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AIRLINE MERGERS, ACQUISITIONS AND BANKRUPTCIES: WILL THE COLLECTIVE BARGAINING AGREEMENT SURVIVE?

JONNI WALLS

I. INTRODUCTION

AIRLINE DEREGULATION has produced a record number of mergers and bankruptcies in the airline industry, turning the industry into a "national oligopoly."¹ Since deregulation, over 200 scheduled carriers have gone out of business, mainly because of mergers, acquisitions and bankruptcies.² As a result, the top eight carriers control over 90 percent of the market.³ Since 1978 more than 120 airlines have filed various types of bankruptcy proceedings.⁴ The flurry of merger activity that began almost immediately upon enactment of deregulation⁵ continues to be extremely vigorous. Between 1985 and 1987 over twenty-five mergers took place, and 1986

¹ P. DEMPSEY, *THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION* 81 (1989); Dempsey, *Airline Deregulation and Laissez Faire Mythology: Economic Theory in Turbulence*, 56 J. AIR L. & COM. 305 (1990).

² Sheets & Dworkin, *A Dogfight for Dominance of the Skies*, U.S. NEWS & WORLD REP., Sept. 11, 1989, at 54.

³ Dempsey, *Robber Barons in the Cockpit: The Airline Industry in Turbulent Skies*, 18 TRANSP. L. J. 133, 137 (1990). The carriers are American Airlines, United Air Lines, Texas Air, Delta Air Lines, Northwest Airlines, TWA, U.S. Air, and Pan Am. *Id.*

⁴ Carnevale, *Presidential Air to End Pact Feb. 6 as Feeder for Continental at Dulles*, Wall St. J., Jan. 11, 1988, at 8, col. 1. See also Papaioannou, *The Duty to Bargain and Rejection of Collective Agreements Under Section 1113 by a Bankrupt Airline: Trying to Reconile R.L.A. with the Bankruptcy Code*, 18 TRANSP. L.J. 219, 220 (1990).

⁵ Kahn, *Airlines*, in COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE, 348 n.58 (G. Sommers, ed. 1980).

witnessed more mergers than any year in history.⁶

Deregulation produced cuts in fares as airlines competed for passengers. Fare cuts eroded the potential for profit, requiring management to search for ways to cut costs.⁷ Mergers and bankruptcies are options that, among other benefits, allow airline management to abrogate collective bargaining agreements which once provided wage stability and job security to their labor force.⁸ Consequently, collective bargaining agreements became ineffective protection for employees of merged or bankrupt air carriers.

In a merger, the unions representing employees of the target carrier are decertified by operation of law because they no longer represent a majority of the craft or class of employees.⁹ Decertification extinguishes rights under the collective bargaining agreement.¹⁰ Before 1984, a carrier who filed a petition in bankruptcy was able to reject its collective bargaining agreements along with other executory contracts.¹¹ The law required no bargaining with em-

⁶ *Rept. of Comm. on Railway & Airline Labor Law*, 3 LAB. LAW. 393, 402 (1987).

⁷ P. DEMPSEY, *supra* note 1, at 172 n.12. "The squeeze on profits engendered by the increased competition unleashed by deregulation has strongly motivated airline management to insist on higher levels of efficiency, enhanced productivity, and lower labor costs. The confrontation between management and labor in this industry since deregulation has been fierce." *Id.*

⁸ Another practice introduced into the airline labor context with deregulation is a technique known as "alter-ego" or "double-breasting" which has long been familiar in other industries. Jansonious & Broughton, *Coping with Deregulation: Reduction of Labor Costs in the Airline Industry*, 49 J. AIR L. & COM. 501, 504-05 (1984). A parent or holding corporation forms or acquires a non-union subsidiary. The parent then channels all expansion through the new carrier and cuts back on the union carrier's operations, which effectively phases out the union carrier in favor of a lower cost operation. *Id.* at 505. See also Kozicharow, *Air Transport Carriers Press to Cut Labor Costs*, AV. WEEK & SPACE TECH., Aug. 29, 1983, at 29, 31 (discussing Frontier Holdings' formation of Frontier Horizon to rid itself of unionized Frontier Airlines). This practice has received judicial approval. See, e.g., *Air Line Pilots Ass'n Int'l v. Texas Int'l Airlines*, 502 F. Supp. 423, 424 (E.D.N.Y. 1980), *aff'd*, 656 F.2d 16 (2d Cir. 1981).

⁹ *Northwest Airlines, Inc.*, 13 N.M.B. 399, 400-01 (1986); *Republic Airlines*, 8 N.M.B. 49, 54-56 (1980).

¹⁰ *Republic Airlines*, 8 N.M.B. at 55.

¹¹ See 11 U.S.C. § 365(a) (1988), which provides: "Except as provided [elsewhere in this title], the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." *Id.*

ployees over the effects of this economic disruption.

This comment will address the current legal status of airline collective bargaining agreements in mergers and bankruptcies, two major threats to employment stability. The first section briefly surveys those economic effects of deregulation most relevant to the airline workforce. After discussing job stability, wages, and working conditions, this first section also outlines the types of labor protection available to airline employees before and after deregulation.

This comment next identifies three separate labor dispute categories and specific resolution procedures provided by the Railway Labor Act¹² governing collective bargaining between airline management and employees. Post-merger labor disputes engender two distinct types of issues, "minor" and "representation" disputes. The cases discussed demonstrate that the courts' overlapping of the two types of disputes has led to unfortunate consequences for airline collective bargaining agreements.

Finally, the discussion focuses on *Association of Flight Attendants v. Delta Air Lines*,¹³ a case which preserves a union's rights under the successorship clause in its collective bargaining agreement, even after a merger. The D.C. Circuit held that the union is entitled to arbitrate over damages for breach of its contract. This decision may significantly strengthen a union's position in merger negotiations between two carriers. It also reaffirms the federal courts' commitment to the grievance arbitration process for resolution of disputes arising in a collective bargaining relationship.

The second major division of this comment addresses the current legal status of collective bargaining agreements when an employer/carrier seeks debt relief through a bankruptcy proceeding. A brief review of case law will illustrate that, prior to 1984, the federal courts grappled

¹² 45 U.S.C. §§ 151-188 (1988).

¹³ 879 F.2d 906 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990).

with the fundamental tension between established labor policy and bankruptcy law. Inconsistent treatment of collective bargaining agreements by lower federal courts eventually culminated in a Supreme Court decision¹⁴ which outraged organized labor. The final portion of this comment is devoted to the legislative response to that decision, namely the Federal Judgeship and Bankruptcy Reform Act of 1984,¹⁵ and a discussion of cases addressing legal issues which have arisen since its enactment.

II. MERGERS AND ACQUISITIONS

A. *Pre-Deregulation Labor Protection*

Before the Airline Deregulation Act of 1978,¹⁶ airline mergers were subject to approval by the Civil Aeronautics Board (CAB).¹⁷ The CAB granted approval only if the proposed transaction was consistent with the "public interest."¹⁸ The "public interest" included a concern for the status of employees affected by the merger.¹⁹ In keeping with this statutory objective, since the early 1950s the CAB imposed protective measures for employees affected

¹⁴ *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

¹⁵ Pub. L. No. 98-353, 98 Stat. 330 (codified at 11 U.S.C. § 1113 (1988)).

¹⁶ Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C. app. (1988)) (amending Federal Aviation Act of 1958, 49 U.S.C. app. §§ 1301-1542 (1988)).

¹⁷ Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, 977, *repealed by* Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, 744 (codified as amended at 49 U.S.C. app. §§ 1301-1542 (1988)).

¹⁸ 49 U.S.C. app. § 1378(b) (originally enacted as Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973). This section provides, in part:

Unless, after a hearing, the Board finds that the transaction [consolidation merger, or acquisition of control] will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall, by order, approve such transaction, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe

Id.

¹⁹ *United-Western Acquisition of Air Carrier Property*, 11 C.A.B. 701, 708 (1950), *aff'd. sub nom. Western Air Lines v. CAB*, 194 F.2d 211 (9th Cir. 1952). "Very often, these benefits to the stockholders and the public will be at the expense of some of the employees of the companies involved. We think it only equitable that in such circumstances, the hardships borne by adversely-affected employees should be mitigated by provisions for their benefit." *Id.*

by commercial transactions.²⁰ These measures, known as labor protective provisions (LPPs), reduced employee hardship resulting from mergers.

Since 1950, the Board acknowledged the collective bargaining agreement as the most satisfactory means of providing stability and protection for workers²¹ and adopted a policy allowing an affected employee to elect either benefits afforded by the CAB order (LPPs) or severance benefits provided in a collective bargaining agreement.²² In no event could employees receive less than the amount to which they were entitled under their respective labor contracts.²³ This was a clear indication that the CAB anticipated that rights and obligations under collective bargaining agreements would survive a merger.²⁴

In 1961 the *United-Capital Merger Case* standardized LPPs for airline mergers.²⁵ The standardized LPPs generally provided compensatory allowances for displacement or termination, integration of seniority lists, relocation assistance and establishment of a mechanism for arbitrating LPP disputes.²⁶ Before deregulation the CAB, in effect, assumed the traditional role of a labor union, protecting the job stability, wages, working conditions,

²⁰ *Id.* at 713. The Civil Aeronautics Board made a finding that employees had been adversely affected by the merger. Prior to this transaction, the Board had not found displacement of any employees so had not had occasion to impose conditions for the protection of workers. *Id.*

²¹ North Atlantic Route Transfer Case, 12 C.A.B. 124, 129 (1950). "Voluntary arrangements between the carriers and labor groups as to the protection to be accorded to affected employees should take precedence over any action by the Board in relation to the matter." *Id.*

²² North Atlantic Route Transfer Case, 12 C.A.B. 140, 141 (1950) (supplemental opinion).

²³ *Id.*

²⁴ See *infra* notes 82-160 and accompanying text concerning present treatment of collective bargaining agreements in a merger situation.

²⁵ 33 C.A.B. 307, 323 (1961). These were modified only slightly thereafter by the Allegheny-Mohawk Merger Case, 59 C.A.B. 19 (1972). Although LPPs are no longer imposed by any government agency as a condition of merger, they are commonly agreed to by an acquiring carrier in merger negotiations. See Delta-Western Acquisition Case, DOT Order Nos. 86-10-44 & 86-12-30 (1986).

²⁶ See S. ROSENFELD, LABOR PROTECTIVE PROVISIONS IN AIRLINE MERGERS (1981). This book presents an in-depth study of LPPs in airline mergers prior to deregulation.

and security of airline employees. Apart from the regulatory role of the CAB, the Railway Labor Act (RLA)²⁷ has since 1936 governed the collective bargaining process and dispute resolution between unionized airlines and their employees. The RLA provides for grievance arbitration by a System Board of Adjustment²⁸ and for certification of bargaining representatives by the National Mediation Board (NMB).²⁹

B. *Effect of Deregulation on Airline Labor*

Organized labor vehemently opposed the passage of the Airline Deregulation Act of 1978.³⁰ This opposition stemmed from the fear that the American airline industry would become an oligopoly. Unions predicted unbridled competition, price slashing, and unemployment as a result of the proposed legislation, leaving only a few carriers in control of major markets.³¹ Over the AFL-CIO's strin-

²⁷ 45 U.S.C. §§ 151-188.

²⁸ 45 U.S.C. § 184 (1988). See *infra* notes 60-78 and accompanying text for a discussion of dispute resolution procedures under the Railway Labor Act.

²⁹ 45 U.S.C. § 152, *Ninth*.

³⁰ Kahn, *supra* note 5, at 337. Organized labor created an "Airline Labor Coordinating Committee of the AFL-CIO" composed of representatives of five unions (International Air Line Pilots Association (ALPA); Brotherhood of Railway, Airline & Steamship Clerks (BRAC); Flight Engineers International Association (FEIA); International Association of Machinists & Aerospace Workers (IAM); and Transport Workers Union of America (TWU)) to bring labor's position to the attention of Congress while the deregulation bill (S. 689) was under consideration. *Id.*

³¹ *Regulatory Reform in Air Transportation: Hearings on S. 292 and S. 689 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess. 1322 (1977) (statement by the AFL-CIO Executive Council on Airline Deregulation).

Proposals to radically change the Federal regulatory laws governing air transportation, currently pending before the House and Senate Aviation Sub-committees, would adversely affect the stability of the air transport industry and the job security of over 300,000 airline employees Specifically, the legislative proposals, if enacted, would . . . encourage cut-throat pricing practices in some markets and some higher prices and reduced service in smaller markets; increase the possibility of bankruptcy of several large carriers and impose financial hardship on several others

Id.

The net result of deregulation will be fewer jobs in air transport, higher rates of unemployment among those now employed in the

gent objection, the Act became law on October 24, 1978. As demonstrated below, labor's foresight has proved to be accurate.³²

Airlines entered the free market of deregulation with heavy debt burdens.³³ Factors such as inflation, rising fuel prices, and the cost of replacing aging equipment significantly increased operating expenses.³⁴ The aftermath of the air traffic controllers' (PATCO) strike temporarily limited flights to and from major airports.³⁵ Perhaps most significant, low-cost carriers entered the market in great numbers, intensifying fare competition.³⁶

Prior to deregulation, carriers faced with rising costs could secure corresponding industry-wide fare increases through the CAB.³⁷ Since deregulation, however, compe-

industry, and the total destruction of existing seniority systems . . . S. 689, as it now stands, would generate cutthroat competition aimed at forcing one or more lines out of markets they now serve or out of business altogether. Carriers, forced by such competition to suspend or limit present operation would naturally leave hundreds or even thousands of workers economically stranded.

Id. at 1323 (statement of John F. Peterpaul, General Vice President, International Ass'n of Machinists & Aerospace Workers, AFL-CIO).

The destruction of section 408 [of the Federal Aviation Act, providing for LPPs] will sweep away what little protection the [Civil Aeronautics] Board has allowed employees in this industry. . . . As the carriers tighten their belts to cut their prices to meet competition, what will they look to to accomplish the economics compelled upon them? They cannot control the price of fuel; they cannot control the cost of aircraft or aircraft parts; they cannot control their airport costs They can cut corners on safety and they can cut their work forces [Labor organizations] know who suffers when a carrier feels compelled to cut its costs. It is the employee, regardless of the mode of transportation. It is the employee.

Id. at 1287. (statement of William Mahoney, counsel for airline labor interests, AFL-CIO).

³² See P. DEMPSEY, *supra* note 1, at 39-40. This book discusses the devastating impact of deregulation on air carriers and their employees. During the first eighteen months of deregulation almost 22,000 airline employees lost their jobs. *Id.* at 57 n.78. By 1983, the number had risen to more than 40,000. *Id.* at 40.

³³ Grebey, *Deregulation: Home Run or Strike Out for Labor Relations*, 9 INDUS. REL. L.J. 57, 62 (1987).

³⁴ P. DEMPSEY, *supra* note 1, at 42-43.

³⁵ Jansonious & Broughton, *supra* note 8, at 503 n.12.

³⁶ *Airline Labor Policies Change in Deregulated U.S. Industries*, AV. WEEK & SPACE TECH., Nov. 12, 1984, at 190.

³⁷ *Id.* at 191.

tition from the myriad low cost carriers entering the market makes fare increases relatively unfeasible.³⁸ Thus, any reduction in overhead is usually exacted from the labor force.³⁹ In a spirit of cooperation domestic airline unions made drastic concessions by way of wage and pension reductions.⁴⁰ Despite concerns over compromised safety, the unions even accepted the cost cutting measures of increased in-flight hours and the controversial two-person cockpit.⁴¹

C. *Post-Deregulation Labor Protection*

1. *LPPs*

Without the protection formerly provided by government regulatory agencies, airline employees are left with only such LPPs as may be negotiated between merging carriers. The Airline Deregulation Act of 1978 contains

³⁸ P. DEMPSEY, *supra* note 1, at 167. Before deregulation wages, staffing levels and work rules were more generous than those available to new entrants after deregulation. In the early years of deregulation newcomers could offer better fares by virtue of low labor costs. Now incumbents have lowered labor costs to remain competitive. Major carriers now utilize two-tier wage scales, with lower rates for new hires, and have exacted wage and work rule concessions from present employees. Continental and TWA have successfully broken some of their unions. *Id.*

³⁹ *Airline Labor Policies Change in Deregulated U.S. Industries*, *supra* note 36, at 191. "The only significant cost that an airline can address is labor. We have no influence over the price of fuel or interest rates." *Id.*

⁴⁰ Jansonious & Broughton, *supra* note 8, at 532-553. This article provides a detailed discussion of concession bargaining in the airlines, as well as a summary of collective bargaining agreements negotiated by major carriers American Airlines, Delta Air Lines, Eastern Airlines, Frontier Airlines, Northwest Airlines, TWA, United, U.S. Air and Western Airlines in the years after deregulation. Concession bargaining has been the carriers' most common approach to cost cutting since deregulation. *Id.* at 552.

⁴¹ *Id.* at 532-33. The two-person cockpit was the first major concession made by airline unions after deregulation. Boeing 737's were certified for operation by two pilots, but, in the interest of safety, ALPA had reached agreements with most major carriers requiring operation by three pilots. The issue was submitted to arbitration in the late 1960's, and the award upheld the three-pilot crew on the grounds that 737's could not be operated safely by only two pilots. The issue was resolved in favor of the employer in July 1981, following the ALPA strike at United Airlines and after determination by a Presidential task force that new model aircraft could be operated safely by only two pilots. *Id.* at 533 (citing 47 N.M.B. ANN. REP. 8 (1981)).

provisions⁴² which ostensibly cover certain "protected employees"⁴³ adversely affected by a "qualifying dislocation" resulting from deregulation.⁴⁴ In reality, however, this protection has been eroded by policies adopted by government agencies. Unlike the LPPs which the CAB ordered merging carriers to pay, the Airline Deregulation Act provides for payment by the Secretary of Labor.⁴⁵ Mergers and bankruptcies occurring after October 24, 1988, are not covered by the provisions of the Act.⁴⁶

The "public interest" concerns of the Federal Aviation Act survived deregulation, in part, as "the need to encourage fair wages and equitable working conditions for air carriers."⁴⁷ In view of the narrow application of the Act's labor protective provisions,⁴⁸ this fair wage promise appears to have been nothing more than window dressing to make the Act more palatable to those opposing its passage. After deregulation, the CAB adopted the policy that airline employees covered by union contracts should rely on the collective bargaining process for protection in merger situations.⁴⁹ Since collective bargaining agree-

⁴² 49 U.S.C. app. § 1552.

⁴³ *Id.* § 1552(h)(1). A "protected employee" is a person, excluding officers and members of the board of directors, who has been employed by a duly certified air carrier for at least four years on October 14, 1978. *Id.*

⁴⁴ *Id.* § 1552(h)(2). A "qualifying dislocation" is a "bankruptcy or major contraction of an air carrier" which occurs within ten calendar years after October 24, 1978, "the major cause of which is the change in regulatory structure provided by the Airline Deregulation Act of 1978, as determined by the Civil Aeronautics Board." *Id.*

⁴⁵ *Id.* § 1552(a)(1).

⁴⁶ *Id.* § 1552(h)(2).

⁴⁷ *Id.* § 1302(3).

⁴⁸ See *infra* notes 52-55 and accompanying text. This section discusses post-deregulation policy in imposing LPPs.

⁴⁹ Texas International-National Acquisition, DOT Order No. 79-12-163 (1979) at 67. See also Piedmont-Empire Acquisition Show Cause Proceeding, DOT Order No. 86-1-45 (1986) (refusing to impose LPPs because "[t]he nature and level of airline employee benefits. . . are appropriately determined" through collective bargaining); Air Florida System-Western Acquisition Show Cause Proceeding, 93 C.A.B. 545, 567-68 (1982) (imposing LPPs only to the extent that the acquiring carrier agrees to their imposition and refusing to extend the time limit on the LPPs' coverage); Texas Int'l-Continental Acquisition Case, 92 C.A.B. 70 (1981) (imposing LPPs but refusing to honor request that collective bargaining agreements be honored).

ments do not survive a merger, the result of this policy is that the employee has neither the protection of government-imposed LPPs nor of a collective bargaining agreement.⁵⁰

On January 1, 1985, the CAB's authority to approve mergers and acquisitions⁵¹ became the province of the Department of Transportation (DOT).⁵² The DOT soon announced its policy to impose LPPs "only where necessary to prevent labor strife that would disrupt the nation's air transportation system."⁵³ It preferred that "carriers and unions should decide through private negotiations what benefits should be paid airline employees in the event of a merger or acquisition."⁵⁴ The DOT's policy was unsound because collective bargaining agreements and the rights they secure are extinguished when a merger takes place. Thereafter, the acquiring carrier has no duty to negotiate with a union which is no longer the certified bargaining representative of its employees. The policy has nevertheless been upheld by federal courts⁵⁵ and applied in numerous mergers and acquisitions.⁵⁶

⁵⁰ See *infra* notes 82-85 and accompanying text for a discussion of the treatment of collective bargaining agreements in a merger situation.

⁵¹ 49 U.S.C. app. § 1378 (1988).

⁵² Civil Aeronautics Board Sunset Act of 1984, § 3, 49 U.S.C. app. § 1551 (1988).

⁵³ Midway-Air Florida Acquisition Show Cause Proceeding, DOT Order No. 85-6-33 (1985). This criteria is unlikely ever to be satisfied. "With deregulation, other carriers can move quickly to fill gaps in service, so a strike will not disrupt the transportation system." *Id.* See also, Southwest Airlines-Muse Air Acquisition, DOT Order No. 85-6-79 (1985).

⁵⁴ *Midway-Air Florida*, DOT Order No. 85-6-33, at 5.

⁵⁵ *Air Line Pilots Ass'n v. Department of Transp.*, 791 F.2d 172 (D.C. Cir. 1986); *Independent Union of Flight Attendants v. Department of Transp.*, 803 F.2d 1029 (9th Cir. 1986).

⁵⁶ *Horizon-Cascade Acquisition Show Cause Proceeding*, DOT Orders Nos. 86-1-43, 86-1-67 (1986); *Texas Air-Eastern Acquisition Case*, DOT Order No. 86-7-21 (1986); *NWA-Republic Acquisition Case*, DOT Order No. 86-7-81 (1986); *Joint Application of People's Express, Inc. & United Air Lines, Inc.*, DOT Order No. 86-8-3 (1986); *Application of Alaska Air Group, Inc., AAG Holdings Inc. & Jet American Airlines & Application of Delta Air Lines, Inc.*, DOT Order No. 86-9-18 (1986); *TWA-Ozark Acquisition Case*, DOT Order No. 86-9-29 (1986); *Joint Application of Texas Air Corp. & People's Express, Inc.*, DOT Orders Nos. 86-10-26, 86-10-53 (1986); *Delta-Western Acquisition Case*, DOT Order No. 86-12-30 (1986).

The DOT's authority expired January 1, 1989, and responsibility for approval of mergers next fell to the Department of Justice (DOJ).⁵⁷ In keeping with the DOT's policy that the public interest is best served by relying upon market forces without unnecessary government regulation,⁵⁸ the DOJ's primary focus now is on antitrust implications of airline mergers. The present attitude toward airline mergers is one of extreme permissiveness.⁵⁹ The following sections demonstrate that employment security afforded by collective bargaining agreements may also be illusory since the agreements themselves usually do not survive a merger.

2. *Collective Bargaining Agreements*

a. *Dispute Resolution Under the Railway Labor Act*

The Railway Labor Act (RLA)⁶⁰ governs collective bargaining between airline management and employees. Its primary emphasis is informal, cooperative methods of settling disputes.⁶¹ The RLA, however, provides more formal structures for resolving certain types of disputes when informal agreement fails. The merger of a union carrier into a nonunion entity raises the type of disputes addressed by the RLA and brings into effect the specific dispute resolution mechanisms provided.

⁵⁷ 49 U.S.C. app. § 1551(a)(7).

⁵⁸ Texas International-National, DOT Order No. 85-6-79, at 29. "[T]he very purpose of the Deregulation Act was to eliminate government oversight and review of the wisdom of business decisions by air carrier managements." *Id.*

⁵⁹ P. DEMPSEY, *supra* note 1, at 147. "In later decisions on merger applications, the agencies seemed to manipulate antitrust analysis to justify approval of almost any merger. More lenient antitrust standards are being applied administratively without statutory amendment. The applicants are becoming bolder in proposing increasingly anticompetitive mergers and are meeting only 'cotton candy' opposition." *Id.*

⁶⁰ 45 U.S.C. §§ 151-188 (1988).

⁶¹ 45 U.S.C. § 152, *Second* provides: "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between the representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." *Id.*

The RLA recognizes two categories of labor disputes⁶² relevant in the merger context: (1) "Minor disputes" (or grievances) arising out of the application or interpretation of an existing collective bargaining agreement;⁶³ and (2) "representation disputes" which call for a determination of the employees' representative in contract negotiations and administration, as well as definition of the bargaining unit, craft or class of employees represented.⁶⁴ The following sections outline the RLA's specific resolution procedure for each type of dispute.

b. "*Minor*" Disputes: Arbitration

"Minor disputes" are resolved through arbitration.⁶⁵ The RLA imposes a duty on carriers and labor organiza-

⁶² A third category is "major" disputes, involving establishment of collective bargaining agreements. 45 U.S.C. § 156. This section requires a carrier to bargain over "rates of pay, rules and working conditions." *Id.* This type of dispute would, of course, not arise in a merger situation where a collective bargaining agreement is already in existence between the parties.

[Major disputes relate] to disputes over the formation of collective [bargaining] 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.

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

"Major" disputes must be resolved through the notice and mediation procedures set out in Section 6 of the RLA, including invocation of the National Mediation Board. 45 U.S.C. §§ 156, 183. If mediation does not avail and either party refuses binding arbitration, a thirty-day cooling off period ensues. *Id.* §§ 155, 156, 183. During this process the parties must maintain the *status quo* regarding rates of pay, rules, and working conditions, even though the prior contract may have expired. *Id.*; see also *International Bhd. of Teamsters v. Texas Int'l Airlines*, 717 F.2d 157, 159 (5th Cir. 1983). Each has recourse to the courts for enforcement of the *status quo*. *Id.* The NMB may not "enforce the requirement that parties to a dispute maintain the status quo pending the results of the Act's dispute-resolution mechanism." *Id.* Only after exhausting statutory dispute resolution procedures may the parties resort to self-help; that is, the union may strike, and the employer may unilaterally change terms and conditions of employment. 45 U.S.C. §§ 156, 183; *Elgin*, 325 U.S. at 725; *Teamsters v. Texas Int'l*, 717 F.2d at 159.

⁶³ 45 U.S.C. § 157. The "major" and "minor" nomenclature does not appear in the RLA, but comes from the United States Supreme Court's opinion in *Elgin*, 325 U.S. at 722-28, and has been commonly adopted in the industry.

⁶⁴ 45 U.S.C. § 152, *Ninth*.

⁶⁵ 45 U.S.C. § 184.

tions to contractually provide a "system board of adjustment" for arbitration of disputes over interpretation of existing collective bargaining agreements.⁶⁶ Jurisdiction over a "minor" dispute lies exclusively with the adjustment board.⁶⁷ Neither federal nor state courts have jurisdiction to interpret collective bargaining agreements subject to the RLA.⁶⁸ Courts may, however, make the determination of whether a dispute is in fact "minor,"⁶⁹ order the parties to submit to binding arbitration,⁷⁰ and enforce awards reached through the arbitration process.⁷¹ Thus, when a merger violates the terms of an existing collective bargaining agreement, it raises a "minor" dispute amenable to arbitration.⁷²

⁶⁶ *Id.*; see also *International Ass'n of Machinists v. Central Airlines*, 372 U.S. 682, 686 (1963); *Ozark Air Lines v. Air Line Pilots Ass'n Int'l*, 577 F. Supp. 487, 490 (E.D. Mo. 1983), *aff'd*, 744 F.2d 1347 (8th Cir. 1984).

⁶⁷ *Independent Fed'n of Flight Attendants v. Trans World Airlines*, 655 F.2d 155, 158 (8th Cir. 1981).

⁶⁸ *Slocum v. Delaware L. & W. R.R.*, 339 U.S. 239, 244 (1950); *International Ass'n of Machinists v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985); *International Ass'n of Machinists v. Republic Airlines*, 761 F.2d 1386, 1389-90 (9th Cir. 1985); *Teamsters v. Texas Int'l Airlines*, 717 F.2d at 159; *Transport Workers Union v. American Airlines*, 413 F.2d 746, 748 (10th Cir. 1969).

⁶⁹ *United Transp. Union v. Burlington N. R.R.*, 458 F.2d 354, 357 (8th Cir. 1972). If there is a reasonable argument that the dispute involves contract interpretation, the courts will defer to the appropriate system board of adjustment. *Id.* The burden of showing that a matter does involve contract interpretation is "relatively light." *Air Line Pilots Ass'n v. Northwest Airlines*, 444 F. Supp. 838, 841 (D. Minn. 1977), *aff'd*, 570 F.2d 257 (8th Cir. 1978); See *Flight Attendants v. TWA*, 655 F.2d at 158-59.

⁷⁰ *Association of Flight Attendants v. Delta Air Lines*, 879 F.2d 906, 917 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990); *International Ass'n of Machinists v. Aloha Airlines*, 776 F.2d at 815; *International Ass'n of Machinists v. Republic Airlines*, 761 F.2d at 1390; *International Ass'n of Machinists v. Northeast Airlines*, 473 F.2d 549, 556 (1st Cir. 1972) [hereinafter *IAM v. Northeast I*].

⁷¹ *IAM v. Central Airlines*, 372 U.S. at 685; *Air Line Pilots Ass'n v. Eastern Airlines*, 632 F.2d 1321, 1324 (5th Cir. 1980). The scope of review is extremely narrow. As long as the arbitrator's award is arguably drawn from the agreement, it is valid and "effectively etched in stone." *Id.*

⁷² *Elgin*, 325 U.S. at 723.

[Minor disputes contemplate] the existence of a collective [bargaining] agreement already 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 spe-

c. "Representation" Disputes: National Mediation Board

Disputes as to identity and certification of a collective bargaining representative comprise a distinct category of "representation" disputes⁷³ within the exclusive jurisdiction of the National Mediation Board (NMB).⁷⁴ Strictly speaking, the carrier is not a party to this type of dispute and does not participate in its resolution.⁷⁵ "Representation" disputes encompass questions of whether a majority of the affected craft or class favors representation by the union,⁷⁶ as well as whether two related carriers will be treated as one for representation purposes.⁷⁷ Obviously, disputes as to the post-merger status of a union also fall within this category.⁷⁸

A simple showing of majority interest will suffice for NMB certification of a union as the bargaining representative of a given class or craft.⁷⁹ The merger of a union car-

cific situation. . . . [T]he claim is to rights accrued, not merely to have new ones created for the future.

Id.

⁷³ *Teamsters v. Texas Int'l*, 717 F.2d at 158-59. Representation disputes involve determining the collective bargaining representative of the employees and the proper bargaining unit, craft, or class of employees to be represented. *Id.* at 158.

⁷⁴ 45 U.S.C. § 152, Ninth. The U.S. Supreme Court has held that the NMB's power to resolve "any dispute. . . among a carrier's employees as to who are the representatives of such employees" is exclusive. *Switchmen's Union v. NMB*, 320 U.S. 297, 303 (1943); *see also*, *Flight Attendants v. Delta*, 879 F.2d at 912; *Air Line Employees Ass'n v. Republic Airlines*, 798 F.2d 967, 968-69 (7th Cir. 1986); *Teamsters v. Texas Int'l*, 717 F.2d at 158; *Airline Pilots Ass'n v. Texas Int'l Airlines*, 656 F.2d 16, 23-24 (2d Cir. 1981); *International Ass'n of Machinists v. Northeast Airlines*, 536 F.2d 975, 977 (1st Cir. 1976) [hereinafter *IAM v. Northeast II*]; *Brotherhood of Ry. & S.S. Clerks v. United Air Lines*, 325 F.2d 576, 579-80 (6th Cir. 1963).

⁷⁵ *Brotherhood of Ry. & S.S. Clerks v. Association for Benefit of Non-Contract Employees*, 380 U.S. 650 (1965). The carrier's only function is to provide documentation to the NMB. *Id.*

⁷⁶ *ALPA v. Texas Int'l*, 656 F.2d at 23; *Summit Airlines v. Teamsters Local Union No. 295*, 628 F.2d 787 (2d Cir. 1980); *Provincetown-Boston Airline*, 6 N.M.B. 29 (1976).

⁷⁷ *Republic Airlines, Inc.*, 8 N.M.B. 49 (1980).

⁷⁸ *Teamsters v. Texas Int'l*, 717 F.2d at 159. "A representation dispute may occur even if only one union claims to represent the employees if there is a question whether a majority of the craft or class desires the union's representation." *Id.*

⁷⁹ 45 U.S.C. § 152, Fourth, provides in part: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." *Id.*

rier with a non-union entity, however, creates doubt as to whether the union still represents a majority of any craft or class of employees. Where such doubt exists, federal courts leave resolution of the dispute to the NMB.⁸⁰ The NMB cannot certify a minority union as representative of the employees.⁸¹

When airlines merge to form a single transportation system, NMB policy dictates that any union representing employees of the target carrier is decertified by operation of law effective as of the merger date.⁸² The NMB does not have adjudicatory power to determine the extent of a carrier's duty to bargain.⁸³ Nor does it have authority to interpret or enforce terms of collective bargaining contracts between carriers and unions.⁸⁴ Interpretation is left to arbitrators and enforcement, ultimately, to federal courts.⁸⁵

3. *Judicial Treatment of Post-Merger Disputes*

Relatively few federal appellate courts have addressed the post-merger status of airline collective bargaining agreements. Those courts addressing the issue unanimously hold that survival of an airline union's certification is a question within the exclusive jurisdiction of the NMB.⁸⁶ The decisions discussed below illustrate the appellate courts' treatment of post-merger issues raised by airline unions. The common thread in these cases is the

⁸⁰ *IAM v. Northeast II*, 536 F.2d at 977.

⁸¹ 45 U.S.C. § 152, Fourth.

⁸² *Air Line Exec. Ass'n v. Republic Airlines*, 798 F.2d 967, 968-69 n.4 (7th Cir. 1986); *Teamsters v. Texas Int'l*, 717 F.2d at 163; *Northwest Airlines, Inc.*, 13 N.M.B. 399, 400-01 (1986); *Republic Airlines, Inc.*, 8 N.M.B. 49, 54-56 (1980).

⁸³ *IAM v. Northeast II*, 536 F.2d at 977. "Where there is no real question about whether a union is the legitimate representative of an airline's employees, the function of deciding the extent of duty to bargain rests properly with federal courts." *Id.*

⁸⁴ *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 579-80 (1977).

⁸⁵ *IAM v. Central Air Lines*, 372 U.S. at 684-85.

⁸⁶ *Air Line Employees Ass'n v. Republic Airlines*, 798 F.2d at 968-79; *Teamsters v. Texas Int'l*, 717 F.2d at 159; *ALPA v. Texas Int'l Airlines*, 656 F.2d at 23-24; *IAM v. Northeast II*, 536 F.2d at 977; *IAM v. Northeast I*, 473 F.2d at 555-56; *Brotherhood of Ry & S.S. Clerks v. United Air Lines*, 325 F.2d at 579-80 (6th Cir. 1963).

union's decertification as bargaining representative following a merger. The distinguishing feature is the character of relief sought.

The earliest appellate court decision to address post-merger decertification in the airline context was *Brotherhood of Railway and Steamship Clerks v. United Air Lines*.⁸⁷ This dispute arose out of the merger of Capital Airlines into United Airlines in 1961.⁸⁸ Although the merger agreement between the two carriers provided that United would be responsible for all "debts, liabilities and duties" of the acquired carrier,⁸⁹ United refused to be bound by any of Capital's existing labor agreements.⁹⁰ The union unsuccessfully urged the CAB to impose the collective bargaining agreement on United as a condition of the merger⁹¹ and then filed suit for declaratory judgment that United was bound by the terms of the agreement.⁹² The union's pleadings alleged an action in contract,⁹³ but the relief sought was "maintenance of a collective bargaining agreement."⁹⁴ The Sixth Circuit, therefore, characterized the action as a "representation dispute" over which it had no jurisdiction.⁹⁵

In another pre-deregulation merger dispute, *International Association of Machinists v. Northeast Airlines*,⁹⁶ the First Circuit characterized a merger as a management decision close to the "core of entrepreneurial control" over which the carrier/employer did not have a statutory duty to bar-

⁸⁷ 325 F.2d 576 (6th Cir. 1963).

⁸⁸ *Id.* at 576.

⁸⁹ *Id.* at 577.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 577, 579.

⁹³ *Id.* at 579.

⁹⁴ *Id.*

⁹⁵ *Id.* at 578. "Three decisions of the Supreme Court make it clear that the federal courts have no jurisdiction over the solution of representation disputes." *Id.* (citing *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943); *General Committee v. Missouri-Kansas-Texas R.R. Co.*, 320 U.S. 323 (1943)); *General Committee v. Southern Pacific Co.* 320 U.S. 338 (1943)).

⁹⁶ 473 F.2d 549 (1st Cir. 1972) (merger of Northeast and Delta).

gain.⁹⁷ The union sought enforcement of a collective bargaining agreement clause providing for bargaining over employees' seniority and other rights prior to a merger or consolidation.⁹⁸ The court refused to enjoin the merger under a balance of hardships analysis.⁹⁹ It did affirm, however, that interpretation of the terms of a collective bargaining agreement raised a minor dispute subject to arbitration.¹⁰⁰

The court did not order Northeast to bargain with the union partly because of its confidence that the CAB's approval of the merger would be conditioned upon "the acceptance by the parties of labor protective provisions designed to protect the employees of the merged airlines from any adverse impact the merger may have on conditions of employment, and also to establish machinery for the peaceful settlement of any labor-management disputes arising out of the merger."¹⁰¹ The implication was that if CAB approval of merger conditions were not required, it might be appropriate for the union's position to be given some weight in the merger.¹⁰² As history since deregulation will attest, however, the courts' position has shifted toward complete deference to the NMB's exclusive jurisdiction.

⁹⁷ *Id.* at 556 (citing *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964)).

⁹⁸ *Id.* at 551.

⁹⁹ *Id.* at 553. The court acknowledged that the union faced serious consequences if the employer merged into a nonunion entity whose employees vastly outnumbered union members. On the other hand, the injunction could result in collapse of the merger which would have serious ramifications for the carrier. The court, therefore, weighed the possible injury to the union against irreparable harm to the carrier caused by the injunction and chose the course likely to cause the least injury. *Id.*

¹⁰⁰ *Id.* at 554-55.

¹⁰¹ *Id.* at 559 (citing *American Airlines v. CAB*, 445 F.2d 891 (2d Cir. 1971); *Kent v. CAB*, 204 F.2d 263 (2d Cir. 1953)).

¹⁰² *Id.* The court implied that the situation might be different in "an unregulated industry, [because] if highly restrictive labor protective provisions in a collective bargaining agreement make unfeasible certain planned postmerger operating changes, the acquiring corporation may still be willing to proceed with the acquisition, foregoing the originally planned changes." *Id.*

In a subsequent action between the same parties,¹⁰³ the union challenged the successor's (Delta's) failure to bargain over integration of seniority lists and the survival of other rights arising from the defunct collective bargaining agreement.¹⁰⁴ Significantly, the union did not seek a court order to *arbitrate*,¹⁰⁵ but instead sought a finding that the successor carrier had a duty to *bargain* or negotiate. Because the union was no longer certified as the majority representative of Delta's employees, however, the court had no jurisdiction to grant the relief sought.¹⁰⁶

A "double-breasting" situation gave rise to the dispute in *Air Line Pilots Association v. Texas International Airlines*.¹⁰⁷ The parent corporation of Texas International formed a holding company, Texas Air Corporation, of which both Texas International and a new nonunion entity, New York Air, became wholly owned subsidiaries.¹⁰⁸ New routes were then awarded to New York Air,¹⁰⁹ and the Air Line Pilots Association (ALPA) filed suit, contending that the creation of New York Air was part of a scheme to "defeat the existing collective bargaining relationship" between the union and the pilots of Texas International Airlines (TXI).¹¹⁰ The relief sought was "an order requiring TXI to deal exclusively with ALPA."¹¹¹ The union chose not to invoke the dispute resolution procedures of the RLA, but instead "sought judicial intervention to prevent what

¹⁰³ *IAM v. Northeast II*, 536 F.2d at 975.

¹⁰⁴ *Id.* at 976.

¹⁰⁵ *Id.* at 978. "Plaintiffs do not allege that they have instituted grievance proceedings which are outstanding or that Delta has refused to submit to a System Board of Adjustment resolution of particular disputes concerning the survival of rights under the Northeast collective bargaining agreements." *Id.*

¹⁰⁶ *Id.* at 977. "[T]he duty to bargain imposed by the Railway Labor act is a duty to bargain with the chosen representative of the majority of a craft or class of employees. . . . In the absence of National Mediation Board certification, 45 U.S.C. § 152 Ninth, there is no basis for finding a duty on the part of Delta to negotiate with plaintiffs." *Id.*

¹⁰⁷ 656 F.2d 16 (2d Cir. 1981). See *supra* note 8 for a discussion of "double-breasting" in the airline industry.

¹⁰⁸ *Id.* at 17.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 18.

it perceived as an illegal attempt by TXI to circumvent its collective bargaining obligations.”¹¹² Once again, because there was doubt as to whether ALPA represented New York Air employees, the court deferred to the NMB’s jurisdiction over “representation disputes.”¹¹³

Through subsequent acquisitions, Texas Air Corporation eventually orchestrated the merger of Continental and Texas International into one airline, Continental, thereby giving rise to the dispute in *International Brotherhood of Teamsters v. Texas International Airlines*.¹¹⁴ Continental employees in the affected crafts were not unionized.¹¹⁵ After filing an application with the NMB seeking certification as representative of employees in the merged entity, the union filed suit seeking a declaration that its collective bargaining agreement was valid¹¹⁶ and an injunction maintaining the *status quo* pending determination of the representation question.¹¹⁷ In this decision, the Fifth Circuit acknowledged for the first time the potential overlapping of “representation disputes” within the NMB’s exclusive jurisdiction and those “other disputes” reserved for judicial resolution.¹¹⁸ The “other disputes” would, of course, be “minor” disputes for which the court could order arbitration or enforce an award. Instead of coming to grips with this inconsistency, however, the court held that the underlying dispute was “a question of employee representation”¹¹⁹ and, therefore, deferred to the NMB.¹²⁰

¹¹² *Id.* at 20.

¹¹³ *Id.* at 24.

¹¹⁴ 717 F.2d 157 (5th Cir. 1983).

¹¹⁵ *Id.* at 160.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 161.

Continuation of the contract in force unavoidably constitutes a determination of employee representation, and the conjunction of the two issues creates a conflict in principles, one dictated by the express statutory provision giving the Board sole jurisdiction over representation matters and the other implicit from the limited scope of the statute, that other disputes are reserved for judicial resolution.

Id.

¹¹⁹ *Id.* at 164.

The dispute in *Air Line Employees Association v. Republic Airlines*¹²¹ arose from the proposed merger of Republic Airlines with Northwest Airlines. Northwest entered into transition agreements with two unions representing its ground employees, whereby those unions would represent the combined workforce of the post-merger entity.¹²² The association, representing Republic's employees, filed suit seeking an injunction to preserve the *status quo* until the NMB could conduct an election to determine the majority representative.¹²³ The association also sought an order to compel arbitration of its grievance over Republic's violation of the collective bargaining agreement.¹²⁴ Predictably, the Seventh Circuit considered the dispute representational, notwithstanding, the contract claims and again deferred to the NMB.¹²⁵ Thus, appellate courts' treatment of post-merger claims as "representation disputes" became firmly entrenched, even though other causes of action were frequently swept away with the extinguished collective bargaining agreements.

4. Association of Flight Attendants v. Delta: *Survival of the Successorship Clause*

A recent decision by the D.C. Circuit, *Association of Flight Attendants v. Delta Air Lines*,¹²⁶ is significant for its holding that a successorship clause in a collective bargaining agreement may survive a merger and entitle the union to damages.¹²⁷ The court held that even the NMB's exclu-

¹²⁰ *Id.* "After a merger that makes the employee group hitherto represented by the Union a minority of the craft, the question of employee representation inevitably arises. When this happens, resolution of the question is the function of the National Mediation Board." *Id.*

¹²¹ 798 F.2d 967 (7th Cir. 1986).

¹²² *Id.*

¹²³ *Id.* at 968.

¹²⁴ *Id.*

¹²⁵ *Id.* at 968-69.

¹²⁶ 879 F.2d 906 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990).

¹²⁷ *Id.* at 909.

Even though a claim for injunctive or declaratory relief has been rendered moot by intervening events, . . . a claim for damages keeps the controversy alive if that claim "is not so insubstantial or so

sive jurisdiction over representation disputes does not divest federal courts of jurisdiction to order binding arbitration of a union's claim that an airline breached its successorship clause when it merged with a non-union carrier.¹²⁸ The case arose from the 1987 merger of Western Airlines and Delta, a non-union carrier.¹²⁹ The Association of Flight Attendants (AFA) represented Western employees.¹³⁰

In return for prior bargaining concessions by AFA, Western had agreed to a successorship clause whereby any successor or parent company was to be bound by the terms of the contract.¹³¹ Nevertheless, Western's merger agreement with Delta did not purport to bind Delta to Western's existing collective bargaining agreements.¹³² AFA filed a grievance, asserting that Western's breach of its contractual duty under the successorship clause amounted to a "minor dispute" which should be submitted to arbitration.¹³³ Western refused to arbitrate, and the union filed its complaint in United States District

clearly foreclosed by prior decisions that th[e] case may not proceed." Thus, the question whether the consummation of the merger and the decertification of AFA rendered this case moot turns upon whether AFA appears to state a claim upon which it could recover in arbitration an award of damages against Western for breach of the successorship provision in the CBA.

Id. (citations omitted).

¹²⁸ *Id.* at 917.

¹²⁹ *Id.* at 907 (Only the pilots and dispatchers are unionized at Delta).

¹³⁰ *Id.*

¹³¹ *Association of Flight Attendants v. Western Airlines*, 662 F. Supp. 1, 2 (D.D.C. 1987), *rev'd sub nom. Association of Flight Attendants v. Delta Air Lines*, 879 F.2d 906 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990). AFA's collective bargaining agreement with Western provided, in part: "This agreement shall be binding on any successor or merged Company or Companies, or any successor in the control of the Company, its parent(s) or subsidiary(ies) until changed in accordance with the provisions of the Railway Labor Act, as amended." *Id.*

¹³² 879 F.2d at 907.

¹³³ 662 F. Supp. at 1. Section 24(D) of the contract, established under 45 U.S.C. § 184 (Section 204 of the Railway Labor Act), provided for arbitration by the System Board of Adjustment over disputes " 'growing out of grievances or out of interpretation or application of any of the terms of the' collective bargaining agreement but 'shall not extend to change in hours of employment, rates of compensation or working conditions. . . .'" *Id.*

Court in January 1987.¹³⁴ AFA alleged that if the System Board ruled in its favor, available relief could include an order binding Delta to the terms of its agreement with Western, or in the alternative, "a determination that Western would be required to respond in damages in the event that it failed to bind Delta to the CBA."¹³⁵ Despite exhaustive efforts by AFA and other Western unions, the district court dismissed AFA's complaint,¹³⁶ and the merger took place as scheduled.¹³⁷

The NMB subsequently ruled that the merger had eliminated Western as a separate operating entity. The certifications of its unions, including AFA, were extinguished retroactively to the merger date (April 1, 1987) because they now represented a minority of their crafts in the merged enterprise.¹³⁸ Delta subsequently moved to dismiss AFA's appeal of the district court's decision on grounds that the NMB's decertification of AFA rendered the cause moot. The United States Court of Appeals for the D.C. Circuit disagreed.¹³⁹ Although AFA's claim for injunctive relief was rendered moot by consummation of the merger and resulting decertification by the NMB, the court held that "a claim for damages keeps the controversy alive if that claim 'is not so insubstantial or so clearly foreclosed by prior decisions that th[e] case may not proceed.'"¹⁴⁰ Because the arbitrator could award damages, the request for an order to arbitrate was not moot.¹⁴¹

The *Flight Attendants* court astutely recognized that while the merger situation appears to raise "representa-

¹³⁴ 662 F. Supp. at 2.

¹³⁵ 879 F.2d at 908.

¹³⁶ 662 F. Supp. at 4.

¹³⁷ 879 F.2d at 908.

¹³⁸ *In re Delta Air Lines, Inc. and Western Air Lines, Inc.*, 14 N.M.B. 291, 301 (1987).

¹³⁹ 879 F.2d at 910. The court of appeals stated: "[A]s long as some issues remain alive, 'the remaining live issues supply the constitutional requirement of case or controversy.' " *Id.* at 909 (citing *Powell v. McCormack*, 395 U.S. 486, 496-97 (1969)).

¹⁴⁰ *Id.* (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8-9 (1978)).

¹⁴¹ *Id.* (citing *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 459 (1957); *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 442-43 (1984)).

tion issues",¹⁴² far more was at stake than the decertification of a bargaining representative. The United States Supreme Court has held that arbitration is an available means of resolving disputes which arise under the RLA but do not fall within the realm of the NMB.¹⁴³ Therefore, the union's claim for breach of contract cannot be declared nonarbitrable simply because there is a tangential "representation issue."¹⁴⁴ An arbitrator's award of damages to the union, even when subsequently enforced through judicial proceedings, would not disturb the NMB's decertification function. "This dispute is over a sum of money: Delta has it and AFA wants it; no other person, and no transaction, is affected by which of them winds up with it."¹⁴⁵

The *Flight Attendants* decision has favorable implications for unions which face abrogation of an existing collective bargaining agreement due to merger or acquisition of the employer/carrier. Although the collective bargaining relationship may not survive the merger, a successorship clause like that in the contract between Western and AFA¹⁴⁶ gives rise to a viable cause of action for contract damages. This decision offers a union some hope of recovery which survives the finality of decertification.

The salient distinction between earlier merger decisions and *Flight Attendants* is the relief sought by the

¹⁴² *Id.* at 917.

¹⁴³ *General Comm. of Adjustment v. Missouri-Kansas-Texas R.R. Co.*, 320 U.S. 323, 336-37 (1943).

¹⁴⁴ 879 F.2d at 917.

¹⁴⁵ *Id.* at 914.

An award of damages for a past breach of contract, on the other hand, would not [invade the NMB's exclusive jurisdiction over representation issues]. First, the NMB's policy of revoking a minority union's certificate as of the date of an operational merger would not be affected if it were later determined that the carrier, by agreeing to the terms of the merger, had breached its [collective bargaining agreement. . . . Second, an award of damages would have no effect on the NMB's certification determination. . . . Finally, a damage award, unlike prospective relief, would not cause any confusion as to which union is the proper post-merger representative.

Id. at 913-14.

¹⁴⁶ See *supra* note 131 setting forth the contents of the successorship clause.

union.¹⁴⁷ The earlier cases did not present an independent claim for damages,¹⁴⁸ but only for decertification or "representation" issues. Whether framed in terms of an employer's refusal to bargain,¹⁴⁹ or a declaratory judgment enforcing the contract,¹⁵⁰ any affirmative relief would still in effect have amounted to a certification of the union as bargaining representative.¹⁵¹ Federal courts have declined subject matter jurisdiction to decide this type of claim.¹⁵²

Such is not the case in *Flight Attendants*. The union did not dispute that the NMB's decertification order precluded its right to represent Delta employees after the merger date.¹⁵³ The union simply asserted, and the court agreed, that Delta¹⁵⁴ should be ordered to arbitrate over Western's breach of its successorship clause,¹⁵⁵ and that a

¹⁴⁷ See *International Bhd. of Teamsters v. Western Airlines*, 813 F.2d 1359 (9th Cir.), *inj. stayed pending cert.*, 480 U.S. 1301 (O'Connor, J., in chambers), *vacated mem.*, 484 U.S. 806 (1987) *dismissed as moot*, 854 F.2d 1178 (9th Cir. 1988). This case was ultimately dismissed as moot because the disputed merger had already taken place. Neither the Supreme Court nor the Ninth Circuit on remand expressed any opinion as to the viability of claims asserted in the post-merger context. See *infra* notes 168-177 and accompanying text, discussing this case in more detail. See also *Air Line Exec. Ass'n v. Republic*, 798 F.2d at 968-79; *Teamsters v. Texas Int'l*, 717 F.2d at 159; *ALPA v. Texas Int'l*, 656 F.2d at 23-24; *IAM v. Northeast II*, 536 F.2d at 977; *Brotherhood of Ry. Clerks v. United*, 325 F.2d at 579-80.

¹⁴⁸ In *ALPA v. Texas Int'l*, 656 F.2d at 18, the Second Circuit noted the union's claim for contract damages but deferred to the NMB's jurisdiction. However, the union in that case sought a *judicial* award of damages, rather than an order to arbitrate. Judicial intervention would have circumvented the specific "minor dispute" resolution provisions of the RLA at 45 U.S.C. § 184.

¹⁴⁹ See *Air Line Exec. Ass'n v. Republic*, 798 F.2d at 968; *ALPA v. Texas Int'l*, 656 F.2d at 17-18; *IAM v. Northeast II*, 536 F.2d at 975.

¹⁵⁰ *Teamsters v. Texas Int'l*, 717 F.2d at 160; *Brotherhood of Ry. Clerks v. United*, 325 F.2d at 576.

¹⁵¹ *Teamsters v. Texas Int'l*, 717 F.2d at 162. "The form of the complaint [does] not control for the substance of the dispute in fact involved the question of representation of the employees." *Id.*

¹⁵² See *supra* notes 73-81 and accompanying text, discussing resolution of "representation" disputes.

¹⁵³ *Flight Attendants v. Delta*, 879 F.2d at 909; *In re Delta Air Lines, Inc. & Western Air Lines, Inc.*, 14 N.M.B. 291, 301 (1987).

¹⁵⁴ As the acquiring corporation in the merger, Delta assumed the liabilities of Western. L. SOLOMON, D. SCHWARTZ & J. BAUMAN, *CORPORATIONS LAW AND POLICY* 947 (1988).

¹⁵⁵ *Flight Attendants v. Delta*, 879 F.2d at 910.

federal district court has jurisdiction to order the arbitration.¹⁵⁶ The relief sought by the AFA does not aspire to any relationship between the union and the employer beyond the date of merger. Rather, it looks to legal rights and duties created by the collective bargaining agreement before the merger was conceived.

The issue still to be addressed is whether Delta is now "answerable in damages" for Western's failure to honor its contractual commitment.¹⁵⁷ This claim survives abrogation of the collective bargaining agreement by the merger.¹⁵⁸ The court stated, "[W]e decline to hold . . . that a bargained-for successorship clause creates no legal rights or duties whatsoever. Whether the successorship clause in this case creates any legal obligations is, of course, a matter within the province of the arbitrator."¹⁵⁹ Accordingly, the matter was remanded to the district court for an order to arbitrate.¹⁶⁰

The Supreme Court denied *certiorari*¹⁶¹ after inviting the Solicitor General to file a brief stating the position of

[A]n arbitrator might find that Western was required to structure the merger so as to preserve itself as a separate operating entity. . . . [T]he arbitrator might also find that the NMB's determination to extinguish AFA's certification as representative of the former Western flight attendants was a foreseeable consequence of Western's breach, and that the carrier is liable to AFA for its contract damages. The situation would be no different analytically if the [collective bargaining agreement] had expressly provided for a sum of liquidated damages in the event that Western breached the successorship clause.

Id.

¹⁵⁶ *Id.* at 917.

This damage action is not a jurisdictional dispute within the NMB's exclusive jurisdiction under § 2, *Ninth*, of the RLA. At most, it may raise what Delta calls a "representation issue." . . . We therefore conclude that § 2, *Ninth* of the RLA does not divest the district court of jurisdiction to order arbitration of AFA's claim for damages.

Id.

¹⁵⁷ *Id.* at 917.

¹⁵⁸ *Id.* at 910. "[A]s a general rule, grievances arising before expiration of a CBA survive and continue to be governed by its terms." *Id.*, (citing *Elgin*, 325 U.S. at 711).

¹⁵⁹ *Id.* at 917.

¹⁶⁰ *Id.*

¹⁶¹ 110 S. Ct. 1781 (1990).

the United States.¹⁶² Thus, there remains at least hope that AFA, having lost its right to represent Western's former employees, will recover its contractual expectations from the defunct collective bargaining agreement. The Solicitor General, in his brief, took the position that "allowing the arbitration to go forward is fully compatible with the statutory plan to entrust representation disputes exclusively to the NMB and to entrust minor disputes over contract application exclusively to arbitrators."¹⁶³ Nor did the Solicitor General see a conflict between *Flight Attendants* and other appellate court decisions in view of the unique nature of relief sought: "a claim for damages for a pre-merger breach of a successorship provision."¹⁶⁴ The Brief did, however, distinguish a recent decision of the Second Circuit, *Flight Engineers International Association v. Pan American World Airways*,¹⁶⁵ which appears slightly in tension with the *Flight Attendants* holding.¹⁶⁶ Finally, the Solicitor General disagreed with Delta's contention that the court of appeals' decision would "create a climate of uncertainty inhibiting airline mergers."¹⁶⁷

¹⁶² 110 S. Ct. 402 (1989).

¹⁶³ Brief for the United States as Amicus Curiae at 3, Delta Air Lines, Inc. v. Association of Flight Attendants, AFL-CIO, 110 S. Ct. 1781 (1990) (No. 89-459) [hereinafter Brief of the United States].

¹⁶⁴ *Id.*

¹⁶⁵ 896 F.2d 672 (2d Cir. 1990).

¹⁶⁶ Brief of the United States, *supra* note 163, at 6-7. The cases are significantly different on their facts. *Flight Attendants* stemmed from a single pre-merger action by the employer, entering the merger agreement with Delta in breach of its successorship clause. *Flight Engineers v. Pan Am*, on the other hand, addressed a union's claim that an airline had breached a "scope" clause requiring the carrier or its subsidiaries to use union employees for all of a designated type of work. Although the union's claim was amended to seek only damages, it still implicated concerns within the exclusive jurisdiction of the NMB because there had been no conclusive determination of the representation issue following Pan Am's acquisition of Ransome Airlines. *Flight Engineers*, 896 F.2d at 674.

¹⁶⁷ Brief of the United States, *supra* note 163, at 3.

Although the risk of damages for breach of a successorship provision conceivably could influence the structure or viability of some airline mergers, more likely it would simply affect the price at which a transaction remains attractive. . . .

At all events, even if some airline mergers are affected by the decision below, the policies of the Railway Labor Act do not provide a basis for changing that result. If Congress determines that the en-

The result in *Flight Attendants* is surprising because the Supreme Court did not deal favorably with the action brought by two other unions whose contracts were also extinguished by the Western/Delta merger.¹⁶⁸ Justice O'Connor lifted an injunction ordered by the Ninth Circuit Court of Appeals.¹⁶⁹ This allowed the merger to be completed on schedule. Subsequently, the Court granted *certiorari* and then vacated and remanded the lower court's decision.¹⁷⁰ The Ninth Circuit eventually dismissed the matter as moot, the merger having been completed and the labor contracts extinguished.¹⁷¹

Neither Justice O'Connor's opinion staying the injunction,¹⁷² nor the Ninth Circuit's dismissal of the appeal as moot,¹⁷³ mentioned damage claims, although they were raised by the pleadings.¹⁷⁴ The Ninth Circuit characterized the relief sought as "an order compelling Western to arbitrate and an injunction prohibiting the merger."¹⁷⁵ Justice O'Connor's opinion focused only upon the propriety of the Ninth Circuit's injunction of the merger and the emergency relief sought.¹⁷⁶ Since neither opinion foreclosed the union's damage claim in *Flight Attendants*, the D.C. Circuit remanded the case for an order to

forcement of successorship clauses adversely affects air or rail systems, it can provide a legislative [sic] remedy. Existing RLA provisions should not be stretched beyond their proper bounds to deny the claim asserted here.

Id. at 8-9.

¹⁶⁸ *International Bhd. of Teamsters v. Western Airlines*, 813 F.2d 1359 (9th Cir.), *inj. stayed pending cert.*, 480 U.S. 1301 (O'Connor, J., in chambers), *vacated mem.*, 484 U.S. 806 (1987), *dismissed as moot*, 854 F.2d 1178 (9th Cir. 1988).

¹⁶⁹ 480 U.S. at 1304.

¹⁷⁰ 484 U.S. at 806.

¹⁷¹ 854 F.2d at 1178. Once Justice O'Connor lifted the Ninth Circuit's injunction, legal obstacles to the merger were removed. The final step of the Delta-Western merger took place, and Western ceased to exist as a separate operating entity. The matter became moot because the relief sought in the union's original complaint was no longer available. *Id.*

¹⁷² 480 U.S. at 1304.

¹⁷³ 854 F.2d at 1178.

¹⁷⁴ *Flight Attendants v. Delta*, 879 F.2d at 914.

¹⁷⁵ *Teamsters v. Western*, 854 F.2d at 1178.

¹⁷⁶ 480 U.S. at 1308-10.

arbitrate.¹⁷⁷

5. Analysis

The result in *Flight Attendants* is sound. If the NMB's decertification of a union automatically adjudicated the remaining damage claim as well, the NMB would, in effect, have exclusive jurisdiction over a cause of action for which it cannot grant relief. Thus, the successorship clause in an airline labor contract would confer only a right without a remedy.¹⁷⁸ The Supreme Court has previously made clear that the "representation dispute" powers granted to the NMB under Section 2, *Ninth*, of the RLA¹⁷⁹ are extremely narrow.¹⁸⁰ It would be anomalous now to construe those powers to include interpretation or application of an existing collective bargaining agreement.¹⁸¹

Furthermore, delegating resolution of a "minor dispute" to the NMB would undermine the contractual arbitration machinery which lies "at the very heart of the

¹⁷⁷ *Flight Attendants v. Delta*, 879 F.2d at 917.

¹⁷⁸ *Air Line Pilots Ass'n & Northwest Airlines*, ALPA Case No. CH1-60-73-F (Eaton, 1975), reprinted in M. HILL & A. SINICROPI, *REMEDIES IN ARBITRATION* 23 (1981).

It is often the case in industrial disputes . . . that the fashioning of a remedy appropriate to a right is required. The necessity for this is founded in the common law maxim that where there is a right, there is a remedy. That maxim, in turn, is derived from the simple realization that where a right is purportedly granted, but where no remedy is awarded when the right is violated, the right itself is meaningless.

Id.

¹⁷⁹ 45 U.S.C. § 152, *Ninth*.

¹⁸⁰ *Switchmen's Union v. NMB*, 320 U.S. at 305. "Under this Act Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It was to find the fact and then cease." *Id.*

¹⁸¹ *Flight Attendants v. Delta*, 879 F.2d at 916.

In the absence of some specific indication that the legislature intended that all issues arguably related to representation must be decided by the NMB, we cannot conclude that Congress vested in a body with such limited powers exclusive jurisdiction over a potentially broad range of disputes that may only tangentially raise issues within its competence.

Id.

system of industrial self-government.”¹⁸² Thirty years ago in the *Steelworkers’ Trilogy*¹⁸³ the Supreme Court firmly established arbitration as the most desirable method of resolving disputes under a collective bargaining agreement.¹⁸⁴ The “arbitration of labor disputes” was described by the Court as “part and parcel of the collective bargaining process itself.”¹⁸⁵ The Supreme Court recognized a strong presumption of arbitrability in holding that “[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”¹⁸⁶ The *Flight Attendants* holding that a union’s damage claim for breach of the successorship clause is arbitrable implicitly imports this time-honored principle of industrial common law into the merger context.

¹⁸² *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement.

Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective bargaining agreement.

Id.

¹⁸³ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 574; *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

¹⁸⁴ See M. HILL & A. SINICROPI, *supra* note 178, at 13-22. This source presents an in-depth discussion of the *Steelworkers’ Trilogy*, its impact on labor-management relations, and the judicial response.

¹⁸⁵ *Warrior & Gulf Navigation*, 363 U.S. at 578.

¹⁸⁶ *Id.* at 582-83.

III. BANKRUPTCY

A. *Treatment of Collective Bargaining Agreements Under Prior Provisions of the Bankruptcy Code*

Section 365 of the United States Bankruptcy Code allows a trustee in bankruptcy, with court approval, to reject any existing executory contract of the debtor.¹⁸⁷ At one time, collective bargaining agreements were treated as any other executory contract and were subject to rejection by an employer upon filing a petition for reorganization under Chapter 11 of the Bankruptcy Code.¹⁸⁸ This treatment created a fundamental tension between bankruptcy law and national labor policy.¹⁸⁹

Theoretically, contracts governed by the Railway Labor Act (RLA)¹⁹⁰ were always exempted from automatic rejection by Section 1167 of the Bankruptcy Code.¹⁹¹ Elimina-

¹⁸⁷ 11 U.S.C. § 365(a) (1988). "Except as provided [elsewhere in this Title], the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." *Id.*

¹⁸⁸ 11 U.S.C. § 502(a), (g).

¹⁸⁹ The U.S. Supreme Court held in the *Steelworkers' Trilogy* that collective bargaining agreements were not just ordinary commercial contracts. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The collective bargaining agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.

A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationships they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice . . . is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces.

Warrior & Gulf Navigation, 363 U.S. at 578-80 (citations omitted).

¹⁹⁰ 45 U.S.C. §§ 151-188 (1988).

¹⁹¹ 11 U.S.C. § 1167 provides:

Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of

tion of an existing collective bargaining agreement would have the effect of changing the wages and working conditions of employees subject to the agreement. Section 1167 provides that neither the bankruptcy court nor a trustee may implement such changes without first exhausting the bargaining procedures set out in the Railway Labor Act.¹⁹²

Conflicting views existed as to whether Section 1167 applied to airline contracts. The confusion resulted in part from an earlier version of the statute clearly protecting only railroad employees,¹⁹³ and in part from inconsistent judicial interpretation.¹⁹⁴ The usual result was that airline collective bargaining agreements were unilaterally abrogated in a bankruptcy proceeding, and the employees, having already granted major concessions to the en-

the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act (45 U.S.C. § 151 et seq.) except in accordance with section 6 of such Act (45 U.S.C. § 156).

Id.

¹⁹² 45 U.S.C. § 156.

¹⁹³ 11 U.S.C. § 205(n), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2642 (codified at 11 U.S.C. §§ 101-151326 (1988)). "No judge or trustee acting under this Act shall change the wages or working conditions of *railroad employees* except in the manner prescribed in the Railway Labor Act, as amended June 21, 1934, or as it may be hereafter amended." *Id.* The present Bankruptcy Code provides that "wages or working conditions of employees of the debtor established by a collective bargaining agreement that is *subject to the Railway Labor Act*" shall not be changed except in accordance with Section 6 of the Railway Labor Act. 11 U.S.C. § 1167 (1988) (emphasis added).

¹⁹⁴ *Air Florida Pilots Ass'n v. Air Florida, Inc.* (In re Air Florida Sys. Inc.), 48 Bankr. 440 (Bankr. S.D. Fla. 1985). "A collective bargaining agreement between a union and an air carrier that, absent bankruptcy, is generally subject to the Railway Labor Act is not operatively distinguishable from a collective bargaining agreement that is subject to the National Labor Relations Act." *Id.* at 444. *See also* *Brotherhood of Ry. Clerks v. REA Express*, 523 F.2d 164 (2d Cir. 1975), explaining that Congress intended only railroad workers to be exempt from the provisions of the Bankruptcy Act because they were "entitled to the unique benefits of railroad reorganization under § 77 of the Bankruptcy Act. . . ." *Id.* at 169 n.4 (citing H.R. REP. No. 1897, 72nd Cong., 2d Sess. (1933); S. REP. No. 92-1158, 92nd Cong., 2d Sess. (1972)).

But cf., In re Overseas Nat'l Airways, 238 F. Supp. 359 (E.D.N.Y. 1965). "[T]he debtor's employees are covered by the Railway Labor Act which, by the terms of the Bankruptcy Act itself (Section 77 sub. n, section 205, sub. n, of Title 11, U.S. Code), prescribes the *only* method by which collective bargaining agreements of the kind here involved may be disaffirmed." *Id.* at 360-61 (emphasis in original).

terprise, became pre-petition creditors in the eyes of the bankruptcy court.¹⁹⁵ Thus, all claims for damages and other entitlements arising under the rejected collective bargaining agreement had to be filed with the bankruptcy court and assigned priority by the court.¹⁹⁶ All employee claims or grievances were treated as unliquidated claims for purposes of reorganization.¹⁹⁷

Despite the usual abrogation of collective bargaining agreements in a Chapter 11 proceeding, a dichotomy of opinion developed regarding the appropriate standards to use in determining when the agreement could be rejected. Some courts simply applied a business judgment rule test despite the unique nature of a labor contract.¹⁹⁸ Others followed an approach first advanced in *In re Over-*

¹⁹⁵ *Oversight Hearing on Effect of Bankruptcy Actions on the Stability of Labor-Management Relations and the Preservation of Labor Standards: Joint Hearing Before the Subcomm. on Labor-Management Relations and Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 19-20 (1983) [hereinafter *Joint Hearing*] (statement of Susan Bianchi Sand, Vice President, Association of Flight Attendants, AFL-CIO).

As a result of either legislative ambivalence or inattentiveness to detail, the status of the airline collective-bargaining agreement after the filing of the bankruptcy petition is unclear. Despite the traditional specialized concern that the Railway Labor Act pacts be differentiated from other labor pacts, . . . [a]irline labor contracts seem to be confined to the same limbo status as other labor contracts in the bankruptcy setting.

Id. at 20-21.

¹⁹⁶ 11 U.S.C. § 502(g).

¹⁹⁷ 11 U.S.C. § 502(e). These claims included loss of wages, fringe benefits, severance, vacation, sick leave, and pension contributions. See also Bendixsen, *Enforcing the Duty to Arbitrate Claims Arising Under a Collective Bargaining Agreement Rejected in Bankruptcy: Preserving the Parties' Bargain and the National Labor Policy*, 8 INDUS. REL. L.J. 401, 421 (1986) (discussing treatment of employee claims in a bankruptcy proceeding).

¹⁹⁸ See, e.g., *In re Continental Airlines Corp.*, 38 Bankr. 67, 71-72 (Bankr. S.D. Tex. 1984) (rejecting "the notion that the [bankruptcy] was 'engineered' over a period of time by management as the means by which it could reject these [collective bargaining] contracts"); *In re Rath Packing Co.*, 36 Bankr. 979, 989-98 (Bankr. N.D. Iowa 1984); *In re Concrete Pipe Mach. Co.*, 28 Bankr. 837, 839-40 (Bankr. N.D. Iowa 1983) ("collective bargaining agreements should receive no more protection than other executory contracts which may be rejected"); *Ateco Equip., Inc. v. Columbia Gas (In re Ateco Equip., Inc.)*, 18 Bankr. 915, 916-917 (Bankr. W.D. Pa. 1982).

*seas National Airways, Inc.*¹⁹⁹ This latter approach paid lip service to the collective bargaining commitment by requiring "thorough scrutiny, and a careful balancing of the equities on both sides."²⁰⁰

The *Overseas National Airways* court acknowledged that relieving a debtor from all contractual duties under a collective bargaining agreement could deprive its employees of "their seniority, welfare and pension rights, as well as other valuable benefits which are incapable of forming the basis of a provable claim for money damages."²⁰¹ Consequently, employees could be left with virtually nothing while their employer made favorable arrangements with its creditors at the employees' expense.²⁰² Some courts specifically held, however, that an arbitration clause survived rejection, leaving a duty to arbitrate the issue of damages sustained as a result of the rejection.²⁰³

The first federal appellate court to articulate a standard for rejection of collective bargaining agreements was the Second Circuit in *Shopmen's Local Union No. 455 v. Kevin Steel Products*.²⁰⁴ The standard it adopted was *Overseas National Airways'* lenient "balancing of the equities."²⁰⁵ Within a year, however, the court adopted a more rigid standard in *Brotherhood of Railway Clerks v. REA Express, Inc.*²⁰⁶ The *REA* standard allowed rejection only where an "onerous and burdensome" collective bargaining agreement alone would thwart efforts to save a failing carrier in bankruptcy from collapse.²⁰⁷

¹⁹⁹ 238 F. Supp. 359 (E.D.N.Y. 1965).

²⁰⁰ *Id.* at 361.

²⁰¹ *Id.* at 361-62.

²⁰² *Id.* at 362.

²⁰³ *Truck Drivers Local Union No. 806 v. Bohack Corp.*, 541 F.2d 312 (2d Cir. 1976).

²⁰⁴ 519 F.2d 698 (2d Cir. 1975).

²⁰⁵ *Id.* at 704.

²⁰⁶ 523 F.2d 164 (2d Cir. 1975). "[I]n view of the serious effects which rejection has on the carrier's employees it should be authorized only where it clearly appears to be the lesser of two evils and that, *unless the agreement is rejected, the carrier will collapse* and the employees will no longer have their jobs." (Emphasis added.) *Id.* at 172.

²⁰⁷ *Id.* at 167.

Courts following the *REA* approach applied a two-step determination: (1) whether the collective bargaining agreement was so burdensome that successful reorganization would be impossible without rejection; and (2) whether the equities of the particular fact situation favored the debtor/employer.²⁰⁸ Notwithstanding the lofty objectives of this careful scrutiny, in practice in the equities usually weighed in favor of the burdened employer. The United States Supreme Court, in *NLRB v. Bildisco & Bildisco*,²⁰⁹ resolved the inconsistency among the circuits between the strict *REA* test and the perfunctory *Kevin Steel* equity balancing.

B. *The Bildisco Decision*

Bildisco involved an employer who filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code and was eventually granted authority to reject its collective bargaining agreement pursuant to Section 365(a).²¹⁰ Prior to approval by the bankruptcy court, however, Bildisco unilaterally ceased paying wage, pension and health obligations.²¹¹ This cessation violated the agreement's express provision that the contract terms were binding on the parties and their successors should bankruptcy intervene.²¹² Unfair labor practice charges filed by the union representing approximately forty-five percent of the work force resulted in a National Labor Relations Board (NLRB) order that Bildisco pay pension, health and welfare benefits, and union dues as provided in the contract.²¹³ The Court of Appeals for the Third Circuit, however, refused to enforce the NLRB's decision.²¹⁴

²⁰⁸ *In re Alan Wood Steel Co.*, 449 F. Supp. 165, 169 (E.D. Pa. 1978); *In re Penn Fruit Co.*, 92 L.R.R.M. 3548 (E.D. Pa. 1976).

²⁰⁹ 465 U.S. 513 (1984).

²¹⁰ *Id.* at 522-23.

²¹¹ *Id.* at 518.

²¹² *Id.* at 518.

²¹³ *Id.* at 517-19.

²¹⁴ *NLRB v. Bildisco & Bildisco*, 682 F.2d 72, 84-85 (3d Cir. 1982), *aff'd*, 465 U.S. 513 (1984).

The Supreme Court, affirming the Third Circuit, held that a collective bargaining agreement should be rejected under Section 365(a) as long as the debtor shows that the agreement burdens the estate and that the equities balance in favor of rejection.²¹⁵ The Court acknowledged that Congress had intended a higher standard than the business judgment rule for rejection of a collective bargaining agreement, but held that the standard was something less than the *REA* standard.²¹⁶ In essence, the standard adopted was the "balancing of equities" standard espoused in *Kevin Steel*.²¹⁷

The Court further concluded that, while a debtor-in-possession remains the same entity which existed before the filing of the bankruptcy petition, the Bankruptcy Code empowers the debtor "to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing."²¹⁸ The result was that "from the filing of a petition in bankruptcy until formal acceptance, the collective-bargaining agreement is not an enforceable contract," even prior to court authorized rejection.²¹⁹

Thus, in *Bildisco* the Supreme Court granted judicial sanction to a practice which had in effect already become a new economic weapon, "the growing use of the Federal bankruptcy laws by corporations to abrogate labor agreements and commitments to workers."²²⁰ Although the *Bildisco* decision avers that labor agreements subject to the Railway Labor Act are expressly exempted by Section 1167 of the Bankruptcy Code, the case has been cited to justify rejection of airline contracts as well.²²¹

²¹⁵ *Bildisco*, 465 U.S. at 525-26.

²¹⁶ *Id.* at 526.

²¹⁷ *Id.* at 520-21; see also *In re Brada Miller Freight Sys., Inc.*, 702 F.2d 390 (11th Cir. 1983).

²¹⁸ *Bildisco*, 465 U.S. at 528.

²¹⁹ *Id.* at 530. Justice Rehnquist cogently stated, "[T]he filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again." *Id.*

²²⁰ *Joint Hearing, supra* note 195, at 2 (statement of George Miller, Chairman, Committee on Labor Standards).

²²¹ *In re Air Florida Sys., Inc.*, 48 Bankr. at 443-44.

Bildisco established that a bankruptcy court could nullify a collective bargaining agreement merely upon a showing that the employer could operate more cheaply without it. The *Bildisco* test would also excuse an employer from performance of its collective bargaining agreement immediately upon filing a petition in bankruptcy, even before adjudication of the motion to reject. The implications of *Bildisco* for organized labor were devastating. Employees' rights under a collective bargaining agreement were secure only so long as the employer deemed it economically feasible to fulfill its obligations.

C. *The Response to Bildisco: Bankruptcy Amendments and Federal Judgeship Act of 1984*²²²

Legislative reaction to the Court's pronouncement in *Bildisco* was swift and forceful.²²³ The following day an amendment to a pending bankruptcy reform bill was proposed.²²⁴ The amendment would have codified the stricter standard for rejection applied in *REA Express*,²²⁵ disallowing rejection of a collective bargaining agreement unless the debtor could prove that otherwise reorganization would absolutely fail.²²⁶ After a deadlock over enactment of legislation to ease the tension between labor policy and bankruptcy law, an emergency bankruptcy court restructuring bill passed, leaving wording of the labor protective provisions to a joint conference committee. Ultimately Section 1113 of the Bankruptcy Code²²⁷

²²² Pub. L. No. 98-353, 98 Stat. 330, 333 (1984) (codified at 11 U.S.C. § 1113 (1988)).

²²³ See Pulliam, *The Collision of Labor and Bankruptcy Law: Bildisco and the Legislative Response*, 36 LAB. L. J. 390 (1985). This article presents a discussion of labor's reaction to the *Bildisco* decision.

²²⁴ H.R. 4908, 98th Cong., 2d Sess., 130 CONG. REC. 2989 (1984).

²²⁵ 523 F.2d at 167. See *supra* notes 205-208 and accompanying text for a discussion of the *REA Express* standards.

²²⁶ H.R. 5174, 98th Cong., 2d Sess., 130 CONG. REC. 6221, 6224 (1984). Section 277 of the bill was the basis for 11 U.S.C. § 1113. See Rosenberg, *Bankruptcy and the Collective Bargaining Agreement—A Brief Lesson in the Use of the Constitutional System of Checks and Balances*, 58 AM. BANKR. L.R. 293, 312-23 (1984). This article contains a detailed legislative history of Section 1113.

²²⁷ 11 U.S.C. § 1113.

emerged, effective on the date of its enactment, July 10, 1984. In the words of one court, Section 1113 "created an expedited form of collective bargaining with a number of safeguards designed to insure that the employers cannot use Chapter 11 solely to rid themselves of their union, but only [may propose] modifications that are directly necessary for the firm's survival."²²⁸

While Congress' main concern was to reverse the effect of *Bildisco*, the legislative history of Section 1113 also makes reference to the "flagrant abuse" of the Continental Airlines bankruptcy,²²⁹ perhaps the most glaring perversion of the bankruptcy law in recent history. The Railway Labor Act (RLA) expressly provides that changes in the pay rates, rules and working conditions agreed upon between air carriers and their employees will be implemented only in the manner prescribed in the agreements themselves or pursuant to procedures set out in the RLA.²³⁰ Nevertheless, on September 24, 1983, Continental filed a voluntary Chapter 11 petition in bankruptcy²³¹ and then "announced the termination of two-thirds of its unionized employees, unilaterally abrogated its union contracts and implemented wage and benefit cuts of 50 percent, eradicated seniority, and established work rules never before so much as reported to its union."²³² Three

²²⁸ In re K&B Mounting, 50 Bankr. 460, 462-63 (Bankr. N.D. Ind. 1985).

²²⁹ 130 CONG. REC. 6247 (1984).

We are all familiar with Continental Airlines' recent flagrant abuse of the bankruptcy and labor laws by rejecting its contract, negotiated under the Railway Labor Act. . . . Since the Continental collective bargaining agreement is subject to the Railway Labor Act, Continental's rejection of the agreement is clearly illegal under the current law.

Id. (statement of Rep. Florio).

²³⁰ 45 U.S.C. § 152, *Second*.

²³¹ In re Continental Airlines Corp., 38 Bankr. 67, 69 (Bankr. S.D. Tex. 1984); *see also*, *Joint Hearing*, *supra* note 195, at 6 (statement of Henry Duffy, President, Air Line Pilots Association).

²³² *Joint Hearing*, *supra* note 195, at 6. "The action of Continental Airlines threatens air safety, destroys the concept of a truly integrated national air system, shatters the standard of living of its former employees, and demonstrates callous disregard for that cornerstone of the free-enterprise system — the sanctity of a contract. . . ." *Id.* at 4. "The Chairman of the Board [Frank Lorenzo] advertised

days later the "proud bird" arose from the ruins of its burdened enterprise and resumed operations on its own take-it-or-leave-it terms.²³³

The tactics employed by Continental are not available to airline employers under Section 1113. The section emphatically applies to airline collective bargaining agreements, excluding only railroad contracts under Title I of the RLA.²³⁴ The message of the new Section 1113 is clear: an employer may no longer unilaterally terminate or alter the terms and conditions of an existing collective bargaining agreement without first complying with the terms of the statute.²³⁵

D. *Legal Issues Raised by Section 1113 of the Bankruptcy Code*

Section 1113 in essence affirms the "balancing of equities" standard unanimously adopted by the Court in *Bildisco*,²³⁶ but rejects the notion that a debtor-in-possession may unilaterally breach a collective bargaining agree-

his purpose in filing — to be rid of its union contracts and reduce the labor costs. This is a use of Chapter 11 as a collective bargaining weapon. . . ." *Id.* at 7. It is these tactics which earned Mr. Lorenzo his reputation as "the No. 1 union buster in this country. . . ." *Id.* at 41 (statement of William L. Scheri, Airline Coordinator, International Association of Machinists & Aerospace Workers, AFL-CIO).

²³³ *Joint Hearing*, *supra* note 195, at 6; see also Kahn, *supra* note 5 at 339-40. Continental was not the first airline employer to employ this tactic to rid itself of labor obligations. In 1933 Century Air Lines announced it would carry air mail at one half the going rate. It then announced a cut in pilots' pay of \$200 per month. Pilots were ordered to resign and reapply for employment at the new rate. This led to ALPA's first strike and eventually resulted in a bill submitted April 1, 1933, to include air transport under the Railway Labor Act. *Id.*

²³⁴ 11 U.S.C. § 1113(a).

The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

Id.

²³⁵ 11 U.S.C. § 1113(f). "No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section." *Id.*

²³⁶ 11 U.S.C. § 1113(c)(3). "The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that . . . the balance of the equities clearly favors rejection of such agreement." *Id.*

ment before formal bankruptcy court action.²³⁷ The statute imposes an affirmative duty on the employer to bargain with the union prior to modification or rejection of its contract.²³⁸ In effect Section 1113 "takes collective bargaining out of the courts and returns them to the negotiating table where these issues should be handled."²³⁹ In the six years since enactment of Section 1113, however, certain issues have emerged which require judicial interpretation. This section, discusses some recent cases in which those issues were addressed.

In the first decision to disallow rejection of a contract under the new Code section, *In re American Provision Co.*,²⁴⁰ the bankruptcy court identified nine requirements to be met by an employer seeking to reject a labor contract.²⁴¹

²³⁷ 11 U.S.C. § 1113(f).

²³⁸ 11 U.S.C. § 1113(b) provides, in pertinent part:

(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section 'trustee' shall include a debtor in possession) shall —

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protection that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

Id.

²³⁹ Ruben, *Developments in Industrial Relations*, 107 MONTHLY LAB. REV. 45 (1984) (quoting AFL-CIO President Lane Kirkland).

²⁴⁰ 44 Bankr. 907 (Bankr. D. Minn. 1984).

²⁴¹ *Id.* at 909. The nine tests are:

1) The debtor in possession must make a proposal to the Union to modify the collective bargaining agreement.

2) The proposal must be based on the most complete and reliable information available at the time of the proposal.

The court further imposed upon the employer/debtor the "burden of persuasion by the preponderance of the evidence on all nine elements."²⁴² Ultimately the court denied a motion to reject the collective bargaining agreement because the employer had failed to confer in good faith with the union.²⁴³ The following cases illustrate how bankruptcy courts have construed the *American Provision* requirements.

In keeping with the *American Provision* requirements, the employer must first make a proposal to the employees' authorized representative to modify the agreement.²⁴⁴ The union is the sole representative of all employees in a specified class, craft, or bargaining unit.²⁴⁵ It may not always be appropriate, however, for the union to represent both active and retired workers in bargaining for modifications incident to a bankruptcy proceeding.²⁴⁶ When a bankruptcy court determines a conflict of interest be-

3) The proposed modifications must be necessary to permit the reorganization of the debtor.

4) The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably.

5) The debtor must provide to the Union such relevant information as is necessary to evaluate the proposal.

6) Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the Union.

7) At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.

8) The union must have refused to accept the proposal without good cause.

9) The balance of the equities must clearly favor rejection of the collective bargaining agreement.

Id.

²⁴² *Id.*

²⁴³ *Id.* at 911.

²⁴⁴ 11 U.S.C. § 1113(b)(1)(A).

²⁴⁵ 45 U.S.C. § 152, *Third, Fourth*. Under the RLA, a bargaining representative has not only the right but also the duty to represent its members' claims under a collective bargaining agreement. *Wein Air Alaska, Inc. v. Bachner*, 865 F.2d 1106, 1110 (9th Cir. 1989).

²⁴⁶ *In re Century Brass Products, Inc.*, 795 F.2d 265, 275 (2d Cir. 1986) (citing *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172-73 (1971)).

tween active and retired workers,²⁴⁷ the bankruptcy judge should appoint a representative for the class of retirees.²⁴⁸ Rejection may be disallowed when the employer fails to meet its threshold burden of negotiating with a representative of its retired employees.²⁴⁹

An employer's counter-proposal to the union's initial opening has satisfied the proposal requirement,²⁵⁰ although an employer's claim that it bargained to impasse before commencing the bankruptcy proceeding will not.²⁵¹ Consequently, the extensive concession bargaining which usually precedes an airline bankruptcy probably will not satisfy the threshold requirement of a proposal. The court has disallowed rejection where the employer's proposal fails to meet *all* statutory requirements²⁵² or where it contains some illegal or discriminatory provisions.²⁵³ The proposal must deal only with changes that will effect savings for the employer,²⁵⁴ and not with such matters as overtime, shutdowns, job classifications, promotions, transfers, absenteeism, or tardiness.²⁵⁵

American Provision also requires that the employer base its proposal on the "most complete and reliable information available at the time of the proposal."²⁵⁶ The court in

²⁴⁷ *Id.* at 274:

In a Chapter 11 context a refusal to negotiate a reduction in retiree benefits under § 1113 will "vitally affect" active employees in two possible ways: first, it could mean that, . . . they will have to bear a much larger reduction in wages and benefits in order to permit reorganization because of the significant cost of the retiree benefits; second, and more importantly, if retiree benefits cannot be renegotiated, the debtor's reorganization may well fail, in which case the active employees would most likely lose their jobs and benefits.

Id.

²⁴⁸ *Id.* at 275.

²⁴⁹ *Id.* at 276.

²⁵⁰ *In re Allied Delivery Sys. Co.*, 49 Bankr. 700, 703-04 (Bankr. N.D. Ohio (1985)).

²⁵¹ *In re K & B Mounting, Inc.*, 50 Bankr. at 464.

²⁵² *In re American Provision Co.*, 44 Bankr. at 908-09.

²⁵³ *In re Mile Hi Metal Sys., Inc.*, 67 Bankr. 114, 118 (Bankr. D. Colo. 1985).

²⁵⁴ *In re Valley Kitchens, Inc.*, 52 Bankr. 493 (Bankr. S.D. Ohio 1985).

²⁵⁵ *Id.* at 495.

²⁵⁶ *In re American Provision Co.*, 44 Bankr. at 909.

*In re K & B Mounting, Inc.*²⁵⁷ interpreted this requirement to call for detailed projections and recommendations to aid the union in assessing the proposed contract modifications.²⁵⁸ Another court, however, held in *In re Salt Creek Freightways*²⁵⁹ that the employer must provide only such information as is relevant for the union to evaluate the employer's proposal. Section 1113 does not require the employer to provide information for the union to evaluate its own proposal or counterproposal.²⁶⁰ Nor is an employer required to furnish audited financial data.²⁶¹

The third *American Provision* requirement, that "the proposed modifications must be necessary," has become the focus of serious disagreement since the enactment of Section 1113. Federal court decisions are polarized between a strict construction of "necessary" espoused in *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*²⁶² and a deferential construction adopted in *Truck Drivers Local No. 807 v. Carey Transportation, Inc.*²⁶³ The *Wheeling-Pittsburgh* standard allows for only essential or bare minimum modifications in a collective bargaining agreement, while the *Carey Transportation* test allows rejection whenever it would "increase the likelihood of successful reorganization."²⁶⁴

The language of Section 1113(b)(1)(A) mandates a proposal from the employer "which provides for those *necessary* modifications in the employees' benefits and protections that are *necessary* to permit the reorganization

²⁵⁷ 50 Bankr. 460 (Bankr. N.D. Ind. 1985).

²⁵⁸ *Id.* at 467.

²⁵⁹ 47 Bankr. 835 (Bankr. D. Wyo. 1985).

²⁶⁰ *Id.* at 839.

²⁶¹ *In re Amherst Sparkle Mkt.*, 75 Bankr. 847, 850 (Bankr. N.D. Ohio 1987). In the case of a "financially distressed corporation which provides the Union with supportive documentation for its current and projected financial posture," the court held that provision of unaudited financial reports by the debtor was not "fatal." *Id.*

²⁶² 791 F.2d 1074 (3d Cir. 1986). "The 'necessary' standard cannot be satisfied by a mere showing that it would be desirable for the trustee to reject a prevailing labor contract so that the debtor can lower its costs." *Id.* at 1088; *see also* *In re Sol-Sieff Produce Co.*, 82 Bankr. 787 (Bankr. W.D. Pa. 1988).

²⁶³ 816 F.2d 82 (2d Cir. 1987).

²⁶⁴ *Id.* at 89.

of the debtor. . . ."²⁶⁵ This double use of the "necessary" requirement is not mere surplusage. The House-Senate Conference Committee which proposed the language ultimately enacted in Section 1113 intended this requirement to be taken seriously.²⁶⁶ This intent is further evidenced by the requirement for interim modifications under Section 1113(e).²⁶⁷ The court in *In re Wright Air Lines, Inc.*²⁶⁸ returned to the former *REA Express* standard, requiring the debtor to show that the interim relief sought is "essential to the continuation of the debtor's business" or will avoid "irreparable damage to the estate."²⁶⁹

The fourth element of the *American Provision* test requires that all parties be treated fairly and equitably.²⁷⁰ The "fair and equitable" language was inserted by the Conference Committee to guarantee "that the focus for cost cutting must not be directed exclusively at the unionized workers," but instead "the burden of sacrifices in the reorganization process will be spread among all affected parties."²⁷¹ Bankruptcy courts have interpreted this fairness element to require good faith negotiation²⁷² or substantial concessions by management and creditors as well as employees, although not necessarily on a dollar-for-

²⁶⁵ 11 U.S.C. § 1113(b)(1)(A) (emphasis added).

²⁶⁶ 130 CONG. REC. 20,092 (1984).

Therefore, the debtor will not be able to exploit the bankruptcy procedure to rid itself of unwanted features of the labor agreement. . . .

The word "necessary" inserted twice into this provision clearly emphasizes this required aspect of the proposal which the debtor must offer and guarantees the sincerity of the debtor's good faith in seeking contact changes.

Id.

²⁶⁷ See 11 U.S.C. § 1113(e).

²⁶⁸ 44 Bankr. 744, 745 (Bankr. N.D. Ohio 1984).

²⁶⁹ *Id.* at 745.

²⁷⁰ *In re Americanc Provision Co.*, 44 Bankr. at 909; 11 U.S.C. § 1113(b)(1)(A).

²⁷¹ 130 CONG. REC. 20,092 (1984). The committee found this consideration desirable because "experience shows that when workers know that they alone are not bearing the sole brunt of the sacrifices, they will agree to shoulder their fair share and in some instances without the necessity for a formal contract rejection." (statement of Sen. Packwood), *Id.*

²⁷² *In re K & B Mounting*, 50 Bankr. at 465; see also *In re William P. Brogna & Co.*, 64 Bankr. 390, 393 (Bankr. E.D. Pa. 1986); *In re Valley Kitchens*, 52 Bankr. at 493; *In re Cook United, Inc.*, 50 Bankr. 561 (Bankr. N.D. Ohio 1985).

dollar basis.²⁷³ Another fairness consideration, though not essential, is the presence in the proposal of a "snap-back" provision allowing for reinstatement of original contract terms and conditions if and when the employer becomes solvent again.²⁷⁴

Some courts have recognized that the rationale underlying Section 1113 is that "the road to resolution of the conflict between labor and bankruptcy principles lies in honest compromise."²⁷⁵ Certainly this is in keeping with the duty imposed upon labor and management by the RLA to "settle all disputes. . . in order to avoid any interruption to commerce or the operation of any carrier. . . ."²⁷⁶ The RLA, with its emphasis on settlement of labor-management disputes through collective bargaining, would appear to provide the ideal mechanism for compliance with Section 1113. In practice, however, Section 1113's provision for a fair proposal and good faith negotiation probably does not contemplate the extensive bargaining which ordinarily precedes modification of an airline labor contract under the RLA. In this respect, Section 1113 could benefit an airline employer which convinces the bankruptcy court that its financial plight is genuine.

E. Analysis

A dichotomy is again emerging as to which standard courts should apply in approving rejection of a collective bargaining agreement. The present state of affairs is reminiscent of the pre-*Bildisco* controversy between the "equity balancing" of *Kevin Steel* and the "onerous and burdensome" standard of *REA Express*. Clearly it is the standard of *Wheeling-Pittsburgh* and *Wright Air Lines* which most accurately reflects the spirit of Section 1113. "[T]he

²⁷³ *In re Walway Co.*, 69 Bankr. 967, 974 (Bankr. E.D. Mich. 1987).

²⁷⁴ *In re William P. Brogna & Co.*, 64 Bankr. at 392; see also *Wheeling-Pittsburgh Steel*, 791 F.2d at 1090 ("snap-back" clause also a factor in "necessity" analysis).

²⁷⁵ *In re Century Brass*, 795 F.2d at 276.

²⁷⁶ 45 U.S.C. § 152, First (1988).

Debtor-In-Possession must establish either that the relief sought is *essential* to the *continuation* of its business, or, that irreparable damage to the Debtor-In-Possession will result if the relief is not granted.”²⁷⁷

The *Wheeling-Pittsburgh* decision is based upon the legislative history of Section 1113. It provides a clear and definite standard for reconciling principles of labor and bankruptcy law. The *Carey Transportation* decision, on the other hand, affords no definite standard for accomplishing the purpose of Section 1113. It serves only the interest of the Bankruptcy Code in providing relief for debtors.

Only by holding employers to a strict standard of necessity for rejection will the statute protect collective bargaining agreements from casual rejection by an employer who finds it economically unfeasible to perform its obligations. Eventually the Supreme Court may again have occasion to address these differences. If the Court does again address the appropriate standards for rejection of a collective bargaining agreement in bankruptcy, it will do so with the guidance of a clear legislative mandate.

IV. CONCLUSION

Despite recent developments in the law, the survival of a collective bargaining agreement when a carrier undergoes a major economic upheaval is speculative at best. The economic impact of the *Flight Attendants* decision depends upon the result of arbitration. The union could ultimately receive a significant damage award, although the measure of damages in such a case is unclear. On the other hand, the carrier may prevail in its contention that the successorship clause was not intended to govern a merger. Any award would ultimately be subject to enforcement by a federal court.

The employer's position, as stated in *Flight Attendants*, is that “if a carrier were liable in damages for breach of the successorship clause in its [collective bargaining agree-

²⁷⁷ In re Wright Air Lines, 44 Bankr. 744, 745 (Bankr. N.D. Ohio 1984).

ment], it might forego entering into an otherwise desirable merger."²⁷⁸ Imposition of substantial liability upon a carrier/employer could undeniably have that effect. The more positive result, however, is that it would encourage carriers to invite union participation in merger negotiations. A merger does, after all, vitally affect the union's contractual right to represent the carrier's employees.

Significantly the *Flight Attendants* decision would place this "minor dispute" back in the hands of the arbitrator where it belongs. The possibility of a substantial damage award could encourage merging carriers to bind successors to their labor commitments in compliance with a successorship clause. In short, a substantial damage award in *Flight Attendants* could encourage carriers entering into future mergers to be more circumspect regarding their contractual obligations.

The picture for unions in the bankruptcy context has improved, in general, only to the extent that wages and benefits cannot be abolished arbitrarily and instantaneously upon the filing of a petition. Courts have fairly consistently held an employer to the procedural strictures of Section 1113 and have in some instances required concessions by the employer to overcome financial exigencies. In the end, however, the equities of the situation usually tip in favor of the burdened employer.

The statute is sufficient to prevent recurrence of glaring past abuses of the bankruptcy law. Negotiation procedures embodied in Section 1113 optimally will allow union input when an employer's unsound financial condition threatens the livelihood of the union's members. The language of Section 1113 contemplates modifications in a collective bargaining agreement which are strictly *necessary* to an employer's reorganization. Only the courts' adherence to that rigid standard for rejection of a collective bargaining agreement will encourage labor and man-

²⁷⁸ Association of Flight Attendants v. Delta Air Lines, 879 F.2d 906, 917 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990). For a discussion of the case, see *supra* notes 126-186 and accompanying text.

agement to weather economic difficulties in a mutually beneficial manner.

