bargaining unit raises the possibility of antitrust violations, for reasons to be discussed in the following section. Finally, it appears from the record in this case that no bargaining impasse had been reached in the negotiations between the union and the News when the latter initiated the lockout. Permitting either party to resort to economic force prior to impasse is inimical to the public interest in the peaceful settlement of labor disputes through collective bargaining.

Employer mutual-aid pacts, although serving the same objectives as multiemployer lockouts, not only constitute a completely different tactical device, but also, because they have so far been confined to the railroad and airlines industries, offer an illuminating comparison between the public policies served by the Railway Labor Act and by the LMRA.

In general, the mutual-aid pacts provide for economic assistance to the struck carrier by nonstruck carriers. Under the airlines agreement, the nonstruck members are obligated to turn over to the struck carrier increased revenues, less increased costs, derived from carrying the struck carrier's traffic. Under the railroad agreement, each member contributes to an insurance fund. When a member is struck, it is paid amounts sufficient to cover its fixed costs and daily expenses. Each nonstruck member must contribute its proportionate share of the cost of indemnifying the struck carrier.

Neither agreement automatically provides for financial assistance when a member is struck; instead, each prescribes the conditions under which the right to subsidy may be invoked. Under the railroad agreement, the right arises when the strike is contrary to the RLA; or is to enforce demands contrary to recommendations of an Emergency Board convened pursuant to Section 10 of the RLA; or is in resistance to the application of Emergency Board recommendations. The airlines agreement provides for financial assistance to a carrier under the second condition specified in the railroad agreement or when a strike is called before the pre-strike procedures of the RLA have been exhausted, or is otherwise "unlawful." Both types of agreement have been upheld by administrative agencies and the courts.

Despite the judicial and administrative approval accorded mutual-aid pacts, the decisions were in each instance narrowly circumscribed and cannot be taken as a broad license for concerted economic action by employers in the railroad and airlines industries. The aid agreements are rather ingenious devices to provide protection for carriers without widening the area of open economic conflict and interrupting operations throughout the industry. This objective is hardly consistent, however, with the tendency in the railroad industry in recent years to convert every local dispute into a national issue requiring the invocation of emergency board procedures.

The RLA obviously places greater importance on the avoidance of any work stoppages than does the LMRA. The emergency disputes procedures of the latter statute have a more restricted coverage, and it does not require the compulsory arbitration of grievances. Given the differing emphases of the two statutes on preventing interruptions of work, the protective devices approved for employers under each–aid pacts under the RLA, multiemployer lockouts under the LMRA–have a logical validity. However, the premise that any threatened halt in rail transportation is inevitably as dangerous to the economy as a "national emergency" under the LMRA deserves far more critical examination than it has yet received. There is an urgent need for a detailed review of bargaining procedures in the railroad industry; in the opinion of some observers those procedures breed emergencies instead of forestalling them.

Summary and Recommendations

The United States has a variety of labor relations laws, each enacted to deal with specific problems, and none designed for accommodation with all of the others. Consequently, the growth of these laws has been excessive and unorganized, frequently creating new problems as it purported to solve others. The most serious inconsistencies exist between the LMRA and the RLA. These inconsistencies are not merely reflections of unique problems and practices in the railroad and air transport industries? rather, they reflect substantially different policies for which there is no longer a reasonable justification.

The various segments of the American economy are now so mutually interdependent that, so far as labor-management relations are concerned, it is no longer possible

dependent that, so far as labor-management relations are concerned, it is no longer possible to speak of "social experiments within the insulated chambers afforded by the several states." There are no "insulated chambers." The extent to which the demands of a truly national labor policy can be reconciled with historical states rights in a federal republic is a question of great complexity that requires for its solution a statecraft of the highest order. Congress has shown neither the willingness nor the ability to face the problem squarely, much less to deal with it effectively.

The continuing prospect of rising levels of wages and prices and the growth of industry-wide or multiemployer collective agreements having at least an indirect effect on product markets reveal the inadequacy of present antitrust laws to provide even a conceptual framework for analysis of these problems. In this area the decisions of the Supreme Court have obfuscated and confused rather than clarified. Congress has neglected its own obvious responsibility to establish a new policy adapted to contemporary needs.

It would be unrealistic to assume that Congress will act on any of these problems unless it is virtually compelled by circumstances to do so, or that it could without guidance and a conviction that it was reflecting consensus of organized labor and management, accomplish substantial legislative reforms. In sort, Congress needs help.

Offers of "help" abound; but, quite naturally, most come from partisans seeking special benefits. The basic job to be done--a detailed review of the principal labor laws in action--should be undertaken by a neutral commission, preferably with, but if necessary without, specific authorization from Congress. The commission should issue findings and recommendations, which should then be reviewed and criticized by labor, management, and consumer groups. The recommendations should concentrate on possibilities of repealing unnecessary laws or specific statutory provisions, eliminating conflicts and inconsistencies in present laws, and developing new policies if they are required.

Whether from such an effort would emerge a consensus that would encourage Congress to act is unlikely but not impossible. Scholars and practitioners alike would learn much from the undertaking, regardless of its legislative consequences. Finally, if the reach of this proposal appears to exceed by a considerable margin the probable grasp of accomplishment, we have at least, as Thomas Reed Powell once remarked, the poet's authority in favor of the differential.

COLLOQUIUM

Jack Stieber

Benjamin Aaron

Nathan P. Feinsinger

Harold S. Roberts, *Moderator*

DR. ROBERTS: Our procedure this afternoon will be to get the reactions of the individual panel members to the presentations of the other panel members. I'm going to ask each of them to speak briefly and answer any of the questions raised, with the exception of the paper by Ted Kheel. After we have a go around on the panel, we'll take a look at some of the questions that have come in from the floor. So to start we'll have Ben Aaron.

DR. AARON: I'll just make a couple of comments about Jack Stieber's analysis this morning with which mainly I agree. The difference between us is really a matter of detail and of emphasis. I liked very much his notion that it would be a good idea if we could divide the kinds of stoppages by public employees into categories of extreme, moderate, and relatively no severity, and govern our policies accordingly. I do not agree with him that it is just about as simple as the kinds of decisions that the National Labor Relations Board makes, nor do I think that most state legislatures will be willing to delegate their authority to an administrative body within the state. I think there is a kind of inconsistency between the notion that we should have a federal law uniformly applicable throughout the states with respect to the right of public employees to organize and bargain collectively and with the notion that we should allow experimentation within the states. That is to say, Jack is for limited experimentation within the certain guidelines. I'm inclined to think that we ought to have a federal law, but I'm wondering how much experimentation will be feasible. I like the idea of experimentation, but I'm not sure that it would work out quite as helpfully as Jack seems to think. But generally speaking, I myself feel with Jack and with Nate that it does no good to simply pass a law saying that there will be no strike. I'm more inclined to emphasize those procedures that make strikes unnecessary. And there are two states, Michigan and Wisconsin, and a few others, where we've seen some major emphasis on fact-finding and mediation for the first time in a long time. I don't myself feel that we've had anywhere near the ingenuity and hard work done on these aspects of dispute settlement procedures than we've had with respect to others that are so well suited to the public sphere.

DR. STIEBER: With regard to Aaron's talk, there was one thing that I liked very much and I think it is very important. As he put it, there is an utter lack of protection for unorganized employees in the United States. This came home to me in doing some work in Western European countries. While we have a great many labor laws, perhaps more than any other country, we do not have laws with respect to certain basic conditions of employment that other countries, who do not have as much labor relations law as we do, do provide through their own legislation. For example, we do have the laws in the United States regarding hours of work and hours of overtime, and this insures reasonable likelihood that even in unorganized plants where there are no contracts, these employees also will have a certain maximum hours and after that they will receive overtime. Most European countries go beyond this with regard to these fundamental necessities that are guaranteed to employees. For example, most countries guarantee certain number of weeks of vacation to all employees regardless of contract, so that in addition to hours law they provide that all employees are entitled to, let us say, a week or two weeks' vacation.

Now unions and employers are at liberty to negotiate for more liberal provisions,