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Negotiating in Good Faith: Management's Obligation to Maintain the Status Quo during Collective Bargaining under the Railway Labor Act - International Ass'n of Machinists & Aerospace Workers v. Transportes Aereos Mercantiles Pan Americandos, S.A.

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NEGOTIATING IN GOOD FAITH: MANAGEMENT'S OBLIGATION TO MAINTAIN THE STATUS QUO DURING COLLECTIVE BARGAINING UNDER THE RAILWAY LABOR ACT

International Ass'n of Machinists & Aerospace Workers v. Transportes Aereos Mercantiles Pan Americandos, S.A.[1]

I. INTRODUCTION

When an employer and employee-representative union engage in collective bargaining negotiations, their negotiating activities are covered under the auspices of the Railway Labor Act.[2] The Act, particularly applicable today in the tumultuous airline industry, established a rather elaborate mechanism for negotiation, mediation, voluntary arbitration, and conciliation to avoid interruptions to interstate commerce, to protect employees' freedom of association with respect to labor unions, and to provide prompt and orderly dispute settlements.[3] Indispensable to this scheme, Section 152, First of the Act imposes a statutory obligation upon the parties to such negotiations to bargain in good faith.[4] In *International Ass'n of Machinists & Aerospace Workers v. Transportes Aereos Mercantiles Pan Americandos, S.A.*, the U.S. Court of Appeals for the Eleventh Circuit determined that the RLA precluded the airline from making unilateral changes in working conditions at the outset of collective bargaining negotiations in that to hold otherwise would be to allow the airline an unbargained-for advantage against its counterpart union.[5] This Note examines to what extent the duty imposed by Section 2, First affects the relative positions of the negotiating parties and how the goals of the Act were affected by the court's holding.

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1. 924 F.2d 1005 (11th Cir.), *cert. denied*, 112 S.Ct. 167 (1991) [hereinafter *Tampa Airlines*].
2. 45 U.S.C. §§ 151-188 (1988) [hereinafter RLA].
3. *See* General Comm. of Adjustment of Bhd. of Locomotive Eng'rs v. Missouri-Kan.-Tex. R.R., 320 U.S. 323, 328-33 (1943); RLA, 45 U.S.C. § 151a.
4. 45 U.S.C. § 152, First [hereinafter Section 2, First].
5. *Tampa Airlines*, 924 F.2d at 1009.

II. FACTS AND HOLDING

Appellee, International Association of Machinists and Aerospace Workers (IAM), was elected on July 15, 1987, to succeed the Teamsters Union as the exclusive bargaining representative for fleet service employees of appellant, Transportes Aereos Mercantiles Pan Americandos (Tampa Airlines).[6] Collective bargaining during the Teamsters' tenure as the airline's employees' representative produced a tentative agreement regarding pay rates, rules, and working conditions.[7] Notwithstanding that the tentative agreement was never finalized or ratified, at the October 2, 1987 initiation of bargaining between IAM and Tampa Airlines, the airline informed IAM that the Teamsters' agreement contained the existing pay rates, rules, and working conditions, in other words, the "status quo".[8]

In May 1988, while engaged in collective bargaining with IAM, Tampa Airlines fired several IAM employees without regard to previously existing seniority rules and advised IAM that no grievance procedure existed to challenge its actions.[9] In the same month, the airline fired the shop steward, "allegedly on the grounds that, although he was a good employee, his position with the union would not be tolerated and that management would not respect the union nor its members' rights."[10]

IAM responded by filing a complaint in the U.S. District Court for the Southern District of Florida, alleging bad faith on the part of Tampa Airlines associated with the ongoing collective bargaining negotiations.[11] Collective bargaining continued between the parties despite the litigation until January 1989, when the airline refused to continue the negotiations.[12] Subsequently, Tampa Airlines made additional unilateral modifications, including stopping without notification contributions it had heretofore made to the IAM employees' dependent group medical insurance coverage, decreasing certain employee bonuses, decreasing flight crews, increasing flights per day, and laying off more

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6. *Id.* at 1006. Tampa Airlines is a "common carrier by air" as defined by the RLA, 45 U.S.C. §§ 151, 181.

7. *Tampa Airlines*, 924 F.2d at 1006.

8. *Id.* In its brief to the court of appeals, Tampa Airlines defined "status quo" as a term defined by a floating definition in "that rates of pay, rules and working conditions were changed by management at its discretion to meet Tampa's needs." *Id.* n.2 (quoting Brief of Appellant at 4, 11, *Tampa Airlines* (No. 89-5912)). The circuit court, however, chose instead to accept the district court's ruling that Tampa Airlines' management had informed IAM that the unratified Teamsters' agreement represented the existing working conditions, therefore setting the terms of the Teamsters' unratified agreement as the status quo. *Id.* The circuit court stated that it upheld the district court's definition because Tampa Airlines chose not to contend on appeal that the lower court's definition was in error. *Id.*

9. *Id.* at 1006.

10. *Id.*

11. *Id.*

12. *Id.*

employees.[13] IAM thereupon amended its original complaint to include these additional changes.[14]

Relying on Section 2, First of the RLA, the district court granted a preliminary injunction in favor of IAM, enjoining Tampa Airlines from making unilateral changes in working conditions during collective bargaining negotiations as well as ordering the airline to restore the working conditions to the "status quo" before certain unilateral changes were made.[15]

Tampa Airlines appealed, arguing: (1) that the district court misapplied the RLA and the supporting case law, and (2) that the injunction was an inappropriate remedy.[16] The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's order enjoining Tampa Airlines from making further unilateral changes as well as restoring the pre-existing conditions.[17] The court held, *inter alia*, that when management, while participating in collective bargaining under the RLA, unilaterally changes existing working conditions after negotiations with the representative union have begun, the company violates the Act's duty to bargain in good faith.[18]

III. LEGAL BACKGROUND

In 1926, Congress enacted the Railway Labor Act.[19] Section 2, First of the Act provides that:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.[20]

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13. *Id.* at 1006-07.

14. *Id.* at 1007.

15. *Id.* at 1006. See *supra* note 8 and accompanying text for a discussion of the circuit court's treatment of "status quo" and the district court's definition of the term.

16. *Id.* Tampa Airlines also contended at oral argument that the district court erred by failing to fix a bond. *Id.* at 1011 n.10. The circuit court declined to address that issue, holding that the airline did not adequately address the issue in its brief. *Id.*

17. *Id.* at 1011.

18. *Id.* at 1010. The court also held that any collective bargaining agreement that might issue from such negotiations "would almost surely be the product of decreased union bargaining strength." *Id.* at 1011. Accordingly, the court found that an injunction such as that issued by the district court was "the only practical and effective remedy here." *Id.*

19. 45 U.S.C. §§ 151-188.

20. 45 U.S.C. § 152, First.

In its preface to the RLA, Congress expressed, *inter alia*, the following purposes:

> to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions [and] . . . 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.[21]

The duty imposed by Section 2, First comprises "[t]he heart of the [RLA]."[22] Accordingly, Section 2, First has been held to impose a legal obligation upon management and labor that is judicially enforceable.[23] In *Chicago & North Western Railway Co. v. United Transportation Union*,[24] the U.S. District Court for the Northern District of Illinois faced a matter where the railroad sought an injunction to enforce the union's Section 2, First duty to bargain after the union threatened to strike when the parties exhausted formal RLA procedures.[25] In an unreported opinion, the district court ruled: (1) that the railroad's complaint that the union had failed to perform its obligation under Section 2, First to "exert every reasonable effort" to maintain the status quo regarding pay rates and working conditions[26] was nonjusticiable and was, instead, a matter for determination by the National Mediation Board;[27] and (2) that Sections 4 and 7 of the Norris-LaGuardia Act[28] deprived the court of jurisdiction to enjoin the union's threatened strike.[29]

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21. 45 U.S.C. § 151a. The act further expresses the additional purposes:
> (1) [t]o 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; [and] (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.

Id.

22. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 377 (1969).

23. Chicago & N. W. Ry. v. United Transp. Union, 402 U.S. 570, 577 (1971).

24. 402 U.S. 570.

25. *Id.* at 570.

26. The union counterclaimed that it had, in fact, complied with Section 2, First, but that the railroad had been derelict in its duty under the section. *Id.* at 572 n.3.

27. *Id.* at 572.

28. 29 U.S.C. §§ 104, 107 (1988).

29. *Chicago & N. W. Ry.*, 402 U.S. at 572. Section 4 of the Norris-LaGuardia Act reads, in relevant part:
> No court . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment . . . .

29 U.S.C. § 104.

The Court of Appeals for the Seventh Circuit affirmed,[30] interpreting Section 2, First as a general statement of the policies and purposes of the subsequent sections of the RLA and not as a specific requirement anticipating judicial enforcement.[31] Rather, the circuit court reasoned, the enforcement of Section 2, First was within the exclusive domain of the National Mediation Board.[32]

The U.S. Supreme Court granted certiorari to consider what Justice Harlan, delivering the majority opinion reversing the lower courts,[33] considered to be an important question under the RLA on which the lower courts, heretofore, had expressed disparate views.[34] The Court majority expressly held that Section 2, First was intended to be more than merely a policy statement.[35] Rather, the Court determined, the statute was "designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis."[36]

The *Chicago & North Western* Court justified its conclusion primarily on the testimony of Donald R. Richberg, counsel for the organized railway employees supporting the RLA, given in 1926 before the House Committee on Interstate and Foreign Commerce.[37] In his testimony, Richberg stated, "it is [the parties'] duty to exert every reasonable effort . . . to settle all disputes, whether arising out of the abrogation of agreements or otherwise, in order to avoid any interruption to commerce. In other words, the legal obligation is imposed . . . ."[38]

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30. Chicago & N. W. Ry. v. United Transp. Union, 422 F.2d 979 (7th Cir. 1970).

31. *Id.* at 985-88.

32. *Id.*

33. *Chicago & N. W. Ry.*, 402 U.S. at 572-73. The Court split, 5-4, in its opinion with Justices Black, Douglas, and White joining Justice Brennan in dissent. *Id.* at 584.

34. *Id.* at 573. In addition to the lower courts' decisions in the matter before the court, Justice Harlan referred to the following cases: *Piedmont Aviation, Inc. v. Air Line Pilots Ass'n*, 416 F.2d 633 (4th Cir. 1969); *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt Railroad*, 385 F.2d 581 (D.C. Cir. 1967); *Seaboard World Airlines, Inc. v. Transport Workers.*, 425 F.2d 1086 (2d Cir. 1970); and *United Industrial Workers v. Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968). *See Chicago & N. W. Ry.*, 402 U.S. at 573 n.4.

35. *Chicago & N. W. Ry.*, 402 U.S. at 577.

36. *Id.* In a strong dissent, wherein he painstakingly summarized the legislative history of the enactment of the RLA, Justice Brennan interpreted the majority's decision to mean,

> in essence, . . . that a district court has the duty under § 2 First, to assess the bargaining tactics of each of the parties *after* the entire statutory scheme has run its course. If, then, the court determines that a party had not exerted sufficient effort to reach settlement, it should enjoin self-help measures, and, if such action is to make any sense within this statutory scheme, remand the parties to some unspecified point in the bargaining process.

Id. at 596 (Brennan, J., dissenting) (emphasis in original). Such a notion, Justice Brennan concluded, was "entirely contrary to the carefully constructed premise of the [RLA]." *Id.*

37. *Id.* at 576-77.

38. *Hearings on Railroad Labor Disputes (H.R. 7180) Before the House Committee on Interstate and Foreign Commerce*, 69th Cong., 1st Sess. 91 (1926). However, Mr. Richberg also testified that

> this is not a duty which would be enforced in a very absolute way, because it is a duty to exert every reasonable effort. In other words, all that could be enforced by the court would be an order against an arbitrary refusal to even attempt to comply with that duty . . . .

One may also look past the Court's *Chicago & North Western* decision to find support for the proposition that Section 2, First is meant to sustain the status quo among the parties involved. Earlier, the Court held in *Detroit & Toledo Shore Line Railway Co. v. United Transportation Union*[39] that Section 2, First, together with other RLA provisions, "form[s] an integrated, harmonious scheme for preserving the status quo."[40]

When determining whether a party has met its Section 2, First obligation "to exert every effort to make . . . agreements,"[41] it is not enough for the parties to jump through all of the RLA's hoops; bargaining must "at all stages" be governed by a party's sincere desire to reach an agreement.[42] The Supreme Court's holding in *Williams v. Jacksonville Terminal Co.*[43] establishes the starting point for examining whether Section 2, First precludes management from making unilateral changes in working conditions after the commencement of negotiations directed toward adoption of an initial collective bargaining agreement.[44]

In *Williams*, no collective bargaining agreement existed when a new union became certified.[45] In light of this situation, the new union requested to negotiate an initial agreement, including the accounting for and disposition of employees' tips.[46] Despite this request, management unilaterally changed the method for employees to account for their tips.[47] The Court concluded that the carrier was permitted, pending negotiations where no collective bargaining agreements were or had been in effect, to make unilateral changes.[48] The status quo provisions of the RLA, including Section 2, Seventh, the Court reasoned,

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Id. at 85.

39. 396 U.S. 142 (1969). See *infra* notes 50-56 and accompanying text for a discussion of the *Detroit & Toledo* decision.

40. *Detroit & Toledo*, 396 U.S. at 152.

41. Williams v. Jacksonville Terminal Co., 315 U.S. 386, 402 (1942).

42. *See generally* American Air Lines, Inc. v. Air Line Pilots Ass'n, 169 F. Supp 777 (S.D.N.Y. 1958); Roger H. Briton, *Airline Collective Bargaining Under the Railway Labor Act: The Management Perspective*, C656 A.L.I.-A.B.A. 113 (Oct. 17, 1991). One court has expressly held that if a party has failed to negotiate in good faith, therefore tainting each step of the RLA process, the parties involved should be required to "revisit each step [negotiation, mediation, etc.] in a good faith effort to settle their dispute." Chicago & N. W. Ry. v. United Transp. Union, 471 F.2d 366, 369 (7th Cir. 1972), *cert. denied*, 410 U.S. 917 (1973).

43. 315 U.S. 386.

44. *Id.* at 399.

45. *Id.* at 402.

46. *Id.*

47. *Id.*

48. *Id.* The Court held that

> [b]ecause the carrier was [by the RLA] placed under the duty to exert every effort to make collective agreements, it does not follow that, pending those negotiations, where no collective bargaining agreements are or have been in effect, the carrier cannot exercise its authority to arrange its business relations with its employees . . . .

Id.

were meant to prevent working condition changes "previously fixed by collective bargaining agreements."[49]

However, the Supreme Court later severely restricted the *Williams* holding in *Detroit & Toledo*, where the carrier sought to enjoin the union from striking and the union counterclaimed to prevent the carrier from violating the RLA's status quo provisions by establishing new outlying work assignments.[50] In *Detroit & Toledo*, where a previous collective bargaining agreement was in place when management made unilateral changes to working conditions not expressly covered by the agreement, Justice Black, writing for the majority, held that the RLA's status quo provisions obligate both parties to maintain not only those working conditions contained in the existing agreement, but also "those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute."[51] The majority expressly added that these conditions need not have been covered in the initial agreement.[52] An employer would be able to make such changes, the Court concluded, only if those changes had occurred for a "sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions."[53]

The Court based its conclusion on the rationale that if the carrier was allowed to resort to self-help before exhausting the RLA's negotiation and mediation procedures, "the union [could not] be expected to hold back its own economic weapons, including the strike."[54] Justice Black further explained that the immediate effect of the RLA's status quo provisions (including Section 2, First) would be not only to prevent strikes but also to provide time for more amicable and constructive resolutions to labor disputes.[55] Justice Black also added that the RLA was useful in compelling a compromise between two disputing parties.[56]

Support for Justice Black's rationale can be found in one commentator's discussion of a similar duty to bargain in good faith under the auspices of the National Labor Relations Act[57]: "Unilateral changes made while the employees' representative is seeking to bargain . . . interfere with the normal course of

49. *Id.* at 403.

50. *Detroit & Toledo*, 396 U.S. at 144-45; *see infra* note 39 and accompanying text.

51. *Detroit & Toledo*, 396 U.S. at 153.

52. *Id.*

53. *Id.* at 154.

54. *Id.* at 155.

55. *Id.* at 150.

56. *Id.* In so doing, Justice Black wrote, "[T]he power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worth-while for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce." *Id.*

57. 29 U.S.C. §§ 151-169 (1988) [hereinafter NLRA].

negotiations by weakening the union's bargaining position."[58] In its *Chicago & North Western* decision, the Supreme Court recognized the validity of such rationale, as illustrated by its holding in *NLRB v. Insurance Agents' International Union*,[59] that "the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union."[60]

The *Detroit & Toledo* Court distinguished the *Williams* decision as one applying only to a situation where there was no pre-existing collective bargaining agreement.[61] By so doing, the Court even limited *Williams'* allowance of unilateral changes to the narrow situation of not only where there is no pre-existing collective bargaining agreement, but also where there is "absolutely no prior history of any collective bargaining."[62]

The U.S. Court of Appeals for the District of Columbia, in announcing *International Ass'n of Machinists v. Trans World Airlines*,[63] recognized that the *Detroit & Toledo* distinguishment "certainly casts some doubt on the continuing willingness of the Supreme Court to follow the *Williams* precedent" in cases not factually distinct from it.[64] However, the D.C. Circuit noted that *Detroit & Toledo* "plainly stops short of overruling" *Williams* and held that the *Williams* rationale was left binding in situations similar to that described in *TWA* where there was no history of prior collective bargaining or agreement between the carrier and the union on any matter.[65]

The *TWA* court noted finally, after examining both *Detroit & Toledo* and *Chicago & North Western*, that *Williams* was not dead, though it was weakened.[66] The court further found that the independent duty for the parties to bargain in good faith, as found by *Chicago & North Western*, was limited and noted that the Supreme Court there held that injunctive remedy would be available

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58. Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1423 (1958). Cox also noted that it is "not enough for the law to compel the parties to meet and treat without passing judgment upon the quality of the negotiations. The bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition." *Id.* at 1413.

59. 361 U.S. 477, 484-85 (1960).

60. *Chicago & N. W. Ry.*, 402 U.S. at 575 (citing *Insurance Agents' Int'l*, 361 U.S. at 484-85).

61. *Detroit & Toledo*, 396 U.S. at 158.

62. *Id.*

63. 839 F.2d 809 (D.C. Cir.) [hereinafter *TWA*], *amended on other grounds*, 848 F.2d 232 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988).

64. *Id.* at 814. The court here was considering the specific *Detroit & Toledo* language which stated that

> [i]n *Williams* there was absolutely no prior history of any collective bargaining or agreement between the parties on any matter. Without pausing to comment upon the present vitality of either of these grounds for dismissing the . . . [RLA] claim [in *Williams*] it is readily apparent that *Williams* involved only the question of whether the status quo requirement of § 6 applied . . . .

Detroit & Toledo, 396 U.S. at 158.

65. *TWA*, 839 F.2d at 814.

66. *Id.*

only "where a strike injunction is the only practical, effective means of enforcing the command of [Section] 2 First."[67]

The U.S. Court of Appeals for the Ninth Circuit concurred with the *TWA* decision in determining *Regional Airline Pilots v. Wings West Airlines*.[68] There, as in the D.C. Circuit, the parties involved had undertaken no steps toward bargaining, mediation, or other means provided by the RLA to assist the bargaining process.[69] The Ninth Circuit agreed with the D.C. Circuit that federal court interjection into the bargaining process was not authorized by Section 2, First, as had been interpreted by the Supreme Court in *Williams* and in *Chicago & North Western*.[70] However, this circuit distinguished itself from the D.C. Circuit in that "our view is that jurisdiction exists to enforce [Section] 2 First through Fourth, but that the prerequisites for stating a claim under authority of [*Chicago & North Western*] do not exist under the facts of this case where there has been no negotiation process instituted at all."[71]

Guidance for the Ninth Circuit's *Wings West* decision may be found based, in part, upon its earlier announcement in *Air Line Pilots Ass'n, International v. Transamerica Airlines, Inc.*[72] In response to the airline's contention that the union failed to allege a violation of Section 2, First, the court held that the airline's underlying activity alleged by the union violated the tenets of Section 2, First that carriers must "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes."[73] Therefore, the court concluded, the union complaint stated a Section 2, First claim for which relief could be properly granted by a federal court.[74]

More recently, the U.S. Court of Appeals for the Second Circuit, in reviewing a lower court's dismissal of a union's counterclaim that an airline violated the "every reasonable effort" provision of Section 2, First by unilaterally altering rates of pay, held in *Virgin Atlantic Airways, Ltd. v. National Mediation*

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67. *Id.* (citing *Chicago & N. W. Ry.*, 402 U.S. at 582).

68. Regional Airline Pilots v. Wings W. Airlines, 915 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2891 (1991).

69. *Id.*

70. *Id.*

71. *Id.*

72. 817 F.2d 510 (9th Cir.), *cert denied*, 484 U.S. 963 (1987). In this case, the pilots' union brought suit against the airline alleging, *inter alia*, that Transamerica violated Section 2, First by "formulat[ing] a plan to institute pay scales without the approval of [the union]" and "that to further this plan, [the airline] entered into collective bargaining negotiation with [the union], but failed and refused to exert reasonable efforts to reach agreement or bargain in good faith." *Id.* at 512.

73. *Id.* at 514 (citing 45 U.S.C. § 152, First); *see supra* notes 19-21 and accompanying text (regarding the tenets of Section 2, First); *see also Chicago & N. W. Ry.*, 402 U.S. at 579 n.11; Trans Int'l Airlines, Inc. v. International Bhd. of Teamsters, 650 F.2d 949, 962 (9th Cir. 1980) ("The Supreme Court in [*Chicago & N. W. Ry.*] held that [Section 2, First] imposed a substantive duty on parties, enforceable by injunctive relief, to exert reasonable efforts during the negotiation process to reach an agreement.").

74. *Air Line Pilots Ass'n*, 817 F.2d at 514.

Board[75] that the district court properly dismissed the union's counterclaim because there was no pre-existing bargaining relationship between the parties.[76] In so holding, the Second Circuit noted that although some courts (specifically the *Tampa Airlines* court) "have held that something less than a formalized collective bargaining agreement may be sufficient to trigger the [RLA's] status quo provisions" [including Section 2, First], in *Virgin Atlantic*, the Circuit could not even find an unratified agreement between the parties.[77] In fact, the court noted that the union (International Brotherhood of Teamsters Airline Division) and the airline had never even bargained with each other.[78] The *Virgin Atlantic* court recognized similar decisions in *TWA* and *Wings West* where no steps toward bargaining had been taken and the unilateral changes in payrates by the airline-employers did not violate Section 2, First's duty to exert "every reasonable effort."[79]

The analysis undertaken by a court when examining an alleged violation of the Section 2, First bargaining obligation has been compared to a similar duty imposed by the NRLA[80] in response to an unfair labor practice alleging a party's failure to bargain in good faith.[81] In interpreting the NLRA's duty to bargain in good faith, the Supreme Court has held that where there has been no prior collective bargaining agreement between management and the union, "an employer's unilateral change in conditions of employment under negotiation is [as much a violation of the duty to bargain in good faith] as . . . a flat refusal [to negotiate]."[82] While there may be some basis for the proposition that Section 2, First generates a more stringent duty to bargain in good faith than is required under the NLRA,[83] a more recent decision rejects this view.[84]

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75. 956 F.2d 1245 (2d Cir. 1992). Here, the court was primarily concerned with determining the validity of the certification of an employee representative under the RLA and the power of the National Mediation Board under Section 2, Ninth, 45 U.S.C. § 152, Ninth, to investigate and resolve disputes among RLA-governed employees as to the identity of their bargaining representative. *Virgin Atlantic*, 956 F.2d at 1247.

76. *Virgin Atlantic*, 956 F.2d at 1247.

77. *Id.* at 1253 (citing *Tampa Airlines*, 924 F.2d at 1008-10).

78. *Id.* at 1253. Because the airline and the union here had never bargained with each other, the Second Circuit held that Section 2, Seventh, as argued by the union, did not apply. *Id.* Section 2, Seventh states, in part, that "[n]o carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements . . . ." 45 U.S.C. § 152, Seventh.

79. *Virgin Atlantic*, 956 F.2d at 1253 (citing *Wings W.*, 915 F.2d at 1402-03; *TWA*, 839 F.2d at 814-15).

80. *See* 29 U.S.C. § 141; *see also supra* notes 57-58 and accompanying text.

81. *See* Norfolk & Portsmouth Belt Line Ry. v. Brotherhood of Ry. Trainmen, 248 F.2d 34, 45 n.6 (4th Cir. 1957), *cert. denied*, 355 U.S. 914 (1958).

82. NLRB v. Katz, 369 U.S. 736, 743 (1962).

83. *See* REA Express, Inc. v. Brotherhood of Ry., Airline & Steamship Clerks, 358 F. Supp. 760 (S.D.N.Y. 1973); *see also* Briton, *supra* note 42.

84. *See* Independent Fed'n of Flight Attendants v. Trans World Airlines, 682 F. Supp. 1003, 1020-21 (W.D. Mo. 1988), *aff'd*, 878 F.2d 254 (8th Cir. 1989), *cert denied*, 493 U.S. 1044 (1990).

IV. THE INSTANT DECISION

In the instant case, the court determined that the purposes of the RLA are "facilitated by an elaborate statutory scheme designed to encourage negotiation and mediation rather than conflict resulting in the interruption of interstate commerce."[85] Crucial to this plan, the court held, is the duty to bargain in good faith, as codified in Section 2, First.[86] The statute, the court concluded, is not merely "horatory" but imposes "judicially enforceable legal obligations" on the parties involved.[87]

The court also noted that IAM did not call upon the identical RLA provisions invoked by the *Detroit & Toledo* union.[88] As a result, the court believed that this distinction raised a question left unresolved by *Detroit & Toledo*: whether the duty to bargain in good faith, as prescribed by Section 2, First, standing alone, precluded unilateral changes after the commencement of negotiations.[89] The *Tampa Airlines* court succinctly concluded that it did.[90]

Though the *Williams* decision, standing alone, might have required finding the opposite result in *Tampa Airlines*, the court resolved that *Detroit & Toledo* "limited *Williams*' allowance of unilateral changes to narrow the situation where there is 'absolutely no prior history of any collective bargaining *or* agreement between the parties on any matter.'"[91] In the instant case, the *Tampa Airlines* court noted that both collective bargaining between Tampa Airlines and the Teamsters and the airline's subsequent bargaining with IAM had already occurred when Tampa Airlines made the unilateral changes contested by IAM.[92] The court further noted that when Tampa Airlines began the collective bargaining procedure with IAM, the airline informed the union that the prior, unratified Teamsters agreement represented the status quo.[93] By finding a prior history of

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85. *Tampa Airlines*, 924 F.2d at 1007.

86. *Id.*; *see supra* notes 19-21 and accompanying text (detailing the purposes and provisions of the statute).

87. *Tampa Airlines*, 924 F.2d at 1007; *see generally Chicago & N. W. Ry.*, 402 U.S. 570.

88. *Tampa Airlines*, 924 F.2d at 1008 n.5. In *Detroit & Toledo*, the union invoked Section 6 of the Act, 45 U.S.C. § 156, which, along with Section 5, First and Section 10, 45 U.S.C. §§ 155, First, 160, constitutes the status quo portion of the RLA. *Detroit & Toledo*, 396 U.S. at 150-51. The *Tampa Airlines* court determined that it need not decide whether the tentative agreement between Tampa Airlines and the Teamsters in the case at hand was a Section 6 agreement because it concluded that Section 2, First preclude[d] the unilateral changes made... *despite* the lack of a formal agreement in light of the history of prior collective bargain[s] between the parties." *Tampa Airlines*, 924 F.2d at 1008 n.5 (emphasis added).

89. *Tampa Airlines*, 924 F.2d at 1008. In *Detroit & Toledo*, the union argued that the railroad had violated its RLA duty to bargain in good faith; the Court there declined to decide that argument because it chose to resolve the case on the basis of Section 6. *Detroit & Toledo*, 396 U.S. at 155 n.23.

90. *Tampa Airlines*, 924 F.2d at 1008.

91. *Id.* (quoting *Detroit & Toledo*, 396 U.S. at 158) (alteration in original).

92. *Id.*

93. *Id.* at 1008-09.

collective bargaining, the court held that the case at hand did not fall within *Williams*' "small window of remaining vitality."[94]

Following its conclusion that *Tampa Airlines* was not controlled by the language of *Williams*, and by holding instead that *Detroit & Toledo* narrowed the scope of that decision, this court next found that the rationale of *Detroit & Toledo*, coupled with the *Chicago & North Western* conclusion that Section 2, First provided for legally enforceable duties, precluded the unilateral changes in working conditions made in this instance by Tampa Airlines.[95] Although in the instant case, there was no prior formal collective bargaining agreement between Tampa Airlines and IAM (as between the parties in *Detroit & Toledo*), the court determined that the instant case implicated the identical policies behind *Detroit & Toledo*: "If management is permitted to make unilateral changes in working conditions during collective bargaining, the union's position will be undermined, interruptions to interstate commerce are likely to occur, and the purposes of the Act will be frustrated."[96]

The court rejected Tampa Airlines' argument that a prior collective bargaining agreement must exist before management can be enjoined from unilaterally changing working conditions.[97] In so rejecting the airline's reliance on *TWA*, this circuit noted that the D.C. Circuit believed the facts in *TWA* fell precisely within the remaining *Williams* "window of vitality" (i.e., no prior collective bargaining and no prior agreement).[98] *Williams*, the Eleventh Circuit found, was "expressly limited" by *Detroit & Toledo* to control only those situations where there are not only no pre-existing agreements, but also no histories of collective bargaining.[99]

The Court also found support for its interpretation of the RLA's duty to bargain in good faith by analogizing to a similar duty required by the NLRA.[100]

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94. *Id.* at 1009. The court even noted that the *Detroit & Toledo* opinion questioned whether *Williams* retained any vitality at this juncture but declined to address *Williams*' continuing validity after determining that there was prior collective bargaining in the instant case. *Id.* (citing *Detroit & Toledo*, 396 U.S. at 158).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* This court distinguished the *TWA* decision by noting that *TWA* held only that "*Williams* . . . [is] binding in a case like this one before us where there has been 'absolutely no prior history of any collective bargaining or agreement between the parties on any matter.'" *Id.* (citing *TWA*, 839 F.2d at 814 (quoting *Detroit & Toledo*, 396 U.S. at 158)).

99. *Tampa Airlines*, 924 F.2d at 1009. The court noted that the Ninth Circuit seemed to be in accord by negative inference with its determination that such unilateral changes in working conditions could be enjoined when there has been some prior collective bargaining. *Id.* n.8 (citing *Wings W.*, 915 F.2d at 1403).

100. *Id.* at 1009 (citing NLRA § 141). In doing so, the court recognized that it could not import the NLRA "wholesale" into RLA-governed negotiations and that it should exercise caution in drawing even rough analogies. *Id.* (citing *Jacksonville Terminal Co.*, 394 U.S. at 383). However, the court held that an analogy was appropriate since both labor acts require good-faith bargaining. *Id.* (citing *Norfolk & Portsmouth Belt Line Ry.*, 248 F.2d at 45 n.6).

Affirming the opinion expressed by the *Chicago & North Western* court[101] that the duty to bargain in good faith required by both acts is grounded in the same underlying policy, the *Tampa Airlines* court held that "existing rates of pay, rules, and working conditions must be maintained during negotiations because '[t]he bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition' of the union as the bargaining representative."[102] Similarly, the court held that Tampa Airlines violated the duty to bargain in good faith under the RLA when it unilaterally modified existing working conditions after the onset of collective bargaining negotiations with IAM.[103]

V. COMMENT

By barring Tampa Airlines from enacting unilateral changes in working conditions (consequently buttressing IAM's bargaining position), and therefore denying the airline what would amount to an unbargained-for advantage, the Eleventh Circuit seemed to operate under the belief that *Detroit & Toledo* stands for the proposition that parties to collective bargaining negotiations should function from relatively equal bargaining positions.[104] However, the question remains whether the court exercised the correct analysis in determining whether to protect the status quo.

In order to reach its belief, the *Tampa Airlines* court first had to trigger the mechanism that it could use to restrict the *Williams* rationale, which, if followed, would preclude unilateral changes by the airline only in the face of any previous or current collective bargaining agreements between the parties at hand.[105] In this matter, there was no collective bargaining agreement ratified between IAM and Tampa Airlines.[106] Therefore, at first blush, it would appear that *Williams* would apply in this matter to allow Tampa Airlines to make unilateral changes.[107]

However, because the airline itself informed IAM at the *outset* of negotiations that the previous tentative Teamsters agreement contained the existing rates of pay, rules, and working conditions, *Detroit & Toledo* provided that limiting mechanism in that it disallows unilateral changes in effect prior to the time of the pending dispute which are involved in or related to the dispute.[108]

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101. *See Chicago & N. W. Ry.*, 402 U.S. at 574-75.

102. *Tampa Airlines*, 924 F.2d at 1010 (citing *Chicago & N. W. Ry.*, 402 U.S. at 574-75). Drawing on this analogy to the NLRA, the court was persuaded by similar logic that the U.S. Supreme Court employed in *Katz* to interpret the NLRA duty to bargain in good faith. *Id.* (citing *Katz*, 369 U.S. at 743).

103. *Id.*

104. *See Detroit & Toledo*, 396 U.S. at 155.

105. *See Williams*, 315 U.S. at 403.

106. *Tampa Airlines*, 924 F.2d at 1006.

107. *See Williams*, 315 U.S. 402.

108. *Tampa Airlines*, 924 F.2d at 1008; *see Detroit & Toledo*, 396 U.S. at 153.

In the alternative, because the Eleventh Circuit was able to find a history of collective bargaining at some point prior to the dispute at hand, it would seem that the circuit would favor the rationale advanced by *Williams* in situations where there was no prior history of any sort of collective bargaining, (attempted, tentative, or ratified) upon which a status quo label could be attached.[109]

What is management's (or any party's) obligation to bargain in good faith under Section 2, First? The RLA seems to impose upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help measures while the Act's remedies are being exhausted.[110] As the Supreme Court noted in *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway Co.*,[111] "the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute."[112] By allowing *Detroit & Toledo* to restrict unilateral modifications by Tampa Airlines, this court seems to adopt wholeheartedly the rationale favored by Justice Black in *Detroit & Toledo* that the RLA's status quo provisions (including Section 2, First) would provide time for peaceful and productive resolutions of labor disputes.[113]

By prohibiting unilateral changes by the airline, the RLA provisions consequently delay when the union can counteract with self-help measures such as strikes or work slow-downs, thereby providing time for "tempers to cool" and "[help] create an atmosphere in which rational bargaining can occur."[114] The result of removing one arrow from the quiver of a negotiating party who seeks to change the status quo without delay or additional negotiation is constructively to empower the other party to maintain the status quo throughout collective bargaining negotiations, which Justice Black believed would "make it worthwhile for the moving party [Tampa Airlines] to compromise with the interests of the other side and thus reach agreement without interruption to commerce."[115]

By forcing the parties to sit at the bargaining table in reasonably equal bargaining positions, each side is bolstered in the knowledge that the other cannot independently change the dimensions of the playing field during the course of collective bargaining negotiations. Even if an agreement does not prevent an employer from conceiving and implementing certain decisions, it is prohibited

109. In fact, the *Tampa Airlines* court explicitly chose not to address the continuing validity of *Williams* because it could not be found to apply to the facts under review. *Tampa Airlines*, 924 F.2d at 1009 n.7.

110. *Brotherhood of R.R. Trainmen*, 394 U.S. at 378.

111. 384 U.S. 238 (1966).

112. *Id.* at 246.

113. *See Detroit & Toledo*, 396 U.S. at 150.

114. *Id.*

115. *Id.*

from doing so once negotiated bargaining begins concerning the disputed decision.[116] Only if, at the commencement of negotiated bargaining, it has become an established practice for the employer to make such decisions without any union reaction, should the employer proceed unfettered with its decision to make unilateral working condition changes.[117]

At this point, one must examine the resultant impact upon the union — and, by extension, its role as negotiator for those employees whom it represents at the bargaining table — following the adoption by the airline of unilateral changes. IAM was in the position of acting as the advocate of Tampa Airlines' employees; they placed their trust in the union to negotiate a reasonable and beneficial agreement regarding pay rates, rules, and working conditions. By firing union employees, decreasing benefits, and changing working conditions to the detriment of the employees while at the same time engaging in negotiations with the union regarding those issues, the airline seemed to telegraph the message that it did not respect the employees.

If the airline did not respect the union's members, how could it possibly respect the union's position at the bargaining table as the advocate representative of those same employees? In order to negotiate an effective settlement or working condition agreement, both parties must appreciate and recognize the legitimacy of their counterparts and of their counterparts' interests in order to reach a reasonable, equitable agreement.[118] Tampa Airlines appeared not to respect the union or its members, and therefore IAM could not operate effectively as the employees' advocate representative. As Archibald Cox wrote, "[t]he bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition."[119]

Following the Eleventh Circuit's decision in *Tampa Airlines*, parties entering into RLA negotiations should note carefully the collective bargaining history between the carrier and its employees. Today, it would appear that if there has been some history of prior collective bargaining, then, following the *Detroit & Toledo* limitation of *Williams*, any unilateral changes in working conditions can be enjoined. The parties are only free to modify working conditions unilaterally when there has been absolutely no prior history of collective bargaining, not only between the parties at hand but also between the carrier and any other similar representative unions in the past. By allowing an equitable remedy for such changes, the courts appear to be upholding the tenets of the RLA which promote the rationale that the parties should approach the bargaining table in good faith in

116. *See generally* Athanassios Papaioannou, *The Employer's Duty to Bargain Over Lay-offs in the Airline Industry: How the Courts Have Distorted the Railway Labor Act*, 55 J. AIR L. & COM. 939 (1990).

117. *See generally id.* But see Justice Harlan's dissent in *Detroit & Toledo* where he proposes the unlikelihood that the RLA was meant to require two parties to remain at the same historical point merely because one party does not wish to change. *Detroit & Toledo*, 396 U.S. at 159-61 (Harlan, J., dissenting).

118. *See* Cox, *supra* note 58, at 1413.

119. *Id.* at 1412-13.

order to negotiate from relatively equal positions. Because of the continuance of this limitation and the removal of the option to make unilateral changes under most fact patterns, parties will now find themselves constructively forced into engaging in rational bargaining with their counterparts in order to reach agreements addressing the needs of both parties.

V. CONCLUSION

By its holding, the *Tampa Airlines* court extended the status quo rationale advanced by *Detroit & Toledo* to determine that Section 2, First's duty to bargain in good faith, standing alone, precluded unilateral changes in working conditions after negotiations have commenced. In so holding, the court removed a potentially contentious self-help arrow from the battle quiver of both parties in that by barring management from making such unilateral working condition changes, the union now should have one less potential reason to counteract with self-help measures which would only result in interruptions to interstate commerce. With this issue judicially predetermined, both parties can now approach the negotiating table confident in the nature of the status quo from which they may commence the negotiating process without the additional apprehension to look over their shoulders.

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