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applicable in deciding whether the corporation has more than one class of stock. One simply would not use the thin corporation doctrine *per se*. Some of the following factors used in the thin corporation cases could be used in determining whether the notes issued by the Subchapter S corporation were stock: what the evidences of indebtedness are called; whether or not there is a maturity date; what the origin of the payments is; whether there is a right to enforce payment of principal or interest; whether there is a right to participate in management; whether the debt is subordinated to that of the other creditors; whether there is adequate capitalization; what the "identity of interest between the creditor and stockholder is . . ."; whether interest is paid out of dividend money only; whether the corporation can obtain funds from financial institutions; and what the parties' intended.[21]

As *Gamman* and *Lewis* suggested, these factors must be considered on a case-by-case basis to see whether the so-called debt is actually a debt or whether it is a capital contribution. If the latter, it will be necessary to determine if different rights and preferences exist in order to determine whether the evidences of the capital contribution are a second class of stock. Use of this procedure will eliminate the problem of definition as well as some of the confusion which has been connected with the one class of stock requirement.

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A STRUCK CARRIER'S RIGHT TO ATTEMPT TO OPERATE

Labor relations in two of the nation's most vital industries, the railroads and the airlines, are regulated by a single federal statute, the Railway Labor Act.[1] In recent years there have been numerous labor disputes involving strikes in these two industries, strikes which have had a serious, often disruptive effect on the public and on national interests. Due to this widespread impact, it is important to determine exactly what measures a railway or airline may legally employ under the Railway Labor Act to continue operations during a strike.

The Supreme Court of the United States considered this question in a recent case, *Brotherhood of Ry. Clerks v. Florida East Coast Ry.*,[2] which involved a much-publicized, long, and sometimes violent strike

[21] O. H. Kruse Grain & Milling v. Commissioner, 279 F.2d 123, 125 (9th Cir. 1960). Although the last factor was listed separately, it seems that all the other factors are elements of the parties' intent.

[1] 44 Stat. 547 (1926), as amended, 45 U.S.C. §§ 151-63, 181-88 (1964).

[2] 384 U.S. 238 (1966).

in the railroad industry. Although *Railway Clerks* was concerned with a railroad labor dispute, the fact that the Railway Labor Act covers both railroads and airlines makes the holding equally applicable to the airline industry.[3]

In September 1961, several unions representing the nonoperating employees[4] of the Florida East Coast Railway (FEC) demanded a general wage increase and a contract provision requiring advance notice of impending layoffs and of abolition of job positions. Management and the unions went through all required procedures under the Railway Labor Act for negotiation and mediation without reaching agreement. In addition, both sides refused to submit to arbitration. The nonoperating unions then struck, and most operating employees honored the picket lines.

After being shut down for a short period, FEC resumed operations with a substantially reduced labor force of supervisory personnel and newly hired replacements for the strikers. FEC made individual agreements with the members of this emergency labor force, thereby unilaterally departing from the terms of its existing collective bargaining agreements in respect to rates of pay, rules, and working conditions. Later FEC replaced the individual agreements with a uniform set of rates of pay, rules, and working conditions, also different from the existing contracts. Claiming that these strike-induced changes could not be lawfully instituted without following the procedures of the Act, the unions invoked mediation but FEC refused. The unions then sought arbitration of the original dispute, but the carrier again refused.

At this point, fifteen months after the resumption of operations by FEC, the United States brought an action to enjoin FEC from continuing its unilateral departures from the collective bargaining agreements. The nonoperating unions intervened as plaintiffs. Relying on the decision of the Court of Appeals in *Florida East Coast Ry. v. Brotherhood of R.R. Trainmen*,[5] a similar suit brought against FEC by one of the operating unions, the District Court granted a preliminary injunction of all deviations by FEC from existing contracts until completion of statutory mediation. However, FEC was allowed to make application to the District Court for permission to make such specific departures as the court deemed "reasonably necessary in

[3]Railway Labor Act § 201, added by 49 Stat. 1189 (1936), 45 U.S.C. § 181 (1964).

[4]"Nonoperating" employees are those who do not actually operate the trains, such as clerks, machinists, and electricians. "Operating" employees are those who actually operate the trains, such as engineers, firemen, and trainmen.

[5]336 F.2d 172 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965).

order for the FEC to continue to operate during the strike." [6]

Upon application by FEC, the District Court entered an order authorizing certain specific deviations and forbidding others.[7] Both sides appealed from the preliminary injunction and the subsequent order, and the Court of Appeals affirmed.[8] The Supreme Court granted certiorari[9] and affirmed.[10] The Court held that a carrier subject to the Railway Labor Act, struck in a dispute over certain working conditions as to which negotiation and mediation have been exhausted, may make without further negotiation and mediation such unilateral changes in other working conditions covered by collective bargaining agreements as are reasonably necessary for continued operation with a substantially different, reduced labor force of experienced and untrained employees. The Court also approved the procedure, first adopted in *Florida East Coast Ry. v. Brotherhood of R.R. Trainmen*,[11] by which the carrier was required to make application to the District Court before instituting any reasonably necessary unilateral changes.

Justification for permitting FEC to make such changes was found in a carrier's right of self-help and its duty to operate. Confinement of the changes to those authorized by the District Court was based on the necessity of upholding both the integrity of the collective bargaining agreement and the orderly bargaining processes provided by the Railway Labor Act.[12]

The basic dispute in *Railway Clerks* over wages and advance notice of layoffs and of job abolition fell within the category of major disputes, *i.e.*, disputes which "seek to create rather than to enforce contractual rights. . . ." [13] Under the Act the parties must attempt to settle major disputes through the successive stages of notice and negotia-

[6]United States v. Florida East Coast Ry., 57 L.R.R.M. 2618, 2622 (M.D. Fla. 1964).

[7]United States v. Florida East Coast Ry., No. 64-107-Civ-J, M.D. Fla., Dec. 3, 1964.

[8]Florida East Coast Ry. v. United States, 348 F.2d 682 (5th Cir. 1965).

[9]Brotherhood of Ry. Clerks v. Florida East Coast Ry, 382 U.S. 1008 (1966).

[10]Brotherhood of Ry. Clerks v. Florida East Coast Ry., 384 U.S. 238 (1966). The Supreme Court summarily affirmed that the United States had standing to bring the action. *Id.* at 242 n.4.

[11]336 F.2d 172 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965).

[12]In a dissenting opinion Justice White expressed the view that the carrier was free to attempt to operate but could depart from the existing contracts only as to those matters which had been through the procedures of the Act. He found that a strike did not constitute an implied exception to the required processes of the Act. Brotherhood of Ry. Clerks v. Florida East Coast Ry., 384 U.S. 238, 248 (1966).

[13]Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 724 (1945).

tion,[14] mediation,[15] voluntary arbitration,[16] and possible investigation by presidential emergency board.[17] Unless they agree to binding arbitration, the parties are under no compulsion to reach agreement.[18] However, several provisions of the Act require the parties to maintain the *status quo* until the proceedings have been completed. The most crucial is section 2 Seventh:

> No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.[19]

Where, as in *Railway Clerks*, the parties to a labor dispute have exhausted the procedures of the Act, they are both free to make use of self-help measures: the union has a right to strike, and the carrier may attempt to continue to operate if a strike occurs.[20] This correlative right of self-help was squarely upheld by the Supreme Court in an earlier case involving the nationwide dispute of which the FEC strike was but a part, *Brotherhood of Locomotive Eng'rs v. Baltimore & O.R.R.*[21] The Court observed that "both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute. . . ." [22] The basis of this *mutual* right of self-help is the volun-

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[14]Railway Labor Act § 6, as amended, 48 Stat. 1197 (1934), 45 U.S.C. § 156 (1964).

[15]Railway Labor Act § 5 First, as amended, 48 Stat. 1195 (1934), 45 U.S.C. § 155 First (1964).

[16]*Ibid.*

[17]Railway Labor Act § 10, 44 Stat. 586 (1926), as amended, 45 U.S.C. § 160 (1964).

[18]Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 725 (1945).

[19]As amended, 48 Stat. 1188 (1934), 45 U.S.C. § 152 Seventh (1964). The other *status quo* provisions are (1) in § 6, as amended, 48 Stat. 1197 (1934), 45 U.S.C. § 156 (1964), for the period of negotiations and ten days thereafter, and, if the National Mediation Board enters the dispute, for so long as mediation is conducted by the Board; (2) in § 5 First, as amended, 48 Stat. 1195 (1934), 45 U.S.C. § 155 First (1964), if the Board has given notice of failure to bring about a settlement and has proffered arbitration, for thirty days after such notice, unless the parties agree to arbitrate or a presidential emergency board is created; and (3) in § 10, 44 Stat. 586 (1926), as amended, 45 U.S.C. § 160 (1964), for the period of the emergency board's activity and for thirty days after its report.

[20]Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 725 (1945); Florida East Coast Ry. v. Brotherhood of R.R. Trainmen, 336 F.2d 172, 181 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965).

[21]372 U.S. 284 (1963).

[22]*Id.* at 291.

tary nature of the statutory scheme for the settlement of major disputes.[23]

The right of a carrier to attempt to operate under strike conditions is given further sanction by virtue of the duty of common carriers to provide service to the public and to shippers. This duty has been made statutory by the Interstate Commerce Act.[24] The Railway Labor Act itself includes among its general purposes the public interest in continuous service.[25] Furthermore, the courts have expressly recognized that the duty of a common carrier to provide service is not suspended during a labor dispute.[26]

As the *status quo* provisions of the Railway Labor Act make clear,[27] a carrier can make no unilateral changes in existing rates of pay, rules, or working conditions until the procedures of the Act have been exhausted.[28] It is equally clear that once the procedures have been exhausted a carrier may make unilateral changes, even of a permanent nature, if limited to matters which were the subject of negotiation and mediation.[29] What was not clear prior to *Railway Clerks* was the right

[23] Pan American World Airways, Inc. v. Flight Eng'rs Ass'n, 306 F.2d 840, 846 (2d Cir. 1962).

[24] Section 1(4), as amended, 54 Stat. 900 (1940), 49 U.S.C. § 1(4) (1964), provides in part: "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor. . . ." Civil liability for failure to comply with this duty is imposed on carriers by § 8 of the Interstate Commerce Act, 24 Stat. 382 (1887), 49 U.S.C. § 8 (1964).

[25] "The purposes of the Act are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein. . . ." Railway Labor Act § 2, as amended, 48 Stat. 1186 (1934), 45 U.S.C. § 151a (1964).

[26] Brotherhood of Ry. Clerks v. Florida East Coast Ry., 384 U.S. 238, 245 (1966); *accord*, Farmers Grain Co. v. Toledo, P. & W.R.R., 66 F. Supp. 845, 861 (S.D. Ill. 1946), *rev'd on other grounds*, 158 F.2d 109 (7th Cir.), *vacated as moot sub nom.* Farmers Grain Co. v. Brotherhood of Locomotive Firemen, 332 U.S. 748 (1947); Illinois Cent. R.R. v. International Ass'n of Machinists, 190 Fed. 910, 912 (E.D. Ill. 1911); Chicago, B. & Q. Ry. v. Burlington, C.R. & N. Ry., 34 Fed. 481, 484 (S.D. Iowa 1888); Montgomery Ward & Co. v. Northern Pac. Terminal Co., 128 F. Supp. 475, 517 (D. Ore. 1953) (dictum). A carrier also has a duty to provide service to a struck shipper even though the carrier's employees refuse to cross picket lines. Minneapolis & St. L. Ry. v. Pacific Gamble Robinson Co., 215 F.2d 126, 132-35 (8th Cir. 1954); Montgomery Ward & Co. v. Northern Pac. Terminal Co., *supra* at 511.

[27] See note 19 *supra* and accompanying text.

[28] Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 346-47 (1944); Manning v. American Airlines, Inc., 329 F.2d 32 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964); Butte, A. & Pac. Ry. v. Brotherhood of Locomotive Firemen, 268 F.2d 54 (9th Cir.), *cert. denied*, 361 U.S. 864 (1959); Railroad Yardmasters v. Pennsylvania R.R., 224 F.2d 226 (3d Cir. 1955); Railway Employees' Co-op. Ass'n v. Atlanta B. & C.R.R., 22 F. Supp. 510 (D. Ga. 1938).

[29] Brotherhood of Locomotive Eng'rs v. Baltimore & O.R.R., 372 U.S. 284 (1963); Pullman Co. v. Order of Ry. Conductors, 316 F.2d 556 (7th Cir.), *cert.*

of the carrier to make temporary, strike-induced changes as to matters not raised during the statutory bargaining in order to continue to operate with a substantially different, reduced labor force.

The union which is the authorized bargaining representative of a craft or a class of employees is, as held in *Steele v. Louisville & N.R.R.*[30] and *Brotherhood of R.R. Trainmen v. Howard*,[31] the representative of both union and non-union employees in that craft or class. Moreover, *Order of R.R. Telegraphers v. Railway Express Agency*[32] held that the authorized representative must be consulted and permitted to bargain about a matter even though individual employees are willing to enter into their own agreements with the employer.

Since none of the three cases involved a strike situation, they do not require a carrier to comply with pre-strike collective bargaining agreements during a strike. In *J. I. Case Co. v. NLRB*,[33] the Court recognized that its holding was not applicable under all conditions:

> Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment, because *there are circumstances in which it may legally be used, in fact, in which there is no alternative.*[34]

Although the unions remain the bargaining agents for the crafts or classes represented before the strike, this does not mean necessarily that carriers are prohibited from making unilateral temporary changes in conditions during a strike.

It is useful to consider more closely the language of section 2 Seventh of the Railway Labor Act:

> No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class *as embodied in agreements* except in the manner prescribed in such agreements or in section 6 of this Act.[35]

denied. 375 U.S. 820 (1963); Pan American World Airways, Inc. v. Flight Eng'rs Ass'n, 306 F.2d 840 (2d Cir. 1962); Flight Eng'rs Ass'n v. Eastern Air Lines, Inc., 208 F. Supp. 182 (S.D.N.Y.), *aff'd*, 307 F.2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963); American Airlines, Inc. v. Air Line Pilots Ass'n, 169 F. Supp. 777 (S.D.N.Y. 1958).

30 323 U.S. 192, 200 (1944).

31 343 U.S. 768, 772-75 (1952).

32 321 U.S. 342, 347 (1944).

33 321 U.S. 332 (1944).

34 *Id.* at 336-37. (Emphasis added.)

35 48 Stat. 1188 (1934), as amended, 45 U.S.C. § 152 Seventh (1964). (Emphasis added.)

In effect, a carrier may not change *the provisions of the agreement* without first going through the Act's procedures. The Court of Appeals for the Fifth Circuit has twice recognized[36] that a unilateral change in conditions is not necessarily a change in agreements and, therefore, does not necessarily fall under the similar prohibition of section 6 of the Act.[37]

Although only railroads and airlines are covered by the Railway Labor Act, parallel problems as to the right of a struck business to attempt to operate have arisen in industries under the National Labor Relations Act,[38] the other major federal statute dealing with labor relations. The NLRA contains no *status quo* provisions similar to those of the Railway Labor Act, but the two acts are based on a common national labor policy and create an identical scope as to the duty to bargain.[39] Furthermore, *Flight Eng'rs Ass'n v. Eastern Air Lines,*

[36]Switchmen's Union v. Central of Ga. Ry., 341 F.2d 213, 216 (5th Cir.), *cert. denied,* 382 U.S. 841 (1965):

> [I]t does not follow that every time a carrier takes unilateral action that may affect "rates of pay, rules or working conditions" then section 6 must be invoked on the theory that the carrier is thus intending to affect a "change in agreements affecting rates of pay, rules or working conditions" which. . . can be accomplished only in the manner provided under section 6 of the Act.

St. Louis, S.F. & Tex. Ry. v. Railroad Yardmasters, 328 F.2d 749, 752 (5th Cir.), *cert. denied,* 377 U.S. 980 (1964):

> [R]eference to the language of section 6 . . . is itself fairly clear in that it requires the bargaining procedure only where there is an intended change *in agreements* affecting rates of pay, rules, or working conditions. Obviously, therefore, if there is no intended change in an existing contract or agreement there is no requirement under section 6 that the bargaining procedures be followed.

[37]As amended, 48 Stat. 1197 (1934), 45 U.S.C. § 156 (1964).

[38]As amended, 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-68 (1964).

[39]Fibreboard Paper Prods. Corp., 138 N.L.R.B. 550, 551-53 (1962), *aff'd sub nom.* East Bay Union of Machinists v. N.L.R.B., 322 F.2d 411 (D.C. Cir. 1963), *aff'd sub nom.* Fibreboard Paper Prods. Corp. v. N.L.R.B., 379 U.S. 203 (1964); Kroner, *Interim Injunctive Relief Under the Railway Labor Act,* N.Y.U. 18TH ANNUAL CONFERENCE ON LABOR 179, 185-86 (1966); see Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 346 (1944); Terminal R.R. Ass'n v. Brotherhood of R.R. Trainmen, 318 U.S. 1, 6 (1943); H. J. Heinz Co. v. NLRB, 311 U.S. 514, 524-25 (1941); Larsen v. American Airlines, Inc., 313 F.2d 599, 602-03 (2d Cir. 1963); American Airlines, Inc. v. Air Line Pilots Ass'n, 169 F. Supp. 777, 793-94 (S.D.N.Y. 1958). *But see* Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R., 353 U.S. 30, 31-32 n.2 (1957), which appears to be questionable in view of the above authority and in light of the fact that the Supreme Court cites decisions under either act interchangeably without distinguishing them as to particular act. See, *e.g.,* Brotherhood of Locomotive Eng'rs v. Baltimore & O.R.R., 372 U.S. 284, 290 (1963); NLRB v. Insurance Agents' Union, 361 U.S. 477, 486 (1960); Leedom v. Kyne, 358 U.S. 184, 189-91 (1958). H. J. Heinz Co. v. NLRB, *supra,* is particularly strong evidence for a common policy, since it makes reference to legislative history:

Inc.[40] indicates that the same principles apply under either Act in determining when the right of self-help is available.[41] The rule permitting resort to self-help if a deadlock is reached after exhausting the procedures established by the Railway Labor Act "does not appear to differ from the rule under the National Labor Relations Act . . . that in labor disputes classified as economic, resort to 'self-help' is permissible when the parties' good faith bargaining reaches an impasse."[42]

Numerous cases under the NLRA uphold the employer's right to resort to economic weapons—self-help—when bargaining has reached an impasse or resulted in a strike.[43] The language used in *NLRB v. Robert S. Abbott Publishing Co.*[44] is particularly significant. The case involved the subcontracting of part of an employer's work in order to keep his struck business operating. Since the company did not consult with the union about the decision to subcontract, the National Labor Relations Board held the company guilty of a refusal to bargain in violation of section 8(a)(5) of the NLRA.[45] The Court of Appeals for the Seventh Circuit set aside the Board's order, stating in part:

> [W]e have a case where the union has turned its back on collective bargaining and has, by calling a strike, placed the employer suddenly in a position made precarious by the inexorable demands of newspaper publishing. If publication may be interrupted while bargaining drags on over matters which have to do with what means the publisher may use in getting his paper on the streets

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The House Committee recommended the legislation [NLRA] as "an amplification and clarification of the principles enacted into law *by the Railway Labor Act* and by § 7(a) of the National Industrial Recovery Act." (Emphasis added.)

H.R. Rep. No. 1147, 74th Cong., 1st Sess. 3 (1935).

[40]208 F. Supp. 182 (S.D.N.Y.) *aff'd*, 307 F.2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963).

[41]"[T]he precedents under the NLRA suggest solutions under the Railway Labor Act. The unfortunate impasse situation is the same, regardless of the statute involved." *Id.* at 193.

[42]*Id.* at 191.

[43]*E.g.*, American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965) (temporary layoff of employees as means to bring economic pressure to bear in support of employer's bargaining position); NLRB v. Brown, 380 U.S. 278 (1965) (lockout by members of employer association and hiring of replacements in response to whipsaw strike against one of its members); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (hiring of permanent replacements for striking employees); Pacific Gamble Robinson Co. v. NLRB, 186 F.2d 106 (6th Cir. 1950) (offering replacements different rate of pay than offered to union); Times Publishing Co., 72 N.L.R.B. 676 (1947) (unilaterally establishing conditions of employment for replacements).

[44]331 F.2d 209 (7th Cir. 1964).

[45]As amended, 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964).

and in the mail, the paper may cease to exist. *It would be a startling doctrine indeed if this court were to tell companies and employers faced with extinction because of a strike, that before they can make economic business decisions to contract out work in order to continue operations, they must first consult the union that caused the threat of extinction.*[46]

There are some NLRA cases which might appear to deny the right of employers to resort to unilateral action in attempting to operate during a strike but most can be distinguished from the situation in *Railway Clerks*.[47] Two of these apparently contrary cases actually recognize the possibility that temporary, strike-induced measures may be lawful. *NLRB v. Katz*[48] is distinguishable in that it did not involve a strike situation. Significantly, while holding that a unilateral change in conditions of employment under negotiation rendered an employer guilty of a refusal to bargain,[49] the Supreme Court nevertheless noted "the possibility that there might be circumstances which the Board could or should accept as excusing for justifying unilateral ac-

[46]NLRB v. Robert S. Abbott Publishing Co., 331 F.2d 209, 213 (7th Cir. 1964). (Emphasis added.) Hawaii Meat Co. v. NLRB, 321 F.2d 397, 400 (9th Cir. 1963), involved a strikingly similar situation with the same results:

> We think that when an employer is confronted with a strike, his legal position is, in some respects, different from that which exists when no strike is expected or occurs. . . .
>
> We think that a requirement that, upon the occurrence of a strike, and before putting into effect a subcontracting arrangement designed to keep the struck business operating, the employer must offer to bargain about the decision to subcontract, would effectively deprive the employer of this method of meeting the strike. A mere naked offer to bargain would not end the matter. The union could, by accepting the offer, deprive the employer of an effective means of meeting the strike for a period of time that might render it valueless to the struck employer.

[47]Examples of the types of cases which can be distinguished are NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), and NLRB v. Pecheur Lozenge Co., 209 F.2d 393 (1953), *cert. denied*, 347 U.S. 953 (1954). The former involved a strike situation, but the changes instituted in response to the strike were permanent; the latter did not involve strike-induced changes. Two cases are not clearly distinguishable. In Industrial Union of Marine Workers v. NLRB, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964), the union went out on strike after the contract expired, and it was held permissible for the company to discontinue the union shop and checkoff, *id.* at 619, but not permissible to abrogate preferential seniority rights or to alter the grievance procedure, *id.* at 620. In Mission Mfg. Co., 128 N.L.R.B. 275 (1960), the company did not violate the NLRA by instituting changes previously discussed with the union, even though the union had rejected them, *id.* at 288, but did violate the Act by excluding the union from the grievance procedure as a temporary, strike-induced measure because that matter was not discussed with the union, *id.* at 289.

[48]369 U.S. 736 (1962).

[49]*Id.* at 747.

tion. . . ." [50] A refusal to bargain was also found in *NLRB v. Tom Joyce Floors, Inc.*,[51] where the employer paid replacements higher wages than offered to the union. However, one of the grounds of decision was that the company failed to introduce any evidence showing that the higher rate of pay "was instituted as a temporary measure in response to an emergency situation created by the strike," [52] thus implying that such evidence might have been a defense to the unfair labor practice charge.

The decision in *Railway Clerks* is important and of a salutory effect in that for the first time the Supreme Court has held that a carrier may make without going through the normal procedures of the Railway Labor Act temporary, strike-induced deviations from existing collective bargaining agreements if such deviations are reasonably necessary for the carrier to continue operations. It is only reasonable that such deviations be permitted. If carriers were required to negotiate with unions concerning measures to counteract strikes, they would in fact be precluded from exercising their right to attempt to operate. It would be difficult, if not impossible, for a carrier to operate under pre-strike conditions during such negotiation using a reduced labor force of supervisors and untrained, unskilled replacements.[53]

For these same reasons, a carrier also should be allowed to operate with deviations from existing collective bargaining agreements while awaiting District Court approval of the deviations. However, the Court did not draw this logical conclusion in *Railway Clerks*. The procedure of application to a district court is not provided for by the Act. No authority is cited for it at any level of the litigation in either *Florida East Coast Ry. v. Brotherhood of R.R. Trainmen*,[54] or *Railway Clerks*.[55]

Granted that the power of a carrier to depart from an existing labor contract should be limited to reasonably necessary measures, it does not follow necessarily that a struck carrier should have to become a supplicant before a district court in order to institute any changes. It would appear to be more consonant with the purposes of the Act to allow a carrier to make any changes it finds necessary in

[50] *Id.* at 748 (dictum).

[51] 353 F.2d 768 (9th Cir. 1965).

[52] *Id.* at 772.

[53] Brotherhood of Ry. Clerks v. Florida East Coast Ry., 384 U.S. 238, 246 (1966); *accord*, NLRB v. Robert S. Abbott Publishing Co., 331 F.2d 209, 213 (7th Cir. 1964); Hawaii Meat Co. v. NLRB, 321 F.2d 397, 399-400 (9th Cir. 1963).

[54] 336 F.2d 172, 182 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965).

[55] 384 U.S. at 246-48, *affirming* Florida East Coast Ry. v. United States, 348 F.2d 682, 685-86 (5th Cir. 1965), *affirming* 57 L.R.R.M. 2618, 2622 (M.D. Fla. 1964).