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AIRLINE MANAGEMENT PREROGATIVE IN THE DEREGULATION ERA

JAMES J. McDONALD, JR.*

INTRODUCTION

IT IS COMMONPLACE in contemporary labor law outside the airline industry that an employer may make decisions relating to the basic scope and direction of the enterprise without first bargaining with, or obtaining the consent of, the union(s) representing its employees. Such decisions typically concern a sale or closing of all or part of a business, or (where contractual restrictions are not involved) relocation of operations or subcontracting of work. However, while this concept of "management prerogative"¹ has become rather firmly entrenched with respect to employers covered by the National Labor Relations Act (NLRA),² its application to airlines and railroads covered by the Railway Labor Act (RLA)³ remains a matter of considerable controversy.

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¹ This concept has also been referred to in the literature as "rights of ownership," "entrepreneurial rights," or simply "management rights." For consistency and clarity, it will be referred to as "management prerogative" herein.

² 29 U.S.C. §§ 151-87 (1982). The development of the principle of management prerogative under the NLRA will be treated more extensively in Part I, below.

³ 45 U.S.C. §§ 151-88 (1982). While the RLA originally applied only to railroads, Congress in 1936 brought the then-infant airline industry under the coverage of the statute. Pub. L. No. 487, 49 Stat. 1189 (1936) (codified at 45 U.S.C. §§ 181-188 (1982)). For a description of some of the reasons why airlines were brought under the coverage of the RLA, see Comment, *Airline Labor Policy, The Stepchild of the Railway Labor Act*, 18 J. AIR L. & COM. 461, 461-63 (1951).

An employer's management prerogative generally may be characterized as inversely proportional in scope to its obligation to bargain collectively with its employees. The RLA details the scope of an air or rail carrier's collective bargaining obligations no more specifically than does the NLRA for other employers.⁴ Nonetheless, the courts historically have construed an air or rail carrier's management prerogative to change the nature or direction of its business as more narrowly constrained than that of an employer governed by the NLRA, especially where such changes have resulted in loss of employment or other prejudice to the carrier's employees. However, most of the law restricting a carrier's management prerogative developed out of a context of extensive federal economic regulation of railroads (primarily) and airlines (to a lesser extent).⁵ Thus, while railroads and airlines once may have been more constrained from unilaterally altering the scope of the enterprise to achieve operating efficiencies than were other types of businesses, they were largely protected from competitive market forces by government regulation. In the past, a carrier's inability to achieve operating efficiencies may have been expensive, but much of that expense could be passed on to the carrier's customers through a highly regulated and noncompetitive fare structure.

However, in 1978 deregulation by Congress drastically altered the nature of the airline industry.⁶ Airlines lost the protective cloak of economic regulation that they had

⁴ Section 8(d) of the NLRA requires that employers governed by that statute bargain over "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1982). Section 2 of the RLA requires air and rail carriers to bargain about "rates of pay, rules, and working conditions." 45 U.S.C. § 152 (1982).

⁵ That regulation derives from the Interstate Commerce Act, now codified at 49 U.S.C. §§ 10101-11917 (1982), covering railroads; and the Civil Aeronautics Act, Pub. L. No. 75-706, 52 Stat. 973 (1938), which was later modified by the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958) (current version at 49 U.S.C. app. §§ 1301-1557 (Supp. III 1985)), covering airlines.

⁶ Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended in scattered sections of 49 U.S.C.).

long enjoyed, as the government's role in allocating routes to be flown and fares to be charged was largely abolished. Suddenly, any air carrier could fly wherever it wished and charge whatever fares the market would bear. Scores of new entrant carriers emerged,⁷ most of them nonunion, low-overhead, low-fare operations. Competition over most routes became fierce. The airline industry had come to resemble, in the words of one observer, "a universe of corner grocery stores more than . . . a public utility."⁸

Unfortunately, principles of airline labor law have not caught up as quickly with the reality of deregulation. Courts have continued to apply interpretations of the RLA that were developed in line with old principles of regulation to questions of management prerogative in the new deregulated era.⁹ As a result, airline managers, faced with the sudden need for greater efficiency in order to compete with the many new entrants in the industry,¹⁰ often find themselves hamstrung in their attempts to achieve such efficiency by the elaborate and lengthy collective bargaining and status quo requirements of the RLA.¹¹ Airline unions continue to staunchly maintain that matters such as elimination of unprofitable routes, stations, or aircraft, or shutdown or sale of all or part of a

⁷ In 1978 there were 32 route air carriers certified by the Federal Aviation Administration. U.S. DEPT. OF TRANSP., FAA STATISTICAL HANDBOOK OF AVIATION 25 (1978). By 1984, that number had risen to 248. U.S. DEPT. OF TRANSP., FAA STATISTICAL HANDBOOK OF AVIATION 52, 79-82 (1984).

⁸ J. NEWHOUSE, *THE SPORTY GAME* 76 (1982).

⁹ See, e.g., *Air Line Pilots Ass'n v. Wien Air Alaska*, 120 L.R.R.M. (BNA) 3388 (D. Alaska 1984); *Local 553, Transp. Workers Union v. Eastern Air Lines*, 544 F. Supp. 1315 (E.D.N.Y.), *modified*, 695 F.2d 668 (2d Cir. 1982).

¹⁰ For a discussion of the impact of the emergence of new entrants upon established carriers as a result of deregulation, see Northrup, *The New Employee-Relations Climate in Airlines*, 36 INDUS. & LAB. REL. REV. 167 (1983). As Northrup explains: "Deregulation soon gave rise to a number of new carriers that immediately began to challenge the standard ones on price — something quite different from the competitive stress on service during the regulatory era." *Id.* at 169.

¹¹ 45 U.S.C. §§ 155, 156 (1982). These processes will be more closely examined in Part II, below.

carrier's operations, are uniformly subject to the RLA's complex lengthy bargaining requirements.

This article will demonstrate that, as one court recently found,¹² no justification exists for construing the scope of an airline's management prerogative in most instances to be any narrower than that of nonairline employers. Nothing in the RLA itself compels such a construction. Rather, Congress drafted the RLA in a purposefully open-ended fashion, intending that the courts should enjoy some flexibility in crafting specific applications of the statute. As such, judicial interpretations of the scope of the RLA's bargaining requirements (and its correlative restraint on airline management prerogative) cannot realistically ignore the drastic changes that have occurred in the industry since deregulation. Airlines need to react quickly in order to survive in today's highly competitive marketplace. The RLA's cumbersome bargaining processes are not only antithetical to the need for such quick response, but they often achieve no end *except* delay. Pre-deregulation precedents that restricted the management prerogative of airlines simply cannot be reflexively applied in the post-deregulation era.

I. THE GENESIS OF THE CONCEPT OF MANAGEMENT PREROGATIVE

The concept of "management prerogative" has developed largely under the NLRA.¹³ That concept emerged, most typically, in cases involving plant closings, sales of businesses, work relocation, and subcontracting of bargaining unit work. However, it is important to note initially that the NLRA did not *grant* management prerogative to employers. In the Senate floor debates of

¹² See *Air Line Pilots Ass'n v. Transamerica Airlines*, 123 L.R.R.M. (BNA) 2682 (E.D.N.Y.), *appeal dismissed*, No. 86-8084, slip op. (2d Cir. 1986).

¹³ A comprehensive history of the development of the concept of management prerogative under the NLRA can be found in P. MISCIMARRA, *THE NLRB AND MANAGERIAL DISCRETION: PLANT CLOSINGS, RELOCATIONS, SUBCONTRACTING, AND AUTOMATION* (1983).

the NLRA, Senator Walsh, Chairman of the Committee on Education and Labor, explained: "No one can keep an employer from closing down his factory and putting thousands of men and women on the street. So in dealing with this bill we have to recognize those fundamental things, and we have not gone into that domain."¹⁴ Thus, the concept of management prerogative already existed as an inherent right of ownership prior to the enactment of the NLRA, and was not intended to be displaced by that statute.¹⁵

Historically, disputes over the scope of management prerogative first appeared in cases involving subcontracting disputes. In a case decided in 1945,¹⁶ the National Labor Relations Board (NLRB) held that an employer could contract out mining work and not require the contractor to adhere to the employer's collective bargaining agreements covering its mines without violating Section 8(5) of the NLRA.¹⁷ The NLRB maintained that it had never held that

an employer may not in good faith, without regard to union organization of employees, change his business structure, sell or contract out a portion of his operations, or make any like change which might affect the constituency of the appropriate unit without first consulting the bargaining representative of the employees affected by the proposed business change.¹⁸

Similarly, in the 1961 *Fibreboard Paper Products Corp.*¹⁹ decision, the NLRB rejected its General Counsel's argument that Section 8(a)(5) of the NLRA should be read to re-

¹⁴ 79 CONG. REC. 7,673 (1935).

¹⁵ See generally McDonald, *State Plant Closing Laws: Preempted by the NLRA?*, 10 EMPLOYEE REL. L.J. 241, 245-46 (1984).

¹⁶ Mahoning Mining Co., 61 N.L.R.B. 792 (1945).

¹⁷ *Id.* at 804. Section 8(5) became Section 8(a)(5) after the enactment of the Taft-Hartley Amendments to the NLRA in 1947. That section makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees" over wages, hours, and other conditions of employment. 29 U.S.C. §§ 158(a)(5), 159(a) (1982).

¹⁸ Mahoning Mining Co., 61 N.L.R.B. at 803.

¹⁹ 130 N.L.R.B. 1558 (1961).

quire an employer to bargain over its economically motivated decision to contract out bargaining unit maintenance work.²⁰ The NLRB noted that while an employer must bargain about the conditions of employment of those *presently-employed*,

[t]he obligation which the General Counsel would impose is . . . of an entirely different nature. For it is not concerned with the conditions of employment of employees within an existing bargaining unit; it involves, rather, the question whether the employment relationship still exists. Although the determination of that question obviously affects employees, that determination does not relate to a condition of employment, but to a precondition necessary to the establishment and continuance of the relationship from which conditions of employment arise. Moreover, although the statutory language is broad, we do not believe it is so broad and all inclusive as to warrant an inference that the Congress intended to compel bargaining concerning basic management decisions, such as whether and to what extent to risk capital and managerial effort.²¹

The NLRB in *Fibreboard* found significance in the fact that the *entire* bargaining unit was displaced as a result of the employer contracting out the maintenance work. The Board distinguished earlier decisions finding a bargaining obligation where an employer subcontracted *part* of the work of the bargaining unit, impacting those employees who remained.²²

The NLRB reconsidered its position a year later in *Town & Country Manufacturing Co.*²³ The Board held that the employer was obligated to bargain over its decision to subcontract work. The NLRB maintained that "the elimination of unit jobs, albeit for economic reasons, is a matter within the statutory phrase 'other terms and

²⁰ *Id.* at 1561.

²¹ *Id.*

²² *Id.* (distinguishing *Shamrock Dairy, Inc.*, 124 N.L.R.B. 494 (1959) and *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947)).

²³ 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

conditions of employment,' " and is thus a mandatory subject of collective bargaining.²⁴ That same year, based upon its holding in *Town & Country*, the NLRB reversed its earlier decision in *Fibreboard*.²⁵

The issue of management prerogative under the NLRA first reached the Supreme Court in 1964²⁶ when it reviewed the NLRB's reversal of the *Fibreboard* decision.²⁷ The Court's inventory of the pertinent facts in that case provided the framework for future analysis of management prerogative by the NLRB and the courts. Holding that the employer in *Fibreboard* was obligated to bargain over its decision to subcontract work, the Court noted that the subcontracting at issue did not alter the employer's basic operation, since maintenance work still had to be performed in the plant.²⁸ Moreover, the Court pointed out that there was no capital investment involved; the employer merely replaced its own employees with those of an independent contractor to do the same work.²⁹ Finally, the Court observed that the employer's motivation for subcontracting was to achieve cost savings, primarily in the area of labor costs.³⁰ The Court therefore concluded that the subcontracting issue in that case was amenable to resolution through the collective bargaining process.³¹

The *Fibreboard* Court did not hold that management must submit all decisions to subcontract work to collective

²⁴ 136 N.L.R.B. at 1027.

²⁵ *Fibreboard Paper Products Corp.*, 138 N.L.R.B. 550, 551 (1962), *enforced sub nom.*, *East Bay Union of Machinists, Local 1304 v. N.L.R.B.*, 322 F.2d 411 (1963), *aff'd*, 379 U.S. 203 (1964).

²⁶ The Court addressed the management prerogative issue under the RLA in *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960). *See infra* notes 122-143 and accompanying text.

²⁷ *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

²⁸ *Id.* at 213.

²⁹ *Id.*

³⁰ *Id.* at 213-14. "[Fibreboard] was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments." *Id.* at 213.

³¹ *Id.* at 214.

bargaining.³² Rather, it only established a framework, albeit somewhat vaguely-delineated, to distinguish between management action that is a mandatory subject of bargaining, and action that lies within management's inherent right of ownership.

Perhaps more often cited than the majority opinion in *Fibreboard*, Justice Stewart's concurring opinion further illustrates the nature of management prerogative.³³ Justice Stewart wrote that there are areas

where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. *Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.*³⁴

Fibreboard thus not only entrenched the concept of management prerogative into labor law, but it began to define the scope and limits of that concept.

The Supreme Court again addressed management prerogative the next year, although in a somewhat different context. In *Textile Workers Union v. Darlington Manufacturing Co.*,³⁵ the board of directors of a textile manufacturing

³² *Id.* at 215. The Court explained,

We are . . . not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case — the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment — is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.

Id. (footnote omitted).

³³ *Id.* at 217. Justices Douglas and Harlan joined Justice Stewart's concurrence.

Id.

³⁴ *Id.* at 223 (emphasis added).

³⁵ 380 U.S. 263 (1965).

plant, one of seventeen mills owned or controlled by a single family, voted to permanently shut down the plant following a union victory in a representation election.³⁶ The NLRB ruled that the shutdown violated Section 8(a)(3) of the NLRA.³⁷ The Fourth Circuit reversed.³⁸

The Supreme Court held that, under the NLRA, "an employer has the absolute right to terminate his entire business for any reason he pleases."³⁹ The Court rejected the argument of the AFL-CIO as amicus curiae that the employer's action was tantamount to a "lockout" or a "runaway shop," both of which are illegal when designed to destroy or undermine a union or to avoid bargaining obligations.⁴⁰ The Court reasoned that unlike a lockout or a runaway shop, in which the employer obtains some benefit (*i.e.*, diminished union potency) in the future, a complete liquidation of a business yields no such future benefit to the employer, regardless of the motivation behind it.⁴¹ The Court also compared an employer's going completely out of business with an employee's right to quit his employment:

Although employees may be prohibited from engaging in a strike under certain conditions, no one would consider it a violation of the Act for the same employees to quit their employment *en masse*, even if motivated by a desire to ruin the employer. The very permanence of such action would negate any future economic benefit to the employees. The employer's right to go out of business is no different.⁴²

Thus, *Darlington* removed an employer's decision to go

³⁶ *Id.* at 265-66.

³⁷ 139 N.L.R.B. 241 (1962). Section 8(a)(3) provides, in pertinent part, "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." 29 U.S.C. § 158(a)(3) (1982).

³⁸ 325 F.2d 682, 687 (4th Cir. 1963).

³⁹ 380 U.S. at 268.

⁴⁰ *Id.* at 271.

⁴¹ *Id.* at 271-72. The Court additionally held that a *partial* closing of a business motivated by a purpose to chill unionism among remaining employees does constitute a violation of Section 8(a)(3). *Id.* at 274-75.

⁴² *Id.* at 272. *Accord* *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974).

completely out of business and permanently terminate its relationship with its employees from the coverage of the NLRA.⁴³

Even after *Darlington*, however, considerable conflict existed between the NLRB and the courts,⁴⁴ and among the various circuits themselves,⁴⁵ concerning the locus of the boundary between management prerogative and duty to bargain with respect to plant shutdowns. The Supreme Court resolved much of this conflict in 1981 in *First National Maintenance Corp. v. NLRB*,⁴⁶ the most definitive pronouncement concerning management prerogative to date. That case involved an employer that performed maintenance work for a nursing home.⁴⁷ The employer can-

⁴³ While the *Darlington* Court did not expressly hold that an employer is obligated to bargain over its decision to go completely out of business, it noted that "no argument is made that § 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise." 380 U.S. at 267 n.5. Moreover, courts have read *Fibreboard* and *Darlington* together for the principle that an employer may go permanently and completely out of business without bargaining over its decision to do so. See, e.g., *Morrison Cafeterias Consol. v. NLRB*, 431 F.2d 254 (8th Cir. 1970) (refusal of parent and subsidiary to bargain over decision to close subsidiary is not an unfair labor practice); *NLRB v. Thompson Transp. Co.*, 406 F.2d 254 (10th Cir. 1969) (no duty to bargain over closing where decision is based on sound economic motivation); *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967) (no duty to bargain over decision, based on changed economic conditions, to terminate business and reinvest in different enterprise). See generally P. MISCIMARRA, *supra* note 13, at 135-37.

⁴⁴ Compare *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966) (employer violated Section 8(a)(5) by closing plant without consulting union) and *Brockway Motor Trucks*, 230 N.L.R.B. 1002 (1977) (employer violated Section 8(a)(5) by refusing to bargain over partial closing that did not affect scope or ultimate direction of enterprise), *enforcement denied*, 582 F.2d 720 (3d Cir. 1978) with *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966) (employer had no duty to bargain in partial closing and liquidation).

⁴⁵ Compare *NLRB v. Product Molded Plastics*, 604 F.2d 451 (6th Cir. 1979) (employer violated NLRA by failing to bargain over plant closing) and *NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512 (5th Cir.) (employer had duty to bargain before discontinuing operations, but could not be forced to bargain over reestablishing them), *cert. denied*, 385 U.S. 935 (1966) with *NLRB v. Thompson Transp. Co.*, 406 F.2d 698 (10th Cir. 1969) (no duty to bargain on decision to close terminal motivated by sound economic reason, but must bargain over effects of closing) and *NLRB v. Royal Plating and Polishing Co.*, 350 F.2d 191 (3d Cir. 1965) (no duty to bargain over economically necessary partial closing unless there was a discriminatory motive).

⁴⁶ 452 U.S. 666 (1981).

⁴⁷ *Id.* at 668.

celled the contract over a fee dispute and discharged the employees working under the contract.⁴⁸ The union representing those employees claimed the employer committed an unfair labor practice in failing to bargain over its decision to terminate the nursing home contract and discharge the employees involved.⁴⁹ The NLRB upheld the union's claim,⁵⁰ and the court of appeals enforced the NLRB's order.⁵¹

The Supreme Court reversed. It held that the employer's economically motivated decision to partially close its business was not a mandatory subject of bargaining.⁵² The Court began by recognizing that Congress deliberately left the words, "wages, hours and other terms and conditions of employment,"⁵³ without further definition, to allow the NLRB to "further define those terms in light of specific industrial practices."⁵⁴ However, the Court made it clear that, in contemplating what issues must be submitted to bargaining, Congress "had no expectation that the elected union representative would become an equal partner in the running of the business enterprise."⁵⁵

⁴⁸ *Id.* at 668-69. The written notice of cancellation specified the cause as lack of efficiency. *Id.* at 669.

⁴⁹ *Id.* at 670. The union alleged violations of NLRA §§ 8(a)(1) and (5). *Id.*

⁵⁰ 242 N.L.R.B. 462 (1979). The NLRB adopted the decision of its Administrative Law Judge, who relied on the NLRB's earlier decision in *Ozark Trailers*, 161 N.L.R.B. 561 (1964).

⁵¹ 627 F.2d 596, 603 (2d Cir. 1980).

⁵² 452 U.S. at 686. The Court concluded, "[T]he harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." *Id.*

⁵³ 29 U.S.C. § 158(d)(1982) provides, in part, that:

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making a concession

⁵⁴ *First Nat'l Maintenance*, 452 U.S. at 675.

⁵⁵ *Id.* at 676.

The *First National Maintenance* Court recognized that the union had a legitimate interest in protecting the jobs of its members.⁵⁶ However, it also maintained that collective bargaining obligations should not be imposed merely because some management decision may adversely impact employees. Rather, the Court explained,

The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole. This will be true, however, *only if the subject proposed for discussion is amenable to resolution through the bargaining process.* Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business [I]n view of an employer's need for unencumbered decisionmaking, *bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.*⁵⁷

Thus, while the Court stopped short of accepting management prerogative as an absolute, it made clear that bargaining must be able potentially to effect a resolution of the matter before any incursion upon management prerogative will be justified.

Additionally, the *First National Maintenance* Court recognized the harm that would result from a reflexive imposition of bargaining obligations upon an employer undertaking a major change in the scope or direction of its business in a competitive economy. The Court observed that "management may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies."⁵⁸ Accordingly, the Court noted that to label management decisions such as those concerning plant closings as mandatory subjects of bargaining,

⁵⁶ *Id.* at 682.

⁵⁷ *Id.* at 678-79 (citations and footnotes omitted; emphasis added).

⁵⁸ *Id.* at 682-83.

"could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose."⁵⁹ The Court thus established that, unless labor costs are the crucial factor prompting management's action, management has the prerogative to change the scope or direction of the enterprise without bargaining first, even though such a change may result in considerable loss of employment.

First National Maintenance firmly established the concept of management prerogative under the NLRA. While *First National Maintenance* addressed only a partial closing of a business, the NLRB, in *Otis Elevator Co.*,⁶⁰ later announced that it would no longer be concerned with the label attached to a change in business operations (*i.e.*, partial closing vs. relocation vs. subcontracting).⁶¹ Rather, the same rule applies to all management decisions that may adversely impact employee jobs.⁶² That rule requires an employer to bargain over its decision to alter its operations only if that decision turns upon a desire to reduce labor costs.⁶³ Conversely, no duty to bargain arises where the decision involves a "change in the basic direction or nature of the enterprise" not premised upon a desire to reduce labor costs.⁶⁴ Employers thus enjoy considerable freedom under the NLRA today to respond to competitive forces in the economy.⁶⁵

⁵⁹ *Id.* at 683.

⁶⁰ 269 N.L.R.B. 891 (1984).

⁶¹ *Id.* at 893.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See, *e.g.*, UOP, Inc., 272 N.L.R.B. 999 (1984) (no obligation to bargain over shutdown of plants and subcontracting of operations); Fraser Shipyards, Inc., 272 N.L.R.B. 496 (1984) (no obligation to bargain over shutdown of plants and subcontracting of operations).

II. THE SCOPE OF COLLECTIVE BARGAINING AND MANAGEMENT PREROGATIVE UNDER THE RAILWAY LABOR ACT

The concept of management prerogative has not been readily accepted under the RLA. In order to understand the reasons for this, one must examine not only the unique structure of the RLA, but the history of government regulation of the railroads, particularly as it concerns employment matters.

A. *Collective Bargaining Under the RLA*

One of the central purposes of the RLA is to provide mechanisms for the settlement of disputes between carriers and their employees.⁶⁶ In *Elgin, Joliet & Eastern Railway v. Burley*,⁶⁷ the Supreme Court described the two kinds of disputes between carriers and their employees that a carrier must resolve pursuant to the procedures of the RLA.⁶⁸ The first kind of dispute, designated a "major dispute," was described by the Court as relating

to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.⁶⁹

By contrast, the second type of dispute, termed a "minor dispute," was described by the Court as one which contemplates the existence of a collective agreement al-

⁶⁶ 45 U.S.C. § 151(a) (1982).

⁶⁷ 325 U.S. 711 (1945).

⁶⁸ *Id.* at 722-24. The RLA also covers a third kind of dispute, a "representation dispute," in which employees disagree as to which union, if any, will represent them. See 45 U.S.C. § 152, Ninth (1982). Strictly speaking, the carrier is not a party to such a dispute and has no obligation to participate in its resolution beyond granting the NMB access to its "books and records." *Id.* See *Brotherhood of Ry. & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965).

⁶⁹ *Elgin, J. & E. Ry.*, 325 U.S. at 723.

ready concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation.⁷⁰

With respect to major disputes,⁷¹ the RLA requires carriers and their employees to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions."⁷² Section 6 of the RLA further prescribes an elaborate procedure for the negotiation of collective bargaining agreements or changes in agreements "affecting rates of pay, rules, or working conditions."⁷³ The party desiring to change an agreement must first give the other party thirty days advance written notice of such change.⁷⁴ The parties are then obliged to confer with one another over the proposed change.⁷⁵ If they cannot come to an agreement, they may invoke the mediatory services of the National Mediation Board (NMB).⁷⁶ If the NMB's services are invoked, that agency assigns a mediator to meet with the parties in an attempt to induce an agreement.⁷⁷ If the NMB determines that it will be unable to bring about an amicable settlement of the controversy through mediation, it will then proffer binding arbitration of the dispute to the parties.⁷⁸ If either or both parties decline the NMB's proffer of arbitration, the NMB notifies the parties that its mediatory efforts have failed and that they will be free to

⁷⁰ *Id.*

⁷¹ The RLA provides that minor disputes between railroads and their employees must be submitted to the National Railroad Adjustment Board for resolution. 45 U.S.C. § 153 (1982). Minor disputes between airlines and their employees must be submitted to the System Board of Adjustment, a form of binding arbitration required to be established under each collective bargaining agreement covering airline employees. 45 U.S.C. § 184 (1982).

⁷² 45 U.S.C. § 152, First (1982).

⁷³ 45 U.S.C. § 156 (1982).

⁷⁴ *Id.*

⁷⁵ 45 U.S.C. § 152, Second (1982); 45 U.S.C. § 155, First (1982).

⁷⁶ 45 U.S.C. § 155(a), First (1982).

⁷⁷ *Id.* See also 29 C.F.R. § 1203.1 (1986).

⁷⁸ 45 U.S.C. § 155, First (1982).

engage in self-help upon the expiration of a thirty-day cooling off period.⁷⁹ The RLA additionally provides that if a dispute, in the judgment of the NMB, "threaten[s] substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," the NMB shall notify the President, who may create an "Emergency Board" to investigate and report respecting such dispute.⁸⁰

Throughout this entire process, including the thirty-day cooling-off period,⁸¹ the RLA prohibits the carrier from altering "rates of pay, rules, or working conditions."⁸² The length of this period of negotiation and mediation, during which the carrier's obligation to maintain the "status quo" applies, is left entirely to the discretion of the NMB.⁸³ In *Detroit & Toledo Shore Line Railroad v. United Transportation Union*,⁸⁴ the Supreme Court held that a carrier's obligation to maintain the status quo during such processes applies not just to terms embodied in agreements, but to the "actual, objective working conditions and practices, broadly conceived . . . out of which the dispute arose."⁸⁵

While the RLA's "major dispute" procedures were designed for the negotiation of collective bargaining agreements, several courts have held them applicable as

⁷⁹ *Id.*

⁸⁰ 45 U.S.C. § 160 (1982).

⁸¹ Where a Presidential Emergency Board has been appointed, the RLA provides for two thirty-day "cooling-off" periods. One follows the NMB's proffer, and the parties' refusal, of arbitration. 45 U.S.C. § 155, First (1982). Another follows the Presidential Emergency Board's submission of its report to the President. 45 U.S.C. § 160 (1982).

⁸² 45 U.S.C. §§ 155, First, 156, 160 (1982). The one exception to this requirement is where a period of ten days has elapsed after termination of conferences between the parties without request for or proffer of the services of the NMB. 45 U.S.C. § 156 (1982). See *Iberia Air Lines v. National Mediation Bd.*, 472 F. Supp. 104 (E.D.N.Y. 1979), *aff'd without opinion*, 636 F.2d 1201 (2d Cir. 1980).

⁸³ See, e.g., *International Ass'n of Machinists v. National Mediation Bd.*, 425 F.2d 527 (D.C. Cir. 1970); *Seaboard World Airways v. Local 851, Int'l Bhd. of Teamsters*, 501 F. Supp. 47 (E.D.N.Y. 1980); *Lan Chile Airlines v. National Mediation Bd.*, 115 L.R.R.M. 3655 (S.D. Fla. 1984).

⁸⁴ 396 U.S. 142 (1969).

⁸⁵ *Id.* at 153.

well to changes in the nature or scope of an enterprise that typically would be considered matters of management prerogative under the NLRA. Since the genesis of that approach is grounded in the history of railroad regulation and the emphasis such regulation placed upon employee protection, an examination of that history is useful.

B. *The History of Special Job Protections for Railroad Employees*⁸⁶

During the Depression Era, the railroads, like many other of the nation's industries, faced great financial distress. Much of the railroads' distress related to inefficiencies and duplication of services that had developed in that industry over the years. At that time in the nation's history, the railroads played an integral role in the national economy as the predominant means of transporting goods and passengers in interstate commerce. As a result, a work stoppage on a major railroad could seriously cripple the national economy. Thus, Congress focused heavily upon the railroads as it attempted to move the nation toward economic recovery.

In 1933, Congress enacted the Emergency Railroad Transportation Act (ERTA).⁸⁷ That statute empowered the President to appoint a federal railroad coordinator who would be responsible for inducing railroads to eliminate waste and duplication (and thus strengthen themselves financially) by consolidating their operations. However, with unemployment also being a critical problem at the time, Congress sought to avoid exacerbating that situation through railroad consolidations. Section

⁸⁶ For a comprehensive discussion of the history of special job protections for railroad employees, see R. ABLES, *THE HISTORY OF AND EXPERIENCE UNDER RAILROAD EMPLOYEE PROTECTION PLANS* (1962) and L. LECHT, *EXPERIENCE UNDER RAILWAY LABOR LEGISLATION* 102-17 (1955).

⁸⁷ 48 Stat. 211 (1933). The statute was enacted "[i]n order to foster and protect interstate commerce in relation to railroad transportation by preventing and relieving obstructions and burdens thereon resulting from the present acute economic emergency, and in order to safeguard and maintain an adequate national system of transportation." *Id.*

7(b) of the ERTA thus prohibited a carrier from reducing the number of its employees below the number of employees on its payroll in May of 1933 as a result of any consolidation of operations undertaken pursuant to the statute. Not surprisingly, in light of the job freeze provisions of the ERTA, railroad managements found it virtually impossible to achieve any real economies through consolidation.⁸⁸ That statute expired in 1936, and Congress did not renew it.⁸⁹

Job protection, however, remained a serious concern of the railroad unions. The unions drafted and introduced in Congress a new legislative proposal providing for extensive job protection for railroad employees; the so-called "Wheeler-Crosser Bill."⁹⁰ While that bill was pending, however, the unions induced the railroads to negotiate a national agreement covering job protection.

As a result of those negotiations, on May 21, 1936, eighty-five percent of the railroads and twenty-one railroad unions entered what has become known as the "Washington Job Protection Agreement."⁹¹ While providing a wide range of employee protections, the agreement applied only to employees affected by a "coordination," defined essentially as a partial or complete merger of two or more railroads.⁹² Unlike previous labor protective measures, the Washington Job Protection Agreement did not *guarantee* employment to railroad employees; rather, it provided that any employee deprived of employment as the result of a railroad "coordination" would receive sixty percent of his prior earnings for up to five years depending upon length of service.⁹³ The agree-

⁸⁸ R. ABLES, *supra* note 86, at 126-27.

⁸⁹ *Id.* at 127.

⁹⁰ S. 4174, 74th Cong., 2d Sess., 80 CONG. REC. 3204 (1936); H.R. 11609, 74th Cong., 2d Sess., 80 CONG. REC. 3295 (1930).

⁹¹ R. ABLES, *supra* note 86, at 127. Appendix A of ABLES includes a copy of the Washington Agreement. *Id.* at app. A.

⁹² *Id.* at § 2(a).

⁹³ *Id.* at § 7(a). This "coordination allowance" would cease in the event of the employee's recall, resignation, retirement, death, or dismissal for cause. *Id.* at § 7(j). In lieu of such an allowance, the employee could resign his employment

ment provided additionally that carriers would pay the moving expenses and related costs of any employee required to relocate as a result of a "coordination."⁹⁴ Further, the agreement provided for binding arbitration by a neutral referee of all disputes arising under its terms.⁹⁵

After the expiration of the ERTA, President Roosevelt appointed a committee of three railroad management representatives and three labor representatives, known as the "Committee of Six," to submit recommendations on the state of the railroads. In 1938, the Committee submitted its report, which was essentially a proposal for further legislation regulating the railroads. The Committee recommended, among other things, that as a prerequisite to government approval of railroad consolidations, a "fair and equitable arrangement" to protect the interests of affected employees be imposed.⁹⁶ This was a significant proposal in that it was recommended jointly by management and labor. As one commentator notes, the report of the Committee of Six was a milestone for railroad employee protection, as it represented a complete acceptance of that concept by railroad management.⁹⁷

Nearly simultaneously with the submission of the report of the Committee of Six, the Interstate Commerce Commission (ICC) took steps of its own to protect the interests of railroad employees, although at that time it lacked any specific statutory mandate to do so. Created by the Interstate Commerce Act (ICA)⁹⁸ to regulate, among other things, the economic aspects of the railroad industry, the ICC was empowered by Section 407 of the Transportation Act of 1920⁹⁹ to approve railroad mergers "on

and accept a lump-sum settlement, the amount of which would be determined by his length of service. *Id.* at § 9.

⁹⁴ *Id.* at § 10.

⁹⁵ *Id.* at § 13.

⁹⁶ R. ABLES, *supra* note 86, at 128.

⁹⁷ *Id.*

⁹⁸ Ch. 104, 24 Stat. 379, 383 (1887).

⁹⁹ Ch. 91, 41 Stat. 456, 481 (1920) (§ 407 amends § 5(2) of the Interstate Commerce Act of 1887).

such terms and conditions as shall be found by the Commissioner to be just and reasonable. . . ." In 1939, the ICC invoked this authority to prescribe labor protective conditions similar to those contained in the Washington Job Protection Agreement as a prerequisite to its approval of a lease of railroad property from one railroad company, which was then bankrupt, to another.¹⁰⁰

One of the carriers involved appealed the ICC's imposition of labor protective conditions to the courts. Ultimately, in *United States v. Lowden*,¹⁰¹ the Supreme Court upheld the ICC's action, and in the process articulated the philosophical bases for the legislative and regulatory concern about railroad labor protection. The Court declared,

One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.¹⁰²

The Court went on to describe various prior congressional measures regulating railroad labor relations and designed to prevent interruptions of commerce,¹⁰³ and continued,

The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of

¹⁰⁰ Chicago, R.I.& G. Ry. Trustees Lease, 230 I.C.C. 181, 187-90 (1938), *modified*, 233 I.C.C. 21 (1939).

¹⁰¹ 308 U.S. 225 (1939).

¹⁰² *Id.* at 234.

¹⁰³ *Id.* at 235-37. The Court cited to, *inter alia*, the RLA and the Adamson Act of 1916, 39 Stat. 721, which fixed wages of railroad employees to avoid interruptions of commerce stemming from labor disputes. *Id.*

justice are ignored.¹⁰⁴

Several themes underlay the Supreme Court's decision in *Lowden*. Most prominently, the Court assumes the necessity to take "extra" care to protect the morale of railroad employees, in the hope that such care would discourage labor unrest that might disrupt the flow of commerce.¹⁰⁵ Second, one finds a concern that railroad employees not suffer unduly, by losing their jobs in a period of high unemployment, as carriers achieved economies.¹⁰⁶ Finally, a strong suggestion runs throughout the *Lowden* decision that the Court perceived that railroad employee protection was a popular political issue of the day and that it was not inclined to take a contrary view of the issue absent clear evidence that the ICC had exceeded its statutory mandate.¹⁰⁷

Meanwhile, Congress had accepted the recommendations of the Committee of Six that any new transportation legislation contain labor protective conditions for railroad workers. Both the House and Senate bills that ultimately were to become the Transportation Act of 1940 authorized the ICC to require a "fair and equitable arrangement" to protect employees affected by certain railroad transactions approved by that agency. After the bills were reported out of committee in both houses, Representative Harrington proposed an amendment that was subsequently adopted by the House. That amendment would have *prohibited* the ICC from approving any transaction that would result in "unemployment or displacement of employees."¹⁰⁸ The ICC itself argued vehemently against the Harrington "job freeze" Amendment as jeopardizing railroads' ability to operate efficiently. Commissioner

¹⁰⁴ 308 U.S. at 235-36.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 234.

¹⁰⁷ *Id.* at 234-40. The Court discussed the report of the Committee of Six and legislation pending in Congress that specifically would have granted the ICC the authority to impose the labor protective conditions it had imposed in the instant case. *Id.* at 237-40.

¹⁰⁸ R. ABLES, *supra* note 86, at 129.

Eastman, chairman of the ICC's Legislative Committee, told Congress,

The [Harrington Amendment], by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation, the railroads must, if they are to thrive and grow, conduct their operations with the utmost economy and efficiency. If they are prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable.¹⁰⁹

The conference committee finally reached a compromise and the Transportation Act of 1940¹¹⁰ was enacted, adding Section 5(2)(f) to the ICA. That section required that "[a]s a condition of its approval" of railroad transactions within its jurisdiction, the ICC "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected," and provided that for four years following such a transaction, railroad employees could not be placed "in a worse position with respect to their employment."¹¹¹ While Section 5(2)(f) was somewhat ambiguous as to whether it contemplated an actual

¹⁰⁹ *Id.* at n.38.

¹¹⁰ Transportation Act of 1940, ch. 722, 54 Stat. 899, 906-07 (1940). This act amended the original act of 1887, and renamed the older law as the now familiar Interstate Commerce Act. *Id.* at 899.

¹¹¹ *Id.* at 906-07. This provision was codified at 49 U.S.C. § 5(2)(f). Congress revised and recodified this section in 1978. Pub. L. No. 95-473, § 11347, 92 Stat. 1439 (1978). The current provision reads:

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a

job freeze, the Supreme Court subsequently interpreted it as requiring only that employees be compensated for job losses, not as an absolute prohibition on the elimination of jobs.¹¹²

Invoking its authority under Section 5(2)(f), the ICC imposed labor protective conditions upon a wide variety of railroad transactions. In *Oklahoma Railway Co. Trustees-Abandonment of Operations*,¹¹³ the ICC imposed conditions (subsequently known as the "Oklahoma Conditions") upon a carrier abandonment-and-purchase transaction. Those conditions largely paralleled the provisions of the Washington Job Protection Agreement, except that they provided a maximum 100% compensation benefit for four years, instead of a 60% benefit for five years.¹¹⁴

In *New Orleans Union Passenger Terminal Case*,¹¹⁵ the ICC imposed labor protective conditions upon the construction of a new passenger terminal. While the ICC initially imposed its Oklahoma Conditions,¹¹⁶ the unions appealed and the Supreme Court held, in *Railway Labor Executives Association v. United States*,¹¹⁷ that the four-year period set forth in section 5(2)(f) constituted a minimum, not a mandatory or maximum period.¹¹⁸ On remand, the ICC combined its Oklahoma Conditions with the additional protections contained in the Washington Job Protection Act to create what became known as its "New Orleans

lesser period of time by the carrier before the action became effective, for that lesser period).

49 U.S.C. § 11347 (Supp. III 1985). Congress did not intend to effect any substantive changes in this provision by means of its revision. See *New York Dock Ry. v. United States*, 609 F.2d 83, 90 n.3 (2d Cir. 1979).

¹¹² *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169, 175-76 (1961).

¹¹³ 257 I.C.C. 177 (1944).

¹¹⁴ *Id.* at 198. In *Chicago, B. & Q. R.R. Abandonment*, 257 I.C.C. 700 (1944), the ICC applied the same conditions (known as the "Burlington Conditions") to a single carrier abandonment of facilities. The Supreme Court upheld the ICC's authority to impose labor protective conditions in abandonment cases in *ICC v. Railway Labor Executives Ass'n*, 315 U.S. 373 (1942).

¹¹⁵ 267 I.C.C. 763 (1948).

¹¹⁶ *Id.* at 782.

¹¹⁷ 339 U.S. 142 (1950).

¹¹⁸ *Id.* at 155.

Conditions.”¹¹⁹ The ICC subsequently applied its New Orleans Conditions to mergers of two carriers,¹²⁰ and leases of one carrier by another.¹²¹

C. *The Courts' Reliance Upon the History of Railroad Labor Protection to Restrict Management Prerogative Under the RLA*

Against this background of extensive ICC-imposed labor protective conditions, the Supreme Court decided its first case addressing a railroad's management prerogative under the RLA. In *Order of Railroad Telegraphers v. Chicago & North Western Railway*,¹²² a railroad had established stations every seven to ten miles along its line when it had begun operations 100 years earlier. The growth of other forms of transportation, however, reduced traffic on the railroad to the extent that many agents in those stations worked less than one hour in an eight-hour day.¹²³ As a result, the railroad announced its intention to abolish certain stations and consolidate others, a move that would result in loss of employment for station agents and telegraphers represented by the union.¹²⁴

The union served a Section 6 notice¹²⁵ upon the railroad, indicating its desire to amend the current collective bargaining agreement by adding the following clause: “No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization.”¹²⁶ The railroad responded that its plan to abolish and consolidate the stations was a matter of management prerogative and did not raise a bargainable issue.¹²⁷

¹¹⁹ See *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952).

¹²⁰ E.g., *Missouri Pac. R.R. Reorganization*, 290 I.C.C. 477, 613, 670 (1954).

¹²¹ E.g., *St. Louis S.W. Ry. Lease*, 290 I.C.C. 205, 215 (1953).

¹²² 362 U.S. 330, 332 (1960).

¹²³ *Id.* at 332.

¹²⁴ *Id.*

¹²⁵ *Railway Labor Act*, ch. 691, § 6, 48 Stat. 1185, 1197 (1934) (codified at 45 U.S.C. § 156 (1982)).

¹²⁶ *Telegraphers*, 362 U.S. at 332.

¹²⁷ *Id.* at 332-33.

The union struck in support of its bargaining demand and the railroad sued to enjoin the strike as unlawful.¹²⁸ The union countered that the district court lacked jurisdiction to grant injunctive relief under Section 4 of the Norris-LaGuardia Act, which generally prohibits federal courts from entering injunctions in "labor disputes."¹²⁹ The district court declined to enjoin the strike.¹³⁰ The court of appeals reversed, finding that the railroad's elimination of the stations did not constitute a bargainable change relating to "rates of pay, rules, or working conditions."¹³¹

The Supreme Court, in turn, reversed the court of appeals, holding that the district court had no jurisdiction under the Norris-LaGuardia Act to enter the injunction, since it grew out of a "labor dispute" within the meaning of that statute.¹³² The Court rejected the railroad's argument that the union's bargaining demand was *unlawful*, stating,

Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions. . . ." It would stretch credulity too far to say that the Railway Labor Act, designed to protect railroad workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and

¹²⁸ *Id.* at 331.

¹²⁹ *Id.* at 333. Section 4 of the Norris-LaGuardia Act provides, in pertinent part, No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
(a) Ceasing or refusing to perform any work or to remain in any relation of employment

29 U.S.C. § 104 (1982).

¹³⁰ *Telegraphers*, 362 U.S. at 334.

¹³¹ *Chicago & N.W. R.R. v. Order of R.R. Telegraphers*, 264 F.2d 254, 260 (7th Cir. 1959), *rev'd*, 362 U.S. 330 (1960).

¹³² 362 U.S. at 335.

permanence in employment for workers.¹³³

The Court disagreed with the view of the court of appeals that the union's efforts to negotiate about the station closings constituted an attempt to "usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations."¹³⁴ It responded that the RLA and the ICA "recognize that stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system."¹³⁵ The Court then construed the RLA by looking to the ICA, the statute which provided the pervasive regulatory scheme covering railroads.¹³⁶ The *Telegraphers* Court noted the ICA's requirement that, prior to approving any transaction within its jurisdiction that might adversely affect the interests of railroad employees, the ICC was bound to "require a fair and equitable arrangement to protect the interests of the railroad employees affected."¹³⁷

The *Telegraphers* Court went on to discuss its earlier holding in *ICC v. Railway Labor Executives Association*,¹³⁸ in which it upheld the authority of the ICC to impose labor protective conditions, under the ICA, for the protection of displaced workers where a railroad abandons a portion of its lines.¹³⁹ The *Telegraphers* Court then observed "In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively."¹⁴⁰ The Court thus based its holding in large part upon the pattern of regulation developed under the ICA, which tradi-

¹³³ *Id.* at 339-40.

¹³⁴ 264 F.2d at 259.

¹³⁵ 362 U.S. at 336-37.

¹³⁶ *Id.* at 337.

¹³⁷ *Id.* See *supra* text accompanying notes 110-112.

¹³⁸ 315 U.S. 373 (1942).

¹³⁹ *Id.* at 378.

¹⁴⁰ *Telegraphers*, 362 U.S. at 338.

tionally had held that "special" employment protections for railroad employees were desirable to help avert labor strife on the railroads which might impede commerce and potentially cripple the national economy.

One should note that the *Telegraphers* opinion did not hold the union's work preservation clause to be a "mandatory" subject of bargaining¹⁴¹ for the carrier. Rather, it held only that the union's proposal constituted a "lawful" subject of bargaining which gave rise to a "labor dispute" within the meaning of the Norris-LaGuardia Act.¹⁴² The Court thus failed to squarely address the issue of a carrier's obligation under the RLA to bargain prior to effecting operational changes that may result in job losses.¹⁴³

The second major case which limited management prerogative under the RLA was *United Industrial Workers v. Board of Trustees of the Galveston Wharves*.¹⁴⁴ In *Galveston Wharves*, the carrier operated the dock facilities of the Port of Galveston, Texas, which included a railroad and a grain elevator.¹⁴⁵ The union represented all grain elevator employees employed by the carrier.¹⁴⁶ While a collective bargaining agreement was in effect, the carrier leased its grain elevator to an unrelated concern for a term of five years, and, as a result, permanently laid off all of its employees.¹⁴⁷ The union served a notice upon the carrier pursuant to Section 6 of the RLA, requesting bargaining

¹⁴¹ In *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958), the Supreme Court distinguished between "mandatory" subjects of bargaining under the NLRA (i.e., "wages, hours, and other terms and conditions of employment") and "permissive" subjects of bargaining. Failure to bargain in good faith over mandatory subjects of bargaining constitutes an unfair labor practice under the NLRA. 29 U.S.C. § 158(a)(5) (1982). Permissive subjects are those which are lawful subjects of bargaining, but about which employers and unions are not obligated to bargain if they do not wish. *Wooster*, 356 U.S. at 349.

¹⁴² *Telegraphers*, 362 U.S. at 340-41.

¹⁴³ For further elaboration of this point, see Weber, *Public Policy and the Scope of Collective Bargaining*, 13 LAB. L.J. 49 (1962).

¹⁴⁴ 351 F.2d 183 (5th Cir. 1965).

¹⁴⁵ *Id.* at 184.

¹⁴⁶ *Id.* at 185.

¹⁴⁷ *Id.*

over a contract proposal that would restrict the carrier's right to lease or terminate grain elevator operations.¹⁴⁸ The carrier engaged in bargaining over the clause, but did not agree to the restriction.¹⁴⁹

The union then sued the carrier, seeking an injunction against consummation of the lease pending exhaustion of the RLA's collective bargaining processes. The district court denied the relief, finding the dispute to be a "minor" one not subject to injunction,¹⁵⁰ and the union appealed.¹⁵¹

The Fifth Circuit reversed. It first rejected the district court's finding that, since the carrier did not seek to actually change the terms of any agreement, the dispute was a "minor" one.¹⁵² The court of appeals instead maintained that "a carrier in imposing changes in nowise contemplated or arguably covered by the agreement is not to escape the impact of the Act merely through the device of unilateral action which it purposefully intends is not to become a part of the written agreement."¹⁵³ The court thus assumed, without citing any authority, that a carrier could terminate its operations or lease its facilities *only* when it was granted the explicit right to do so by a collective bargaining agreement.¹⁵⁴

The remainder of the *Galveston Wharves* court's opinion is unevenly reasoned and appears to be based more upon

¹⁴⁸ *Id.* at 185-86.

¹⁴⁹ *Id.* at 186.

¹⁵⁰ *Id.* at 184. The general rule is that a union is not entitled to an injunction preserving the status quo during the period in which a "minor" dispute is submitted to the board of adjustment, unless the union would suffer such irreparable harm from denial of an injunction that a union victory before the system board of adjustment would be meaningless. See *Brotherhood of Locomotive Eng'rs v. Missouri-K.-T. R.R.*, 363 U.S. 528, 533-34 (1960); *Local Lodge 2144, Bhd. of Ry., Airline and S.S. Clerks v. Railway Express Agency*, 409 F.2d 312, 316-17 (2d Cir. 1969). See also *Local Lodge No. 1266, Int'l Ass'n of Machinists v. Panoramic Corp.*, 668 F.2d 276, 285-86 (7th Cir. 1981).

¹⁵¹ *Galveston Wharves*, 351 F.2d at 187.

¹⁵² *Id.* at 188-89.

¹⁵³ *Id.*

¹⁵⁴ The court mentioned again later in its opinion that "the Carrier can point to no provision of the contract giving it the contract right to make this decisive change." *Id.* at 190.

the court's sympathy for the displaced employees than upon any principled application of the terms of the RLA. In the court's view, the carrier terminated the collective bargaining agreement by going out of business, "[b]ut it had no right to terminate the contract prior to its expiration."¹⁵⁵ The court continued,

[T]here is absolutely nothing about the Agreement, or more fundamentally, about the nature of the relationship and the peculiar role of collective bargaining agreements in assuring industrial peace, which contemplates that during the term the employer has the right to bring it all to an end simply by ceasing operations.¹⁵⁶

The *Galveston Wharves* court did not appear to contest a carrier's right to go out of business. However, it maintained that the RLA requires the carrier to give notice and satisfy the RLA's bargaining requirements before effecting such a change in "working conditions" during the term of an agreement.¹⁵⁷ The court went on to specify that bargaining must be conducted over the decision to shut down the operation, *even though it might produce absolutely no benefit for the union*.¹⁵⁸

¹⁵⁵ *Id.* at 189.

¹⁵⁶ *Id.* Considerable law exists to the contrary, at least under the NLRA. *See, e.g.,* *Fraser v. Magic Chef-Food Giant Markets, Inc.*, 324 F.2d 853, 856-57 (6th Cir. 1963); *Union de Trabajadores de la Industria Gastronomica v. Helio San Jeronimo Corp.*, 434 F. Supp. 643, 646 (D.P.R. 1977).

¹⁵⁷ *Galveston Wharves*, 351 F.2d at 190. Somewhat inconsistently, however, the court later in its opinion took a different approach to the issue of a carrier's right to go out of business. After citing *Darlington*, and acknowledging the Supreme Court's holding in *Fibreboard* that some employee displacements may be left entirely to management discretion and outside collective bargaining, the court attempted to distinguish those cases by stating, "There may well be an absolute legal right to go out of business when not done with anti-union purpose. But the Carrier did not go out of business. Its lease, as leases of large industrial properties go, is short termed indeed." *Id.* at 191 (footnote omitted). Thus, at one point in its opinion, the *Galveston Wharves* court says that while a carrier may have a right to go out of business, it must first pursue the RLA's lengthy bargaining processes. At another point, the court says that while a carrier may have the "absolute" right to go out of business without first bargaining, the carrier in the case before the court was not really going out of business. *Id.*

¹⁵⁸ *Id.* at 190. This position was clearly refuted by the Supreme Court's holding in *First National Maintenance* that bargaining over an operational change is not required where it will produce no benefit for the union except perhaps delay of the

The concluding paragraphs in the *Galveston Wharves* opinion are particularly peculiar in their reasoning, and underscore again the court's apparent sentiment that the shutdown of the grain elevator worked an injustice upon the employees involved that required reparation. The court summarized as follows,

[T]he very snarl these employees are in . . . shows why an employer subject to the Railway Labor Act may have special obligations in pretermination bargaining. Suddenly from an action which is entirely legitimate and undoubtedly sound from an economic standpoint, employees of long standing find themselves with neither job nor representation continuity. In no small measure this is due to the mutual-exclusiveness of LMRA and Railway Labor Act. Surely through bargaining a way might be found to accommodate two congressional Acts, a single business operation and a labor force whose loyalty or competence has not here been criticized in the least.

That means we must reverse and remand. We think we need not direct that the lease be unscrambled at this time. *But these employees' rights have been so clearly violated, some suitable relief and sanction should be imposed.* . . .¹⁵⁹

Thus, while suggesting that an employer subject to the RLA might owe "special" duties to its employees in a shutdown situation, the *Galveston Wharves* court failed to articulate any meaningful rationale for that proposition.¹⁶⁰

The first case finding an airline's management prerogative restricted under the RLA was *Ruby v. Airlift International*.¹⁶¹ In that case, Airlift performed certain military

inevitable. 452 U.S. at 682-83, 686. *Cf. Otis Elevator*, 269 N.L.R.B. at 897 (concurring opinion of Member Dennis) (analysis of bargaining obligations in plant shutdown situations).

¹⁵⁹ *Galveston Wharves*, 351 F.2d at 191-92 (emphasis added).

¹⁶⁰ Circuit Judge Griffin Bell dissented in part, maintaining that only a minor dispute was at issue, but that even if a major dispute was involved, *Telegraphers* could not be extended to cover a total shutdown of a business in light of the Supreme Court's decision in *Darlington*. *Id.* at 192-93 (Bell, J., concurring in part, dissenting in part).

¹⁶¹ 81 L.R.R.M. (BNA) 2610 (D.D.C. 1972).

contract flying (called "LOGAIR," or "Logistical Air Support") for the United States Government. It sought to transfer its LOGAIR contracts and three of its L-100-20 aircraft to Saturn Airways, which would then perform the contracts using the transferred aircraft. The Air Line Pilots Association (ALPA) served notice upon Airlift, under Section 6 of the RLA, of its desire to bargain over the transfer of the LOGAIR contracts to another carrier. Airlift rejected ALPA's bargaining demand, claiming that its transfer of the LOGAIR contracts to Saturn was a "non-bargainable matter of management prerogative."¹⁶² When the transfer was consummated and thirty Airlift pilots were furloughed as a result, ALPA sued Airlift, alleging violations of the RLA.¹⁶³

Airlift moved to dismiss for lack of jurisdiction, arguing that its dispute with ALPA was "minor".¹⁶⁴ The court denied Airlift's motion to dismiss, holding that

Airlift's unilateral transfer to Saturn of flying opportunities and work performed at all relevant times by Airlift pilots, without prior collective bargaining negotiations between Airlift and ALPA, constitutes a major change in an existing collective bargaining agreement and presents a "major dispute" governed by the provisions of Sections 2, Seventh, 5 and 6 of the Railway Labor Act, subject to the jurisdiction of the District Court.¹⁶⁵

The court cited *Galveston Wharves* and *Telegraphers* in support of its holding,¹⁶⁶ but provided no further analysis or rationale.

The most recent case taking a narrow view of management prerogative under the RLA was *Air Line Pilots Association v. Wien Air Alaska*.¹⁶⁷ In that case a carrier in extreme financial difficulty sought wage concessions from its pilots

¹⁶² *Id.* at 2611.

¹⁶³ *Id.* at 2612.

¹⁶⁴ *Id.* at 2610.

¹⁶⁵ *Id.* at 2612.

¹⁶⁶ *Id.* The court additionally cited *Detroit & Toledo Shore Line*, 396 U.S. at 142, and *Ruby v. TACA Int'l Airlines*, 439 F.2d 1359 (5th Cir. 1971).

¹⁶⁷ 120 L.R.R.M. (BNA) 3389 (D. Alaska 1984).

and other unionized employees.¹⁶⁸ After an impasse in those negotiations, Wien announced that it would temporarily suspend flight operations for a twenty-five day period in order to "restructure" its operations, and would furlough its pilots during that period.¹⁶⁹ ALPA sued to enjoin the shutdown, alleging that it constituted a "unilateral change in the terms and conditions of employment" of Wien pilots in violation of Section 6 of the RLA.¹⁷⁰

The court granted ALPA's request for preliminary injunctive relief.¹⁷¹ It rejected Wien's argument that the pilot layoffs were justified under a contractual provision permitting the furlough of pilots on account of "seasonal factors" or termination of service to particular destinations.¹⁷² The court maintained that Wien's suspension of operations "create[d] a major dispute, neither covered [n]or anticipated under the collective bargaining agreement."¹⁷³

The *Wien* court essentially sidestepped the carrier's argument that its decision to shut down was a "fundamental managerial decision" over which it had no obligation to bargain. The court commented, "The short answer to this is, of course, that *Wien's management has not claimed to be closing down the business*. On the contrary, the announced purpose of Wien's actions was to permit the Company to reorganize its operations in order to continue business at a profit."¹⁷⁴ While *Wien* essentially held that a temporary shutdown¹⁷⁵ does not lie within management's preroga-

¹⁶⁸ *Id.* at 3389.

¹⁶⁹ *Id.* at 3389-90.

¹⁷⁰ *Id.* at 3389.

¹⁷¹ *Id.* at 3391. The "status quo injunction" preserved "existing working conditions as they [were] in the collective bargaining agreement . . ." *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* The court surveyed the boundaries between "major" and "minor" disputes, concluding that federal courts have no jurisdiction to resolve a "minor dispute." *Id.* at 3390.

¹⁷⁴ *Id.* at 3391 (emphasis added).

¹⁷⁵ The *Wien* court was inconsistent in its treatment of the likely duration of the shutdown. While it avoided the management prerogative issue by pointing out that the shutdown was only temporary, earlier in its opinion it observed, "Although the suspension of all scheduled flights was announced as temporary, I

tive, one should note the context of the decision. Wien suspended operations in the midst of mid-term concessionary bargaining with its pilots. Its actions, then, basically constituted a *lockout*,¹⁷⁶ which would violate the RLA's requirement that a carrier not undertake economic self-help measures during the bargaining process.

A number of additional courts, relying largely upon *Telegraphers* and *Galveston Wharves*, have found carrier shut-downs or restructuring of operations to constitute "major disputes" subject to Section 6 of the RLA, particularly where such moves have resulted in considerable job loss.¹⁷⁷ Other courts have viewed such operational changes as "minor disputes," particularly where management could justify its actions under some term of the collective bargaining agreement.¹⁷⁸

believe it is improbable in the light of Wien's financial condition that the carrier will resume scheduled flights on the scale that existed on November 7, 1984." *Id.*

¹⁷⁶ ALPA characterized Wien's actions as such during proceedings before the court. Transcript of Hearing of November 19, 1984 at 3, *Wein*, 120 L.R.R.M. (BNA) at 3389.

¹⁷⁷ See, e.g., *Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir. 1986) (abolishment of positions created a "major dispute"); *International Ass'n of Machinists v. Qantas Airways*, 121 L.R.R.M. (BNA) 2312 (N.D. Cal. 1984), *aff'd mem.*, 772 F.2d 912 (1985), *cert. denied*, 106 S. Ct. 1191 (1986) (management's decision to contract-out work is a mandatory subject of bargaining); *In re Michigan Interstate Ry.*, 116 L.R.R.M. (BNA) 2843 (Bankr. E.D. Mich. 1983) (sharp curtailment of service due to state's withdrawal of lease was a mandatory subject of bargaining); *Local 553, Transp. Workers Union v. Eastern Air Lines*, 544 F. Supp. 1315 (E.D.N.Y. 1982), *aff'd as modified*, 695 F.2d 668 (2d Cir. 1983) (deprivation of work opportunity involving type of work traditionally performed by union, even where work is new, is a change in working conditions giving rise to a "major dispute"); *International Bhd. of Teamsters v. BIC Guardian Services, Inc.*, 87 L.R.R.M. (BNA) 2817 (N.D. Tex. 1974) (unilateral subcontracting of work constitutes a violation of RLA's status quo requirement); *Baker v. Railroad Yardmasters Ass'n*, 347 F. Supp. 215 (E.D. Pa. 1972), *aff'd*, 480 F.2d 917 (3d Cir. 1973) (abolishment of one-sixth of total jobs in the craft or class constituted a "major dispute").

¹⁷⁸ See, e.g., *Carbone v. Meserve*, 645 F.2d 96 (1st Cir.), *cert. denied*, 454 U.S. 859 (1981) (jobs eliminated through consolidation of positions); *United Transp. Union v. Penn Cent. Transp. Co.*, 505 F.2d 542 (3d Cir. 1974) (elimination of positions); *Railway Express Agency, Inc. v. Brotherhood of Ry., Airline and S.S. Clerks*, 437 F.2d 388 (5th Cir.), *cert. denied*, 403 U.S. 919 (1971) (contracting-out of work); *International Bhd. of Teamsters v. Braniff Int'l Airways*, 437 F.2d 1272 (5th Cir. 1971) (abolishment of jobs); *St. Louis, S.F. & T. Ry v. Railroad Yardmasters Ass'n*, 328 F.2d 749 (5th Cir. 1964), *vacated*, 347 F.2d 983 (1965) (abolish-

D. *Emergence of the Management Prerogative Concept Under the RLA*

In contrast with the above cases, courts in three cases so far have laid the groundwork for recognition of the concept of management prerogative under the RLA.¹⁷⁹

In the first, *International Association of Machinists v. Northeast Airlines*,¹⁸⁰ Northeast had entered into an agreement to merge with Delta Air Lines. The International Association of Machinists and Aerospace Workers (IAM) sought to negotiate with Northeast prior to the merger concerning post-merger seniority and employment protections. When Northeast refused to bargain, the IAM sued to enjoin the merger until such bargaining occurred.¹⁸¹ The district court denied relief¹⁸² and the union appealed.

On appeal, the First Circuit affirmed the district court's ruling, holding that a union has no right under the RLA to bargain over a carrier's decision to sell the business.¹⁸³ In reaching its result, the court relied upon NLRA author-

ment of jobs); *Portland Terminal R.R. v. United Transp. Union*, 114 L.R.R.M. (BNA) 3606 (D. Or. 1983) (transfer of work and elimination of jobs); *International Bhd. of Firemen & Oilers v. Consolidated Rail Corp.*, 560 F. Supp. 169 (S.D. Ohio 1982) (abolishment of positions); *Independent Union of Flight Attendants v. Pan American World Airways*, 502 F. Supp. 1013 (D.D.C. 1980) (closing of flight attendant base and furlough of more than 1,000 employees); *Norfolk & W. Ry. v. Brotherhood of Locomotive Eng'rs*, 459 F. Supp. 136 (W.D. Va. 1978), *aff'd in part*, 657 F.2d 596 (4th Cir. 1981) (design and operation of new locomotives); *Peterson v. Braniff Airways, Inc.*, 94 L.R.R.M. (BNA) 3173 (W.D. Mo. 1977) (closing of flight attendant base); *International Ass'n of Machinists v. Compagnie Nationale Air France*, 93 L.R.R.M. (BNA) 2453 (E.D.N.Y. 1976) (elimination of positions and transfer of personnel).

¹⁷⁹ In addition, in *Brotherhood of Locomotive Eng'rs v. Baltimore & Ohio R.R.*, 310 F.2d 503 (7th Cir.), *aff'd*, 372 U.S. 284 (1962), the court of appeals asserted, without elaboration, "There is an area in the administration of a railroad business in which management is free to operate without consultation with the representatives of its employees." 310 F.2d at 511.

¹⁸⁰ 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972).

¹⁸¹ *Id.* at 552.

¹⁸² *International Ass'n of Machinists v. Northeast Airlines*, 337 F. Supp. 499 (D. Mass. 1972).

¹⁸³ *Northeast Airlines*, 473 F.2d at 557. While the union did not initially seek to bargain over Northeast's decision to merge, it argued that the district court's holding that the IAM could not bargain about the effects of the merger "rests upon the faulty premise that the merger itself is non-negotiable." *Id.* at 556.

ities recognizing management prerogative.¹⁸⁴ It rejected the union's argument that *Fibreboard* should apply to mandate collective bargaining, noting that, unlike management's decision to subcontract bargaining unit work in *Fibreboard*, the decision to merge is "much nearer the core of entrepreneurial control."¹⁸⁵ The court went on to explain:

To require an employer to include the union, in some cases possibly many unions, in discussions concerning a possible sale of the business would infringe greatly upon his control over his investment. Moreover, the nature of the decision itself makes it excessively burdensome to bring the union into the decision-making process. Unlike a proposed subcontract, merger negotiations require a secrecy, flexibility and quickness antithetical to collective bargaining. Nor are the employees in a position to judge the complex financial considerations often involved.¹⁸⁶

The court additionally observed that bargaining over a proposed merger would produce no real benefit,¹⁸⁷ since (unlike in *Fibreboard*) management's action was not based upon labor considerations and the necessity of the merger would not be affected by bargaining.¹⁸⁸

The second case that laid the groundwork for a recognition of management prerogative under the RLA was *Japan*

¹⁸⁴ See *id.* n.9.

¹⁸⁵ *Id.* at 557.

¹⁸⁶ *Id.* (citation omitted).

¹⁸⁷ The court took note of the union's less than sterling motives in seeking to compel the carrier to bargain about the merger:

We do not believe, or even suspect, that the Union wants the merger to fail. Rather, our suspicion is that realizing how strongly other persons desire the merger, the Union feels it may have the leverage to obtain something additional for itself. We do not say that this is wrong. On the other hand, the Union is not possessed with fireside equities.

Id. at 554 n.6.

¹⁸⁸ *Id.* at 557. The court went on to reject the union's argument that "effects" bargaining only should be required. In so holding, the court noted that after the merger Northeast's employees would become Delta's employees, and to require Northeast to negotiate about such effects of the merger would potentially require Northeast to renegotiate the terms of the merger itself. *Id.* at 558.

Air Lines v. International Association of Machinists.¹⁸⁹ In that case, during the course of negotiations for a new collective bargaining agreement, the IAM proposed a "scope" clause obligating Japan Air Lines(JAL) to hire its own employees to perform maintenance and ground service work which JAL previously had contracted out.¹⁹⁰ JAL refused to bargain over the IAM's "scope" proposal, as well as over "other issues not related to rates of pay or working conditions for our own employees."¹⁹¹ The NMB, having conducted fruitless mediation of the dispute, released the parties to engage in self-help at the expiration of the 30-day "cooling off" period.¹⁹² JAL then filed suit to enjoin the IAM from striking over its "scope" proposal.

The district court issued a series of temporary restraining orders against a union strike, and ultimately issued a declaratory judgment finding that the IAM's "scope" proposal was not a "mandatory" subject of bargaining, "insofar as it [sought] to require JAL to alter the method it has chosen for conducting its business."¹⁹³ The court declined to issue a preliminary injunction against a strike, however, because it was unable to conclude, on the record before it, that the parties' inability to reach agreement was attributable solely to the IAM's "scope" clause.¹⁹⁴

The Second Circuit affirmed the district court's conclusion that the IAM's "scope" proposal was not a mandatory subject of bargaining under the RLA.¹⁹⁵ On appeal, the union argued that under Section 2, First of the RLA, labor and management must meet and confer over

¹⁸⁹ 538 F.2d 46 (2d Cir. 1976).

¹⁹⁰ *Id.* at 47-48.

¹⁹¹ *Id.* at 48.

¹⁹² *Id.* See 45 U.S.C. § 155 (1982).

¹⁹³ 389 F. Supp. 27, 37 (S.D.N.Y. 1975).

¹⁹⁴ *Id.* at 38. The court also declined to hold that the union's insistence upon a nonmandatory subject of bargaining violated its bargaining obligation under the RLA. *Id.* at 37-38. *Cf.* *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) (employer's insistence on objectionable clauses as a condition precedent to the collective bargaining agreement amounted to a refusal to bargain).

¹⁹⁵ *Japan Air Lines*, 538 F.2d at 51-53.

"any proposal, advanced by either party, which is neither unlawful nor expressly contravened by a provision of the RLA."¹⁹⁶ The court disagreed with the union's "expansive interpretation" of Section 2, reasoning that such an interpretation "would impede rather than facilitate the industrial peace which the RLA was intended to promote."¹⁹⁷ It thus concluded that JAL's practice of contracting out work was a matter of its management prerogative, involving the carrier's "proper interest in retaining basic control over the size and direction of its enterprise," and was not directly related to "rates of pay, rules and working conditions."¹⁹⁸ As such, the courts, for the first time in an RLA case, implicitly recognized that certain matters may constitute "permissive" subjects of bargaining without carrying a "mandatory" bargaining obligation.¹⁹⁹

While *Northeast Airlines* and *Japan Air Lines* recognized that an RLA carrier may enjoy a management prerogative in certain matters, neither case presented a situation in which the carrier's action resulted in immediate job loss. The *Northeast Airlines* court recognized that a merger "does not immediately and directly eliminate jobs."²⁰⁰ Rather, a merger merely substitutes a new employer, who may later decide to combine the two carriers with some resulting job loss.²⁰¹ Similarly, the court in *Japan Air Lines* noted that the union's "scope" proposal in that case had no immediate impact upon current JAL employees.²⁰²

The first RLA case to recognize a carrier's management

¹⁹⁶ *Id.* at 51 (emphasis added).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 52.

¹⁹⁹ *Id.* This distinction was again recognized in *Air Line Pilots Ass'n v. United Airlines*, 802 F.2d 886, 902 (7th Cir. 1986).

²⁰⁰ *Northeast Airlines*, 473 F.2d at 558.

²⁰¹ *Id.*

²⁰² *Japan Air Lines*, 538 F.2d at 42. The court explained, "If [the IAM's "scope" proposal were] adopted, its principal beneficiaries would be those persons hired to fill the newly created jobs. Nothing in the RLA obliges JAL to discuss with the Union issues of immediate concern only to individuals not yet included within the bargaining unit." *Id.* at 52 (citing *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179-80 (1971)).

prerogative in a situation involving immediate and significant job loss was *Air Line Pilots Association v. Transamerica Airlines*.²⁰³ In that case, the carrier's corporate parent, a large holding company owning subsidiaries engaged primarily in insurance and financial services, chose to divest itself of several of its subsidiaries not involved in those areas, including Transamerica Airlines.²⁰⁴ For nearly two years prior to this decision, Transamerica had been engaged in contract negotiations with the ALPA, which represented its pilots, and the International Brotherhood of Teamsters (IBT), which represented its flight engineers.²⁰⁵ Transamerica's parent company attempted to sell the airline as a going concern, but when those efforts proved unsuccessful, it began selling the airline's assets.²⁰⁶ Shortly thereafter, Transamerica's board of directors decided to cease operations permanently due to mounting losses.²⁰⁷

When Transamerica announced the lease-sale of twelve of its fourteen L-100-30 "Hercules" aircraft to another carrier, ALPA and the IBT sued to enjoin the transfer of aircraft and the shutdown of the airline. The unions argued that those actions constituted a violation of Transamerica's obligation to maintain the "status quo" as to working conditions under Section 6 of the RLA.²⁰⁸ Alternatively, the unions claimed that Transamerica's actions gave rise to a "minor dispute," and sought a "status quo" injunction pending arbitration of their grievances.²⁰⁹

The district court rejected the unions' motion for preliminary injunctive relief. The court asserted that the decision to go completely out of business is one "so basic to

²⁰³ 123 L.R.R.M. (BNA) 2682 (E.D.N.Y.), *appeal dismissed*, No. 86-8084 (2d Cir. 1986).

²⁰⁴ *Id.* at 2684. The other subsidiaries chosen for divestment were a rental car company, a manufacturing firm, and another small charter airline. *Id.*

²⁰⁵ *Id.* at 2683-84.

²⁰⁶ *Id.* at 2684-85.

²⁰⁷ *Id.* at 2685.

²⁰⁸ *Id.* at 2685-86. See 45 U.S.C. § 156 (1982).

²⁰⁹ *Transamerica*, 123 L.R.R.M. (BNA) at 2684-86.

the ownership of a business that a carrier is not obligated to bargain with a union over that decision."²¹⁰

The *Transamerica* court was the first court to apply *First National Maintenance* in an RLA context.²¹¹ It recognized, as the Supreme Court had in *First National Maintenance*, that forcing an employer to bargain over its decision to go out of business would grant the union a powerful tool for achieving delay, even though the union might not be able to offer any feasible solution to the problems underlying the decision.²¹² The court also referred to the Supreme Court's observation in *Detroit & Toledo Shore Line* that the RLA's bargaining and mediation processes are "purposely long and drawn out," so that one party may choose to make them "almost interminable."²¹³ In conclusion, the *Transamerica* court stated,

It would serve no useful purpose to require that Transamerica engage in a further drawn out period of bargaining with the [unions] here prior to going out of business. Transamerica's going out of business is the result of its parent company's decision to divest itself of all of its subsidiaries that are not related to its insurance and financial and related services businesses. *No amount of bargaining between Transamerica and its unions will change that decision.* Moreover, Transamerica already has negotiated with its employees over the possibility of a sale of the airline to them, but those negotiations were unsuccessful. *Thus, the only end to be achieved by requiring Transamerica to bargain with the [unions] over its decision to go out of business is delay of the inevitable;* the Supreme Court clearly held in *First National Maintenance*, *supra*, that to require bargaining for such a purpose would be inappropriate.²¹⁴

The *Transamerica* court rejected the unions' arguments

²¹⁰ *Id.* at 2686.

²¹¹ See *supra* notes 46-65 for a discussion of *First Nat'l Maintenance*, 452 U.S. at 683.

²¹² *Transamerica*, 123 L.R.R.M. (BNA) at 2687. See *First Nat'l Maintenance*, 452 U.S. at 683.

²¹³ *Transamerica*, 123 L.R.R.M. (BNA) at 2687 (quoting *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. at 149).

²¹⁴ *Id.* at 2687 (emphasis added).

that a different result should apply solely because Transamerica was an airline covered by the RLA.²¹⁵ It noted that the Supreme Court, in *First National Maintenance*, was interpreting Section 8(d) of the NLRA, which requires an employer to bargain over "wages, hours, and other terms and conditions of employment,"²¹⁶ when it held that an employer has no obligation to bargain over its decision to go out of business. The court then observed that Section 8(d) was "nearly identical" to Section 2, First of the RLA, which requires a carrier to bargain over "rates of pay, rules, and working conditions."²¹⁷ The court concluded that the unions had "shown no reason, and this Court can find none, why an air carrier should be required to bargain over its decision to go completely out of business, solely because it is covered by the RLA."²¹⁸

The *Transamerica* court also rejected the unions' argument that Transamerica violated its status quo obligations under the RLA by going out of business. First, the court explained that since Transamerica had no obligation to bargain over its decision to go out of business, no "major dispute" had arisen, and the carrier had no attendant obligation to maintain the status quo.²¹⁹

Second, the *Transamerica* court rejected the unions' characterization of Transamerica's going out of business

²¹⁵ *Id.*

²¹⁶ 29 U.S.C. § 158(d) (1982). Section 8(d) of the NLRA provides, in pertinent part, "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." *Id.*

²¹⁷ 123 L.R.R.M. (BNA) at 2687 (quoting 45 U.S.C. § 152 (1982)). Section 2, First of the RLA provides, in pertinent part,

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

45 U.S.C. § 152 (1982).

²¹⁸ *Transamerica*, 123 L.R.R.M. (BNA) at 2687.

²¹⁹ *Id.* See 45 U.S.C. § 156 (1982).

as a "lockout" or as an unlawful exercise of "self-help" during contract negotiations. The court observed,

While [the unions] might have a point if Transamerica's shutdown were designed to be only partial or temporary, the pending contractual negotiations between Transamerica and its unions will be mooted by Transamerica's going out of business, and the very suggestion that a carrier would go completely out of business in order to obtain leverage in contract negotiations with its unions makes no sense. While unions may be barred from striking and carriers may be barred from locking out their employees during collective bargaining on an ongoing carrier, the RLA does not require that either carriers or employees maintain employment relations with one another.²²⁰

The court went on to note the distinction, first made by the Supreme Court in *Darlington*, between a strike and permanent quitting of employment by employees, and between a lockout and an employer's going out of business.²²¹

As the foregoing discussion indicates, the *Transamerica* case is significant for several reasons. First, it is the first case decided under the RLA that recognized a carrier's management prerogative to change the scope and direction of its business without bargaining with any union, even where extensive job loss is involved.²²² Second, it applied principles developed under the NLRA for determining which management actions should be subject to mandatory bargaining, rejecting the proposition that under the RLA a carrier must bargain over *any* issue that may impact upon employment.²²³ Third, it recognized a carrier's management prerogative as an *inherent* right of ownership, departing from previous RLA cases suggesting that a carrier could change the nature and scope of the enterprise only if its collective bargaining agree-

²²⁰ *Transamerica*, 123 L.R.R.M. (BNA) at 2687.

²²¹ *Id.* This distinction was also recognized in *Hoh v. PepsiCo*, 491 F.2d at 461.

²²² *Transamerica*, 123 L.R.R.M. (BNA) at 2686-87.

²²³ *Id.* at 2687.

ments expressly accorded it such a right.²²⁴ Finally, it refined the RLA's status quo concept to distinguish between management action calculated to obtain an advantage in a collective bargaining relationship (which would violate the RLA's status quo requirement), and management action undertaken for wholly nonlabor reasons (which would not violate the requirement).²²⁵

Despite its recognition of management prerogative under the RLA, *Transamerica* contains some important limitations. Perhaps the most significant limitation arises from the fact that the carrier in that case was going completely and permanently out of business. As such, the applicability of *Transamerica* to less extreme carrier actions, such as partial shutdowns, transfers of work, or subcontracting, is uncertain. Nonetheless, *Transamerica* is an important step toward firmly establishing the concept of carrier management prerogative under the RLA.

III. THE APPLICABILITY OF THE DOCTRINE OF AIRLINE MANAGEMENT PREROGATIVE UNDER DEREGULATION

While *Transamerica* is only the first step toward full acceptance of airline management prerogative under the RLA, expansion of that concept to cover management actions other than the total shutdown of a carrier is clearly justified in today's deregulated airline industry. As illustrated earlier, the restrictive view of management prerogative that has developed in judicial decisions under the RLA arose largely from a context of extensive government regulation of the railroads designed to ensure a continuous flow of commerce. However, that context is so starkly different from the state of the present day airline industry that the old approaches are simply no longer applicable. In light of these modern developments, the courts should adopt a new approach toward the concept

²²⁴ *Id.* See, e.g., *Galveston Wharves*, 351 F.2d at 190.

²²⁵ *Transamerica*, 123 L.R.R.M. (BNA) at 2687.

of management prerogative as it involves carrier actions other than complete liquidations.

Specifically, *First National Maintenance* should be applied to all carrier actions that effect a change in the basic scope and nature of the enterprise. While the Supreme Court, in *First National Maintenance*, distinguished its 1960 decision in *Telegraphers* (which took a restrictive view of management prerogative) as "rest[ing] on the particular aims of the Railway Labor Act and national transportation policy,"²²⁶ neither the aims nor the bargaining commands of the RLA are dissimilar to those of the NLRA. Moreover, Congress, in enacting the RLA, did *not* intend to abolish a carrier's management prerogative. Instead, the RLA's bargaining requirements were designed to be flexible in order to meet the changing needs of the two very different industries the RLA governs. Finally, the *First National Maintenance* approach is entirely consistent with national transportation policy affecting airlines today.

A. *The Express Purposes of the NLRA and the RLA Are Similar*

It is significant that both the express purposes of the NLRA and the RLA, and the collective bargaining commands of each statute, are strikingly similar. As demonstrated earlier,²²⁷ the *Telegraphers* Court intimated that it may be necessary to afford railroad employees enhanced employment protections (and consequently to impose greater restrictions upon a railroad's management prerogative) in order to achieve the RLA's goal of avoiding strikes that might interrupt the flow of commerce.²²⁸ It is true that Section 1 of the RLA provides, in pertinent part, that one of the primary purposes of the RLA is to "avoid any interruption to commerce or to the operation of any carrier engaged therein."²²⁹

²²⁶ *First Nat'l Maintenance*, 452 U.S. at 686 n.23.

²²⁷ See *supra* text accompanying note 140.

²²⁸ *Telegraphers*, 362 U.S. at 338.

²²⁹ 45 U.S.C. § 151(a) (1982).

However, the express purpose of the NLRA likewise is to avoid obstructions to the free flow of commerce resulting from strikes and industrial strife.²³⁰ In *First National Maintenance*, the Supreme Court began its analysis by stating,

A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce. Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management.²³¹

Nevertheless, the Court held that there are limits to an employer's obligation to bargain about certain matters. In so holding, it refuted any lingering notion that it is necessary to restrict management prerogative in order to further the goal of preventing strikes.

In addition to their similarity of purpose, the collective

²³⁰ See 29 U.S.C. § 151 (1982). Section 1 of the NLRA provides, in pertinent part,

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by

- (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce;
- (b) occurring in the current of commerce;
- (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce; or
- (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce. . . .

. . .

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id.
²³¹ *First Nat'l Maintenance*, 452 U.S. at 674 (citation and footnote omitted).

bargaining obligations imposed by the NLRA and the RLA are virtually identical. Section 8(d) of the NLRA commands employers governed by that statute to bargain with representatives of their employees "with respect to wages, hours, and other terms and conditions of employment."²³² Section 2, First of the RLA employs virtually identical language as it commands carriers to "make and maintain agreements concerning rates of pay, rules, and working conditions."²³³ The courts have long equated these two provisions, particularly with respect to the "terms and conditions of employment" and "working conditions."²³⁴

Thus, *both* the NLRA and the RLA were designed to avoid strikes that might interrupt or impede interstate commerce. To that end, *both* statutes command that employers subject to the respective statutes bargain with the representatives of their employees over wages and working conditions. Because the aims and purposes of the RLA are *not* significantly different from those of the NLRA, there is no valid justification for failing to apply the *First National Maintenance* rationale under the RLA.

B. *The RLA Was Not Intended to Abolish Management Prerogative*

The RLA itself contains no express restrictions upon the management prerogative of carriers. To the contrary, Congress recognized the rights of business ownership, which are the foundation of the concept of management prerogative, when it enacted the RLA, just as it did during consideration and passage of the NLRA.²³⁵ Consequently, neither labor statute was designed to infringe upon the basic right of the owner of a business to deter-

²³² 29 U.S.C. § 158(d) (1982).

²³³ 45 U.S.C. § 152, First (1982).

²³⁴ See, e.g., *Fibreboard*, 379 U.S. at 210; *Galveston Wharves*, 351 F.2d at 191; *McCullans v. Kansas, O. & G. Ry.*, 229 F.2d 50, 55 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956). See generally Harper, *Major Disputes Under the Railway Labor Act*, 35 J. AIR L. & COM. 3, 31-32 (1969).

²³⁵ See *supra* text accompanying notes 14-15.

mine unilaterally the scope and direction of the enterprise. In his testimony before the House Committee on Interstate and Foreign Commerce, Donald Richberg, the union spokesman for and chief drafter of the RLA,²³⁶ acknowledged that "the courts have always preserved as peculiarly sacred *the right of the employer to control his own business.*"²³⁷ Richberg also asserted, "I am quite sure that [the RLA] does not in any way disturb the general law regarding industrial relations."²³⁸

During these hearings, a colloquy between D.B. Robertson, president of the Brotherhood of Locomotive Firemen and Enginemen and another drafter of the RLA, and Representative Shallenberger, a member of the House Committee, illustrated a similar view of the RLA's intended effect on industrial relations:

Mr. Shallenberger: In other words, we are giving the men no rights or privileges under this bill that they have not at present, or taken [sic] anything away from one side or the other side.

Mr. Robertson: That is my understanding.

Mr. Shallenberger: The manner of the adjustment will be different; but so far as their rights under the law are concerned, they remain the same.

Mr. Robertson: Yes, sir.²³⁹

Clearly, then, the drafters of the RLA did not intend to abolish or restrict the basic managerial rights of ownership that were recognized as inuring to carriers long before that statute came into being.

Nor was the RLA designed to serve as a guarantee of

²³⁶ The RLA, as enacted in 1926, essentially consisted of an agreement worked out between rail carriers and the railroad unions that Congress subsequently adopted. Richberg's statements as labor spokesperson for that agreement in the congressional hearings on the RLA have been described by the Supreme Court as "entitled to great weight in the construction of the Act." *Chicago & N. W. Ry. v. United Transp. Union*, 402 U.S. 570, 576 (1971).

²³⁷ *Hearings on H.R. 7180 before the House Committee on Interstate and Foreign Commerce*, 69th Cong., 1st Sess. 92 (1926) (hereinafter "House Hearings") (emphasis added).

²³⁸ *Id.* at 41.

²³⁹ *Id.* (emphasis added).

employment for rail and air carrier employees. When a rail carrier attacked the RLA on due process grounds²⁴⁰ in *Texas & New Orleans Railroad v. Brotherhood of Railway & Steamship Clerks*,²⁴¹ the Supreme Court upheld the constitutionality of the RLA, but specified that the RLA "does not interfere with the normal right of the carrier to select its employees or to discharge them."²⁴² As the Court recognized, the RLA was not designed to provide railroad employees with any special right to continued employment which is not accorded to other workers in U.S. industry. Rather, its purpose is to facilitate voluntary agreement between management and labor.²⁴³

C. *The RLA's Bargaining Requirements Were Designed to Be Flexible*

The collective bargaining obligations imposed upon carriers by the RLA were not designed to be static and inflexible. The RLA's drafters intentionally wrote the statute in broad, general terms, leaving its specific application to the courts.²⁴⁴ Section 2, First of the RLA states

²⁴⁰ "No person shall be deprived of . . . life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

²⁴¹ 281 U.S. 548 (1930).

²⁴² *Id.* at 571. The Court made an identical observation seven years later with respect to the NLRA in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

²⁴³ In the 1926 floor debates of the RLA in the House of Representatives, Representative Crosser, a proponent of the RLA, explained that the statute was designed to provide

merely that the railroads and their employees shall at all times settle their differences by voluntary agreement if possible. If they fail to agree to wages or working conditions, the question is to be brought before the board of conciliation. If that board is unable to settle the matter, the emergency board has a period of 60 days in which to work to bring the parties to an agreement. If the emergency board fails to settle the dispute, the railroads and the men, if they are willing, may bring the dispute before a board of arbitration, but they are not compelled to do so. There is no harsh procedure provided by the terms of the bill. *Neither the men nor the companies would, by this measure, be forced to do anything not now required of them by law.*

Senate Committee on Labor and Public Welfare, 93d Cong., 2d Sess., *Legislative History of the Railway Labor Act, As Amended* 344 (1974) (emphasis added).

²⁴⁴ *Chicago & N. W. Ry.*, 402 U.S. at 577. The Court stated that the RLA was

only that carriers must bargain over "rates of pay, rules, and working conditions."²⁴⁵ In response to the question of why the collective bargaining obligations of carriers under the RLA were not more specifically defined, Richberg explained,

We believe, and this law has been written upon the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is more danger in attempting to write specific provisions and penalties into the law than there is in writing the general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America.²⁴⁶

The notion that Congress should write a general labor relations statute to be interpreted specifically as industrial needs and conditions dictate was not an unusual one. Congress followed a similar practice in enacting the NLRA, wherein it left that statute's general command that employers bargain about "wages, hours and other terms and conditions of employment"²⁴⁷ to be applied in specific situations by the National Labor Relations Board (NLRB) and the courts.²⁴⁸ In testifying before Congress in 1947 concerning the Taft-Hartley amendments to the NLRA, Paul Herzog, then-Chairman of the NLRB, stated that the scope of collective bargaining "depends upon the industry's customs and history, the previously existing employer-employee relationship, technological problems

"designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis." *Id.*

²⁴⁵ 45 U.S.C. § 152, First (1982).

²⁴⁶ *House Hearings*, *supra* note 237, at 91.

²⁴⁷ 29 U.S.C. § 158(d) (1982).

²⁴⁸ 29 U.S.C. § 160(a) (1982). Section 10(a) of the NLRA, by vesting the NLRB with authority to adjudicate unfair labor practices, implicitly confers upon that agency authority to determine whether particular matters are mandatory subjects of bargaining. Under the RLA, there is no agency which is vested with such authority. Rather, the enforcement of the RLA is left to the federal courts. *See Chicago & N. W. Ry.*, 402 U.S. at 577.

and demands and other factors.”²⁴⁹ He additionally asserted that the scope of an employer’s bargaining obligation may “vary with changes in industrial structure and practice.”²⁵⁰ Likewise, Justice Stewart, concurring in *Fibreboard*, noted that, while one might once have taken the view that the NLRB and the courts had no power to determine which subjects of bargaining should be mandatory, “too much law has been built upon a contrary assumption for this view any longer to prevail.”²⁵¹

Thus, the RLA is not static and inflexible, and courts today are not bound to apply the same approaches that may have been desirable nearly half a century ago. The courts under the RLA, no less than the NLRB and the courts under the NLRA, are charged with tailoring specific applications of the RLA to the problems and realities of the railroad and airline industries as they exist at a given time.²⁵² The courts can and should take into account the many recent changes in the airline industry in crafting specific applications of the RLA.

²⁴⁹ *Hearings on S. 55 and S.J. Res. 22 Before the Senate Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess. 1914 (1947).

²⁵⁰ *Id.* See generally C. MORRIS, *THE DEVELOPING LABOR LAW* 757-60 (2d ed. 1983).

²⁵¹ *Fibreboard*, 379 U.S. at 219 n.2 (Stewart, J., concurring). Similarly, the Supreme Court, in *First Nat’l Maintenance*, quoted the House Report of the 1947 Taft-Hartley Amendments to the NLRA, which explained,

The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors. What are proper subject matters for collective bargaining should be left in the first instance to employers and trade-unions, and in the second place, to any administrative agency skilled in the field and competent to devote the necessary time to a study of industrial practices and traditions in each industry or area of the country, subject to review by the courts. It cannot and should not be strait jacketed by legislative enactment.

452 U.S. at 675 n.14 (quoting H.R. REP. NO. 245, 80th Cong., 1st Sess. 34-35 (1947)).

²⁵² See *Chicago & N. W. Ry.*, 402 U.S. at 577.

D. *The First National Maintenance Approach Is Consistent With the National Transportation Policy of Airline Deregulation*

As demonstrated earlier, the restrictive view of management prerogative under the RLA grew out of the Supreme Court's decision in *Telegraphers*. That decision in turn reflected the then prevailing political culture, which emphasized federal regulatory protections for railroad employees.²⁵³ However, the national transportation policy of economic deregulation which covers airlines today differs fundamentally from national transportation policy affecting railroads in 1960 and before. The deregulated airline industry is, by congressional design, highly competitive, and, in that respect, resembles most of the industries covered by the NLRA (and *First National Maintenance*). In addition, the regulatory scheme now covering airlines no longer provides the same extraordinary employment protections to airline employees as does the regulatory scheme covering railroads.²⁵⁴ These features of national transportation policy clearly warrant full acceptance of the concept of management prerogative in the airline industry today.

1. *Competition in the Airline Industry*

Airline industry regulation discouraged efficient operation. As market entry was strictly limited, efficient operation could not be rewarded with market expansion. Fares were rigidly regulated and were based upon average costs, so that inefficiencies were simply passed on to the consumer.²⁵⁵ In addition, the CAB often would award new routes to unprofitable, inefficient carriers in order to maintain a competitive balance in the industry.²⁵⁶

²⁵³ See *supra* text accompanying notes 133-140.

²⁵⁴ See *infra* notes 277-310 for a discussion of airline employee protection under deregulation.

²⁵⁵ E. BAILEY, D. GRAHAM & D. KAPLAN, *DEREGULATING THE AIRLINES* 96 (1985).

²⁵⁶ J. MEYER, C. OSTER, I. MORGAN, B. BERMAN, & D. STRASSMAN, *AIRLINE DEREGULATION: THE EARLY EXPERIENCE* 213, 213-214 (1981).

Deregulation, however, changed most all of the rules. With few exceptions,²⁵⁷ deregulation eliminated government control over airline market entry and exit, route systems, and fare structures. As a result, inefficient carriers could no longer enjoy regulatory protection from the forces of the marketplace, as deregulation was *intended* "to produce better and cheaper service at the expense of the least fit and adaptable airlines."²⁵⁸ In such an environment, as one commentator has observed, "[m]anagement cannot afford to ease the pressure for more efficiency, particularly if its nonunion competition remains severe."²⁵⁹ This new economic environment has led a number of carriers to effect changes in the nature or scope of their operations in order to compete more effectively. Since deregulation, many carriers have merged with or acquired other carriers to enhance their market positions.²⁶⁰ Others have found retrenchment to be necessary, and have closed flight crew bases,²⁶¹ or sold routes to other carriers.²⁶² Still others have sought to contract out ground handling or other support work that they could not themselves perform efficiently.²⁶³ Finally, some carriers have voluntarily exited the market.²⁶⁴

All such moves involve a carrier's exercise of its man-

²⁵⁷ Federal statutes continue to regulate international routes. 49 U.S.C. app. § 1502 (Supp. I 1983). Also, there are still provisions requiring certain carriers to provide "essential air service" to small communities. 49 U.S.C. app. § 1389 (Supp. I 1983).

²⁵⁸ J. NEWHOUSE, *supra* note 8, at 78.

²⁵⁹ Northrup, *supra* note 10, at 180.

²⁶⁰ Prominent recent examples of mergers or acquisitions between airlines include Northwest-Republic, Texas Air-Eastern, Texas Air-People Express, and TWA-Ozark.

²⁶¹ See, e.g., *Independent Union of Flight Attendants v. Pan American World Airways*, 502 F. Supp. 1013 (D.D.C. 1980) (involving a union challenge to Pan American's closing of a flight attendant base to eliminate duplication following the Pan American-National merger).

²⁶² Two recent examples are Braniff's sale of its Latin American route system to Eastern Airlines and Pan American's sale of its Pacific routes to United Airlines.

²⁶³ See *Qantas Airways*, 121 L.R.R.M. (BNA) at 2312.

²⁶⁴ Transamerica Airlines shut down completely after its parent decided to get out of the airline business. See *Transamerica*, 123 L.R.R.M. (BNA) at 2684. World Airways has discontinued scheduled service, but continues to operate charter service.

agement prerogative in some form. A strict and inflexible application of *Telegraphers* and its progeny would probably require that a carrier exhaust the RLA's "major dispute" processes prior to undertaking such moves. However, if a carrier were forced to exhaust the RLA's lengthy bargaining and mediation processes prior to making any such move to restructure its operations, the carrier's competitive position likely would only deteriorate further. Clearly, airline managements must be able to respond quickly to market forces in order to compete effectively.

The Supreme Court itself has observed that the RLA's bargaining and mediation processes, which were designed for negotiation of collective bargaining agreements, are "purposely long and drawn out."²⁶⁵ These processes typically take from many months to several years to complete.²⁶⁶ Moreover, the duration of these processes can often be controlled by the union, and is under the *absolute* control of the NMB. In *Detroit & Toledo Shore Line*, the Supreme Court recognized that "a final and crucial aspect" of the RLA is the "power given to the parties and to representatives of the public to make the exhaustion of the Act's remedies *an almost interminable process*."²⁶⁷

While such a mechanism may serve to prevent strikes or other economic self-help by the parties during negotiations for new collective bargaining agreements, it is completely antithetical to a carrier's need to move quickly and decisively in response to changes in a highly competitive marketplace.²⁶⁸ The excessive time required to exhaust

²⁶⁵ *Brotherhood of Ry. & S.S. Workers v. Florida E. Coast Ry.*, 384 U.S. 238, 246 (1966).

²⁶⁶ In Krislov, *Mediation Under the Railway Labor Act: A Process in Search of a Name*, 27 LAB. L.J. 310, 312 (1976), the author observed that "under the procedures of the Railway Labor Act, it's possible to keep the bargaining going for years." In *Qantas Airways*, more than eleven months elapsed between the time when the carrier notified the union of its desire to contract-out ground handling work and the time at which the carrier was free to implement its decision. 121 L.R.R.M. (BNA) at 2312. A further year and a half of litigation ensued as the union attacked the carrier's bargaining conduct. *Id.*

²⁶⁷ *Detroit & Toledo Shore Line*, 396 U.S. at 149 (emphasis added).

²⁶⁸ See *Northeast Airlines*, 473 F.2d at 557.

the RLA's bargaining and mediation processes is compounded by the fact that nearly all major carriers must bargain with at least six different labor organizations, each representing separate employee crafts or classes.²⁶⁹ If a carrier were required to exhaust the RLA's processes with respect to each union prior to making a change in the nature or scope of its operations, it might never be able to respond to competitive forces.²⁷⁰

As noted earlier,²⁷¹ the Supreme Court, in *First National Maintenance*, explicitly maintained that an employer should not be forced to submit to collective bargaining over a management decision where the union is unlikely to be able to propose any feasible alternative, and the only probable result is delay.²⁷² Significantly, the Court reached that determination in light of the NLRA's requirement that an employer bargain only to "impasse" prior to implementing its decision.²⁷³ In bargaining to impasse under the NLRA, the employer must consider any proposals which the union advances, but neither side may be compelled to agree to anything.²⁷⁴ An impasse occurs when good faith negotiations have exhausted the prospects of concluding an agreement.²⁷⁵ Such an occurrence is largely within the judgment of the parties, and may come quite quickly where the negotiations involve the single issue of a plant closing or relocation of operations. Once the parties have reached an impasse, the employer may unilaterally implement its last proposal that the union rejected.²⁷⁶

²⁶⁹ See Burgoon, *Mediation Under the Railway Labor Act*, in *THE RAILWAY LABOR ACT AT FIFTY: COLLECTIVE BARGAINING IN THE RAILROAD AND AIRLINE INDUSTRIES* 89 (1976).

²⁷⁰ The Court in *Northeast Airlines* recognized that it would be "excessively burdensome" to involve several unions in a management decision such as the decision to merge with another carrier. 473 F.2d at 557.

²⁷¹ See *supra* text accompanying note 59.

²⁷² *First Nat'l Maintenance*, 452 U.S. at 683.

²⁷³ See *NLRB v. Katz*, 369 U.S. 736 (1962); *Taft Broadcasting Co.*, 163 N.L.R.B. 475 (1967).

²⁷⁴ *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 106 (1970).

²⁷⁵ *Taft Broadcasting Co.*, 163 N.L.R.B. at 478.

²⁷⁶ *Katz*, 369 U.S. at 745.

By contrast, when one considers the RLA's much longer and more extensive processes of bargaining, mediation, and a thirty-day "cooling off" period, application of the *First National Maintenance* rationale to airlines is even more compelling. Many carriers simply will be unable to survive in today's competitive marketplace if they are to be held hostage to the RLA's "interminable" bargaining and mediation processes when little or nothing can be expected to be gained from pursuing those processes.

2. *Airline Employee Protection Under Deregulation*

As in the railroad industry,²⁷⁷ extensive employee protection policies grew up during the early period of government regulation of the airlines.²⁷⁸ Much of Congress' early regulation of the airline industry was patterned after its regulation of the railroads, and for a long time airlines were subject to economic regulation as stringent as that covering railroads.

The Civil Aeronautics Act of 1938 was the first statutory source of airline regulation.²⁷⁹ This statute chiefly governed airline consolidations, mergers, route transfers and similar transactions, and was designed to prohibit the development of monopolies through airline combinations. Unlike the Interstate Commerce Act, this statute did not contain a command that the Civil Aeronautics Board (CAB), the agency established to carry out economic regulation of the airlines, specifically require "a fair and equitable arrangement"²⁸⁰ to protect airline employees affected by a transaction. Nonetheless, the CAB, relying upon the requirement of the Civil Aeronautics Act that any transaction approved thereunder be within the "pub-

²⁷⁷ See *supra* text accompanying notes 87-121.

²⁷⁸ For a thorough history of employee protection in the airline industry, see S. ROSENFELD, *LABOR PROTECTIVE PROVISIONS IN AIRLINE MERGERS* (1977) and Green, *Labor Protective Provisions In the Airline Industry 1950-1985*, ALI-ABA AIRLINE LAB. L. 273-299 (1985).

²⁷⁹ 52 Stat. 973 (1938). This was replaced by the Federal Aviation Act of 1958, 72 Stat. 754 (1958).

²⁸⁰ See *supra* text accompanying note 137.

lic interest,"²⁸¹ imposed labor protective conditions upon airline transactions which were similar to those imposed upon the railroads.²⁸² The Ninth Circuit affirmed the CAB's action in *Western Air Lines v. CAB*.²⁸³ In so holding, the court simply echoed the old approach, taken with respect to the railroads, that providing preferential treatment for airline employees would "tend to prevent interruption of interstate commerce through labor disputes."²⁸⁴

The labor protective conditions imposed by the CAB became somewhat standardized by 1961,²⁸⁵ and largely resembled those applied to railroads by the ICC.²⁸⁶ However, the Airline Deregulation Act sharply narrowed the scope of the CAB's "public interest" review of airline merger transactions.²⁸⁷ As a result, the CAB determined that it could no longer impose labor protective provisions as a routine condition of its approval of airline merger transactions.²⁸⁸ After employing a case-by-case approach to labor protective provisions for a time, imposing such provisions only where affected employees were not covered by a collective bargaining agreement,²⁸⁹ the CAB (and its successor, the Department of Transportation (DOT)) shifted its position again. It held that labor protective conditions are appropriate under deregulation only where it is apparent that, in the absence of such pro-

²⁸¹ 52 Stat. 973, 989 (1938). Section 401(i) of the Civil Aeronautics Act provided, "No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest." *Id.*

²⁸² The CAB first imposed labor protective conditions in *United-Western, Acquisition of Air Carrier Property*, 11 C.A.B. 701 (1950), *aff'd*, 194 F.2d 211 (9th Cir. 1952) (transfer by Western to United of a Los Angeles-Denver route).

²⁸³ *Western Air Lines v. CAB*, 194 F.2d 211 (9th Cir. 1952).

²⁸⁴ *Id.* at 214 (quoting *United States v. Lowden*, 308 U.S. 225, 238 (1939)).

²⁸⁵ See *United-Capital Merger Case*, 33 C.A.B. 307 (1961). The CAB essentially reaffirmed this formula in *Allegheny-Mohawk Merger Case*, 59 C.A.B. 19 (1972).

²⁸⁶ See *supra* text accompanying notes 100-121 for a discussion of the labor protective provisions applied to railroads.

²⁸⁷ See H.R. REP. NO. 1779, 95th Cong., 2d Sess. 73 (1978).

²⁸⁸ *National Airlines Acquisition*, 84 C.A.B. 408, 474-75 (1979).

²⁸⁹ See, e.g., *Air Florida System - Western Acquisition Show Cause Proceeding*, C.A.B. Order No. 82-1-148 (Jan. 1982); *Texas Int'l - Continental Acquisition Case*, 92 C.A.B. 70 (1981).

tections, labor strife threatening a *systemwide* disruption of the nation's airways would result.²⁹⁰

That approach was consistent with the Airline Deregulation Act's definition of the "public interest." That statute lists twelve factors considered by Congress to constitute the public interest in the airline industry.²⁹¹

²⁹⁰ *E.g.*, Transamerica Corp., Trans Int'l Enters., Inc., and Midcontinent Air Investors, Inc., C.A.B. Order No. 84-7-60 (July 19, 1984), *aff'd sub nom.* Air Line Pilots Ass'n v. DOT, 791 F.2d 172 (D.C. Cir. 1986); Frontier Horizon, Inc. Fitness Investigation, C.A.B. Order No. 84-1-17 (Jan. 6, 1984) and Frontier Airlines, Inc., C.A.B. Order No. 84-6-16 (June 8, 1984), *vacated as moot sub nom.* International Ass'n of Machinists v. Dole, No. 84-1005, (D.C. Cir. 1985); Texas Int'l Airlines-New York Air, C.A.B. Order No. 80-12-57 (1980), *aff'd sub nom.* Air Line Pilots Ass'n v. C.A.B., 643 F.2d 935 (2d Cir. 1981).

²⁹¹ The elements of the "public interest," as enumerated by Congress, are the following:

- (1) The assignment and maintenance of safety as the highest priority in air commerce, and prior to the authorization of new air transportation services, full evaluation of the recommendations of the Secretary of Transportation on the safety implications of such new services and full evaluation of any report or recommendation submitted under section 1307 of this Appendix.
- (2) The prevention of any deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of the Congress to the furtherance of the highest degree of safety in air transportation and air commerce, and the maintenance of the safety vigilance that has evolved within air transportation and air commerce and has come to be expected by the traveling and shipping public.
- (3) The availability of a variety of adequate, economic, efficient, and low-price services by air carriers and foreign air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices, the need to improve relations among, and coordinate transportation by, air carriers, and the need to improve relations among, and coordinate transportation by, air carriers, and the need to encourage fair wages and equitable working conditions for air carriers.
- (4) The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital, taking account, nevertheless, of material differences, if any, which may exist between interstate and overseas air transportation, on the one hand, and foreign air transportation, on the other.
- (5) The development and maintenance of a sound regulatory environment which is responsive to the needs of the public and in which decisions are reached promptly in order to facilitate adaption of the air transportation system to the present and future needs of the do-

None of those factors include preferential treatment for airline employees at the expense of airline efficiency. Indeed, Congress maintained specifically that "economic, efficient and low-price" air service is in the public interest under deregulation.²⁹² Further, it mandated that this occur through "maximum reliance on competitive market forces" to encourage "efficient and well-managed carri-

mestic and foreign commerce of the United States, the Postal Service, and the national defense.

(6) The encouragement of air service at major urban areas in the United States through secondary or satellite airports, where consistent with regional airport plans of regional and local authorities, and when such encouragement is endorsed by appropriate State entities encouraging such service by air carriers whose sole responsibility in any specific market is to provide service exclusively at the secondary or satellite airport, and fostering an environment which reasonably enables such carriers to establish themselves and to develop their secondary or satellite airport services.

(7) The prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation, and the avoidance of —

(A) unreasonable industry concentration, excessive market domination, and monopoly power; and

(B) other conditions;

that would tend to allow one or more air carriers or foreign air carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation.

(8) The maintenance of a comprehensive and convenient system of continuous scheduled interstate and overseas airline service for small communities and for isolated areas in the United States, with direct Federal assistance where appropriate.

(9) The encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices and to determine the variety, quality, and price of air transportation services.

(10) The encouragement of entry into air transportation markets by new air carriers, the encouragement of entry into additional air transportation markets by existing air carriers, and the continued strengthening of small air carriers so as to assure a more effective, competitive airline industry.

(11) The promotion, encouragement, and development of civil aeronautics and a viable, privately owned United States air transport industry.

(12) The strengthening of the competitive position of United States air carriers to at least assure equality with foreign air carriers, including the attainment of opportunities for United States air carriers to maintain and increase their profitability, in foreign air transportation.

49 U.S.C. § 1302(a) (1982).

²⁹² 49 U.S.C. § 1302(a)(3) (1982).

ers.”²⁹³ Thus, Congress was unmistakably explicit that the concept of “public interest” in the airline industry was to be radically changed by deregulation. The Conference Report accompanying the Airline Deregulation Act stated,

The “public interest” standard in section 408(b) of the Federal Aviation Act of 1958 is retained in the new section, but that standard must now be interpreted in light of the intent of Congress to move the airline industry rapidly toward deregulation. *The foundation of the new airline legislation is that it is in the public interest to allow the airline industry to be governed by the forces of the marketplace.*²⁹⁴

As a result, the old regime of special employment protections for airline employees is “out of step with the new national policy favoring competition among carriers and reliance upon market forces to meet the needs of the public.”²⁹⁵

Moreover, the DOT has recognized that the primary argument historically used to justify preferential treatment of airline (and railroad) employees, *viz.*, that such “extra” consideration will help avoid labor strife that might interrupt the flow of interstate commerce,²⁹⁶ is no longer valid. In one of its orders pertaining to Texas Air Corporation’s acquisition of Eastern Air Lines, the DOT rejected the unions’ contentions that labor strife on Eastern would lead to a disruption of the national air transportation system.²⁹⁷ It found that “[a] strike against Eastern, although it is one of the largest carriers in the country, would not threaten the national system, although it could cause significant inconvenience.”²⁹⁸

Prior to airline deregulation, the law strictly limited en-

²⁹³ 49 U.S.C. § 1302(a)(4) (1982).

²⁹⁴ See H.R. REP. NO. 1779, 95th Cong., 2d Sess. 73 (1978).

²⁹⁵ *Air Line Pilots Ass’n v. DOT*, 791 F.2d at 176-77.

²⁹⁶ See *supra* notes 101-107 and accompanying text.

²⁹⁷ Texas Air-Eastern Acquisition Case, D.O.T. Order No. 86-8-77 (Aug. 26, 1986).

²⁹⁸ *Id.* at 19. The DOT had made similar findings with respect to United and Pan American in its approval of Pan American’s sale of its Pacific Routes to United, in DOT Order No. 85-11-67, *aff’d sub nom.* Independent Union of Flight Attendants v. DOT, 803 F.2d 1029 (9th Cir. 1986).

try into the market. The CAB could permit a carrier to enter a new market only if the carrier could show that the service it proposed was "required" by the "public convenience and necessity."²⁹⁹ By contrast, deregulation not only allows new carriers to enter the market with relative ease, but also permits any carrier to respond by providing the air transportation service of a struck carrier, as is the case in most industries generally. Thus, the need to afford "extra" protection to airline employees to avoid potential interruptions of commerce by strikes is much less compelling. As the District of Columbia Circuit noted in approving the DOT's *laissez faire* policy with respect to labor protection, "deregulation brings winners and losers among employees as well as carriers."³⁰⁰ While some might consider such an observation to be overly harsh, it merely reflects the reality of free market competition.

Even in the midst of such free market competition, however, airline employees have not fared poorly. Airline employment has *increased* by 8.8 percent since deregulation.³⁰¹ Average annual compensation for airline employees has increased as well, by a significant sixty-two percent.³⁰² Moreover, one recent study indicates that airline employees are paid at substantially higher rates as a whole than are workers performing similar work in other industries.³⁰³ As such, concern that airline employees have suffered as a result of deregulation is simply misplaced, and cannot justify affording airline employees spe-

²⁹⁹ *City of New Haven v. CAB*, 618 F.2d 955, 957 (2d Cir. 1980).

³⁰⁰ *Air Line Pilots Ass'n v. DOT*, 791 F.2d at 178 n.1.

³⁰¹ H. Northrup, *The Economics of Airline Labor Protective Provisions* 22 (Unpublished paper, Industrial Research Unit, The Wharton School, University of Pennsylvania 1986).

³⁰² *Id.*

³⁰³ E. BAILEY, D. GRAHAM, & D. KAPLAN, *supra* note 255, at 102. For example, key punch operators who work for airlines earn 31% more than their nonairline counterparts. Typists earn 41% more and computer operators are paid 38% more. Air freight agents are paid 58% more than nonairline freight shippers. Aircraft cleaners are paid 82% more than janitors, and aircraft mechanics earn 28% more than motor vehicle mechanics. *Id.*

cial consideration, as a matter of federal labor law, that is not afforded to any other employees in U.S. industry.

While there has been a renewed move in Congress to require the DOT to impose labor protective provisions upon airline mergers and similar transactions,³⁰⁴ that move is grounded upon a fundamentally different basis than that which underlay labor protection when the airlines were regulated. The new move toward labor protective provisions in airline mergers is not based upon any need for such provisions to avoid disruptions of interstate commerce, but, rather, is characterized by its proponents as social welfare legislation designed to assist employees displaced as a result of the wave of recent airline mergers.³⁰⁵ The House Committee Report on the new labor protective conditions legislation explicitly concedes, "In a deregulated system, it is unlikely that labor strife arising out of a merger would disrupt the national air transportation system since other carriers are free to provide any service that would be disrupted by a strike."³⁰⁶ In light of the data set forth above concerning airline employee welfare after deregulation, the need for special social welfare legislation for airline employees must be seriously questioned. However, whatever the political motivation behind the new legislation, it is clear that such legislation is not grounded in any policy of providing for an uninterrupted flow of interstate commerce.

At any rate, the new labor protective conditions legislation is designed to apply to airline mergers and similar transactions, since those are the only transactions still within the DOT's regulatory authority.³⁰⁷ This legislation

³⁰⁴ H.R. 4838, passed by the House of Representatives on September 16, 1986, would require the DOT to impose labor protective conditions upon any airline consolidation, merger, or acquisition of control that would "tend to cause reduction in employment, or to adversely affect the wages and working conditions including the seniority of any air carrier employees." *Id.*

³⁰⁵ See 132 CONG. REC. H6926-6930 (daily ed. Sept. 16, 1986).

³⁰⁶ H.R. REP. NO. 99-822, 99th Cong., 2d Sess. 3 (1986).

³⁰⁷ See 49 U.S.C. § 1377 (1982) (list of transactions still within the regulatory authority of the DOT).

would not apply to other airline management decisions that would result in loss of employment, such as partial or total carrier shutdowns, elimination of routes or stations, or subcontracting. In enacting the Airline Deregulation Act, Congress anticipated that changes in the industry resulting from deregulation would cause displacement of some airline employees. However, unlike the railroad industry, which is on the decline, the airline industry continues to expand,³⁰⁸ providing new employment opportunities. Hence, instead of inhibiting industry changes which might cause job loss, as is still largely the practice under railroad regulation,³⁰⁹ Congress enacted a new scheme that focuses upon the employment of displaced employees by other carriers.³¹⁰ In so acting, it reaffirmed its intent that airline employees, as well as carriers, be subject to free market forces.

Therefore, it is clear that the regulatory context which the *Telegraphers* Court relied upon in taking a narrow view of management prerogative under the RLA in 1960 differed dramatically from the present state of deregulation in the airline industry. In the *Telegraphers* era, railroad de-

³⁰⁸ E. BAILEY, D. GRAHAM, & D. KAPLAN, *supra* note 255, at 81-82.

³⁰⁹ While Congress has also decreased regulation of some economic aspects of the railroad industry, *see, e.g.*, Staggers Rail Act of 1980, 94 Stat. 1895 (1980), the ICC still imposes extensive employee protective conditions. *See New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). The ICC is explicitly directed by statute that, while it may exempt certain carrier actions from regulation, it may not "relieve a carrier of its obligation to protect the interests of employees" with respect to such matters. 49 U.S.C. § 10505(g)(2) (1982).

³¹⁰ This scheme requires that employees with four years service on carriers in existence in 1978 who are displaced as a result of deregulation must be given first right of hire by other carriers for any vacancy for which they are qualified. 49 U.S.C. § 1552(d)(1) (1982). In promulgating regulations pursuant to this provision, the Department of Labor explained, "Although airline deregulation is expected to result in expanded overall employment opportunities over the long term, Congress recognized the possibility of reduction of the labor force of one or more air carriers as they make the adjustment from government regulation to an economic environment governed by market forces" 50 Fed. Reg. 53,094 (1985) (emphasis added). The Airline Deregulation Act also authorized payments to be made, from the federal treasury, "subject to such amounts as are provided in appropriation acts," to airline employees displaced due to deregulation. 49 U.S.C. § 1552(a) (1982). Congress has effectively negated this provision, however, by failing to appropriate funds for such payments.

regulation dictated that employee protections take precedence over considerations of carrier efficiency in order to prevent interruptions of interstate commerce, and the courts took their cues from that regulatory scheme in interpreting the RLA. Under present-day airline deregulation, where a strike on even the largest carrier would not appreciably impede the flow of commerce, such a justification for restricting airline management prerogative is no longer valid. In deregulating the airlines, Congress intended that airlines and their employees should be subjected to free market forces, and that movement of employees from retrenching carriers to new or expanding ones should follow as a natural consequence. It is with reference to *this* economic and regulatory scheme, which represents the current "national transportation policy" affecting airlines, that the courts must consider the concept of management prerogative. Because the current national transportation policy affecting airlines is not at variance with the economic policy of free market competition affecting other U.S. industries, there is no justifiable basis for restricting the management prerogative of airlines to any greater extent than that of U.S. industries generally.

IV. PROCEDURAL CONSIDERATIONS

Full acceptance of the doctrine of management prerogative under the RLA will likely raise a number of procedural issues which were not salient in prior cases. Among these procedural issues are whether management prerogative questions constitute minor disputes; if so, whether a union may obtain injunctive relief pending resolution of such minor disputes; and whether a carrier has an obligation to engage in "effects bargaining" in a management prerogative situation.

A. *Management Prerogative Matters As Minor Disputes*

As noted earlier, disputes between carriers and their employees have been generally divided into two catego-

ries — major and minor.³¹¹ Since major disputes are disputes which a carrier is obligated to submit to collective bargaining and mediation, and since, by definition, a carrier would have no obligation to bargain over matters of management prerogative, such matters cannot give rise to major disputes. On the other hand, the weight of authority suggests that questions of management prerogative constitute minor disputes, although this issue remains somewhat unclear.³¹²

In distinguishing between major and minor disputes in *Elgin, Joliet & Eastern Railway v. Burley*,³¹³ the Supreme Court did not restrict its definition of minor disputes to disputes that solely involve interpretations of contractual provisions. Rather, the Court described a minor dispute as one relating

either to the meaning or proper application of a particular provision with reference to a specific situation *or to an omitted case*. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, *independent of those covered by the collective agreement*, e.g., claims on account of personal injuries.³¹⁴

Likewise, the terms of the RLA itself suggest that minor disputes are not limited to contract questions. Section 204 of the RLA, in defining what disputes must be referred to a system board of adjustment, refers to disputes "arising out of grievances, *or* out of the interpretation of agreements."³¹⁵ Congress' use of the disjunctive suggests that any dispute between a carrier and its employees that

³¹¹ See *supra* text accompanying notes 68-70.

³¹² The court in *Transamerica* found that since the carrier's decision to go out of business was a matter solely of management prerogative, *neither* a major nor a minor dispute was involved. 123 L.R.R.M. (BNA) at 2686. Also, in *Pan American World Airways*, 502 F. Supp. at 1013, the court maintained that the carrier's closing of a flight attendant base and furlough of more than 1,000 employees created neither a major nor minor dispute. *Id.* at 1019. However, the court also noted that the union had not yet filed a grievance over the matter. *Id.*

³¹³ 325 U.S. at 711. See *supra* notes 67-69 and accompanying text.

³¹⁴ *Id.* at 723 (emphasis added).

³¹⁵ 45 U.S.C. § 184 (1982) (emphasis added).

is not "major" could be the subject of a grievance, and thus, a minor dispute.

The parties must submit minor disputes to a system board of adjustment for resolution. This procedure is essentially a form of neutral, binding arbitration.³¹⁶ The question which then must arise is how to apply the concept of management prerogative in the arbitral setting. If the collective bargaining agreement contains an express prohibition against the management action at issue, the system board is likely to find that a violation of the contract has occurred, regardless of management prerogative.³¹⁷

If the collective bargaining agreement is silent on the issue, some courts have held that a carrier is justified in taking a particular action if it has undertaken similar actions in the past without union objection.³¹⁸ Limiting a carrier's actions to those to which the union has not objected in the past is antithetical to the concept of management prerogative, however, as it suggests that even in the absence of restrictive contract language, a carrier may act only if the union does not object. Rather, the whole thrust of the management prerogative concept is that a carrier has the *inherent* right to act unilaterally with respect to matters which do not directly involve "rates of pay, rules, and working conditions."³¹⁹

The Court of Appeals for the Eleventh Circuit recently indicated that a carrier's assertion of an inherent right apart from the collective bargaining agreement (in that case the right to replace strikers) nonetheless gives rise to

³¹⁶ *Id.*

³¹⁷ Even though a matter may not be a mandatory subject of bargaining, if the parties nonetheless negotiate a contractual provision covering that matter, that provision likely would be enforceable by the system board of adjustment. *Cf. Allied Chemical & Alkali Workers Local 1*, 404 U.S. at 176 n.17.

³¹⁸ *E.g.*, *Air Cargo, Inc. v. Local Union 851, Int'l Bhd. of Teamsters*, 733 F.2d 241, 246 (2d Cir. 1984); *Baker v. United Transp. Union*, 455 F.2d 149, 156 (3d Cir. 1971).

³¹⁹ *See, e.g.*, *NLRB v. McKay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938) (holding that an employer has the inherent right to replace striking employees).

a minor dispute.³²⁰ The court rejected the union's claim that the carrier was attempting to amend the collective bargaining agreement (thus creating a major dispute) by "adding" a right to engage in self help.³²¹ The court maintained,

This effort to bootstrap a minor dispute over terms of the bargaining agreement into a major dispute involving proposed changes in the agreement must be rejected. The airline did not assert a right to replace strikers under the agreement, present or prospective, but under principles of self-help extrinsic to the agreement. Accepting the union's contention — that assertions by the airline of a managerial power not included within the bargaining agreement is an effort to amend the agreement to give management that power — would convert many minor disputes into major disputes and alter the basic dichotomy of the Act.³²²

Other courts, as well, have suggested that management prerogative may exist apart from specific contract terms or past practices, and that the scope and extent of that prerogative is for the system board of adjustment to determine in the course of minor dispute procedures.³²³ Thus, while a carrier's exercise of its management prerogative may give rise to a minor dispute, the carrier would be justified in its action so long as no explicit contractual language proscribes such action.³²⁴

B. *Injunctive Relief Pending System Board Resolution of Management Prerogative Issue*

One basis for the *First National Maintenance* Court's em-

³²⁰ *Empresa Ecuatoriana de Aviacion v. District Lodge No. 100*, 690 F.2d 838 (11th Cir. 1982).

³²¹ *Id.* at 843.

³²² *Id.*

³²³ See, e.g., *Railway Express Agency*, 437 F.2d at 392; *Rutland Ry. v. Brotherhood of Locomotive Eng'rs*, 307 F.2d 21, 35 (2d Cir. 1962); *Long Island R.R. v. Brotherhood of Locomotive Eng'rs*, 290 F. Supp. 100, 104 n.8 (E.D.N.Y. 1968).

³²⁴ See *Railway Labor Executives Ass'n v. Atchison, T. & S.F. Ry.*, 430 F.2d 994, 997 (9th Cir. 1970) ("Insofar as displaced employees are concerned, it is, at best, conjectural that Congress intended to confer on them additional labor security rights independent of the collective bargaining agreement").

phatic affirmance of the management prerogative concept was its recognition that in many decisions involving the scope and direction of the enterprise, management has a need to act quickly which could be frustrated by delays caused by the collective bargaining process.³²⁵ Such a need could similarly be frustrated by delays while a system board of adjustment processes a grievance concerning a carrier's management prerogative.

The general rule under the RLA is that a carrier is not obligated to maintain the status quo during the pendency of a minor dispute.³²⁶ However, a federal court may exercise its equitable discretion to require that the carrier return to the *status quo ante* pending arbitration of the controversy.³²⁷ Courts typically exercise such discretion where a carrier's action has a substantial adverse effect upon the employees or would foreclose any meaningful future relief.³²⁸

A union petitioning for injunctive relief pending system board processing of a grievance must meet the ordinary standards for the issuance of injunctions, however.³²⁹ While these vary slightly from circuit to circuit, all circuits require a showing of both irreparable harm in the absence of an injunction, and some likelihood or probability of success on the merits.³³⁰

With respect to irreparable harm, there is considerable authority for the principle that a union does *not* suffer ir-

³²⁵ *First Nat'l Maintenance*, 452 U.S. at 678-79. The First Circuit expressed the same concern in *Northeast Airlines*, 473 F.2d at 557.

³²⁶ See *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30 (1957); *International Bhd. of Firemen & Oilers v. Consolidated Rail Corp.*, 560 F. Supp. 169, 173 (S.D. Ohio 1982).

³²⁷ *Brotherhood of Locomotive Eng'rs v. Missouri-K.-T. R.R.*, 363 U.S. 528, 531-35 (1960).

³²⁸ See, e.g., *Railway Express Agency*, 437 F.2d at 394; *Independent Union of Flight Attendants*, 502 F. Supp. at 1019.

³²⁹ See *Westchester Lodge 2186 v. Railway Express Agency*, 329 F.2d 748, 753 (2d Cir. 1964). The union must also have a grievance pending before the system board of adjustment. *Id.* at 753. See also *United Transp. Union v. Penn Central Transp. Co.*, 87 L.R.R.M. (BNA) 3050, 3054-56 (E.D. Pa. 1973).

³³⁰ See, e.g., *Callaway v. Block*, 763 F.2d 1283, 1287 (11th Cir. 1985); *Eastern Air Lines*, 544 F. Supp. at 1318.

reparable harm based solely upon its members' loss of employment, since their damages are remediable through back pay awards should the union ultimately prevail.³³¹ Thus, a court should not delay implementation of a management decision simply because it may result in loss of employment.

Nor should a court enjoin a management action pending arbitration of a grievance that is obviously insubstantial on its face. While some courts have held that they have no jurisdiction to examine the merits of a grievance (as to do so would displace the arbitrator),³³² other courts have taken a closer look at the union's grievance and denied a status quo injunction pending arbitration where the grievance was obviously insubstantial.³³³ In *Air Line Pilots Association v. Seaboard World Airlines*,³³⁴ the court denied the union's application for a preliminary injunction pending arbitration of a work assignment dispute. Without resolving the parties' dispute over the proper interpretation of the contract, the court examined the controversy and found that the carrier's action did not appear to be prohibited by the express terms of the contract.³³⁵

Similarly, in *Transamerica*, the court maintained that the unions could not show a likelihood of success on their claims that the carrier's shutdown violated the unions' contracts, and therefore, denied injunctive relief pending arbitration of the unions' grievances. The court commented, "No clause in either agreement restricts Trans-

³³¹ See, e.g., *Eastern Air Lines*, 695 F.2d at 678; *Aluminum Workers Int'l Union v. Consolidated Aluminum Corp.*, 696 F.2d 437 (6th Cir. 1982); *Transamerica*, 123 L.R.R.M. (BNA) at 2688. But see *Brotherhood of Ry., Airline & Steamship Clerks v. Railway Express Agency*, 409 F.2d 312 (2d Cir. 1969) (finding irreparable injury in loss of employee jobs).

³³² See, e.g., *Maine Cent. R.R. v. United Transp. Union*, 787 F.2d 780, 783 (1st Cir. 1986); *Panoramic Corp.*, 668 F.2d at 284.

³³³ See, e.g., *Lever Bros. Co. v. International Chemical Workers Union*, 554 F.2d 115, 120 (4th Cir. 1976) (the union must "establish that the position [it] will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor") (quoting *Amalgamated Transit Union, Div. 1384 v. Greyhound Lines*, 529 F.2d 1073, 1077-78 (9th Cir. 1976)).

³³⁴ 93 L.R.R.M. (BNA) 2876 (E.D.N.Y. 1976).

³³⁵ *Id.* at 2877.

america from going out of business. . . . Where there is no indication that a contract prohibits the carrier's action at issue, injunctive relief pending a union's arbitration of whatever claims it may nonetheless desire to press is not appropriate."³³⁶ Thus, courts should not enjoin management action pending resolution of union grievances that are obviously frivolous or insubstantial.

C. *The Duty to Engage In "Effects" Bargaining*

The Supreme Court in *First National Maintenance* made it clear that even though the doctrine of management prerogative may exempt an employer from the duty to bargain over certain management decisions, such an employer is nonetheless obligated to bargain over the *effects* of that decision upon the employees involved.³³⁷ Such effects generally include severance pay, pensions, unused vacation or sick leave, and employee transfer rights. Effects bargaining must be conducted "in a meaningful manner and at a meaningful time."³³⁸ That is, the union must be given sufficient advance notice to bargain from a position of some strength; management's action cannot simply be announced as a *fait accompli*.³³⁹ The employer is not obligated to initiate effects bargaining, however. Once the employer gives notice of its plans, the union must demand bargaining over the effects of those plans.³⁴⁰

No court has affirmatively held that a carrier governed by the RLA is obligated to engage in effects bargaining. The only court to address the issue determined that a carrier that is being merged with another carrier has no obli-

³³⁶ *Transamerica*, 123 L.R.R.M. (BNA) at 2688.

³³⁷ *First Nat'l Maintenance*, 452 U.S. at 682. For a more extensive discussion of an employer's effects bargaining obligations, see McGuinness & McDonald, *Plant Closings and Employee Separations: A Guide to the Law*, in *MANAGING PLANT CLOSINGS AND OCCUPATIONAL READJUSTMENT: AN EMPLOYER'S GUIDEBOOK* 138-40 (R. Swigart ed. 1984).

³³⁸ *First Nat'l Maintenance*, 452 U.S. at 682.

³³⁹ See *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 26-27 (1st Cir. 1983).

³⁴⁰ See *NLRB v. Gibraltar Industries*, 653 F.2d 1091, 1096 (6th Cir. 1981); *NLRB v. Spun-Jee Corp.*, 385 F.2d 379, 384 (2d Cir. 1967).

gation to bargain with its employees over the effects of the merger.³⁴¹ That court reasoned that to require bargaining over the effects of the merger would be tantamount to requiring bargaining about the terms of the merger itself.³⁴²

The dearth of law in this area is most likely due to the fact that management prerogative itself is a recently emerging concept under the RLA. Even the court in *Northeast Airlines*, in refusing to apply a duty of effects bargaining to a merger, stressed that a merger, "unlike a decision to relocate, to shut down a plant, or to terminate operations altogether, does not immediately and directly eliminate jobs."³⁴³ The court implicitly suggested that where job loss does result from a management decision, effects bargaining would be appropriate.³⁴⁴

Perhaps the more significant issue is what *type* of bargaining over the effects of a management decision is required. Clearly, the nature and purpose of effects bargaining does not lend itself to rigid application of the RLA's major dispute processes of bargaining, mediation for an indefinite period, and a thirty-day "cooling off" period. If these "almost interminable" processes were to be pursued prior to implementation of the management decision, a carrier might be effectively prevented from *ever* exercising its management prerogative. Alternatively, implementation of the carrier's management decision could become a *fait accompli* long before any meaningful bargaining might take place under standard RLA procedures.

The RLA does not require that *all* collective bargaining be conducted pursuant to the major dispute processes of Section 6, however. Rather, carriers and unions are obligated to settle all disputes arising between themselves "in

³⁴¹ *Northeast Airlines*, 473 F.2d at 557-60.

³⁴² *Id.* at 558-59. For a further development of this notion, see Kohler, *Distinctions Without Differences: Effects Bargaining In Light of First National Maintenance*, 5 Indus. Rel. L.J. 402 (1983).

³⁴³ *Northeast Airlines*, 473 F.2d at 558.

³⁴⁴ *Id.*

conference.”³⁴⁵ The lengthy processes of Section 6 must be pursued where a change in “rates of pay, rules, or working conditions . . . as embodied in agreements” is involved.³⁴⁶ While the Supreme Court in *Detroit & Toledo Shore Line* held that the status quo extends to objective working conditions not explicit in agreements,³⁴⁷ effects bargaining, by definition, does not concern changes in working conditions themselves, but, rather, is concerned with the effects of those changes. Thus, there is a statutory basis for requiring that effects bargaining under the RLA involve only bargaining to impasse, as under the NLRA.

The court recognized such a “lesser” standard of bargaining under the RLA in *Brotherhood of Railway, Airline & Steamship Clerks v. REA Express, Inc.*,³⁴⁸ where it held that a carrier that was a debtor-in-possession in bankruptcy was not obligated to “follow the elaborate and protracted procedures of the RLA before implementing its proposed terms of employment.”³⁴⁹ Rather, the carrier was obligated “merely to give reasonable notice of its proposed terms and to negotiate in good faith for a reasonable length of time before putting them into effect.”³⁵⁰ Due to the relatively short time frame in which effects bargaining typically must occur, the kind of bargaining to impasse recognized in *REA Express* is ideally suited for effects bargaining under the RLA. Therefore, while effects bargaining obligations are likely to be applicable to the RLA carrier as to the NLRA employer, the RLA should mandate no more extensive bargaining obligations than those applied under the NLRA.

³⁴⁵ 45 U.S.C. § 152, First and Second (1982).

³⁴⁶ 45 U.S.C. § 152, Seventh (1982).

³⁴⁷ *Detroit & Toledo Shore Line*, 396 U.S. at 153.

³⁴⁸ 523 F.2d 164 (2d Cir.), cert. denied, 423 U.S. 1017 (1975).

³⁴⁹ *Id.* at 171.

³⁵⁰ *Id.* Another court reached a similar result in *In re Continental Airlines*, No. 83-04019-H2-5 (Bankr. S.D. Tex. 1984).

CONCLUSION

There is no rational basis for failure to apply fully the concept of management prerogative under the RLA. While a line of authority has developed that has rejected application of management prerogative to RLA carriers, such authority grew out of a doctrine that is simply no longer valid in an era of airline deregulation; *viz.*, that railroad (and later airline) employees should be accorded "extra" employment protections in order to help avert strikes that might interrupt the flow of commerce. As the airline industry has become economically deregulated and highly competitive, not only do carriers require greater freedom to respond to the forces of the marketplace, but the potential of airline labor strife no longer constitutes the threat to the continuous flow of commerce that it once might have. Moreover, unlike workers in the declining railroad industry, airline employees displaced by an airline's exercise of its management prerogative still face an expanding industry with new job opportunities. As such, with respect to management prerogative, airlines and their employees should be treated no differently than employers and employees in other industries.

