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Implementation: policy becomes reality.

Walter K. Steiner
University of Massachusetts Amherst

IMPLEMENTATION: POLICY BECOMES REALITY

A Thesis Presented

By

Walter K. Steiner

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Approved as to style and content by:

Prof. Harvey L. Friedman, Chairperson of Committee

Prof. Jeffrey L. Sedgwick, Member

Prof. David Bloodsworth, Member

Prof. Glen Gordon, Chairman
Department of Political Science

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While many facts, ideas and opinions were collected from many sources, the opinions and conclusions expressed in this paper are solely mine and, as such, do not in any way represent the official policies or positions of the United States Department of Labor or the University of Massachusetts.

INTRODUCTION

The purpose of this paper is to study the implementation of the legislatively-mandated labor protection provision incorporated in the Airline Deregulation Act of 1978. The case study contained herein describes and elucidates the implementation of the Airline Employee Protection Program at the U.S. Department of Labor.

Implementation as an organizational and administrative phenomenon is examined. This includes a review of several attempts to bring order and perspective to bear upon the subject. While the purpose of this paper is to study a case in the labor field, it is with the express a priori intent to critically analyze the application of administrative theory to a first-hand situation. In this way, this case study will be different from previous studies of implementation where researchers were required to utilize secondary and tertiary documentation. In this case, the author was intricately involved in the implementation process on a day-to-day basis. It is anticipated that this close observation and intimate involvement will lend vitality to this enterprise and enhance the explication of the implementation phenomenon.

The case study involves three segments: a canvas of the relevant legislative history; assessment of specific Congressional intent on certain highlighted issues; and, an examination of the development of the program machinery for the delivery of services. Individual problems that are examined include: (1) the gaining of a consensus on issues; (2) the difficulty of developing regulations when no accompanying appropriations have been enacted and when no specific

enforcement powers are contained in the legislation; (3) the inherent conflict involved when new legislation has been passed that contains certain provisions distinctly distasteful to and publicly disavowed by the President; and, (4) the lack of clear-cut Departmental leadership compounded with competition between agencies in overlapping areas. These problems were the most pervasive and were further compounded by inter-Departmental complexities that were unique to the legislation, e.g., requiring the Civil Aeronautics Board (CAB) to make a determination that an airline had suffered a sufficiently large "qualifying dislocation" before benefit payments could be made by the Secretary of Labor to those laid off. In addition, the Act required consultations between the Secretary of Labor and the Secretary of Transportation on certain aspects of implementation.

The last chapter reviews the course of development of the program policies and, in addition, attempts to generate feasible forecasts regarding the success of the implementation effort for Airlines and other legislation. Recommendations of specific courses of action that would facilitate the implementation of future programs in the employee protections area are made. A brief summation of the findings, conclusions and recommendations complete the study.

In the spring of 1978, the author was detailed for a time from his position as a program analyst in the Office of Planning, Evaluation and Systems (OPE&S), Labor-Management Services Administration, U.S. Department of Labor in Washington, D.C. to the Office of Labor Management Relations Services (LMRS), another component of the same Agency. His duties involved participating in the establisnment of the

Redwood Employee Protection Program (REPP) which had been signed into law by the President on March 27, 1978, (P.L. 95-250). Following some initial success in assisting the professional industrial relations specialists establish this program, the author was assigned on 1 July 1978 to LMRS for the purpose of assisting in the implementation of a portion of the Airline Deregulation Act (ADA) of 1978 (P.L. 95-504, 92 Stat. 7250, 49 U.S.C. 1371, 1552) which was fast approaching enactment. In fact, the ADA was signed into law on 24 October 1978. The author continued to participate in the implementation of this program, known as the Airline Employee Protection Program (AEPP) through the summer of 1979.

C H A P T E R I

EMPLOYEE PROTECTIONS AND IMPLEMENTATION

The history of America is rich with stories of poor immigrant sons and daughters aspiring to social class, wealth and property ownership through hard work. Indeed, the cycle has been repeated by generations of working people paving the way for their children to improve their stock by dedicating their lives to sacrifice and hard work. This apparent social mobility has been rooted in the promise that hard work would manifest success. Success translated into the material accumulation of capital and property. This transcendent view of work was based on the shared beliefs of equality and opportunity: It was made possible by the system of craft guilds. A young man would enter a guild as an apprentice, apply himself by learning all aspects of his trade, and, eventually, work his way up to master craftsman. The historical expectation was that the young worker would succeed in applying himself by mastering the technical skills of his craft and, then, would engage in small independent entrepreneurial enterprise. As time passed, the small business would grow as a result of the improvement in the management and financial skills of the owner and the ability of the firm to amass capital. As businessman, the owner would profit through the employ and production of others, i.e., apprentices, journeymen and masters. Thus, workers were never "locked in" or "pigeon-holed" in a class of work from which they could never rise above. The promise of upward mobility continued to fuel the dreams and the determination of earlier Americans. These early American

assumptions were predicated upon two beliefs: economic mobility and a constant demand for new labor. However, as America reached its present borders, frontiers for independent business enterprise for the guild and craft skills diminished. As wave upon wave of immigrant workers reached American shores, the tremendous demand for labor, particularly cheap labor, became satiated. Economic mobility, while not completely eliminated, has become more difficult to pursue without a formal education which in itself has become a perquisite of the established middle and upper classes of the nation. Industrialization, automation and the development of the factory system throughout the 19th and 20th centuries have rendered the concept of guilds virtually obsolete in most industries. Further aggravating the insecurity of the workplace has been the trend towards specialization. While specialization may improve productivity and quality on a company-wide basis, it severely limits the repertoire of skills that improve the marketability of the blue-collar worker. It appears to severely reduce the psychological rewards of the worker due to constant repetition and a resulting lack of job stimulation. The net effect of these social and economic changes has been a growing perception of a fixed working class within a more stratified American society.

This recognition of a more-or-less static "working class" began to replace the historical American view of the "worker becoming employer." This in turn resulted in the realization that the heretofore demeaning but accepted temporary conditions that were present in the unskilled and semiskilled work areas were becoming permanent in nature and demographically definable by economic class.

This recognition of a permanent state of undesirable work conditions inevitably led those concerned, i.e., the workers and social progressives, to press for improvements in all facets of the work environment. The development of the union movement was instrumental in improving the workplace. At first, interest focused on wages, hours and working conditions, but due to constant technological change and an abundant supply of labor, workers' concerns expanded to their job security.

This view of one's job as a possession is demonstrated by the two approaches that are commonly applied today in private sector collective bargaining agreements. One approach seeks to achieve employment stability and some insulation against the economic misfortunes that a company might suffer over which the workers have virtually no control. This objective is achieved through provisions insuring some degree of job protection. Multiple methods exist by which to accomplish this labor objective. Some of the most common that are applied singularly or in combination in labor-management contracts are: seniority (precedence in layoff and recall rights); sole union jurisdiction (to perform express types of jobs or to operate certain highly-skilled machinery); work rules (setting minimum crew sizes); slack work provisions (spreading out the available work); attrition (allowing normal employment turnover to reduce labor force size); and, bumping or transfer (relocating to other jobs or geographical locations). If an employee must be laid off or terminated due to adverse economic

conditions, technological obsolescence or business efficiency, and the worker cannot be employed elsewhere within the company, then the second approach may be prescribed.

This approach stems from the belief that the worker has lost something of value, i.e., his job. If he is to be laid off or terminated, then the beneficiaries of this action have a responsibility to assist the dislocated employee in readjusting to his new economic situation. This is commonly called adjustment assistance. It may take the form of economic assistance, training assistance or, simply, advance notice of layoff. Economic assistance may include severance pay, supplemental unemployment benefits (S.U.B.) or the opportunity for early retirement. Severance pay and S.U.B. are paid in addition to unemployment compensation. Generally, all forms of adjustment assistance, including unemployment insurance, are funded by the employer. However, many of these benefits are limited to employees in the major unionized industries. It is interesting to note that only 20% of the industrial labor force belong to unions and collective bargaining agreements extend coverage to only 25% of the work force.

The author shall discuss specific legislative efforts to address issues of job security further along in this study. Suffice it to say for now that the U.S. Government has no clear-cut policy regarding job security beyond unemployment insurance. Due to the absence of an explicit policy direction, Congress has seen fit to fashion unique and diverse remedies to meet each situation according to unique interest group pressures and other influences. Also, it must be noted that while there is no government policy on employee protections, that fact

has not in any way stemmed the increasing demand for specialized job security provisions. A discussion of the dynamic aspects of implementation is now appropriate.

The body politic, through its representatives, legislates the law of the land; the law that all people must abide by, and, if necessary, adjust to. The passage of a law is only the first act of stated intentions in a long series of progressively detailed decisions. What occurs in this sequence is the translation of an expansive idea, a metaphysical conceptualization containing no substance, to a physical state of minute but coherent procedures that provide outputs (products or services). The impact of the outputs should, in fact, produce the desired outcomes (satisfy the anticipations) as stated in the law. Thus, the application of the law involves the creation of the means to meet the ends. The creative interaction between the elements of the means-ends dichotomy is, in a structural sense, implementation.

In examining implementation, one might very well observe a variety of situations ranging from chaos to harmony, i.e., organic confrontation and complementary cooperation. In an idealized situation, one would expect to see a streamlined supportive composition of systematic components working together in a unilinear "cause and effect" relationship; however, in the least desirable situation, it is likely that one would observe a directionless conglomerate that is fractionalized by continuing discord between dissimilar parts. This would generally result in a cancellation of efforts in either a random or purposeful manner. Bureaucracies are the elements and the catalysts of implementation, as well as being the deliverers of public services

or social/economic outputs. The nature of bureaucracies is of utmost importance in understanding implementation. A common criticism of bureaucracies is their meandering and lethargic movement. But, if one looks beneath the surface of this criticism, another phenomenon becomes apparent. Beneath, there is an ardent interplay of commitment and reservation. Actors commit resources to some degree or reserve them to some degree. One does not usually find the participants acting in an extreme fashion; rather, commitment or reservation occur in partial degrees. While each actor has his or her own purposes and intents, certain mitigating factors normally prevent any extreme actions from occurring: These factors include a prime emotional deterrent, i.e., the survival of a viable career. That personal motivation precludes excessive activity outside of an ambiguous unwritten professional norm enforced by both contemporaries and superiors. When decision-making is left to specialists, i.e., those who are intensively trained in a certain discipline and who would have difficulty transfering their skills out of an exclusive industry, the survival precept is paramount. On the other hand, generalists, if not co-opted by a multitude of intervening factors such as political vulnerability, may enjoy a greater latitude in their decision-making and, thus, will be the ones that press the margins of the professional norm for their personal advantage and/or on behalf of their constituents.

It should be pointed out that instances demanding critical decisions important to the overall success of one's career are few and far between for the typical professional bureaucrat. Many, in fact, employ a strategy of risk-avoidance in order to preserve their options

for continued success. This strategy of risk-avoidance does not readily facilitate the translation of a legislative intent into a successful, timely and fully responsive program. Quite to the contrary, it is the very nature of implementation that requires a succession of decisions latent with risks and unknowns. These decisions must be made in as objective and immediate a fashion as possible; yet, there must exist a clear and precise understanding of the original intent of the law and an assumption that errors will be committed.

Because implementation is not conducted in a political vacuum, it is highly susceptible to both political inputs and political consequences. In fact, it is highly political merely because it is in immediate linear proximity to the legislative process. It is political because it occurs prior to the formalization of the routine. Institutionalization of a number of routines in a program provides some degree of insulation from political inputs because it provides a formalized quasi-legal basis for denying political requests or resisting political pressures, <u>if</u> implied by the chief policymaker in charge of the program. Every little detail may have political ramifications during the implementation stage. Necessarily, implementors, i.e., he or she who implements, will be in a position of making value judgments. Sometimes, they will be made without sufficient knowledge to do so. There may not be any analogous or comparable experience from which to correlate decision-making. So the author humbly takes exception to one of the pioneers in public administration, Herbert A. Simon, when he states, "In so far as

decisions lead toward the selection of final goals, they will be called 'value judgements'"; so far as they involve the implementation of such goals they will be called 'factual judgements.'"[1] What Simon seems to overlook is the moment of metamorphosis when the electricity is applied to Doctor Frankenstein's pet project and the monster changes from a vision in the good doctor's head to an entity with a life of its own. At that point, as with a newly-christened government program, it becomes a viable life form. It may or may not be controllable by its creators and. to some degree, at least, may demonstrate qualities of self-sufficiency.

To dichotomize as Simon does into categories of policy (ends) and administration (means) is too neat. Simon concedes this in a paragraph following his suggested tneoretical conclusions regarding normative and empirical questions:

> "It would be naive to suggest that the division of work between legislature and administrator in any actual public agency will ever follow very closely the lines just suggested. In the first place the legislative body will often wish, for political reasons, to avoid making clear-cut policy decisions, and to pass these on to an administrative agency. In the second place the administrator may be very different from the neutral, compliant individual pictured here. He may (and usually will) have his own very definite set of personal values that he would like to see implemented by his administrative organization, and he may resist attempts by the legislature to assume completely the function of policy determination, or he may sabotage their decisions by his manner of executing them."[2]

No doubt, he is closer to the truth with this representation than with his hypothetical conclusions. The implementation process is the catalyst of administration after the policy has been decided. Thus, it assumes an importance potentially far greater than the actual administration of a program which may be quite rote. The difficulty lies in the over-simplification of policy and administration. Simon essentially sees the legislature as the policy-giver and administration as the production facility (a la Frederick Taylor.) This is accurate to a point; however, it does not take into account the dynamics of a constructive interface between the legislative processes and administrative processes. These dynamics include the definition of function, the elaboration of operating plans and detailed procedures, the creation of budgets, the development of positions, the hiring of personnel and the location of facilities and all that goes into them. These are the institutional dynamics. In addition, there are programmatical dynamics. Interpretation of the law and the legislative history, assigning appropriate integral priorities, gaining consensus on vital issues, maintaining liaison and consulting on required matters as well as complying with all regulatory requirements are but a few of these programmatical dynamics.

Also, in a macroscopic and conceptual sense, implementation is a dynamic process. It is an expansion rather than a contraction; a growing rather than a shrinking. It may compete for limited resources with existing programs. It may overlap jurisdictions and duplicate services. It will probably require a reactive adjustment on the part

of some existing agencies or programs. These are all elements of change and change is the essence of the process. It is creative in nature, experimental in conduct and aggressive in competition. Due to this creative nature, the implementation process feeds on new ideas and fresh approaches. The intellectual characteristics of implementors are some of the most demanding in any profession: varied experience and background; wide perspective and multifaceted knowledge; ability to observe and analyze inductively and deductively, vertically, horizontally and diagonally; ability to adapt old concepts to new applications; extrapolate, correlate and infer; research, communicate and judge. All of these aspects and more are necessary to be a successful implementor. But, in a sense, these are all manipulations of existing practices; without fresh input, the well would go dry. At the wellspring of implementation are ideas, theories and hypotheses. These conceptions are the gist of structural creativity.

"Implementation, then, is the ability to forge subsequent links in the causal chain so as to obtain the desired results."[3] The key word in Pressman and Wildavsky's definition is "causal." What is constructed during policy-making will engender the desired outcomes; what is constructed in the implementation stage will determine the output. Hargrove, in his monograph, "The Missing Link, The Study of The Implementation of Social Policy," makes an important distinction in the use of the term "implementation." On one hand, it describes the a priori state of planning an overall policy strategy; on the other hand, it describes the a postiori state of program execution.[4] The primary focus of this paper is encompassed in the second meaning, although

there will be often, useful and necessary reference to the first state. Much of the first state is usually embodied in the text of the law and in its legislative history. "Implementation does not refer to creating the initial conditions."[5] Few modern laws are simple statements of purpose and rule in the tradition of English common law; our tendency of late in law-making and jurisprudence has been towards the specificity of the Napoleonic codes of law, e.g., ERISA (Employee Retirement Income Security Act), OSHA (Occupational Safety and Health Act), and IRS (Internal Revenue Service) tax laws.

> "To emphasize the actual existence of initial conditions we must distinguish a program from a policy. A program consists of governmental action initiated in order to secure objectives whose attainment is problematical. A program exists when the initial conditions - the 'if' stage of the policy hypothesis - have been met. The word 'program' signifies the conversion of a hypothesis into governmental action. The initial premises of the hypothesis have been authorized. The degree to which the predicated consequences (the "then" stage) take place we will call implementation. Implementation may be viewed as a process of interaction between the setting of goals and actions geared to achieving them."[6]

In the strictest sense, implementation does not include the incremental changes (technical or operational improvements) that occur beyond the initial start-up of a program. Those changes more readily fall into the domain of institutional analysis, operations research and program evaluation.

Case studies in implementation analysis are scarce. To be more than simply descriptive, a case study must include a paradigm of at least a rudimentary calibre. To properly analyze, one must have a

reference with which to compare and measure, be it performance, objectives, resources or any other parameters. There is no surfeit of actual case studies of implementation and only a few words that can be considered of genuine theoretical significance. Eugene Bardach's, The Implementation Game: What Happens After a Bill Becomes a Law, must be considered one of the authoritative pieces on implementation. For policy designers, his advice is clear: "design simple, straightforward programs that require as little management as possible."[7] His advice is predicated on a recognition of the complexity of joint action between organizations, the knowledge of a proliferation of actors that become involved during implementation, and an understanding of the unique strengths and weaknesses in government, special interest groups, private corporations and individuals.[8] He states, "the most important approach to solving, or at least ameliorating, this problem is to design policies and programs that in their basic conception are able to withstand buffeting by a constantly shifting set of political and social pressures during the implementation phase."[9] Even the most comprehensive and adaptable design may go astray over the course of implementation. "The classic symptoms of underperformance, delay, and escalating costs are bound to appear."[10] Bardach contends that it is necessary to "fix" the game so that divergence does not occur and, if it does occur, it is remedied with a minimum of damage to program expectations (outcomes).[11]

Various obstacles may arise that demand the attention of a "fixer." Pressman and Wildavsky hypothesize in Implementation that

any one or all of the following obstacles may affect program participants during the implementation of new programs:

(1) Direct incompatibility with other commitments.

(2) No direct incompatibility, but a preference for other programs.

(3) Simultaneous commitments to other projects.

(4) Dependence on others who lack a sense of urgency in the project.

(5) Differences of opinion on leadership and proper organizational roles.

(6) Legal and procedural differences.

(7) Agreement coupled with lack of power.[12]

This would seem to be a useful typology for the classifcation of problems experienced by implementors in this case study. There is recognition that case study research in the arena of political science encounters difficulties in determining discrete variables and, as a logical result, is chary of cause-and-effect statements.[13] Nevertheless, it is necessary to attempt to define and determine the process by which a program comes into existence. In this case study, it may be extremely difficult to measure the outputs of the Airline Employee Protection Program (much less the outcomes - the effects of the Program) because of the small passage of time since enactment. Having developed something of a staff expertise in program implementation, tne author will attempt to highlight analogous situations of first-hand knowledge. As a program analyst, the

author's fundamental and continuing responsibility was to provide the Assistant Secretary for Labor Management Relations with alternatives, options, strategies and recommendations for programs within his jurisdiction. This experience, which had been gained prior to and during the author's involvement as a staffer on the Airline Employee Protection Program (AEPP), served some useful analytical purposes in differentiating policy analysis from implementation analysis. "However, it is not enough simply to study these institutional changes to describe or even explain them. Policy research upon implementation should be prescriptive in its capacity to suggest means for improving the delivery of services."[14]

In simple terms, the problem to be addressed is, how will all of the activities necessary to physically put a program in place be controlled and directed "so as to achieve program objectives, keep costs down, and reduce delay."[15] Some caveats are in order. Certain laws are better than others in terms of their technical completeness, logical coherence and explicit statements of purpose. Often, an agency will inherit a law, or a portion of a law, that has been subject to intense debate and substantial compromise. As such, it may be dissected, fragmented and completely politicized. Thus, it is exceedingly difficult to institute workable program machinery that will meet the expectations of all of the concerned parties. In addition, "it is impossible to implement well a policy or program that is defective in its basic theoretical conception."[16] In many situations the bureaucracy receives a law that possesses neither a definition of the problem nor an explicit social objective. A law may

be faulted by basic social assumptions that are invalid. Other laws may have been so compromised by various special interest pressure groups that they contain inherently conflicting objectives. Still other laws may accomplish their objectives but, nevertheless, result in unanticipated and undesirable side effects that must be dealt with.

A recent paper by Messrs. Montjoy and O'Toole analyzed implementation from two perspectives: (1) Is a vague or a specific mandate provided in the law? and (2) are new and adequate resources provided by Congress?[17] They develop a matrix on the basis of the two possible answers to the questions, i.e., vague or specific, yes or no. These dichotomies yield four integrals which Montjoy and O'Toole classify as types A, B, C and D. Type A is characterized as having a vague Congressional mandate and is provided with new resources to carry it out. Type B has a specific mandate and additional resources. Type C is vague and receives no new resources. The last category, type D, is specifically mandated but is not authorized new resources to perform its mandate.[18] They propose to predict the impact of intra-organizational implementation based on the typology described above. They conclude that "the surest way to avoid intra-organizational implementation problems is to establish a specific mandate and provide sufficient resources (type B). It is true that we found some start-up problems with type B mandates, but, at least, there was new activity directed toward an externally specified goal."[19] They go on to discuss the next hierarchical organizational level.

> "However, the attractiveness of type B policies is partially an illusion caused by our concentration on intra-organizational problems. Inter-organizational problems arise largely from the difficulty of coordinating the activities of several different units, each of which has its own goals and established routines. The creation of a specialized unit to handle a type B mandate will increase the number of agencies dealing in a certain area and may increase the coordination costs for the new mandate and for other, existing programs. Thus, we have a dilemma: a solution to an intra-organizational problem may exacerbate an inter-organizational problem."[20] (Emphasis is in the original).

Additional problems may occur as a result of the creation of sub-units with overlapping delegations of authority. The following case study will allude to these organizational difficulties.

One final consideration is that laws may be negative in that they remedy inequities or the effects of discrimination that have been visited upon the weakest segments of society, i.e., those elements too economically ineffective to defend their interests in the unregulated marketplace.[21] These problems may prove intractable in spite of the awesome resources that the Federal Government can bring to bear.

As we examine the implementation of the Airline Employee Protection Program, we might ask some questions ex post facto:

-Was an implementation strategy articulated in the legislation?

-Was an estimate of the required resources made?

-What alternatives were developed? By whom?

-Who was responsible for seeing the law implemented?

-Is the program successful?

These questions should serve as the basis of our case study.

Historical Development of Employee Protections in the United States

Commencing in the early 1930's in response to the extremely high unemployment of the Depression, the well-organized rail industry unions supported rail consolidations in the Emergency Railroad Transportation Act. From 1933 to 1936, this Act provided rail workers with basic employment protection in the form of a job freeze, i.e., no layoffs or terminations. Due to the expiration of the Act in 1936, the railway unions and management negotiated the Washington Job Protection Agreement of 1936. This comprehensive agreement stipulated basic elements of job protection, including an adjustment allowance for either separation or reductions in income due to relocations, as well as fringe benefits and relocation expenses.

Following the Washington Agreement, the Interstate Commerce Commission (ICC) invoked discretionary authority under its regulatory responsibility for the railroad industry and required that employee protections be included in any subsequent mergers or consolidations. Congress codified this requirement in the Transportation Act of 1940. Since then, the ICC has had several successive sets of minimum standards which have provided increased protections to adversely affected employees in the railroad industry. Today, the "AMTRAK" protections apply to all proposed rail mergers or consolidations.

AMTRAK (National Railroad Passenger Corporation) was an attempt to create a profit-guided quasi-private enterprise by salvaging rail passenger service by assuming the non-profitable routes of the nationwide rail systems. It was contained in the Rail Passenger Service Act of

1970. Its employee protections stipulated that all rights, benefits and privileges required by current collective bargaining agreements be maintained as well as rights to continue collective bargaining, employment protection, priority reemployment rights and recompensated training costs. Coverage was for up to six years, provided an arbitration procedure favorable to employees and, for the first time, included COLA (Cost-of-Living Allowance) protection.

As the railroad industry has continued to retrench, employee protections have grown from ICC-required guidelines to Congressionally-specified provisions. The Regional Rail Reorganization Act of 1973 created CONRAIL (Consolidated Rail Corporation) in an effort to reduce government subsidization for certain financially troubled railroads in the Northeast and increase the competitive conditions for regional portions of the rail sector of the transportation industry. Not only were all of the existing AMTRAK provisions included in the CONRAIL employee protections section of the 1973 Act but, for the first time in American industry, the principle of "cradle-to-grave" employment/income was accepted by labor, management and the Federal Government, albeit in a modified form. If an employee had five years or more of creditable service as of the date of enactment, he is guaranteed a job with no reduction in wages or, if laid off, an allowance equaling his average monthly railroad income until age 65 or upon his eligibility for pension. In return for this lifelong protection, the employee agrees to relocate to wherever jobs in his class or craft are available. Obviously, if no jobs are available, the employee collects his adjustment allowance nevertheless. This Act, and the Railroad Revitalization and

Regulatory Reform Act of 1976 cover approximately one-half million railroad employees and all costs for the employee protections contained therein are borne by the Federal Government.

The Urban Mass Transportation Act of 1964 (UMTA) is a Federal effort to assist urban areas in maintaining and improving their public transportation equipment, facilities and services. This is effected by the U.S. Department of Transportation granting operating assistance or capital purchase assistance to cities. UMTA, along with the High Speed Ground Transportation Act of 1965 and the Federal-Aid Highway Act of 1973, requires the U.S. Department of Labor to certify that "fair and equitable" employment conditions, patterned after AMTRAK provisions, have been agreed to by the public bodies and representatives of the employees. Or, the DOL may recommend the level of protections if the employees are unorganized. Thus, the DOL protects the employment interests of those working for the mass transit systems within the project service area.

In the airline industry, the Civil Aeronautics Board (CAB) has interpreted Section 408 of the Federal Aviation Act to require the inclusion of employee protections in all merger proposals. Section 408 mandates the CAB to protect the public's interests. As interpreted by the CAB, it is in the public's interest to insure the equitable and reasonable employment conditions of such proposals. The prevailing base required by the CAB for merger protections are the provisions of the Allegheny-Mohawk merger of 1972. These provisions stipulate:

> (1) "fair and equitable" integration of seniority lists within the collective bargaining process with final resolution of disputes by the National Mediation Board (NMB).

(2) "displaced" employees, who suffer a reduction in wages, shall be made whole by the use of a special allowance for a period not to exceed four years and initiated within three years of the date of merger.

(3) displaced employees exercise their "bumping" rights at their home base to regain their former level of compensation or forfeit their special displacement allowance.

(4) "dismissed" employees shall receive 60% of their previous remuneration (averaged over the last 12 months of work) for up to five years unless recalled to work by the carrier at a comparable level of compensation. The claim period, as above, is within three years of the date of merger and may be reduced by other earnings and unemployment insurance.

(5) that a lump-sum payment of up to one year of pay may be chosen by the dismissed employee in lieu of all other rights, privileges and benefits.

(6) that if an employee chooses to relocate within the surviving carrier's employment structure, all moving costs, losses involving the sale of a home or the cancellation of a lease and the costs associated with the search for a new home, shall be recompensated.

(7) that all fringe benefits shall remain intact and be protected.

(8) that the NMB shall provide the final level of dispute settlement through arbitration beyond the collective bargaining agreements in effect.[22]

Other recent legislatively-mandated protections are contained in the Juvenile Justice and Delinquency Prevention Act of 1974, the Special Health Revenue Sharing Act of 1975 and the Developmental Disabilities Services and Facilities Construction Act amendments (1975). The thrust of all three pieces of legislation is to deinstitutionalize to the maximum extent possible three population classes, i.e., juvenile offenders, mentally ill persons, and developmentally disabled persons (mentally retarded, victims of cerebral palsy, autism or epilepsy).

In turn, employees of the institutions charged with protecting and treating these individuals might suffer job loss and other adverse effects. Various protections are included in these laws to provide for job security, retraining and, in general, "fair and equitable" protective arrangements.

The Trade Act of 1974 and predecessor statutes established a program to assist workers adversely affected by foreign imports and the lowering of U.S. import quotas. This program includes financial assistance (70% of wages for up to one year if laid off or terminated) and employment services (job matching, referral and placement services, retraining and job search and relocation allowances.)

The recently enacted Redwood National Park Act Amendments of 1978 provides assistance to adversely affected employees of the declining redwood lumbering industry. These labor protections were legislated to assist redwood workers who were adversely affected by the purchase of 48,000 acres of prime redwood forests by the U.S. Government that were previously owned by three lumber companies. Job protection coverage is restricted, timewise, to those employees working (or recently laid off) on the date of enactment and, geographically, to the two northernmost counties in the State of California, Humboldt and Santa Rosa Counties. Any employee of certain "affected employers" who is laid off or otherwise separated between May 31, 1977 and September 30, 1980 is deemed to be an affected employee by a conclusive presumption as stipulated in the Act. No determination of individual or specific class impact need be made beyond the designation of "affected employer." The burden of proof of the non-existence of adverse impact is shifted from the individual or

company to the Federal Government. Beyond this important legalistic point, the array of benefits for eligible employees is most generous as judged by previous standards. Benefit payments make the employee whole (100% of former earnings) and, in an effort to encourage redwood workers to find careers in other industries, it is theoretically possible for an adversely affected employee to earn 150% of his prior redwood industry wages by combining his income maintenance allowance and his wages from his new job. Adjustment assistance in the form of income maintenance and employment services may be utilized for up to six years. All important benefits, such as seniority and health, welfare and pension plans, are maintained. A lump sum severance pay can be elected. Employment services include preferential hiring in the expanded Redwood National Park, as well as new skills training, and job search and relocation allowances.

After this rather exhausting overview of employee protections, rights and benefits, one must ask, what is the underlying philosophy? In the private economic sector, the philosophy represents the concerns of organized labor for the job security of its consitutents. It is recognized as a moral and economic requirement to exchange some of the benefits gained for all as a result of the change for some of the losses suffered by the unfortunate dislocated workers. (Incidentally, employee protections generally applies to existing workers only.) Initially, the focus was on industries that were either in decline or where automation was posing a threat to employees' job security. Job security not only entails the loss of one's job but may also include changes in the basic character or purposes of one's work so that the new position may require

new training, may pay less, may provide less hours to work, may entail different or additional responsibilities, may require a shift in geographical location, or may require other changes that may diminish one's job status.

Employee protections required by law, as distinguished from those gained through collective bargaining, are a recognition that changes in governmental policy may adversely affect specific employees who have contributed some sizeable portion of their lives to an industry or that their employment security was based on a given set of assumptions directly altered by government action. When the government changes those conditions upon which the assumptions are based, there is a belief that the affected worker should not bear the impact of the economic consequences alone. To see one's career swept away, an "investment" of some number of years cast aside, Congress has felt morally and politically compelled to assist those workers by sharing the economic burden with the American taxpayer-at-large, or by requiring the industry which is to be advantaged to share such benefits. For example, in the case of AMTRAK, railroads which were being relieved of the burden to provide unprofitable rail passenger service had to provide for the protection of employees adversely affected in that transaction. This seems equitable where the society as a whole will benefit due to a policy change or new legislation that presumably will result in some economic advantage or social benefit for all. Thus, motivated by a sense of fairness, Congress returns some of that advantage or benefit to adversely affected workers in order to ameliorate the disruption and negative consequences attributable to legislated change.

On a political level, it is often the price necessary to garner organized labor's support for new policy initiatives. However, beyond that political consideration, there does seem to exist a sincere concern on the part of a majority of Congress for the welfare of dislocated workers, their families and the attendant social and economic ramifications of public-policy innovations. One has made an investment of one's life in an industry. If that investment can be considered property, tnen the argument is an extension, if you will, of the Constitutional requirement to compensate property interests since the Constitution requires that private property seized by tne government be compensated for.

United States Department of Labor's Role in Employee Protections

The U.S. Department of Labor (DOL) has the prime responsibility within the Executive Branch for the great majority of employee protection programs. In addition, it is charged with providing guidance tnrough consultation on employee protections and ensuring "fair and equitable" protective arrangements with other Executive Departments who have responsibilities to administer certain laws containing employee protection provisions.

DOL has three Agencies with major employee protections responsibilities. The Labor-Management Services Administration (LMSA), in its Office of Labor Management Relations Services (LMRS), Division of Employee Protections (DEP) has responsibility for Section 13(c) of UMTA (certifications), individual employee claims under the AMTRAK and UMTA

legislation, Redwood National Park Act (Redwood Employee Protection Program - REPP), Airline Deregulation Act of 1978 (Airline Employee Protection Program - AEPP) and Small Urban and Rural Transit legislation which, only recently, has been fully implemented. LMRS has the Delegation of Authority to act for the Secretary of Labor directly on the above pieces of legislation and, also, has an additional obligation to consult with the Secretary of Health and Human Services (HHS) in the development of protective arrangements for employee protections on the Special Health Revenue Sharing Act of 1975 and the Developmental Disabilities Services and Facilities Construction Act, and the Attorney General on the Juvenile Justice and Delinquency Prevention Act of 1974. The Hospital Conversion Act was recently signed by the President in October, 1979. It requires the Secretary of Labor to certify protective arrangements in much the same manner as in Section 13(c) of UMTA and in the Small Urban and Rural Transit portion of the Surface Transportation Act of 1978.

The Bureau of International Labor Affairs (ILAB) is responsible under the Trade Act of 1974 for determining whether: certain industries, companies and/or corporate subdivisions have suffered layoffs; sales and/or production have been reduced, and, if increased quantities of imported products have significantly caused the layoffs and reduced business. This determination is accomplished through investigation and certification.

The Employment and Training Administration (ETA) has the responsibility to effect adjustment assistance in cooperation with LMSA and ILAB. This is accomplisned mainly through the U.S. Employment

Service (ES) and the Unemployment Insurance Program (UI). ES and UI develop contracts with fifty-two State Employment Security Agencies (thus, the acronym - SESA's) for the distribution of funds and the delivery of employment services to the local level.

This completes the review of the basic structural components and experiential bases within the DOL for the implementation of new programs. Now the author will take a much closer look at the recent implementation of a new DOL program - the Airline Employee Protection Program - known in abbreviated form simply as "Airlines."

C H A P T E R I

NOTES

1. Herbert A. Simon, Administrative Behavior (New York: The Free Press, 1957), pp. 4-5.

2. Ibid., pp. 57-9.

3. Jeffrey L. Pressman and Aaron B. Wildavsky, Implementation (Berkeley: University of California Press, 1973), p. xv.

4. Erwin C. Hargrove, The Missing Link (Washington, D.C.: The Urban Institute, 1975), pp. 2-3.

5. Pressman and Wildavsky, Implementation, p. xiv.

6. Ibid., pp. xiv-xv.

7. Eugene Bardach, The Implementation Game: What Happens After a Bill Becomes a Law (Cambridge: The MIT Press, 1977), p. 253.

8. Ibid., p. 5.

9. Ibid.

10. Ibid.

11. Ibid., p. 274.

12. Pressman and Wildavsky, Implementation, pp. 99-101.

13. Hargrove, The Missing Link, p. 52.

14. Ibid., p. 45.

15. Bardach, The Implementation Game, p. 250.

16. Ibid.

17. Robert S. Montjoy and Laurence J. O'Toole, Jr., "Toward a Theory of Policy Implementation: An Organizational Perspective," Public Administration Review no. 5 (September/October 1979), p. 466.

18. Ibid.

19. Ibid., p. 473.

20. Ibid.

21. Bardach, The Implementation Game, p. 251.

22. See appendix 1 for the full text of the Allegheny - Mohawk labor protective conditions.

C H A P T E R II

THE CASE OF AIRLINE EMPLOYEE PROTECTIONS

Airline employee protections became a public issue in the mid-1970's. Not since the creation of the Civil Aeronautics Board in 1938 had such expansive changes been considered by Congress for the air transportation industry. Under the Chairmanship of John Robson initially and, most notably, Alfred Kahn, the CAB reversed its protectionist posture and, in 1975, commenced concentrated efforts to deregulate the air transportation industry by administrative fiat.

The House Public Works Committee report on H.R. 12622 (Amendments to the Federal Aviation Act of 1958) alluded to this protectionist orientation when it stated that the CAB prior to 1975 "tended to place restrictions on airline management, which gave it much less competitive freedom than management in other industries."[1] The airlines themselves had grown quite comfortable with this arrangement. Since rates and schedules were set by the government, the only competition that took place occurred in superficial areas, i.e., frills. Furthermore, with the route structure virtually impenetrable to new airlines, normal pressures of supply and demand were excluded from the airline marketplace. Consequently, airline management presented a near-unanimous front in opposition to deregulation with United Airlines being the sole deserter from the corporate ranks.

The changes made by the CAB fostered competition by decreasing economic regulation. By allowing more flexible rescheduling and rate-setting, these regulatory changes resulted in drastically increased

public utilization, lower fares for the traveling public, and much higher profits for the airline companies. This experience combined with the examples of certain highly successful intrastate airlines that were not subject to CAB approval as well as massive support on the part of economists fueled the nascent movement towards increased airline competition. Both Presidents Ford and Carter strongly encouraged regulatory reform of the highly regulated airline industry. This structural reform could only have been made possible by continuing the administrative implementation of deregulation initiated by Robson and Kahn by other means.

Opponents raised various objections to deregulation. One that possessed little merit focused on safety. This argument was that deregulation would reduce safety in America's commercial airlines because of new competitors (presumably not as safety-oriented), old and unairworthy aircraft, and untrained personnel. All of these aspects of the flight environment are regulated by the Federal Aviation Administration (FAA), whose responsibilities (among others) it is to issue and enforce "rules, regulations, and minimum standards relating to the manufacture, operation, and maintenance of aircraft as well as the rating and certification (including medical) of airmen and the certification of airports serving air carriers certified by the Civil Aeronautics Board."[2] There could be no lessening of either the scope or the degree of the FAA's mandate without separate legislation and considerable public discussion. Safety regulation is beneficial to all - the airlines, the unions, the communities, the public. Economic regulation, on the other hand, may only be beneficial to certain vested interests. This seemed to be the case in the airline industry.

In fairness, the direction of the impact of economic deregulation depends upon the perspective. The allusion here is to small communities. A recent example reported in the Washington Post describes the throes of identity that Bakersfield, California has been going through. United Airlines wants to drop its service to Bakersfield while Air Pacific, a commuter airline, wants to pick it up. As a matter of "civic pride" Bakersfield has gone to court complaining that it has been "virtually removed" from the air transport system by United's pulling out, and that the CAB has failed to meet its obligation in assuring communities "essential" air service.[3] These pull-outs have, in turn, "sparked widespread fears that affected communities might simply shrivel up and die - unable to attract new businesses or even retain their existing economic base."[4] What the Airline Deregulation Act provides is a guarantee of essential air service for up to ten years even if that means requiring an airline that cannot find a replacement to continue providing service on a money-losing route. These types of problems surfaced and received extensive review during the lengthy hearings preceding the formulation of the legislation.

However, it was for Congress to develop the legislation and to reach agreement on the specific provisions within the environment of the public forum. Separate legislation was developed in each House of Congress as a means to prevent any erosion in the deregulation successes already achieved, and to continue deregulation in the face of potential changes of CAB membership and/or policies. In addition, legislation would preclude any reversals of deregulation by the judiciary. The Senate process covered several years, whereas the House involvement, especially

in the employee protections' area, was of much shorter duration. Accordingly, we will commence with an examination of the Senate.

The United States Senate

The move to deregulate the U.S. airline industry in the Senate was an exercise in determination and compromise. Elizabeth Bailey, a Civil Aeronautics Board member, recently commented that the Senate hearings accompanying the airline deregulation bill were especially enlightened by the use of massive and intensive economic analyses accompanied with statistically quantified supporting data.[5] This was especially true in the Senate hearings before Senator Kennedy's Subcommittee on Administrative Practice and Procedure, and Senator Cannon's Commerce, Science, and Transportation Committee. Two significant bodies of data, heretofore unavailable, provided a portion of empirical validation for the proposed legislation. First, there was an abundant amount of data regarding the recently applied deregulatory edicts of the CAB. The positive results of these limited administrative measures were manifest for all to consider. Second, certain provisions of the Senate bill concerning deregulation of domestic all-cargo service had been separated from an airline deregulation bill presented in 1977. The former provisions involved three all-cargo carriers (Flying Tiger, Seaboard World and Airlift) and several all-cargo "commuter" carriers, such as Federal Express. These provisions were included in H.R. 6010 in October 1977 and were subsequently reported out of the House-Senate Conference and signed into law by the President on 9 November 1977. Incidentally,

it should be noted that this legislation contained no employee protection provisions. Nevertheless, the performance improvement in the all-cargo business was further evidence for minimizing regulation in the industry.

The following synopsis of early Senate activity is necessarily brief because there was virtually no consideration of employee protections in the initial movement to deregulate the American airline industry. Bipartisan efforts to reform the CAB go back to the Ford Administration. Senator Cannon initiated legislation on the topic (S. 689) and Senator Kennedy, while having no jurisdiction over airline regulatory reform, highlighted the issue by presiding over oversight hearings before the Administrative Practice Subcommittee. The Kennedy hearings were concluded in 1975 and resulted in an eight volume transcript of testimony titled, appropriately enough, the Kennedy Hearings. These hearings were condensed into the "Kennedy Report."[6] In addition, President Ford initiated research in the U.S. Department of Transportation and at the CAB that served as the basis for his legislative proposals (S. 292) to Congress. The Carter Administration continued the marshalling of political forces to ensure passage, as well as strengthening and further refining the pro-deregulation arguments. Such groups as the Ad Hoc Committee for Airline Regulatory Reform provided penetrating analyses and served as a focus for proponents of deregulation. This Committee contained a very wide range of conservative and liberal entities.[7]

Senator Cannon (D-Nev.) commenced hearings in 1976 in the Senate Committee on Commerce, Science, and Transportation. These hearings lasted two years until October 27, 1977 when the Committee reported out S. 2493, the Air Transportation Regulatory Reform Act of 1978.[8] In the

beginning, the focus was on amending the Federal Aviation Act of 1958; however, as the reformist perspective continued to enlarge and the momentum continued to grow, the title continued to change until at the time of its enactment, it was known as the Airline Deregulation Act of 1978. This was a period of intense scrutiny and debate. Senator Cannon, the Committee Chairman, stated, "(t)he committee met more than 20 times to mark up a bill before voting 13 to 3 to send this legislation to the Senate."[9] This may have been a record number of mark-ups. Senator Pearson (R-Kan.) commented, "I cannot recall any bill that has received closer and more extended consideration by the full committee."[10]

The first suggestion of an employee protections provision being included in the bill was made in mid-October, 1977 by Senator Danforth (R-Mo.). While to some it may seem ideologically incongruous for a Midwestern Republican Senator to introduce legislation designed to directly benefit the interests of labor; nevertheless, it was a politically sound judgment on his part. It so happens that the main overhaul and repair facility and other operations for Trans World Airlines (TWA) are located in Kansas City, Missouri and support a workforce of approximately 11,200 people. TWA is the most economically vulnerable of the "Big Four" airlines (United, American, Eastern and TWA) in terms of its debt-equity ratio. To compound TWA's fiscal problems, the average age of the airline's fleet of aircraft is approaching retirement and replacement equipment will be needed in the near future. Securing loans in today's high interest economy could further weaken the company (if it can secure financing at all.) This economic weakness could result in numerous route closings, or in the worst case, bankruptcy

for TWA in an unregulated environment where TWA would be susceptible to increased competition on its profitable routes from smaller but economically healthier airlines and decreasing governmental subsidization on its small city routes. Additional uncertainties might occur during a forced merger attempt.

Such an attempt was recently witnessed. Texas International and Pan American Airlines vied for control of National Airlines for two reasons: (1) a modern aircraft inventory; and (2) extensive north-south domestic routes. Thus, it was one of Senator Danfortn's prime concerns to assure the economic welfare of employees in case large-scale dislocations were suffered by TWA.

Senator Danforth voiced his reservations (specifically regarding what he considered to be less favorable treatment of certain airlines purely on the basis of size) in his attached comments to the Committee report where he wrote, "(t)he original version of this bill caused me serious concern. I felt that substantial damage might be caused to certain airlines, resulting in the loss of thousands of jobs including many in my own State of Missouri."[11] As Sentor Inouye (D-Hawaii) observed in reacting to the proposal for automatic market entry:

> "Should automatic market entry become law, carriers in precarious financial condition could very well become bankrupt. Among other carriers, cut-throat competition could force large-scale employee cutbacks and other disruptions.
>
> In either event, because of the airline seniority system it would be impossible for employees to shift from one airline to another and retain their wage and benefit status.....

> If enactment of this legislation would cause the instability many including myself fear it would, the hardship will not only be felt by airline industry employees.
>
> In addition to pilots - flight attendants, dispatchers, mechanics, ticket agents, clerical workers, and others will suffer as well.....
>
> That supporters of the legislation recognize the very real possibility of these consequences is, I believe, evidenced by adoption in Committee of an 'employee protection' amendment. That amendment is intended to compensate airline employees who are deprived of their employment as a result of an airlines's bankruptcy or other financial difficulty which would necessitate a reduction in its labor force.
>
> To me, all of the risks I have discussed are unacceptable..."[12]

And, thus, Senator Inouye stated his opposition to the legislation.

An important consideration in addition to deregulation that weighed on the airlines was the possibility of a repetition of the 1973 oil embargo that could again threaten severe cutbacks in service which might result in massive layoffS.[13] However, for the most part, the committee did not factor this variable into their development of employee protections.

At the outset there was unanimous union resistance to airline deregulation. The major unions representing employees in the airline industry are the Airline Pilots Association (ALPA), Flight Engineers' International Association (FEIA), Transport Workers Union (TWU), Association of Flight Attendants (AFA), International Association of Machinists (IAM), Brotherhood of Railway and Airline Clerks (BRAC), AFL-CIO, and the International Brotherhood of Teamsters (IBT). The body of law that governs union-management arrangements and collective

bargaining processes in the airline industry is the National Railway Labor Act. This law does not require employee protections as a federal minimum standard. Only employee protections contained in collective bargaining agreements or merger agreements (as required by the CAB) are applicable. These protections were discussed extensively in Chapter I. As recognition and acceptance of the concept of employee protections grew in Congress during the development of the legislation, most airline union opposition gradually fell by the wayside. But while the concept of employee protections was eventually accepted, the form and degree of this assistance was the topic of lively and high-pitched committee debate. Strong exception was taken by Senator Zorinsky (D-Neb.) to the final form of the committee's recommendation on labor protection:

> "Concern for this type of dislocation of airline employees has been the major stimulus for certain airline employee organizations to seek labor protection provisions, or oppose the legislation. Because of this pressure such provisions were drafted.
>
> There is no disagreement with the Committee as to the probable nexus between the dislocation and this legislation.
>
> The initial threshold that must be logically crossed is whether or not the dislocation probably caused by this legislation merits any labor protection. As the Committee report persuasively articulates, there is precedent for protective provisions, but the precedents are however, analogous only to those provisions defeated by the 8-6 vote, <u>not</u> to what is proposed by the Committee. Therefore, the only disagreement is the remedy that is to be afforded the dislocated employee."[14]

Senator Zorinsky had proposed a "last fired, first hired" preferential hiring policy as the all-inclusive employee protections without any Federal financial assistance. This was the provision defeated by the 8

to 6 vote. With Federal assistance as stipulated by the committee's approved provision on employee protections, he estimated the potential cost in the case of a bankruptcy at one billion dollars. He termed this a "raid on the treasury."[15] However, in a masterful political move, the proponents of financial assistance to dislocated workers co-opted much of Senator Zorinsky's substitute by simply including preferential hiring as an additional principle in the complete employee protections package.

The format and principal provisions on employee protections that eventually passed the committee became the model for the full Senate bill, the joint House-Senate Conference report, and the enacted legislation. They were based on the assumption that employment opportunities would increase throughout the industry when it was deregulated. Furthermore, the seasonal and cyclical nature of the industry was considered. Thus, the committee members wanted to guarantee payment of monetary compensation only in those situations that were directly and without question dislocations attributable to the change in the airline regulatory scheme, as opposed to dislocations resulting from any other factors, such as general economic downturns, fuel shortages, and so on. Thus, the committee defined a "qualifying dislocation" as either a bankruptcy or a "major contraction" in an individual airline's total employment. A "major contraction" was defined as a layoff of at least 15% of a carrier's full time employees in any twelve month period. This layoff had to be a result of the change in the regulatory structure as specifically determined by the CAB. Strike-related layoffs as well as strikers would be ineligible for CAB determination.

The Department of Labor would have express responsibility for conducting the program. Only full-time employees with four or more years of service as of the date of enactment of the ADA were eligible: if impacted, these employees could collect monthly payments for 36 months. This program was limited to a basic ten year eligibility period. Employees found eligible during that period could receive up to 36 months of monetary benefits. If an adversely affected employee was declared eligible on the last day of the ten year eligibility period, and he or she could not find work in the industry, the employee's protected period, in this situation, could extend for 36 months beyond the ten year eligibility period. The program's eligibility period was limited to ten years in order to define the transition from a fully regulated condition to a completely competitive environment that was fully exposed to the rigors and the impacts of free market forces. This was in keeping with the spirit exhibited by other transitional safeguards contained in the bill for carriers and small communities. It was the 15% trigger and the accompanying CAB determination which insured that only the effects of deregulation would prompt the payment of any benefits.

Once declared eligible under a qualifying dislocation, an adversely affected employee could take advantage of a range of benefits including priority hiring, moving expenses and reimbursement for any losses incurred by the change of residences, in addition to the monthly assistance payments. Any protected employee who suffered a loss due to the reduction of his wages would receive partial compensation for the difference between his prior and current wages. The Secretary of Labor, after consultation with the Secretary of Transportation, would be

responsible for setting the percentages and amounts of monetary compensation for each class and craft of airline worker. "The committee intends that the percentages chosen will result in compensation payments that are less than the employee's after-tax income in order to preserve maximum incentives for employees to secure comparable work."[16] However, in the body of Section 22 (b) (1), the committee stipulated "that the protected employee will not, during the period in which he is entitled to protection, be placed in a substantially worse financial position with respect to wages and fringe benefits."[17] Although not exactly contrary, these two positions reflect the difference in approaches between various factions. This lack of definitive guidance would subsequently prove difficult to interpret during the implementation stage. In addition, the Secretary of Labor would be required to periodically publish a list of jobs in aviation-related industries to augment preferential hiring. This reference to aeronautically-related industries is contained in the committee's report.[18] This report is a prime source for determining the fundamental philosophy that prevailed in the committee and the legislative intent on an issue-by-issue basis.

To further illustrate the Senate posture, it is useful to review the Congressional Budget Office (CBO) analysis of major issues:

> "It is highly unlikely that any payments will be necessary under this provision, and therefore no cost has been included in this estimate. A dislocation of the required magnitude has been historically rare in the airline industry. While the change in the regulatory environment will result in some changes in the nature of the industy, there is no evidence that major dislocations will occur. Rather, the opportunity for greater pricing and service flexibility is likely to result in increases in airline traffic and in the

> number of airline jobs. Further, the carefully structured transition period should allow the existing carriers to adapt gradually to the new environment."[19]

As with the committee, the CBO concludes that it is highly improbable that dislocations resulting from deregulation would be of such a dimension as to trigger payments. However, the CBO did perform a rather perfunctory cost analysis anyway. As an example, it estimated a 20% reduction in work force for three sizes of carriers - large trunk, small trunk, and local service. The potential government liability would be 30 million, 9 million, and 3 million dollars, respectively.[20]

In addition to the labor protective section, some of the other highlights of S. 2493 are enumerated below:

(1) A new policy declaration for the CAB stressing competition, innovation and low cost.

(2) Automatic market entry in a phased transition without prior CAB approval; the burden of proof was shifted to opponents to prove that new route applications by competitors are not consistent with the public convenience and necessity (PCN).

(3) New guidelines on public convenience and necessity (PCN).

(4) Market exit from unprofitable routes after ninety days if substitute air service is available.

(5) Fare increases up to five percent and decreases to thirty-five percent without CAB approval (later changed to fifty percent.)

(6) Small cities that currently have air service or on which there is dormant authority are guaranteed continued service for ten years.

(7) A new class of local air carriers was created that could utilize aircraft of up to 36 passenger seats and 40,000 pounds maximum gross weight.

(8) Streamlined and expedited CAB hearings.

S. 2493 was reported out of the Senate Commerce, Science, and Transportation Committee on 27 October 1977 and sent to the Senate floor.

Senate floor debate commenced on 19 April 1978 with a vote scheduled for no later than 4:00 p.m. on April 20th. Senator Cannon introduced the bill, discussed its evolution, and set the array of pro and con forces who were either urging passage or defeat. Considerable controversy followed on a range of subjects, including employee protections. Senator Pearson commented in part:

> "Throughout this process, airline labor has almost unanimously opposed the passage of this legislation. They contend that the bill will result in contractions among certain carriers and therefore result in fewer jobs...I find little merit in (that) argument. Increased traffic generation through more moderate fares and access to new markets will enhance employment opportunities... The Nation's airline employees are among the most highly trained and well paid of any group of employees in the American labor force. In my judgment, there is nothing in this legislation that in any way threatens their relative position in the marketplace...
>
> Should the merger of a failing carrier become necessary, there is ample precedent at the CAB for the imposition of extensive labor protective provisions in such cases including such benefits as moving expenses, seniority list integration and mandatory binding arbitration. In short, existing practice and procedure adequately protects the airline labor force and the traveling public in cases where a particular carrier fails."[21]

The Senator's last point regarding the CAB protecting airline employees through the use of merger protections may not be entirely fair. While historically the CAB has allowed a failing airline to merge with a competitor, there is no guarantee of that policy continuing. Quite to the contrary, during his tenure, CAB Chairman Kahn strongly resisted

mergers on the grounds that they were monopolistic in tendency and destructive of the competitive framework that he was attempting to fashion.[22] So to assume that all dislocated workers of a failing carrier would receive mandatory CAB merger protections is spurious. It is just as possible that a failing airline would be allowed to go into receivership and that its employees would be eligible for nothing more than standard employment services and unemployment insurance. Even if a merger were to be approved, seniority list integration is an extremely important and sensitive issue as recently demonstrated in the Pan American-National merger. Pan Am has had pilots on furlough for up to ten years, but the relatively new National pilots with considerably less seniority than their Pan Am counterparts were allowed to continue to fly. Now, if any new positions open for pilots, the old furloughed Pan Am pilots will be called back to work.

Senator McGovern (D-S.D.) was critical of many points in the legislation. Being from South Dakota, he obviously was very concerned about air service to small cities. Also, he proceeded to attack the bill from another quarter that bears on employee protections: that, at a time when the Administration was proposing an $11 billion public services job bill to combat unemployment, it was also supporting S. 2493, a bill that Senator McGovern purported would put airline employees out of work.

> "Proponents of this legislation may well quarrel with these projections, but the fact is that they do not know - and there is no data available - to determine the full adverse effect of this legislation upon the Nation's airline employees.
>
> The employee protection program in S. 2493 signals that the sponsors of this legislation are aware that there will be layoffs, but it does not - and cannot - fill in

> the numbers or the costs involved. It is a sad commentary on this bill when we find ourselves providing unemployment benefits for an unknown number of people, in an amount that we cannot quantify, at a time when we are desperately trying to find ways to put people to work."[23]

Senator McGovern indeed recognized problems that would continue to plague the employee protection program during implementation. The fact that three years of Senate hearings and untold research could not even generally estimate the impact of deregulation in terms of adverse consequences for airline employees due to airline bankruptcies or contractions was testimony to the seemingly insoluble nature of the dilemma. It would fall upon the Department of Labor as the implementing agent to make those estimates out of necessity.

During the course of the Senate floor debate on protections, the only amendment accepted by the Senate was that offered by Senator Cannon to delete the language which specifically protected an employee from being placed in a "substantially worse financial position." It was felt that this phrase obligated the Secretary of Labor to pay the full amount of present salaries and fringe benefits. Many worried that this would be an excessive payout of tax dollars, expecially since the management of Northwest Orient Airlines which was involved in a pilots' strike at the time had advertised nationally in newspapers that some of its pilots currently were receiving over $100,000 annually in total compensation (salary and fringe benefits) and were on strike for more.[24] (According to the Airline Pilots Association which represents virtually all of the pilots and many of the flight engineers in the airline industry, the average member pilot's earnings in 1976 were $41,500 per annum and only

one percent of ALPA's membership of 27,000 earned in excess of $75,000 annually. Generally, these are management pilots who fly and also hold senior management positions.) By deleting this language, Senator Cannon indicated that he felt that "the Secretary of Labor,...., is the one who ought to make the determination as to the adjustment assistance which is provided."[25] In providing further guidance, Senator Cannon stated his support of incorporating the "last fired, first hired" concept as a means of keeping people working. He conceded, however, that this would create problems between the involved unions, obviously referring to the potential problems surrounding the integration of union seniority lists, union jurisdictional disputes and disruptive rehiring procedures.

Employee protections were not the centerpiece of debate because no one thought that they would ever be needed.

> "I must say that I do not think we are going to have those kinds of disruptions. I believe this is merely a provision where some might say it is adequate insurance. I believe we have a bill here which will insure that we will end up with more employees for these various carriers rather than fewer, and that will be true right across the board."[26]

This belief was in accordance with the CBO analysis and other prior comments and reveals what can be construed as the Senate's intention of establishing a "contingency" program. No one was definitely sure employee protections either would or would not be needed. Thus, provision for employee protections appears to have been political insurance.

Other amendments, offered but not accepted, included one by Senator Zorinsky which would have eliminated the 15% requirement for a major contraction and extended coverage to employees with only one year of

service. However, the amendment eliminated all monetary benefits and provided only for a preferential right to employment within the industry for eligible employees, and a duty to hire those employees on the part of certified carriers. The vote on the Zorinsky amendment was 43 yeas and 48 nays.

Senator Danforth, who introduced the original protective provision contained in the bill, also proposed an amendment to the protections which did not prevail. Like the Zorinsky amendment, it provided for the elimination of the 15% requirement for a major contraction. The amendment also extended the employee's protective period to a maximum of 5 years and placed the definition of "reasonably comparable employment" with the Secretary of Labor. The vote on Senator Danforth's amendment was 37 yeas and 54 nays.

Senator Hatch (R-Utah) took strong issue with the whole concept of employee protections. He felt it represented a dangerous trend to single out special groups for benefits and make the U.S. Government the last recourse for employment dislocations. He raised previously enacted legislation to demonstrate his point - Redwoods, AMTRAK and CONRAIL - and their costs. Then Senator Hatch placed his amendment before the Senate to affirm that "It is the policy of the United States not to approve employee protection programs."[27] Senators Kennedy and Cannon spoke in opposition to the amendment. Subsequently, the amendment was defeated by a vote of 7 yeas and 85 nays with 8 Senators not voting.

Actually, it appears that many of these amendments were posturing for later positions or for the purpose of assessing the strengths of the various factions in anticipation of the final Senate vote. A vote was

called on the same day and S. 2493 was passed by a vote of 83 yeas and 9 nays. Those voting against the bill were Senators Chiles (Florida), Hatfield, Paul G. (Montana), Inouye (Hawaii), Matsunaga (Hawaii), Melcher (Montana), Nunn (Georgia), Randolph (West Virginia), Stone (Florida), and Talmadge (Georgia). Indications are that the Senate delegations from Montana, Hawaii, Florida, Georgia and West Virginia feared a detrimental impact upon air service to towns and small cities in their respective states and were not persuaded by safeguarding provisions included in the Senate bill. Nevertheless, the weight of the votes in favor of passage carried the day in a resounding victory.

The United States House of Representatives

As alluded to earlier, the House of Representatives did not conduct nearly as lengthy a debate on the Airline Deregulation Act of 1978 nor on the employee protections clause as did the Senate. In the House, airline deregulation was discussed in the 1977 Anderson Hearings. House Aviation Subcommittee Chairman Anderson (D-Calif.) originally offered H.R. 8813 without any employee protections. During the 1977 Christmas recess, H.R. 8813 was substantially altered to incorporate the divergent views of several committee members. Key people in these revisions were Representative Levitas (D-Ga.) and Representative Mineta (D-Calif.). The product was a new bill, H.R. 11145, which, however, still did not contain any labor protections. After holding hearings on March 6th and 7th with Rep. Anderson acting as the bill's manager, the Aviation Subcommittee of the House Public Works and Transportation Committee commenced mark-up of

H.R. 11145 on 8 March 1978. During this public mark-up session, Mr. Mineta recognized the need for labor protections and embarked upon developing employee protections language. The International Association of Machinists and Aerospace Workers (IAM) had proposed certain protections language in their earlier testimony which had as its basis the protections provided in the railroad industry. The Machinists stood to be the most adversely impacted union if any airline, such as TWA, suffered major contractions or bankruptcy.

On March 21st, the following amendment (#30A) was offered to the Subcommittee by Rep. Mineta:

> "Sec. 31. No authority granted by this Act, or by any amendment made by this Act, shall be exercised by any carrier unless prior to each such exercise, the Secretary of Labor has certified to the Civil Aeronautics Board that the interests of the employees who may be affected thereby have been adequately protected by fair and equitable arrangements providing levels of protection no less beneficial to and protective of such interests than those established pursuant to section 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Service Act as in existence to date or hereafter amended except that the carrier employer of the affected employees shall be responsible for the application of the protective arrangements to such employees and shall be reimbursed by the Secretary of the Treasury for the cost of such application. There is hereby established in the Treasury of the United States a separate account to be known as the 'Airlines Employees Protective Account.' Funds in such account shall be available to the Secretary of the Treasury to make reimbursements pursuant to this section. There is authorized to be appropriated to such account annually such funds as may be required to meet the obligations thereunder."

"Section 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Service Act" refer to the "AMTRAK" level of protections.

This amendment was subsequently passed in the Subcommittee by a vote of 23 yeas and 1 nay. The 1 nay vote was a proxy.

In spite of this apparent agreement on the protective provision, the next day, March 22, saw a substitute bill proposed by Rep. Levitas. It was a collection of many amendments, some of the orignial provisions and two new sections, i.e., (1) Sunset Provisions (for the termination of the Civil Aeronautics Board and the transfer of remaining functions that had not been phased out to other government agencies) and (2) Employee Protections, which read as follows:

> "Sec. 13. Not later than the one-hundred-eightieth day after the date of enactment of this Act, the Secretary of Labor shall prescribe regulations to insure protection of the interests of employees who are adversely affected by new competition resulting from the amendments to the Federal Aviation Act of 1958 made by this Act. The carrier employer of the affected employees shall be responsible for the actual payment of all allowances, expenses, and costs provided to protect employees pursuant to such regulations. Such carrier employer shall then be reimbursed for the actual amounts paid to or for the benefit of protected employees. Such reimbursement shall be made from a separate account maintained in the Treasury of the United States to be known as the 'Airlines Employees Protective Account.' There is authorized to be appropriated to such account annually such funds as may be required to meet the obligations thereunder."

In a surprise move, the Subcommittee passed the Levitas substitute by a vote of 13 to 11. At this point, the Subcommittee had both the original bill and the substitute under consideration. It appears that Rep. Levitas was attempting to seriously expand the deregulatory aspects of the initial legislation by completely eliminating the CAB as were others in the Georgia Congressional delegation. Due to this confusion, Chairman

Anderson recessed the Subcommittee in order to facilitate private negotiations to reconcile the differences.

The Subcommittee was reconvened in early May after receiving the Senate bill, S. 2493, on 20 April 1978. Little was accomplished with tne Senate bill. Having reconciled the various positions and having achieved a consensus, the Suocommittee did not want to recess again and attempt to include S. 2493 in their considerations. With the reconciliation of H.R. 11145 and the Levitas Substitute, the synthesis was renumbered H.R. 12611 and reported out of the Subcommittee with approval on May 9th. At this juncture, the bill contained the Mineta language unchanged on employee protections.

Rep. Johnson (D-Calif.), tne Chairman of the House Public Works and Transportation Committee, wanted to link tne deregulation bill to two other aviation-related pieces of legislation, H.R. 8729 and H.R. 11986, that were designed to financially assist airline companies and airport operators to comply with new Environmental Protection Agency (EPA) and FAA regulations requiring quieter aircraft and the development of noise control programs. The deregulation bill (H.R. 12611), as reported out of the Subcommittee, was not explicitly linked to the aviation noise abatement legislation although a continuing effort was made by members of the House to link passage of one with passage of the other.[28] This effort died in the joint House-Senate Conference when the Senate members refused the linkage. By attempting this linkage, the airlines and the airports sought offsetting Federal assistance for noise control as the price of passage of the deregulation legislation.

On 15 May 1978, the full House Public Works and Transportation Committee approved the compromise airline deregulation bill with minor alterations by a vote of 37 to 5. Sixty amendments had been considered by the Aviation Subcommittee and the full Public Works Committee. No changes were made in the Mineta language on employee protections. The bill then went to the Rules Committee where it was granted an open rule providing for one hour of general debate. Subsequently, it was reported out on August 15th. After another month, H.R. 12611 (now named the Air Service Improvement Act of 1973) was taken up by the full House on 14 September 1978 as a Committee of the Whole House on the State of the Union. Although extensive floor discussion ensued in support of the bill, no specific discussion of the employee protections occurred. On September 21st, again as a Committee of the Whole, the House discussed H.R. 12611. (By convening the Committee of the Whole, Congress spreads any detrimental consequences that might result from a regular Committee vote among the entire House of Representatives.) In any case, section 34 (renumbered fron section 31 but containing the Mineta AMTRAK protections in identical language) was passed without objection. The full House was convened on H.R. 12611 on the same day and the bill was passed by a vote of 363 yeas to 8 nays. Shortly thereafter, both the House and the Senate bills were sent to a joint House-Senate conference to reconcile the two pieces of legislation and produce a single bill for both Houses to pass and send to the President.

Congressional Intent - the Joint House-Senate Conference

A strange thing occurred during the Conference. While there were great differences in scope and objectives between the Senate and the House bills, the Senate bill was generally considered to be the stronger deregulation effort. What resulted from the Conference turned out to be stronger than either of the two proposals that went into the Conference.

This phenomenon occurred in a Conference containing most of the principal actors from the Senate and the House: Senators Cannon, Magnuson, Stevenson, Ford, Stevens, Schmitt and Danforth: and Representatives Johnson, Roberts, Anderson, Roncalio, Levitas, Harsha, and Snyder. Several factors may have precipitated this stiffened pro-competitive attitude. First, an intelligent and knowledgeable staff attorney had recently left the CAB where he had formulated a number of deregulatory measures under Chairman Kahn and moved to the Senate staff where he ended up redrafting much of the Conference report. Second, large increases in airline ridership measured by such parameters as revenue passenger miles, load factors, available seat miles flown, as well as airline industry earnings, were seen as a confirmation of Chairman Kahn's philosophy of having applied administrative deregulation to the industry in the recent past. Incidentally, these same profits had the political side effect of eliminating any possibility of Rep. Johnson convincing the Senate conferees that the airlines needed financial assistance in retrofitting older aircraft engines or purchasing new quieter equipment, thus losing his battle to link the two pieces of

legislation.[29] Third, a national consensus seemed to be developing generally favoring fiscal conservatism, free interaction of market forces and control of inflation.

S. 2493 and H.R. 12611 were considered during three Conference sessions - September 29th, October 5th and October 6th. The Congressional conferees approved the compromise legislation on October 6th. Immediately thereupon, they referred the legislation back to their respective Chambers for immediate action.

The Conference Report, titled the "Airline Deregulation Act of 1978" amended the Federal Aviation Act of 1958 by substituting a new policy statement, drastically altering and curtailing the regulatory authority of the CAB, and scheduling the CAB for gradual, but eventual, elimination by 1 January 1985. It established the goal of freeing the domestic airline industry from expensive and stultifying regulations while stimulating competition and growth.

Prior to the 1978 Act, CAB authority extended into several areas: (1) granting of authority to airlines to enter or exit routes and markets; (2) approval of passenger fares; (3) conferring antitrust immunity upon airline mergers or takeovers; and, (4) administering subsidies to airlines for maintaining local passenger and airmail service to small cities. In a series of steps, the new law eliminated: CAB's route assignment authority by 31 December 1981 (thereafter allowing virtually automatic market entry or contingent exit); CAB's authority over domestic rates, fares and charges on 1 January 1983 (thereupon allowing market forces to dictate pricing); the Board's special authority over mergers and acquisitions by 1 January 1983 (transfering

jurisdictional authority to the antitrust laws that apply to other non-regulated U.S. industries); and, the CAB as a legal body by 1 January 1985 (transfering its residual powers to other existing agencies.) Furthermore, new air carriers could come into existence simply by showing that they are "fit, willing and able" before an abbreviated informal hearing. As previously mentioned, the compromise was modeled upon S. 2493. However, many of its basic tenets were considerably strengthened. Of particular interest to this study is the evolutionary development of the employee protection provision in the Conference.

As discussed previously, the House bill provided airline employees the protections afforded employees under the Rail Passenger Service Act (AMTRAK). The existing AMTRAK protections attempt to make dislocated workers "whole" by providing employee displacement, dismissal and relocation allowances for up to six years, or allow the employee to elect a lump sum settlement of up to twelve months pay in lieu of all other benefits. The Senate bill provided for a program of employment and financial assistance that was not to exceed 36 months of payments and was caused by bankruptcy or a 15% reduction in total full-time employees within a twelve month period as a result of this legislation as determined by the CAB.

Several compromises occurred. Senator Cannon had not wanted to abolish the airlines Mutual Aid Pact (MAP) which the House had included in its version of the legislation. So he "got the conferees to agree to trade some provisions in the labor protection provision for a provision that would allow the CAB to approve a mutual aid pact under which 60 percent of an airline's expenses during the strike period would be paid

for eight weeks if all members of the pact agree in advance to submit to binding arbitration."[30] What he traded away to get the modified MAP was the 15% trigger for a "qualified dislocation" for a 7 1/2% trigger and, instead of a 36 month assistance period, he opted for a 72 month assistance period (as AMTRAK provides.) The 7 1/2% trigger is a much more reasonable figure if compared to the historical downturns in the airline industry. The worst economic downturn (not including strikes) occurred in response to the oil embargo in 1973 and then the size of the layoffs amounted to a little over 7% at the hardest hit airline, TWA. The six year limit is more in keeping with the AMTRAK level of benefits, as well as practical experience with furloughs since 1973. According to ALPA, only Eastern and Pan American Airlines still have pilots on furlough. These changes notwithstanding, the House and Senate conferees basically adopted the Senate protective arrangements.

In addition to the changes described above, the Conference bill provided that protected employees who are furloughed or terminated - other than "for cause" which abrogates all rights or benefits under the program - have the first right of hire over non-protected employees with any airline hiring new employees. Further, it provided that if a protected employee is hired by another air carrier, that employee shall retain his rights of seniority and recall with his original furloughing carrier. However, in no way does this affect any rights employees may have as a matter of contract. (All aspects of status and pay result from the sacrosanct principle of seniority in the airline industry.)

> "The conferees intend the requirement that the deprivation of employment be related to the Deregulation Act to be a continuing requirement. For example, an employee who begins to receive benefits and then reaches mandatory retirement age would not be eligible for benefits beyond the date he reached retirement age. After that date the cause of unemployment would not be the Deregulation Act, but the reaching of retirement age."[31]

The last item added on by the conferees stipulated that the Secretary of Labor promulgate all rules, regulations and guidelines within six months after enactment. These regulations would then be submitted to the Senate Commerce Committee and the House Public Works Committee. These final rules or regulations would become effective sixty legislative days later unless during that time "either House adopts a resolution stating that that House disapproves such rules or regulations."[32] Therein lies a serious question as to the constitutionality of a Congressional review of Executive action following enactment of a piece of legislation. This question will be addressed later.

And, thus, the Conference Report went back to the two Houses of Congress. The Senate passed the measure on 14 October 1978 on a vote of 82 yeas and 4 nays. The House also passed the legislation on the same day but not until lengthy discussion of the employee protection provision and the MAP linkage had transpired. Regarding employee protections, Rep. Anderson pointed out that "This is the first time airline employees have been given these benefits. Under existing law, employment can and does fluctuate widely, and displaced employees are not given any protection by law.... I believe that....the conference provisions represent substantial progress for the airline employees."[33] Mr. Mineta, the sponsor of the

House employee protection provision, struck a different tone by expressing grave concern about the protection contained in the Conference Report. "By comparison with the House-passed provision, the conference agreement - which was based on the Senate language - is not much protection at all."[34] Although regretting the Conference compromise, Rep. Mineta, along with 355 of his peers, voted for passage with token opposition amounting to 6 nays. Now the bill went to the President for his signature.

Executive Intent Prior to Passage of the Act

While momentum for airline deregulation slowly developed in the Congress, President Carter reaffirmed his campaign promises of less government interference in the American society and reductions in the size of government in a speech at a White House press conference on 20 June 1977 favoring deregulation of the domestic airline industry. Earlier in 1977, Secretary of Transportation Brock Adams also supported deregulation in testimony before Senator Cannon's Commerce Committee. Not only did the Department of Transportation (DOT) take this position but the CAB was now in a philosophical stance where it could also strongly advocate greater airline management flexibility in decisions regarding routes, fares and services. (Incidentally, the CAB never has had the authority to dictate the frequency, schedules or the type of aircraft to be used.) By increasing flexibility in these matters, a phased deregulation of the industry could evolve to a point eventually equivalent to other traditionally unregulated industrial sectors. The first indications of interest in the impact of deregulation on airline

employees are contained in a heavily documented, unpublished paper prepared in April, 1977 by the DOT which summarized the arguments for and against airline deregulation.

> "Labor - There is some evidence that deregulation will tend to keep wages from rising as fast as they would otherwise, increase the number of jobs available in the industry, and enhance productivity. The CAB staff has estimated that regulation tends to raise airline wages by artificially enhancing the power of airline unions, thus implying that deregulation would tend to hold down wages. Studies indicate, however that non-CAB carriers and non-unionized CAB carriers pay comparable wages to unionized CAB carriers at comparable seniority levels. The number of jobs would seem likely to increase since such increases have been observed in the area stimulated by intrastate carriers. Like management, however, labor would be dislocated by substantial changes in the fortunes of a given airline. Since airline employee practices are characterized by very strong seniority benefits, it may be difficult for a laid-off senior employee to find employment with comparable benefits from another airline. Finally, it appears that the non-CAB regulated carriers have achieved substantially higher rates of productivity than the CAB-regulated carriers and therefore that deregulation might increase productivity."[35]

This brief caption provides much of the basic logic for the Administration's position. That position was explicitly enunciated by Charles Schultze, Chairman of the President's Council of Economic Advisors, on 22 March 1977 in testimony given before the Senate Subcommittee on Aviation:

> "What about labor? In his message to the Congress, the President made it clear that the administration recognizes an obligation to protect the legitimate interests of airline employees.
>
> What might these legitimate interests be?
>
> In the administration's view, the Federal Government would have a valid cause for concern only if it could be demonstrated that the transitional effects directly resulting from the enactment of airline regulatory reform legislation are substantial, so substantial that they cannot be handled by the normal procedures now in effect in this industry.

However, we are unwilling to support any proposal that would provide workers with absolute protection from the normal ups and downs of business activity within a less regulated airline industry.

Such protection would be undeserved and would grant airline workers an unprecedented measure of security.

We urge the committee to keep the following principles in mind as it wrestles with this complex problem.

In contrast to the case of the railroads, firms are actively seeking to enter the airline industry, and firms in the industry are seeking to expand. Consequently, the most plausible expectation is that total industry employment opportunities will increase, not decrease, as a result of regulatory reform.

Since there will be no wholesale abandonment or disruption of service as a result of regulatory reform and since any entry or exit provisions likely to be embodied in legislation will be carefully phased, no significant displacement of labor is likely even in the short run.

Substantial shifts in employment currently occur regularly within the airline industry. As business expands, workers are hired. As it contracts, they are laid off, sometimes on a rather large scale.

Quarter-to-quarter changes in carrier employment of several percentage points are not uncommon. Compensating workers for all such shifts would be very expensive and unjustified.

Consequently, to be acceptable, labor protection provisions must be able to discriminate against this normal labor turnover activity and the rather small direct impacts that may accompany regulatory reform.

In the event of a merger or major route swap, the CAB currently has procedures to see to it that no worker is disadvantaged. Current labor contracts contain provisions providing furlough protection. Nothing in the proposed legislation would affect either of these.

In sum, based upon the available evidence to date, the administration is not persuaded that airline regulatory reform will harm the legitimate interests of labor. However, if a case for protection can be made, we are prepared to work together with the Congress in determining what remedies might be appropriate."[36]

These two positions indicate a confluence of opinions between the Department of Transportation and the Executive Office of the President.

However, the specific recommendations of the DOT were most telling and, as measured by the outcomes, most effective in steering the Administration and in developing the Senate language.

> "We recommend the Administration not support specific labor protection provisions at this time. However, if pressed, Administration witnesses should be willing to assure Congress that the Administration will not oppose reasonable and limited labor protection provisions provided labor can show (a) that actions accompanying the introduction of airline regulatory reform will be sufficiently disruptive that special protection is justified (the baseline against which this must be shown is the rather substantial level of labor turnover activity that is a current characteristic of this industry - see below); (b) that existing CAB procedures and union contract provisions are inadequate to handle any problem that might be found to exist; and (c) that labor protection provisions can be designed that provide aid only to workers whose situations are significantly affected by regulatory reform. The Administration should make it absolutely clear that it will not accept provisions under the name of 'labor protection' that guarantee every existing job; this would put a straightjacket on labor mobility in this industry."[37] (Emphasis is in the original.)

The DOT sought to insure early on that the potentially affected labor organizations did not garner support for an employee protection provision similar to Title V of the Regional Rail Reorganizaton Act of 1973. As discussed in Chapter I, this Title insured that adversely affected employees would be guaranteed either a comparably paying job or a monthly allowance equal to their recent average monthly earnings on the condition that they move to wherever work was available. In a close reading of the tone of the DOT support document, the author detects that DOT may be speaking for airline management. If Title V-type provisions were passed without basic modifications, the carriers would be solely responsible for providing earning protection for the affected employee until placed in a job at his prior earning level.

In the early summer of 1977, the White House Domestic Policy Staff commenced the development of a formal Administration position on airline employee protection provisions. Submission of various alternatives regarding labor were collected from representatives of the pertinent Departments, including DOL and DOT. The Department of Labor recommended the prevailing Allegheny-Monawk level of protection, assigning the Secretary of Labor responsibility for administering airline employee protections, and an UMTA-style (Urban Mass Transportation Act) certification of the adequacy and fairness of the prospective individual protective arrangements. Prior to Senator Danforth's initial recommendation of labor protections on 13 October 1977, the Administration had internally indicated its disapproval of employee protections unless they were applied to adversely affected employees who had suffered dislocations directly attributable to the implementation of the deregulation legislation. On 20 October 1977, representatives of the major air carrier employee organizations met with the Secretary of Labor to voice their concerns and request his support for employee protections.

On 9 November 1977, legislation deregulating the air cargo industry was signed into law by the President without any employee protective provisions. This omission probably created concern on the part of both the Assistant Secretary for Labor Management Relations, Francis X. Burkhardt and LMSA constituents because, shortly thereafter, he petitioned the Secretary of Labor, Ray Marshall, for active support of a DOL policy on employee protections in general and airlines in particular. His reasons were apparently twofold: (1) to respond to the

concerns of organized labor[38] and (2) to assume a leadership position for his Agency (LMSA) on the entire issue of employee protections. Ass't Secretary Burkhardt sought to have employee protections at a level no less than those provided by the industry included in the regulatory reform of the airline industry. Further, he sought the Secretary's support to reverse the Domestic Council's and Office of Management and Budget's (OMB) opposition to the inclusion of any employee protections in the airline legislation. He pointed out that other constituencies, such as airline management, stockholders and small communities, had been pursuing their concerns with their respective agencies and in Congress. Their concerns appeared to be addressed in both versions of the pending legislation through various guarantees and protections. Except for airline employees, all other interests involved appeared to be granted some compensatory protections. In addition to this entreaty, Burkhardt compared the inadequacy, in his opinion, of the legislatively-proposed protective provisions, to the extensiveness of the airline unions' positions and the reasonableness of LMSA's suggested provisions.

There were several activities that while not being specifically related to the Airline Deregulation Act were relevant to the Department of Labor's ongoing liaison with the industry. On November 23rd, LMSA met with representatives of the Airline Industrial Relations Conference (AirCon) in order to discuss their inputs on a wide range of industry-related issues, including the financial impact of deregulation. In January of 1978, the Secretary convened the first DOL Airline Conference with senior level members of airline management and airline employee organizations in order to facilitate labor peace in the

industry. However, the purpose of this continuing Conference did not include specific discussion of deregulation employee protections. Meanwhile, throughout the spring of 1978, meetings on airline employee protections continued between White House representatives and DOL.

The President's position on airline employee protections became unmistakable on 27 March 1978. During the signing ceremony of the legislation authorizing the expansion of the Redwoods National Park - which contained an all-encompassing and very generous employee protection package that far exceeded the range of benefits even discussed for airlines - President Carter specifically denounced employee protections and expressed his reservations in signing legislation containing such protections.

In May, the Under Secretary of Labor, Robert Brown, representing the views of a group of senior-level DOL officials and representatives of organized labor, concluded that workforce dislocations would continue to occur and that the currently fragmented and uneven responses to them were inadequate. Because of the lack of an initiative on the part of the Administration on employee protections, Congress would, no doubt, continue to fashion individual remedies in response to various political pressures. Under Secretary Brown pointed out that the Administration would do much better by accepting the inevitability of dislocations that develop as a result of public policy decisions and initiate a broad White House-sponsored policy on employee protections.

Throughout the exchange of views with the Domestic Council and OMB up until the joint House-Senate Conference, DOL was consistent in its view that some form of employee protections would ultimately be included.

Therefore, in order to get an acceptable, reasonable and workable provision, the Administration should guide Congress in the development of employee protections rather than opposing protections outright. As passage of a bill containing some form of employee protections became imminently apparent, the Domestic Council began signaling marginal receptivity for the structure of the Senate employee protections which more nearly resembled the Administration's minimum position than did the House bill. Undoubtedly, this change in position occurred because of the Administration's experience with the Redwood bill where it took an absolute position in opposition to employee protections and was presented with a bill which contained such a vast array of benefits as to be deemed onerous by the White House.

The passage of the Senate bill, S. 2493, catalyzed DOL and LMSA into specifically-directed activity. The Labor Management Relations Service (LMRS) is operationally responsible for the administration of several existing employee protection programs. LMRS had been closely monitoring the progress of employee protection provisions through both Houses of Congress, as well as providing technical assistance upon request by Congress and with the approval of the White House Domestic Council. The Secretary of Labor proposed contact with the Secretary of Transportation Brock Adams for consultations in light of the lack of a clear-cut Administration policy. On 19 June 1978, Ass't Secretary Burkhardt authorized LMRS and the Division of Employee Protections (DEP) to gather a planning group in preparation for the passage of airline reform legislation in order to prevent a repetition of the Redwoods experience.

The Redwoods bill had proved to be a considerable strain on the Agency's personnel resources in that when such a bill is signed into law, benefits and services are expected to be forthcoming immediately to the individuals seeking remedy for their problems. The Redwoods Act proved to be a complicated piece of employee protection legislation requiring extensive interpretation and complex programmatical linkages. The Agency was hard pressed to find enough people on short notice to establish the program machinery and to develop program policies and guidance in order to award benefits to the eligible lumbermen and mill workers within six months of passage. Fifteen months after passage of the Redwoods Act, the Agency had declared approximately 2000 individuals eligible and those people were receiving monthly assistance payments; however, due to its efforts in that direction, the Agency had yet to be able to publish its regulations and to complete the arrangements for the pension, health and welfare plans mandated by the law. It was felt that any repeat of this performance would be embarrassing for the Agency and the Department. Thus, a planning group for airline protections was developed and constituted by 24 July 1978 in anticipation of the passage of the Act.

At the same time, the Department responded to a July request from the White House Domestic Policy Staff for the DOL position on the pertinent portions of the airline reform bills. The Department opted for a variety of different features contained in one or the other prospective bills. From the viewpoint of administrative feasibility and programmatical consistency, the duration and basic level of benefits, and the lump sum option, DOL favored the House version. However, DOL did prefer certain aspects of the Senate bill - the ten year limit on eligibility by

claimants and preferential hiring rights. The Department strongly opposed the inclusion of a legislative veto of regulations such as that contained in the Senate bill. This objection was consistent with the President's position, as stated on June 21st in a speech to Congress, that he considered this kind of legislative review of the Airline Employee Protection Program regulations to be an unconstitutional infringement upon the powers of the Executive Office and that these kinds of vetoes upset the constitutional balance between the separate branches of government. The Department of Labor's response to the request for its position went to Mary Schuman, Assistant Director of the White House Domestic Policy Staff, on July 10th. It was followed in the middle of September by a letter to Ms. Schuman from Frank Burkhardt advising her of the creation of a DOL planning task force and providing her with two lists (one for each bill under consideration) of questions of legislative intent and technical implementation that had been developed by the Departmental task force in consultation with LMSA and the Employment and Training Administration (ETA).

In order to continue emphasizing deregulation, President Carter announced a new international air route policy on August 21st. The new policy stimulated competition among airlines and reduced fares for passengers and air freight rates for shippers. "In announcing the new policy President Carter described it (sic) a part of his continuing effort 'to introduce the airline industry to the benefits of competition both at home and abroad.'"[39] It was particularly criticized by labor, but airline management and certain Members of Congress also felt that it was unfavorable to the U.S.

In September, 1978, the President nominated Marvin Cohen to the CAB Chairmanship to replace Alfred Kahn who had been elevated to the Council of Economic Advisors (CEA) in the Executive Office of the President as the nead of the Council of Wage and Price Stability (CWPS), as the President's chief inflation fighter. To Mr. Cohen now fell the task of implementing the final deregulation bill, and as it turns out, the dismantling of the CAB. The appointment of Mr. Cohen continued the momentum of the effort that was now rapidly approaching fruition, i.e., airline deregulation. Nothing more significant occurred regarding employee protections except that during the joint House-Senate Conference, Mary Schuman signaled the Administration's tacit acceptance of Senate-type protections at a reduced level. In essence, the Conference left the determination of the level of benefits up to the Secretary of Labor. This was probably done in order to avoid an outright conflict between those who supported strong employee protections and the President. On 24 October 1978, the President signed the Airline Deregulation Act of 1978 and, thus, the Act became law (Public Law 95-504).

Development of the Program

The planning task force was designed with two levels. At the Department level, the task force was made up of representatives from LMSA, the Solicitor of Labor's Office, ETA, ASPER (Assistant Secretary for Policy, Evaluation and Research) and OASAM (Office of the Assistant Secretary for Administration and Management.) This group's

responsbilities were for policy review, technical assistance and administrative coordination to insure that the Department complied with all existing laws and regulations in implementing the new law. The second planning task force at LMSA included internal LMSA representatives from LMRS (Labor Management Relations Services), LMPD (Labor Management Policy Development), OAM (Office of Administration and Management), OFO (Office of Field Operations), PWBP (Pension Welfare Benefits Program), and OPE&S (Office of Planning, Evaluation and Systems.) The primary actors in this planning task force were Peter Husselmann from LMRS, Sheldon Kline from LMPD and Walter Steiner from OPE&S. This group was augmented as necessary by ETA (Robert Johnson) and by LMSA field personnel (Thomas Stover and Hugh Segal) and a National Mediation Board (NMB) mediator (Thomas Roadley) on temporary assignment. This was the basic working group supplemented by attorneys from the Solicitor's Office. This working group was convened shortly after its appointment on 24 July 1978. A comparable group at ETA also was formed under the Deputy Director, Office of Program Management, Robert Kenyon. Lary Yud, Chief of the Division of Employee Protections in LMRS, presided over the LMSA working group. The first task assigned these groups was to examine the pieces of legislation (S. 2493 and the House bills) that were under consideration and to frame policy and technical questions not adequately addressed in the legislation. These were the bases for the questions sent to Ms. Schuman at the White House by the Department prior to the joint House-Senate Conference.

Prior to passage of the Act there was no demarcation of responsibilities between Agencies because the employee protection

language had not been finalized. Given the differences in the protections programs proposed under the House and Senate bills (the House bill more nearly identifiable with LMSA and the Senate bill with ETA), LMSA and ETA pursued independent research and development of the issues. Although Ass't Secretary Burkhardt had attempted to establish LMSA's primacy in the employee protections area, ETA contended that it should have the lead responsibility in the benefits area of the legislation. ETA's position was based on its experience with the Trade Adjustment Assistance Act and, especially, the Redwoods National Park Expansion Act. In the case of Redwoods, ETA was, in fact, operationally subordinated to LMSA in that LMSA had the policy lead on virtually all of the salient issues, including the payment of benefits. This meant that LMSA was deciding and directing the assignment of ETA resources and, further, was involving itself with traditional ETA-SESA (State Employment Security Agency) relationships. ETA was not about to allow that to occur again with the Airline Program.

Although Secretary Marshall had given LMSA the lead responsibility for the Airlines Act initially in June, 1978, enactment clearly defined a specific program and required a thoughtful re-examination of the apportionment of responsibilities. On November 8th, shortly after enactment, Mary Ann Wyrsch, Special Assistant to the Executive Assistant to the Secretary, convened the principal parties and requested a series of issue papers in order to develop a better understanding of the nature of the policy issues involved. Eleven papers were developed and forwarded as alert memoranda to the Secretary. They provided initial analyses of the issues and posed alternative metnodologies that could be

employed in the establishment of policy. In addition, the two Assistant Secretaries described the areas of agreement and disagreement between them.

> "LMSA should have the policy resolution and regulation preparation under Section 43d. (Author's note: Section 43d concerns the first right of hire.) (Except the determination of an individual's obligation to maintain eligibility for monthly and relocation allowances), and operational responsibility for negotiating both the seniority and rehire provisions of the Act.
>
> ETA, through the State Employment Security Agencies, should be responsible for administering (delivery) of monthly benefit allowances, relocation allowances, insuring that eligibility requirements are met, and providing reemployment assistance.
>
> Disagreement arises, however, as to who should be responsible for regulation development, policy authority and resolution of appeals concerning monthly benefits, relocation allowances and reemployment assistance."[40]

The Secretary concurred with Ms. Wyrsch's recommendation that "ETA should be given final responsibility for the policy direction of the benefit payment portion of the Airline Deregulation Act's employee protection provisions."[41] She pointed out LMSA's mention of ETA's opposition to special employee protection programs, such as the Trade Act and Redwoods. On the other hand, she noted ETA's concern of the special employee protection programs operating through ETA mechanisms (SESA's) but ETA not having policy responsibility for these programs.

As a result of that decision, the Secretary issued the Delegations of Authority and the Assignments of Responsibility for the Airline Deregulation Act of 1978 (ADA) on 5 February 1979.[42] LMSA was delegated authority and assigned responsibility for (1) developing,

promulgating and administering the policies, procedures and regulations regarding the hiring and rehiring practices and the nationwide job list; (2) encouraging negotiations between air carriers and representatives of affected employees concerning rehiring practices and seniority issues; and, (3) requesting the airlines to file the necessary information in order to effectuate the job list. ETA drew the remaining responsibilities, the most noteworthy of which was the policy responsibility for individual eligibility and monthly benefits.

At about the same time as the responsibilities were being assigned, President Carter sent Secretary Marshall a memorandum stating the President's directions regarding the submission of regulations to Congress for review and approval. "I have informed Congress... that I would interpret all such legislative veto provisions to be 'report and wait' provisions. I want this interpretation to apply to the provision in S. 2493."[43] This meant that the regulations should be submitted to Congress within the prescribed six months, but that any single vote of disapproval by either House was insufficient to block the regulations from going into effect. Only a new bill or a joint resolution subject to Presidential review and signed by the President could block the regulations from publication. In fact, because of intensive OMB involvement on the policy aspects, e.g., benefit levels and the associated costs, the final regulations were delayed going to Congress beyond the April 24, 1979 deadline.

Since DOL now had an immediate responsibility for implementing Section 43 of the ADA, events began to take shape. On January 24, the Assistant Secretaries from LMSA and ETA jointly forwarded nine major

issues with alternatives and recommended strategies for implementation to the Under Secretary for decisions. These nine topics were:

(1) A pay cap on monthly assistance payments was inferred in the legislative history - Should there even be a pay cap and, if so, at what amount?

(2) Congress left the determination of the percentage of wages attributable to the monthly assistance payment to the Secretary of Labor - Should it be the Allegheny-Mohawk labor protective provision level (60% of average monthly gross wages) or higher (70% of average monthly gross wages)?

(3) Should fringe benefits be compensated for?

(4) Are the terms "other employment" and "reasonably comparable employment" synonymous?

(5) What amount of monthly assistance should be paid to an eligible protected employee (that is a protected employee who actually suffers a qualifying dislocation) who refuses reasonably comparable employment? What is reasonably comparable employment?

(6) What amount or percentage of monthly assistance should be deducted as an offset of earnings from other than reasonably comparable employment?

(7) When does the period of eligibility commence for monthly assistance payments? In other words, should the U.S. Government pay an eligible protected employee from the date that the airline reaches the 7 1/2% trigger, or retroactively to when the employee was laid off (which could be as early as twelve months prior to the trigger date?)

(8) What tact should be taken regarding the administration of the first right of hire where no enforcement powers or sanctions are included in the Act?

(9) Should DOL encourage negotiations between carriers and unions on rehiring practices and seniority on a broad industry basis or react to individual labor disruptions by attempting to ameliorate the situation by facilitating favorable employment conditions with other carriers?[44]

These issues were considered individually by Under Secretary Brown. Tentative decisions were verbally transmitted to the responsible Agency as they were decided. Certain decisions have not been finalized as of this writing due to continued Executive-level discussions. While these decisions were being made, DOL nevertheless had a clear-cut responsibility to respond to any claims from affected airline employees who had been laid off from the date of enactment (24 October 1978) onward. The final procedures could only be instituted after publication of the final regulations in the Federal Register following the Congressional review period. In the meantime, it was necessary to prepare interim measures to respond to inquiries and complaints.

At this point in the implementation of the program certain judgments had to be made in order to develop responsible interim measures that would meet the needs of the clients but, at the same time, not waste resources. As Senator McGovern had pointed out on the Senate floor, no one had an accurate idea of the number of airline employees who might be adversely affected as a result of deregulation. Nonetheless, it was necessary for planning purposes to estimate the potential number of complaints that could be anticipated.

This estimate was developed in the following manner: The total airline industry employed 312,000 workers of all classes and crafts. Statistically speaking, this was the universe from which cases i.e., complaints, would come. It appeared that the type of problem that would require LMSA's immediate attention would revolve around furloughed airline employees who attempted to exercise their first right of hire at another airline. The law stipulated that only employees of certificated

carriers who had four or more years of full-time service as of 24 October 1978 were eligible to exercise this right. Therefore, it was necessary for LMSA to estimate this subgroup of the universe (of airline workers.) After a quick sampling of industry sources in an effort to collect aggregate information on the seniority characteristics of their labor force and their labor turnover, LMSA estimated the population of protected employees at 240,000. It was projected that complaints, which were a result of airlines allegedly denying protected employees their first right of hire, could range anywhere from 0 to 2,000. Although diversified research was conducted, it was agreed that there were no analogous experiences from which to derive data or assumptions since the industry had always been tightly regulated and was now entering a progressively more deregulated environment.

Thus, with that wide of a range of possible complaints, the Agency felt that it had to be prepared for some operational complaint case influx. For budgetary justification of workload, it was conservatively estimated that the program would receive 25 cases per year in Fiscal Years 1980 and 1981. That may have been a low estimate given many airlines' resistance to hiring competitors' former employees who would keep their recall rights, as well as the questions surrounding such situations as "termination for cause" and established company policies of not hiring their own former terminated employees (not having recall rights.) If the influx of cases was appreciably higher, the Agency would have to request additional resources to handle the increase.

Accordingly, minimal measures for handling cases were developed and established in the Agency. Shortly after enactment, a small number of

layoffs occurred in Boston when National Airlines dropped its service, and in Providence where both National and American Airlines discontinued service. The individuals who were laid off were assisted on an ad hoc basis by the Division of Employee Protections in LMSA. ETA was not in a position to extend any special assistance beyond the available employment services already in existence (testing, counseling, interviewing, job referral and job placement) and unemployment compensation. LMSA attempted to assist these adversely affected employees by calling and writing on their behalf and pointing out the duty to hire to the airlines that were continuing to operate in Boston and Providence and contacting Piedmont Airlines, which was introducing new service to Boston. In the absence of an established program, there was little beyond the existing SESA services that could be done to assist these employees. These individuals could not be considered cases because program eligibility criteria had not been finally established nor had there been an allegation that the first right of hire had been violated.

In January, 1979, one of the members of the LMSA working group developed an options paper regarding the implications and other aspects of case handling for LMSA. In the paper, he alluded to the potential for an initial complaint case filing of unknown proportion, as well as a continuing case filing of unknown dimension for up to sixteen years beyond enactment. Given the uncertainties, he went on to describe some of the requirements in the light of his interpretation of the law.

> "Nevertheless, LMSA should be prepared for some amount of casework. Although it may initially be a very small number of cases, it contains a potential for rapid expansion. LMSA has a responsibility to process an employee's claim that his first right of hire has been

> violated. Because the legislation does not provide for an enforcement mechanism, LMSA has little guidance as to the limits of its mandate on this issue.
>
> However, at the very least, it appears clear that LMSA should develop procedures to collect information on the complaint from the parties concerned, investigate and establish facts, judge merit and provide good offices and mediation services in an effort to resolve the complaint in an amicable and equitable fashion.
>
> As the regulatory process now stands, any protected employee or eligible protected employee who believes that his right of hire has been violated must resort to private action in the courts for redress if LMSA is unable to encourage a voluntary settlement of the dispute."[45]

Several options were posed and the one that was recommended suggested that the LMSA intensively train a representative from each of its six Regional Offices in all aspects of the Airline Employee Protection Program to process cases. If case influx overwhelmed these individuals, then the Agency should train several hundred LMSA Investigators, who routinely carry out LMSA's other mandated responsibilities, to handle Airline cases and request additional personnel from Congress to make up the shortfall in staffing resources. This seemed to be the most reasonable and flexible measured response to the ambiguities surrounding complaints.

Shortly thereafter on March 2nd, the Assistant Secretary sent a Notice to LMSA field personnel informing them of the law, LMSA's responsibilities and what they should do if contacted by former airline employees with complaints. The field personnel were directed to forward these individuals' names and addresses to the National Office by telephone and, also, to inform their respective Regional representative. Until publication of the final regulations governing the program, this has been the <u>modus operandi</u> for the Agency.

An Airline Deregulation Act Regulations Development Plan was forwarded to Under Secretary Brown by Assistant Secretaries Burkhardt and Green (LMSA and ETA, respectively) on 3 January 1979. A plan was necessitated by Executive Order 12044 (Improving Government Regulations) and Departmental policies. In this Plan, the utilization of public comment was described. "Any new issues, fresh alternatives or unanticipated responses would be analyzed for feasibility and responsibility. If found to be in the public interest and in harmony with policy objectives, these new concepts would be included in the proposed regulation,..."[46] Also, since the Act required that regulations be promulgated within six months after enactment, a plan was necessary to accomplish this task in a timely manner.

The proposed regulations were officially published in the Federal Register on 30 March 1979. They were the joint product of LMSA and ETA. They were a tentative formalization of the decisions reached by the Secretary of Labor, in consultation with the Secretary of Transportation (as required by the Act,) and OMB. A provisional timetable for promulgation of the rules and regulations had been drafted prior to enactment. However, the need to adequately canvas public comment and the continuing debate between the DOL and OMB regarding such things as benefit levels and pay caps combined with a lack of program personnel slowed down the process considerably.

The proposed regulations were a product of input from various segments of the airline industry and the general public. First, LMSA and ETA separately sketched out the regulations that governed the responsibilities that they had been delegated by the Secretary of Labor.

Second, multiple collaborative inter-Agency meetings ensued to adjust, fine tune and meld the two proposed operations together where required.

Then LMSA invited representatives of airline management and airline unions to two separate briefings given under the auspices of LMRS (Labor Management Relations Services.) The union representatives met on January 8th and the management representatives on January 10th at the National Office of the Department of Labor in Washington, D.C. The agenda were identical for both groups and generally described the roles of the two Agencies and a timetable for publishing the regulations. The first right of hire and, conversely, the duty to hire, the national center for the National Listing of Air Carrier Jobs and its operation, the proposed Labor-Management Committee and its purpose and role, and interim procedures were all discussed. Inputs from the attendees were sought and notes were made on salient issues. Union representatives questioned the Department's position that in the absence of clear language no enforcement powers could be asserted under Section 43.

The management representatives took vociferous exception to DOL's interpretation of the term "protected employee" in that DOL was according the first right of hire - illegally as they saw it - to any employee who had four years of full-time service with a certificated carrier without a qualifying dislocation and a CAB determination. The carriers felt that only eligible protected employees, i.e., only those who were adversely impacted by a "qualifying dislocation" - a major contraction or bankruptcy - as determined by the CAB, should be accorded the first right of hire. After some emotional debate had transpired, Charles Wood, a legislative aide to Senator Danforth (the originator of the Senate

employee protections section and a member of the Conference Committee) announced that, yes, in fact, the Department of Labor was correctly interpreting the legislative intent as the product of the joint House-Senate Conference. While that comment and the subsequent explanation by Mr. Wood quieted the discussion for the moment, the airlines maintained their objection to that interpretation. Subsequently, they have sought elaboration from the Congress to support their interpretation. They allege that it makes the Federal Government a hiring hall and that it is "reregulation" rather "deregulation."[47] So far, they have had no effect in Congress on this issue. The attendees to the two meetings were invited to submit further comments in writing along with their nominations for the Labor-Management Committee.

Because the law grants and provides the first right of hire to job vacancies at other carriers while preserving seniority and recall rights with the employee's original carrier, the Act designated the Secretary to "...encourage negotiations between air carriers and representatives of eligible protected employees with respect to rehiring practices and seniority."[48] The Labor-Management Committee is the Secretary's approach to satisfying this requirement in Section 43 (d) (3) of the Act. As contained in the Charter of the Committee, and as required under the Advisory Committee Act, the purpose is to advise the Assistant Secretary for Labor Management Relations on these issues. The purpose of the Committee is to serve as a working advisory group to assist the Department in its efforts to promote negotiations which will produce a voluntary private agreement or other mechanisms to facilitate those aspects of employee protection objectives of the ADA.

Tom Roadley, an experienced mediator from the National Mediation Board and known to most airline labor and management representatives, was detailed to LMSA to assist in developing the Committee, and since that time has accepted a position with the Division of Employee Protections for that continuing purpose. The Committee itself is composed of nine members of union and management each for a total of eighteen participants. The nine management members represent United Airlines, USAir, Seaboard World Airlines, Eastern Airlines, American Airlines, Republic Airlines, TransAmerica Airlines, Continental Airlines and Pan American World Airways. The nine representatives of employees are from the Airline and Aerospace Employees - Teamsters Local 732, Air Line Employees Association, Brotherhood of Railway and Airline Clerks, Transport Workers Union, Air Line Pilots Association, Association of Flight Attendants, International Association of Machinists and Aerospace Workers, Independent Federation of Flight Attendants and the Flight Engineers' International Association.

The first meeting of the Airline Deregulation Labor Management Advisory Committee (its formal title) occurred on 20 March 1980 in the Secretary of Labor's offices in Washington, D.C. and was open to the public. Ray Marshall, the Secretary of Labor, served as Chairman and William P. Hobgood, the current Assistant Secretary for Labor Management Relations who succeeded Frank Burkhardt, served as the Committee Chairperson. Opening remarks stressed the opportunity for the Committee to exercise a positive influence on developing mechanisms to accommodate the rehiring and seniority provision mandated in the Act. Mr. Hobgood requested that all of the participants forward a list of topics, problems

and issues suitable for the Committee's consideration. Statements of support for any forthcoming negotiated processes that emanated from the Committee's deliberations were unanimously proclaimed. Considerable discussion ensued on various objections that concerned either labor or management representatives. Mr. Hobgood kept the discussion within the scope of the Charter of the Committee and explained that the list of issues received would be developed into the agenda for the next meeting to be held approximately two months hence. Thus, the only positive outcome to really surface was the commitment on the part of the participants to effect any agreement reached by the Committee's members and to get unrepresented airlines and unions to join in or, at least, to acquiesce to whatever procedures or mechanisms could be developed.

Following LMSA's two public meetings with the airlines and the unions in January, 1979, ETA conducted a similar meeting on 2 February 1979 with both union and management at the same time. It, too, proved to be a stormy session. The unions strongly objected to the proposed payment level which, at that time, was proposed as 75% of an individual's adjusted gross wage; on the other hand, the airlines objected to having to file their job openings with the Employment Service and keeping them unfilled while the positions were listed.

The comments encountered during these sessions were collected, discussed and judged for merit. Those deemed reasonable and in accord with the intent of Congress were written into a revised draft of the regulations. This is basically the same draft mentioned above that was published in the Federal Register on 30 March 1979. A public comment

period was stipulated from 30 March to 30 April 1979. Courtesy copies were forwarded to the attendees and other interested parties.

In an effort to gain insight into air carrier personnel practices and the potential impact of the proposals being considered, a representative from ETA (Robert Johnson) and several staffers from LMSA (Sheldon Kline, Peter Husselmann and Walter Steiner) met with the various airline representatives in charge of labor relations, employee policies, personnel and other similar functions. Although not all airlines were visited, approximately ten air carriers ranging in size of the numbers of employees from the largest trunkline, United Airlines with 48,262 employees, to one of the smaller supplementals, World Airways with 858 employees, were given the opportunity to discuss their individual problems and concerns. Carriers possessing relatively unique characteristics, such as Delta Airlines which is largely non-unionized except for its pilots, and Flying Tiger, an all-cargo carrier that was deregulated by Public Law 95-163 in November, 1977, were also visited. The exchange of views in this setting was fruitful and went some distance in enhancing positive relationships. The frank discussion of positions and policies ameliorated any antipathies that may have developed. Beyond that, the concise outlining of intents and purposes clarified many ambiguous areas. The DOL representatives urged the company representatives to forward their written comments for active consideration and to personally contact the Airline Employee Protection Program (AEPP) staff with any questions.

Approximately fifty comments were received from all sources by the end of the public comment period. Comments covered the entire spectrum of positions from those who wished to see the benefit level substantially increased to those who saw the AEPP as a big government giveaway. Nearly half of the comments emanated from State Employment Security Agencies who saw innumerable difficulties in administering the Program. It should be pointed out that their contentions were, for the most part,, technical and minor in scope; however, ETA fully considered them. Many comments were received from the air carriers and these generally reflected the position of the Air Transport Association of America (ATA). The ATA felt that only the eligible protected employees should have the first right of hire; having to file job openings with the Employment Service was unwarranted interference in the personnel practices of private firms; air carriers' "terminations for cause" should go unchallenged; and, strikers and workers laid off or terminated due to strikes, and part-time and seasonal employees, should be excluded from coverage under the "protected employee" label. The Airline Coordinating Committee, AFL-CIO and unions such as the Air Line Pilots Association, Allied Pilots Association, Association of Flight Attendants and the United Plant Guard Workers felt that: (1) the benefit level and pay cap were too low; and (2) the monthly assistance relocation payments were meant as reimbursement rather than as unemployment insurance (which is the way that the AFL-CIO contended that DOL (ETA) seemed to be interpreting Section 43.) The responding unions argued that DOL should make the affected employees nearly "whole" as if it were reimbursement for a loss. All of the comments were entered in the official record and, on the basis of these comments, many alterations were made to the regulations.

In addition to carrying out the first right of hire provision and encouraging negotiations on rehiring practices and seniority, the Secretary of Labor had delegated one other responsibility to LMSA - that being to establish policy and provide guidance for the creation, publication and distribution of a comprehensive job list for protected employees (Section 43 (d) (2)). However, ETA had been delegated the responsibility for the actual management and operation of the national center for the National Listing of the Airline Employee Job Vacancies. The scope of the operation and services that could be provided were considerably reduced when ETA learned that it would have to finance the National Listing from its general operating fund, because no appropriations designated for that purpose have been forthcoming from Congress.

ETA selected the South Carolina SESA as the national center. On 10 April 1979, Robert Johnson from ETA and Walter Steiner from LMSA traveled to Columbia, S.C. to establish the machinery for the initiation and production of the National Listing. Through discussions regarding objectives and capabilities, they, in concert with the automated services professionals from the SESA, developed a computer-produced micro-fiche job listing that can be distributed to virtually every one of 2,800 local Job Service offices nationwide on a bi-weekly basis. New job openings among the air carriers are required to be filed as they occur with local Job Service offices who subsequently transfer that job opening to the national center for inclusion on the National Listing. In addition, all activities on that job order, e.g., who was referred for interviews, who was hired, etc., are also communicated to the center where the

information is stored and records are constantly updated. This will allow for LMSA Investigators to query the system in pursuit of an alleged violation of the first right of hire. (Author's note: As long as an air carrier fills a job with a protected employee, it has fulfilled its duty to hire.) The ability to accumulate several case histories on carrier's job orders provides a method of monitoring which will be capable of pointing out patterns of abuse on the part of individuals or the airlines.

Protected employees have sole access with priority referral to the listing of airline job vacancies for two weeks after publication. Then, the unfilled jobs are made available to the general public as well (unless an airline has previously indicated that it does not want its jobs made available to the public-at-large). This issue of having to hire protected employees and having to keep the vacancies open for a specified period of time (one week) has stimulated more criticism from the airlines than any other single issue. Nevertheless, the job list is specifically dictated in the act and it has been strictly interpreted by the DOL, thereby excluding such options as a complementing employee list or matching services.

The other major issue that has fomented much contention revolves around the benefit level for the eligible protected employees. Although the draft of the final regulations has been circulated for review for some time now, that issue was hotly contested within the Administration. While LMSA drafted the original issue paper on benefit levels based on the Senate bill prior to enactment, after enactment the responsibility for establishing that level was delegated to ETA, and LMSA subsequently withdrew from actively attempting to influence it. Notwithstanding, DOL

was directed to propose the amount of a monthly assistance payment to be 70 percent of an eligible protected employee's average monthly wage after taxes with a maximum payment of $1,200 per month. This position was somewhat embarrassing when the Department of Transportation (presumably management-oriented) indicated that the amounts proposed by the Department of Labor (presumably labor-oriented) were too low. Although DOL appealed to OMB for an upward revision, OMB held firm.

One major alteration that LMSA suggested which has been included in ETA's regulations was the concept of a job search allowance rather than a training allowance, as ETA had originally proposed. Since the field of employment in aviation is predicted to expand, it makes much more sense to relocate previously trained individuals and keep them in the industry, rather than train them for new jobs outside of the industry.

Although Congress left the determination of benefit levels up to the Secretary of Labor, fringe benefits had been dropped from the Senate bill by an amendment proposed by Senator Cannon (D-Nevada) upon original passage by the Senate. It was clear to DOL that Congress did not want to get into the business of guaranteeing fringe benefits that had proven so costly and administratively complex in implementing the Redwoods bill. As a result, laid-off airline employees must make their own contributions to any health, welfare or pension plans to which they subscribe.

LMSA is currently developing a contingency strategy for utilization of LMSA's field professionals in case of a major upsurge in case activity. This could occur from a single incident such as the planned move of American Airlines headquarters from New York City to Dallas, Texas. Several hundred protected employees might be immediately eligible

to exercise their first right of hire. At present, any cases alleging violation of the first right of hire are being handled at the LMSA Regional and National Offices.

The proposed regulations have been submitted to the cognizant Committees in Congress and returned. However, the Equal Employment Opportunity Commission (EEOC) contested the concept of the right of first hire without definitive regulations regarding mandatory and voluntary affirmative action plans, and how the right of first hire would operate in that context. At this time, LMSA and EEOC are working to come to an agreement on this issue.

This concludes the chronicle of events that have transpired in the translation of Senator Danforth's idea for employee protections to the point where it has evolved into program machinery. Although the program establishment has not been finalized in all aspects, those issues of significant relativity to LMSA appear to be immutable at this time. Now, in the next chapter, these experiences will be analyzed and improvements in the process of establishing government programs will be recommended.

CHAPTER II

NOTES

1. U.S. Congress, House, Public Works Committee, Report on H.R. 12622, quoted in Irwin B. Arieff, "House Panel Approves Bill To Boost Airline Competition," Congressional Quarterly, 27 May 1978, p. 1341.

2. General Services Administration, National Archives and Records Service, Office of the Federal Register, United States Government Manual 1979-1980 (Washington, D.C.: Government Printing Office, 1 May 1979), p. 444.

3. Carole Shifrin, "Commuter Airline Fighting Civic Pride," Washington Post, 6 November 1979, p. D6.

4. Vincent Coppola, John Wolcott and Pamela Abramson, "The Puddle-Jump Problem," Newsweek, 23 October 1978, p. 75.

5. Elizabeth Bailey, Guest Speaker, MIT Club Symposium on Deregulation, National Bureau of Standards, Gaithersburg, Maryland, 2 June 1979.

6. The formal title of the Kennedy Report is the Civil Aeronautics Board Practices and Procedures published by the U.S. Senate Subcommittee on Administrative Practice and Procedures in 1975.

7. Listed below are the members of the Ad Hoc Committee for Airline Regulatory Reform:

American Association of Retired Persons
American Conservative Union
Americans for Democratic Action
Aviation Consumer Action Project
Common Cause
Congress Watch
Cooperative League of the USA
Food Marketing Institute
Libertarian Advocate
National Association of Counties
National Association of State Aviation Officials
National Consumers Congress
National Retail Merchants Association
National Retired Teachers Association
National Student Lobby
National Taxpayers Union
Public Interest Economics Center
Sears, Roebuck and Co.
Western Traffic Conference

8. See appendix 2 for the full text of Section 22, the Employee Protection Program.

9. U.S. Congress, Senate, Senator Cannon speaking on S. 2493, 95th Cong., 2d sess., 19 April 1978, Congressional Record, p. S5849.

10. U.S. Congress, Senate, Senator Pearson speaking on S. 2493, 95th Cong., 2d sess., 19 April 1978, Congressional Record, p. S5852.

11. U.S. Congress, Senate, Amending The Federal Aviation Act of 1958, Sen. Rep. No. 95-631, 95th Cong., 2d sess., 1978, p. 216.

12. Ibid., p. 221.

13. Alan Goldsand and Chris Barnett, "Sharp Cutbacks Threaten Airlines," The Journal of Commerce, 21 March 1979, p. 1.

14. Sen. Rep. No. 95-631, 95th Cong., 2d sess. (1978), p. 206.

15. See appendix 3 for Senator Zorinsky's additional discussion on employee protections.

16. Sen. Rep. No. 95-631, 95th Cong., 2d sess. (1978), p. 117.

17. Ibid., p. 46.

18. A full text of the Committee's discussion and a description of the features are included in appendix 4.

19. Sen. Rep. No. 95-631, 95th Cong., 2d sess. (1978), pp. 121-2.

20. Ibid.

21. U.S. Congress, Senate, Senator Pearson speaking on S. 2493, 95th Cong., 2d sess., 19 April 1978, Congressional Record, pp. S5852-3.

22. Carol Shifrin, "CAB Eases Air Charter Restrictions," Washington Post, 18 August 1978, p. F5.

23. U.S. Congress, Senate, Senator McGovern speaking on S. 2493, 95th Cong., 2d sess., 19 April 1978, Congressional Record, p. S5863.

24. U.S. Congress, Senate, Senator Zorinsky speaking on S. 2493, 95th Cong., 2d sess., 19 April 1978, Congressional Record, p. S5877.

25. U.S. Congress, Senate, Senator Cannon speaking on S.2493, 95th Cong., 2d sess., 19 April 1978, Congressional Record, p. S5879.

26. Ibid.

27. U.S. Congress, Senate, Senator Hatch speaking on S. 2493, 95th Cong., 2d sess., 19 April 1978, Congressional Record, p. S5884.

28. Carole Shifrin, "House Votes To Ease Curbs On Airlines," Washington Post, 22 September 1978, p. A1.

29. See pages 42-43 above for other discussion on this topic.

30. Carole Shifrin, "Airline Deregulation Bill Approved by Conference," Washington Post, 7 October 1978, p. F3.

31. U.S. Congress, House, Airline Deregulation Act of 1978, H.R. Rep. No. 95-1779, 95th Cong., 2d sess., 1978, p. 106.

32. Ibid.

33. U.S. Congress, House, Representative Anderson speaking on the Conference Report on S. 2493, 95th Cong., 2d sess., 14 October 1978, Congressional Record, p. H1344.

34. U.S. Congress, House, Representative Mineta speaking on the Conference Report on S. 2493, 95th Cong., 2d sess., 14 October 1978, Congressional Record, p. H13448.

35. U.S. Department of Transportation, "An Annotated Summary of the Arguments For and Against Regulatory Reform of the Domestic Airline System of the United States," 25 April 1977, p. 15.

36. U.S. Congress, Senate, Committee on Commerce, Science, and Transportation, Subcommittee on Aviation, Regulatory Reform in Air Transportation, 95th Cong., 1st sess., 1977, ser. 95-10, pt. 1 at 258(22 March 1977).

37. U.S. Department of Transportation, "Issues Relating to Labor Protection," Received from the Department of Transportation by the U.S. Department of Labor on 16 August 1978, p. 1.

38. Assistant Secretary Burkhardt had been appointed by President Carter. He had previously served as the Research Director for the Painters Union, AFL-CIO.

39. U.S. Department of Labor, Labor Management Relations Services, "Recent Developments in the Airline Industry," Internal Review Paper, p. 9.

40. Francis X. Burkhardt and Ernest G. Green, "Airline Deregulation Act of 1978," Memorandum to the Secretary of Labor, 30 November 1978, pp. 2-3.

41. Mary Ann Wyrsch, "Division of Responsibilities for Airline Deregulation Activities," Memorandum to the Secretary of Labor, 1 December 1978, p. 3.

42. See appendix 5 for the complete language.

43. Jimmy Carter, Memorandum for the Secretary of Labor on the Congressional review of regulations, 30 November 1978, p. 1.

44. Jack A. Warshaw and Ernest G. Green, "Major Issues to Be Resolved for Implementation of the Airline Deregulation Act of 1978," Memorandum for the Under Secretary, 24 January 1979, passim.

45. Walter Steiner, "Field Implications of LMSA's Airline Employee Protections Complaint Case Handling," Options paper for the U.S. Department of Labor, 26 January 1979, p. 2.

46. Francis X. Burkhardt and Ernest G. Green, "Airline Deregulation Act Regulations Development Plan," Memorandum for Under Secretary Robert J. Brown, 3 January 1979, p. 7.

47. "Unions, Carriers Unhappy with Deregulation Labor Provision," Aviation Daily 241 (January 1979): 8-57.

48. Airline Deregulation Act of 1978 (Federal Aviation Act of 1958), sec. 43(d)(3), 92 Stat. 1705, 49 U.S.C. 1301 (1978).

C H A P T E R III

THE INTEGRAL PROBLEMS

Any useful examination of the problems encountered during the implementation state of the Airline Employee Protection Program necessarily demands a perspective from which to analyze the efficacy of the steps taken during the development of the program. These problems represent an extensive range of highly particular and unique quandaries that, upon preliminary review, seem to deny any logical attempt at consistent analysis. However, after some assessment, it appears useful to analyze these problems in the context of their outcomes, or failing that, their anticipated outcomes.

This is not an attempt to establish a model for analyzing implementation: That would require an explanation of all of the variables involved which would prove unfeasible in this case because of their infinite number.

> "Implementation is too complicated and too little is known about it to expect either orderliness or rigor when analysis and assessment are actually undertaken. Indeed, the study of implementation carries us into social science's weakest area - dynamics. The determination of whether or not a social program or policy can be implemented cannot be based on a static checklist. Rather, it must involve an analysis of whether technical, bureaucratic, staff, and institutional/political elements can be blended into a viable process. Implementation analysis must ask whether the organization can do what is desired in technical terms, whether it can function well in a bureaucratic sense (which involves micro-organizational issues), and whether it can operate successfully in its larger environment (major organizational/political issues). Questions of this type push into relatively uncharted research terrain."[1]

This chapter is an attempt to utilize an analytical framework to retrospectively examine the independent variables that will determine the success of the program, i.e., the outcomes. These independent variables are not intended to be all-inclusive; instead, this framework will provide a vantage point for only those major independent variables judged to be critical to the success of the program. These major independent variables are: the benefit levels; the application of the first right of hire; and, the utility of the labor-management committee. The effects of these separate measures will determine the outcome, i.e., the success, of the program. On the basis of other efforts (Bardach, Pressman and Wildavsky) to analyze the implementation process, the success or lack of success of the program can be judged in terms of how these effects impact the program's intended beneficiaries - adversely affected airline workers.

The Case Study Demonstration

As we analyze the entire evolution of the law and the program is analyzed, it appears that some of the specific objectives of the Airline Employee Protection Program (AEPP) mandated in the legislation were purposely left vague, were deferred, were logically unsound or were politically unreasonable. The author is reminded of Herbert Simon's comment mentioned earlier in this paper[2] where he alluded to the consideration that legislators may desire to avoid unsavory political choices that will place them in a defensive or unfavorable position at election time. By not providing explicit guidance to the Executive Branch, legislators often avoid providing their political adversaries

specific ammunition, e.g., roll call votes on controversial and potentially unpopular provisions. However, by averting decisions at this point, the conflict surrounding the alternative choices may be transmitted forward into the implementation phase and create unnecessary tension, acrimony and confusion during the organic formation of the program. Often, this lack of precise direction eventually carries through the Executive Branch's implementation and operational phases to the courts where one party or another contests the Executive Branch's interpretation of a provision in the legislation. This ambiguity seems to be the problem surrounding the airline benefit levels and paycap, as well as the issue of the first right of hire, as developed in the proposed regulations of the Airline Employee Protection Program.

Because of the ill-defined language and obvious intent to defer the decisions regarding these issues to the Secretary of Labor, the same conflicting interest groups that were active in the legislative phase were attempting to continue to exercise their influence during the implementation phase. In addition, the Administration's initial opposition to employee protections put Congress in the defensive position where it could <u>not</u> specifically declare high benefit levels (absent a paycap) without running the risk of incurring a Presidential veto, as well as immediately precipitating a stiffening of resistance from Congressmen who were philosophically adverse to employee protections. If, on the other hand, Congress had specifically defined a stingy pay level with a low paycap, in all probability, labor organizations would more actively have opposed the entire airline regulatory reform effort.

Contextually, it should be pointed out that the labor movement was on the defensive when this legislation was developed.[3] It had suffered several highly publicized legislative defeats during the 95th Congress, including the much-touted common situs picketing bill for the construction industry, and the effective neutralization of the Humphrey-Hawkins full employment bill. Another factor that mitigated the effectiveness of the union movement to bring pressure to bear on the Administration to enhance the employee protection program was the apparent rift between the Administration and the top union leadership. This was brought to a head when virtually the entire AFL-CIO contingent walked out of the President's Advisory Committee on fighting inflation. From this backdrop of events there developed what must be considered a relatively modest employee protection program for airline employees compared to prior protection programs in other industries.

Although Secretary Marshall and, in particular, Assistant Secretary Burkhardt, championed a program of protections more advantageous to adversely affected airline workers, the program as outlined in the legislation meets the relatively austere outline originally suggested by the Department of Transportation as a fallback position should the Administration be required to accept employee protections. These suggestions had been expressed to the Congress throughout the development of the Airline Deregulation Act. The protections ultimately incorporated into what became Section 43 during the joint House-Senate Conference conceptually reflect these suggestions.

Certainly, the comprehensive social issue regarding the propriety and justice of industry-specific employee protections has not been settled. This lack of national consensus on the direction that labor protections should take continues to be riven with point and counterpoint, as reflected in Congressional debate on airline employee protections and as frequently discussed by policy makers in the labor field.

> "Often, of course, it is difficult - as in the case of the expansion of the Redwood National Park - to quantify the gains to the public welfare and to compare them again with the benefits paid out to a specific group of workers. This means that in most instances - in the absence of generally accepted standards of what is 'fair' in the society - the ultimate justification for a program, and for the redistributive function it represents, is a political one.
>
> Political decisions or not, certain economic questions concerning both equity and efficiency must be addressed. On the equity side, every attempt must be made to treat people in similar economic situations in equal fashion. This is one of the arguments used by those who favor the exclusive use of unemployment insurance for all types of unemployment. If there are to be special assistance programs for certain classes of workers, then an attempt should be made to assure that horizontal equity across programs and within each program exists.
>
> Economic efficiency demands that benefit levels and duration of benefits should be structured to encourage workers to seek new jobs. Or, under certain circumstances, lump-sum payments to discharged workers would spur earlier job search than would weekly benefits.
>
> Care must be exercised in designing economically efficient programs. Job protection programs in inefficient industries promote less efficient utilization of labor and result in a misallocation of labor resources...[4]

William K. Ris, Jr., in his perceptive article, "Government Protection of Transportation Employees: Sound Policy or Costly Precedent?", points out that labor protections have historically resulted from short-term

considerations that have not lent themselves to a studied analysis of the social, economic and political ramifications.[5]

It would appear that the Redwood law and the abundant criticism of both its eligibility criteria - the "conclusive presumption" (virtually all workers associated with the redwood industry in the two affected northern California counties were eligible for benefits if they were laid off during the "window period") - and its extremely generous benefits - that is, the potential for receiving up to fifty percent of former redwood wages while earning and keeping one hundred percent of current wages in another industry, or receiving one hundred percent of former redwood income while laid off - have highlighted and brought the issue of employee protections to public attention. In the face of this, sometimes, acrimonious criticism, decision-makers seem to be providing more critical review of employee protective provisions. Two recent examples of this exceptive review concern Conrail and the Rock Island Railroad.

Congress appropriated a $250 million fund to support employee protections included in the Regional Rail Reorganization Act of 1973 that created Conrail. That fund was supposed to last forty years until the last eligible employee reached the retirement age of 65. However, due to unconsidered factors, that fund was depleted by the end of 1979 and "could cost from $884 million to $1.7 billion,"[6] if not altered. Although on 28 June 1980 the Senate passed S.2530 authorizing an additional $235 million for employee protection payments,[7] the Senate made it clear that this would be the last authorization of funds for the life of the Conrail employee protections program. S.2530 also revised

the formulas for calculating monthly benefits and made other changes in procedures. That bill has since become law with the Senate employee protections intact.

The second example of exceptive review involves the U.S. Supreme Court upholding a lower court injunction against using a portion of the Rock Island Railroad's estate expressly for employee protections as required by Public Law 96-254 providing for the liquidation of the railroad. The Railway Labor Executives' Association (RLEA), representing twenty labor organizations, has twice petitioned the Supreme Court for a reversal of its decision. The Court upheld its first finding in response to the RLEA's first petition. The second petition for a hearing remains in abeyance. Between 5,000 and 5,700 former railroad workers qualify for those job protection payments.[8] Perforce, the involved unions are requesting that Congress issue some statement of intent to the effect "that the laid-off Rock Island workers be given job protections benefits."[9] As yet, this has not occurred. In this case the Supreme Court has only judged on the constitutionality of the legislative remedy fabricated by Congress. It has not passed judgment on the constitutionality of employee protections. The intent of this example is to demonstrate the exercise of critical review by Congress in that the RLEA has requested Congress to make a statement in support of the remedy but Congress has not reiterated its initial intentions by issuing any such statement of support.

Perhaps this increased resistance to employee protections will only occur in highly regulated industries, such as railroads, airlines, trucking and communications. It is conceivable that this apparent

increase in scrutiny is a result of a perception held by some that workers in highly regulated business sectors enjoy pay and benefits that far exceed what would normally be expected if these industries were less regulated or unregulated. William Jordan, an economist, stated before Senator Kennedy's Subcommittee that in the airline industry, labor was able to profit because of the artifical insulation of status quo-oriented economic regulation. This was due to:

> "(1) Knowing that entry by new carriers with lower labor costs is unlikely, the unions have been able to demand and obtain, over time, higher wages and more costly work rules.
>
> (2) The unions know that their employers are able to transfer a large portion of the above-market wage demands to the consumer through higher fares without fear of price undercutting by other carriers.
>
> (3) If their company should fail as a result of the high expense of labor, the employee can be fairly certain that the company will be merged with or acquired by another carrier desiring to obtain the route authority of the failing company and in such circumstances, the acquiring company will be required to provide employment or substantial termination payments to the affected employees."[10]

This perception might explain the tremendous variance in the level of benefits bestowed on the clearly shrinking redwood industry and the supposedly healthy and expanding airline industry. Furthermore, the Ris article concluded that, "(i)n contrast to the railroad experience, the airline labor protections are unlikely to be so great as to perpetuate the existing inefficiencies in the industry. While they provide some insulation for labor in the transition to a deregulated environment, virtually every other provision of the legislation will moderate labor's traditional bargaining position."[11] In summary, Ris makes a point that

while it may have been politically expedient to provide "backstop" employee protections to the airline industry, it also set a precedent that may often be repeated of the government providing special transitional protections for workers who are adversely affected for whatever reasons (deregulation, environmental violations, policy changes, etc.) and without consideration for the viability and economic well-being of the industry in general.[12]

Beyond all of the rationalization and rhetoric in support of or against employee protections, its ultimate success or failure as a social and governmental policy will hinge in large measure on the fullness of the coffers. While the economy is healthy and the Nation can affort to recognize the special problems of people, beneficent industry-specific employee protection programs will continue to be legislated. However, when the Nation is on hard times and everyone is suffering some deprivation, it will be very difficult for workers who feel that their employment problems are so unique that tney deserve special remedy to be heard. This concludes the discussion of employee protections from a social policy viewpoint.

The Application of Administrative Theory

Now we shall attempt to analyze the implementation of Section 43 of the Airline Deregulation Act - the Airline Employee Protection Program - in some detail. The integral problems in implementing the airline employee protections provision fall into five categories:

(1) Inter-organizational problems, i.e., the Civil Aeronautics Board 7 1/2% trigger mechanism, and the requirement for consultations between the Departments of Labor and Transportation.

(2) Problems surrounding the achievement of a consensus on issues from interest groups.

(3) Structural-functional problems in developing the regulations and constituting the AEPP.

(4) Inherent political conflicts within the Administration.

(5) Intramural difficulties at the Department of Labor.

Each of these problem areas affected, individually or collectively, the three independent variables (identified earlier) that will determine the success of the Airline Employee Protection Program.

The inter-organizational problems discussed here are really hierarchical structural problems that inherently exist between agencies and departments. While this category of problem is not definitively exclusive from some of the other kinds of problems outlined above, it represents a primary systemic problem affecting implementation on a macro-governmental scale.

The law stipulated that for monetary benefits under the program, the Civil Aeronautics Board make the determination of when an air carrier has reduced its workforce, or appears that it will reduce its workforce in a twelve month period, by at least 7 1/2% as a result of the air regulatory reform effort. Because the Secretary of Labor would be responsible for paying benefits to eligible protected employees so determined to be adversely affected by the air deregulation legislation, the lack of a CAB policy or the development of procedures on this topic proved to be a difficult unknown to factor into the implementation scheme.

Considerable ambiguity surrounded the issues of the definition of eligible protected employees, the retroactivity of benefits once the trigger had been actuated, and the applicability of the eligibility determination to certain of an air carrier's designated routes or regions versus an air carrier's complete workforce. This ambiguity put the Labor Department in a position of trying to design an adequate system for the payment of benefits without knowing the dimensions or the parameters of the possible group of beneficiaries, the timing of any determinations, or even if there would be any processes established to make determinations. However, that was not the only inter-organizational problem.

The Act also mandated that the Secretary of Labor consult with the Secretary of Transportation prior to the promulgation of guidelines for benefit levels. While it is acknowledged that the term "consult" does not connote approval, nonetheless, there exists an implied responsibility to seek agreement on an issue such as this. This situation became more complicated when the Office of Management and Budget became deeply involved in the question of benefit levels and paycaps due to its interest in minimizing the financial impact of the legislation.

Extensive resources were expended, and continue to be expended, on the next category of problems. These problems revolved around attempts to gain a consensus on outstanding issues contained in the proposed regulations and elsewhere. For the most part, the Secretary of Labor's policy decisions were contained in the proposed regulations. Operational and administrative procedures as developed by the staff were made known through a variety of mechanisms. In the interest of open government and consistent with law and regulation, the Department of Labor sought the

greatest exposure and circulation of its contemplated positions. Additionally, it invited the views of all interested parties for advance consideration in the decision-making process. As described earlier, the DOL held open meetings to inform the public on its first draft of the proposed regulations and procedures. Subsequently, the proposed regulations were reviewed and revised where possible in accordance with the comments submitted during and after the meetings. These proposed regulations were then published in the Federal Register with the required thirty day period for public comment following the publication date. Concurrently, the regulations were submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives for preliminary review. Approximately fifty responses were received from the interested parties. In addition, DOL staff met with many air carriers in order to gain a better understanding of the day-to-day impact on this group as they would be the most heavily affected in terms of the commitment of resources and effort to accommodate the DOL regulations and procedures. All of these actions were designed to inform all interested parties of all important activities and preliminary decisions in order to allow for maximum public input in the regulations process. Additionally, to provide a forum for negotiations between the air carriers and the unions on rehiring and seniority (per Section 43(d) of the Act), the Secretary of Labor established a labor-management advisory committee. These types of committees had proven useful in other industrial sectors, particularly in the construction industry. Issues were those normally discussed outside of the usual collective bargaining

environment.[13] The labor-management committee was designed to serve as a continuing source of advice and input into the airline program's developmental process (within the scope of its Charter.)

Another category of problems that were both structural and functional in nature, concerned the promulgation of the regulations and the constitution of the program mechanisms. The proposed regulations corresponded to policy decisions made by DOL's executive leadership after public comment. In terms of structuring the program to fulfill these policy goals, the inadequacy of the legislation in two specific areas proved difficult to overcome.

The first area was financing. While paragraph (g) of Section 43 stated, "(t)here are authorized to be appropriated to such account annually, beginning with the fiscal year ending September 30, 1979, such sums as are necessary to carry out the purposes of this section, including amounts necessary for the administrative expenses of the Secretary related to carrying out the provisions of this section,"[14] that phrase is simply a statement of Congress authorizing itself to appropriate funds, not the actual appropriation of funds to carry out the program. No appropriation bill has ever been passed to fund this program. Unless large-scale layoffs or air carrier bankruptcies are experienced, it is highly unlikely that any funds will be appropriated for this purpose. In the meantime, the Department must still comply with the Act. It must publish regulations, establish a national job list mechanism for laid-off airline employees, develop program machinery and

linkages to disburse benefits, investigate violations of the first right of hire and review state determinations of eligibility, and constitute a labor-management advisory committee.

Similar problems of administrative funding for Redwoods occurred. Monies were appropriated for benefit payments in Redwoods but no money for personnel was formally designated to develop or operate the program. Much of the criticism of the Redwood Employee Protection Program can be traced to this same deficiency.

The Airline Employee Protection Program suffered the same staffing problems as did the Redwood program. Staffing requirements were fulfilled in a ad hoc manner of borrowing staff from other programs, offices and agencies, hiring temporary and part-time personnel, and utilizing the Departmental budgetary lapse rate on full-time positions (FTP) to fund positions on an "as available" basis. The Employment and Training Administration contracted the development and operation of the National Listing of Air Carrier Jobs to the South Carolina State Employment Security Agency. The establishment of that project was funded by Comprehensive Employment and Training Act (CETA) Title III (Secretary of Labor's discretionary funds.) Consistent with the Administration's anti-employee protections position, the OMB has steadfastly opposed the inclusion of positions for the purpose of developing the program. Ironically, if personnel are borrowed from other tasks to do this kind of implementation work, the OMB may question the necessity of those positions to performing the original tasks, or may call into question the need to perform the original tasks at all. As a result, program managers are hesitant to supply personnel to be borrowed for program start-up.

A second functional problem concerned the omission of any enforcement or injunctive powers to require air carriers to comply with the first right of hire. While there is an oblique sub poena-like statement whereas "the Secretary may require each such air carrier to file with the Secretary the reports, data, and other information necessary to fulfill his duties,"[15] no mention of judicial recourse, sanctions against violators, or remedies for victims is made. It was the interpretation of the Solicitor of Labor that the maximum extent of the action that the Department could take to assist laid-off airline workers alleging violation of their first right of hire was to employ moral suasion and conciliation on their behalf with the allegedly offending airline. Thus, the Department's Labor-Management Services Administration was very limited in the action it could take if violations were found to occur. Whether airline workers alleging denial of their first right of hire will have access to the courts under the Act is still an open and untried question. Nevertheless, from a programmatical aspect, designing a coherent and logical process of investigating and resolving complaints was seriously encumbered by the statutory omission.

Inherent political and philosophical conflicts proved to be the next category of problems. As mentioned earlier, the Administration showed little enthusiasm for employee protections in general and opposed the inclusion of any employee protections in the airline deregulation legislation throughout its development.

After the ADA became law the focus of attention turned to the benefit levels and paycaps. OMB interest was intense. OMB desired the minimal, politically feasible, benefit payments. Suffice it to say that extensive

negotiations transpired which delayed incorporation of the benefit levels and paycaps into the proposed regulations, thus slowing the entire process of developing regulations.

Another impediment was the Civil Aeronautics Board. In the early days after enactment, the Civil Aeronautics Board displayed little interest in establisning a procedure for determining "qualifying dislocations." The CAB was primarily concerned with the considerable changes of philosophy, scope and operations mandated by the law that more directly impacted the CAB. As a consequence, little emphasis was attributed to Section 43 wherein the CAB served only as a catalyst for activity that would directly impact another agency but could only indirectly affect the CAB.

The last type of problem examined nerein is categorized as being intramural, i.e., within the Department of Labor. This type of problem took two forms: confusion due to two organizational lines of authority and competition between Agencies. Confusion developed as a result of diffused Departmental leadership. This confusion seemed to occur as a byproduct of the structure of the executive level task force that, along with the staff level task force, had been created by the Secretary in anticipation of passage of the Act. That executive level task force assumed initial policy making responsibilities for the program and, subsequently, provided guidance and direction to the staff level task force in the drafting of the proposed regulations and in the origination of program structures. At the same time, however, the Assistant Secretaries utilized their prerogative of direct access to the Secretary whenever decisions unfavorable to their Agencies were rendered by the

executive level task force. Henceforth, the Secretary's Office took an increasingly active role in decision-making while the Under Secretary and his task group played a correspondingly less active role. Out of this confusion, the Under Secretary requested the Decision Memoranda in order to make sense of the contested issues and, subsequently, to assign responsibilities for the Act between LMSA and ETA.

Another intramural problem within the Department on the micro-organizational level was the resultant sharing of jurisdictions between LMSA and ETA and the concomitant competition. In the areas of the benefit levels, eligibility determinations and the national job listing, incongruous delegations of authority exacerbated some of the partisan views held in each Agency. The issuance of formal delegations of authority in a Secretary's Order did not alleviate some of the nonsensical relationships that had developed as the respective Agencies extended themselves into areas of natural interest early on in the process. As a matter of fact, the formal delegations of authority only reflected these early efforts and institutionalized them, e.g., LMSA was delegated policy authority for the development and general operating procedures of the airline job list while ETA was made responsible for the day-to-day operations of the list. Since ETA already sets national policy and continually monitors the Nation's entire employment security system (including general job lists and applicant-to-job matching systems,) it would seem to have made eminently more sense to have delegated all aspects of the job list to ETA. Apparently, a comparable problem with clear and logical lines of authority exists in the Redwood Employee Protection Program (REPP).

A recently published study conducted by the General Accounting Office of the REPP concluded that DOL "needs to clarify lines of authority and responsibility."[16] It also recommended remedial measures and said in response to the Department of Labor's comment that, "(a)lthough there are documents formalizing the delegation of authority and assignment of responsibility for adminstering REPP, our review showed that program implementation has been hindered by confusion over the roles and functions of the Labor staff at the local level and that clarification was needed to correct these problems."[17] While the airline job list has been activated for test and demonstration purposes, it is unknown whether problems of lines of authority and responsibility will occur in the operational mode.

An additional development for LMSA that caused some discontinuity was the resignation of Assistant Secretary Burkhardt in January, 1979. The interregnum lasted for approximately six months until Assistant Secretary Hobgood was sworn in. During the interim, the Agency was administered by career civil servants whose perspective for policy making and developing initiatives was politically limited.

This concludes the discussion of the nature of the problems confronting the successful implementation of the Airline Employee Protection Program. Now attention is directed to see if and how the Department of Labor identified and resolved these contentious issues and whether the program components will work if the program is activated.

Pragmatic Problem-Solving

In discussing the resolution or continuation of the problems catalogued above, it is important to keep in mind the major independent variables that will determine the success of the program. They are the benefit levels, the first right of hire and the Airline Labor-Management Advisory Committee. How successfully each of these variables are applied and subsequently function will determine the ultimate extent of the positive impact on airline workers who are either laid-off or who have otherwise been adversely affected.

As has been recounted, the final decision on the level of the monetary benefits and the associated paycap was, for all practical purposes, made by OMB. This controversy exhibited all of the characteristics of the panoply of problems listed earlier: (1) inter-organizational problems between OMB, DOT, and DOL; (2) consensus problems as labor unions pushed for higher benefits and the Administration sought to keep them lower; (3) structural-functional problems where the Secretary of Labor was explicitly directed by the legislation to compute the benefit levels and OMB directly intervened and virtually dictated those guidelines for computations; (4) inherent political conflicts within the Executive Branch as demonstrated between the major policy making bodies at the CAB, DOT, DOL and OMB; and, (5) the intramural difficulties within the Labor Department when both LMSA and ETA sought to have the final authority for the determination of benefit levels. These intramural difficulties have been resolved for the time

being; however, since the regulations have yet to be published in final form, a possibility, no matter how improbable, of a change continues to exist.

The first right of hire may very well be the most important of the three identified independent variables. The first right of hire and its primary supporting mechanism, the airline employee job vacancy list, should provide nearly continuous employment opportunities for adversely affected airline workers in either a stable or growing commerical aviation environment. But its interpretation and development has displayed several shared problems with the evolution of the benefit levels. A serious difficulty was encountered in trying to reach a consensus of who was eligible to exercise the first right of hire, i.e., protected employees versus eligible protected employees, where what made the difference was whether or not the laid-off worker was determined by the CAB to have been laid off as a result of the Airline Deregulation Act. That equivocation in the legislation is accompanied by another flaw. That flaw in the statute is that only carriers certificated on the date of enactment have the duty to hire. If one were to logically extend the line of reasoning of reserving airline jobs for those employees laid off as a result of the legislation, then new airlines (those certificated after enactment) should also have been tasked with the duty to hire.

Other difficulties concerning the first right of hire ensued of a structural and functional nature. Proper funding support was not available nor could an enforcement mechanism be developed where none existed in the legislation. The funding problem has been broached with OMB in each of the successive budget cycles since the legislation became law to little avail. The lack of enforcement powers in effect

neutralized any meaningful impact of the first right of hire and the corresponding duty to hire on the part of the airline companies. This has to be regarded as one of the most serious omissions of the law.

And, as in the monetary benefits variable, there were and continue to persist internal Departmental problems with competing lines of authority. These ambiguities may cause problems with the job list when it is activated. Hypothetically speaking, it would seem that as long as any delegation of authority to ETA for the policy and operation of the job list stipulated that LMSA was a customer and, therefore, would be permitted to request certain information in the system, everyone's needs would be satisfied. LMSA's claim to the policy aspect of the job list system emanated from its concern for enforcement of the first right of hire provision. (Ironically, when a policy analysis was made of that issue, LMSA had no enforcement powers and, as a result, could not most effectively utilize the system in seeking to correct employee claims of right of hire violations.) Nevertheless, the current delegations continue in effect.

The third independent variable is the airline labor-management advisory committee. It, too, suffers several deficiencies in common with the other two variables. There seems to be a lack of consensus among participants and observers on the scope of the committee. Many parties apparently want to expand the range of issues to be discussed beyond the two specified in the law and in its Charter, id est, seniority and rehire procedures. That observation leads directly into the second problem that the committee is experiencing.

The mandate of the committee is far too narrow and disconnected from

what are perceived to be the major issues to be successful. The first meeting has already demonstrated tne difficulties that will arise in restraining the participants from discussing the entire spectrum of differences that exist between the labor and management positions, specifically, those contained in the regulations. Perhaps, a feasible structural and functional alternative would have been for the Secretary to have sought the advice of the existing Secretarial-level Airline Labor-Management Committee composed of union and airline company presidents on the two topics stipulated in the law, rather than creating an entirely new committee expressly for the very limited purpose of fulfilling the requirement in the law. A lot of effort would undoubtedly have been saved by seeking advice on these issues from the Secretary's Committee.

Implementation of the Airline Employee Protection Program could have been enhanced in three ways. First, Section 43 of the Airline Deregulation Act could have been greatly improved by one of two possible means. Either the legislation could nave empowered the Secretary to develop employee protections with a general statement of purpose and intent subject to Congressional review, or the legislation could have gone so far as to have stipulated the entire process to assist adversely affected airline employees in an explicit, rational and justifiable manner giving the Secretary the tools and resources to accomplisn tne task at the initial stage of implementation. Second, the Department of Labor could have been more coherent in its delegations of authority and responsibility and in its policy making coordination at the uppermost levels of the Department. This coherence and coordination would

have occurred to a greater degree had the Departmental policy makers been closer to the staff-level problems. Third, the existence of a professional program development staff would have provided greater continuity in practice and in advice in developing the program. This recommendation to create a small professional staff for employee protections has gone forward from LMSA to OMB in the Department's budget request for Fiscal Year 1982 in anticipation of new employee protections responsibilities and the recent enactment of several laws containing employee protective provisions requiring immediate action.

Has Eugene Bardach's advice in implementing programs "to achieve program objectives, keep costs down, and reduce delay,"[18] been followed? He would, no doubt, cringe at the prospect of it taking over two years to develop and implement a relatively small provision with a limited constituent impact. And it is still uncertain as to when the program will be put into operation. It is not known if the program has "achieved program objectives" since it has never been operated and evaluated;legislative follow-up may have "kept costs down," possibly too far down by not adequately financing the program; and, the initiation of the program certainly been "delayed." Now, with new leadership, the Agency is again reviewing the proposed program and may recommend legislative revisions which may possibly add two to three years prior to the program becoming fully operational. Since the transition to an entirely deregulated airline environment is scheduled to occur over a ten-year period, it may very well be that half or more of that transition period will have elapsed before adversely impacted airline employees can utilize the rights and benefits contained in the Airline Deregulation Act

of 1978. Whether one philosophically agrees or disagrees with the concept of employee protections, this kind of delay is destructive and cripples the credibility of the Department, and indeed, the entire Government, in satisfying its mandates, present and future. Furthermore, even if the program is put into operation as presently constituted, it probably will provide little more effect than a palliative.

The Outlook for Employee Protections

The Secretary of Labor has also been accorded responsibility for new employee protection provisions contained in several widely diverse laws. The Surface Transportation Assistance Act of 1978 (Small Urban and Rural program) has been undergoing concurrent implementation. It provided funding for transportation projects comparable to the Urban Mass Transportation Act (UMTA) to small urban and rural jurisdictions with populations of less than 50,000. It is currently being administered in DOL by the Division of Employee Protections in the same fashion (certifications) as are UMTA grant applications. However, the program is being scrutinized by the Department of Transportation due to disagreements between the Federal Highway Administration (FHWA) and UMSA over the certification process and, as a consequence, may be revised in the future.

The Health Planning and Resources Development Act of 1979 contains provisions for the conversion or discontinuance of unnecessary hospital services. Section 1642 (c) (1) of the Act also requires the "certification" of protective arrangements for hospital employees in the

spirit of the UMTA and Small Urban and Rural programs. The Act directs the Secretary of Health, Education and Welfare (now the Secretary of Health and Human Services) "to establish a program" prior to 1 April 1980. DOL is in the process of issuing regulations at this time. Implementation of the Hospital program in the Division of Employee Protections appears to be going smoother than has the Airline program. This implementation may be going smoother because staff expertise in program development has been fostered and maintained within the Division (at the staffing expense of other programs.)

Amendments to the Social Security Act were passed on 9 June 1980. Contained therein is a confusing and equivocal employee protective provision which is wide open to limitless interpretation. It appears to require the Secretary of Labor to determine that fair and equitable arrangements for state employees displaced by Federal takeover of state disability insurance determination functions have been made (according to state law.) In this case the DOL must take its cue from the Social Security Administration to initiate the certification process. It may very well be that the first step that the Department has taken may be the most important. It has requested clarification on its responsibilities under the Act from the Solicitor's office. Any recommendations for implementation must await that response.

Limited deregulation of the trucking industry recently became law. The only employee protective provision that it contained was a requirement to establish an industry-specific job list akin to the airline job list. A source close to ETA recently indicated that the

Agency may incorporate the trucking jobs list (along with the airlines job list) in the Interstate Processing Center (I.P.C.) already located in Albany, N.Y. This system was developed and implemented after the Airline National Listing Center was established in South Carolina. Furthermore, the I.P.C. utilized many of the principles originally developed for the airlines job listing.

In the category of prospective legislation, three potential bills under active consideration contain some employee protective provisions. The effort to deregulate the rail industry does contain employee protections. Basically, they are a continuation of existing government-mandated and industry protections. Therefore, the role of the Department of Labor or any other government component would be relatively minor.

The Mental Health Deinstitutionalization Bills (S.1177 and H.R.7299) under development in Congress contain varying employee protection measures. The purpose of the legislation is to transition as many mental patients to community-and home-based living and treatment arrangements as possible, which may result in the loss of jobs for employees of affected centralized mental institutions. The Senate approved S.1177 on 24 July 1980 with extensive employee protections patterned after Section 13 (c) of UMTA and Section 1642 of the Health Planning and Resources Development Act (discussed above.) On the other hand, the House bill which is in committee only provided for retraining assistance for adversely impacted workers. The differences of the employee protection provisions can be reconciled in two alternative ways. The opportunity exists for a Congressman to

introduce the Senate employee protections provision on the floor of the House and for the House to adopt it, or, failing that, the House and Senate will be required to attend a joint conference in order to arrive at identical provisions. If the Senate provision is the one that eventually prevails, the Secretary of Labor must certify that state governments have developed acceptable employee protective arrangements prior to receiving funds from the Department of Health and Human Services. Again, the model that would probably be utilized for this provision would be the UMTA 13 (c) certification procedure. Passage of this legislation prior to adjournment is questionable.

In the area of telecommunications regulatory reform, it appears that the Communication Workers of America (CWA) and American Telephone and Telegraph (AT&T) have jointly developed employee protective arrangements that are mutually acceptable and self-administered. Thus, the role of the Labor Department might be non-existent or, at the most, very minor. It should be noted at this point that, in announcing his support for this reform effort, the President stated that when existing AT&T company structures were altered, "employment, pension, and union rights of the employees should be protected",[19] an apparent departure from earlier non-election year positions. This measure may be legislatively blocked for this session and, therefore, passage is not anticipated. This completes our recitation of new and prospective legislation.

While the Department of Labor faces some new laws that may contain employee protections, the tight budget situation seems to be mandating against expensive employee protection programs even while efforts to

deregulate various industries are proceeding at an accelerated pace. It may be that other industries have learned something from the airline experience, at least in the area of employee protections. Both labor and management in other industries undergoing regulatory reform are making early mediatory efforts to jointly develop employee protection provisions that are acceptable to Congress, and that require the minimum of Federal government involvement. They may realize that Federal involvement may give neither of them what they desire nor even what they can accept in the form of workable employee protections.[20] That may be the lesson learned at the expense of the laid-off airline workers who after over two years have yet to see any measures implemented or programs operating on their behalf.

CONCLUSION

Eugene Bardach wrote that "the most important approach to solving, or at least ameliorating, this problem is to design policies and programs that in their basic conception are able to withstand buffeting by a constantly shifting set of political and social pressures during the implementation stage."[21] It should be obvious at this point that while the Department of Labor could more or less successfully dispense with procedural problems in implementing the Airline program, it has not, as yet, overcome some of the basic deficiencies of the legislation. The quality of the employee protection provision in the law is found wanting. It is a poorly-written, inconsistent, not-very-well-thought-out attempt at legislation. The Administration's policy of "no policy" on the issue is clear. Perhaps, if one were more cynical, one would think that those who had opposed employee protections, actually had won the day.

C H A P T E R III

NOTES

1. Walter Williams, "Implementation Analysis and Assessment," Policy Analysis 1 (Summer 1975): 535.

2. Herbert A. Simon, Administrative Behavior (New York: The Free Press, 1957), pp. 57-59.

3. A.H. Raskin, "Big Labor Strives To Break Out Of Its Rut," Fortune, 27 August 1979, pp. 32-40.

4. Bruce H. Millen, "Providing Assistance to Displaced Workers," Daily Labor Report, 21 June 1979, pp. F-5-6 (Reprinted from the May 1979 issue of the Monthly Labor Review). Bruce Millen was the Director of the Office of Wage and Labor Relations under the Assistant Secretary for Policy, Evaluation and Research in the Department of Labor.

5. William K. Ris, Jr., "Government Protection of Transportation Employees: Sound Policy or Costly Precedent?", Journal of Air Law and Commerce, no. 44 (1979), p. 532.

6. Judy Sarasohn, "Conrail's Expensive Labor Plan Revamped," Congressional Quarterly, 31 May 1980, p. 1513.

7. Judy Sarasohn, "Conrail Labor Plan Is Revised To Limit Employee Payments," Congressional Quarterly, 5 July 1980, p. 1846.

8. "Supreme Court Denies Petition For Job Protection Aid For Rock Island Workers," Daily Labor Report, 2 July 1980, p. A-8.

9. Ibid., p. A-9.

10. Ris, "Government Protection of Transportation Employees," p. 539.

11. Ris, "Government Protection of Transportation Employees," p. 543.

12. Ris, "Government Protection of Transportation Employees," p. 544.

13. In the construction industry, a tripartite committee composed of management, labor and government attempts to modulate the seasonality and cyclicality of large government (local, state and Federal) construction projects in a major metropolitan area, such as Chicago, Illinois, through such mechanisms as published Bid Calendars.

14. Airline Deregulation Act of 1978 (Federal Aviation Act of 1958), sec. 43 (g), 92 Stat. 1752-3, 49 U.S.C. 1301 (1978).

15. Airline Deregulation Act of 1978, sec. 43 (d)(2), 92 Stat. 1752.

16. "GAO Report Says Cost of Redwood Employee Program Exceeds Estimates," Daily Labor Report, 16 July 1980, p. A-6.

17. Ibid., p. A-8.

18. Eugene Bardach, The Implementation Game: What Happens After a Bill Becomes a Law (Cambridge: The MIT Press, 1977), p. 250.

19. Lary Yud, "Impact of Legislative Proposals on FY 1982 Budget," Memorandum for Labor Management Relations Services Director (Acting) Philip G. Riccobono, 28 May 1980, p. 2.

20. In fairness, LMSA has consistently urged that parties should always develop their own employee protective arrangements and that any costs (including benefit payments) should always be at the expense of the benefiting party. In both the Redwoods and Airlines cases, the public was deemed to be the benefiting entity.

21. Bardach, The Implementation Game, p. 5.

SELECTED BIBLIOGRAPHY

Airline Deregulation Act of 1978. (Federal Aviation Act of 1958), sec. 43, 92 Stat. 1750-3, 49 U.S.C. 1301 (1978).

Bailey, Elizabeth. MIT Club Symposium on Deregulation. National Bureau of Standards, Gaithersburg, Maryland, Guest Speaker, 2 June 1979.

Bardach, Eugene. The Implementation Game: What Happens After a Bill Becomes a Law. Cambridge: The MIT Press, 1977.

Burkhardt, Francis X., and Green, Ernest G."Airline Deregulation Act of 1978." Memorandum to the Secretary of Labor, 30 November 1978.

Burkhardt, Francis X., and Green, Ernest G. "Airline Deregulation Act Regulations Development Plan." Memorandum for Under Secretary Robert J. Brown, 3 January 1979.

Carter, Jimmy. Memorandum for the Secretary of Labor on the Congressional review of regulations, 30 November 1978.

Coppola, Vincent; Wolcott, John; and Abramson, Pamela. "The Puddle-Jump Problem." Newsweek, 23 October 1978, pp. 75-6.

Forester, J. Gordon, Jr. "Protected Litigation in Airline Seniority Disputes." Labor Law Journal, March 1979, pp. 157-64.

"GAO Report Says Cost of Redwood Employee Program Exceeds Estimates." Daily Labor Report, 16 July 1980, pp. A-4-9.

General Services Administration. National Archives and Records Service. Office of the Federal Register. United States Government Manual 1979-1980. Washington, D.C.: Government Printing Office, 1 May 1979.

Goldsand, Alan, and Barnett, Chris. "Sharp Cutbacks Threaten Airlines." The Journal of Commerce, 21 March 1979, p. 1.

Hargrove, Erwin C. The Missing Link. Washington, D.C.: The Urban Institute, 1975.

Millen, Bruce H. "Providing Assistance to Displaced Workers." Daily Labor Report, 21 June 1979, pp. F-1-6 (Reprinted from the May 1979 Issue of the Monthly Labor Review).

_____. "Public Policy and Economic Dislocation of Employees." A paper prepared for the Job Protection Committee, U.S. Department of Labor by the Office of the Assistant Secretary for Policy, Evaluation and Research, 11 October 1978.

Montjoy, Robert S., and O'Toole, Laurence J., Jr. "Towards a Theory of Policy Implementation: An Organizational Perspective." Public Administration Review no. 5 (September/October 1979), pp. 465-76.

Pressman, Jeffrey L., and Wildavsky, Aaron B. Implementation. Berkeley: University of California Press, 1973.

Raskin, A.H. "Big Labor Strives to Break Out of Its Rut." Fortune, 27 August 1979, pp. 32-40.

Ris, William K., Jr. "Government Protection of Transportation Employees: Sound Policy or Costly Precedent?" Journal of Air Law and Commerce, no. 44 (1979), pp. 509-44.

Sarasohn, Judy. "Conrail's Expensive Labor Plan Revamped." Congressional Quarterly, 31 May 1980, pp. 1513-4.

_____. "Conrail Labor Plan Is Revised to Limit Employee Protections." Congressional Quarterly, 5 July 1980, p. 1846.

Shifrin, Carole. "Airline Deregulation Bill Approved by Conference." Washington Post, 7 October 1978, p. F3.

_____. "CAB Eases Air Charter Restrictions." Washington Post, 18 August 1978, p. F5.

_____. "Commuter Airline Fighting Civic Pride." Washington Post, 6 November 1979, p. D6.

_____. "House Votes To Ease Curbs On Airlines." Washington Post, 22 September 1978, p. A1.

Simon, Herbert A. Administrative Behavior. New York: The Free Press, 1957.

Steiner, Walter K. "Field Implications of LMSA's Airline Employee Protections Complaint Case Handling." Options paper for the U.S. Department of Labor, 26 January 1979.

"Supreme Court Denies Petition For Job Protection Aid For Rock Island Workers." Daily Labor Report, 2 July 1980, pp. A-8-9.

"Unions, Carriers Unhappy with Deregulation Labor Provision." Aviation Daily 241 (January 1979): 8-57.

U.S. Congress. House. Airline Deregulation Act of 1978. H.R. Rep. No. 95-1779, 95th Cong., 2d sess., 1978.

_____. House. Public Works Committee. Report on H.R. 12622, quoted in Arieff, Irwin B. "House Panel Approves Bill To Boost Airline Competition." Congressional Quarterly, 27 May 1978, pp. 1341-2.

U.S. Congress. Senate. "Air Transportation Regulatory Reform Act of 1978." S. 2493. 95th Cong., 2d sess., 19 April 1978. Congressional Record, pp. S5849-914.

_____. Senate. Amending The Federal Aviation Act of 1958. Sen. Rep. No. 95-631, 95th Cong., 2d sess., 1978.

_____. Senate. Committee on Commerce, Science, and Transportation. Subcommittee on Aviation. Regulatory Reform in Air Transportation. 95th Cong., 1st sess., 1977.

_____. Senate. "Conference Report on S. 2493, The Airline Deregulation Act of 1978." 95th Cong., 2d sess., 14 October 1978. Congressional Record, pp. H13444-50.

U.S. Department of Labor. Labor Management Relations Services. "Recent Developments in the Airline Industry." Internal Review Paper.

U.S. Department of Transportation. "An Annotated Summary of the Arguments For and Against Regulatory Reform of the Domestic Airline System of the United States," 25 April 1977, pp. 1-38.

_____. "Issues Relating to Labor Protection." Received from the Department of Transportation by the U.S. Department of Labor on 16 August 1978.

Warshaw, Jack A., and Green Ernest G. "Major Issues to be Resolved for Implementation of the Airline Deregulation Act of 1978." Memorandum for the Under Secretary, 24 January 1979.

Williams, Walter. "Implementation Analysis and Assessment." Policy Analysis 1 (Summer 1975): 531-66.

Wyrsch, Mary Ann. "Division of Reponsibilities for Airline Deregulation Activities." Memorandum to the Secretary of Labor, 1 December 1978.

Yud, Lary. "Impact of Legislative Proposals on FY 1982 Budget." Memorandum for Labor Management Relations Services Director (Acting) Philip G. Riccobono, 28 May 1980.

APPENDIX 1

ALLEGHENY-MOHAWK MERGER
LABOR PROTECTIVE PROVISIONS

Labor Protective Provisions

Section 1. The fundamental scope and purpose of the conditions hereinafter specified are to provide for compensatory allowances to employees who may be affected by the proposed acquisition of control of

approved by the attached order, and it is the intent that such conditions are to be restricted to those changes in employment due to and resulting from such acquisition or merger. Fluctuations, rises and falls, and changes in volume or character of employment brought about by other causes are not covered by or intended to be covered by these provisions.

Section 2(a). The term "merger " as used herein means joint action by the two carriers whereby they unify, consolidate, merge, coordinate or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them through such separate facilities.

(b) The term "carrier" as used herein refers to either or or to the corporation surviving after consummation of the proposed merger of the two companies.

(c) The term "effective date of merger" as used herein shall mean the effective date of the amended certificates of public convenience and necessity transferred to the surviving corporation pursuant to the approval granted in the attached order.

(d) The term "employee" as used herein shall mean an employee of the carriers other than a temporary or part-time employee.

Section 3. Insofar as the acquisition or merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.

Section 4(a). Subject to the applicable conditions set forth herein, no employee of either of the carriers involved in the acquisition or merger who is continued in service shall as a result of the acquisition or merger be placed in a worse position with respect

to compensation than he occupied immediately prior to his displacement so long as he is unable in the normal exercise of his seniority rights under existing agreements, rules, and practices to obtain a position producing compensation equal to or exceeding the compensation of the position held by him immediately prior to such date, except, however, that if he fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline.

(b) The protection afforded by the foregoing paragraph is hereby designated as a "displacement allowance" which shall be determined in each instance in the manner hereinafter described. Any employee entitled to such an allowance is hereinafter referred to as a "displaced" employee.

(c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last 12 months in which he performed service immediately preceding the date of his displacement (such 12 months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by 12, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee; and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation, he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period.

(d) The protection afforded herein shall only apply to displacements occurring within a period of 3 years from the effective date of the acquisition or merger (referred to herein as the claim period); and the period during which this protection is to be given (referred to herein as the protective period) shall extend for a period of 4 years from the date on which the employee is displaced.

Section 5(a). Any employee of either of the carriers participating in the acquisition or merger who is deprived of employment as a result of said acquisition or merger shall be accorded an allowance

(hereinafter termed a "dismissal allowance"), based on length of service, which (except in the case of an employee with less than 1 year of service) shall be a monthly allowance equivalent in each instance to 60 percent of the average monthly compensation of the employee in question during the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the acquisition or merger. This dismissal allowance will be made to each eligible employee, while unemployed, by the surviving carrier during a period beginning at the date he is first deprived of employment as a result of the acquisition or merger and extending in each instance for a length of time determined and limited by the following schedule:

Length of service (Years)	Period of Payment Months
1 and less than 2	6
2 and less than 3	12
3 and less than 5	18
5 and less than 10	36
10 and less than 15	48
15 and over	60

In the case of an employee with less than 1 year of service such employee shall not be covered by the benefits provided in this section, but shall receive such benefits, and only such benefits, as are provided by section 7.

(b) For the purpose of these provisions, the length of service of the employee shall be determined from the date he last acquired an employment status with the employing carrier and he shall be given credit for 1 month's service for each month in which he performed any service (in any capacity whatsoever) and 12 such months shall be credited as 1 year's service. The employment status of an employee shall not be interrupted by furlough in instances where the employee has a right to and does return to service when called. In determining length of service of an employee acting as an officer or other official representative of an employee organization, he will be given credit for performing service while so engaged on leave of absence from the service of the carrier: Provided, That in calculating the dismissal allowance for such an employee, such allowance shall be based upon the compensation paid such employee by the carrier during his last 12 months of service on the company payroll and not on the compensation he may have been paid by the employee representative organization.

(c) An employee shall not be regarded as deprived of employment in case of his resignation, death, or retirement on account of age or disability in accordance with the current rules and practices applica-

ble to employees generally, dismissal for justifiable cause in accordance with the rules, or furlough because of reduction in forces due to seasonal requirements of the service; nor shall any employee be regarded as deprived of employment as the result of the acquisition or merger who is not deprived of his employment within 3 years from the effective date of said acquisition or merger .

(d) Each employee receiving a dismissal allowance shall keep Tiger International informed of his address and the name and address of any other person by whom he may be regularly employed.

(e) The dismissal allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished while he is absent from service, he will be entitled to the dismissal allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be given a dismissal allowance on the basis of said position until the regular employee is available for service and thereafter shall revert to his previous status and will be given a dismissal allowance accordingly if any is due.

(f) An employee receiving a dismissal allowance shall be subject to call to return to service after being notified in accordance with the working agreement, and such employee may be required to return to the service of the employing carrier for other reasonably comparable employment for which he is physically and mentally qualified and which does not require a change in his place of residence, if his return does not infringe upon the employment rights of other employees under the working agreement.

(g) If an employee who is receiving a dismissal allowance returns to service the dismissal allowance shall cease while he is so reemployed and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a dismissal allowance. During the time of such reemployment, however, he shall be entitled to protection in accordance with the provisions of section 4.

(h) If an employee who is receiving a dismissal allowance obtains other employment, his dismissal allowance shall be reduced to the extent that the sum total of his earnings in such employment plus his allowance and any unemployment insurance benefit (or similar benefit) exceed the amount upon which his dismissal allowance is based: Provided: That this shall not apply to employees with less than 1 year's service.

(i) A dismissal allowance shall cease prior to the expiration of its prescribed period in the event of —

1. Failure without good cause to return to service after being notified of a position for which he is eligible and as provided in paragraphs (f) and (g);
2. Resignation;
3. Death
4. Retirement or on account of age or disability in accordance with the current rules and practices applicable to employees generally;
5. Dismissal for justifiable cause.

Section 6. An employee affected by the acquisition or merger shall not during the applicable protective period be deprived of benefits attaching to his previous employment, such as hospitalization, relief, and the like.

Section 7. Any employee eligible to receive a dismissal allowance under section 5 hereof may, at his option at the time of acquisition or merger , resign and (in lieu of all other benefits and protections provided in these provisions) accept in a lump sum a separation allowance determined in accordance with the following schedule:

Length of service (Years)	Separation allowance (Months' pay)
1 and less than 2	3
2 and less than 3	6
3 and less than 5	9
5 and over	12

In the case of employees with less than 1 year's service, 5 days' pay, at the straight time rate per working day of the position last occupied, for each full month in which they performed service will be paid as the lump sum.

(a) Length of service shall be computed as provided in section 5.

(b) One month's pay shall be computed by multiplying by 30 the calendar daily rate of pay received by the employee in the position last occupied prior to the time of the acquisition or merger.

Section 8(a). Any employee who is retained in the service of the carrier surviving the acquisition or merger (or who is later restored to service from the group of employees entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of such acquisition or merger and is therefore required to move his place of residence shall be reimbursed for all expenses of moving his household and other personal effects and for the traveling ex-

penses of himself and members of his family, including living expenses for himself and his family and his own actual wage loss during the time necessary for such transfer and for a reasonable time thereafter (not to exceed 2 working days) used in securing a place of residence in his new location. The exact extent of the responsibility of the carrier under this provision and the ways and means of transportation shall be agreed upon in advance between the carrier and the affected employee or his representative. No claims for expenses under this section shall be allowed unless they are incurred within 3 years from the effective date of the acquisition or merger , and the claim must be submitted within 90 days after the expenses are incurred.

(b) Changes in place of residence subsequent to the initial change caused by the acquisition or merger which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

Section 9(a). The following provisions shall apply, to the extent they are applicable in each instance, to any employee who is retained in the service of the carriers involved in this acquisition or merger (or who is later restored to such service from the group of employees entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of such acquisition or merger and is therefore required to move his place of residence.

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the acquisition or merger to be unaffected thereby; Provided, however, that if the home is not sold within a substantial period of time after the acquisition or merger, then the fair value of the home shall be determined as of a date as closely related to the date of sale as possible, with an agreed-upon adjustment being made to exclude any effect of the acquisition or merger on such fair value. The carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other party.

2. If the employee is under a contract to purchase his home, the carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligations under his contract.

3. If the employee holds an unexpired lease of a dwelling occupied by him as his home, the carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(h) Changes in place of residence subsequent to the initial change caused by the acquisition or merger which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

(c) No claim for loss shall be paid under the provisions of this section which is not presented within 3 years after the effective date of the acquisition or merger.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee or his representative and the carrier, and in the event they are unable to agree, the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the employee or his representative and one by the carrier, respectively; these two shall endeavor by agreement within 10 days after their appointment to select the third appraiser or to select some person authorized to name the third appraiser; and in the event of failure to agree, then the Chairman of the National Mediation Board shall be requested to appoint the third appraiser. A decision of a majority of the appraisers shall be required, and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the salary of the appraiser selected by such party.

Section 10. If either carrier, on or after July 19, 1979, shall rearrange or adjust its forces in anticipation of the acquisition or merger, with the purpose or effect of depriving an employee of benefits to which he should be entitled under these provisions as an employee immediately affected by the acquisition or merger , these provisions shall apply to such an employee as of the date when he is so affected.

Section 11. shall jointly or severally give at least 45 days' written notice containing a full and adequate statement of the proposed changes to be effected by the acquisition or merger, including an estimate of the number of employees of each class, craft, or field of endeavor affected by the intended changes. Such notice shall be posted on bulletin boards or other conspicuous places convenient to the employees of said carriers, and a copy of the notice shall be sent by registered mail to all authorized representatives of any of the employees of both carriers.

If requested in writing by any employee or employees of either carrier or the authorized representative of such employee or employees, the date and place of a meeting between said employees or their representatives and the representatives of the carriers to settle problems of the rearrangement of such employees arising out of and because of the acquisition or merger shall be agreed upon within 10 days after such request is received by the carrier. The meeting shall commence within 30 days from the date the request is received by the carrier.

In the event of a failure to agree upon a settlement of a problem or of problems presented at the meeting, the unsettled problems may be submitted by either party for adjustment in accordance with section 13.

Section 12. No employee of either carrier shall, as a condition of eligibility for the protection afforded by the terms of this order be required to accept employment with the surviving carrier that is not within the class, craft, or field of endeavor in which he was employed by either carrier on the date of the attached order.

Section 13(a). In the event that any dispute or controversy (except as to matters arising under section 9) arises with respect to the protections provided herein which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. The parties shall select the arbitrator from such panel by alternatively striking names until only one remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties. The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing the employee or employees or (ii) if unrepresented, the employee or employees or group or groups of employees. The decision of the arbitrator shall be final and binding on the parties.

(b) The above condition shall not apply if the parties by mutual agreement determine that an alternative method for dispute settlement or an alternative procedure for selection of an arbitrator is appropriate in their particular dispute. No party shall be excused from complying with the above condition by reason of having suggested an alternative method or procedure unless and until that alternative method or procedure shall have been agreed to by all the parties.

APPENDIX 2

UNITED STATES SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION REPORT ON AMENDING THE FEDERAL AVIATION ACT OF 1958, SECTION 22

Calendar No. 575

95TH CONGRESS
2d Session

SENATE

REPORT
No. 95-631

AMENDING THE FEDERAL AVIATION ACT OF 1958

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 2493

TO AMEND THE FEDERAL AVIATION ACT OF 1958, AS AMENDED, TO ENCOURAGE, DEVELOP, AND ATTAIN AN AIR TRANSPORTATION SYSTEM WHICH RELIES ON COMPETITIVE MARKET FORCES TO DETERMINE THE QUALITY, VARIETY, AND PRICE OF AIR SERVICES, AND FOR OTHER PURPOSES

FEBRUARY 6 (legislative day, JANUARY 30), 1978.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
86-576 WASHINGTON : 1978

EXISTING DETERMINATIONS

SEC. 21. All orders, determinations, rules, regulations, permits, contracts, certificates, rates, and privileges which have been issued, made, or granted, or allowed to become effective, by the President, the Civil Aeronautics Board, or the Postmaster General, or any court of competent jurisdiction, under any provision of law repealed or amended by this Act, or in the exercise of duties, powers, or functions, which are vested in the Board, and which are in effect at the time this Act takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Board, or by any court of competent jurisdiction, or by operation of law.

EMPLOYEE PROTECTION PROGRAM

SEC. 22. (a) GENERAL RULE.—The Secretary of Labor shall make monthly assistance payments, or reimbursement payments, in amounts computed according to the provisions of this section, to each individual who the Secretary finds, upon application, to be an eligible protected employee. An eligible protected employee shall be a protected employee who (1) has been deprived of employment, or (2) has been adversely affected with respect to his compensation, on account of a qualifying dislocation.

(b) MONTHLY ASSISTANCE COMPUTATION.—(1) An eligible protected employee shall be entitled to receive a monthly assistance payment, for each month in which he is an eligible protected employee, in an amount computed by the Secretary. The Secretary, after consultation with the Secretary of Transportation, shall, by rule, promulgate guidelines to be used by him in determining the amount of each monthly assistance payment to be made to a member of each craft and class of protected employees, and what percentage of salary such payment shall constitute for each applicable class or craft of employees. The amounts of monthly assistance payable under this section shall be computed by the Secretary to insure that the protected employee will not, during the period in which he is entitled to protection, be placed in a substantially worse financial position with respect to wages and fringe benefits. In computing such amounts for any individual protected employee, the Secretary shall deduct from such amounts the full amount of any unemployment compensation received by the protected employee.

(2) If an eligible protected employee is offered reasonably comparable employment, and such employee does not accept such employment, then such employee's monthly assistance payment under this section shall be reduced to an amount which such employee would have been entitled to receive if such employee had accepted such employment. If the acceptance of such comparable employment would require relocation, such employee may elect not to relocate and, in lieu of all other benefits provided herein, to receive the monthly assistance payments to which he would be entitled if this paragraph were not in effect, except that the total number of such payments shall be the lesser of three or the number remaining pursuant to the maximum provided in subsection (e).

(c) ASSISTANCE FOR RELOCATION.—If an eligible protected employee relocates in order to obtain other employment, such employee shall be entitled to receive reasonable moving expenses (as determined by the Secretary) for himself and his immediate family. In addition, such employee shall be entitled to receive reimbursement payments for any loss resulting from selling his principal place of residence at a price below its fair market value (as determined by the Secretary) or any loss incurred in canceling such employee's lease agreement or contract of purchase relating to his principal place of residence.

(d) DUTY TO HIRE PROTECTED EMPLOYEES.—(1) Each person who is a protected employee of an air carrier which is subject to regulation by the Civil Aeronautics Board who is furloughed or otherwise terminated by such an air carrier on account of a qualifying dislocation shall have first right of hire, in order of seniority and regardless of age, in his occupational specialty, by any other air carrier hiring additional employees which held a certificate issued under section 401 of the Federal Aviation Act of 1958 prior to the effective date of this section. Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person. Any employee who is furloughed or otherwise terminated on account of a qualifying dislocation, and who is hired by another air carrier under the provisions of this subsection, shall retain his rights of seniority and right of recall with the air carrier that furloughed or terminated him.

(2) Beginning on the date on which monthly assistance payments under this section begin, the Secretary shall establish, maintain, and periodically publish a comprehensive list of jobs available with air carriers certificated under section 401 of the Federal Aviation Act of 1958. Such list shall include that information and detail, such as job descriptions and required skills, the Secretary deems relevant and necessary. In addition to publishing the list, the Secretary shall make every effort to assist an eligible protected employee in finding other employment. Any individual receiving monthly assistance payments, moving expenses, or reimbursement payments under this section shall, as a condition to receiving such expenses or payments, cooperate fully with the Secretary in seeking other employment. In order to carry out his responsibilities under this subsection, the Secretary may require each such air carrier to file with the Secretary the reports, data and other information necessary to fulfill his duties under this subsection.

(3) In addition to making monthly assistance or reimbursement payments under this section, the Secretary shall encourage negotiations between air carriers and representatives of eligible protected employees with respect to rehiring practices and seniority.

(e) PERIOD OF MONTHLY ASSISTANCE PAYMENTS.—(1) Monthly assistance payments computed under subsection (b) for a protected employee who has been deprived of employment shall be made each month until the recipient obtains other employment, or until the end of the 36 months occurring immediately after the month such payments were first made to such recipient, whichever first occurs.

(2) Monthly assistance payments computed under subsection (b) for a protected employee who has been adversely affected relating to his compensation shall be paid for no longer than 36 months, as long as the total number of monthly assistance payments made under this section for any reason do not exceed 36.

(f) RULES AND REGULATIONS.—(1) The Secretary may issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section.

(2) All rules and regulations shall be submitted to the Congress on the date that they are proposed by the Secretary. Such rules and regulations shall become effective 60 legislative days after the date they were submitted to the Congress, unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regulations, except that such rules or regulations may become effective on the date. during such 60-day period, that a resolution has been adopted by both Houses stating that the Congress approves of them.

(3) For purposes of this subsection, the term "legislative day" means a calendar day on which both Houses of Congress are in session.

(g) AIRLINE EMPLOYEES PROTECTIVE ACCOUNT.—All payments under this section shall be made by the Secretary from a separate account maintained in the Treasury of the United States to be known as the Airline Employees Protective Account. There is authorized to be appropriated to such account annually, beginning with the fiscal year ending September 30, 1979, such sums as are necessary to carry out the purposes of this section. including amounts necessary for the administrative expenses of the Secretary related to carrying out the provision of this section.

(h) DEFINITIONS.—For the purposes of this section—

(1) The term "protected employee" means a person who, on the date of enactment of this section, has been employed for at least 4 years by an air carrier holding a certificate issued under section 401 of the Federal Aviation Act of 1958. Such term shall not include any members of the Board of Directors or officers of a corporation.

(2) The term "qualifying dislocation" means a bankruptcy or major contraction of an air carrier holding a certificate under section 401 of the Federal Aviation Act of 1958, occurring during the first 10 complete calendar years occurring after the date of enactment of the Air Transportation Regulatory Reform Act of 1978, the major cause of which is the change in regulatory structure provided by the Air Transportation Regulatory Reform Act of 1978, as determined by the Civil Aeronautics Board.

(3) The term "Secretary" means the Secretary of Labor.

(4) The term "major contraction" means a reduction by at least 15 percent of the total number of full-time employees of an air carrier within a 12-month period. Any particular reduction of less than 15 percent may be found by the Board to be part of a major contraction of an air carrier if the Board determines that other reductions are likely to occur such that within a 12-month period in which such particular reduction occurs the total reduction will exceed 15 percent. In computing a 15-percent reduction under this paragraph. the Board shall not include employees who are deprived of employment because of a strike.

(i) TERMINATION.—The provisions of this section shall terminate on the last day the Secretary is required to make a payment under this section.

LOAN GUARANTY

SEC. 23. The Act entitled "An Act to provide for Government guaranty of private loans to certain air carriers for purchase of modern aircraft and equipment, to foster the development and use of modern transport aircraft by such carriers and for other purposes", approved September 7, 1957 (49 U.S.C. 1324 note), is amended as follows:

(1) Section 3 of such Act is amended to read as follows:

"SEC. 3. The Secretary is hereby authorized to guarantee any lender against loss of principal or interest on any aircraft purchase loan made by such lender to (a) any air carrier holding a certificate to engage in local air transportation from the Civil Aeronautics Board or (b) any air carrier holding a certificate of public convenience and necessity for local or regional air service issued by the Board: such guaranty shall be made in such form, on such terms and conditions, and pursuant to such regulations, as the Secretary deems necessary and which are not inconsistent with the provisions of this Act.".

(2) Section 4(c) of such Act is amended by striking out "10" and inserting in lieu thereof "15".

(3) Section 4(d) of such Act is amended by striking out "$30,000,000" and inserting in lieu thereof "$100,000,000".

(4) Section 8 of such Act is amended by striking out "twenty" and inserting in lieu thereof "25".

AIRPORT AND AIRWAY DEVELOPMENT ACT AMENDMENTS

SEC. 24. Section 11 of the Airport and Airway Development Act (49 U.S.C. 1711) is amended as follows:

(1) Paragraph (1) of such section 11 is amended to read as follows:

"(1) 'air carrier airport' means—

"(A) an airport which, on December 31, 1978, was an air carrier airport (as that term was defined on that date); and

"(B) an existing public airport regularly served, or a new public airport which the Secretary determines will be regularly served, by an air carrier certificated by the Civil Aeronautics Board under section 401 of the Federal Aviation Act of 1958, and a commuter airport.".

(2) Paragraph (7) of such section 11 is amended by (A) striking out "401(a)" and inserting in lieu thereof "422(a)": and (B) inserting "or operating under a certificate issued by the Civil Aeronautics Board under section 420 of such Act," immediately after "1958".

MISCELLANEOUS

SEC. 25. The table of contents for the Federal Aviation Act of 1958 is amended as follows:

(a) Strike out "Sec. 102. Declaration of policy: The Board." and insert in lieu thereof the following item:

Sec. 102. Declaration of policy: The Board.
"(a) Interstate and overseas air transportation.
"(b) All-cargo air transportation.
"(c) Foreign air transportation."

APPENDIX 3

UNITED STATES SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION REPORT ON AMENDING THE FEDERAL AVIATION ACT OF 1958, ADDITIONAL VIEWS OF MR. ZORINSKY

Calendar No. 575

95TH CONGRESS
2d Session
SENATE
REPORT
No. 95-631

AMENDING THE FEDERAL AVIATION ACT OF 1958

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 2493

TO AMEND THE FEDERAL AVIATION ACT OF 1958, AS AMENDED, TO ENCOURAGE, DEVELOP, AND ATTAIN AN AIR TRANSPORTATION SYSTEM WHICH RELIES ON COMPETITIVE MARKET FORCES TO DETERMINE THE QUALITY, VARIETY, AND PRICE OF AIR SERVICES, AND FOR OTHER PURPOSES

FEBRUARY 6 (legislative day, JANUARY 30), 1978.—Ordered to be printed

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ADDITIONAL VIEWS OF MR. ZORINSKY

COMMITTEE ACTION

I take exception to the Committee action defeating, by the narrowest margin of any failing amendment (8–6), the motion to utilize a "last fired, first hired" policy as the sole labor protection provisions for this legislation.

Instead, the Committee opted to also provide funds from the federal treasury, which could conceivably cost $1 billion, as the labor protection provision.

PREMISE

There is no disagreement as to the prognosis for the airline industry resulting from this legislation. I say at the outset that I have supported efforts to return the airline industry to a less regulated, free enterprise environment.

This support is grounded on the premise that this legislation, by it's very nature, will benefit this industry by encouraging growth and additional employment. As a result of this return to a more competitive environment, expansions and contractions may occur in the marketplace. Employment may commensurately also expand and contract. Some less competitive, less efficient carriers may be consumed by their competitors; new carriers will very likely enter the marketplace.

Some previously employed individuals, as a result, may need to seek new employment.

The "last fired, first hired" provisions that I support will therefore mesh perfectly with this expanding competitive environment.

JUSTIFICATION FOR ANY LABOR PROTECTION WHATSOEVER

Concern for this type of dislocation of airline employees has been the major stimulus for certain airline employee organizations to seek labor protection provisions, or oppose the legislation. Because of this pressure such provisions were drafted.

There is no disagreement with the Committee as to the probable nexus between the dislocation and this legislation.

The initial threshold that must be logically crossed is whether or not the dislocation probably caused by this legislation merits any labor protection. As the Committee report persuasively articulates, there is precedent for protective provisions, but the precedents are however, analogous only to those provisions defeated by the 8–6 vote, *not* to what is proposed by the Committee. Therefore, the only disagreement is the remedy that is to be afforded the dislocated employee.

COMPARISON OF OUR ALTERNATIVES VS. COMMITTEE'S PROVISIONS

The provision I support would assist those previously employed by immediately giving them priority in the hiring process of other ex-

panding carriers. Clearly this amendment seeks to take advantage of the ebb and flow of the free enterprise system. The dislocated employees are not required to wait for relief until a 15 percent contraction has taken effect within their employer/carrier.

In the alternative, the Committee has authorized a fund to provide an unemployment compensation program under the auspicies of the Secretary of Labor.

Such compensation will be triggered when a 15 percent contraction of employment in a carrier occurs. However, the Secretary is given discretion to provide such compensation in contractions of a less degree. The Secretary of Labor will be entitled to decide what degree of compensation will be provided.

Nevertheless, the statutory language requires that protected employees who are furloughed be placed in no "substantially worse position regarding wages and fringe benefits." Since airline employees are some of the highest paid in the nation, and receive generous fringe benefits, and since the legislation allows payments to an individual for a three year period, the amount of money from the federal treasury required to support even a small number of these employees is unthinkable.

Category of employees:	*Projected costs* *Average annual salary*
1. Pilots, copilots, and engineers	$45,480
Those likely to be furloughed—sample No. 25,665	(22,000)
2. Inflight personnel	13,241
Those likely to be furloughed—sample No. 33,844	(13,241)
3. Maintenance personnel	20,140
Those likely to be furloughed—sample No. 36,531	(12,000)
4. Reservation and sales	14,219
Those likely to be furloughed—sample No. 21,739	(14,219)
5. Recordkeeping and statutes	16,255
Those likely to be furloughed	(16,255)

Depending on the mix of employees furloughed

Reasonable example:	
1,000 pilots, et cetera times $22,000	$22,000,000
1,500 inflight times $13,241	19,861,500
1,500 maintenance times $12,000	18,000,000
1,000 reservation times $14,219	14,219,000
1,000 recordkeeping, et cetera times $16,225	16,225,000
Total (6,000÷134,802=4.45 percent)	90,305,500

Consequently, for 6,000 persons or 4.45% of the airline industry, 1 year's unemployment could cost the federal treasury nearly $100 million dollars. These figures are a minimum because they do not reflect fringe benefits and are taken from the CAB Form #41 for the first quarter of 1977, which does not reflect inflation to date.

Even worse is the possibility of an airline going bankrupt. The cost escalates geometrically. No longer are we dealing with those likely to be furloughed, but rather with some of the highest paid employees in the industry. I wonder if the general public is willing to support from it's tax dollars a senor pilot at $100,000 a year, not to mention fringe benefits. The cost of the Committee's employee protection provision could conceivably cost the treasury $1,000,000,000.00 (one billion dollars) if such a bankruptcy were to occur.

CONCLUSION

What in essence the Committee has constructed is a new, unemployment compensation program for airline employees. I find it abhorrent that the nation's taxpayers are being called upon to bail out the executives of the nation's airline industry for their bad business decisions by compensating their employees. This remedy is especially noxious in light of the ability of the free enterprise system resulting from the thrust of this legislation as a whole to remedy the employment problem here in question.

ARGUMENTS

First. In support of this existing provision, the Committee says that the concept of employee protection is not new to the U.S. airline industry.

REBUTTAL

This is true, but this statement begs the question. As I previously stated, the remedy here provided is a strong departure from past precedent. Protection is not new, but this remedy is new and without precedent in this industry.

ARGUMENTS

Second. The Committee states that this industry is "unique" because of the degree to which it is regulated by the federal government.

REBUTTAL

Many industries are regulated to varying degrees by the federal government. To single out this industry as "unique" is illogical. Who can say that the ultimate effect on the airline industry economy by CAB regulation is greater than the EPA's economic effect on the steel industry. Does not the trucking industry have analogous regulation by the ICC. Quite frankly, OSHA's effect on the small businesses may be just as much in degree by it's economic effect on those businesses as the CAB is on the airline industry. To single out the airline industry as being "uniquely" qualified for this type of remedy is simply without foundation.

Consequently I doubt that this so-called "unique" quality of the airline industry will preclude these provisions from being utilized as a precedent in the future. To the contrary, every labor organzation working in any type of regulated industry will seize this opportunity to seek this remedy if and when relief is perceived as necessary. The "unique" quality of this precedent will pale in the light of such pressure.

There is no disagreement that such a precedent would be injurious to the nation's treasury and economic well being.

The text of my employee protection provision follows:

EMPLOYEE PROTECTION PROGRAM

(a) DUTY TO HIRE PROTECTED EMPLOYEES.—Each person who is a protected employee of an air carrier which is subject to regulation by the Civil Aeronautics Board who is furloughed or otherwise termi-

nated by such an air carrier on account of a qualifying dislocation, shall have first right of hire, in order of seniority and regardless of age, in his occupational specialty, by any other such carrier hiring additional employees. Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person. Any employee who is furloughed or otherwise terminated on account of a qualifying dislocation, and who is hired by another air carrier under the provisions of this subsection, shall retain his rights of seniority and right to recall with the air carrier that furloughed or terminated him. The Secretary shall establish, maintain, and periodically publish a comprehensive list of jobs available with air carrier certificated under section 401 of the Federal Aviation Act of 1958. Such list shall include that information and detail, such as job descriptions and required skills, the Secretary deems relevant and necessary. In addition to publishing the list, the Secretary shall make every effort to assist an eligible protected employee in finding other employment. In order to carry out his responsibilities under this subsection, the Secretary may require each such air carrier to file with the Secretary the reports, data, and other information necessary to fulfill his duties under this subsection.

(b) RULES AND REGULATIONS.—(1) The Secretary may issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section.

(2) All rules and regulations shall be submitted to the Congress on the date that they are proposed by the Secretary. Such rules and regulations shall become effective 60 legislative days after the date they were submitted to the Congress, unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regulations, except that such rules or regulations may become effective on the date, during such 60-day period, that a resolution has been adopted by both Houses stating that the Congress approves of them.

(3) For purposes of this subsection, the term "legislative day" means a calendar day on which both Houses of Congress are in session.

(c) DEFINITIONS.—For the purposes of this section—

(1) The term "protected employee" means a person who, on the date of enactment of this section, has been employed by an air carrier holding a certificate issued under section 401 of the Federal Aviation Act of 1958 for at least 4 years. Such term shall not include any members of the Board of Directors or officers of a corporation.

(2) The term "qualifying dislocation" means a contraction of an air carrier holding a certificate under section 401 of the Federal Aviation Act of 1958, Air Transportation Regulatory Reform Act, the major cause of which is the change in regulatory structure provided by the Air Transportation Regulatory Reform Act of 1977, as determined by the Civil Aeronautics Board.

(3) The term "Secretary" means the Secretary of Transportation.

(4) The term "major contraction" means a reduction of the total number of full-time employees of an air carrier within a 12-month period except for those employees who are deprived of employment because of a strike.

(d) TERMINATION.—The provisions of this section shall terminate 10 years from enactment of this legislation.

EDITORIAL

[The Washington Star, Monday, Oct. 31, 1977] "AIRLINE DEREGULATION"

The Senate Commerce Committee has taken an overdue step toward increasing competition in the air transportation business.

By an 11-to-2 vote, it approved a bill Thursday that would allow airlines to decrease fares up to 35 percent a year, or increase them by 5 percent, without approval of the Civil Aeronautics Board; that would allow airlines to open new routes, on a limited basis, without CAB approval; that would allow airlines to discontinue services that are unprofitable and would encourage small commuter airlines to pick up services that are unprofitable to the bigger companies.

This is hardly drastic deregulation, but it promises at least to loosen the tight grip the CAB has over where and when airlines may operate and how much they may charge.

There's no assurance, however, that even so mild a change will make it through Congress. The move toward deregulation started during President Ford's administration and was firmly endorsed by President Carter, yet legislation has only now emerged from a Senate committee. It's uncertain that the full Senate will act on it before adjournment this year and if the bill wins approval there, it faces a doubtful future in the House where resistance to deregulation seems even stronger.

Whether the Senate committee's action is the "breakthrough . . . to remove outdated regulatory burdens" that President Carter called it remains to be seen. Pro-regulation lobbyists will be out in force to scuttle the legislation.

While officials of the big airlines talk a good competitive game, most of them like the mothering their companies have been getting from the CAB. They like the cozy arrangement under which the airlines and the CAB divide up the territories and then the CAB keeps off poachers.

Likewise, the unions of airline workers oppose deregulation because they fear jobs may be lost or shuffled around during the boat rocking that would result from freer competition.

In an apparent attempt to sweeten the bill for labor, the drafters included a provision providing federal financial assistance to employes put out of work by a bankrupty or major cutback of an airline because of new competitive pressures produced by the legislation. Sen. Edward Zorinsky, D-Neb., has reservations, as we do, about this provision, which appears to require the government to reimburse such employes for up to three years in an amount equal to the wages and fringe benefits they were receiving. Senator Zorinsky called it a misuse of taxpayers' money—a "raid on the treasury."

There is talk that similar provisions will be included in legislation to deregulate other industries. If the government does this for workers in the airline industry, how can it refuse to do the same for, say, truck drivers who might be displaced by introducing freer competition into the trucking industry?

Some dislocations, perhaps even substantial ones, probably are inevitable in opening an industry to competitive market forces. But if deregulation works as anticipated by its supporters, more jobs ought

to result, not fewer. The question is whether the government should guarantee full income to workers displaced as a result of deregulation when it does not do so for workers who lose their jobs for other reasons.

Senator Zorinsky is right to question such a precedent. Deregulation, yes. A guarantee of full income, no.

EDWARD ZORINSKY.

APPENDIX 4

UNITED STATES SENATE COMMITTEE ON
COMMERCE, SCIENCE, AND TRANSPORTATION REPORT
ON AMENDING THE FEDERAL AVIATION ACT OF 1958,
DISCUSSION OF MAJOR PROVISIONS OF THE BILL,
EMPLOYEE PROTECTION - SECTION 22

Calendar No. 575

95TH CONGRESS
2d Session
SENATE
REPORT
No. 95-631

AMENDING THE FEDERAL AVIATION ACT OF 1958

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 2493

TO AMEND THE FEDERAL AVIATION ACT OF 1958, AS AMENDED, TO ENCOURAGE, DEVELOP, AND ATTAIN AN AIR TRANSPORTATION SYSTEM WHICH RELIES ON COMPETITIVE MARKET FORCES TO DETERMINE THE QUALITY, VARIETY, AND PRICE OF AIR SERVICES, AND FOR OTHER PURPOSES

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EMPLOYEE PROTECTION—SECTION 22

The Committee believes that enactment of this regulatory reform bill will increase the total number of jobs in the airline industry. The purpose of the bill is to create a more competitive environment through an easing of entry restrictions and increase in pricing flexibility. Because the elasticity of demand for airline service is relatively high in many markets, the lower fares inherent in a more competitive industry should lead to an increase in the number of airline passengers. This increase, as well as the greater number of competitors that would result from less restricted market entry, should lead to additional airline flights. More passengers and flights would necessarily entail expanded overall employment opportunities.

Nevertheless, it is true that after enactment of this bill the airlines for the first time will be principally responsible to market forces rather than government regulation. Airlines will undoubtedly differ in their ability to succeed in the new market oriented environment. The Committee does not believe that this difference in competitive ability will cause system contractions, but rather different levels of growth. There is certainly a possibility, however, that one or more airlines will encounter such difficulties in adjusting that they will lose enough traffic to cause a major reduction in their total labor force.

The theoretical possibility that a major reduction might occur in the labor force of one or more airlines is the primary source for the serious concern expressed about this bill by many airline employees and their labor representatives. The Committee felt that this concern should not be ignored and that careful consideration of the question of employee protection programs was warranted. The Committee concluded that the kind of employee dislocations that might occur as a result of the new regulatory structure should be dealt with by a statutory employee protection program, as has been done in certain cases in the past.

The fundamental reason why this regulatory reform bill should include an employee protection program is that for 40 years the U.S. airline industry has been regulated in all of its most economically significant aspects, including entry, exit, and pricing. This regulation has protected from competition the fares and routes of certificated airlines, thus protecting their traffic and revenue as well. An airline's traffic and revenue is of course the key to its economic well-being—and its need for and ability to pay employees. Regulation has, therefore, had the effect of reducing the potential for major employment reductions in individual airlines (at the same time, however, reducing potential increases not only in each airline but in the industry as a whole).

An additional aspect of the regulatory system which has had protectionist value to employees has been that certificates have become extremely valuable as a result of entry restrictions. Because of the value of their certificates, airlines in serious financial difficulty have without exception been able to merge with stronger airlines, thereby avoiding bankruptcy or substantial system contraction. A statutory condition for merger has been CAB approved. Such approval has been forthcoming only if the merger agreement contained a satisfactory program for employee protection.

Airline employees have relied on the present regulatory system through their reliance on the conditions which have resulted from that system. They have relied directly in their decision to enter the industry and indirectly through their acceptance of compensation and work rules which have been negotiated within the context of the regulatory system and the job security it was thought to offer.

A crucial element of the present bill is the gradual phasing in of its key provisions. The Committee accepted without controversy the principle that a transition period should be provided to airline companies in order to allow them time for adjustment before the full force of the new regulatory system is felt. However, an individual employee will be able to do little to adjust to the new structure. Many airline employees have given most of their working lives to the air transportation industry and have too much invested to leave it now. In many cases, a job shift even within the industry would be costly because of lost seniority. Older employees looking for a new job might encounter difficulties because of their age. Since employees will not be abe to adjust in the sense their employers can, the Committee believes that a reasonable program of transition assistance should be provided.

As already stated, the Committee has determined that the public interest will be best served by a more competitive system in which airline management has greater discretion with respect to routes and prices. Because it is the public who will benefit from the regulatory reform provided for in this bill, the public should be willing to assume reasonably close to the full cost of such reform, including the cost of transition for any dislocated employees. The Committee believes that the Congress, on behalf of the American people, must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority—the airline employees and their families who have relied on the present system.

Critics of the employee protection program argue that airline employees are no more deserving of protection against dislocations resulting from regulatory reform than employees in any other area of private industry who may be harmed as a result of Government actions (such as cancellation of a Government contract or establishment of pollution or occupational safety standards) that have adverse effects on their employers. The Committee disagrees. The air transportation industry is one of the few industries in the United States which is so comprehensively regulated, and thus immune from normal market forces. It is because of the past decisions of Congress to require such regulation that the present air transportation system has developed as it has. In order to conduct their operations, the airline companies had no choice but to comply with these regulations. This forced compliance led to a justifiable reliance on the stability of the regulatory structure. The Committee believes that Congress, having acted to prevent the normal free market evolution of the industry, now has a duty to the industry and its employees which would not exist if such action had not been taken. In order for Congress responsibly to change its policy now and require the industry to move toward a much more competitive market oriented environment, Congress should attempt to minimize the dislocations caused by the change. The change in policy and the temporary dislocations it may cause would not be

necessary if Congress had not left in place so long a regulatory framework designed for the conditions that existed in the 1930's.

These considerations do not apply when a Government contract is cancelled or when Congress changes the general legal background of competitive industries, such as by enacting new pollution standards. No company can reasonably rely on the renewal of a Government contract any more than it could rely on the renewal of a contract with a private buyer. Cancellation of a contract by Government or any other economic entity imposes no special responsibilities or duties outside the dictates of applicable contract law. A company is not required to enter into Government contracts. Similarly, a company cannot reasonably assume that the general legal environment within which it must do business will not change, and certainly not that all the physically damaging effects of a business on the persons and property of others will not eventually be restricted by statute.

Another concern expressed to the Committee is the fear that its employee protection program would set an unfavorable precedent for future legislation. The Committee believes that an employee protection program is justified only in very special circumstances. As indicated, the Committee concluded that the particular features of the airline industry and the regulated environment in which it has existed since 1938 make a temporary transitional assistance program appropriate. The appropriateness of such programs for future regulatory reform legislation must be examined on a case by case basis.

The Committee believes that the increased vitality of the airline industry, with the accompanying increased employment opportunities, that will result from enactment of this bill will alleviate a good deal of anxiety and opposition to similar regulatory reform efforts in the future.

The alternatives are clear: continued regulation and thus a continuing economic loss to the public, versus decreased regulation and, therefore, decreased loss to the public, potentially paid for by a temporary assistance program.

Features of the employee protection program

The employee protection program fashioned by the committee limits as much as possible the potential expenditure of Government funds, while providing a comprehensive program of protection for dislocated employees.

In order to be eligible for assistance an employee must have at least 4 years full-time experience with a certificated airline as of the date of enactment. These protected employees would then be eligible for monetary compensation in the event of job loss, relocation, or reduction in wages suffered in connection with a bankruptcy or "major contraction" of their employer which occurred within the first 10 years of enactment and which was in major part caused by the change in the regulatory structure brought about by the act as determined by the Board.

The requirement for 4 years experience is included because the committee believes that employees with 3 years or less seniority have not relied to a substantial enough degree on the present system to warrant protection. They have made less of a commitment to a particular airline and would suffer fewer difficulties and hardships in shifting to new employment.

The 10-year period was selected because it is during such period that the airlines will be making most of their adjustments to the new system. Carriers will be rationalizing their route structures and establishing fares for the first time in an environment relatively unfettered by regulatory constraints. Because of the particular transitional provisions in the bill (for example, some automatic entry protection phases out in 3 years, the remainder in 5 years, and section 406 subsidy will phase out in 7 years), by the end of the 10-year period the carriers' competitive capabilities will have been tested and the successes or failures of adjustment to the new climate demonstrated.

A "major contraction" is defined as a reduction by at least 15 percent of the total number of full-time employees of the employing carrier occurring within a 12-month period. Strike-related reductions will not be counted for this purpose. The 15-percent figure was chosen as the lowest figure consistent with the desire to avoid CAB determinations of causality with respect to dislocations caused by normal economic fluctuations. In the last 20 years, there have been only a few non-strike-related instances when the 15-percent level has been exceeded. The 15-percent test was chosen not only in order to reduce the number of CAB investigations, but also because the committee felt that assistance should only be made available if the employing carrier were in major financial difficulty. Otherwise, the protection offered in the collective bargaining agreement should be relied upon. Any particular reduction of less than 15 percent would, nevertheless, constitute a major contraction if the Board determined that other reductions were likely to occur such that the test would be satisfied. This provision is intended to give displaced workers in clear cases the ability to receive assistance without their having to wait a full year before becoming eligible.

Under the program. each regulated air carrier is required to give priority hiring to displaced employees who satisfy the eligibility requirement as described above. Thus, few such employees would be without work for a long period of time. In addition if compensation payments began, the Secretary of Labor would be required to periodically publish a list of available jobs in aeronautics and related industries. Employees receiving compensation payments would be required to accept "reasonably comparable" employment or else lose a portion of their benefits, except that if the new job required relocation, the employee could elect not to relocate but would receive benefits for a shorter period. The provisions are intended to place on the employees the reasonable requirement of seeking and accepting available employment while still providing assistance where necessary. The interaction of these provisions will decrease the cash payments required under the program.

Eligible employees who lost their jobs would be entitled to monthly assistance payments for a maximum of 3 years or until they were reemployed, whichever occurred first. The amount of such payment would be equal to a percentage of former wages, as determined by regulations promulgated by the Department of Labor. These regulations will be subject to congressional review. The commitee considered setting statutory percentage figures and maximum dollar amounts, but concluded that the Secretary of Labor, after consultation with the Secretary of Transportation, will be in a better position to determine

the appropriate amounts. The committee intends that the percentages chosen will result in compensation payments that are less than the employees' after-tax income in order to preserve maximum incentives for employees to secure comparable work.

An eligible employee suffering a reduction in wages, would be entitled to receive a percentage of the decrease in wages, as set forth in regulations of the Department of Labor, determined pursuant to the preceding paragraph. Again, the maximum payment period is 3 years, except that the total number of monthly assistance payments—the payments for unemployment together with the payments for reduced wages—could not exceed 36. An eligible employee required to relocate would be entitled to reasonable moving and living expenses as well as compensation for any loss incurred on the sale of a residence, cancellation of a contract to purchase a residence, or cancellation of such employee's lease.

LOAN GUARANTY—SECTION 23

Since 1957 there has been a Government guaranteed loan program to assist air carriers offering service to small communities in acquiring aircraft. To date, the Government has guaranteed in excess of $200 million in loans under the program without a single default. This program has been very important to our smaller local and regional carriers in obtaining loans to purchase aircraft needed for small community air service.

Congress has renewed this loan guaranty program three times since 1957 at 5-year intervals. This section of the bill would renew the program for another 5 years and broaden it to include the new classification of carriers created for small community service—carriers certificated under section 420. These airlines, now known as commuters, are not eligible for loan guaranties under the present act despite the fact that they are major participants in the Nation's small community air service program.

The current limit of $30 million per airline in guaranty authority has been extended to $100 million to reflect increases in aircraft costs in the past 5 years and to allow a carrier to finance more aircraft under the program than is presently possible.

In keeping pace with current business trends, the prohibition on the guaranty of loans containing terms permitting full repayment more than 10 years after execution has been changed to prohibit loans containing more than 15-year repayment clauses.

The program has been extended for a 5-year term.

ADAP CONFORMING AMENDMENTS—SECTION 24

Section 24 of the bill provides amendments to the Airport and Airway Development Act which insure that no airport operator will be penalized with respect to ADAP fund eligibility as a result of this bill. The bill's potential changes in the nature of small community service will require a comprehensive review of the ADAP funding mechanism. However, until that review can properly be made, no airport should be placed in a less advantageous position for obtaining Federal funds than they enjoy at present.

APPENDIX 5

SECRETARY OF LABOR'S DELEGATION OF AUTHORITY AND ASSIGNMENT OF RESPONSIBILITY FOR THE AIRLINE DEREGULATION ACT OF 1978

U. S. DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY
WASHINGTON

February 15, 1979

SECRETARY'S ORDER 1-79

SUBJECT: Delegation of Authority and Assignment of Responsibility for the Airline Deregulation Act of 1978

1. Purpose. To delegate authority and assign responsibility in the Department of Labor for the implementation and administration of the Secretary of Labor's responsibilities under the Airline Deregulation Act of 1978.

2. Authority and Directives Affected.

a. Authority. This Order is issued pursuant to the Airline Deregulation Act of 1978, P.L. No. 95-504.

b. Directives Affected. The authorities delegated herein are in addition to those delegated in Secretary's Orders 6-78, 9-77, and 4-75, which Orders remain in effect.

3. Background. The Airline Deregulation Act of 1978 curtails the regulatory authority of the Civil Aeronautics Board in order to increase competition within the U. S. domestic airlines industry. Under provisions of the Act, protection would be afforded to all employees who had four years of service upon enactment. Certain protection provisions, such as first right of hire, are effective immediately. Other monetary protection would be provided for employees deprived of employment or adversely affected with respect to compensation by a "qualifying dislocation" as determined by the Civil Aeronautics Board and occurring during the first ten years after enactment.

DISTRIBUTION: SO-1

4. Delegation of Authority and Assignment of Responsibility

a. The Assistant Secretary for Employment and Training is delegated authority and assigned responsibility under the Airline Deregulation Act of 1978 for:

(1) The development, promulgation, and administration of policies, regulations and procedures concerning benefit payments required under Section 43.

(2) Maintenance of liaison with the Civil Aeronautics Board; and beginning January 1, 1985, the Department of Transportation, under the Sunset provisions of the Act.

(3) The determination of individual eligibility and the administration of monthly benefit payments from a separate account maintained in the Treasury of the United States to be known as the Airline Employees Protective Account, to affected employees as provided by Section 43(a)(b)(c)(d) and (e).

(4) The implementation, maintenance and publication of a comprehensive list of job openings available with certified air carriers.

(5) Providing a full range of employment services including job search and relocation for protected employees seeking employment in other areas.

(6) Developing and carrying out, in cooperation with LMSA, a program to inform and advise workers about the Airline Employee Protection Program.

(7) Developing agreements for the administration of the program by State Employment Security Agencies, as agents for the United States, and in the absence of an agreement with any State or Agency, a system for performing the functions required to provide benefits to eligible workers.

(8) Developing and maintaining a system for monitoring Federal or State Agency performance in carrying out the provisions of the Act.

b. The Assistant Secretary for Labor-Management Relations is delegated authority and assigned responsibility under the Airline Deregulation Act of 1978 for:

(1) The development, promulgation and administration of policies, regulations and procedures, covering the first right of hire - duty to hire and rehire provision of Section 43(d)(1).

(2) The development and promulgation of policies, regulations, and procedures covering the comprehensive job list required under Section 43(d)(2).

(3) Encouraging negotiations between air carriers and representatives of affected employees with respect to rehiring practices and seniority.

(4) Requesting air carriers to file reports, data and other pertinent information necessary for fulfilling responsibilities under Section 43(d)(2).

c. The Assistant Secretary for Policy Evaluation and Research shall assist the Assitant Secretaries for Employment and Training and for Labor-Management Relations in developing major policy aspects of program regulations.

d. The Solicitor of Labor shall provide legal advice and assistance to all Department of Labor officials relating to the implementation of this Order.

5. Reservations of Authority. Reserved to the Secretary of Labor are the following:

a. Submission of rules, regulations or reports to the Secretary of Transportation and/or the Congress as appropriate.

b. Entering into agreements and modifications to agreements with any State which will act as agent in carrying out Department of Labor responsibilities under this Act.

c. Entering into agreements with agencies of the Federal Government, as required, to carry out responsibilities under this Act.

6. Effective Date. This Order is effective immediately.

Ray Marshall

Secretary of Labor