Report

TO

THE PRESIDENT

BY THE

EMERGENCY BOARD

APPOINTED MAY 15, 1948
PURSUANT TO SECTION 10 OF THE
RAILWAY LABOR ACT, AS AMENDED

To investigate unadjusted disputes between National Airlines, Inc., and certain of its employees represented by the Air Line Pilots Association, International, and the International Association of Machinists.

(*NMB Case A-2707*)

WASHINGTON, D. C.

JULY 9, 1948

(No. 62)

WASHINGTON, D. C., *July 9, 1948.*

THE PRESIDENT,
The White House.

Mr. PRESIDENT: The Emergency Board designated by you under Executive Order 9958 of May 15, 1948, and redesignated by Executive Order 9965 of June 3, 1948, under authority of section 10 of the Railway Labor Act to investigate and report on unadjusted disputes between National Airlines, Inc., and certain of its employes represented by the Air Line Pilots Association, International, and the International Association of Machinists, has the honor to submit its report and recommendations based upon its investigation of the matters in dispute.

GRADY LEWIS, *Chairman.*
WALTER V. SCHAEFER, *Member.*
CURTIS W. ROLL, *Member.*

Report to the President by the Emergency Board created May 15, 1948, under Section 10 of the Railway Labor Act, as amended, to investigate and report on unadjusted disputes between the National Airlines, Inc., and certain of its employees represented by the Air Line Pilots Association, International, and the International Association of Machinists

By proclamation dated May 15, 1948, the President created an Emergency Board pursuant to the provisions of section 10 of the Railway Labor Act, as amended, to investigate and report on an unadjusted dispute between National Airlines, Inc., and certain of its employees represented by the Air Line Pilots Association, International. On May 19, 1948, he designated and appointed as members of this Emergency Board Grady Lewis, of Washington, D. C.; Walter V. Schaefer, of Chicago, Ill.; and Curtis W. Roll, of Kokomo, Ind.

The Board as thus constituted first met on May 25, 1948, at 10 a. m., in Interdepartmental Auditorium Conference Room C, Department of Labor Building, Constitution Avenue, Washington, D. C. It selected Grady Lewis as its Chairman and approved the appointment of Ward & Paul as its official reporter.

The Carrier was represented by Attorneys William I. Denning, of Washington, D. C., and Alfred L. McCarthy, of Miami, Fla.; and the Air Line Pilots Association was represented by Daniel D. Carmell, attorney, of Chicago, Ill.; Henry Kaiser, attorney, of Washington, D. C.; and David L. Behncke, its president, also of Chicago, Ill.

Public hearings were held from May 25 through June 4, holidays excepted, upon which last date the Board was notified of an amendatory Executive order of June 3, 1948, superseding the Executive order under which the Board was originally created, which said amendatory order directed the Board to also investigate and report on an unadjusted dispute between the above-named carrier and certain of its employees represented by the International Association of Machinists.

Thereupon, the Board recessed further hearings until June 21, 1948, when same were resumed in International Conference Room, 1778 Pennsylvania Avenue, Washington, D. C., through June 25, 1948, during which hearings the Carrier was represented by Attorneys John W. Cross, of Washington, D. C., and Alfred L. McCarthy, of Miami, Fla.; and the International Association of Machinists was represented

by Attorneys C. M. Mulholland, of Toledo, Ohio, and Edward J. Hickey, Jr., of Washington, D. C.

The respective parties orally argued the disputed issues to the Board at public hearings held June 30 and July 1, 1948, at Auditorium Conference Room B, Department of Labor Building, Washington, D. C.

Twice during the period of the hearings mediation was undertaken by the Board. These efforts proved of no avail in composing either dispute.

An extension of time until July 30, 1948, within which this report may be filed has been allowed by the President. Such extension has been agreed to by all the parties to the proceedings.

I

The Pilots' Dispute

1. HISTORY

The dispute between the Pilots Association and the Carrier had its origin in an accident to one of Carrier's planes piloted by one Maston G. O'Neal on September 13,1945. The pilot was discharged by Carrier and, under the provisions of the agreement he asked for, and was allowed, a review of the propriety of the discharge. This review resulted in a deadlock in the System Board of Adjustment on May 6, 1946. By the terms of the agreement, the life of the System Board of Adjustment is limited. After a time that Board lost jurisdiction to resolve the difference within itself. No other settlement of the dispute having been arrived at by the parties, the Pilots Association served a strike notice in May 1947. Thereupon, an agreement was entered into by the parties that provided for the selection by the National Mediation Board of a neutral referee to break the deadlock still in force in the System Board of Adjustment.

The Mediation Board selected a referee who was objected to by the Association by reason of his employment by the Civil Aeronautics Board in the capacity as flight operation specialist with the National Standard Division of that Board. The Mediation Board agreed that its choice was not a proper one; it communicated to the referee the objection so made to his appointment. The referee thereupon declined to serve. Another referee was chosen by the Mediation Board. The Carrier refused to recognize him and insisted upon appearing before the referee first appointed, or none. No reason was ever assigned by Carrier for refusing to submit the dispute to the second-named

referee, except its determination to exercise an objection to a referee, inasmuch as the Association had previously done so.

The Carrier then considered the matter of the dispute closed until a further strike notice was served by the Association in November 1947. Several persons were then discussed as referee, but none agreed upon by the parties.

At the instance of the National Mediation Board, the effective date of the strike was postponed from November 12 to 19. Representatives of the disputants met with the Mediation Board in Washington on November 17 and remained in mediation with that Board until November 19 when Association representatives were obliged to return to Chicago to meet a previous engagement. Upon his departure from Washington on the 19th, the president of the Association gave assurance that there would be no work stoppage by the pilots by reason of his inability to remain for further mediation at that time.

Proposals of the Carrier looking toward the selection of neutrals to decide the controversy were neither accepted nor rejected by the Association and were, by the Carrier, withdrawn when the negotiations were recessed.

The Association indicated its willingness to resume mediation November 26, 1947. No further meetings between the parties were had, however, until, on February 3, 1948, the pilots went out on strike.

On February 5, the presidents of the Carrier and of the Association were requested to meet with the Chairman of the National Mediation Board February 7, 1948. The Association president appeared on the requested date; the Carrier president appeared by his attorney who was authorized to consider proposals of the Association. Shortly after the meeting convened, the Carrier's attorney advised the Chairman of the Mediation Board that all Association pilots had been discharged from Carrier's service, by action of Carrier's president on February 6, 1948.

All proceedings were thereupon discontinued until the issuance of the Executive order creating this Board.

2. THE ISSUE

The sole issue between the parties is their inability to agree, in finality, upon a method of breaking the deadlock in their System Board of Adjustment occasioned by the Maston G. O'Neal discipline case.

3. DISCUSSION

The primary cause of the failure of the System Board of Adjustment to resolve the O'Neal case lies in the provision of the agreement for a

"balanced board," or one composed of four members, two of whom are designated by the Carrier and two by the Association. In the event of a deadlock in any case, the agreement provides that the Board shall "endeavor to agree" within 30 days from the date of such deadlock upon a procedure for the breaking of the deadlock. Provision is made for extending the 30-day period specified for agreement upon a procedure for the breaking of deadlocks by mutual consent of the parties. If, however, the 30 days is not so extended, the Board has no further jurisdiction in the case.

In the O'Neal case, the Board lost jurisdiction by failure to mutually agree to extensions of time in accordance with the terms of the agreement.

When it became reasonably apparent to the president of the Association that the deadlock of the Board was not likely to be broken, he communicated with Carrier president requesting suggestions for a method of breaking the deadlock. Nothing fruitful came of this request.

Immediately following the final deadlock of the Board on May 6, 1946, correspondence was initiated by Association president looking toward a meeting with Carrier president to settle the O'Neal case. Various correspondence and personal interviews with Carrier representatives was continued at the instance of the Association in an attempt to arrive at a method of settling the O'Neal case until in May 1947, a year after the creation of the deadlock, the Association served notice of a strike of the pilots in a further attempt to obtain a disposition of the O'Neal grievance.

The strike threat brought the parties to the office of the National Mediation Board in Washington, D. C., where an agreement was entered into May 14, 1947, whereby the National Mediation Board was requested to appoint "a fifth and/or neutral member to sit as a referee with the National Airlines Pilots System Board of Adjustment." The agreement further recited that the Adjustment Board so constituted had jurisdiction to arrive at a final decision in the O'Neal case.

The National Mediation Board considered, and we think properly, that the duty devolving upon it by the agreement of May 14, 1947, to appoint "a fifth and/or neutral member" of the System Adjustment Board had not been discharged until the System Adjustment Board was able to sit with a neutral referee in the O'Neal case.

Accordingly, when the Association called attention to the fact that the first referee appointed was an employee of the Safety Bureau of the Civil Aeronautics Board, the Bureau charged with the responsibility of policing the safety regulations of that Board, the Mediation Board advised that referee of the objection which had been made to his

appointment before he performed any service under his appointment. He declined to serve, and the Mediation Board designated another referee.

Carrier refused to sit on the Adjustment Board with the second referee and insisted upon its right to challenge his appointment. No reason was given to support such challenge except that the Association had protested the appointment of the first designated referee.

The communication advising the Mediation Board of Carrier's refusal to recognize the second-named referee reminded that Board that the Carrier "reluctantly signed" the agreement designed to effect a settlement of the O'Neal dispute and that the Association was the "moving party in forcing National to agree to the appointment of a referee" whereby that grievance might be disposed of. That communication also attempted to withdraw the request of Carrier for the appointment of a referee unless the original appointee served. Carrier's letter was dated June 28, 1947.

The policy of the Carrier to take no voluntary action with respect to the O'Neal case was continued by it. Efforts, in the form of letters and telegrams of inquiry addressed to the Mediation Board and personal communication with Carrier President by the President of the Association was had to and through October 3, 1947, with no fruitful results.

On October 29, 1947, the President of the Association notified the President of the Carrier, by letter, that unless a conclusion was reached in the O'Neal case in the meantime, the pilots would choose not to fly after midnight November 12, 1947. This letter also expressed willingness on the part of the Association to proceed in the O'Neal case with the referee appointed by the National Mediation Board. A copy of this letter was sent to the National Mediation Board.

Agreeable to a request from the Mediation Board for a temporary postponement of the strike date to permit the Chairman of that Board to return to Washington, the Association postponed the strike date until November 19, 1947. It also advised that a regular meeting of its executive board was set and that early action by the Mediation Board would be helpful.

The Carrier again referred the Association to the appointment by the Mediation Board of the first-named referee who had long since resigned, and referred to its previous letter to the Mediation Board claiming it to be "willing to proceed in accordance with the agreement of May 14, 1947."

The chief executives of Carrier and Association were requested to meet with Chairman of the National Mediation Board in Washington, D. C., November 17, 1947, in an effort to find a satisfactory solution

to the O'Neal case. After 3 days of mediation, Carrier proposed, on November 19, 1947, the appointment of three neutrals by the Mediation Board to settle the dispute. Upon the return, that day, of Association president to Chicago for his executive board meeting, previously mentioned, without having given definite answer to the proposal, the Carrier withdrew its offer. At the time of his return to Chicago, the Association's president agreed that the pilots would not then quit their jobs.

Upon close of Association's executive board meeting, its president, on November 26, 1947, suggested to the National Mediation Board a resumption of mediation the following week. Again, no step was taken by the Carrier to settle the dispute. This situation obtained until February 3, 1948, at which time the strike was ordered and became effective.

On February 4, 1948, Carrier addressed a circular letter to all pilots and expressed amazement that some of the pilots insisted on a member of "The Club" who had been proved incompetent and unsafe being permitted to continue to fly. The reference was, obviously, directed to the O'Neal dispute. It also expressed an expectation that all pilots would return to work immediately in order that it would not be necessary for the Carrier to take any steps which might jeopardize their future. A telegram of the same date was sent by Carrier to all pilots requesting that they report immediately for flight duty. Although fully aware of the reason for the pilots' absence, the message asked to be advised why they were unable to return if such were the case.

The National Mediation Board requested, by telegram, on February 5, 1948, that both parties meet in Washington on February 7, 1948, to discuss the situation. The Chairman of the Board was also in telephone communication with the Carrier's attorney on February 6, 1948, but was not advised that Carrier, by circular telegram on that date, had discharged all pilots. Carrier's attorney had, on February 4, offered to accept one neutral to be appointed by the Mediation Board to act as a referee to settle the O'Neal case. This offer was communicated to the Association's president by the Chairman of the Mediation Board. The Association agreed to be present on February 7 and to accept the offer. Its president appeared at the appointed time.

At the scheduled meeting, however, the president of the Carrier was represented by his attorney, who stated that Carrier's offer had been withdrawn the day before and his only authority was to listen to proposals of the Association.

He then advised the Chairman of the Mediation Board of the action of the Carrier in discharging all pilots 2 days before. Upon receipt

of that information by the Mediation Board, further efforts to compose the differences were discontinued.

Section 2, first, of the Railway Labor Act imposes on the Carrier the duty "to exert every reasonable effort * * * to settle all disputes * * * in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." The evidence establishes that this statutory duty has not been performed by the Carrier. Over the entire period from the date of O'Neal's discharge, September 27, 1945, to the date of the strike, February 3, 1948, every one of the many efforts to dispose of the dispute was initiated by the Association; in no instance did the Carrier take the initiative and it was induced to act at all only when confronted by the threat of a strike. What was sought by the Association was reasonable. It did not seek reinstatement of O'Neal. It sought only an impartial determination of the propriety of his discharge.

Such a determination has not been had to this date. Failure to afford it caused the strike, and responsibility for the strike rests with the Carrier.

In the System Board of Adjustment, at least one of the Carrier's representatives on that Board took the position that he would not reverse the Carrier's decision to discharge O'Neal if there was any evidence to support it. Unless the unlikely assumption is made that the parties will process to the System Board of Adjustment grievances which are utterly without foundation, it is clear that such an attitude, if indulged by all members of the Board, would automatically condemn its proceedings to complete futility. Whatever may be said for such an attitude in cases where machinery exists for breaking a deadlock, it is clearly improper where, as here, no method is provided for breaking a deadlock in the System Board of Adjustment.

Later, in the November 1947, meetings with the National Mediation Board, the Carrier withdrew its offer of a means of settlement before it had been acted upon, when it became necessary to recess those meetings.

The Carrier's refusal to proceed before the System Board of Adjustment augmented by the neutral ultimately appointed by the National Mediation Board, was a violation of its agreement of May 14, 1947, with the Association. It is elementary that authority to appoint a neutral to determine a dispute is not exhausted by a single nomination and that if the first nominee does not act, successive nominations may be made. The authority is determined only when it has been effectively executed.

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After the strike occurred on February 3, 1948, the Carrier on February 4, 1948, indicated to the National Mediation Board its willingness to proceed with the O'Neal case before the System Board augmented by a single neutral appointed by the National Mediation Board. The Association accepted that offer and the National Mediation Board summoned the parties to Washington on February 7, 1948. In the meantime, before the February 7 meeting, the Carrier withdrew its offer and discharged its striking pilots. Its representative at the meeting called by the National Mediation Board had authority only to listen to and report to the Carrier any proposals which might be made.

The story revealed by the evidence is one of disregard for statutory and contractual obligations on the part of the Carrier. It indicates an immaturity and lack of responsibility which is not consistent with the duties imposed by Congress upon carriers in interstate commerce.

In the discussion of the dispute between the International Association of Machinists and the Carrier, reference is made to judicial treatment of the matter of reinstatement of striking employees when reinstatement requires the discharge of others hired to replace them. The judicial pattern is unmistakably clear and convincingly fair. It involves an appraisal of responsibility for the strike and enforced reinstatement of striking employees when the strike is due to the misconduct of the employer.

4. RECOMMENDATIONS

(*a*) The Board, therefore, recommends that the striking pilots be reinstated as working employees.

(*b*) The Board further recommends that paragraph (m), page 23, of the agreement between National Airlines, Inc., and the Air Line Pilots in the service of the National Airlines, Inc., effective December 9, 1941, be amended and supplemented to the end that in case the said System Board of Adjustment becomes deadlocked and unable to reach a decision on any matter properly coming before it, either party may thereupon petition the National Mediation Board for the appointment of a neutral referee to sit with the System Board of Adjustment, as a member thereof. Such System Board of Adjustment as then constituted shall hear the parties with reference to the dispute pending before it, de novo, and a majority vote of the Board shall be final and conclusive between the parties.

(*c*) The Board also recommends that the O'Neal dispute be finally determined pursuant to the agreement of the parties dated May 14, 1947, by the System Board of Adjustment augmented by a neutral member to be appointed by the National Mediation Board.

II

Clerks' Dispute

1. HISTORY

On May 26, 1947, the National Mediation Board, as the result of an election, certified that the International Association of Machinists had been duly designated and authorized to represent clerical, office, stores, fleet, and passenger service employees of the National Airlines, Inc., for the purposes of the Railway Labor Act.

At various times from June 2, 1947, to August 27, representatives of the Association requested of the Carrier a copy of its present wage rate, job description, and titles, being used by the Carrier, to be used by the Association in drafting the proposed contract. The Carrier failed to supply the requested information prior to August 27, 1947.

On August 27, 1947, a letter of transmittal and two copies of the proposed contract were sent to the Carrier by the reperesentatives of the Association.

October 14, 1947, was fixed as the date for conference to negotiate an agreement for the clerical employees. Afterward, the date to start negotiation was advanced to October 21, 1947. The parties were present by their duly authorized representatives and conferred on the various provisions of the contract proposed by the Association. The conference met from October 24 to October 29, 1947, and adjourned without successfully negotiating an agreement. No date for resumption of negotiation was agreed upon at that time.

The services of the National Mediation Board were invoked October 31, 1947, and the Board accepted jurisdiction and docketed the same as case No. A–2707.

On November 17, 1947, the Carrier issued a bulletin granting increase in pay of $20 per month to all company employees not covered by labor agreements, and receiving less than $275 per month, effective December 6, 1947.

As a result of the inability of the parties to successfully negotiate a contract, a strike vote was taken on November 12, 1947, and the date to strike was fixed as of December 12. The Carrier and the National Mediation Board were notified of the strike vote. A mediator was designated by the National Mediation Board to mediate the dispute between the parties. The mediator met with the parties from December 2 to December 8. The parties failed to negotiate a contract, and on December 8, the mediator announced that he had reached a stalemate; that he would request the National Mediation Board to request the parties to submit their dispute to arbitration under the

terms of the Railway Labor Act. The National Mediation Board proposed arbitration within the Railway Labor Act, on December 10, 1947. The Association accepted arbitration, but the Carrier rejected the offer.

On December 23, 1947, the Carrier issued a bulletin, giving employees certain concessions, such as sick compensation, vacation and holiday pay, and notice of lay-offs and grievances.

The mediator, theretofore appointed, continued his efforts to compose the differences between the parties and conferred with representatives of the Association at Miami, Fla., on January 13, and subsequent.

On January 19, 1948, the mediator advised the Association that he had been unable to persuade the Carrier to meet for further discussions.

Further effort was made by the National Mediation Board to resolve the differences on January 22, but nothing was accomplished.

The employees walked out on strike at 12 o'clock noon, January 23, 1948.

On January 22, 1948, the Mediation Board notified the president of the International Association of Machinists that the Board members would mediate the dispute of the machinists on January 26, and invited the Carrier and the Association to meet in the office of the Board in Washington on that date in a further attempt to dispose of the clerical, office, and station employees' dispute. The Board also requested the strike be withheld until it had tried again to compose the differences between the parties.

Efforts were made by officers of the union to contact their committee at several points on the Carrier's line, but found that in most places the employees were already on strike. Efforts were then made to persuade the striking employees to return to work. The employees refused to return to work because they claimed they had been told by their supervisors that if they struck they would be discharged. The employees asked for assurance, in writing, that there would be no discrimination if they returned. The mediator was reassigned to assist in getting the employees back to work. At first the Carrier refused to give any written statement that there would be no repercussions. Some of the employees remained at work, some returned to work, and others refused to return.

On Saturday, January 24, 1948, a conference was had between the parties and an agreement was reached, whereby it was agreed that neither the Carrier nor the Association would discriminate against any employee whether he had ceased or continued to work. This agreement was typed in duplicate. One copy was signed by the president of the Carrier, and the other was given to the officials of the Association. It was submitted to the employees for their acceptance or rejection.

The employees rejected the agreement, because the agreement contained no provision for the settlement of the dispute.

The officials of the Association met in Washington to mediate, as requested by the Board, but the representatives of the Carrier did not appear.

2. THE ISSUE

The controversy here involved is due to the fact that the Carrier and the Association have been unable to negotiate an agreement governing rates of pay, hours, and working conditions.

The principal point of difference centers around the provision relating to the right of the Carrier to subcontract work.

3. DICUSSION

(*a*) *General*

The Association was certified by the National Mediation Board as the representative of clerical, office, stores, fleet and passenger service employees of the Carrier on May 26, 1947. At that time, however, the Carrier and the Association were not strangers. The Association had also been the certified representative of the Carrier's mechanics since December 13, 1945. The prior relations of the parties are of significance in appraising their conduct and their attitudes in connection with present dispute.

Before the Association was certified as the bargaining representative of the Carrier's mechanics, the Carrier had attempted to prevent the employees from affiliating with a national union and to bring about the establishment of an independent organization of its employees. Its efforts in this direction included an offer of the free use of the Carrier's legal services in securing certification of an independent union and in the preparation of a contract with the Carrier; they included also the promise of more substantial future benefits to the employees from the formation of an independent union than would be forthcoming if they affiliated with a national union. While the Association and the Carrier were negotiating the contract covering the air-line mechanics, the Carrier placed in the pay envelopes a publication which vigorously attacked unions and which argued that the effect of unionization had been to reduce, rather than to increase, the average annual earnings of the American wage worker. These interferences with the right of the employees to designate their bargaining representatives were patent violations of section 2, third, of the Railway Labor Act.

Negotiating conferences concerning the agreement relating to clerical employees took place from October 21 to 29, 1947. On October 29,

1947, the president and treasurer of the Carrier presented to the representatives of the Association a detailed statement of the Carrier's financial position and pointed out that in view of the financial difficulties confronting the company, no increase in wages was possible. On November 17, 1947, however, the Carrier by unilateral action announced a pay increase of $20 per month effective December 6, 1947, for all employees who earned less than $275 per month and who were not covered by "labor agreements." This wage increase was applicable to the clerical employees represented by the Association whose negotiating representatives had just been informed that no increase in wages was possible.

When the negotiating conferences were recessed on October 29, 1947, the Association requested the National Mediation Board to assign a mediator to assist the parties in reaching an agreement. Negotiations were resumed with the mediator on December 2, and a series of meetings were held which terminated on December 8, 1947. At the insistence of the Carrier, the discussions during this period were confined almost exclusively to a consideration of proposed contractual provisions relating to "subcontracting." On December 10, 1947, the National Mediation Board notified both parties that mediatory efforts had failed and proffered arbitration. On December 23, 1947, the Carrier distributed to its employees an announcement of company policies concerning sick leave, vacations with pay, holidays, notices of lay-offs and grievances. The announced policies were applicable to employees represented by the Association, although in the negotiating sessions just concluded the Carrier had refused to discuss these matters with the Association.

Wages, vacations, sick leave, lay-offs, and grievances were all matters appropriate for collective bargaining and were properly the subject of negotiation and agreement between the parties. Unilateral action by an employer in changing wage rates or working conditions while negotiations for a collective bargaining agreement are in progress is subversive of the processes of collective bargaining. Such conduct has been judicially condemned because it minimizes the influence of organized bargaining, interferes with the right of self-organization, and might, if successful, block the bargaining representatve in securing further adjustments concerning wages and working conditions.

The Railway Labor Act imposes upon the Carrier the duty to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions. This duty is imposed to protect the public from the consequences of interruptions to commerce. By its unilateral actions concerning matters properly the

subject of collective bargaining, National Airlines violated the duty imposed upon it by statute. National's persistent and repeated violations of the duties imposed upon it by Congress in the public interest were the major factors in the development of the existing dispute.

(*b*) *Legality of the strike*

The Carrier contends that the Association violated the Railway Labor Act by striking on January 23, 1948. The statutory provision relied upon is section 5, first (b), which reads:

> If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Arbitration was proffered by the National Mediation Board on December 10, 1947. The offer was accepted by the Association on December 11, 1947. On December 17, 1947, the Carrier informed the Board that it was not willing "at this time" to enter into an agreement to arbitrate. It stated, however, that the question would be submitted to the company's board of directors in January of 1948 and that if arbitration was approved by the directors, the Board would be so advised. On January 21, 1948, the National Mediation Board announced that the Carrier had refused to arbitrate and that the services of the Board were terminated. It also directed the attention of the parties to the statutory provision set forth above.

What the statute prohibits is any change in "rates of pay, rules, or working conditions or established practices." All of these are matters which are subject to change by the employer; none of them can be changed by employees. On its face, the statutory provision in question is a restriction upon the conduct of the employer and not of the employee. The legislative history of the provision makes its limited objective completely clear. The pertinent clause of the statute was added by amendment in 1934. Its purpose was described as follows by Joseph B. Eastman, then Federal Coordinator of Transportation:

> As the present act reads, a railroad, by rejecting the Board of Mediation's final recommendation to arbitrate the dispute, is enabled to change the rates of pay, rules, or working conditions arbitrarily, prior to the issuance of an order by the President appointing a fact-finding board and maintaining the status quo for 60 days. The only way the employees can now guard against this possibility is for them to be forehanded and arm themselves with a strike vote prior to the termination of mediation, obviously a very unsatisfactory expedient, so as to enable the Board of Mediation to certify to the President that an interruption

to interstate commerce threatens, thus enabling him in turn to issue an executive order before the railroad can change the status quo. The railroads have taken advantage of this unintentional hiatus in the present law in several instances. The change now proposed is designed to plug this hole.

The plain language of the statute, supported as it is by the legislative history, makes it clear that the strike which took place on January 23, 1948, was not in violation of the Railway Labor Act.

(*c*) *Reinstatement*

When the Association went on strike on January 23, 1948, because of the dispute over the negotiation of the agreement covering clerical employees, the mechanics of the Carrier, who are also members of the Association, refused to cross the picket line established by the clerks. The Carrier continued operations, and hired on a "permanent" basis new employees to take the place of the clerks and mechanics who refused to cross the picket line. The replacement employees are now on the job; the strikers are not. This situation presents the most serious obstacle to the settlement of the existing dispute.

That an employee does not cease to be such because he is on strike is thoroughly established by decisions of Federal and State courts. In determining whether or not it is the duty of an employer to take back striking employees even though by so doing he is forced to discharge those hired to replace the strikers, the courts have considered the conduct of the parties leading up to the strike. Where the strike is connected with or results from the violation of a statutory duty by an employer, he is compelled to rehire the striking employees even though that course involves the discharge of employees hired to replace those on strike. On the other hand, if the employer has not been at fault in the events leading up to strike, no such duty is imposed upon him and he may rehire the strikers or not as he sees fit.

The Railway Labor Act does not contain compulsory provisions like those of the National Labor Relations Act under which the question here involved has most frequently arisen. The decisions under that statute, however, are based upon considerations which are inherently equitable and just. The consistent course of judicial decisions dealing with identical problems under a statute, which, like the Railway Labor Act, is designed to minimize industrial strife, urgently impels this Board to formulate its recommendations upon the basis of like considerations.

In its dealings with the Association, National has repeatedly been guilty of conduct which violated the provisions of the Railway Labor Act. Identical conduct, in the statutory setting of the National Labor Relations Act, is uniformly held to constitute "unfair labor practices,"

and to warrant the enforced reinstatement of the striking employees. The Carrier's disregard of its statutory duty was not isolated or accidental; on the contrary, it was repeated and deliberate. And it contributed directly and immediately to the situation out of which the strike arose.

RECOMMENDATION

It is, therefore, the recommendation of the Board that the employees who have refused to work during the pendency of the strike should be reinstated as working employees of the Carrier.

(*d*) *Subcontracting*

The inability of the parties to agree upon a provision concerning the right of the Carrier to subcontract to others work presently performed by members of the Association was a major factor in the immediate precipitation of the dispute. On August 15, 1947, the Carrier began to dismiss mechanics in its instrument department because it had subcontracted this phase of its work to Barfield Instrument Co. Although the agreement between the Association and the Carrier concerning the mechanics contained no specific provision concerning contracting out work, the Association regarded this conduct as a breach of the agreement and initiated a grievance proceeding concerning it.

Although the subcontracting issue was thus probably in the minds of both parties during October 1947 negotiations, it did not at that time appear to present a major obstacle to agreement. The discussions during the December 1947 negotiating sessions, however, were confined almost exclusively to the subcontracting issue because the Carrier insisted upon disposing of that matter before considering other provisions of the proposed agreement.

With respect to this issue both parties took extreme positions. The Association, manifesting the traditional abhorrence of organized labor toward the practice, contended that under no circumstances should the Carrier be permitted to farm out work. The Carrier insisted upon an unrestricted right to farm out work whenever it saw fit to do so.

Neither of these extreme positions is sound. There may be circumstances in which subcontracting of work is highly desirable and perhaps economically imperative for the Carrier. On behalf of its mechanics, the Association has itself entered into an agreement with another air line recognizing the right of that air line to contract out specified work. On the other hand, an agreement retaining for the Carrier an unlimited right to contract out would be illusory; any rights which it conferred upon employees would exist only at the will

of the Carrier. Nor is there necessity for the existence of so far reaching a power; it is inconceivable that the clerical work of an established air line so lacks integration as to be susceptible of complete and comprehensive subcontracting.

There were occasions during the negotiations when each of the parties suggested a willingness to depart from its extreme position. The Association, for example, suggested a possible willingness to accept a provision permitting the Carrier to contract out certain work to a specifically named agency which operates in certain terminals and which is subject to the provisions of the Railway Labor Act. The Carrier suggested the possibility of defining the work which would be the subject of contract. These suggestions were not fully explored, and each party manifested an unwillingness to enter upon a penetrating discussion of the problem.

The issue is not of cosmic importance; its theoretical significance to each of the parties to the dispute diminishes when weighed against the interest of the public in the continuance of healthy relations between the Association and the Carrier. Much of the difficulty surrounding this issue would be dissipated if the parties would consider it on a realistic rather than a theoretical basis. The contract when negotiated will be of limited duration. Only those problems which are foreseeable during the life of the contract need be provided for. The suggestions which have already been tentatively advanced by the parties—a delineation either in terms of specific agencies or in terms of specific work—warrant further exploration by the parties.

RECOMMENDATION

The Board recommends that the parties resume negotiations for an agreement covering clerical employees, and that the National Mediation Board assist the parties in these negotiations. The Board further recommends that the parties defer consideration of the problem of contracting out work until all other areas of potential agreement have been explored. When the problem of contracting out work is reached, the Board recommends that it be approached on a practical basis, with attention directed to specific matters likely to arise during the life of the contract. In the event that the parties are unable to reach agreement, it is recommended that the issue be submitted to arbitration before an arbitrator agreed upon by the parties, or, in the event of their failure to agree, appointed by the National Mediation Board.

Respectfully submitted.

GRADY LEWIS, *Chairman.*
WALTER V. SCHAEFER, *Member.*
CURTIS W. ROLL, *Member.*

U. S. GOVERNMENT PRINTING OFFICE: 1948