

# The Arbitrability and Enforceability of a Successorship Provision in a Collective Bargaining Agreement Under the Railway Labor Act: *Association of Flight Attendants v. Delta Air Lines*

## I. INTRODUCTION

The Railway Labor Act (RLA)<sup>1</sup> “must be considered as . . . a valuable aid toward eliminating interruption of service in the transportation industry and hence valuable to all the public.”<sup>2</sup> This Comment will give a brief overview of the RLA. Next, it shall focus on the effect of the RLA on the arbitrability of a dispute regarding a successorship provision negotiated between an airline and a union. Both parties’ arguments will be reviewed and compared, although the final judgment of the case is still questionable because the United States Supreme Court is considering a petition for writ of certiorari at the time of this writing. Finally, this Comment will recommend a final disposition of the case and offer the likely outcome as an illustration of why the RLA requires revision.

## II. THE RAILWAY LABOR ACT

“A basic tenet of American labor relations has been the vesting of exclusive representation rights in the representative selected by a majority of the employees in a particular bargaining unit.”<sup>3</sup> Originally enacted in 1926, the Railway Labor Act included this concept of majority representation and extended authorization to the National Mediation Board (NMB) to resolve representation disputes in the airline industry.<sup>4</sup> In the RLA, Congress has “left to the discretionary authority of the National Mediation Board the determination of eligible voters, the determination of craft or class bargaining units and the certification of representatives.”<sup>5</sup> No judicial review is expressly provided for in the Act.<sup>6</sup>

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1. 45 U.S.C. § 151-188 (1982).

2. C. UPDEGRAFF, *ARBITRATION OF LABOR DISPUTES* 144 (2d ed. 1961).

3. Eischen, *Representation Disputes and Their Resolution in the Railroad and Airline Industries*, in *THE RAILWAY LABOR ACT AT FIFTY: COLLECTIVE BARGAINING IN THE RAILROAD AND AIRLINE INDUSTRIES* 23 (1976) [hereinafter *RAILWAY LABOR ACT AT FIFTY*].

4. *RAILWAY LABOR ACT AT FIFTY*, *supra* note 3. The 1936 amendment extended the NMB authority to the airline industry without substantial tailoring. *Id.* For a discussion of why airlines were brought under the coverage of the RLA, see Comment, *Airline Labor Policy, The Stepchild of the Railway Labor Act*, 18 J. AIR L. & COM. 461, 461-63 (1951).

5. *RAILWAY LABOR ACT AT FIFTY*, *supra* note 3, at 28.

The RLA is a product of the customs and practices already established by both labor and management in the railroad industry.<sup>7</sup> The RLA's purposes are twofold: to prevent the interruption of interstate commerce and to promote a stable relationship between labor and management in the transportation industry.<sup>8</sup>

In *Western Airlines v. International Brotherhood of Teamsters*, Justice O'Connor of the United States Supreme Court summarized the three classes of labor disputes recognized under the RLA and their respective dispute resolution procedures as follows:

"Minor" disputes involve the application or interpretation of an existing collective-bargaining agreement. Minor disputes are subject to arbitration by a System Board of Adjustment. 45 U.S.C. § 184 . . . "Major" disputes involve the formation of collective-bargaining agreements, and the resolution of such disputes is governed by § 6 of the Act, 45 U.S.C. §§ 156, 181. "Representation" disputes involve defining the bargaining unit and determining the employee representative for collective-bargaining. Under § 2, Ninth, of the Act, the National Mediation Board has exclusive jurisdiction over representation disputes. 45 U.S.C. §§ 152, 181.<sup>9</sup>

A grievance characterized as "minor" must be referred to an appropriate system, group, or regional board of adjustment as stipulated by section 184.<sup>10</sup> The adjustment boards are bipartisan; they generally are comprised of an equal number of labor and management appointees,

6. *Id.* But see Green & Rutledge, *The Federal Courts as Super-Arbitration Tribunals: Judicial Review of Non-Reviewable Railroad Labor Grievance Awards*, 37 LAB. L.J. 387 (1986).

7. RAILWAY LABOR ACT AT FIFTY, *supra* note 3, at 23.

8. The purposes of the RLA are the following:

- (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.

45 U.S.C. § 151a.

9. *Western Airlines v. International Bhd. of Teamsters*, 480 U.S. 1301, 1302-03 (1987). The RLA itself does not recognize the terms "major" and "minor" for the disputes, but this classification has been applied since the Supreme Court case of *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945). See Comment, *Deregulation in the Airline Industry: Toward a New Judicial Interpretation of the Railway Labor Act*, 80 NW. U.L. REV. 1003, 1005 n.20 (1986) [hereinafter Comment, *Deregulation in the Airline Industry*].

10. 45 U.S.C. § 184.

with an impartial chairperson appointed to break a tie.<sup>11</sup> “Where a minor dispute arises and the parties are unable to resolve it through negotiations . . . , the arbitrator has primary and exclusive jurisdiction to interpret the agreement of the parties and make the appropriate award.”<sup>12</sup> “In virtually all minor disputes, the court will relay the matter to the appropriate adjustment board and absolve itself of jurisdiction.”<sup>13</sup>

Disputes are labelled “major” where there is no collective bargaining agreement, “or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to the assertion of rights claimed to have vested in the past.”<sup>14</sup> Section 6 of the RLA mandates an explicit procedure for intended changes of collective bargaining agreements, including “at least thirty days notice of an intended change in agreements affecting rates of pay, rules, or working conditions.”<sup>15</sup> If the parties do not agree, they may utilize a mediator from the NMB.<sup>16</sup> If an amicable settlement cannot be reached and either party declines to submit to binding arbitration before the NMB,<sup>17</sup> a thirty-day “cooling-off” period is imposed, prohibiting any alteration of rates of pay, rules, or working conditions.<sup>18</sup> However, if a dispute “threaten[s] substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service,” the NMB shall notify the President so that an “Emergency Board” may be created to investigate and report the dispute within thirty days.<sup>19</sup> Another thirty-day “cooling-off” period is imposed following the Board’s report to the President.<sup>20</sup>

Section 2, Ninth of the RLA governs representation disputes.<sup>21</sup> Upon request of either party, the NMB shall investigate such dispute and certify the individual(s) or organization(s) designated and authorized to represent the employees involved in the dispute.<sup>22</sup> Beyond general direc-

11. Comment, *Deregulation in the Airline Industry*, *supra* note 9, at 1008.

12. *International Ass’n of Machinists and Aerospace Workers v. Republic Airlines*, 761 F.2d 1386, 1390 (9th Cir. 1985).

13. Comment, *Deregulation in the Airline Industry*, *supra* note 9, at 1009.

14. *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945).

15. 45 U.S.C. § 156 (1982).

16. 45 U.S.C. § 155(a), First (1982).

17. 45 U.S.C. § 155, First (1982) provides that the NMB must endeavor to induce arbitration if a settlement through mediation is unsuccessful.

18. *Id.* For a brief overview of collective bargaining under the RLA, see McDonald, *Airline Management Prerogative in the Deregulation Era*, 52 J. AIR L. & COM. 869, 882-85 (1987).

19. 45 U.S.C. § 160 (1982).

20. *Id.*

21. 45 U.S.C. § 152, Ninth (1982).

22. *Id.*

tives, section 2 provides no specific procedures nor any particular guidelines to which the NMB must conform during its investigation.<sup>23</sup> The NMB is "authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method . . . [that] shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier."<sup>24</sup> The NMB itself may designate who may participate in the election, or it may assign this duty to an appointed committee of three neutral persons.<sup>25</sup> A federal district court does not have the authority to review the NMB's decision of certification of representatives for collective bargaining.<sup>26</sup>

### III. ASSOCIATION OF FLIGHT ATTENDANTS V. DELTA AIR LINES

Recently decided before the United States Court of Appeals for the District of Columbia, *Association of Flight Attendants v. Delta Air Lines*<sup>27</sup> presented the issue of whether the termination of a union's certification due to a merger renders moot the union's request to arbitrate a grievance involving representation issues under a successor clause. Additionally, the court determined whether an arbitrator could award damages to the Appellant (AFA) if the arbitrator found that the Appellee (Western/Delta) had breached the collective bargaining agreement.<sup>28</sup>

#### A. Factual Overview

On September 9, 1986, Western Airlines, Inc. (Western) entered into a merger agreement with Delta Air Lines, Inc., (Delta) providing for Western to become a wholly-owned subsidiary of Delta.<sup>29</sup> The acquisition occurred on December 18, 1986, and Delta became Western's parent.<sup>30</sup> On April 1, 1987, Western was legally and operationally merged into Delta, eliminating Western as a separate entity.<sup>31</sup>

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23. Local 732, International Bhd. of Teamsters v. National Mediation Bd., 438 F. Supp. 1357, 1364 (S.D.N.Y. 1977).

24. 45 U.S.C. § 152, Ninth (1982).

25. *Id.*

26. Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 306 (1943).

27. 879 F.2d 906 (D.C. Cir. 1989), *petition for cert. filed*, (U.S. Sept. 15, 1989) (No. 89-459).

28. Brief for Appellant at 2, *Association of Flight Attendants v. Delta Air Lines*, 879 F.2d 906 (D.C. Cir. 1988).

29. *Id.* at 4.

30. *Id.*

31. *Id.*

The merger agreement required Western to honor its collective bargaining agreements while it operated as a separate carrier. Western and AFA were already parties to a collective bargaining agreement which contained broad grievance procedures (Pre-Merger Agreement).<sup>32</sup> After April 1, Delta intended to levy its own policies and rules on the flight attendants due to the nonexistence of Western as a separate entity. AFA's grievances arose because Western did not bind Delta to the Pre-Merger Agreement.<sup>33</sup> In response to the grievances filed by the union, Western "indicated that it does not believe that the matters raised in . . . [AFA's] grievance are properly grievable, but rather that they are representation issues within the exclusive jurisdiction of the National Mediation Board."<sup>34</sup> The AFA characterized the dispute as "minor" under the RLA and contended that Delta must be bound to AFA's labor contract and recognize AFA as the representative of Western's flight attendants after the Delta-Western merger.<sup>35</sup> AFA sought arbitration before Western's System Board of Adjustment for the purpose of contract interpretation. Western refused to arbitrate on the grounds that the grievance was within the exclusive jurisdiction of the NMB because it raised a representational dispute.

### B. *Litigation History*

On February 20, 1987, the district court granted summary judgment in favor of Western, stating that the dispute was within the NMB's exclusive jurisdiction:

Where both representational issues and "minor" disputes which arguably may not involve representational issues are involved in a single dispute, it is not the role of a court to attempt to define such minor issues and require they be segregated for evaluation by the System Board. As a practical matter the issues inevitably overlap, and any attempt to divide jurisdiction between the System Board and the National Mediation Board would defeat

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32. For text of Section 1(c), see Brief for Appellant, *supra* note 28, at 3: The provision in dispute states, "This Agreement shall be binding on any successor or merged Company or Companies, or any successor in the control of the Company, its parent(s) or subsidiary(ies) until change in accordance with the provisions of the Railway Labor Act, as amended."

33. Brief for Appellant, *supra* note 28, at 4.

34. Attached Letter to the Complaint from Catherine King (Western) to Susan E. Pace (MEC Chairperson, AFA) (Nov. 19, 1986).

35. *Association of Flight Attendants v. Western Airlines*, 662 F. Supp. 1, 3 (D.D.C. 1987); *See also International Bhd. of Teamsters v. Texas Int'l Airlines*, 717 F.2d 157, 164: "Given the [National] Mediation Board's undeniable sole jurisdiction over representation matters, we infer from the practical problems of divided jurisdiction a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements."

the purposes of the RLA. . . . For AFA to characterize this as a minor dispute wholly within the province of the System Board ignores the reality of the situation and constitutes an attempt to circumvent procedures clearly mandated by Congress for resolution of disputes by the National Mediation Board under the RLA.<sup>36</sup>

Subsequently, the court of appeals denied an injunction to compel arbitration pending appeal, but the “[c]ourt granted AFA’s unopposed Motion for Stay pending the Supreme Court’s disposition of Delta’s petition for certiorari in related litigation arising in the Ninth Circuit.”<sup>37</sup>

This pertinent litigation involved two other Western unions which sought to compel arbitration of grievances over the successor provisions in their labor agreements. In addition, the unions sought damages and an injunction against the merger.<sup>38</sup> Both actions were dismissed on the same jurisdictional grounds cited by the district court in *Association of Flight Attendants*.<sup>39</sup> On appeal, the Ninth Circuit reversed both decisions and issued an order compelling arbitration and enjoining the merger of Delta and Western pending arbitration.<sup>40</sup> However, Supreme Court Justice O’Connor immediately granted a stay of the Ninth Circuit’s injunction.<sup>41</sup> On April 6, 1987, the Supreme Court declined to vacate the stay order.<sup>42</sup>

During the same time period, the NMB revoked the employee representation certifications of all former Western unions, including AFA’s, effective retroactively to April 1, 1987.<sup>43</sup> On October 5, 1987, the Supreme Court granted Delta’s petition for certiorari and reversed and remanded to the Ninth Circuit to consider whether the cases became moot.<sup>44</sup> Subsequently, the Ninth Circuit dismissed the two Western unions’ actions as moot because “none of the relief sought in the original complaint is now available.”<sup>45</sup> Seeking to dismiss the instant appeal on similar grounds of mootness, Delta argued that the revocation of AFA’s

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36. *Association of Flight Attendants v. Western Airlines*, 662 F. Supp. 1, 3 (D.D.C. 1987).

37. Brief for Appellee at 5, *Association of Flight Attendants v. Delta Air Lines*, 879 F.2d 906 (D.C. Cir. 1989).

38. See *International Bhd. of Teamsters v. Western Airlines*, No. CV86-7921 (C.D. Cal. Feb. 13, 1987); *Air Transport Employees v. Western Airlines*, No. CV86-8032 (C.D. Cal. Feb. 13, 1987).

39. See *International Bhd. of Teamsters v. Western Airlines*, No. CV86-7921 (C.D. Cal. Feb. 13, 1987); *Air Transport Employees v. Western Airlines*, No. CV86-8032 (C.D. Cal. Feb. 13, 1987).

40. *IBTCHWA, Local Union No. 2707 v. Western Air Lines*, 813 F.2d 1359 (9th Cir. 1987), *vacated and remanded*, 480 U.S. 806.

41. *Western Airlines v. International Bhd. of Teamsters*, 480 U.S. 1301 (1987).

42. *In re merger of Western Airlines v. International Bhd. of Teamsters*, 481 U.S. 1001 (1987).

43. *Delta Air Lines and Western Air Lines*, 14 NMB 291 (1987).

44. *Delta Air Lines v. International Bhd. of Teamsters*, 484 U.S. 806 (1987).

45. *IBTCHWA, Local No. 2702 v. Western*, No. 87-5657.

certification precluded any award by an arbitrator.<sup>46</sup> Denying the motion, the court held the following:

Although Appellant's claim based on any right of continued representation is moot, it is not clear whether an arbitrator could award damages for breach of the collective-bargaining agreement. It is further ordered that the parties limit their briefs to the issue of whether an arbitrator could award damages to Appellant if the arbitrator finds that Appellee breached the collective-bargaining agreement.<sup>47</sup>

### C. *Delta's/Western's Contentions*

Delta's primary argument favoring dismissal of the court of appeals' case was jurisdictional. The RLA requires the court to analyze the form of the union's grievance to determine whether a representation issue is raised. The courts must defer absolutely to the jurisdiction of the NMB on representation issues, and the decisions of the NMB on representation matters are not subject to judicial review.<sup>48</sup> Supreme Court Justice O'Connor asserts that "the great weight of the case law supports the proposition that disputes as to the effect of collective-bargaining agreements on representation in an airline merger are representation disputes within the exclusive jurisdiction of the National Mediation Board."<sup>49</sup> *Air Line Employees Association v. Republic Airlines*<sup>50</sup> determined that a union's action for expedited arbitration of a grievance concerning survival of a labor contract in a merger raised a representation issue. Also, *International Brotherhood of Teamsters v. Texas International Airlines*<sup>51</sup> held that a union action seeking a declaration that its contract survived a merger raised an issue of representation. Although the RLA requires the court to specify the character of the grievance, it does not require the court to evaluate the merits of the union's complaint.<sup>52</sup> Once the court decides that the action concerns an underlying representational dispute, the court must dismiss the complaint and require the parties to proceed before the NMB.<sup>53</sup> Where contract interpretation issues overlap

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46. Brief for Appellee, *supra* note 37, at 7, 8.

47. *Association of Flight Attendants v. Western Airlines*, No. 87-7040 (D.C. Cir. June 6, 1988) (order denying motion to dismiss).

48. *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 306 (1943).

49. *Western Airlines v. Teamsters*, 480 U.S. 1301, 1305 (1987).

50. 798 F.2d 967, 968 (7th Cir. 1986)(per curiam), *cert. denied*, 479 U.S. 962 (1986).

51. 717 F.2d 157, 158 (5th Cir. 1983).

52. Brief for Appellee, *supra* note 37, at 18.

53. *See, e.g., Air Line Pilots Assoc. v. Texas Int'l Airlines*, 656 F.2d 16, 23 (2d Cir. 1981); *Ruby v. American Airlines*, 323 F.2d 248, 257 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964).

with representational concerns, "the proper course for a court to follow . . . is to allow the National Mediation Board alone to consider the post-merger problems that arise from existing collective-bargaining agreements."<sup>54</sup>

Strong precedent also supports Delta's view that the instant dispute raises a representation issue to be resolved by the NMB. *Texas International Airlines*<sup>55</sup> shares many of the same principles as the current dispute. After Texas International (TXI) merged with the larger Continental Air Lines, TXI's 1800 Teamsters combined with a nonunionized unit of 4000 Continental employees. The Teamsters sought to establish the continuing validity of its premerger agreement. The Fifth Circuit dismissed the complaint on the grounds that the action for contract enforcement depended on the underlying representation dispute: "Continuation of the contract in force unavoidably constitutes a determination of employee representation. . . ."<sup>56</sup> The NMB itself has established that upon a merger of two airlines, "all certifications . . . [are] extinguished by operation of law."<sup>57</sup> Once certification is extinguished, "the collective-bargaining agreement reached as a result of a certification should not survive termination of the certification itself."<sup>58</sup>

Even if Delta were to recognize AFA's claim that the instant case deals with a contract issue, precedent supports the contention that the NMB may still preside. The court in *IUFA v. Pan American World Airways* asserts:

[W]hat may be characterized as a "minor" dispute over the interpretation of a contract may also implicate concerns which are representational in nature. Where the issues thus overlap, a jurisdictional problem arises. The proper course for a court to follow in such circumstances is to allow the National Mediation Board<sup>59</sup>. . . alone to consider the post-merger problems that arise from existing collective bargaining agreements.<sup>60</sup>

Delta may also rely on AFA's admissions to support Delta's view that the RLA renders the entire dispute moot. In seeking an injunction to compel arbitration, the AFA stated:

[I]f this [c]ourt does not issue an injunction pending appeal . . . the jurisdiction of the System Board of Adjustment to resolve this dispute will be

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54. *IUFA v. Pan American World Airways*, 664 F. Supp. 156, 158 (S.D.N.Y. 1987), *aff'd.*, 836 F.2d 130 (2d Cir. 1988), *citing* *Teamsters v. Texas Int'l Airlines*, 717 F.2d 157, 164.

55. 717 F.2d 157 (5th Cir. 1983).

56. *Id.* at 161.

57. *Republic Airlines, Inc. and Hughes Air Corp.*, 8 NMB 49, 56 (1980).

58. 717 F.2d 157, 163.

59. 664 F. Supp. 156, 158 (S.D.N.Y. 1987).

60. *Id.* (citing 717 F.2d 157, 164).



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destroyed. On April 1, Western will cease to exist. Therefore, it is imperative that Western be ordered prior to April 1 to arbitrate this contractual dispute.<sup>61</sup>

AFA also indicated that the Pre-Merger Agreement is enforceable only against Western, not Delta: "Successorship clauses of this nature have been enforceable in a labor relations context for years, and the Railway Labor Act is no exception. *These clauses are not enforceable against the successor itself.* They are, however, enforceable against the contracting parties."<sup>62</sup>

### D. AFA's Contentions

According to AFA, the Railway Labor Act did not preclude compliance with the Pre-Merger Agreement.<sup>63</sup> Rather, Western should be held responsible for the impossibility of performance because Western's own actions were the cause of the situation.<sup>64</sup> Western voluntarily entered into an agreement for an operational merger, making adherence to section 1(c) impossible.<sup>65</sup> Liability for breach of contract is not escaped because Western "committed itself voluntarily to two conflicting. . . obligations."<sup>66</sup> Impossibility of performance is not necessarily an available defense where a company's "own actions created the condition of impossibility."<sup>67</sup>

AFA stresses that it is not seeking damages from the court in *Association of Flight Attendants*, but rather a judicial order compelling arbitration of an award of damages.<sup>68</sup> AFA asserts that the availability of damages defeats a claim of mootness: "The wide latitude of an arbitrator to award damages, despite the merger, saves this case from mootness."<sup>69</sup>

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61. Brief in Support of Plaintiff-Appellant's Emergency Motion for Injunction to Compel Arbitration Pending Appeal, 7 (filed Mar. 23, 1987).

62. *Id.* at 21 (emphasis added).

63. Plaintiff's Reply Memorandum of Points and Authorities in Support of its Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment at 9, *Association of Flight Attendants v. Western Airlines*, 662 F. Supp. 1 (D.C. Cir. 1987) [hereinafter reply in support of Summary Judgment].

64. *Id.*

65. For text of Section 1(c), see Brief for Appellant, *supra* note 28, at 3.

66. Reply in support of Summary Judgment, *supra* note 63, at 8 (quoting *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 767 (1983)).

67. *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 767 n.10 (1983).

68. Reply Brief for Appellant at 5, *Association of Flight Attendants v. Delta Air Lines*, 879 F.2d 906 (D.C. Cir. 1989).

69. Brief for Appellant, *supra* note 28, at 25 (citing *Ellis v. Railway Clerks*, 466 U.S. 435, 442-43 (1984); *Air Line Pilots Ass'n v. Transamerica Air Lines*, 817 F.2d 510, 512 n.1 (9th Cir. 1987), *cert. denied*, 484 U.S. 963 (1987); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 459 (1957)).

Even if a union has been decertified as the bargaining representative, any damages occurring prior to the decertification renders a case in controversy.<sup>70</sup>

AFA distinguishes Delta's precedents in order to avoid the conclusion that the instant case is within the exclusive jurisdiction of the NMB. AFA stresses that *Texas International Airlines* is inapposite to the case at bar because it involves "post-merger attempts to enforce contracts or bargaining rights against non-signatories to the plaintiff unions' labor agreements."<sup>71</sup> In the instant case, AFA seeks "arbitration of a dispute under its current agreement with signatory Western, before an operational merger."<sup>72</sup> The NMB's exclusive jurisdiction over the representation "issue cannot extinguish the arbitrator's exclusive jurisdiction to resolve the prior contractual dispute as to whether the successorship clause permitted Western to engage in the operational merger in the first place."<sup>73</sup>

"Several of the cases cited by Western [/Delta] do not even involve contract disputes between signatories, but rather attempts to impose a post-merger duty to bargain on an employer where no such duty existed before."<sup>74</sup> AFA stresses that the arbitrable issue is enforcement of a contract provision before a merger occurs rather than seeking a representation determination after the merger.

AFA criticizes Delta's reliance on *Air Line Employees Association v. Republic Airlines* because the court in that case did not reach the issue presented in the instant case.<sup>75</sup> Because another union held a voluntary recognition agreement, "continuation of the contract in force unavoidably constitute[d] a determination of employee representation."<sup>76</sup> Enforcing ALEA's "contract would necessarily have meant abrogating the other union's representation rights."<sup>77</sup> In *Association of Flight Attendants*, AFA only seeks to compel arbitration under the Railway Labor Act. The representation issue is speculative and not ripe because AFA

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70. *Ellis v. Railway Clerks*, 466 U.S. 435, 441-42.

71. Reply in support of Summary Judgment, *supra* note 63, at 22.

72. *Id.*

73. Reply Brief for Appellant, *supra* note 68, at 3 (citing *Andrews v. Louisville & N.R.R. Co.*, 406 U.S. 320, 323 (1972)).

74. Reply in support of Summary Judgment, *supra* note 63, at 23; see, e.g., *Airline Pilots Ass'n v. Texas Int'l Airlines, Inc.*, 656 F.2d 16; *Flight Engineers Int'l Ass'n v. Eastern Airlines*, 311 F.2d 745 (2d Cir. 1963).

75. Reply in support of Summary Judgment, *supra* note 63, at 19.

76. 798 F.2d 967, 968 (citing *Teamsters v. Texas Int'l Airlines*, 717 F.2d 157, 161 (5th Cir. 1983)).

77. Reply in support of Summary Judgment, *supra* note 63, at 20.

has not claimed a right to represent all of the flight attendants at post-merger Delta.<sup>78</sup>

Although Delta claims that *Flight Engineers International Association v. Eastern Air Lines*<sup>79</sup> is precedent for dismissing on jurisdictional grounds a union's action seeking reinstatement,<sup>80</sup> AFA exemplifies important omissions in Delta's analysis. *Flight Engineers* is factually distinct because the plaintiff union sought reinstatement "after the NMB had certified a different union to represent the class."<sup>81</sup> Furthermore, the Flight Engineers' agreement had expired while AFA's had not.<sup>82</sup> Due to this distinction, *Flight Engineers* may be cited as support for AFA's position:

As long as it appears that the underlying collective bargaining agreement is still in effect, all disputes as to grievances and their processing should be solved by resort to the System Board of Adjustment, and courts will not permit this machinery to be paralyzed by unilateral action on the part of either the carrier or the representatives of the employees.<sup>83</sup>

#### E. Policy Considerations

Delta, however, contends that for the court to give effect to the contractual provision "would be as much a representational decision as an outright order that Delta be required to recognize the AFA."<sup>84</sup> For the AFA to be entitled to damages, it must convince the arbitrator that it was entitled to representational status under the successorship clause. This issue is within the exclusive jurisdiction of the NMB and was resolved against AFA when the NMB found that Western's certificates of representation terminated on April 1, 1987.<sup>85</sup>

Several policy considerations support Delta's view that the representation dispute should be resolved solely by the NMB. After the merger, a substantial majority (about seventy-five percent) of the flight attendant class was comprised of original Delta employees who have never chosen to be represented by a union.<sup>86</sup> The RLA would be violated if Delta is required to create a fragmented bargaining unit of flight attendants who are covered by AFA's labor contract: "The Railway Labor Act does not

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78. *Id.*

79. 359 F.2d 303 (2d Cir. 1966).

80. Brief for Appellee, *supra* note 37, at 17.

81. Reply in support of Summary Judgment, *supra* note 63, at 24.

82. *Id.*

83. 359 F.2d 303, 310.

84. Brief for Appellee, *supra* note 37, at 27.

85. 14 NMB 291, 302 (1987).

86. Brief for Appellee, *supra* note 37, at 2.

authorize the National Mediation Board to certify representatives for small groups of employees arbitrarily selected. Representatives may be designated and authorized only for the *whole* of a craft or class employed by a carrier."<sup>87</sup> However, AFA may argue that it is not an arbitrarily selected group because the collective bargaining agreement established AFA's continued representation in the event of a merger or acquisition.

Fragmentation of the labor force would also likely create chaos for Delta's post-merger operations. Former Western flight attendants would remain unionized while working with nonunionized Delta flight attendants. The result would be that employees of the same company, with identical job functions, would have different wages and work policies.<sup>88</sup> Refusing to fragment the work force preserves the stability of collective bargaining relations. "The Board's policy of promoting stable labor relations dictates that just as there is only one carrier for purposes of the Railway Labor Act, there should be only one representative for each craft or class."<sup>89</sup> AFA will claim that it only seeks to compel arbitration in the instant case, so the fragmentation issue is not ripe.<sup>90</sup>

A holding for Delta would also support the NMB's recent Merger Procedures<sup>91</sup> which ensure that the Board's principles, not premerger agreements, will determine representation issues in airline mergers. These Merger Procedures require the carrier to notify the NMB of its intent to merge, acquire, or consolidate when the company applies for approval by the Department of Transportation.<sup>92</sup> The Merger Procedures expressly provide for termination of representation certifications of the acquired carrier where the NMB has determined that the carriers will operate as a single transportation system.<sup>93</sup>

The Merger Procedures also establish a process by which the union of an acquired carrier may represent a combined class or craft after a merger. The union must "file a representation application supported by a showing of interest of no less than 35% of the combined craft or class"<sup>94</sup>

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87. Pennsylvania R.R. Co., 1 NMB 23, 24 (1973) (emphasis added).

88. Brief for Appellee, *supra* note 37, at 28.

89. Northwest Airlines, 13 NMB 399, 401 (1986).

90. Reply in support of Summary Judgment, *supra* note 63, at 20.

91. Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry, 14 NMB 388 (1987) [hereinafter Merger Procedures].

92. As of January 1, 1989, carriers must file with the Department of Justice and Federal Trade Commission for approval of its intent to merge. The Department of Transportation's authority to give final approval to airline mergers and acquisitions expired at the end of 1988. Wall Street J., Nov. 23, 1988, at A6, col. 1.

93. 14 NMB 291, 391.

94. *Id.* at 391-92.

within sixty days from the date of the NMB representation decision. AFA did not file such an application to represent the combined employees within the sixty-day period.<sup>95</sup> Because the NMB has exclusive jurisdiction over representation issues, any contractual provision which seeks to compel recognition of a union in a merger must resort to the NMB's Procedures.<sup>96</sup>

In the event that the Court compels arbitration of damages, public policy dictates that Delta is the appropriate party against whom damages should be imposed. Allowing Delta to escape liability would promote a disregard of the RLA's purposes.<sup>97</sup> Arbitration would certainly "provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation of agreements covering . . . working conditions."<sup>98</sup> Indeed, *Golden State Bottling Co. v. National Labor Relations Board* asserts that a successor becomes liable for its predecessor's unfair labor practices when the transaction is consummated with knowledge of such conduct.<sup>99</sup> Although the RLA does not list unfair labor practices,<sup>100</sup> *Golden State Bottling* held that a successor cannot refuse liability for a predecessor's breach when it had notice of such breach.<sup>101</sup> Delta makes no assertion that it was without knowledge of the Pre-Merger Agreements.<sup>102</sup> Also, Delta assumes risks of labor and contract obligations by entering a merger. Such risks may be offset by negotiations in acquisition price or by the insistence of indemnity agreements. Thus, Delta was in a position to protect itself.

Delta contends that "no conceivable monetary damages could have accrued to AFA or its members prior to April 1 because until that date there simply was no change in working conditions or other matters covered by the collective bargaining agreement."<sup>103</sup> However, AFA contends that an arbitrator could find that AFA bargained for the Pre-Merger Agreements in exchange for wage concessions or other measurable damages.<sup>104</sup> AFA stipulates that the arbitrator could award the value of these concessions as damages because the AFA did not receive the

95. Brief for Appellee, *supra* note 37, at 31.

96. *Id.*

97. *See supra* note 8.

98. 45 U.S.C. § 151a(5).

99. 414 U.S. 168 (1973). However, this case arises under the jurisdiction of the National Labor Relations Act, 29 U.S.C. § 151, rather than the RLA.

100. Railway Labor Act at Fifty, *supra* note 3, at 32.

101. *Golden State Bottling v. National Labor Relations Bd.*, 414 U.S. 168, 185.

102. Brief for Appellant, *supra* note 28, at 41.

103. Brief for Appellee, *supra* note 37, at 39.

104. Brief for Appellant, *supra* note 28, at 29 n.9. However, one should note that opportunity costs are often very difficult or impossible to measure.

benefit of its bargain.<sup>106</sup> Delta counters that an arbitrator cannot rewrite the collective bargaining agreement; it is limited to interpreting the express terms of the contract (that is, an arbitrator cannot change the wage rates or other terms of the agreement).<sup>106</sup>

An arbitrator might well formulate a remedy in the nature of damages (e.g. benefit disparities for the life of the contract or moving costs in the event the flight attendants were compelled to relocate), provided, of course, that the award "draws its essence from the collective bargaining agreement."<sup>107</sup> The Supreme Court recognizes that

[w]hen an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations.* The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.<sup>108</sup>

Therefore, the arbitrator may have the flexibility to prescribe an award of damages in the event that the court finds the grievance to be arbitrable.

#### F. *The Court of Appeals' Decision*

On July 18, 1989, the D.C. Circuit reversed the decision favoring Delta and remanded the case to the district court to compel arbitration of AFA's damages claims.<sup>109</sup> Judge Ginsburg delivered the court's opinion that AFA's claims for damages were not moot and that the "damage action is not a jurisdictional dispute within the NMB's exclusive jurisdiction under § 2, *Ninth*, of the RLA."<sup>110</sup> The court concluded that a resolution of damages in arbitration would not interfere with the NMB's certification function, even if the damages action raised some *issue* of representation.<sup>111</sup> The court questioned

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105. *Id.*

106. Telephone interview with Scott A. Kruse, Counsel for Appellee (Nov. 20, 1989).

107. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

108. *Id.* (emphasis added).

109. *Association of Flight Attendants v. Delta Air Lines*, 879 F.2d 906, 917 (D.C. Cir. 1989).

110. *Id.*

111. *Id.*

whether (at least in the absence of a clear statutory allocation of competence) any adjudicatory tribunal can have exclusive jurisdiction over an issue, as opposed to a type of claim or a remedy. Virtually any issue may arise in a variety of different contexts. As a general rule, whether a case is within the exclusive jurisdiction of an expert tribunal depends upon the nature not of the issues that may have to be decided, but of the substantive cause of action.<sup>112</sup>

The court noted that relief sought in cases relied upon by Delta involved "either the functional equivalent of certification by the NMB, . . . or a judicial award of damages that appeared to be inconsistent with the . . . 'narrow role of the courts in enforcing the RLA.'" <sup>113</sup> Judge Ginsburg analyzed the subject matter of the dispute as not *affecting* a representation issue. "This dispute is over a sum of money: Delta has it, and AFA wants it; no other person, and no transaction, is affected by which of them ends up with it."<sup>114</sup> Thus, the court of appeals held that the district court has subject matter jurisdiction to determine whether the damages claims are arbitrable.

The D.C. Circuit granted a stay of its mandate pending certiorari so that the Supreme Court could determine whether arbitration should proceed.<sup>115</sup> The decision by the Supreme Court whether to grant certiorari is pending at the time of this writing.

### G. *The Supreme Court's Impending Decision*

The Supreme Court will likely grant certiorari, given the arguable split between the D.C. and Ninth Circuits on the parallel issues.<sup>116</sup> During this era of mass consolidation in the deregulated airline industry, the ramifications of the Supreme Court's decision are of national importance and must fill a need for a consistent and uniform interpretation of the RLA.

In order to preserve the goals of the RLA and to avoid overstepping its bounds, the Supreme Court is likely to reverse the D.C. Circuit's decision and rule that the dispute involves a representation issue and is, therefore, outside of its jurisdiction. The appellate courts have consistently deferred to the NMB where a complaint fringes on a representa-

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112. *Id.* at 915. The court of appeals refers to Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 59 (1988).

113. 879 F.2d 906, 916 (quoting Air Line Pilots Ass'n v. Texas Int'l Airlines, 656 F.2d 16, 17 (2d Cir. 1981)).

114. *Id.* at 914.

115. Association of Flight Attendants v. Western Airlines, No. 87-7040 (D.C. Cir. filed Sept. 5, 1989).

116. See *supra* text accompanying notes 36-47.

tion issue.<sup>117</sup> The Supreme Court's decision will be based on its definition of the issue. The D.C. Circuit stipulated that representation is not the central issue because an award of monetary damages would not affect the NMB's certification determination.<sup>118</sup> Thus, the court of appeals focused on the form of the relief sought by the union rather than on what issues must be examined by an arbitrator in order to award monetary relief. As counsel for Delta so aptly stated: "This puts the cart before the horse. One must look at the underlying claim before one can look at the remedy."<sup>119</sup> The judiciary cannot ignore the fact that a court compelling an arbitrator to consider monetary relief is equivalent to ordering the arbitrator to consider whether an alleged duty of *representation* was breached.

#### IV. CONCLUSION

The Railway Labor Act mandates that the court yield to the National Mediation Board's unreviewable discretion over representation issues in

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117. Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 11-12, *Delta Air Lines v. Association of Flight Attendants* (filed Sept. 15, 1989) (No. 89-459). The Petition stated:

[A]n unbroken line of appellate decisions established that the courts must look beyond the superficial form of a complaint to determine whether, as here, it masks an underlying representation dispute. . . . See, e.g., *Independent Union of Flight Attendants v. Pan American World Airways*, 836 F.2d 130 (2d Cir. 1988) (per curiam) (seeking arbitration of a claim that union's contract governed work at another acquired airline); *Air Line Employees Assoc. v. Republic Airlines, Inc.*, 798 F.2d 967, 968 (7th Cir.) (per curiam), *cert. denied*, 479 U.S. 962 (1986) (pre-merger action by union from smaller merging carrier for expedited arbitration of grievance over contract violation); *International Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 158 (5th Cir. 1983) (seeking declaration that union's contract survived a merger); *Air Line Pilot's Assoc. v. Texas Int'l Airlines, Inc.*, 656 F.2d 16, 19 (2d Cir. 1981) (action to enforce union contract on carrier's newly established subsidiary); *International Assoc. of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976) (seeking negotiation of employees' post-merger rights); *Flight Engineers Int'l Assoc. v. Eastern Air Lines, Inc.*, 359 F.2d 303, 307 (2d Cir. 1966) (action seeking reinstatement of replaced striking employees "flew in the teeth" of NMB's certification of a different union representing the replacement employees); *Brotherhood of Ry. and Steamship Clerks v. United Air Lines, Inc.*, 325 F.2d 576, 579 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964) (seeking declaration that union's contract with successor provision survived a merger); *Flight Engineers' Int'l Assoc. v. Eastern Air Lines, Inc.*, 311 F.2d 745, 746 (2d Cir.), *cert. denied*, 373 U.S. 924 (1963) (seeking injunction requiring airline to bargain); *Division No. 14, Order of R.R. Telegraphers v. Leighty*, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962) (seeking to enjoin agreement between railroad and parent union).

*Id.*

118. *Association of Flight Attendants v. Delta Air Lines*, 879 F.2d 906, 913.

119. Petition for a Writ of Certiorari, *supra* note 117, at 13.



the airline industry. However, this presumable decision of the Supreme Court exemplifies an inequity which the RLA promotes.

Because the instant case concerns a decertified union, litigation of the premerger agreements necessarily fringes on a representation dispute. By forcing the court to defer to the NMB, the RLA precludes the AFA from having its day in court with regards to the damages claim. AFA should have the right to judicial consideration of its claim that it suffered damages *before* April 1, 1987, when Western ceased existence.

The RLA has been under increasing scrutiny during the 1980's, with proposals ranging from amendments to repeal.<sup>120</sup> This Comment does not propose a severe change in the RLA, but rather for a shift of authority for the NMB. The NMB should be granted power to subject parties to binding arbitration where disputes involve both representative and contractual matters. These disputes must be brought to the NMB's attention before the merger takes place so as to make the awarding of damages a plausible remedy.<sup>121</sup> In addition to carrying the final decision-making authority over representation issues, the NMB must also be authorized to enforce its determination. The Supreme Court should not invade the exclusive jurisdiction over representation issues which the RLA has vested in the NMB. Any changes in the RLA must be mandated by the legislature. Although it is unfortunate that the AFA may not receive the benefit of its bargain in the face of the Delta-Western merger, the Court is without jurisdiction to decide whether there was a duty of representation and, hence, a remedy of damages. However, the Court's impending decision may send another message to Congress that the NMB's authority must keep pace with the rapidly consolidating airline industry.

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120. See, e.g., Roukis, *Should the Railway Labor Act Be Amended?*, 38-1 ARBITRATION J. 16 (1983); Wilner, *The Railway Labor Act: Why, What, and for How Much Longer* (part 1), 55 TRANSP. PRAC. J. 242 (1988); Comment, *Deregulation in the Airline Industry: Toward a New Judicial Interpretation of the Railway Labor Act*, 80 NW. U.L. REV. 1003 (1985); Wall Street J., Feb. 27, 1989, at A10, col. 1, calling the NMB a "government anachronism."

121. The Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry now requires a carrier to notify the NMB of its intent to merge at the same time the carrier files for approval of the Department of Justice. Merger Procedures, *supra* note 91, at 390.

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