

THE LEGALITY OF STRIKES UNDER THE RAILWAY LABOR ACT: SEEKING A BRIGHT-LINE RULE

I. Defining the Problem

Litigation over strikes in the airline and railroad industries is often intense and fast-paced. Late night applications to federal judges for emergency restraining orders are not unusual. And the stakes in these cases are incredibly high. As one former federal judge put it, a strike is like a death penalty for a carrier. Judge Posner has explained why strikes against air and rail carriers are “unduly disruptive”:

“[u]nlike manufacturing industries and even some service industries, the transportation industry does not produce a storable commodity, and so it cannot produce for inventory in anticipation of a strike or accelerate production afterward to make up for lost production during the strike. It is therefore peculiarly vulnerable to a strike.”¹

Indeed, a carrier that is shut down by a strike can suffer grave harm, to the point of imperiling its very existence as a going concern. Ready alternatives in other modes of transportation provide shippers or passengers with an opportunity to shift to competitors without risky labor problems. The damage caused to a carrier by strikes in terms of lost revenues and loss of customer goodwill may take years to repair.

In addition, the effects of strikes against air and rail carriers often extend far beyond their point of origin. For example, strikes or picketing against any one of the major rail carriers can easily cause harm to the others. The railroads all exchange traffic with one another at hundreds of interchange points across the country. Shutdowns or delays on one system cause havoc on all the others as well. Cars pile up on the sidings, traffic must be rerouted, crucial timetables are destroyed, and delivery obligations cannot be met. A strike against one of the major carriers could quickly cripple large portions of the national rail transportation system. Likewise, strikes that shut down a major airline can lead to delays and disruptions on other carriers (especially airlines that operate in the same region of the country). Thus, disruption of service on one air carrier has the same kind of ripple effects on other carriers as in the rail industry.² In short, the consequences of self-help can extend far beyond the affected carrier itself, impacting industry, consumers, and the traveling public alike.

¹ *Chicago & N.W. Transp. Co. v. Railway Labor Executives' Ass'n.*, 908 F.2d 144, 148 (7th Cir. 1990). See also *E.E.O.C. v. United Air Lines, Inc.*, 755 F.2d 94, 98 (7th Cir. 1985) (“Transportation strikes are more disruptive than strikes in manufacturing.”); *Air Line Pilots Ass’n Int’l v. Civil Aeronautics Bd.*, 502 F.2d 453, 458 (D.C. Cir. 1974) (discussing Board findings that “the air transport industry ‘suffers a greater impact by strike than do other industries, and is therefore more vulnerable to strike[s] . . . than are other industries.’”).

² See, e.g., *Association of Flight Attendants, AFL-CIO v. Alaska Airlines*, 847 F.Supp. 832 (1993).

It was largely because of these potentially devastating consequences of transportation strikes that Congress passed the Railway Labor Act (“RLA”), 45 U.S.C. § 151 *et seq.*³ The RLA provides various mandatory dispute resolution mechanisms that are designed to settle disagreements between labor and management without resort to economic self-help. According to the now-ossified judicial gloss on the statute, the RLA divides disputes into “major” and “minor” categories (with a rarely-mentioned third category involving union representation disputes).⁴ Minor disputes must be resolved through binding arbitration, meaning that unions cannot strike over such disputes, and attempts to circumvent the arbitration process through strikes may be enjoined by federal courts, notwithstanding the Norris-LaGuardia Act. As for major disputes, the statute requires lengthy negotiation and mediation procedures -- the so-called “status quo” period -- during which time both sides are forbidden from engaging in self-help. As in the case of minor disputes, courts have the power to enjoin self-help during the status quo period. It is only once these major dispute procedures are exhausted that the employees may take to the streets or the carrier may lock out employees. In other words, once the Act’s procedures have failed to produce agreement, all bets are off.

Despite this relatively simple architecture, the RLA’s treatment of self-help has been a source of constant debate and litigation over the years. Unions regularly attempt to strike in situations where they have not -- for one reason or another -- exhausted the major dispute procedures.⁵ Carriers, on the other hand, sometimes seek to enjoin strikes or other forms of labor protests even after the parties have exhausted the major dispute procedures of the Act, arguing that employees should continue to be restrained from using economic force.

Intermittent strikes – sometimes referred to as “CHAOS” tactics – are a prime example of the difficulties in applying the RLA’s rules concerning strikes. (In general, an intermittent strike, work-to-rule campaign, or sick-out or similar activity is a scheme by which employees attempt to inflict economic harm on the carrier through recurring refusals to work that are sufficiently limited in duration as to avoid judicial intervention or carrier discipline.) Unions have, on occasion, sought to use intermittent strikes in situations outside of the exhaustion context, betting that the intermittent nature of the activity will make it more difficult for a carrier to secure a TRO. On the flip side, some carriers have sought to enjoin the use of intermittent strikes even after major dispute procedures have been exhausted, arguing that such tactics should be unlawful.

³ The Act’s primary stated purpose is “to avoid any interruption to commerce or to the operation of any carrier engaged therein.” 45 U.S.C. § 151a.

⁴ See *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945).

⁵ The usual paradigm involves a dispute over an existing collective bargaining agreement, where the union asserts that a carrier’s asserted interpretation is really just a pretext for a unilateral change in the agreement (a “major dispute”). The courts have adopted a standard providing that so long as the carrier’s position is “arguably justified” or not “frivolous,” it does not constitute an attempt to circumvent the restriction on unilateral changes under Section 2 Seventh and so is a minor dispute subject to arbitration. See *Consolidated Rail Corp. v. RLEA*, 491 U.S. 299 (1989) (“*Conrail*”). Unfortunately, this standard tends to invite disagreements about whether the carrier’s position is indeed “arguable” or not.

These battles over the legality of strikes prior to and after exhaustion of the major dispute procedures undermine the basic bargain of the RLA. The Act was originally intended as a *quid pro quo* between the carriers and the unions, whereby employees received a means of resolving contract interpretation disputes and employers received a guarantee that devastating strikes would, for the most part, be avoided. Likewise, the Act was designed to permit a wide array of self-help – even some forms of self-help that would be unlawful under the National Labor Relations Act (“NLRA”) – once major dispute procedures are exhausted, thereby ensuring that maximum pressure could be brought to bear to end the dispute as quickly as possible.

II. The Solution: A Bright-Line Rule

The solution to this fundamental problem in the application of the RLA is a deceptively simple bright-line rule: the *only* circumstance in which a union may engage in self-help against a carrier is if it fully exhausts the “major dispute” procedures of the RLA.⁶ In all other cases – if the parties have not exhausted or cannot exhaust major dispute procedures – it may not strike. There are no loopholes or special cases or exceptions. In particular, there is no basis under the RLA’s bright-line rule for strikes or other uses of economic force in response to a perceived violation of the RLA by a carrier. Illegal behavior by a carrier does not mean that a union can respond with illegal behavior of its own. Rather, the availability of judicial actions for damages and injunctions provide the sole – but entirely adequate – remedy through which the unions can seek redress of unjustified or unlawful carrier conduct, such as a violation of Section 2 Seventh. Nor should pre-exhaustion strikes ever be justifiable as a response to political disputes, third party behavior, or any other similar rationale.

By contrast, there is no basis for enjoining almost any form of self-help *after* exhaustion.⁷ Once RLA major-dispute procedures are exhausted, the parties’ right to exercise self-help is extraordinarily broad, essentially unlimited by the restrictions that apply to economic force in other industries under the NLRA. Thus, there is no limit on tactics such as secondary strikes, intermittent strikes, slow-downs, and the like. Once the parties have fully complied with the Act’s procedures and been released by the National Mediation Board, the right of both sides to bring maximum economic pressure to bear should limit the duration of the labor dispute by encouraging bargaining, and with it, the attendant damage to the economy should be reduced. Of course, unions and employers may not engage in any activities that are criminal or unlawful under some other law, but the RLA should not be used to limit in any way the pressure to settle once post-exhaustion self-help is exercised.

The principle benefit of such a bright-line rule is certainty. A bright-line rule concerning the availability of self-help eliminates or at least diminishes the risk that a union or carrier will test the looseness of the current standards. As it now stands, unions are often tempted to try pre-

⁶ See John Gallagher & Margaret Spurlin, “CHAOS: Slowdowns and Partial Strikes Under the RLA,” ALI-ABA Airline and Railroad Labor and Employment Law (2004) 533.

⁷ See *TWA, Inc. v. Flight Attendants*, 489 U.S. 426 (1989) (explaining that during period following exhaustion of Act’s procedures, virtually all forms of peaceful self-help are lawful; *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 392 (1969) (parties that have exhausted major dispute procedures may “employ the full range of whatever peaceful economic power they can muster.”).

exhaustion self-help, gambling on the chance that a court might deny an injunction, thereby forcing the carrier to either suffer a strike or capitulate to the union's demands without going through the RLA arbitration procedures. Likewise, without a clear and comprehensive conception of when self help is available, carriers have every incentive to seek restrictions on the employees' post-exhaustion self-help rights.⁸ Indeed, with ongoing corporate downsizing, mergers, increasing competition, and other pressures on the transportation industries, and the concomitant rise of "inside game" disruptive tactics such as the intermittent strike, these battles over the outer boundaries of the RLA's strike rules could easily intensify unless both unions and management know with precision and certainty when economic self-help is legal.

III. Statutory and Judicial Support for the Bright-Line Rule

Support for a bright-line rule barring all pre-exhaustion self-help but allowing all post-exhaustion self-help is found both in the Act itself and in case law. First, consider the structure of the Act. The purpose of the RLA, the statute tells us quite plainly, is to provide a means of resolving disputes without disruptions to commerce. As noted above, a wide array of procedures, including negotiation, mediation, and arbitration (both binding and non-binding), are offered as alternatives to strikes or other forms of self-help. Thus, in virtually every case of dispute between a carrier and its employees, one or more of these procedures are available. It is not the case that the union is stripped of its primary weapon – the strike – and left without any means of imposing its will on the carrier.⁹ The Act's negotiation, mediation, and arbitration procedures are a complete and adequate remedy for resolving disputes, up to the point that those procedures have been fully exhausted. And once those procedures are exhausted, the policies of the Act encourage the parties to resolve their dispute through whatever means necessary so as to minimize the impact on the public.¹⁰

Beyond structural considerations, a bright-line rule also finds textual support in the Act. To be sure, there is no provision in the RLA that expressly discusses the use of self-help *per se*. But Section 2 First of the RLA does address the obligation to avert disruptions of commerce, and is therefore the primary textual support for the Act's bright-line rule against pre-exhaustion strikes. Section 2 First provides that carriers and employees are obligated to "exert every reasonable effort" to "make and maintain agreements" and "to *settle all disputes . . . in order to*

⁸ See John J. Gallagher & Margaret H. Spurlin, "CHAOS: Slowdowns and Partial Strikes Under the RLA," ALI-ABA Airline and Railroad Labor and Employment Law at 541 (arguing that post-exhaustion strikes should be enjoined in some situations); Robert Siegel, "Partial Strikes Under the Railway Labor Act: The Need for a Doctrine of Unprotected Concerted Activity," ALI-ABA Airline and Railroad Labor and Employment Law (2004) 513.

⁹ *Brotherhood of RR Trainmen v. Chicago River & Indiana RR Co.*, 353 U.S. 30, 41 (1957) ("*Chicago River*"). The Court explained that the Norris-LaGuardia Act was designed to prevent federal courts from "upsetting the natural interplay of the competing economic forces of labor and capital." But the sponsors of that Act recognized that "the machinery of the Railway Labor Act channeled these economic forces, in matters dealing with railway labor, into special processes intended to compromise them. Such controversies, therefore, are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative." *Id.*

¹⁰ See 45 U.S.C. § 151a (referencing the need for "prompt and orderly" settlement of all disputes arising from proposals for changes in agreements).

avoid *any* interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.”¹¹ A careful reading of the plain language of this provision reveals a wide-ranging prohibition against strikes absent exhaustion of the Act’s procedures. It is, on its face, a broadly worded provision, and it is hard to understand what “reasonable efforts” would include if they did not encompass the Act’s own procedures. An obligation to use reasonable efforts – including the Act’s procedures – to avoid interruptions to commerce cannot be read as anything other than a restriction on the use of self-help prior to exhaustion. A failure to invoke those alternative procedures prior to a strike is almost by definition a failure to “exert every reasonable effort” to avoid a disruption to commerce.¹²

Additionally, a number of judicial decisions – many of them from the earlier days of the Act – assume a bright-line rule against pre-exhaustion strikes based on the “reasonable efforts” clause of Section 2 First. These cases expressly or implicitly recognize a difference between, on the one hand, self-help that is attempted notwithstanding the availability of an alternative form of dispute resolution procedure, and, on the other hand, self-help that is initiated after all such procedures have been fully utilized without success. In doing so, these cases suggest where the line of lawfulness of self-help should be drawn.

First, in *Virginian Railway v. Federation* the Supreme Court addressed Section 2 First and its relationship to the use of self-help. In particular, the Court noted that Congress had decided to regulate “the relations of rail carriers to their employees” by means that are “reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders.”¹³ The Court pointed specifically to Section 2 First, explaining that its clear purpose was the prevention of “any interruption to commerce,” and that it accomplished that goal by providing for “the settlement of industrial disputes by the promotion of collective bargaining between employers and the authorized representative of their employees, and by mediation and arbitration when such bargaining does not result in agreement.”¹⁴ In other words, the Court clearly believed that the procedures of the Act were designed to prevent strikes, meaning that strikes are not permissible while such procedures are available. Indeed, the Court went so far as to hold that that injunctions issued to enforce the RLA’s dispute resolution procedures were not subject to the Norris-LaGuardia Act’s general bar on labor injunctions.¹⁵

The Court addressed the lawfulness of self-help under the RLA again in *Trainmen v. Toledo, P. & W. R.R.*¹⁶ That case dealt with the question whether a railroad could obtain a strike

¹¹ 45 U.S.C. 152 First (emphasis added).

¹² The legislative history of the Act bolsters this interpretation. In the hearings and debates over the RLA and its amendments, both supporters of unions and supporters of carriers suggested that Section 2 First was intended to bar either side from resorting to economic force pending full exhaustion of the Act’s procedures, but not thereafter. *See, e.g.*, Hearings on H.R. 7189, 69th Cong. 1st Sess. (1926) at 91-93 (testimony of Mr. Richberg); Senate Debates, 67 Cong. Rec. 8881 (1926) (statement of Senator Cummins); Hearings on S. 2306 Before the Senate Comm. on Interstate Commerce, 69th Cong., 1st Sess. (1926) at 16

¹³ *Virginian Railway*, 300 U.S. at 553.

¹⁴ *Id.*

¹⁵ *Id.* at 563.

¹⁶ 321 U.S. 50 (1944).

injunction during a major dispute after mediation had failed, and the employees had accepted the Board's proffer of arbitration but the railroad had rejected it. The Court ultimately held that the railroad was not entitled to an injunction in those circumstances, because by rejecting the proffer of arbitration the carrier had failed to satisfy Section 8 of the Norris-LaGuardia Act, which provides that "[n]o restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law . . . or who has failed to make every reasonable effort to settle such dispute. . . ."¹⁷ But in discussing Section 8, the Court also discussed the general bounds of lawful self-help under the RLA. It noted that when the Norris-LaGuardia Act was drafted, its sponsors understood that self-help would not be permissible without first resorting to any available procedures of the RLA:

"The workers could not and would not think of going on strike before *all the remedies provided in law* have been exhausted. If the railroads have complied, they would not, as has been suggested [by Representative Beck], be deprived of any relief which they may have in law or equity."¹⁸

Thus, it appears that the Court's conclusions about the applicability of Section 8 were, at least in part, based on the notion that exhaustion by the employees was a prerequisite for the right to strike, and so should likewise be a prerequisite for a railroad's right to an injunction against self-help.¹⁹

The watershed *Chicago River* decision followed thirteen years thereafter, establishing the basic principle that employees may not strike in derogation of the Act's procedures.²⁰ Several years later, in *Locomotive Engineers v. Baltimore & Ohio R.*, the Supreme Court again expressly linked the exhaustion of the Act's procedures to the right of self-help.²¹ In that case, a group of unions and railroads engaged in the major dispute bargaining procedures of the RLA – including service of Section 6 notices, conferences, mediation, and a proffer of arbitration – and were unable to reach agreement. After the Act's procedures were exhausted, the railroads served notice of their intent to implement unilaterally their proposed changes in agreements. The

¹⁷ 29 U.S.C. § 108.

¹⁸ *Id.* at 59 (quoting 75 Cong. Rec. 5504, statement of Representative LaGuardia) (emphasis in original).

¹⁹ Moreover, the Court's holding that the reference to "every reasonable effort" in Section 8 of the Norris-LaGuardia Act includes all of the RLA's "provisions and machinery for voluntary arbitration" has obvious implications for the meaning of the same language in Section 2 of the RLA. If a carrier must use the Act's procedures as "every reasonable effort" in order to secure an injunction, then clearly a union must utilize those procedures as "every reasonable effort" under Section 2 First before it may disrupt commerce.

²⁰ The strike in that case involved a minor dispute, subject to the arbitration procedures of Section 3 First. In *Locomotive Engineers v. Louisville & N. R.R.*, 373 U.S. 33, 38 (1963), the Court extended its holding in *Chicago River* by ruling that once a minor dispute is submitted to arbitration, the union may never use self-help, even after the arbitration has concluded. It held that "[t]o allow the parties to resort to economic self-help at this point in the process [after the arbitration award is issued] would . . . permit [a union] to withdraw at will from the process of settlement which Congress has expressly required both parties to follow." *Id.* at 41-42. The Court has since gone on to hold that the *Chicago River* principle applies not just to arbitrable disputes under Section 3, but also to other categories of disputes subject to the procedures of the RLA. *See, e.g.*, P&LE.

²¹ *Locomotive Engineers v. Baltimore & O.R.R.*, 372 U.S. 284 (1963).

unions sued, complaining that such actions violated the RLA. But the Court rejected that claim. When it came to the lawfulness of self-help, the Court said, the “only question” is whether “the parties have exhausted the procedures provided by the Railway Labor Act for major disputes such as that involved here.”²² Because all the statutory procedures were exhausted, the parties were free to use self-help.²³

The *Shore Line* decision in 1969 muddied these waters, and has been the source of much of the confusion about the lawfulness of self-help under the RLA ever since. The holding of *Shore Line* concerned the definition of the “status quo” that must be maintained during the pendency of the Section 6 major dispute process.²⁴ The Court held that the “status quo” obligation of the Act extended to “actual, objective working conditions and practices, broadly conceived, which were in effect at the time the pending dispute arose and which are involved in or related to that dispute.” In getting to that holding, the Court described the status quo requirement of the RLA as follows: “The Act’s status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike.”²⁵ The Court then noted as follows:

“The goal of the BLF&E was to prevent the Shore Line from making outlying assignments, a matter not covered in their existing collective agreement. To achieve its goal, the union invoked the procedures of the Act. The railroad, however, refused to maintain the status quo and, instead, proceeded to make the disputed outlying assignments. *It could hardly be expected that the union would sit idly by as the railroad rushed to accomplish the very result the union was seeking to prohibit by agreement. The union undoubtedly felt it could resort to self-help if the railroad could, and, not unreasonably, it threatened to strike.* Because the railroad prematurely resorted to self-help, the primary goal of the Act came very close to being defeated. . . . *If the railroad is free at this stage to take advantage of the agreement’s silence and resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. Only if both sides are equally restrained can the Act’s remedies work effectively.*”²⁶

While this language has sometimes been read to mean that unions are free to strike prior to exhaustion if the railroad has violated the status quo, it is at least arguable that the Supreme Court was saying in this passage only that it would be “reasonable” and “expected” for a union to want to strike in response to violations of the RLA by a carrier, not that a union would be acting lawfully if it actually did so. Thus, the Court has never held that employees may lawfully

²² *Id.* at 290.

²³ *Id.* at 291. The Court used similar language in the *Railway Clerks v. Florida East Coast R. Co.* decision. In that case, the parties had again reached the end of the major dispute procedures. The Court explained that “[t]he unions, *having made their demands and having exhausted all the procedures provided by Congress,* were therefore warranted in striking.” 384 U.S. 238, 244 (1960) (emphasis added).

²⁴ *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969).

²⁵ *Id.* at 153.

²⁶ *Id.*

strike in response to a Section 2 Seventh violation by a carrier (although a number of lower court decisions seem to assume this to be true).

The next significant RLA decision by the Supreme Court came in 1971, in the case of *Chicago & North Western Transportation v. UTU*. The issue was whether Section 2 First could be used as the basis for a strike injunction after a nominal exhaustion of major dispute procedures, but where the carrier alleged that the union had failed to use “every reasonable effort” to settle the dispute. In other words, the case presented the question whether Section 2 First could be used to enjoin a strike in a situation where the parties had allegedly *not* complied with their obligation to fully exhaust the procedures of the Act.

The Court held, as an initial matter, that Section 2 First is judicially enforceable and not a “mere exhortation.” It went on to explain that federal courts should be cautious about using Section 2 First to enjoin strikes because of the risk of “infringement of the strong federal labor policy against interference with the substantive terms of collective bargaining agreements.”²⁷ In other words, the Court was concerned that allegations that one side or the other failed to use “every reasonable effort” not be used as a basis for second-guessing the bargaining strategy of labor or management during a pending major dispute. However, the Court did say that federal courts can enforce Section 2 First by enjoining strikes in at least some cases. In particular, it held that Section 2 First is enforceable “by whatever appropriate means might be developed on a case-by-case basis.”²⁸ This means, the Court explained, that Section 2 First may be used to enjoin strikes when it is “appropriate” and “practical [and] effective” to do so.²⁹ So in the end, this case supports the notion that the RLA imposes a comprehensive ban on pre-exhaustion strikes. It further suggests that courts would *not* be able to use Section 2 First to enjoin strikes after the parties have fully exerted every reasonable effort to settle, as it would not be “appropriate, practical, or effective” to do so.

Perhaps more important than what the Supreme Court *has* said on this subject is what it has *not* said. There is no decision that expressly holds that strikes are permissible prior to exhaustion of the Act’s procedures, or that Section 2 First does not support a general ban on pre-exhaustion self-help. The closest the Court came to such a statement was in the case of *Burlington Northern v. BMW*.³⁰ There, the Supreme Court held that Section 2 First does not bar secondary picketing by a union. But the holding in *Burlington Northern* was based squarely on the fact that the union engaged in secondary picketing had fully exhausted the major dispute procedures. The Supreme Court reasoned that Section 2 First does not limit secondary picketing *after* exhaustion of the Act’s major dispute procedures because “the availability of such self-help measures as secondary picketing may increase the effectiveness of the RLA in settling major disputes by creating an incentive for the parties to settle prior to exhaustion of the statutory procedures.” 481 U.S. at 451-52.

²⁷ *Chicago & North Western*, 402 U.S. at 579 n.11.

²⁸ 402 U.S. at 577.

²⁹ *Id.* at 577, 582.

³⁰ *Burlington Northern R.R. v. BMW*, 481 U.S. 429 (1987).

Burlington Northern, therefore, actually supports both sides of the bright-line rule – it suggests that prior to exhaustion, the procedures of the Act are exclusive, but that after exhaustion, there are few constraints on the parties’ uses of economic force. Even forms of self-help – like secondary picketing – that are unlawful under the NLRA may be lawful under the RLA so long as they are used in the post-exhaustion context.

Finally, the Supreme Court was reasonably clear about the post-exhaustion side of the bright-line rule in *TWA, Inc. v. Flight Attendants*. In that case, it stated that virtually all forms of peaceful self-help are permissible once the formal bargaining process ends.³¹ The Court noted that “at this final stage of a labor dispute regulated by the RLA, ‘the Act is wholly inexplicit as to the scope of allowable self-help.’”³² This legislative “silence,” the Court held, “indicate[s] that we should hesitate to imply limitations on all but those forms of self-help that strike a fundamental blow to union or employer activity and the collective bargaining process itself.”³³

In sum, the text, legislative history, and weight of judicial authority demonstrate that the Act can and should be interpreted as providing a bright-line rule: exhaustion of RLA procedures is a fundamental predicate to strikes, and such strikes are barred in all other situations. There are *no* exceptions.³⁴ But once those major dispute procedures are exhausted, the union is free to engage in virtually any form of non-violent economic self-help it desires.

III. Application of the Bright-Line Rule to Intermittent Strikes

Intermittent strikes provide a good example of the bright-line rule in practice because questions about intermittent strikes have arisen on both sides of the line: attempts by unions to use such tactics prior to exhaustion, and attempts by carriers to enjoin or otherwise limit such tactics after exhaustion.

A. Pre-Exhaustion

The courts have generally been clear that intermittent strikes – like all other forms of concerted use of economic force – are unlawful when occurring prior to exhaustion. Thus, for example, the 1981 *Texas International Airlines* decision emphasized that parties in a major dispute have an obligation to exhaust RLA procedures prior to engaging in self-help – including slow-downs and intermittent strikes.³⁵ A legion of other decisions likewise hold that non-traditional work stoppages – slow-downs, refusals to work overtime, work-to-rule campaigns,

³¹ 489 U.S. at 431.

³² *Id.*

³³ *Id.*

³⁴ For example, the D.C. Circuit has recently rejected the notion that a pre-exhaustion strike can be justified on “political” grounds. *National Passenger Corp. v. TWU*, 373 F.3d 121 (D.C. Cir. 2004).

³⁵ *Texas Int’l Airlines, Inc. v. ALPA*, 518 F.Supp. 203, 215 (S.D. Tex. 1981) (“Under the Railway Labor Act, parties in a major dispute have a statutory duty to fully exhaust statutorily-mandated notice and mediation procedures before resorting to self-help measures such as a strike or work slowdown.”).

and so on – are enjoined prior to exhaustion on the same basis as traditional strikes.³⁶ Indeed, the issues arising from use of intermittent strikes in this context are not so much legal as practical. Demonstrating that a slow-down is actually underway or that the disruption is a product of union organizing can be difficult for the carrier, often requiring detailed discovery and/or development of statistical proofs while simultaneously facing enormous pressure for immediate results.

More recently, in a context that has been increasingly common in recent years, the Southern District of New York in *Northwest Airlines Corp. v. Ass'n of Flight Attendants*,³⁷ held that Northwest Airlines, which was under Chapter 11 bankruptcy protection, was entitled to an injunction to prevent self-help by the flight attendants' union. Northwest had been granted permission by the bankruptcy court to reject its collective bargaining agreement with the flight attendants and institute new terms and conditions that tracked a previous agreement the union rank-and-file had rejected. The union then announced it would engage in a series of intermittent strikes. The bankruptcy court concluded that it could not enjoin the union's actions, but the district court came to the opposite conclusion, noting that a strike in this context amounted to "a suicide weapon."³⁸ The outcome of this case is consistent with the bright-line theory of the RLA – there has been no exhaustion of the Act's dispute procedures, and thus there is no right to strike, period. The unilateral change in the CBA by the carrier (whether or not approved by the bankruptcy court) does and cannot provide a justification or excuse for work stoppages or other use of economic force.

A decision that is harder to square with the theory is the Sixth Circuit's 2001 decision in *ABX Air*. In that case, the court refused to enjoin an organized refusal to bid for open-time flying during a pre-exhaustion period.³⁹ It did so because it found that the union activity was not really a disruption of the carrier's "regular business." But the court also said that because the issue raised a minor dispute, there was no obligation on the part of the union to maintain the status quo, thus freeing it to use self-help. This reasoning appears to be a perversion of the Supreme Court's observation in *Conrail* that there is no "status quo" obligation on *employers* during a minor dispute, meaning that they are free to implement their interpretation of an agreement pending arbitration.⁴⁰ The *ABX* court's suggestion that unions are free to use self-help in some situations prior to exhaustion of the Act's procedures is, at best, inconsistent with 50 years of RLA jurisprudence.

³⁶ See e.g. *Delta Air Lines v. ALPA*, 238 F.3d 1300 (11th Cir. 2001); *United Air Lines, Inc. v. IAM*, 243 F.3d 349 (7th Cir. 2001); *American Airlines, Inc. v. ALPA*, 160 LRRM 2459 (N.D. Tex. Feb. 12, 1999), *aff'd* 228 F.3d 574 (5th Cir. 2000).

³⁷ 349 B.R. 338 (S.D.N.Y. 2006)

³⁸ *Id.* at 370. The trial court's ruling is currently on appeal to the Second Circuit.

³⁹ *ABX Air, Inc. v. APA*, 266 F.3d 392 (6th Cir. 2001).

⁴⁰ 491 U.S. at 306.

B. *Post-Exhaustion*

In the post-exhaustion context, it is reasonably well-settled that intermittent strikes are lawful. The Second Circuit’s 1990 decision in *Pan American World Airways* held that intermittent strikes were not enjoined once the self-help period had commenced.⁴¹ The court rejected the argument that intermittent strikes are illegal under the “federal common law of labor relations,” noting that under the NLRA, intermittent strikes are “unprotected activity” but are not unlawful or enjoined.⁴² Similarly, in *Alaska Airlines*, a Washington district court held that once the major dispute mechanisms were satisfied, unions were free to engage in intermittent or partial strikes aimed at disrupting operations.⁴³ Thus, once again the law as applied appears to follow the bright-line rule.

There is, however, a lingering question concerning whether carriers can respond to intermittent strikes in the post-exhaustion context by firing or otherwise disciplining the striking employees. The *Alaska Airlines* decision said that carriers may *not* discharge intermittent strikers, reasoning that the carrier’s ability to respond to self-help by the union must be limited to measure that are reasonably necessary to maintain operations and cannot undercut the union’s ability to represent its members.⁴⁴ Thus, a carrier may bring on permanent replacements, but cannot discharge the striking employees.⁴⁵ The result is that workers who engage in disruptive tactics continue to draw pay, meaning that the carrier is essentially subsidizing the use of self-help against itself.

This notion that a carrier cannot respond to post-exhaustion intermittent strikes with discipline is, at best, in tension with the bright-line rule of the RLA. If the overriding principle of exhaustion is that both sides are free to exercise all of the economic weapons at their disposal, it seems inconsistent that the carrier would be handicapped in this respect. Just as the union is able to engage in virtually unlimited self-help, the carrier should be able to respond as it sees fit. To be sure, the carrier’s right of self-help in the post-exhaustion context must be managed with an eye toward actions that are “reasonably necessary” to permit the carrier to sustain operations.”⁴⁶ But a blanket prohibition on discharge or discipline of employees who engage in intermittent strikes is highly problematic. By limiting the carrier’s range of conduct in this fashion, the pressure on employees to settle is gravely reduced, which in turn may prolong the disruption in commerce, to the detriment of the public at large.

⁴¹ *Pan American World Airways, Inc. v. Int’l Brotherhood of Teamsters Local 732*, 894 F.2d 36, 40 (2d Cir. 1990)

⁴² *Id.*

⁴³ 847 F. Supp. 832 (W.D. Wash. 1993).

⁴⁴ *Id.* at 836. See also *National Airlines v. IAM*, 416 F.2d 998 (5th Cir. 1969) (holding that carrier may not fire workers who engaged in illegal strike). By contrast, under the NLRA, intermittent strikes are generally not protected activity. *International Union, UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949)

⁴⁵ 847 F. Supp. at 836.

⁴⁶ *BRAC v. Florida East Coast Ry.*, 384 U.S. 238 (1966); see also *TWA*, 489 U.S. at 442 (rejecting union argument that permanent replacements must be justified by business necessity).

IV. Conclusions

Application of a bright-line rule for strikes and other forms of economic force under the RLA has substantial benefits in terms of enhanced certainty and reduced transaction costs. Certain that strikes will always be barred in the absence of exhaustion, the parties are freed from the temptation to litigate over minor disputes, and encouraged to fully utilize the dispute resolution procedures of the Act in a timely and efficient manner. Likewise, the surety that carriers and unions will be free to use virtually any means of self-help in the post-exhaustion world is the best means of encouraging settlement at the end of the major dispute process. Nor is this simply a normative argument – the bright-line rule is a thread that is woven through the long history of Supreme Court interpretations of the Act. It reflects the reality of the way that the Act is and should be applied.

Judicial treatment of intermittent strikes is, for the most part, fully consistent with this bright-line rule. It is well-settled that pre-exhaustion intermittent and non-traditional strikes are illegal, and equally clear that post-exhaustion strikes are lawful. It is only around the edges – in intermittent strike cases like *ABX* and *Alaska Airlines* – where courts have arguably strayed from the line. Thus, it is these decisions that are most suspect when viewed from the perspective of the overall jurisprudence, purposes, and structure of the RLA.