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LOSING LIFT AND CREATING DRAG! THE EFFECT OF NATIONAL MEDIATION BOARD EXECUTION AND RAILWAY LABOR ACT COURT DECISIONS ON THE COLLECTIVE BARGAINING PROCESS IN THE AIRLINE INDUSTRY: A UNION PERSPECTIVE

Mark C. Stephens

I. Collective Bargaining in the Airline Industry - A Preflight

In July of 2006, American Airlines and its pilots, represented by the Allied Pilots Association, opened negotiations in an attempt to reach a new Collective Bargaining Agreement ("CBA") to supersede the highly concessionary agreement forced upon the pilots in 2003 under pressure to keep the company solvent.[1] The pilots are seeking significant improvements to work rules and compensation including a restoration in pay equivalent to 1992 hourly rates corrected for inflation (a

1. Allied Pilots Ass'n, Negotiations Overview, http://www.apanegotiations.com/Overview/tabid/80/Default.aspx (last visited Oct. 6, 2008).

nearly 55% increase from the current hourly pay rates).[2] Because the current negotiating environment is overtly anti-labor as a result of executive implementation and judicial interpretation of the Railway Labor Act ("RLA"), these negotiations, and those involving other airline labor unions, are likely to be onerous and lengthy.

Due to a developing bias against labor in the execution of the statutory negotiating procedure and the resulting negotiating imbalance between labor unions and airline management, the legislature and the National Mediation Board ("NMB") should revisit the application of the RLA and take remedial action with regard to collective bargaining in the airline industry. Because labor tends to be the party seeking changes to the status quo during normal contract negotiations, the recent implementation of the RLA provisions by the NMB, coupled with recent court decisions interpreting the collective bargaining provisions contained in the RLA, have significantly tilted the bargaining balance in favor of airline management and against airline labor unions. Recent judicial decisions regarding: (1) managements' ability to unilaterally change the status quo by rejecting collective bargaining agreements (CBAs) in bankruptcy reorganization; (2) the courts' limitations on the unions' use of strikes and other self-help strategies to defend the rejection of contracts during bankruptcy proceedings; (3) the courts' concurrence with NMB's use of compulsory, indefinite recess during mediation; and (4) the courts' creation of a bifurcated standard regarding the requirement for the parties to maintain the status quo during negotiations for amendments to the CBAs will seriously erode the ability of airline unions to timely and legally use economic leverage. This will be a critical disadvantage as labor seeks to remedy the effects of extremely concessionary agreements that management forced upon them early this decade as the result of the bankruptcy or near bankruptcy of nearly every major airline in the United States. The imbalance created by the NMB's implementation of the bargaining provisions of the RLA, combined with these court decisions will significantly (and negatively for labor) impact the bargaining process during future negotiations. The NMB implementation and judicial decisions are just the most recent indications that the RLA is an inappropriate and ineffective statutory framework for pilot union/airline management negotiations.

Because the NMB implementation and court decisions virtually ensure that the RLA does not meet all the goals set out in the legislation, Congress should amend the RLA to thwart the effect of these decisions or it should consider applying provisions similar to those in the National Labor Relations Act ("NLRA") that ensure a more balanced and efficient bargaining environment. Possible areas for change

2. ALLIED PILOTS ASSOCIATION, UNDERSTANDING THE APA PAY RESTORATION PROPOSAL 2 (2007), http://www.apanegotiations.com (follow "Hot Items" tab; then follow the "Understanding the APA Pay Restoration" hyperlink).

https://scholarship.law.tamu.edu/txwes-lr/vol15/iss1/7
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include: (1) allowing airline CBAs to expire on their amendable date, (2) allowing self-help any time the parties are at impasse after the expiration date, (3) establishing a timeline for negotiation that includes the mediation process as outlined in the RLA but that leads to predictable and reasonable timing for negotiations, and (4) applying § 1167 of the Bankruptcy Act, which disallows the rejection of rail industry CBAs, to airlines as well as railroads, thereby mitigating the imbalance in bargaining power that occurs when airlines opt to reorganize under Chapter Eleven of the U. S. Bankruptcy Code.

This comment will: (1) contrast the divergent statutory bargaining provisions implemented in the RLA and NLRA, (2) discuss how the NMB's application of the RLA combined with court interpretation of RLA provisions negatively impacts labor unions' leverage in the collective bargaining process, and (3) suggest potential solutions to balance the negotiating dynamic in the airline industry while still serving the legislative purposes enumerated in the RLA.

II. RLA—*Bargaining with a Statutory Headwind v. NRLA*—Negotiating with a Legislative Tailwind

Most industries negotiate CBAs under the National Labor Relations Act (NLRA).[3] Congress specifically exempted railroad and airline agreements from the NLRA, which are instead negotiated under the RLA.[4] Although the NRLA and RLA diverge significantly in many areas, for the purpose of this comment it is important for the reader to understand only a few key differences between the collective bargaining processes required under the Acts.

A. *Collective Bargaining under the RLA - Low and Slow*

Congress enacted the RLA[5] in 1926 and in 1936 it amended the RLA to include the burgeoning airline industry.[6] The RLA provides a broad framework and a statutorily-required checklist for resolution of labor disputes and collective contract bargaining.[7] The general purposes of the RLA are enumerated in §151a. This comment focuses specifically on the RLA's requirements "to avoid interruption to *commerce* or to the operation of any carrier engaged therein," and "to provide for the *prompt and orderly* settlement of all disputes concerning rates of pay, rules or working conditions."[8] The RLA further requires the parties to "exert *every reasonable effort* to make and

3. *See* ABA Section of Labor & Emplomment Law, The Railway Labor Act 2 (Michael E. Abram et al. eds., 2d ed. 2005).
4. *Id.*
5. Ry. Labor Act, 45 U.S.C. § 151–88 (2000).
6. ABA Section of Labor & Employment Law, *supra* note 3.
7. *Id.*
8. 45 U.S.C. § 151a (emphasis added).

maintain agreements concerning rates of pay, rules, and working conditions."[9]

The RLA establishes a statutory procedure that the NMB and the parties must follow during bargaining.[10] No party can engage in self-help or vary from the status quo before the process is complete.[11] CBAs in the airline industry do not expire; they become amendable on a date agreed to by the parties and they are self-renewing on an annual basis unless either party gives written notice of intent to amend the contract at least thirty days before the amendable date.[12] Upon notice, the parties must engage in direct bargaining in an attempt to reach an agreement.[13] Under § 155, at any time during the process either or both parties may petition the NMB to provide mediation assistance in bargaining.[14] The NMB may also unilaterally implement this provision to prevent a "labor emergency."[15] The NMB then dockets the case and assigns a mediator(s) to assist in the negotiations.[16] The mediator has wide latitude with regard to mediation techniques and the duration of the mediation process.[17] If the NMB determines that the mediation is unlikely to result in an agreement, it will declare an impasse and subsequently proffer binding arbitration to the parties.[18] The parties are not statutorily required to accept the arbitration proffer and if either party rejects arbitration, the NMB will release the parties into a 30-day "cooling off" period.[19] Normally, the parties are free to engage in self-help or vary the status quo at the completion of the "cooling off" period. Under the RLA, the term "self-help" encompasses a continuum of economic leverage activities up to and including a general union strike or management lockout.[20] If the NMB determines that the dispute will "threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," it may recommend that the President create a Presidential Emergency Board ("PEB") to investigate the dispute and make a recommendation within thirty days of its creation.[21] PEB recommendations are not binding, and if either party does not accept the PEB recommendation another 30-day "cooling off" period ensues and the parties may subse-

9. *Id.* § 152 (emphasis added).
10. *See generally* ABA SECTION OF LABOR & EMPLOYMENT LAW, *supra* note 3, at 322–41(discussing the statutory negotiating process).
11. *See* 45 U.S.C. § 155.
12. ABA SECTION OF LABOR & EMPLOYMENT LAW, *supra* note 3, at 323.
13. *Id.* at 325.
14. 45 U.S.C. § 155.
15. *Id.*
16. ABA SECTION OF LABOR & EMPLOYMENT LAW, *supra* note 3, at 327.
17. *Id.* at 328–29.
18. *Id.* at 329.
19. *Id.* at 330.
20. *Id.* at 14–17.
21. 45 U.S.C. § 160 (2007).

quently engage in self-help.[22] The PEB recommendation marks the end of the statutorily required negotiation process.[23] In the railroad industry, Congress has occasionally passed legislation mandating binding arbitration or implementing a PEB recommendation, but Congress has rarely intervened in an airline industry dispute.[24]

B. *RLA Compared with the NRLA - The Blimp and the Turbojet*

Concerning the procedures for collective bargaining, there are several important differences between the NLRA and RLA. Under the RLA, unions may not engage in self-help while a CBA is in effect.[25] In contrast, under the NRLA, unions may engage in self-help at any time absent preclusive provisions in the CBA.[26] More importantly, CBAs negotiated under the NRLA generally have specific expiration dates, while RLA CBAs have amendable dates.[27] Parties governed by the NRLA may engage in self-help and vary the status quo anytime after "good faith" negotiations are at "impasse."[28] Finally, the NRLA does not mandate mediation or other government intervention in the negotiation process.

Historically, the duration of NRLA negotiations for amended agreements is significantly less than for airline industry negotiations under the RLA.[29] During the period from 1994 to 1999, 74% of all NRLA contract negotiations settled within one month of the expiration date, while only 11% of airline negotiations resulted in new agreements within one month of the amendable date.[30] In fact, from 1982 to 2002 more than 90% of all major airline negotiations failed to reach an agreement within one month of the amendable date.[31] Almost 50% of airline negotiations required NMB mediation and the average negotiation duration was more than nineteen months.[32] While less than 2% of those negotiations necessitated a PEB, the average duration of those negotiations exceeded three years.[33] Trends show more airline negotiations are going into the mediation phase and the average duration of those negotiations is increasing.[34] Prompt resolution of disputes is only one purpose of the RLA, but the statistics show that compared to the NRLA, the RLA does not achieve that

22. ABA SECTION OF LABOR & EMPLOYMENT LAW, *supra* note 3, at 340.
23. *Id.* at 337.
24. *Id.* at 340.
25. *Id.* at 14–15.
26. *Id.* at 15.
27. *Id.* at 15.
28. *See id.* at 15.
29. *See* Andrew von Nordendflycht & Thomas A. Kochan, *Labor Contract Negotiations in the Airline Industry*, MONTHLY LAB. REV., July 2003, at 21.
30. *Id.*
31. *Id.* at 22.
32. *Id.*
33. *Id.*
34. Id. at 27.

goal.[35] There were, however, only six strikes (3%) in the airline industry from 1982 to 2002,[36] so the RLA seems to satisfy its purpose of preventing negotiations-related disruption to the transportation system and commerce. The difference in success in these conflicting purposes of the RLA indicates a bias favoring preventing disruption to commerce at the expense of failing, in many airline cases, to resolve CBA disputes promptly.

Statistics show that this bias is already reflected in the NMB's execution of its statutory duties.[37] Besides the delay that is inherent in the NMB's implementation of the RLA requirements, recent court decisions have either created additional inequities or exacerbated the imbalance between labor and management power during negotiations. The courts' rulings will likely have considerable impact on the next round of airline industry negotiations.

III. RLA Judicial Decisions - Bargaining in a Holding Pattern

A. *The RLA's Midair Collision with the Bankruptcy Act*

Bankruptcy has always been part of the business life cycle for many airlines. Since industry deregulation in 1978 there have been more than 100 airline bankruptcies.[38] Some airlines have declared bankruptcy more than once in that period.[39] The situation became especially acute during and after 2002 when a post-9/11 industry downturn combined with weak industry economics forced many of the major air carriers into bankruptcy or near-bankruptcy.[40]

As part of the bankruptcy process, airline management may abrogate CBAs by rejecting them under § 1113.[41] Alternatively, the railroad industry is covered by a unique and contrary provision of the Bankruptcy Code, § 1167.[42] This provision specifically implicates the RLA and mandates that management cannot reject railroad labor contracts during the bankruptcy process without following the specific provisions delineated in the RLA.[43] The net effect of this provision is that it obligates both management and labor to maintain the contractual status quo during bankruptcy proceedings. Consequently, railroad management cannot use Chapter Eleven to reject its labor

35. *Id.* at 21–22.
36. *Id.* at 22.
37. *Id.* at 21–22.
38. Air Transp. Ass'n, Inc., U.S. Airline Bankruptcies & Service Cessations, http://www.airlines.org/economics/specialtopics/USAirlineBankruptcies.htm (last visited Jan. 25, 2008).
39. *Id.*
40. *Id.*
41. Bankruptcy Code, 11 U.S.C. § 1113 (2000).
42. Bankruptcy Code, 11 U.S.C. § 1167 (2000).
43. *See id.*

contracts unilaterally as part of a financial reorganization.[44] Since this is a railroad specific exception, the courts have held that § 1167 does not apply to airlines (even though it is the only other industry covered by the RLA). Therefore, airlines may reject their labor contracts in bankruptcy by following the provisions prescribed in § 1113 of the Bankruptcy Code.[45] If pre-rejection negotiation between the union and management fails, the court will approve the rejection of a labor contract under § 1113(c) if: (1) the company makes a proposal necessary to permit a fair and equitable reorganization, (2) the union refuses the proposal without "good cause," and (3) the "balance of the equities favor the rejection."[46] This has been a fairly easy standard for airline management to meet because the court does not analyze "good cause" from the union's perspective but instead defers to the company's interest in insuring the success of reorganization by reducing its labor costs.[47] Management merely needs to show that the changes are necessary for reorganization; the presumption is with management and the legal burden placed on labor to avoid rejection is severe.[48]

In 1984, the Supreme Court affirmed in *NLRB v. Bildisco*[49] that a company could reject its CBAs, just as it could any executory contract, without prospective bargaining with the union.[50] Congress subsequently enacted 11 U.S.C. § 1113. This provision at least obligated some negotiations with the union before a bankruptcy judge could approve modification or rejection of the CBA.[51] The courts have applied up to nine factors when determining whether to allow rejection of a CBA.[52] The factors are based on the three provisions found in § 1113(c) discussed above. Although § 1113(c) does require some bargaining, the recent experience in airline bankruptcies has demonstrated that management will almost always be able to meet its burden and get court approval to reject their labor agreements.[53] The Bankruptcy Code has also established a strict and swift timeline for pre-rejection negotiations that ultimately allows management to move forward with rejection absent a timely agreement with the union.[54] Most recently in the cases of *Northwest Airlines*, *Mesaba Airlines*, and *Comair*, unions have challenged managements' attempts to reject con-

44. ABA SECTION OF LABOR & EMPLOYMENT LAW, *supra* note 3, at 498.

45. *See In re* Delta Air Lines, Inc., 359 B.R. 491, 498 (Bankr. S.D.N.Y. 2007); *In re* Air Florida System, Inc., 48 B.R. 440, 443 (Bankr. D. Fla. 1985).

46. 11 U.S.C. §1113.

47. *See In re* Salt Creek Freightways, 47 B.R. 835, 840 (Bankr. D. Wyo. 1985).

48. *Id.*

49. NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984).

50. *Id.* at 489.

51. ABA SECTION OF LABOR & EMPLOYMENT LAW, *supra* note 3, at 500; 11 U.S.C. § 1113.

52. *In re* Nat'l Forge Co., 289 B.R. 803, 809–10 (Bankr. W.D. Pa. 2003).

53. *See In re* Delta Air Lines, Inc., 359 B.R. 491, 509 (Bankr. S.D.N.Y. 2007).

54. 11 U.S.C. § 1113.

tracts.[55] In each case, the courts have held that if management follows the procedures in § 1113(c), the burden shifts to labor to overcome a presumption that the carrier acted in "good faith" negotiating a "necessary" pre-rejection proposal and a further presumption the union acted in "bad faith" by refusing the proposal without "good cause."[56] Because these presumptions are weighed against the economic necessity for financial reorganization and not what the union deems is in the best interest of its membership, management almost uniformly succeeds in its bid to reject contracts or to get unions to concede in lieu of a complete rejection of the CBA.[57]

Concerning the duty to maintain the status quo, the RLA and the Bankruptcy Code are in philosophical conflict. The RLA encompasses a comprehensive duty to maintain the status quo until the statutory process is complete.[58] Presumably this avoids unnecessary disruption to the transportation system. Conversely, the Bankruptcy Code allows airline management to change the status quo unilaterally, on a short timeline, as part of the reorganization process.

B. *Right to Strike During Bankruptcy - A Judicially Ordered "Go-around"*

During the latest round of airline bankruptcy proceedings several unions threatened with rejections of their CBAs sought to engage in self-help. The legal theory was that since management was not maintaining the status quo as required under the RLA, then the union no longer had a reciprocal duty and could engage in self-help.[59] With the exception of one decision involving the NWA flight attendants that was subsequently overturned on appeal,[60] the courts have uniformly enjoined labor self-help subsequent to bankruptcy rejection of a CBA.[61]

Because the anti-injunction provisions of the Norris-LaGuardia Act prevent the federal courts from intervening in non-violent labor disputes,[62] the courts have sought to enjoin self-help activity under the

55. *See In re* Nw. Airlines Corp., 346 B.R. 307, 315 (Bankr. S.D.N.Y. 2006); *In re* Mesaba Aviation, Inc., 350 B.R. 112, 117 (Bankr. D. Minn. 2006); *In re* Delta Air Lines, Inc., 359 B.R. at 495 (Bankr. D.N.Y. 2007).

56. *See In re* Delta, 359 B.R. at 494.

57. *See In re* Nw. Airlines Corp., 346 B.R. at 307; *In re* Mesaba Aviation, Inc., 350 B.R. at 138; *In re* Delta Air Lines, Inc., 359 B.R. at 495.

58. Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142, 151–52 (1969).

59. *See In re* Nw. Airlines Corp., 346 B.R. at 307; *In re* Mesaba Aviation, Inc., 350 B.R. at 128; *In re* Delta Air Lines, Inc., 359 B.R. at 495.

60. *In re* Nw. Airlines Corp., 346 B.R. 333, 345–46 (Bankr. S.D.N.Y. 2006), *rev'd*, 349 B.R. 338 (Bankr. S.D.N.Y. 2006), *aff'd*, 483 F.3d 160 (2d Cir. 2007).

61. *See In re* Nw. Airlines Corp., 346 B.R. at 307; *In re* Mesaba Aviation, Inc., 350 B.R. at 138; *In re* Delta Air Lines, Inc., 359 B.R. at 495.

62. Norris-LaGuardia Act (NLGA), 29 U.S.C.A. §§ 101-110 (West 1998).

auspices of the RLA.[63] Although each court decided to intervene and enjoin post-rejection self-help, the decisions were based on significantly divergent reasoning. The *Northwest* court held that the CBA no longer existed after rejection and that the union and management were compelled to negotiate a "new" agreement following the complete procedure outlined in the RLA.[64] The *Delta* court held that rejection simply meant that management did not need to perform under the contract and that the union was still bound to maintain the status quo under the current contract until released by the NMB.[65] In *Mesaba* and *Delta*, the courts seem to have applied a "bad faith" test to the decision to enjoin.[66] Absent a showing of "bad faith" on the part of management by making more than the minimum changes required for restructuring, the courts would enjoin self-help.[67] These decisions seem to leave the door open for the possible use of self-help after contract rejection if a union can prove that management made changes to the status quo that were not reasonably necessary. The union would have to overcome the presumption that management rejected the contract in good faith while the union refused to accept the changes without good cause.[68] This has been a difficult trial burden.

The courts have largely remedied the conflict between the Bankruptcy Code and the RLA in favor of management. The courts have allowed management to use Chapter Eleven bankruptcy reorganization as a tool for what amounts to unilateral changes to or complete rejection of CBAs. After giving management relief from the status quo by applying the contrary bankruptcy code, the courts have then flip-flopped and used the provisions of the RLA to enforce the status quo requirements on the affected labor unions.[69] Basically, the courts have allowed management to operate outside the auspices of the RLA during bankruptcy reorganization while requiring that the unions maneuver within the RLA during the same period. The effect of bankruptcy and management's ability to reject CBAs as part of the process has been catastrophic for airline labor agreements.[70] Labor has largely been left with no choice but to negotiate extremely concessionary agreements in the face of the potentially worse option of whole-

63. *See In re* Nw. Airlines Corp., 346 B.R. at 307; *In re* Mesaba Aviation, Inc., 350 B.R. at 127–30; *In re* Delta Air Lines, Inc., 359 B.R. at 495 (where the courts enjoin under the RLA to avoid conflict with Norris-LaGuardia).

64. *In re* Nw. Airlines Corp., 483 F.3d 160, 173–74 (2d Cir. 2007).

65. *In re* Delta Air Lines, Inc., 359 B.R. 491, 505 (Bankr. S.D.N.Y. 2007).

66. *See In re* Delta Air Lines, Inc., 359 B.R. at 505; *In re* Mesaba Aviation, Inc., 350 B.R. at 138–39.

67. *See id.*

68. *In re* Mesaba Aviation, Inc., 350 B.R. at 138–39.

69. *See In re* Delta Air Lines, Inc., 359 B.R. at 505; *In re* Mesaba Aviation, Inc., 350 B.R. at 138–39.

70. *See* ECLAT CONSULTING INC., AIRLINE CONCESSIONS TIMELINE 2, *available at* http://www.eclatconsulting.com/im_pdf/airline_labor_concessions_summary.pdf (last visited on Jan. 25, 2008).

sale rejection of the CBA under § 1113(c). The mere threat of bankruptcy proceedings is generally enough to get labor unions to agree to concessionary deals[71] because the courts have demonstrated that they typically allow management to reject labor contracts without any counter-balancing threat of labor self-help. The unions were compelled to minimize the damage and live to fight another day.

Since 2002, nearly all major carriers with the exception of Southwest Airlines have used bankruptcy or the threat of bankruptcy to extort hugely concessionary contracts from union leadership.[72] For example, when American Airlines told its unions that it would declare bankruptcy on a specific date absent membership assent to highly concessionary changes to the CBA, all three unions acquiesced rather than face the possibility of management rejection of the CBAs as a result of § 1113(c).[73] US Airways, Delta, United, Northwest, American, and Continental (five of the six largest carriers in the country) were able to leverage labor concessions worth billions of dollars individually, and tens of billions industry-wide. Management essentially avoided the last round of industry RLA negotiations by replacing them with the unfettered and management-friendly bankruptcy process.[74]

The recent wave of bankruptcies and near-bankruptcies has set up a unique dynamic for the next round of negotiations. During the next three years almost all of the CBAs between the major carriers and their unions will become amendable.[75] This does not account for any regional carriers or the railroads, which also negotiate under the RLA. Some carriers will have multiple contracts with each of their unions amendable on the same day. American Airlines, for example, is in negotiations with all three unions on the property at the same time, because all of the CBAs at American were amendable as of May 1, 2008.[76]

In addition to the sheer number of contracts that will be in the negotiation phase, expectations are that with few exceptions, the airline labor unions are likely to tailor their bargaining proposals to recoup the concessions of the past few years and seek to make real improvements to their contracts, particularly with regard to compensation and pensions.[77] The airlines themselves, of course, will be attempting to

71. *Id.* at 1–2.

72. *Id.*

73. CBC News.ca, *Flight Attendants Accept Concessions, American Airlines Avoids Bankruptcy*, Apr. 16, 2003, http://www.cbc.ca/money/story/2003/04/16/amerair030416.html#skip300x250.

74. ECLAT CONSULTING INC., *supra* note 70, at 1.

75. ECLAT CONSULTING INC., NETWORK AND LOW COST CARRIER LABOR CONTRACT AMENDABLE DATES, *available at* http://www.eclatconsulting.com/im_pdf/contract_amendable_dates_605.pdf (last visited on Jan. 25, 2008).

76. *Id.*

77. *See, e.g.*, Allied Pilots Ass'n, Negotiations Overview, *supra* note 1.

maintain the cost savings they were able to achieve during bankruptcy negotiations. The airline industry has largely recovered from the post-9/11 financial crisis that led to bankruptcies, even considering the significant increase in fuel cost.[78] With the industry in a relatively healthy financial situation, the bulk of negotiations will be under the RLA process and should be quite contentious because there will be a large chasm between the goals and initial negotiating positions of the parties.

The RLA requires that the parties maintain the status quo during negotiations. For this round of bargaining, based on the current financial and labor dynamics, airline management will assume that new CBAs will result in significantly higher labor costs than the contracts they negotiated during bankruptcy. The American Airlines pilots, represented by the Allied Pilots Association, for example, recently proposed pay increases in excess of 50% that would restore their pay rates to the 1992 rates adjusted for inflation.[79] Assuming other unions also seek to restore their pay rates to pre-bankruptcy levels, it should be apparent that airline management will largely be happy with maintaining the status quo for as long as possible. The RLA is structurally designed to prefer the status quo and, because the RLA leads to extended negotiations, the process is again weighted in management's favor. Because the current financial climate and bankruptcy-created contracts result in high union expectation for improvements, it is likely that management will dig in and extend negotiations to maintain the status quo as long as possible or until the industry financial dynamic shifts towards their favor. Since most union contracts require membership ratification, it is safe to assume that the membership will require significant improvements in new CBAs to gain ratification. Management used bankruptcy to shift the negotiating dynamic to their favor during the last round and the union does not have any non-RLA alternative to counter-balance. Consequently, playing out the entire RLA process is the only likely scenario for this round of negotiations. This is problematic for at least two reasons.

First, the NMB is ill-prepared to take scores of negotiations through the mediation process. The mediation division of the NMB employs only twelve mediators, and more than one mediator is often assigned to each case.[80] These twelve mediators must cover all negotiations in

78. John Heimlich, 2008 Outlook: "A Global Perspective," http://www.airlines.org/economics/review_and_outlook/ATA2008EconOutlookOpEd.htm (last visited Mar. 1, 2008).

79. ALLIED PILOTS ASS'N, UNDERSTANDING THE APA PAY RESTORATION PROPOSAL 2 (2007), http://www.apanegotiations.com/LinkClick.aspx?fileticket=JRh7r3uVt80%3d&tabid=65&mid=448.

80. Joshua M. Javits, Arbitrator & Mediator, Nat'l Acad. Of Arbitrators 2007 Annual Meeting, Airline Mediation: Becalming Brewing Battles 5 (May 25, 2007), http://www.dispute-resolution.biz/pdf/AIRLINE_MEDIATION_2007_NAA_Mtg.pdf.

the railroad industry as well as airline industry.[81] The NMB budget has been stagnant for many years and does not allow for quick expansion.[82] The dearth of resources at the NMB is likely to result in delays for any negotiations which require mediation services.

Second, since the concessionary contracts from the last round are the status quo and contracts with significant improvements will be necessary for union ratification, there is little or no overlap in negotiating positions. The use of self-help, authorized near the end of the RLA process is the only real tool labor or management will have to close the chasm between negotiating positions. Since legal self-help cannot happen until after mediation and a proffer of binding arbitration, negotiations are more likely to extend deep into the RLA process during this round. Once again, this works against the party attempting to change the status quo, in this case, labor.

Recent court decisions upholding the ability of management to reject CBAs during bankruptcy and further decisions limiting or denying labor unions use of self-help to counter the unilateral changes to the status quo have led directly to extremely concessionary contracts in the airline industry over the last few years. This situation has created a dynamic that will tax the NMB infrastructure and make it less likely that RLA contract disputes will be solved in a timely manner as mandated by the legislature.[83] The NMB's inherent shortcomings will further skew the negotiating balance in management's favor.

C. *NMB Mediation - All Drag and No Thrust*

The RLA outlines specific statutory duties for the parties and the NMB during the collective bargaining process.[84] Specifically, § 152 of the RLA requires the parties to "exert every reasonable effort to make and maintain agreements. . .and to settle all disputes. . .in order to avoid disruption to commerce. . .."[85] The courts have generally treated this directive as the primary statutory provision in the RLA.[86] This language is a word for word repeat of one of the five general purpose statements specifically delineated in § 151a of the RLA.[87] Another primary purpose enumerated in the RLA is "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions."[88] Recent NMB implementation and judicial decisions demonstrate an apparent disregard for this legislative provision. By including such a statement in the RLA, Congress

81. *Id.*
82. *Id.*
83. *Id.* at 4–12.
84. Ry. Labor Act, 45 U.S.C. §§ 152, 155 (2000).
85. *Id.* § 152.
86. *See* Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 148–54 (1969).
87. 45 U.S.C. § 151a.
88. *Id.*

obviously intended for the NMB to execute the terms of the RLA such that labor disputes are settled promptly.[89] Although the RLA does not indicate in its language that any one of the specific purpose provisos takes precedence over another, close examination of the negotiation statistics presented above and judicial history of cases brought under the RLA indicates an executive and judicial discount for the prompt settlement provision.[90]

The NMB's execution of the mediation process favors a party seeking to maintain the status quo.[91] In general, this favors management since labor unions almost always seek improvements in the contract. Also, the last round of concessionary contracts will likely ensure that labor unions, trying to regain lost ground, will seek significant and costly improvements to their CBAs in the near future.

The RLA does not require federal mediation during negotiations, but if the parties do not reach an agreement they will either end up in mediation by request or by NMB compulsion before being released to exercise self-help.[92] RLA § 155 outlines the mediation procedure.[93] The NMB will docket a dispute for mediation on request from one or both parties or if at any time it finds a labor emergency exists.[94] The NMB will continue mediation efforts until such a time as it proffers binding arbitration.[95] The RLA specifies that the NMB will proffer binding arbitration if it determines "efforts to bring about an amicable settlement through mediation shall be unsuccessful."[96] The RLA does not contain any further guidance for the methods or a timeline for the mediation process. Consequently, there have been several court cases trying to define the breadth of the NMB's authority and the timing of the mediation process.[97]

Federal courts have generally held that the NMB has complete control of the statutory mediation process.[98] The courts have been loath to question the NMB's judgment in mediation cases and will defer to its judgment absent a finding of "patent official bad faith."[99] In *Teamsters v. NMB*, the company and the train dispatchers had been in RLA § 155 mediation for more than two years without reaching an amicable agreement.[100] Although the trial court ordered the NMB to terminate mediation and offer binding arbitration, the appeals court

89. *See* ABA SECTION OF LABOR & EMPLOYMENT LAW, *supra* note 3, at 61.
90. *See* discussion *supra.*
91. *See Detroit & Toledo Shore R.R.*, 396 U.S. at 148–50.
92. 45 U.S.C. § 155.
93. *Id.*
94. *Id.*
95. See *id.*
96. *Id.*
97. *See* discussion *infra.*
98. *See, e.g.*, Local 808, Bldg. Maint., Serv. & R.R. Workers v. Nat'l Mediation Bd., 888 F.2d 1428, 1429–30 (D.C. Cir. 1989).
99. *Id.* at 1430.
100. *Id.*

reversed, holding that the court is in no position to second-guess the NMB, that the duration of the mediation was not unduly long, and that the NMB's decision was not "patently unreasonable."[101] The court also noted that no court had ever ordered the termination of mediation and that several courts had refused to do so.[102] In *Machinists v. NMB*, a railroad union sued the NMB because it refused to release the parties from mediation and allow the union to exercise self-help.[103] The parties engaged in direct negotiations for ten months, followed by ten months of NMB-mediated discussions.[104] Even after all parties agreed that mediation had failed and they had reached an impasse, the NMB insisted on intensified mediation for an additional four months.[105] Once again, the court did not intervene, holding the NMB action was not "patently arbitrary" and that the mediation period was not "patently unreasonable."[106] In *Dispatchers v. Ft. Smith Railroad*, it was management that wanted to be released from mediation because it felt the proceedings had reached an impasse and it questioned the techniques (such as changes in venue) that the NMB employed.[107] The court ordered the railroad to return to the negotiating table, holding that the NMB had the authority to experiment with any mediation device it thought might lead to an agreement as long as the method chosen did not offend other laws.[108] Each of these decisions demonstrates the deference the court gives to the NMB in determining the duration and the methods used in the arbitration process. The NMB continues to demonstrate, with court approval, that concern over disruption to the transportation system trumps the apparently conflicting interest of promptly settling disputes.

More recently, the court has sided with the NMB in determining that the complete lack of mediation is a legitimate mediation technique.[109] In *Grand Trunk v. NMB*, the parties failed to come to agreement after direct and mediated discussions.[110] The NMB determined that further negotiations would be fruitless because neither party was willing to adjust its position.[111] (Author's note: Isn't this exactly what the RLA defines as the criteria to offer binding arbitration when it

101. *See generally id.*
102. *Id.* at 1433.
103. Int'l Ass'n of Machinists v. Nat'l Mediation Bd., 930 F.2d 45, 46 (D.C. Cir. 1991).
104. *Id.* at 47.
105. *Id.*
106. *Id.* at 48.
107. Am. Train Dispatchers Dep't of the Int'l Bhd. of Locomotive Eng'rs v. Fort Smith R.R., 121 F.3d 267, 269 (7th Cir. 1997).
108. *Id.* at 268.
109. Grand Trunk W. R.R. v. Bhd. of Maint. of Way Employees Div., 497 F.3d 568 (6th Cir. 2007).
110. *Id.* at 570.
111. *Id.*

says in § 155 that arbitration should be proffered when mediation efforts fail to bring about an amicable settlement?) Instead, the NMB put the negotiations into an indefinite recess, requiring the parties to significantly modify their bargaining positions before it would agree to schedule any future bargaining sessions.[112] Once again, the *Grand Trunk* court sided with the NMB (and effectively with the party seeking to maintain the status quo) legitimizing indefinite recess as a mediation technique.[113]

The NMB has now included a discussion of "indefinite recess" as a mediation technique on the frequently-asked questions section of its official web site.[114] The NMB also continues to use the technique frequently in railroad negotiations, and has demonstrated a willingness to apply it to the airline industry as well. The NMB recessed the recent negotiations between the United Parcel Service and its pilots for more than four months before scheduling additional mediated sessions.[115]

The net effect of the courts' deference to the NMB's mediation decisions is ever increasing durations for collective bargaining. The NMB's prerogative to avoid declaring an impasse and subsequently releasing the parties to self-help appears to be contrary to the black letter of the statute. But the courts have consistently upheld the NMB's position, signaling that there is no requirement for the NMB to balance its execution to ensure all purposes of the RLA are met. Instead the protection of commerce seems to supersede the requirement for prompt resolution of disputes.

This flies in the face of the parallel bargaining process under the National Labor Relations Act, which balances the right to efficiently resolve disputes with concerns regarding economic disruption.[116] Automobile manufacturer/union negotiations often result in self-help and new contracts are negotiated in weeks. Yet the RLA/NMB process results in negotiations that often take years to complete[117] (even though a break in the production of automobiles arguably has a much greater impact on the economy than the disruption to the operations of one of the major airlines). Northwest Airlines was shut down by a pilots strike for more than two weeks in the late 90s as was American Airlines by a flight attendant strike in the early 90s.[118] Other airlines

112. *Id.*

113. *Id.* at 572–73.

114. Nat'l Mediation Bd., Frequently-Asked Questions: Mediation, http://www.nmb.gov/mediation/faq-mediation.html (last visited on Jan. 25, 2008).

115. Ed McKenna, *UPS, Pilots Talks in Recess*, AIR CARGO WORLD ONLINE, http://www.aircargoworld.com/break_news/07012005b.htm (last visited Mar. 1, 2008).

116. Nat'l Labor Relations Act, 29 U.S.C. §§ 151–69 (2000).

117. *See* Nordenflycht & Kochan, *supra* note 28, at 18, 21–22.

118. NAT'L MEDIATION BD., STRIKE REPORT: U.S. AIRLINES UNDER THE RAILWAY LABOR ACT, http://www.nmb.gov/publicinfo/airline-strikes.html (last visited Mar. 1, 2008).

picked up the capacity lost by the striking carrier and neither strike had an effect on the economy that should justify the NMB delaying bargaining agreements for years.

D. *Judicial Bifurcation of the RLA Status Quo Standard—Grounding Labor While Management Flies High*

Court interpretations have resulted in a judicial inconsistency regarding the parties' duty to maintain the status quo during negotiations.[119] The RLA requires that the bargaining parties maintain the status quo until they reach an agreement or until the NMB releases them into self-help at the exhaustion of the statutory bargaining process.[120] In *Shoreline*, the court found the status quo requirement serves ". . .to prevent a union from striking and management from doing anything that would justify a strike."[121] While the status quo requirement certainly applies to the terms of the current CBA, the courts have also determined that the requirement applies even more broadly to the "objective working conditions and practices . . .which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute."[122]

When determining whether a party has or is violating the status quo, the courts first must determine whether the action constitutes a major or a minor dispute.[123] Minor disputes are not considered violations of the status quo and are subject to the RLA arbitration provisions.[124] Consequently, minor disputes fall outside the jurisdiction of the courts.[125] Violations of the status quo that rise to the level of a major dispute do come under the jurisdiction of the court and the party's actions that give rise to the dispute may be enjoined.[126] Although the Norris-LaGuardia Act is implicated and generally precludes courts from issuing injunctions in pure labor disputes, the Supreme Court has determined that the courts do have jurisdiction to enforce the specific RLA provisions.[127]

When determining whether management actions violate the status quo, the courts base their analysis on two standards delineated in two 1989 Supreme Court cases decided within days of one another. First, changes that are not implicated specifically in the current CBA provisions and that are the result of management prerogative decisions are not considered changes to the status quo and do not engage any duty

119. *See* discussion *infra.*
120. Ry. Labor Act, 45 U.S.C., §§ 151, 155 (2000).
121. *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 296 U.S. 142, 150 (1969).
122. *Id.* at 152–53.
123. *See* Conrail v. Ry. Labor Executives' Ass'n, 491 U.S. 299, 300 (1989).
124. *Id.* at 305–06.
125. *Id.* at 303.
126. *Id.*
127. Bhd. of R.R. Trainmen v. Chi., River & Ind. R.R., 353 U.S. 30, 40–41 (1957).

https://scholarship.law.tamu.edu/txwes-lr/vol15/iss1/7
DOI: 10.37419/TWLR.V15.I1.6

specified in the RLA.[128] Second, in *Conrail* the court found that if management can show that any changes can "arguably be justified" by express or implied provisions in the current agreement then that change is a minor dispute subject to arbitration, not a major dispute subject to injunction or other court action.[129] The Supreme Court decision in *Conrail* specifically states that if a disputed action of either party can arguably be justified by the agreement, it is not a status quo violation.[130] More recent case law appears to apply this standard only to management actions while applying a different standard to union actions.[131]

Specifically, the courts have generally held that if a union engages in economic self-help prior to a release by the NMB then it has violated the status quo.[132] Although a strike prior to release would obviously violate the status quo, courts have held that any activity that has the economic consequence of a strike is a violation.[133] The court looks at the potential or actual consequences of the action such as economic harm in the form of lost revenue or diminished goodwill.[134] The management and union court standard for maintaining the status quo is therefore fundamentally different. There is no harm test for management. If management's action can arguably be justified by a provision in the contract it is a not a status quo violation even if it causes harm to the union or a member. A union, on the other hand, violates the status quo if there is any economic harm to the carrier, regardless of whether that action could arguably be justified by a contract provision.

In a dispute during contentious contract negotiations between Delta Airlines and its pilots, a decision by the 11th Circuit further widened the chasm between the disparate status quo standards. In *Delta Airlines v. Air Line Pilots Association* ("ALPA"),[135] Delta asked the court to order the union to stop its pilots from declining to accept "volunteer overtime" flying.[136] ALPA contended that accepting overtime flying was optional and voluntary under the contract and applying the "arguably justifiable" standard the dispute was minor and subject to arbitration, not the jurisdiction of the court.[137] ALPA argued further that the union had no role in persuading the pilots to decline overtime and, in fact, complied with company requests to en-

128. Pittsburgh & Lake Erie R.R. v. Ry. Labor Executives' Ass'n, 491 U.S. 490, 510 (1989).
129. Conrail, 491 U.S. at 306.
130. *Id.*
131. *See* Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc., 802 F.2d 886 (7th Cir. 1986).
132. *Id.* at 906–07.
133. *Id.*
134. *Id.* at 906.
135. Delta Air Lines, Inc. v. Air Line Pilots Ass'n, 238 F.3d 1300 (11th Cir. 2001).
136. *Id.* at 1301–03.
137. *Id.* at 1307.

courage the pilots to fly.[138] In an onerous ruling, the circuit court reversed the district court and ordered the judge to issue an injunction in Delta's favor.[139] The appeals court reasoned that since Delta had relied on pilots flying overtime to fill its schedule, the pilots' refusal to fly overtime caused Delta economic harm and consequently represented a change to the status quo.[140] The court came to this conclusion even though it acknowledged that the contract specifically stated that overtime was to be flown at the pilots' option and there was little evidence that the union organized or supported the pilots' decision not to volunteer for overtime.[141]

This case particularly illustrates the different standards the court applies to labor and management when applying the status quo tests. Presumably, the company and the union agreed to this provision when they negotiated the contract. If the company had wanted the overtime flying provision to be mandatory it could have bargained for it. If management did bargain for mandatory overtime, the union obviously prevailed and presumably gave up something else in bargaining to keep the provision voluntary. It is interesting that under the "arguably justifiable" standard, if management had stopped offering overtime flying to pilots then that change would constitute a minor dispute, not a status quo violation. This seems to be an obvious double standard that also gave Delta a second bite at the apple to get what it was unable to get in the previous bargaining process. Once again, this court ruling serves to avoid disruption to commerce at the expense of a union's ability to use its legitimate contract leverage to resolve a dispute promptly.

IV. Potential Solutions - Increasing Labor's Lift and Diminishing Negotiation Drag

The airline industry collective bargaining system as it is now implemented is inefficient and does not serve all the purposes outlined in the RLA. It sets up a negotiating dynamic wherein a party satisfied with the status quo agreement will use the system to delay negotiations rather than to seek out a potential agreement that will meet the needs of both parties. There are several possible solutions to correcting the imbalance that now exists between management and labor in the RLA collective bargaining process. The solutions could be legislative, judicial, or executive. Since the courts have been so consistent in their decisions and the doctrine of *stare decisis* normally precludes the courts from ruling against precedent, it is unlikely that the courts will serve as the impetus for such change.

138. *Id.* at 1309–10.
139. *Id.* at 1311.
140. *See id.* at 1310.
141. *See id.*

Legislatively, Congress could revise the RLA to correct the imbalance and make the negotiating process more efficient. It could certainly put the aviation industry under the NRLA and bring aviation collective bargaining immediately in line with most other industries. Absent a willingness to do that, Congress could modify the RLA to make airline contracts expire on their amendable date. This would force the parties to negotiate new agreements before expiration and set an immediate timeline for resolution. Congress could define impasse and direct the NMB to release the parties when impasse is reached. This would keep the NMB from using techniques, such as "indefinite recess," to keep parties involved in unproductive negotiations, while maintaining the positive aspects of mediation assistance. Congress could establish specific timelines for the various phases of the bargaining process. For example, direct contract talks could begin 180 days before the amendable date; absent an agreement, mediation would begin 120 days prior; at thirty days prior "cooling off" would commence; and at the amendable date the parties would be authorized to use self-help. This would add certainty to the negotiating process, helping the parties, and the NMB design a negotiating plan likely to result in a timelier and more satisfactory outcome. It would also serve as an impetus to negotiate vigorously and in good faith to reach agreement before self-help occurs with all its potentially negative consequences. To stabilize and balance the effect of bankruptcy-induced CBA rejections, Congress could make § 1167 apply to airlines as well as railroads. This would mandate use of the new and improved RLA process before management could reject a CBA. The timelines could be shortened to better fit the provisions of the Bankruptcy Code. Congress could also amend § 1113 of the Bankruptcy Code to eliminate the presumptions against unions and balance the burdens of bankruptcy between management and unions.[142] Any or all of these legislative solutions could add stability and a certainty to collective bargaining in the airline industry. This would likely create a more predictable and positive negotiating environment. Instead of depending on the system to protect positions, the parties would be forced to negotiate productively or face the uncertain consequences of self-help.

At the executive level, the NMB could unilaterally implement many of the suggested legislative solutions because the courts have held that the NMB has nearly absolute control over the mediation process. The NMB could encourage the parties to write bargaining timelines into their agreements and agree to enforce them. The NMB could define impasse and release parties to self-help thereby encouraging productive bargaining before that inevitability. The NMB could certainly mediate on a timeline similar to the legislative example above. And finally, the NMB could concentrate on creative mediation efforts to

142. *See, e.g.*, Protecting Employees and Retirees in Business Bankruptcies Act, H.R. 3652, 110th Cong. § 8 (2007).

encourage meaningful bargaining, rather than on techniques designed to delay.

A two-pronged solution—formulated in the short-term on unilateral improvements to the NMB's execution of current RLA provisions and in the long-term on legislative effort to overhaul the RLA with a more stable and certain statutory negotiating process—would ultimately better serve labor, management, and the industry as a whole. Such a solution would be much more likely to serve the purposes that are enumerated in the RLA.

V. Conclusion from a Union Perspective - Avoiding Hard Landings

An executive and judicial bias in the implementation of an outdated and ineffective RLA has tilted the balance in the airline industry collective bargaining process toward management. In recent proceedings, the NMB has practiced a form of mediation designed more to delay progress than to achieve agreements. The courts' bias toward avoiding potential disruptions to commerce at the expense of the prompt resolution of disputes is demonstrated by decisions that (1) allow management a virtually unfettered ability to reject CBAs in bankruptcy; (2) deny unions the ability to use strikes or other self-help strategies to defend against bankruptcy contract rejections; (3) validate the NMB decisions to use "indefinite recess" and other questionable mediation techniques to delay self-help instead of encouraging productive bargaining; and (4) create a bifurcated standard that disadvantages labor unions in status quo disputes.

Restoring balance to the RLA negotiating process would have the added effect of increasing stability and certainty in airline labor relations. The NMB should deal with the problem in the short term by unilaterally adding timelines and creative mediation techniques into the process while minimizing delay tactics and encouraging more productive bargaining. The Legislature should overhaul the RLA to bring it more in line with NRLA by replacing amendable dates with expiration dates, making the mediation process more objective by defining impasse and establishing timelines, and protecting CBAs from unilateral rejection without recourse during bankruptcy proceedings. A thoughtful rebalancing of statutory negotiation and mediation procedures would ultimately better serve the unions, management, the airline industry, and our mobile society.