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It has been said that "[u]ninsured motorists coverage 'is designed to further close the gaps inherent in the motor vehicle financial responsibility and compulsory insurance legislation.' "[29] Such a "gap" certainly occurs when a motorist, driving a vehicle supposedly covered by liability insurance, negligently injures another party, insured under uninsured motorists coverage, and the negligent party's liability insurer refuses to pay the injured party on the ground that the policy did not cover the vehicle, the driver, or the type of accident involved. The vehicle involved should then be considered "uninsured" within the terms of the statute because the liability insurer has denied coverage, thus enabling the injured party to collect upon his uninsured motorists coverage. Such a result fits the judicially stated purpose of our statutory scheme of compulsory liability insurance "to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle. . . ."[30]

If a vehicle is uninsured when there is no liability policy at all or when the liability insurer is insolvent, then it should be uninsured when the liability insurer will not pay. The effect in each instance is to deprive the injured person of the protection afforded by liability insurance contrary to the principle of protection for all innocent motorists provided by the Motor Vehicle Financial Responsibility Act.

PENDER R. MCELROY

Labor Law—Collective Bargaining—Is the Court Replacing the Union

Labor-management disputes in railroad operations are regulated by the Railway Labor Act.[1] It provides for negotiation,[2] mediation,[3] voluntary arbitration,[4] and fact finding.[5] However, the ulti-

[29] Buck v. United States Fid. & Guar. Co. 265 N.C. 285, 288, 144 S.E.2d 34, 36 (1965).
[30] Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 126, 116 S.E.2d 482, 487 (1960).

[1] 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-63 (1964).
[2] 64 Stat. 1238 (1951), 45 U.S.C. § 152, Second (1964).
[3] 78 Stat. 748, 45 U.S.C. § 154 (1964).
[4] 48 Stat. 1197 (1934), 45 U.S.C. § 157 (1964).
[5] 63 Stat. 107 (1949), 45 U.S.C. § 155 (1964).

mate weapon of "self-help"[6] is preserved. Management is permitted to hire replacements, make unilateral changes,[7] and the unions can strike. But in a nationwide emergency, Congress can and has substituted compulsory arbitration for self-help in a labor dispute.[8]

The ultimate form of union self-help is the right to strike, but it is not without limitations. Strikes such as "sit-downs"[9] and "mutinies"[10] are prohibited. Furthermore, if the strike is for economic reasons, the jobs of strikers are forfeited if permanent strike replacements are hired.[11]

The employer, as well, may resort to self-help when good faith collective bargaining fails.[12] He may hire strike replacements to keep his business operative[13] or "shut-down"[14] at a time of his own choosing. But here again limitations are imposed. Employer sympathy lock-outs[15] and super seniority privileges[16] are examples of prohibited measures.

The availability of self-help however, does not terminate the bargaining relationship. It is still unlawful for the employer to make unilateral changes in terms of conditions of employment and he must negotiate with the union in regards to pay rates and working conditions of strike replacements.[17]

The recent case of *Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry.*[18] represents an inroad into the aforementioned labor-management concepts of self-help, at least in the context of railroad

[6] See note 27 *infra.*

[7] In NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938), the employer hired replacements to operate his business and was not required to discharge them on return of the participants in an economic strike.

[8] *E.g.*, Act of Aug. 28, 1963, 77 Stat. 132, in which Congress provided for a special arbitration board to establish conditions that would be in effect for a two-year period, thus avoiding a threatened nationwide railroad union strike. See Brief for Brotherhood of Locomotive Firemen & Enginemen as Appellant, pp. 4-5, Brotherhood of Locomotive Firemen & Engineman v. Bangor & Aroostock R.R., —— F.2d —— (D.C. Cir. 1966).

[9] *E.g.*, NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

[10] See Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942).

[11] See note 7 *supra.*

[12] See note 27 *infra.*

[13] Note 7 *supra.*

[14] American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).

[15] See NLRB v. Brown, 380 U.S. 278 (1965), for the proposition that a lockout based on hostility to the process of collective bargaining would be illegal.

[16] See note 37 *infra.*

[17] See note 36 *infra.*

[18] 384 U.S. 238 (1966).

operations. The labor unions,[19] on behalf of nonoperating employees,[20] demanded a general twenty-five-cents-per-hour wage increase and six months notice of prospective lay-offs and job terminations. This demand was made of virtually all Class One railroads, including the defendant.

Pursuant to the Railway Labor Act negotiation and mediation ensued but no agreement was reached. A presidential emergency board[21] was then created to conduct hearings and make settlement recommendations. Its efforts were successful with respect to all railroads concerned except Florida East Coast.

Subsequent to the failure of defendant and the unions to come to terms, the latter struck and defendant hired replacement workers.[22] In so doing, new contracts that were at variance with the existing collective agreements in respect to wages and notice were negotiated with the replacements. Florida East Coast further attempted to nullify the previous union-negotiated agreements by substituting new contracts that embodied additional departures. These were foreign to the union agreements in particulars other than those that were the initial subject of dispute. The new agreements were challenged by the United States as violative of the Railway Labor Act.[23] The ensuing litigation resulted in a decision that the railroad

[19] The unions referred to are a group of eleven cooperating labor organizations representing workers employed by the railroad. Brief for Petitioner, p. 4.

[20] Employees in "so-called non-operating crafts—clerks, machinists, etc." *Id.* at 4 n.1.

[21] § 160, providing for the board, states in part:

> If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. . . .
>
> After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

48 Stat. 1197 (1934), 45 U.S.C. § 160 (1964).

[22] For a time, the railroad ceased operations altogether as a result of the strike. This was prior to the hiring of the replacements in question.

[23] The segment of the act in question was 64 Stat. 1238 (1951), 45 U.S.C. § 152, Seventh (1964) which provides:

> 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 156 of this title.

had violated the act by this unilateral action. But it was held that the railroad could institute changes if they were first submitted to a court and found to be "reasonably necessary to effectuate its rights to continue to run its railroad under the strike conditions."[24] This in effect, opened the way for defendant to secure proposed contractual changes by court approval without resorting to further negotiation with the union. Such changes could encompass areas that had not heretofore been the subject of a union-management dispute.[25]

The Supreme Court approved this approach, including the "reasonably necessary" criteria enunciated by the lower court. The union contended that the only changes Florida East Coast could legitimately make in formulating the replacement worker agreements were those that had previously been submitted to negotiation as required by the act. This proposition was rejected on the basis that if the mediation procedure was invoked for every individual change deemed necessary during a strike, the carrier would be crippled. In addition, the Court felt that the union proposal would prevent the

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48 Stat. 1197 (1934), 45 U.S.C. § 156 (1964) provides;

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

[24] Florida East Coast Ry. v. Brotherhood of R.R. Trainmen, 336 F.2d 172, 182 (5th Cir. 1964). Subsequent to this decision the district court allowed the alterations enumerated in note 25 *infra*. This was affirmed in Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry., 348 F.2d 682 (5th Cir. 1965) and precipitated the present holding.

[25] The district court had permitted Florida East Coast:

> to exceed the ratio of apprentices to journeymen and age limitations established by the collective bargaining agreement to contract out certain work, and to use supervisory personnel to perform specified jobs where it appeared that trained personnel were unavailable.

384 U.S. at 243.

It must be remembered that the subject of the original negotiations was wages and notice. See text accompanying note 20 *supra*.

railroad from making a "reasonable effort"[26] to continue operations during the strike and thereby constitute a breach of public duty on the part of the carrier. In fact, the duty of the railroad to the public appeared to be the Court's major concern. It discussed the potential disaster of a general shutdown of service and stated that the carrier's right of self-help[27] would be meaningless if the already cumbersome negotiation procedure was extended.

Given that the public interest in uninterrupted carrier service is substantial and that the present ruling will protect that interest, what of the public interest in the protection of organized labor? It is submitted that Congress was well aware of the vital nature of railway transportation at the time the act was passed.[28] As the right to strike was not prohibited, it would seem that union equities were considered a substantial public interest. Moreover, as pointed out by the dissent of Mr. Justice White, the act does not call for compulsory arbitration of disputes,[29] a measure that would virtually insure continued carrier operation in the face of labor-management disagreements. In addition, there is no absolute duty on the carrier to continue service; only a reasonable effort is required.[30] Thus it is reasonable to assume that Congress did not intend to negate the effectiveness of a strike where the railroad is concerned, though admittedly desiring to encourage settlements by protracted negotiation procedures in hopes that a strike would be unnecessary.

Although it is uncertain what contractual changes a court may find "reasonably necessary" in a particular fact situation, the poten-

[26] The Court did not consider the duty of the carrier to operate absolute, but stated that the railroad:

> owes the public reasonable efforts to maintain public service at all times, even when beset by labor-management controversies and that this duty continues even when all the mediation provisions of the Act have been exhausted and self-help becomes available to both sides of the labor-management controversy.

Id. at 245.

[27] The Court referred to Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R., 372 U.S. 284 (1963), as authority for the proposition that self-help is available to both parties to a dispute when statutory procedures have failed to result in settlement. 384 U.S. at 244. Of course, the strike is the union method of exercising this right.

[28] May 20, 1926 was the date of initial enactment.

[29] It provides for voluntary arbitration but specifically states, "The failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise." 48 Stat. 1197 (1934), 45 U.S.C. § 157, First (1964).

[30] See note 26 *supra.*

tial danger to union bargaining power is significant. As the purpose of a strike is application of economic pressure to management, it must hamper management activity to be of any consequence. Assuming that a railroad is able to convince a court that sweeping changes are necessary to effectively operate under strike conditions, the inconvenience of changing personnel might be the single major obstacle that management would face. Any expense incurred thereby would be overshadowed by the pecuniary consequences of yielding to substantial union demands for wage increases and alterations of working conditions.

The knowledge that collective agreements that were in effect prior to the strike would remain the standard contracts and return to prominence at the conclusion of the dispute[31] would be little consolation from the union viewpoint. As dissatisfaction with existing arrangements is the primary motive for strikes, a return to the same would not justify the effort. In fact, labor would suffer more than management as participating rank and file would be unemployed during the strike while management continues to function with relative ease. The mere prospect of such an occurrence will constitute a deterrent to union activity, though in the final analysis a court may not agree that management demands were "reasonably necessary."

As to enforcement of this "reasonably necessary" standard, the Court in this case stated that it must be strictly construed and:

> The carrier must respect the continuing status of the collective bargaining agreement and make only those changes as are truly necessary in light of the inexperience and lack of training of the new labor force or the lesser number of employees available for the continued operation.[32]

It is submitted that the above does not constitute a standard that is susceptible of strict construction. The necessities, as seen by a court faced with such determination, will depend upon various factual issues that may not fit into a neat pattern. Moreover, the language quoted would seem to indicate a balance in favor of the collective agreements that a carrier must overcome.[33] But consider-

[31] The collective agreements were to constitute the basic framework upon which the court approved changes would be tacked. See note 33 *infra*.

[32] 384 U.S. at 248.

[33] The Court stated that "the burden is on the carrier to show the need for any alteration . . . that it is required to employ in order to maintain that continuity of operation that the law requires of it." *Id.* at 248.

ing the Court's emphasis on the plight of the railroad undertaking "to keep its vital services going *with a substantially different labor force*,"[34] the balance disappears. The carrier will be operating with a substantially different labor force in every strike situation where contractual changes are sought. Furthermore, it is unlikely that replacements, as a group, will ever have the training and railroad orientation of employees for whose benefit the collective agreements were tailored.[35] Thus the union is faced with the prospect of management having a built-in argument in support of its contentions.

If wholesale changes do result from such a process, what of the right of the union "to represent all employees in the craft irregardless of union membership"[36] as enunciated by the Court? This phrase is without substance if the union is unable to make a showing of strength during the crucial strike period. Such showing would be evidenced by a continued adherence to existing collective agreements. With the railroad now able to appeal to the courts for extensive alteration of these agreements, can it be said that union representation is not thereby undermined?[37]

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[34] *Id.* at 245.

[35] The Court emphasized that the qualifications of replacements are unlikely to blend with "the terms of a collective bargaining agreement, drafted to meet the sophisticated requirements of a trained and professional labor force." *Id.* at 246.

[36] The Court refers to Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) in which it was stated:

> The labor organization chosen to be the representative of the craft or class of employees is thus chosen to represent all of its members, regardless of their union affiliations or want of them. . . . The purpose of providing for a representative is to secure those benefits for those who are represented and not to deprive them or any of them of the benefits of collective bargaining for the advantage of the representative or those members of the craft who selected it.

Id. at 200-01.

[37] In NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), replacement workers hired during a strike were given "20 years additional seniority . . . which would be available only for credit against future layoffs and which could not be used for other employee benefits based on years of service." *Id.* at 223. The same benefits were accorded strikers who returned to work.

The Court evidenced concern for continuing union strength in strike situations by declaring the seniority gambit an unfair labor practice. In regard to management claims that such action was taken in pursuit of legitimate business purposes, the Court stated:

> Nevertheless, his conduct *does* speak for itself—it *is* discriminating and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended.

Furthermore, it is far from certain that the effect of the present holding will be confined to union activity within the purview of the Railway Labor Act. Neither the Court[38] nor the National Labor Relations Board[39] has hesitated to cite cases involving the act as authority in otherwise unrelated areas of labor law. Thus the instant decision may serve as precedent for similar appeals in other industries, especially if they are found to be charged with a public duty.

But regardless of future expansion, it is submitted that the instant case creates an imbalance[40] in the railway labor process that unions are unlikely to overcome.[41] If taking such a step is truly necessary to maintain the vital function of carrier operations in the present economic complex, it would seem to be a congressional rather than judicial prerogative.

WILLIAM H. FAULK, JR.

Real Property—Discontinuance of Dedicated Streets—Disposition of Property

Having been established by dedication, a street retains its status as a public way until it is discontinued in a manner provided by law.[1] Generally, statutes provide that streets may legally cease to exist

Id. at 228. In light of the Court's reasoning, should conduct that discourages union membership be treated differently if the employer is able to secure the approval of a lower court? This situation may arise in various areas of labor law if the *Florida East Coast* decision is not limited to the confines of the Railway Labor Act. For a consideration of such possibility see note 39 *infra* and the accompanying text.

[38] *E.g.*, Syres v. Oil Workers Int'l Union, 223 F.2d 739 (5th Cir. 1955), *rev'd and remanded per curiam*, 350 U.S. 892 (1956), in which the Supreme Court cited Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) as authority for reversing the lower court finding of "no jurisdiction" in a racial discrimination case against the unions.

[39] *E.g.*, Hughes Tool Co., 147 N.L.R.B. 1573 (1966), in which the board cited *Steele* as authority for application of the duty of fair representation in labor law.

[40] For the proposition that a balancing process is in order, *i.e.* weighing the right to strike against the right of the employer to maintain his business, see NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

[41] Mr. Justice White considered the majority opinion "very close to a judgment that there shall be no strikes in the transportation business, a judgment which Congress rejected in drafting the Railway Labor Act." 384 U.S. at 250.

[1] 11 McQUILLAN, MUNICIPAL CORPORATIONS § 30.182, at 101 (3d ed. 1964) [hereinafter cited as McQUILLAN].