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THE CONGRESSIONAL MANDATE AGAINST A FEDERAL STRIKE: THE GOVERNMENT'S ENFORCEMENT OF THAT STATUTORY GUIDANCE*

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CONGRESS HAS repeatedly and emphatically forbidden federal employees from striking. In the landscape of the law, this simple concept stands in stark contrast to an otherwise jumbled mass of obscure doctrines and bewildering statutes. No person or group is allowed to halt essential government services.

Despite clear and explicit warnings from each branch of the federal government, the Professional Air Traffic Controllers Organization (PATCO) on August 3, 1981 ignored available alternatives and chose to go on strike. Robert Poli, PATCO's President, in calling the strike promised that "the skies will be silent." In the face of a massive and unprecedented strike, the supply of air traffic control services nevertheless continued uninterrupted, albeit at a reduced level.

The myriad facets of this dispute, factually, legally and philosophically, are impossible to summarize in a short essay. We will outline the historical relationship between the Federal Aviation Administration (FAA) and PATCO, the law governing collective bargaining with federal employees, and the events of 1981. It is our position that the government cor-

* The views expressed in this article are those of the authors and not necessarily those of the Federal Aviation Administration or the Department of Transportation.

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rectly reacted to this attempted shutdown of the national air transportation system. The time-consuming process of rebuilding the air traffic control system is an investment against future threats to the provision of essential government services. Still, the strike and its resolution raises questions about labor-management relations involving public employees.

I. THE EVOLUTION OF AN ILLEGAL STRIKE: PRE-1981 EVENTS

The sources of air traffic controller discontent in 1981 can be found in the 1960's. During the early and mid-1960's, use of the nation's airspace by both commercial and general aviation grew sharply. Initially, the air traffic control system rapidly expanded to meet this demand. One negative aspect of this expansion was a depersonalization of the relationship between management (the FAA) and labor (the controllers). To handle future growth in air traffic, the FAA concentrated on developing new technology, particularly the combination of computers with improved radar systems. Limited attention was given to increasing the system's manpower. The ability to change new and experimental technology into operational hardware and software systems was hampered by limited funds. Because neither increased manpower nor new technology was used to expand the system's capacity, further increases in air traffic were handled by imposing greater workloads on controllers.

Naturally, the controllers reacted. Their discontent was channeled into collective action. A number of local bargaining units, affiliated with either the National Association of Government Employees or the American Federation of Government Employees, were formed. PATCO was created in 1968 as a professional society of controllers interested in improving the air traffic control system. PATCO's purpose quickly changed to that of a labor organization. Within two years of its creation, PATCO initiated the first major job action taken by controllers. Between March 25 and April 13, 1970, approximately 4,000 controllers participated in a nationwide sick-out. Enormous economic injury was inflicted on the public.

Several reactions occurred. Both the government and the

Air Transport Association of America (ATA) obtained preliminary injunctions against the sick-out. PATCO initially defied these court orders, thereby giving ATA a claim for damages. PATCO subsequently consented to the entry of a permanent injunction that prohibited its future participation in strike activity. In return, ATA waived its damage claims. In a separate administrative action, the government barred for five months PATCO's bid to become the exclusive bargaining representative for air controllers.¹ No organization of federal employees previously had received such punishment. Finally, individual controllers were either dismissed or suspended.

In 1972, PATCO won certification as the controllers' exclusive national bargaining representative. Contracts between the FAA and PATCO were signed in 1973, 1975, and 1978. Substantial reforms resulted. The FAA improved its management attitude by listening and affirmatively responding to controller's complaints. Among these responses were the hiring of additional controllers and the introduction of improved equipment.

Despite these changes, PATCO became more militant. In 1976, FAA and PATCO jointly proposed that the Civil Service Commission upgrade the job classification of certain controller positions. In effect, both FAA and PATCO sought to increase the pay of these controllers. The Commission's study on the proposals was delayed. PATCO responded in late July with a "work-to-the-rule" slowdown timed to occur during the 1976 political conventions. Assurances that the study would be completed by August 30 ended this job action.

When the draft study was released, it rejected reclassification on the grounds that the existing level of work was insufficient to justify an increase in controller pay levels. Both FAA and PATCO objected to this conclusion. PATCO went further by again threatening a slowdown. The Commission quickly reconsidered the study and awarded a substantial number of

¹ Professional Air Traffic Controllers Org., Inc., 1 Decisions & Reports on Rulings of Ass't Sec'y of Labor for Labor Mgmt. Rel. 71 (1971); Professional Air Traffic Controllers Org., Inc., 1 Decisions & Reports on Rulings of Ass't Sec'y of Labor for Labor Mgmt. Rel. 268 (1971).

upward reclassifications. From PATCO's perspective, the threat of a job action produced the desired result.

Yet another illegal slowdown occurred in 1978. In the contract signed during March of that year, the FAA authorized all controllers to participate in overseas "familiarization flights." By riding in the cockpit's jump seat, a controller could acquaint himself with the cockpit environment and observe the operation of the air traffic control system from the pilot's perspective. Airlines were not under a duty to provide these privileges although many did so. Faced with a flood of requests for free overseas travel, the airlines perceived abuse of this program and placed some restrictions on its use.

PATCO responded in May and June of 1978 with another slowdown. ATA moved to enforce the 1970 injunction which prohibited PATCO from engaging in strike activity. The Court found PATCO in contempt and awarded ATA \$100,000 in damages.² The slowdown ended but PATCO suffered more than just financial loss. In 1972, Congress established the Air Traffic Controller Second Career Program. Through the program, controllers, who were disqualified from continuing their air traffic control duties, could obtain government-paid training for second careers. A participant in the program remained on full salary for two years. In the summer of 1978, Congress followed a recommendation by the General Accounting Office and rejected future funding for this program.

PATCO responded to these events by hardening its position. Slowdowns were abandoned. The next job action was scheduled to be a strike. In May of 1978, a strike fund was established. Labeled the "National Controller Subsistence Fund," the monies were earmarked for members who participated in a nationally sanctioned job action, and were subsequently dismissed or suspended. By early 1981, the fund contained more than \$3 million. In the Spring of 1980, PATCO Executive Vice President Robert Meyer sent a strike plan to PATCO locals under the title "education package." The plan

² Air Transp. Ass'n of America v. Professional Air Traffic Controllers Org., 453 F. Supp. 1287 (E.D.N.Y.), *aff'd*, 594 F.2d 851 (2d Cir. 1978), *cert. denied*, 441 U.S. 944 (1979).

advised locals to establish communications networks and strike-related committees, to make arrangements for bail bondsmen and legal services, and suggested members prepare financially for a strike.

The FAA challenged these actions before the Federal Labor Relations Authority (FLRA) as unfair labor practices under 5 U.S.C. § 7116(b)(7) which prohibits a union's participation in or condonation of strike-related activity. In addition to a copy of the plan and the resolution authorizing the strike fund, FAA offered additional statements and publications of PATCO officers and members as proof of extensive planning for a 1981 strike. Despite the weight of the evidence, the FLRA refused to draw the obvious conclusion: these acts were in contemplation of an illegal strike and thus constituted an unfair labor practice.

II. 1981: NEGOTIATIONS, STRIKE, CONTINUED PROVISION OF AIR TRAFFIC CONTROL SERVICES

A. *The Law Governing Collective Bargaining with Federal Employees*

Title VII of the Civil Service Reform Act of 1978 establishes a comprehensive scheme for the regulation of federal labor-management relations.³ Previously, this relationship was governed only by Executive Order.⁴ In 1978, however, an independent agency, the Federal Labor Relations Authority (FLRA), was created to enforce this scheme. Among its duties, the FLRA conducts elections to select exclusive bargaining representatives, adjudicates complaints of unfair labor practices, and resolves exceptions to arbitration awards.⁵ In many ways, the FLRA plays a role analogous to that of the National Labor Relations Board. Resolution of deadlocked negotiations is handled by the Federal Service Impasses Panel, an entity within FLRA.⁶ When negotiations have reached an impasse,

³ 5 U.S.C. §§ 7101-7135 (1979).

⁴ Exec. Order No. 11,491, 34 Fed. Reg. 17,605 (1969); Exec. Order No. 10,988, 27 Fed. Reg. 551 (1962).

⁵ 5 U.S.C. § 7105 (1979).

⁶ *Id.* § 7119.

either party may resort to consultation with the Panel. In order to resolve the dispute, the Panel may simply recommend that both parties use a particular procedure. If this fails, the Panel may impose a binding solution.

Although similarities exist with collective bargaining in the private sector, federal labor-management relations are significantly different. In granting federal employees the right to collectively bargain, Congress has specifically reserved certain rights to management. Wages, work assignments, and hiring decisions are *not* subject to negotiation.⁷ Procedures for the exercise of management authority, methods of handling employee grievances, the number and types of employees assigned to a work project, and the methods of performing work are proper subjects of bargaining.⁸ Within these bounds, both sides are under a duty to bargain in good faith. A breach of this duty is an unfair labor practice.⁹

Federal employees are prohibited from striking¹⁰ and take an oath to obey that law.¹¹ Violation of this prohibition is a felony, punishable by a fine of not more than \$1,000 and/or imprisonment for not more than one year.¹²

B. 1981 Negotiations: Agreement Then Strike

It is within this general outline of the law governing federal labor-management relations that the 1981 negotiations should be examined. These talks produced an agreement in June which was first accepted by PATCO's leadership but was subsequently rejected by that same leadership. Further talks in late July, which more closely resembled an ultimatum from PATCO, led to a deadlock. Instead of using the services of the Federal Service Impasses Panel, PATCO called for a strike.

FAA and PATCO began negotiating on February 12, 1981. The union presented a proposed contract consisting of ninety-

⁷ *Id.* § 7106(a) (1979).

⁸ *Id.* § 7106(b) (1979).

⁹ *Id.* § 7116(a)(5), (b)(5) (1979).

¹⁰ 5 U.S.C. § 7311 (1966).

¹¹ 5 U.S.C. § 3333 (1955).

¹² 18 U.S.C. § 1918 (1966).

six articles. Only forty-one of these articles were negotiable. Approximately five of the proposals dealt with the technology and methods of performing work, which are negotiable at the agency's option,¹³ but the FAA elected not to exercise that option. The law barred negotiations on nearly fifty of the articles. Either these proposals interfered with exclusive management rights or involved matters totally within the authority of Congress. For example, PATCO's demand for a thirty-two hour workweek, a \$10,000 lump sum payment to each controller, a revised pay scale with automatic annual increases, and expanded annual and sick leave benefits could only be achieved through legislation. When PATCO broke off talks on April 29, after thirty-seven sessions, agreement had been reached on only four of the forty-one negotiable articles despite the exchange of written proposals and extensive across-the-table bargaining. PATCO's proposed contract would have cost an additional \$1.1 billion a year, an exorbitant sum, particularly in light of the electorate's mandate that the new Administration reduce federal spending.

On May 22, PATCO made the next move. At its annual convention, a strike date of June 22 was set. A formal strike vote was to be taken during the early morning of the 22nd. If the required number of "yes" votes were received, the strike was scheduled to begin at 7 A.M. Robert Poli repeated his often quoted statement, "the only illegal strike is an unsuccessful strike."¹⁴

Several people begged to differ. During the four week period following the strike threat, the executive, legislative, and judicial branches of the government repeatedly warned PATCO both of a strike's illegality and its potential consequences.

J. Lynn Helms, Administrator of the FAA, warned of the illegality of a strike in a memo to all nonunion air traffic control supervisors. He directed the supervisors to inform their workers that a strike would be a violation of the law. Helms also sent a letter to the home address of each controller.

¹³ 5 U.S.C. § 7106(b)(1) (1979).

¹⁴ N.Y. Times, May 24, 1981, at 24.

Again, the illegality of a strike was pointed out. Enclosed with the letter was a Justice Department memo which announced that the Department would consider all civil, criminal and administrative actions in response to an illegal strike. As June 22 approached, Secretary of Transportation Drew Lewis warned that the government would take a very strong stand against a strike, including the use of civil and criminal penalties. On June 16, the Justice Department again gave notice that strong actions would be taken in response to a strike.

Congressman Norman Mineta, Chairman of the Aviation Subcommittee of the Committee on Public Works and Transportation, sent a letter to Robert Poli requesting an explanation for the strike threat, since Mr. Poli had previously testified before Congress that a strike would not occur. The Senate Commerce Committee sent Mr. Poli a similar letter and further warned that a strike would end the chances for passage of a PATCO sponsored bill to increase controller's wages. Additional Congressmen independently notified PATCO of a strike's illegality and consequences.

Finally, the courts issued their own warning. PATCO had moved on jurisdictional grounds to vacate the 1970 permanent injunction against strike activities. On June 18, Judge Platt of the Eastern District of New York ruled that the injunction remained in effect and "gently reminded" PATCO's members of their duty to obey the law.

In the meantime, bargaining between PATCO and FAA resumed on June 15 under the auspices of the Federal Mediation and Conciliation Service. On June 19 Secretary Lewis became directly involved in these sessions. A last minute agreement averted a June 22 strike.

The first part of the agreement covered personnel policies and practices. The second part consisted of four legislative proposals to improve controller benefits by approximately \$40 million. This latter part was exclusively within the authority of Congress. However, the Department of Transportation and FAA agreed to support the proposals before Congress. In effect, PATCO had successfully bargained for wages, an unprecedented event in Federal labor relations.

Ten days later, PATCO's Executive Board, consisting of its Regional Vice Presidents, Executive Vice President Robert Meyer, and President Poli issued a unanimous recommendation to reject the contract. PATCO's membership followed that advice in late July.

PATCO notified Secretary Lewis of the rejection on July 29 and requested an immediate resumption of negotiations. On July 31 the union gave the FAA seventy-two hours to reach an agreement. In negotiation sessions with Secretary Lewis, Robert Poli insisted that substantially all of PATCO's original proposals be accepted in order to avoid a strike. These escalated demands were rejected.

Again, PATCO and its members were fully warned of a strike's consequences. On July 28, a letter signed by fifty-five United States Senators was sent to every controller. The Senators reminded the controllers of their legal duty not to strike. Each signatory promised to urge the President to use the full force of the law in the event of a strike. A similar letter signed by seventeen United States Congressmen was sent to the controllers on July 29. Nevertheless, a strike began at 7 A.M. August 3, 1981.

C. *Reaction to the Strike*

1. *Continuation of Air Traffic Control Services*

At the onset of the strike, the FAA immediately implemented a long standing and well publicized plan to continue operation of the air traffic control system. The plan was developed after the 1978 job action as a uniform method of handling future job actions, rather than merely continuing the reliance on ad hoc reactions to situations. Created with input from various users of the nation's airspace and air traffic control system, the plan gave priorities to different classes of air traffic.¹⁵ The extent to which traffic in a particular priority classification could be handled was determined by the number of available controllers at different facilities. Supervisors, non-striking controllers, and other FAA employees qualified to

¹⁵ See 45 Fed. Reg. 75,100 (1980).

staff air traffic control positions filled the gaps left by strikers. In addition, military controllers were used in certain facilities. Since its creation, the plan has been constantly updated.

Even amidst the uncertainty which accompanied the beginning of the strike, the plan was successfully implemented. On August 3 most scheduled carriers reported 60-80 per cent of their flights operating. That figure rose to 80 per cent of all scheduled traffic a few days after the strike began.

The situation stabilized within a week, and now the air space is allocated with more certainty. However, all demand cannot be fulfilled at every airport, particularly during peak periods and will not be for some time to come. Nevertheless, most users have shown imagination in overcoming the system's capacity restraints. The safety of the air traffic control system has not been and will not be compromised by authorizing additional flights. Expanded training of new controllers will allow a gradual increase in the system's capacity.

2. *The law is invoked*

When the strike began the government initially sought to have the striking controllers return to work. At 4:35 A.M. on August 3, the United States obtained a temporary restraining order from the District Court for the District of Columbia enjoining PATCO, its officers, and its members from commencing the threatened strike. As the day progressed, it became apparent this order was being ignored. By late afternoon, the District Court found PATCO and Robert Poli in contempt and created a series of fines to be imposed if the strike continued. Since the national union would not obey the court, a legal contingency plan, developed by the FAA and the Justice Department, was implemented. United States Attorneys obtained temporary injunctions against PATCO locals and their members in eighty-six of the ninety-one Federal judicial districts.

Administrative relief was also sought. On the morning of August 3, an unfair labor practice charge against PATCO was filed with the Federal Labor Relations Authority. Later in the day, the FLRA issued its own complaint against PATCO. It

sought and received a temporary restraining order barring PATCO's strike activity.

At 11 A.M. on August 3, President Reagan warned that those controllers still on strike 48 hours from that time would be fired. Secretary Lewis later construed that order to permit controllers to report to work at the beginning of their next scheduled shift after 11 A.M. August 5 without being fired.

In addition to the government's actions, ATA moved to enforce the 1970 permanent injunction. Judge Platt found PATCO in contempt and imposed a schedule of damages that increased the award to ATA as the strike continued. Eventually, ATA obtained a judgment of \$4.5 million and attached most, if not all, of PATCO's funds.

Despite these actions, most of the controllers remained on strike and were fired. Contemporaneously, the government's legal strategy focused on ending PATCO's status as the exclusive bargaining representative for the controllers. On August 10, John Fenton, the Chief Administrative Law Judge for the FLRA, held a hearing on the unfair labor practice charge. The government used witnesses, videotape, and documents to prove that a strike had indeed occurred. PATCO did not offer a rebuttal. On August 14, Judge Fenton found PATCO had committed an unfair labor practice by willfully and intentionally calling for and participating in a strike against the FAA. He recommended revocation of PATCO's status as the exclusive bargaining representative. This ruling was appealed to the full FLRA. After oral argument on September 16, the FLRA issued its order on October 22. All three members agreed with Judge Fenton's findings. Two members voted to revoke PATCO's status, while Chairman Haughton indicated he would support the majority unless the union called off the strike and promised to obey the no-strike provisions of the law. Chairman Haughton subsequently joined the majority after PATCO filed an alleged compliance notice that failed to meet these conditions. The Court of Appeals for the District of Columbia stayed the FLRA order on October 22, but lifted the stay on October 27. The FLRA order is currently on appeal before that court.

The Justice Department has continued to pursue strike-related litigation. Civil contempt penalties were sought and obtained in several jurisdictions. Because striking controllers were fired, some court orders were modified to remove provisions requiring controllers to return to work. Other provisions such as those regulating picketing were left intact or strengthened to meet particular problems. Also, for the first time, strikers have been prosecuted under the criminal statute forbidding Federal employee strike activity. About eighty criminal indictments have been returned. Finally, virtually all of the nearly 11,400 fired controllers have appealed their terminations to the Merit Systems Protection Board.

III. THE AFTERMATH

The decision to fire over 11,000 striking controllers was difficult and costly. Air traffic will operate at constrained levels for about two years, until the system is rebuilt. That reconstruction requires time-consuming training of new controllers. Although harsh, this decision was the only course of action available short of the FAA abdicating its statutory responsibilities.

Under the United States Constitution, the executive branch has a duty to provide essential government services and protect the public. Congress has not given labor unions or their members the right to withhold or eliminate these services through a strike. Indeed, strikes are expressly prohibited. The actions taken to uphold this law serve as a singularly clear signal that essential government services will be maintained and the public interest will be protected in the face of organized efforts to disrupt those services.

Still, the PATCO strike raises important questions in the context of labor-management relations involving public employees. Governments provide many essential public services such as air traffic control, police and fire protection, medical aid, and sanitation that have no available substitutes. A strike by government employees denies the public these services. Until the blackmail is paid, the public is held hostage. This result is unacceptable in our society and thus is forbidden by

the federal government and by many state governments.

Yet removing this power to strike from labor imposes a substantial duty on government managers. They must be diligent in responding to the legitimate needs of their employees. Without thoughtful management one finds employee discontent, a lower quantity and quality of work, and the loss of experienced, competent people. Bad management, like a strike, disrupts and deprives the public of the supply of effective and efficient public services.

Both labor and management should remember their respective duties as they engage in the collective bargaining process. In the 1981 negotiations, the FAA took extraordinary steps, including bargaining in areas reserved to Congress, to meet this high duty. PATCO rejected that effort, ignored the availability of the Federal Service Impasses Panel, dismissed all warnings about the risks of a job action, and proclaimed the only appropriate remedy was the extreme — a strike. In effect, PATCO snatched defeat from the jaws of victory by incorrectly perceiving its ability to shutdown the air transportation system and the resolve of the FAA to maintain that system. Thus, PATCO engaged in an act of self-destruction.

