Federal Express Corporation *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Petitioner. Case 4–RC–17698

July 17, 1995

DECISION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, COHEN, AND TRUESDALE

On August 27, 1991, the Union filed a petition seeking to represent certain ground service employees who are employed in the Respondent's Liberty District, which encompasses parts of Pennsylvania, New Jersey, Delaware, and Maryland.[1] The Employer moved to dismiss the petition claiming that it was an air carrier subject to jurisdiction under the Railway Labor Act (RLA) and that because of that status, the Board lacked jurisdiction under Section 2(2) of the National Labor Relations Act. After a hearing, the Regional Director transferred the proceeding to the Board.

By letter dated June 29, 1992, the Board sent the record to the National Mediation Board (NMB) requesting an advisory opinion as to whether the employees at issue were subject to its jurisdiction under the RLA. On August 27, 1992, the Petitioner moved the Board to reopen the record to take additional, previously unavailable, evidence in support of its petition. After issuing a Notice to Show Cause why the record should not be reopened, to which the parties responded, the Board remanded the case to the Regional Director with instructions to take the additional evidence. Following 2 days of hearings in March 1993, the Regional Director again transferred the proceedings to the Board. On June 8, 1993, the Board requested the NMB to return the record so that the Board could examine it in light of the additional evidence.

The Board held oral argument on December 7, 1994, in this case, together with *United Parcel Service*, 8–CA–24212, to consider whether and under what circumstances the Board should continue its practice of referring cases of arguable RLA jurisdiction to the NMB for an advisory opinion. The parties participated in the oral argument, as did several amici,[2] and submitted postargument briefs supplementing their arguments.[3]

The Board has considered the issue in light of the arguments and briefs and has decided that the circumstances of this case do not warrant a departure from the Board's practice.[4] In so concluding, we are mindful of the statutory framework of the National labor Relations Act.

Section 2(2) and (3) of the Act provide, in pertinent part:

> (2) The term ''employer'' includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any person subject to the Railway Labor Act. . . .
>
> (3) The term ''employee'' shall include any employee . . . but shall not include . . . any individual employed by an employer subject to the Railway Labor Act.

In view of this clear statutory language, the first step in considering our jurisdiction under the Act, when a claim of arguable RLA jurisdiction is raised, is the determination whether the employer is subject to the Railway Labor Act. Although occasional departures may be justified, we believe the better policy, particularly where there are very difficult questions of interpretation under the RLA, is to refer jurisdictional questions of this type to the National Mediation Board.[5] *Pan American World Airways*, supra at 495.

Contrary to the suggestion of our dissenting colleague, we do not resolve the issue of whether Section 2(2) and (3) *mandate* a referral to NMB. Nor do we resolve the issue of whether NMB has primary jurisdiction to decide the jurisdictional issue. Rather, we simply hold that where, as here, the jurisdictional issue is doubtful, we consider it prudent to defer the issue to the NMB. Our decision in this respect is *informed by* the language of Section 2(2) and (3), but it is not necessarily *compelled by* that language. In addition, our decision is supported by the absence of any showing that the historic system of referral has broken down. Accordingly, we perceive no need to fix it.

Our dissenting colleague suggests that the Board has the expertise to interpret and apply the RLA, and that the Board's policy of referring cases of possible RLA jurisdiction to the NMB for its determination constitutes an impermissible abdication of the Board's statutory obligation to administer and enforce the NLRA. As noted by the dissent, however, in this case

[1] The petition, as amended in December 1991, seeks to represent the following unit:

> All regular full-time and part-time hourly ground service employees in the Liberty District; Excluding Ramp Agents, Ramp Agent/Feeders, Handlers, Senior Handlers, Heavyweight Handlers, Senior Heavyweight Handlers, Checkers/Sorters, Senior Checker/Sorters, Shuttle Drivers, Shuttle Driver/Handlers, office clerical employees, engineers, guards and supervisors as defined in the Act.

[2] Emery Air Freight Corporation d/b/a Emery Worldwide, the Labor Policy Association, the American Federation of Labor and Congress of Industrial Organizations, the National Railway Labor Conference, and the Airline Industrial Relations Conference and Regional Airline Association.

[3] The parties also addressed the question of whether jurisdiction in this case lies with the Board or the NMB, but we do not reach that question because of our disposition of the referral issue.

[4] *Pan American World Airways*, 115 NLRB 493 (1956); *Wings & Wheels*, 139 NLRB 578 (1962).

[5] If it is clear that an employer is subject to the NLRA, there is no point in referring the case to the NMB, and such cases are therefore not referred.

''jurisdiction is not clear,'' and the Board has never asserted jurisdiction over Federal Express. Indeed, Federal Express has been a carrier under the RLA since at least the mid-1970's. Resolution of the question of whether Federal Express *remains* subject to the RLA would require us to delve into very difficult questions of RLA law and possibly to make new law under that statute. In no way does our decision, under all the circumstances of this case, to decline to interpret the RLA in the first instance constitute an abdication of our obligations under the Act.[6] Rather, adherence to the long-established and successful practice, under the circumstances here, discourages forum shopping, promotes stability and is consistent with our mandate in Section 1(b) of the Act to ''provide orderly and peaceful procedures . . . in connection with labor disputes affecting commerce.'' LMRA, 29 U.S.C. § 141(b). Accordingly, we have this day resubmitted the record in this case to the NMB requesting an advisory opinion as to whether the employees at issue are subject to jurisdiction under the RLA.

CHAIRMAN GOULD, dissenting.

The Union initiated this case by filing a representation petition under Section 9 of the National Labor Relations Act (NLRA). In determining whether to direct an election, we must consider the Employer's claim that the Board has no jurisdiction because the Railway Labor Act (RLA) covers the Employer's operations and its employees in the petitioned-for unit.[1] In any other instance, the Union and the unit employees could expect the Board to resolve the jurisdictional issue. For the past 40 years, however, the Board has generally referred cases involving RLA jurisdictional claims to the National Mediation Board (NMB) for a dispositive ruling.[2] Contrary to my colleagues, I would no longer adhere to this practice. In my view, the Board has the authority, the expertise, and the responsibility to decide matters of its own jurisdiction in cases initiated before it.

''There is no statutory requirement that this question of jurisdiction be submitted for answer first to the National Mediation Board.'' *Dobbs Houses, Inc. v. NLRB*, 443 F.2d 1066 (6th Cir. 1971). Indeed, in *Dobbs House* and several other cases, the Board has departed from the general practice of referral to decide certain claims of RLA jurisdiction on its own.[3] These ''exceptions'' to the NMB referral procedure are actually representative of the Board's general practice with respect to jurisdictional claims involving the interpretation of other statutes or the decisions of other administrative agencies. In fact, there is no other instance in which the Board effectively asks another agency to decide the scope of the Board's own jurisdiction.

The Board has automatically deferred to the decisions of the NMB in cases referred by the Board. Consequently, when the NMB decides whether it has statutory jurisdiction in a referred case, it is making a conclusive decision about the Board's jurisdiction as well. The majority suggests that it would depart from this precedent and ''would not automatically and necessarily adopt'' an NMB jurisdictional determination. It does not describe with any specificity whatsoever the standard of review which would apply in deciding whether to defer to the NMB's decision. In fact, it is most telling that the majority cites no case—and, I submit, there is none—in which the Board has disagreed with an NMB determination after referring a case to the NMB. Although I would much prefer eliminating the current policy of referring RLA jurisdictional claims to the NMB for initial decision, I would welcome any departure from precedent which represents an independent exercise of Board decisional authority.

The Board has traditionally justified its discretionary referral practice by summary reference to the NMB's primary administrative authority to resolve matters of its own jurisdiction.[4] Certain participants in this proceeding have gone even farther to argue that the doctrine of primary administrative jurisdiction mandates referral to the NMB of all Board representation and unfair labor practice cases involving claims of RLA jurisdiction. Clearly, it does not.

The doctrine of primary administrative jurisdiction defines the relationship of *courts* to administrative agencies.[5] With respect to representation case issues which are unmistakably within the NMB's jurisdiction

[6] Our dissenting colleague misstates our position when he says that we would ''automatically dismiss the Board proceeding solely because the NMB is of the view that it has jurisdiction.'' Although we would give appropriate deference to the NMB's determination, we would not automatically and necessarily adopt that determination.

Our colleague complains that the NLRB has never refused to defer to a jurisdictional decision by NMB. On the other hand, he has not established that NMB has erred in any such decision. In our view, the fact that NMB has responsibly discharged its responsibilities in this respect is hardly a reason to terminate the practice of referral.

[1] The definition of an ''employer'' in Sec. 2(2) of the NLRA excludes ''any person subject to the Railway Labor Act.'' The definition of an ''employee'' in Sec. 2(3) of the NLRA excludes ''any individual employed by an employer subject to the Railway Labor Act.''

[2] See *Pan American World Airways*, 115 NLRB 493 (1956).

[3] *Teamsters Local 287 (Emery Air)*, 304 NLRB 119 (1991); *Conway Railroad YMCA*, 237 NLRB 1151, 1152 fn. 8 (1978); *Golden Nugget Motel*, 235 NLRB 1348 (1978); *Trans World Airlines*, 211 NLRB 733 (1974); *E. W. Wiggins Airways*, 210 NLRB 996 (1974); *Air California*, 170 NLRB 996 (1968); and *Hot Shoppes*, 143 NLRB 578 (1963).

[4] E.g., *Pan American World Airways*, 115 NLRB at 495 (quoting from *Northwest Airlines*, 47 NLRB 498, 501–502 (1943).)

[5] See K. Davis & R. Pierce, Jr., *Administrative Law Treatise*, 271 (3d ed. 1994).

to resolve, its decisions are virtually unreviewable by the courts.[6] So are like decisions of the Board.[7]

As a corollary matter, ''the proper course for a federal court faced with an 'arguable representation dispute' is to recognize that the NMB has primary jurisdiction to determine whether it has exclusive jurisdiction over the dispute.''[8]

Again, however, the Board has comparable primary jurisdiction. In defining the jurisdictional limits between states and the NLRA, the Supreme Court held that ''[w]hen an activity is arguably subject to § 7 or § 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.''[9] Similarly, in an earlier case affirming a Board determination that newsboys were employees within the meaning of the NLRA, the Supreme Court explained:

> It is not necessary in this case to make a completely definitive limitation around the term ''employee.'' That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of ''where all the conditions of the relation require protection'' involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, ''belongs to the usual administrative routine'' of the Board.[10]

Three points are readily apparent from a review of judicial precedent and academic treatises discussing the doctrine of primary administrative jurisdiction. First, the doctrine only defines the relationship between the courts and an administrative agency. It does not define the relationship between administrative agencies. Second, the doctrine is not unique to the NMB. The courts have recognized comparable primary jurisdiction in the Board and other agencies. Finally, and most significantly, the doctrine does not provide any support for the argument that the NMB has a greater right or expertise than the Board to decide a threshold jurisdictional question about a matter which may be arguably subject to either agency's jurisdiction. This is particularly so when a party has initiated a proceeding before the Board rather than the NMB.

The Board is clearly capable of applying and interpreting the RLA, its legislative history, and NMB decisions to the extent necessary to decide whether the Board or the NMB has jurisdiction over a particular employer or employee. It has effectively done this in those cases which it did not refer to the NMB.[11]

Furthermore, the Board has frequently had to refer to the law of other agencies in resolving representation and unfair labor practice issues under the NLRA.[12] Most notably, since 1946, Congress has mandated that the Board interpret and apply Section (3)(f) of the Fair Labor Standards Act (FLSA) in determining which individuals fall within the definition of agricultural laborer under Section 2(3) of the Act. Although the Board has relied on relevant rulings by the Department of Labor, the agency primarily charged with interpreting the FLSA, the Board has never referred agricul-

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[6] *Switchmen's Union v. NMB*, 320 U.S. 297 (1943); but see *Railway Labor Executives Assn. v. National Mediation Bd.*, 29 F.3d 655, 662–663 (D.C. Cir. 1994), which states that:

> *Switchmen's* itself . . . thus makes abundantly clear that the Supreme Court crafted a very sweeping rule for a very limited class of cases: While the [NMB] enjoys exceptional latitude when acting within its proper sphere of Section 2, Ninth power, that sphere itself is exceptionally narrow. Viewing *Switchmen's* in this light, it is difficult to conclude that the Supreme Court intended to insulate from review every action of the [NMB] which arguably involves a question of representation, including those (like the one at bar) that bear absolutely no relationship to ''find[ing] the fact'' of who employees desire as their representative.

[7] See *Boire v. Greyhound*, 376 U.S. 473 (1964).

[8] *United Transportation Union v. U.S.*, 987 F.2d 784, 789 (1993).

[9] *San Diego Building Trades v. Garmon*, 359 U.S. 236, 245 (1959). Cf. William B. Gould IV, *The Garmon Case: Decline and Threshold of ''Litigating Elucidation,''* 39 U. Det. L. Rev. 539 (1962); Archibald Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297 (1954).

[10] *NLRB v. Hearst Publications*, 322 U.S. 111, 130 (1944) (footnotes omitted).

[11] It is particularly noteworthy that the Board did not refer the RLA jurisdictional question to the NMB in the very case which is cited in *Pan American World Airways* as the analytical foundation for the referral practice. In both the original *Northwest Airlines* decision and in a supplemental decision in the same case, 51 NLRB 1012 (1943), the Board decided the jurisdictional issue *on its own*.

Furthermore, the Board articulated two reasons for dismissing a petition for an election in a unit of employees of an undisputed common carrier by air: (1) a finding, based on an independent review of the evidence, that the bomber modification project on which the employees worked was ''so integrated with its carrier activities as to preclude a finding that the project is a separate and distinct enterprise'' (51 NLRB at 1015), and (2) the fact that the NMB ''had not been shown to have at any time declined to assume jurisdiction over the operations here involved.'' Id.

[12] E.g., *Dickerson-Chapman, Inc.*, 313 NLRB 907 (1994) (Occupational Safety and Health Administration rules and regulation); *Postal Service*, 310 NLRB 391 (1993) (ERISA); *National Fuel Corp.*, 308 NLRB 841 (1992) (Internal Revenue Service Code); *Tri-Produce Co.*, 300 NLRB 974 (1990) (Immigration and Naturalization Act); and *Jones Dairy Farm*, 295 NLRB 113 (1989) (state workers' compensation laws).

tural laborer issues to that agency for disposition.[13] Furthermore, the Supreme Court has held that the Board's conclusion in such cases ''is one we must respect even if the issue might 'with nearly equal reason be resolved one way rather than another.'''[14]

Finally, and most importantly, the current NMB referral practice represents an impermissible abdication of the Board's statutory obligation to administer and enforce the NLRA. The RLA and the NLRA provide ''independent and mutually exclusive federal labor schemes,'' which differ in substance and in procedure.[15] When parties come to the Board seeking the substantive and procedural rights which the NLRA affords, we should not automatically turn them away to the NMB when an arguable claim of RLA jurisdiction is made; nor should we automatically dismiss the Board proceeding solely because the NMB is of the view that it has jurisdiction.

I recognize that the exclusionary language of Section 2(2) and (3) of the NLRA represents an express Congressional mandate that the Board should not ''tread upon the ground covered by the Railway Labor Act.'' *Teamsters Local 25 v. New York*, New Haven & Hartford Railroad Co., 350 U.S. 155, 159 (1956). Clearly then, the Board cannot, as some parties to this proceeding have suggested, ''expand'' its jurisdiction at the expense of the NMB.[16]

Of course, if this were a case in which no reasonable argument could be made against RLA coverage of the petitioned-for employees, there would be no apparent need to involve the NMB in this Board proceeding. We could simply dismiss the petition. Here, however, jurisdiction is not clear. As in many cases involving claims of RLA coverage, we address an employment situation in the shadowlands which lie on either side of the boundary between the NLRA and the RLA. The Congressional mandate represented by the exclusionary language in Section 2(2) and (3) does not in any way support the proposition that only the expertise and authority of the NMB should be brought to bear on a jurisdictional issue in this murky area. On the contrary, a proper administrative resolution of such an issue, where the employer or employees are arguably subject to either the NLRA or the RLA, requires a ''careful accommodation of one statutory scheme to another.''[17]

It is quite true, as the majority states, that the Board has never asserted jurisdiction over Federal Express and that the NMB has viewed Federal Express as a carrier under the RLA since at least the mid-1970's. This jurisdictional history developed under the prevailing referral practice. Consequently, the Board has never given independent consideration to the jurisdictional issue. It serves this agency to base a current refusal to address this issue on a past failure to have done so. This is particularly so when, as here, the party seeking recourse to the Board contends that there are changes in the employer's intermodal transportation operations which make more prominent its trucking services, an activity traditionally within the Board's jurisdiction and specifically exempted from the RLA.

There is a marked difference between interagency accomodation and the abandonment of independent inquiry into the requirements of one's own statute through mechanical acceptance of standards elaborated by another agency.[18] Accommodation connotes a scheme which will bring to bear the relevant policies and expertise of each agency. The Board does not accomplish this through its current referral practice. The NMB makes no reference to Board law when deciding cases referred to it, and the Board defers to NMB decisions without further substantive review.

In this case and in all cases arising before this Board, we can make the necessary accommodation by giving appropriate consideration to the RLA and to NMB precedent while deciding the jurisdictional issue on our own. This is exactly what the Board did in *Northwest Airlines*. This is exactly what it should resume doing in order to fulfill its statutory obligation to assure that the rights and procedures of the NLRA are made available to all those who seek and are entitled to them.[19] Accordingly, I would overrule the referral practice initiated by *Pan American World Airways*, and I dissent from the referral of the present case to the NMB.[20]

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[13] E.g., *Imperial Garden Growers*, 91 NLRB 1034 (1950).

[14] *Bayside Enterprises, v. NLRB*, 429 U.S. 298, 302 (1977) (footnote omitted).

[15] *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 371 (1969).

[16] It shall remain a matter for speculation why these parties perceive the risk of Board misinterpretation of the jurisdictional boundary between the NLRA and the NMB as greater than the risk of NMB misinterpretation. In any event, judicial redress is available should either agency clearly exceed its statutory limitations. See *Leedom v. Kyne*, 358 U.S. 184 (1958); and *Railway Labor Executives Assn.*, 29 F.3d 655 (D.C. Cir. 1994).

[17] *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942).

[18] See *Carpenters Local 1976 v. NLRB*, 357 U.S. 93, 111 (1958).

[19] The General Counsel argues that delay in the NMB decisional process is further reason to abandon the referral practice. There is no empirical evidence that the NMB would take longer to decide a jurisdictional issue than the Board. It is true, however, that the Board loses control of the pace of the decisional process once it refers a case to the NMB. To that limited extent, I agree that this is further reason not to continue the referral practice.

I find no merit in the countervailing argument that an increase in the Board's caseload resulting from abandonment of the referral practice will overwhelm its casehandling abilities. There is no objective basis for this claim. I note that there have been only slightly more than 100 published cases involving RLA jurisdictional claims in the past 40 years.

[20] I find no need to address the merits of the Employer's jurisdictional claim at this time in light of my colleagues' decision to refer the case to the NMB.