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Lost Solidarity, Lost Profits: The Consequences of the Railway Labor Act's "Craft or Class" Language for the Penn Central Merger

The failure of the Penn Central merger was significantly impacted by fragmented labor relations, rigid collective-bargaining agreements (CBAs), and an inefficient proliferation of bargaining units. This article contends that two types of constraints on bargaining units could have mitigated these challenges: the unit ceilings imposed in the hospital industry in the 1980s and sectoral bargaining as practiced in Europe. The primary obstacle to these constraints was the statute governing labor-management relations in the railroad sector, the Railway Labor Act (RLA).[1] Imposing these constraints would have fostered labor solidarity while enabling management to better adapt to major disruptions that befell the rail industry.

This article proceeds as follows. Part A describes the basic structure of the RLA, with a focus on its unit-determination procedure. Part B contrasts that procedure with that of the National Labor Relations Act (NLRA),[2] the statute governing labor-management relations for most of the private sector in the United States. Part C explains the state of railroad collective bargaining in the mid-twentieth century and the prevalence of featherbedding in the form of rigid work rules found in legislation and CBAs. Part D provides some history of the Penn Central merger and the subsequent bankruptcy from a labor-relations perspective. Part E describes how Congress and the National Labor Relations Board (NLRB), the agency that enforces the NLRA,

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[1] 45 U.S.C. § 151.
[2] 29 U.S.C. § 152.

successfully handled the problem of unit proliferation in acute-care hospitals. Part F illustrates how the National Mediation Board (NMB), the agency that administers the RLA, invoked its authority to more sensibly define bargaining units in the airline industry. Part G outlines how the sectoral bargaining model practiced in demonstrates the benefits of bargaining-unit consolidation for purposes of national-level macroeconomic planning and coordination. Finally, Parts H, I, and J analyze the lessons learned from the preceding sections. Hence, I conclude that the Penn Central's demise was exacerbated by labor fragmentation caused by the RLA's language for bargaining-unit composition, and a failure of United States labor policy to require stakeholders to internalize industry-wide market trends.

A. Unit-determination Procedures under the RLA

The RLA was signed into law in 1926, drafted not by Congress but by railroad and union executives in response to the failure of prior legislation governing the sector.[3] Those previous laws had been viewed as having failed to maintain industrial peace.[4] The RLA emphasized collective bargaining for the resolution of disputes, empowering the NMB only to intervene when necessary.[5] The RLA enumerates its purposes as follows:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.[6]

[3] Charles M. Rehmus, *Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries*, in THE RAILWAY LABOR ACT AT FIFTY: COLLECTIVE BARGAINING IN THE RAILROAD AND AIRLINE INDUSTRIES 7 (NMB 1977).
[4] *Id.* at 8.
[5] *Id.*
[6] 45 U.S.C. § 151.

Unfortunately, the law was not robust enough to prevent companies from infiltrating unions in fulfilment of the third purpose, above. In 1933, 147 of the 233 largest railroads had company-dominated unions.[7] Thus, in 1934 the RLA was amended to prohibit these company-dominated unions, to ensure that management not influence employees in the designation of their representatives, and to require that management bargain with RLA-certified representatives.[8] Significantly, the law also banned the *yellow-dog contract*, whereby an employer requires an employee, as a condition of employment, to sign a contract never to unionize.[9] These changes proved effective, as by 1935 about 550 company-dominated unions were replaced by independent unions.[10]

One commentator noted that "[t]he [RLA] is not a very detailed statute. It was enacted in concert with a well-established system of labor relations and collective bargaining."[11] The RLA does not give an administrative agency the power to enforce violations of the law. Contrast this with the NLRA, which requires a lengthy administrative procedure by the NLRB before any authorization to invoke a district court for a possible injunction.[12] Further, the RLA does not have a provision outlawing featherbedding— "[a] union practice designed to increase employment and guarantee job security by requiring employers to hire or retain more employees than are needed."[13] In contrast, the NLRA makes it unlawful "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the

[7] IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 43 (1950).
[8] Rehmus, *supra* note 3, at 13.
[9] *Id.* at 14.
[10] LEONARD A. LECHT, EXPERIENCE UNDER RAILWAY LABOR LEGISLATION 155 (1955).
[11] Thomas E. Reinert, Jr., *Overview of the Railway Labor Act*, AM. L. INST., ALI-CLE Course Materials (Apr. 27-28, 2017).
[12] 29 U.S.C. § 162(j).
[13] Featherbedding, BLACK'S L. DICTIONARY (12th ed. 2024) ("The practice stems from employees' desire for job security in the face of technological improvement.")

nature of an exaction, for services which are not performed or not to be performed."[14] To its credit, whereas the NLRA only permits restorative remedies, the RLA contains criminal and monetary damages, including against individual "officers or agents" of carriers.[15] Moreover, the RLA's exclusive reliance on federal courts (and their power to issue preliminary injunctions) is believed to have helped combat discriminatory discharges in the sector. [16]

Regarding the determination of bargaining units, the RLA did not change the custom that had existed in previous statutes,[17] namely the focus on a "craft or class" as the central organizing principle.[18] The 1934 amendments enabled a new administrative agency, the NMB, to resolve disputes over the composition of bargaining units.[19] Section II Fourth provides, in relevant part:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purposes of this Act.[20]

To invoke the NMB's procedures, at least 35 percent of the given set of employees seeking representation must demonstrate a "showing of interest," usually through authorization cards designating a union as their desired representative.[21] Upon the NMB's investigation establishing majority status (usually via secret ballot), the agency issues a certification legally obligating the railroad employer to bargain with the union.[22]

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[14] 29 U.S.C. § 160(b)(6).
[15] 45 U.S.C. § 152 (Tenth).
[16] Charles J. Morris, *A "Tale of Two Statutes" Redux: Anti-Union Employment Discharges Under the NLRA and RLA, with a Solution*, 40 BERKELEY J. EMP. & LAB. L. 295, 297 (2019).
[17] Dana E. Eischen, *Representation in the Airline and Railroad Industries*, in THE RAILWAY LABOR ACT AT FIFTY: COLLECTIVE BARGAINING IN THE RAILROAD AND AIRLINE INDUSTRIES 24 (NMB 1977).
[18] 45 U.S.C. § 152 (Fourth).
[19] *Id.* § 151 (Third).
[20] *Id.* § 152 (Fourth).
[21] Eischen, *supra* note 17, at 46.
[22] 45 U.S.C. § 152 (Ninth).

Neither the NMB nor the courts have provided bright-line definitions of "craft or class."[23] The RLA never defined these terms or even specified whether the "or" is disjunctive.[24] Instead, the NMB and the courts have relied on historically accepted demarcations of these terms as asserted by unions and railroads.[25] Though not exhaustive, a 1945 NMB decision lists two sets of recognized groupings conforming to the "craft or class" designation:

> First, those which more nearly conform with the old craft guilds and are today quite closely restricted to employees in one particular occupation. Examples [include] . . . locomotive engineers, locomotive firemen, road conductors, road trainmen, yardmen (switchmen), train dispatchers, . . . machinists, boilermakers, blacksmiths, sheet metal workers and pipe fitters.
> . . .
> The second type of crafts and classes combine into one group various occupations which are all generally related to a particular line of endeavor. Examples [include] . . . communications . . . , consisting of telegraphers, telephoners, teletype operators, agents, towermen, block operators . . . [;] maintenance of way employees, [including] . . . track labor, bridge and building mechanics and helpers, foremen of these groups, operators of roadway machines such as ditchers, pile driers, etc., track motor car mechanics, crossing watchmen; and others.[26]

This second grouping would also include "Clerical, Office, Station, and Storehouse" employees.[27]

In other words, by statute, a large railroad carrier can reasonably anticipate at least about 15 bargaining units, conceivably with each having separate unions as representatives. This would result in numerous CBAs that must be negotiated and that impact the carrier's business operations. It also means increased probabilities of strikes, picketing, and other labor disputes—especially for smaller units that are easier to mobilize. But even a work stoppage among a small unit can significantly delay overall operations. To put it mildly, this is an administrative and

[23] Eischen, *supra* note 17, at 29–30.
[24] *See* 45 U.S.C. § 152 (Fourth).
[25] *Id.* at 28.
[26] *American Airlines, Inc.*, 1 N.M.B. 394 (1945).
[27] *Id.*

strategic burden for a railroad employer seeking to control costs amid fierce competition from automobiles and airlines.

After the NMB has already certified a bargaining unit, disputes over unit composition are litigated in federal court.[28] Yet some have noted that the RLA's "bargaining unit decisions are virtually unreviewable by the courts and little law exists on the standards for reviewing bargaining agent selection decisions."[29] Ironically, the NMB "has a limited role in representation matters under the [RLA] but its discretion is virtually unlimited in the performance of that role."[30]

B. The NLRB's Determination of Bargaining Units

In contrast to the RLA's hands-off approach, the NLRB plays a significant role in the determination of bargaining units. The NLRA only requires a mere "appropriate unit" and is permitted to certify groupings other than craft units:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act . . ., the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof[.]"[31]

Thus, an employer-wide unit comprising multiple facilities is presumptively appropriate.[32] In determining the scope of a unit, "(a) a plantwide unit is presumptively appropriate; (b) a petitioner's desires as to the unit is always a relevant consideration; and (c) it is not essential that a unit be the *most* appropriate unit."[33] The NLRA also requires professional employees (strictly defined) to be given a choice as to whether to be in a combined unit with nonprofessional

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[28] *See, e.g.*, Switchmen's Union v. NMB, 135 F. 2d. 785 (D.C. Cir. 1943).
[29] Dennis A. Arouca & Henrey H. Perritt, *Transportation Labor Regulation: Is the Railway Labor Act or the National Labor Relations Act the Better Statutory Vehicle?* 36 (3) LABOR L. J. 145, 152 (1985).
[30] Eischen, *supra* note 17, 30.
[31] 29 U.S.C. § 159(b).
[32] Greenhorne & O'Mara, Inc., 326 N.L.R.B. 514, 516 (1998).
[33] Marks Oxygen Co. of Alabama, 147 N.L.R.B. 228, 230 (1964); NLRB v. Southern Metal Servs., 606 F.2d 512 (5th Cir. 1979).

employees.[34] Because of their role in protecting an employer's private property, which can have repercussions during strikes and lockouts, guards must be in their own separate units.[35]

Under the NLRA, unions have wide discretion in petitioning for "subdivision" units based on their own organizing preferences.[36] The Board will certify a subdivision of employees that "(1) shares an internal community of interest; (2) is readily identifiable as a group based on job classifications, departments, functions, work locations, skills, or similar factors; and (3) is sufficiently distinct."[37] In situations where employers and unions disagree on the boundaries of a unit, the Board will conduct a formal hearing and ultimately issue a decision to evaluate "community of interest":

> [T]he Board considers whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the [e]mployer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. [38]

Though uncommon, the Board will certify a multiemployer unit where the parties consent.[39] Through a roundabout procedure called a *test of certification*, a federal court may review the NLRB's determinations despite the lack of statutory authorization.[40]

This has led to some common subdivisions across industries which, while not presumptively appropriate as that term of art is used, are considered standard. These include

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[34] 29 U.S.C. § 159(b).
[35] *Id.*
[36] Am. Steel Constr., Inc., 372 N.L.R.B. No. 23, slip op. at 17 (Dec. 14, 2022).
[37] *Id.*
[38] *See, e.g.* United Operations, Inc., 338 N.L.R.B. 123, 123 (2002).
[39] W.L. Miller Co., 284 N.L.R.B. 1180, 1185 (1987).
[40] *See, e.g.*, Alphabet Workers Union-Commc'n Workers of Am., Loc. 9009 v. NLRB, No. 24-1003, 2025 WL 1162314 (D.C. Cir. Apr. 22, 2025).

broad multi-classification categories such as production and maintenance,[41] technical,[42] and office clericals.[43] The only sector within the NLRB's jurisdiction in which craft units are prevalent is in construction,[44] where historically powerful building trades operate hiring halls and train their members for highly skilled work. The justification for honoring craft-level bargaining in construction is the sequenced and temporary nature of the work.[45] Thus, it makes no sense to have both electricians and carpenters in the same bargaining unit if the electricians cannot work until all carpenters are finished.

While the NLRB's procedure might plausibly lead to even more proliferation than that of the RLA, it permits unions, employers, the NLRB, and the courts to craft realistic bargaining units based on industrial circumstances. Unit-determination procedures can be contentious and complex, arguably permitting splintering even intra-craft or intra-class. But in stark contrast with the RLA approach, it permits the creation of bargaining units that incentivize cross-classification integration and therefore nonproliferation.

C. Bargaining in the Railroad Industry in the Twentieth Century

In the twentieth century, it was typical for a railroad to have separate CBAs "with approximately twenty different unions, though a big railroad could have hundreds of additional agreements regarding local conditions. On top of this were industry-wide [CBAs] . . . ."[46] Some

[41] Weyerhaeuser Co., 173 N.L.R.B. 1170, 1171 (1968).
[42] Avco Lycoming Div., 173 N.L.R.B. 1199, 1200 (1969).
[43] PECO Energy Co., 322 N.L.R.B. 1074, 1084–85 (1997).
[44] *See* Plumbing Contractors Assn., 93 N.L.R.B. 1081, 1091 (1951) ("the pattern of bargaining on a craft basis in the area, and the long history of separate representation of the very employees sought herein, is further evidence of the appropriateness of the proposed single craft unit").
[45] *See id.* at 1091 ("the construction of a building involves a series of successive operations by each of the crafts involved, in which the work of each craft must precede or follow the work of other crafts in a specified order, and is dependent for the performance of its work upon the performance by the other crafts of their particular work.").
[46] CARL M. BRAUER, UNTITLED CONRAIL MANUSCRIPT, 1-11 (1998).

classifications fell along racial lines, such as Pullman porters who were invariably Black men.[47] An interesting case study of the impact of craft-based bargaining is the history of the fireman.[48] This position was rendered obsolete with the transition from steam to diesel, yet the position existed on most railroads through 1985 despite litigation to attempt its elimination.[49] Some suspect[50] that this is partly due to the RLA's rigidity compared to the NLRA, which has a unit-clarification procedure[51] to handle industrial changes. But it could also be attributed to the NMB's own reluctance to assert its discretionary authority to determine bargaining units in the face of changing circumstances.[52]

Unlike in other industries, the norm in railroad labor relations was to have CBAs without expiration dates.[53] Rather than a contract expiration being the trigger for collective bargaining, a party may propose modification of a CBA provision, triggering bargaining until the parties reach agreement.[54] This convention dates since around 1875 and continued through at least the 1970s.[55] The RLA accommodated this norm by requiring "at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions."[56] The RLA imposes a duty on the parties to reach agreements;[57] where impasse is reached, a party may request intervention by the NMB.[58]

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[47] Allissa V. Richardson, *The Platform: How Pullman Porters Used Railways to Engage in Networked Journalism* 17:4 JOURNALISM STUDIES 398 (2016).
[48] Arouca & Perritt, *supra* note 29, at 163.
[49] *Id.*
[50] *See id.* at 152.
[51] *See* Sections 11490–11498 of N.L.R.B. Casehandling Manual, Part 2, Representation Proceedings (Jan. 2025), https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/chm-part2-january2025.pdf (last visited Mar. 17, 2025).
[52] Arouca & Perritt, *supra* note 29, at 164.
[53] Beatrice M. Burgoon, *Mediation of Railroad and Airline Bargaining Disputes*, in THE RAILWAY LABOR ACT AT FIFTY: COLLECTIVE BARGAINING IN THE RAILROAD AND AIRLINE INDUSTRIES 72 (NMB 1977).
[54] *Id.*
[55] *Id.*
[56] 45 U.S.C. § 156.
[57] *Id.* § 152 (First).
[58] *Id.* § 155.

In 1975, there were about 497 carriers and an estimated 6,800 CBAs.[59] About 1,000 of those CBAs were subject to negotiation that year, of which 230 required NMB assistance.[60] Contrast this with bargaining under the NLRA, where three-year contracts are the norm and interim bargaining is not required during the pendency of a contract.[61]

From the late 1940s to the early 1970s, the railroad workforce dropped about 61 percent to about 566,000.[62] While the ascent of automotive and air travel is partly to blame, so was the technological change from steam to diesel locomotives.[63] From 1950 to 1967, there was a 61 percent drop in shopcraft jobs, including an 80 percent drop for boilermakers.[64] This might have impacted the solidarity that had previously existed among the 15 non-operating crafts, which had bargained jointly from the 1930s until the 1960s.[65]

Featherbedding and Rigid Work Rules

This staggering decline of employees and splintering of employee interests along craft lines might explain unions' tendency to featherbed and create rigid work rules aimed at employee retention.[66] In 1963, when the railroad industry earned about $681 million,[67] featherbedding was estimated to have cost the industry $592 million.[68] Rigid rules dictated

[59] Beatrice M. Burgoon, *Mediation of Railroad and Airline Bargaining Disputes*, IN THE RAILWAY LABOR ACT AT FIFTY: COLLECTIVE BARGAINING IN THE RAILROAD AND AIRLINE INDUSTRIES 80 (NMB 1977).
[60] *Id.*
[61] This is partly attributable to the "contract bar" doctrine, whereby the NLRB will prohibit competing unions from attempting to represent employees already covered by a CBA for no longer than three years. *See* Hexton Furniture Co., 111 N.L.R.B. 342, 343 (1955) (explaining doctrine); General Cable Corp., 139 N.L.R.B. 1123, 1125 (1962) ("Contracts of definite duration for terms up to 3 years will bar an election for their entire period; contracts having longer fixed terms will be treated for bar purposes as 3-year agreements and will preclude an election for only their initial 3 years.").
[62] JOHN E. HARR, THE GREAT RAILWAY CRISIS: AN ADMINISTRATIVE HISTORY OF THE UNITED STATES RAILWAY ADMINISTRATION 27 (1978).
[63] Burgoon, *supra* note 59, at 86.
[64] Railroad Shopcraft Factfinding Study, U.S. Dept. of Labor (1968).
[65] Burgoon, *supra* note 59, at 86.
[66] HARR, *supra* note 62, at 27.
[67] MOODY'S TRANSPORTATION MANUAL at a5 (1974).
[68] ADRIAN A. PARADIS, THE LABOR REFERENCE BOOK 71 (1972).

various terms and conditions of employment that would often differ based on location even within the same company, let alone between different companies.[69] The rules likely originated due to the dangerous nature of the work performed but reportedly became "hopelessly archaic, ... hampering the ability of management to deploy its labor force in the most productive manner."[70] Though the rules were custom-tailored to the given CBA, in general they delineated which classifications of employees performed a given scope of work, prohibiting other employees from even assisting with that work.[71] These rules were primarily found in CBAs, but they were also encouraged by similar state and federal laws.[72]

Featherbedding laws generally fell into three categories: full-crew, train consist, and job protection.[73] Arkansas had a full-crew law requiring (with two exceptions) trains to have a six-person crew of "an engineer, a fireman, a conductor and three brakemen, regardless of any modern equipment of automatic couplers and air brakes."[74] In other words, the text of the statute itself admitted that technological advances could render some of these classifications obsolete. "Train consist laws limited the maximum number of cars that could be connected in a single train[, which][75] . . . forced a railroad to add more trains to its schedule . . . [thus] requir[ing] more crews."[76] Job-protection laws aimed to "guarantee compensation for employees who [were] either laid off or transferred into another job category."[77] Such laws included the Emergency Railroad Transportation Act of 1933 (limiting reduction of employment below five percent and

[69] *See id.*
[70] *Id.* at 27-28.
[71] *See* J.A. Lipowski, *Featherbedding on the Railroads: by Law and by Agreement*, 8 TRANS. L. J. 141, 150 (1976).
[72] *Id.* at 142–44.
[73] *Id.* at 142.
[74] ARK. STAT. ANN. § 73-720 (1957). Repealed by Initiative Act No. 1, November 7, 1972.
[75] Lipowski, *supra* note 71, at 142 n. 7.
[76] *Id.* at 144.
[77] *Id.*

prohibiting wage reduction)[78] and the Transportation Act of 1940 (four years of compensation for employees impacted by mergers and consolidations).[79]

The Adamson Act of 1916[80] exemplifies the interplay of outdated legislation with union featherbedding. The law codified the eight-hour workday in the railroad industry "except [for] railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads."[81] Thereafter, CBAs often included provisions that defined employee workdays both in terms of hours worked or miles travelled by the employee—often setting that figure at 100 miles.[82] That made sense in 1916 when freight trains could not travel 100 miles in a single day, but it became absurd once locomotive speed surged.[83] By 1957, some train employees could expect to travel 100 miles in less than two hours.[84]

On April 9, 2025, I spoke to former Associate General Counsel of Consolidated Rail Corp. ("Conrail") Dennis Arouca about his experience with rigid work rules in the industry. He mentioned the hatch-and-beam gangs in Philadelphia represented by the International Longshoreman's Association (ILA). Though the dispute took place within an NLRA framework, it nonetheless involved Conrail and is a good illustration of what happens when bargaining units are fragmented and a narrow union interest gains outsized power despite changes in industry.[85] Anthracite coal-carrying ships in Philadelphia used to require a seven-person "spout gang" to ensure that the ships were properly balanced before heading to sea.[86] These spout gangs evolved

[78] Pub. L. No. 73-67, 48 Stat. 211 (1933).
[79] Pub. L. No. 76-785, 54 Stat. 898 (1940).
[80] Pub. L. No. 64-252, 39 Stat. 721 (1916).
[81] *Id.*
[82] J.A. Lipowski, *Featherbedding on the Railroads: by Law and by Agreement*, 8 TRANS. L. J. 141, 149 (1976).
[83] *Id.*
[84] *See id.* at 150.
[85] *See* James Asher, *Conrail-ILA Dispute Heats Up in Philadelphia*, J. OF COM. (Aug. 20, 1987 8:00 AM), https://www.joc.com/article/conrail-ila-dispute-heats-up-in-philadelphia-5634224. [hereinafter: *Conrail-ILA Dispute Heats Up in Philadelphia*]
[86] *See id.*; personal conversation with Dennis Arouca on April 9, 2025.

from the hatch-and-beam gang, which "originally was used to remove the hatch covers over the loads of bulk cargo ships."[87] New technologies in the 1960s that mechanically removed the hatch covers rendered the work obsolete.[88] Thus, even though hatch-and-beam gangs had not performed any of that work since the early 1960s, they were nonetheless still paid for the work until the Conrail-ILA CBA was revised around 1986.[89] Similarly, despite technological advancements rendering a seven-person spout gang unnecessary for coal loading in 1986, ILA threatened to picket Philadelphia's Port Richmond Terminal to preserve the work.[90] Conrail countered that hiring these seven-person crews would increase labor costs by 50%, causing the terminal's operator to abandon the facility.[91]

I also spoke to Dennis's son, David Arouca, the National Legislative Director of the Transportation Communications Union, affiliated with the International Association of Machinists & Aerospace Workers. He noted that even on the labor side, the fragmentation of bargaining units in the industry leads to inefficiencies and petty inter-union squabbling over union representation. Sometimes it is a matter of historic loyalties and traditions regarding which union represents which given set of employees. Sometimes it is a dispute over dues: Employees who could be represented by either of two unions want the lower dues, and the respective unions fight over these employees to increase dues revenue. David suggested that unnecessary time was wasted on these rivalries created by the RLA's "craft-or-class" language.

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[87] James Asher, *Philadelphia's Conrail Drops Charges Against the ILA*, J. OF COM. (Aug. 24, 1987 8:00 PM), https://www.joc.com/article/philadelphias-conrail-drops-charges-against-the-ila-5633223. [hereinafter: *Philadelphia's Conrail Drops Charges Against the ILA*]
[88] *Id.*
[89] *Conrail-ILA Dispute Heats Up in Philadelphia*, *supra* note 85.
[90] *See Philadelphia's Conrail Drops Charges Against the ILA*, *supra* note 87.
[91] *Conrail-ILA Dispute Heats Up in Philadelphia*, *supra* note 85.

D. The Labor Situation Surrounding the Penn Central Merger

On February 1, 1968, the Pennsylvania Railroad (PRR) and the New York Central merged and created the Penn Central Transportation Company.[92] This was "the largest corporate merger in American history, ... having . . . almost 100,000 employees, and an annual payroll exceeding a billion dollars."[93] Though it is unclear how many total bargaining units were involved in the merger, PRR chairman Stuart Saunders had to negotiate with 23 separate unions in order to provide their members with protections.[94] This number is at best a floor for the number of bargaining units, as a single union can represent multiple bargaining units.

Together with Afred Perlman, president of the New York Central, Penn Central bargained the "Employe [sic] Protection Agreement" with these 23 unions.[95] In a major victory for the unions, employees of the merged entity received "lifetime job protection compared with four years in previous mergers [and the] right to be rehired for those who lost their jobs between signing date and effective date."[96] The agreement also hampered the company from layoffs except if a business decline exceeded "5 percent in any 30-day period, measured by gross operating revenue and net revenue ton-miles, compared with the 1962-1963 level for the same 30-day period."[97] Though the agreement was estimated to cost $78.5 million over eight years, it ended up costing the merged railroad $93 million from 1968 to 1970.[98]

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[92] HARR, *supra* note 62, at i.
[93] *Id.*
[94] *Id.* at 51.
[95] *How Employes Are Protected*, PENN CENT. POST 3 (Mar. 1, 1968).
[96] Robert Townsend, *The Wreck of the Penn Central*, N.Y. TIMES (Dec. 12, 1971).
[97] *How Employes Are Protected*, PENN CENT. POST 3 (Mar. 1, 1968).
[98] JOSEPH R. DAUGHEN & PETER BINZEN, THE WRECK OF THE PENN CENTRAL 221 (1971).

Yet the Employe Protection Agreement was only one of at least 200 labor agreements negotiated as part of the merger.[99] This incredible burden only compounded the effects of incompatible computer systems, accounting systems, and work cultures between the two entities.[100]

On June 21, 1970, the Penn Central filed for "the greatest corporate bankruptcy in American history."[101] In 1971 the trustees identified four conditions of economic viability, including modification of rules that resulted in 10,000 employees more than was necessary.[102] The hope was that attrition would drop the number of employees to 81,000.[103] This reduction was predicted to result in savings of $180 million per year, the largest source of savings compared to the other paths to viability.[104] But these efforts failed.[105] On February 8, 1973, the unions engaged in a one-day strike, which successfully gained national attention and resulted in intervention by Congress and the President.[106] The Senate Labor Committee, with help from the Nixon Administration, drafted a resolution including a victory for labor—the rescission of a decision by the trustees to reduce train crews from four employees to three.[107] In other words, featherbedding reared its ugly head again, ultimately spelling doom for the industry.

E. The NLRB's Acute-Care Hospital Rule

Not long after the Penn Central bankruptcy, Congress and the NLRB were faced with tackling a potential unit proliferation problem in the burgeoning hospital industry. In 1974,

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[99] *Labor and Management Settle Another Detail*, PENN CENT. POST 6 (Mar. 1, 1968).
[100] CARL M. BRAUER, UNTITLED CONRAIL MANUSCRIPT, at 1-16 to 1-17 (1998); Robert Townsend, *The Wreck of the Penn Central*, N.Y. TIMES (Dec. 12, 1971).
[101] HARR, *supra* note 62, at i.
[102] BRAUER, *supra* note 100, at 1-21.
[103] HARR, *supra* note 62, at 65.
[104] *Id.* at 66.
[105] *See id.*
[106] BRAUER, *supra* note 100, at 2-2.
[107] *Id.* at 2-1 to 2-4.

Congress amended the NLRA to permit collective bargaining in acute-care hospitals.[108] Though not contained in the amendments, House and Senate Committee reports implored the NLRB "to prevent[] proliferation of bargaining units in the health care industry."[109] By placing hospitals under NLRB jurisdiction, Congress was able to delegate the task of nonproliferation to the NLRB.[110] The amendments thus implicitly permitted Congress to take advantage of the NLRA's flexibility regarding bargaining-unit determination to address the problem.

Initially, the NLRB undertook the task through its standard procedure of case adjudication.[111] Due to the expenditure of resources,[112] the difficulty of achieving a workable standard on a case-by-case basis, and hostility from the circuit courts of appeal in its attempts to do so,[113] the NLRB engaged in notice-and-comment rulemaking to fashion the rule that remains to this day.[114]

The final rule permits only up to eight units in any given hospital:

(1) All registered nurses.
(2) All physicians.
(3) All professionals except for registered nurses and physicians.
(4) All technical employees.
(5) All skilled maintenance employees.
(6) All business office clerical employees.
(7) All guards.

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[108] 29 U.S.C. §§ 152(2), 152(14), 153(c), 158(d)–(e), 158(g) (Supp. V, 1975), amending 29 U.S.C. §§ 151–ß68 (1970).
[109] S. Rep. 93-766, 93d Cong., 2d Sess. 5 (1974); H. Rep. 93-1501, 93d Cong., 2d Sess. 6-7 (1974); United States. Congress. Senate. Committee on Labor and Public Welfare. Subcommittee on Labor., United States. (1974). Legislative history of the coverage of nonprofit hospitals under the National Labor Relations Act, 1974: Public law 93-360 (S. 3203). Washington: U.S. Govt. Print. Off.
[110] *See* St. Francis Hosp., 271 N.L.R.B. 948, 951 (1984) (explaining congressional history).
[111] *See, e.g.*, Four Seasons Nursing Ctr., 208 N.L.R.B. 403 (1974); Woodland Park Hosp., 205 N.L.R.B. 888 (1973); Extendicare of West Virginia, 203 N.L.R.B. 1232 (1973).
[112] 52 Fed. Reg. 25142.
[113] *See, e.g.*, Masonic Hall v. NLRB, 699 F.2d 626 (1983); Watonwan Memorial Hospital v. NLRB, 711 F.2d 848, 850 (1983); NLRB v. Walker County Med. Ctr., 722 F.2d 1535,1539 at fn.4 (1984).
[114] Decision on Appropriate Bargaining Units in the Health Care Industry, 284 N.L.R.B. 1514 (1987), codified in 29 C.F.R. § 103.30 (1989), *aff'd* Am. Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991) (rule not arbitrary or capricious under Administrative Procedure Act).

(8) All nonprofessional employees . . . .[115]

Even so, this would not eliminate the potential of a hospital-wide unit or employer-wide unit comprising multiple hospitals because the rule also provides for "[e]xcept[ions] in extraordinary circumstances and in circumstances in which there are existing non-conforming units, [or] . . . various combinations of units[.]"[116] Accordingly, for practical purposes, the rule provides a typical maximum of units, leaving the ultimate number flexible depending on a union's organizing strategy and other industrial circumstances.

F. The NMB's Handling of Bargaining Units in the Airline Industry

The way the NMB interpreted the "craft or class" language for the airline industry is illustrative of the authority it could potentially have wielded vis-à-vis the rail industry. When the RLA was first applied to the airline industry in 1936, the NMB did not have the benefit of a historically recognized set of crafts or classes.[117] Hence, in 1945 the NMB began holding industry-wide hearings so that employers and unions could help define the contours of airline bargaining units.[118] Flight personnel were relatively straightforward to group into crafts or classes, with the only controversial issues being the placement of flight engineers and flight instructors.[119] Thus, of the six hearings were held by the NMB to determine proper bargaining units for the airline industry between 1945 and 1972, five were devoted to ground personnel.[120] Unfortunately, no definitive criteria were determined; the parties to the hearings consistently debated the proper scope of the various crafts and classes.[121] But this at least set a precedent for

[115] 29 C.F.R. § 103.30.
[116] *Id.*
[117] Eischen, *supra* note 17, at 58.
[118] *E.g.* American Airlines, Inc., 1 N.M.B. 394 (1945).
[119] Eischen, *supra* note 17, at 58.
[120] *Id.*
[121] Eischen, *supra* note 17, at 60–68.

the NMB recognizing that it had some power to evaluate and change the determination of what constitutes a "craft or class" within the meaning of the RLA.

G. Bargaining in European Rail Industries

To exemplify the benefits of consolidation of bargaining units to more efficiently run a business, I now turn to one of the European models of labor relations—sectoral bargaining. Under that model, a confederation of businesses for a given industry bargains with a confederation of unions for CBAs that bind all employees in that industry. This has the advantage of putting all competitors on a level playing field, such that wages and other elements of the employment relationship cannot become the primary differentiator in business performance. It also has the advantage of forcing the parties to reckon with national, macro trends in the industry rather than the necessarily narrow concerns of a given employer, union, geography, plant, class, or craft.

Sectoral bargaining is prevalent in the European Union (EU) for most non-rail industries.[122] According to the Organization for Economic Cooperation and Development (OECD),

> While many OECD countries have taken steps towards decentralisation in the past two decades, . . . the best outcomes in terms of employment, productivity and wages seem to be reached when sectoral agreements set broad framework conditions but leave detailed provisions to firm-level negotiations. However, other forms of decentralisation that simply replace sectoral with firm-level bargaining, without co-ordination within and across sectors, tend to be associated with somewhat poorer labour market outcomes.[123]

[122] OECD (2019), Negotiating Our Way Up: Collective Bargaining in a Changing World of Work, OECD Publishing, Paris, at 16, https://doi.org/10.1787/1fd2da34-en.
[123] *Id.* at 17.

In Germany, which has the world's fourth largest economy, sectoral bargaining is the norm, with partial decentralization at the firm level to permit more customization.[124]

Though an assessment of all European countries' railroad labor relations is beyond the scope of this paper, some trends are apparent. Of the 27 EU countries, company-level bargaining is the prevalent method within the rail industry, with only Finland and Sweden engaging in exclusive sectoral bargaining and seven other countries engaging in a combination of both.[125] Rail has not had the same devastating decline in the EU, with only modest declines in freight transport and even some increases in passenger transport between the years of 1995 to 2009.[126] While the EU has pushed for deregulation, nearly all European railroads are state-owned even if they are commercial holdings comprising multiple subdivisions.[127] Hungary and Greece have the most unions of any EU country at 18, but the mode is the ten countries that each have between five and ten unions.[128] Five of the smaller countries have only one or two unions each, but even larger EU countries such as Germany and the United Kingdom have only three and four unions, respectively.[129] In sum, the rail industry in the EU does not suffer from a unit-proliferation problem.

H. Unit Proliferation and Fragmentation Contributed to the Decline of the Railroad Industry

[124] Simon Jäger, Shakked Noy & Benjamin Schoefer, *The German Model of Industrial Relations: Balancing Flexibility and Collective Action*, 36 J. ECON. PERSPECTIVES 4, 53, 55 (2022). Germany also has firm-level "codetermination," whereby employees participate on company boards and "works councils" (separate from union) resolve disputes on the job. *Id.*
[125] EMPLOYMENT AND INDUSTRIAL RELATIONS IN THE RAILWAYS SECTOR, EUROPEAN FOUND. FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS 34 (2012), https://www.eurofound.europa.eu/sites/default/files/ef_files/docs/eiro/tn1109030s/tn1109030s.pdf.
[126] *Id.* at 10.
[127] *Id.* at 12. The United Kingdom is the only exception. *Id.*
[128] *Id.* at 30.
[129] *Id.*

The archaic craft-or-class level of unit determination prescribed by the RLA was hopelessly unsuited to technological shifts that occurred in the mid-twentieth century. Not only did railroads have to compete with entirely different modes of transportation such as automobiles and airplanes; railroads also had to contend with shifts within their own industries that required radical business restructuring. Though a provision in the RLA outlawing featherbedding might have helped, the proliferation of bargaining units still would have incentivized a labor's narrow focus on parochial concerns. An employer's need to bargain with about 20 different unions for labor-related changes was difficult enough as a sheerly administrative matter. Even more challenging, some of those unions might have represented obsolete jobs, yet the RLA and basic contract law prohibited railroads from adapting. Layer on top of that the merger of two of the major players in the sector, each with their own cultures and union agreements that hampered a genuine rethinking of how to run the business, and the experiment was doomed to fail. In what follows, I explain how the NMB could have helped the situation by placing limits on the number of bargaining units similar to those applied in the hospital industry. Next, I discuss how sectoral bargaining would have stabilized labor relations and controlled costs.

I. Applying the Hospital Model to Railroads

Imagine if a rule similar to the NLRB's hospital rule had existed for railroads at the time of the Penn Central merger. Instead of negotiating with 23 unions and producing over 200 agreements, conceivably the parties might have only had to bargain a handful of agreements with a handful of unions. The issue is not simply one of quantity. Rather, because the RLA mandates unions along "craft or class" lines, such demarcations encourage the overemphasis of narrow special interests in the process of bargaining. The ability to have a company-wide unit could foster inter-classification solidarity among workers. That would incentivize unions and

management to work together to create flexible, efficient terms and conditions of employment. Rather than arbitrarily protecting certain groups of employees—some of whom might occupy outdated or obsolete job roles—the parties could create rules that might entertain cross-class training and/or collaboration. At best, larger unions with multi-craft scopes would be incentivized to eye macro-level trends in the industry rather than a parochial focus on the interests of their respective crafts.

While admittedly constrained by the "craft-or-class" language in the statute, the NMB might have been able to engage in notice-and-comment rulemaking similar to what the NLRB did for acute-care hospitals, and similar to what the NLRB itself did for the airline industry. As an administrative agency afforded a good deal of discretion in administering the representational aspects of the RLA, the NMB could have placed an upper limit on the number of bargaining units by broadly defining "class." Thus, even if there might be a historically accepted 15 "crafts," the NMB could have grouped them into broader categories. Those classes might have been Locomotive, Shop, Communications, Maintenance, and Station.[130] Hearings could have been held to determine the best groupings, as had been done with airline industry stakeholders.

For existing railroads that already had numerous organized crafts, the NMB could require that bargaining units be reconfigured such that multiple crafts be consolidated into larger classes. Existing labor organizations could either merge, or the NMB could oversee a new election in which the represented employees vote on which historical craft union is responsible for the larger class. Thus, if Penn Central locomotive firemen were in the same bargaining unit as yardmen, perhaps their unions would have negotiated more realistic rules that recognized the obsolescence

[130] In our April 9, 2025 discussion, David Arouca suggested that Operations, Non-Operations, and Maintenance Away would be a good split.

of firemen. Because of the declining influence of certain jobs, the union would be incentivized to encourage cross-training of employees.

But these reforms should not sweep so broadly as to imperil employees' rights to organize. For new railroad firms, unions could continue their initial organizing efforts at the craft level. Once organizing reached a certain threshold, the crafts would merge into classes similar to the above-described process. This would balance the RLA's competing aims of employees' freedom of association and the overarching goals of promoting labor peace and preventing disruptions in service.

J. Sectoral Bargaining as Another Solution

Though it would have required a congressional overhaul of the RLA, a shift to sectoral bargaining might also have benefitted the industry. When bargaining is splintered among varying interest groups, it is easy to lose the forest for the trees. Instead, a confederation of all the industry's employers could bargain a national baseline agreement with a confederation of all the industry's unions. The national agreements could address basic terms and conditions such as wages, paid time off, disciplinary procedures, and the grievance-arbitration procedure. Those bargaining would be forced to contend with macro-level trends impacting the entire industry. Company-level agreements could then address more niche concerns at the plant level. Though not necessarily free of parochial concerns, it is easier to imagine the elimination of the fireman classification under this structure—and less of an incentive to featherbed or to create rigid work rules to preserve an outdated status quo. National contracts affecting all railroads might have created more standardization in the industry, perhaps easing the merger between PRR and Central. Hence, there may have been fewer conflicts between the company's CBAs, making the transition easier.

K. Conclusion

These reforms would have been win-win for railroad unions and employers in the long run. On the one hand, freedom of association should be honored, which would militate in favor of permitting the smallest bargaining units possible and an emphasis on local bargaining. On the other hand, a business must be viable for union members to enjoy the fruits of collective bargaining. Whereas the current RLA structure emphasizes historical designations and narrow skill sets, cross-craft solidarity looks to the future for mutually beneficial terms and conditions of employment. If the employer is out of business, then the unions and the employees lose their livelihoods altogether.

While the collective-bargaining structure of the railroad industry was not the sole cause of the failure of the Penn Central, its inefficiencies likely made the merger more difficult and contributed to unsustainable labor costs. Craft-level bargaining incentivizes myopic and short-term strategies by unions and their members, who gain a source of pride and separate identity by their narrow skillsets. This creates unnecessary administrative costs and prevents individual actors from internalizing the larger trends in the industry. Though there is a consensus that the Penn Central merger might have been "unwise in the first place and then . . . very badly managed[,] . . . these factors found only a late-coming place within a complex and long-standing web of other causative factors."[131] Bankruptcy, reorganization, and consolidation became commonplace in the industry, and many of the congressional reforms of the 1970s[132] and 1980s[133] were arguably overdue. But a cap on the number of bargaining units with which

[131] HARR, *supra* note 62, at 58.
[132] *E.g.*, National Railroad Passenger Service Act of 1970, 49 U.S.C. § 24101 (establishing Amtrak for passenger rail); Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701 (creating United States Railway Association and Conrail); Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. § 801 (implementing plan for Conrail's financial success).
[133] Staggers Rail Act of 1980, 49 U.S.C. § 10101 (deregulating rail industry); Railroad Labor Emergency Board Act, Pub. L. No. 97-35, 95 Stat. 310 (1981) (creating board to mediate disputes and prevent rail strikes).

railroad employers had to bargain, combined with sectoral bargaining, might have ironed out some of the wrinkles in the Penn Central merger. And perhaps it could have made the Penn Central more successful economically, obviating the complex and seemingly insoluble bankruptcy proceeding that ensued.