

1982

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Recommended Citation

Mitchelle J. Notis, *In Defense of PATCO*, 47 J. AIR L. & COM. 317 (1982)
<https://scholar.smu.edu/jalc/vol47/iss2/8>

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IN DEFENSE OF PATCO

MITCHELL J. NOTIS*

Never before has there been such a deliberate effort to eliminate a national union. . . . The Administration has ignored constructive avenues for resolving the conflict.

. . .¹

Letter from Representative John Conyers to the *New York Times*, 8/13/81.

ON AUGUST 3, 1981 more than twelve thousand air traffic controllers went on strike against their employer, the Federal Aviation Administration (FAA), an agency within the United States Department of Transportation (DOT).² As a result of the events which began on August 3, virtually all of the twelve thousand striking controllers were discharged from their jobs. The labor union to which the strikers belonged, the Professional Air Traffic Controllers Organization (PATCO), had all of its assets attached,³ filed a bankruptcy petition,⁴ and had its certification to act as the union representing FAA air traffic controllers revoked.⁵ The striking controllers and PATCO became *personae non grata* in the eyes of the FAA

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¹ N. Y. Times, Aug. 13, 1981, at 22, col. 3.

² N. Y. Times, Aug. 4, 1981, at 1, col. 6; *Id.*, Aug. 16, 1981, at 37, col. 1.

³ Air Transp. Ass'n of America v. PATCO, No. 81-0173 (D.D.C. Aug. 7, 1981).

⁴ *In re* PATCO, No. 81-00656 (D.D.C., filed Nov. 25, 1981).

⁵ Professional Air Traffic Controllers Org., 7 Fed. Lab. Rel. Auth. No. 10 (October 22, 1981), *appeal docketed*, No. 81-2135 (D.C. Cir. Oct. 22, 1981).

and the DOT.

This article, in defending the actions of PATCO and its members, indicts the government's antiquated labor relations policies for provoking PATCO and its members into striking. The actions which these policies engendered will serve as more than a mere chronicle of the Reagan administration's labor relations policies; eventually, the desire to prevent recurrences of the events under discussion will cause these actions to be prime justification for allowing federal workers to have the legal right to strike.

I. FACTUAL BACKGROUND

On June 22, 1981, after five months of negotiations, the negotiating teams for PATCO and the FAA reached agreement on a tentative contract.⁶ The proposed agreement contained the following key provisions:⁷

- (a) 42 hours of pay for 40 hours of work;
- (b) a 15% premium for night work;
- (c) exemption of night, Sunday and holiday premium pay from the maximum annual pay limitation for federal employees;⁸
- (d) a \$2300 annual pay increase in addition to the annual pay increases received by other federal employees.

A tally of votes completed on July 29, revealed that ninety-six percent of PATCO members had rejected the proposed contract.⁹

On July 31, PATCO President, Robert E. Poli, and Secretary of Transportation, Drew Lewis, resumed negotiations.¹⁰

⁶ Affidavit of Dennis Reardon, PATCO Negotiations Spokesman, at 1; FAA, Dep't of Transp., Fed. Lab. Rel. Auth. No. 3-CA-2729; Letter from the Regional Director, FLRA Region III, to Richard J. Leighton (August 25, 1981) (declining to issue complaint in FAA, Dep't of Transp., Fed. Lab. Rel. Auth. No. 3-CA-2729, at 1).

⁷ N. Y. Times, July 30, 1981, at 12, col. 2; *Id.*, Aug. 1, 1981, at 13, col. 1.

⁸ 5 U.S.C. § 5308 (1976).

⁹ The vote was 13,495 against the agreement, and 616 in favor of it (approximately 2,000 controllers in the PATCO bargaining unit were not PATCO members, and therefore were not entitled to vote). N. Y. Times, July 30, 1981, at 12, col. 2.

¹⁰ Letter from the Regional Director, FLRA Region III, to Richard J. Leighton (Aug. 25, 1981) (declining to issue complaint in FAA, Dep't of Transp., Fed. Lab. Rel. Auth. No. 3-CA-2729, at 1). [Hereinafter cited as Regional Director's Letter]

Mr. Poli submitted to Mr. Lewis a revised version of PATCO's January, 1981 contract proposal, revealing the deletion of several sections, in an effort to reduce the total cost of the proposal and stimulate bargaining.¹¹ The parties met again on August 1, at which time Poli's request for a counterproposal was denied.¹²

Negotiations were resumed on August 2. Mr. Poli informed Mr. Lewis that the union was willing to modify its position if the FAA would offer a counterproposal to PATCO's July 31 proposal.¹³ Although he denied submitting a counterproposal,¹⁴ Lewis submitted a proposal to Poli which was claimed to be worth \$10 million more than the June 22 tentative agreement.¹⁵ In actuality, the total cost of the proposal to the FAA was \$15 million less than the June agreement.¹⁶ Lewis' offer was rejected and negotiations terminated at 2:30 a.m. on Monday, August 3.¹⁷

In the early morning hours of August 3, 1981, air traffic controllers across the United States went on strike.¹⁸ Between August 3 and August 5, twelve thousand of the nation's seventeen thousand controllers participated in the walkout.¹⁹ In re-

¹¹ PATCO Appeal to FLRA General Counsel of Refusal to Issue Complaint at 2, in FAA, Dep't of Transp., Fed. Lab. Rel. Auth. No. 3-CA-2729 (Aug. 27, 1981).

¹² Regional Director's Letter, *supra* note 10, at 1.

¹³ *Id.*

¹⁴ Affidavit of Robert E. Poli, PATCO President, at 10, FAA, Dep't of Transp., Fed. Lab. Rel. Auth. No. 3-CA-2729.

¹⁵ Regional Director's Letter, *supra* note 10, at 2.

¹⁶ The rejected tentative agreement provided for a benefits package worth \$40 million in each of three years, resulting in a total value of \$120 million. The August 2 proposal provided for an escalating benefits package worth \$20 million in the first year, \$35 million in the second year, and \$50 million in the third year, resulting in a total value of \$105 million. Washington Post, Aug. 4, 1981, at 7, col. 6. Additionally, Secretary Lewis demanded that PATCO's acceptance of the August 2 proposal be conditioned upon the following terms: (1) The FAA would not reopen discussions of the non-economic proposals submitted by the Union; (2) the Union would have to obtain the approval of its entire negotiating team before a new agreement could be reached; and (3) the entire third year package had to be in the form of increased benefits, as opposed to increased wages. Regional Director's Letter, *supra* note 10, at 2.

¹⁷ Regional Director's Letter, *supra* note 10, at 2; N. Y. Times, Aug. 3, 1981, at 1, col. 6.

¹⁸ N. Y. Times, Aug. 4, 1981, at 1, col. 6.

¹⁹ N. Y. Times, Aug. 16, 1981, at 37, col. 1.

sponse to the strike, President Reagan announced on August 3 that any controllers who did not report back to work within 48 hours would be fired.²⁰ In the meantime, Department of Justice attorneys had obtained restraining orders against PATCO and its members, enjoining them from engaging in a strike and ordering them back to work, in 66 federal judicial districts.²¹ Criminal complaints were filed against a number of PATCO members in fourteen different cities,²² and several PATCO members were jailed.²³

On August 5, 1981, Secretary of Transportation Drew Lewis announced that "as of 11:00 today, the strike is over."²⁴ Subsequent to Lewis' declaration, the Federal Labor Relations Authority (FLRA) revoked PATCO's certification to act as the exclusive bargaining representative for FAA air traffic controllers,²⁵ and the twelve thousand air traffic controllers who did not respond to the President's offer to return to work were fired.²⁶

It has been said of the air traffic controllers' strike: "At the heart of the struggle is a disagreement over wages, and working conditions. In addition, it appears that the striking controllers are desperately attempting to achieve status for themselves as individuals and workers, as well as for their union."²⁷

On its face, the PATCO strike seems no different than many other labor disputes; yet it is. Why, for instance, did the controllers strike, knowing as they did that they would in all likelihood be fired, and their union severely punished? It is

²⁰ President's Statement on Air Traffic Controller's Strike, 17 WEEKLY COMP. PRES. Doc. 845 (Aug. 3, 1981); N. Y. Times, Aug. 4, 1981, at B8, col. 1.

²¹ Wall St. J., Aug. 6, 1981, at 3, col. 3. See also PATCO Brief in Support of Exceptions to the Decision of the Administrative Law Judge, Professional Air Traffic Controllers Org., 7 Fed. Lab. Rel. Auth. No. 10 (Oct. 22, 1981).

²² Wall St. J., Aug. 6, 1981, at 3, col. 4.

²³ N. Y. Times, Aug. 6, 1981, at 1, col. 6.

²⁴ United States v. PATCO, No. 81-1805 (D.D.C., Aug. 11, 1981) (memorandum order); PATCO Brief in Support of Exceptions to the Decision of the Administrative Law Judge, Professional Air Traffic Controllers Org., 7 Fed. Lab. Rel. Auth. No. 10 (Oct. 22, 1981).

²⁵ Professional Air Traffic Controllers Org., 7 Fed. Lab. Rel. Auth. No. 10 (Oct. 22, 1981), appeal docketed, No. 81-2135 (D.C. Cir. Oct. 22, 1981).

²⁶ 1981 Gov't. EMPL. REL. REP. (BNA) 926:12.

²⁷ N. Y. Times, Aug. 10, 1981, at D10, col. 2.

necessary to examine the individual controller and his workplace to find the answer.

II. THE CONTROLLER AND HIS WORKPLACE

[W]hen working people feel a deep sense of grievance, they will exercise what I think is a basic human right, the right to withdraw their services, not to work under conditions they no longer find tolerable.

I think that right is inherent and one that is not adequately addressed by legislative remedies simply saying that it is against the law.²⁸

Lane Kirkland, President of the AFL-CIO, speaking at a news conference hours after the controllers' strike began.

Air traffic controllers are responsible for directing the air traffic in our skies, earning an average base pay of \$33,000 per year.²⁹ In order to enter the FAA Academy for three to four months of initial training, potential controllers must have high school diplomas, and be able to pass various physical and psychological tests.³⁰ Their ample compensation and extensive training notwithstanding, controllers have traditionally not been satisfied with their jobs.

Air traffic controllers have had a history of militant unionism at least since 1969, when controllers engaged in massive absenteeism in many parts of the country.³¹ In 1970, controllers joined in a three week job action which also involved mass absenteeism.³² As a result of its participation in and condonation of the 1970 strike, PATCO's certification as an exclusive representative was revoked for five months.³³ During two days

²⁸ N. Y. Times, Aug. 4, 1981, at B8, col. 5.

²⁹ N. Y. Times, July 30, 1981, at 12, col. 2.

³⁰ Newsweek, Aug. 17, 1981, at 22.

³¹ See, e.g., *Leyden v. FAA*, 315 F. Supp. 1398 (E.D.N.Y. 1970).

³² See, e.g., *Air Transp. Ass'n v. PATCO*, 313 F. Supp. 181 (E.D.N.Y.), *vacated in part sub nom.*, *United States v. PATCO*, 438 F.2d 79 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971).

³³ Professional Air Traffic Controllers Organization, Inc., 1 Decisions & Reports on

in May and two days in June of 1978, controllers started a work slowdown.³⁴ As their labor relations history suggests, controllers are not satisfied with their working conditions. They have good cause to complain:

At larger facilities they may work in vast windowless rooms, juggling 30 aircraft at a time, each appearing only as blips and a computer-generated set of numbers on radar scopes. The job can demand split-second timing and constant concentration. Controllers typically work rotating shifts, some times [sic] punching out at 11 p.m. and returning by 7 a.m. the next day .

...

.....

... An FAA-commissioned study of 416 controllers found that they are twice as likely to develop high blood pressure as most other workers The study also found that a major source of stress was not the job itself, but tensions between controllers and managers.

Controllers concede that their chief complaint is not money but hours, working conditions and a lack of recognition for the pressures they face.³⁵

The study referred to above was conducted by behavioral scientists at Boston University.³⁶ At a cost to the FAA of \$2.8 million, controllers at Boston's Logan Airport were observed from 1973 through 1978.³⁷ The study recommended, among other things, that steps be taken to improve air traffic controller labor relations.³⁸ After the controllers' strike began, one of the psychiatrists who conducted the study, Dr. Robert Rose, was interviewed by the *Christian Science Monitor*.³⁹ In the interview, Rose expounded on the root causes of the strike:

I believe the strike is a result of the alienation of the control-

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

³⁴ See, e.g., *Air Transp. Ass'n v. PATCO*, 453 F. Supp. 1287 (E.D.N.Y.), *aff'd*, 594 F.2d 851 (2d Cir. 1978), *cert. denied*, 441 U.S. 944 (1979).

³⁵ *Newsweek*, Aug. 17, 1981, at 22-23.

³⁶ *N. Y. Times*, Aug. 9, 1981, at 23, col. 1.

³⁷ *Id.*; *Christian Sci. Monitor*, Aug. 7, 1981, at 12, col. 1 (Eastern ed.).

³⁸ *Christian Sci. Monitor*, Aug. 17, 1981, at 3, col. 1 (Eastern ed.).

³⁹ *Christian Sci. Monitor*, Aug. 7, 1981, at 12, col. 1 (Eastern ed.).

lers from their management. Most of the time when something goes wrong, the controllers are not supported by their supervisors — they are left out there all alone.

[T]here is no positive reinforcement [sic]

All they get is negative reinforcement if something goes wrong.

. . . .

. . . [T]he government can fire all of them and bring in an entirely new crew . . . but the seeds of discontent that caused this strike will still be there . . . the problem is the FAA's lack of willingness to acknowledge in a significant way that there is a problem.⁴⁰

The FAA has paid little heed to the results of the study it commissioned. Its indifference is particularly reproachable because the alienation and discontent shown by air traffic controllers is not a unique industrial relations problem; indeed, it is "similar to that identified in industry and many commercial jobs at least a decade ago."⁴¹

The reaction by the government to this labor relations problem is disappointing. The administrator of the FAA, J. Lynn Helms, has been quoted as saying in relation to the work that controllers do, "[t]here is no stress."⁴² Secretary of Transportation, Drew Lewis, qualified his statement that controllers "have a difficult job" by saying that "other jobs have stress, too."⁴³

In answer to the stress and dissatisfaction undergone by air traffic controllers, PATCO leadership emphasized financial benefits in their bargaining proposals. It was easier for both sides to the negotiations to focus their attention on remuneration, instead of facing the more difficult task of admitting to

⁴⁰ *Id.*

⁴¹ N. Y. Times, Aug. 10, 1981, at D10, col. 2-3.

⁴² *Id.* at col. 3.

⁴³ CBS Interview with Drew Lewis, Secretary of Transportation (Aug. 5, 1981); PATCO Brief Supporting Exceptions to the Decision of the Administrative Law Judge, Professional Air Traffic Controllers Org., 7 Fed. Lab. Rel. Auth. No. 10 (Oct. 22, 1981). Four days after he had declared the PATCO strike to be over, Lewis stated that controllers probably did have some legitimate grievances and said that the charge that the FAA was "a bad boss to work for" was "probably a legitimate charge." N. Y. Times, Aug. 10, 1981, at D10, col. 1.

having failed to create an efficient and effective workplace, responsive to the needs of employer and employees. In walking off their jobs on August 3, as much as anything else, controllers were striking for recognition of the difficulties of their jobs. Striking in support of PATCO's bargaining demands allowed controllers to bring worldwide attention to the errors of FAA personnel management and administration. It was a final attempt to solve a decade's worth of problems.

III. FEDERAL EMPLOYEE STRIKES

[T]he remedy sought is a death sentence - industrial capital punishment. . . .

Comments of FLRA Chief Administrative Law Judge John Fenton on the FLRA General Counsel's request that PATCO be permanently barred from functioning as a federal sector labor union.⁴⁴

Government's stance resembled the actions of the Federal Government and employers . . . in the first decade of the century.

New York Times article on press conference held by Lane Kirkland, President of the AFL-CIO, shortly after the controllers' strike began.⁴⁵

The history of strikes by American working people virtually parallels the history of the United States itself. Printers went on strike in New York in 1794; cabinet makers struck in 1796; carpenters in Philadelphia in 1797; and cordwainers in 1799.⁴⁶ The first recorded strike by federal employees occurred al-

⁴⁴ Professional Air Traffic Controllers Org., 7 Fed. Lab. Rel. Auth. No. 10 (1981) (opinion of Chief A.L.J. Fenton, at 6, attached as addendum), *appeal docketed*, No. 81-2135 (D.C. Cir. Oct. 22, 1981).

⁴⁵ N. Y. Times, Aug. 4, 1981, at B8, col. 6.

⁴⁶ 88 AFL-CIO Am. Federationist No. 3, 3 (March 1981).

most that long ago, in the Navy Yard in Washington, D.C. in August of 1835.⁴⁷ In the years prior to the Civil War, Navy Department employees also went on strike at the Philadelphia Navy Yard and the Charlestown, Massachusetts Navy Yard.⁴⁸ Strikes and other job actions by federal employees have continued up to the present time, with varying degrees of frequency.⁴⁹

The right of private sector employees to strike was recognized in 1935 with the passage by Congress of the National Labor Relations Act.⁵⁰ Although the right to strike has been modified at times by Congress and federal courts, both entities have recognized its legitimate use as a tool of organized labor.⁵¹ The regulation of strikes in the public sector in recent years has followed a different course.

In 1955, Congress enacted Public Law No. 84-330⁵² in order to "prohibit the employment by the Government of the United States of persons who are disloyal or who participate in or assert the right to strike against the Government of the United States. . . ."⁵³ Public Law No. 84-330 contains three major provisions:⁵⁴ (1) a prohibition on the employment of persons who, *inter alia*, engage in strikes against the govern-

⁴⁷ ZISKIND, ONE THOUSAND STRIKES OF GOVERNMENT EMPLOYEES 24 (1971) [herein cited as ZISKIND].

⁴⁸ *Id.*, at 25.

⁴⁹ See, e.g., H. EDWARDS, R. CLARK, & C. CRAVER, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 493 (2d ed. 1979); ZISKIND, *supra* note 47 at 24-33, 133-184; *Work Stoppages in Government, 1979*, GOV'T. EMPL. REL. REP. (BNA) Reference File No. 71:1011, 1014 (1980).

⁵⁰ Act of July 5, 1935, ch. 372, 49 Stat. 449, amended by Act of June 23, 1947, ch. 120, 61 Stat. 136 (codified at 29 U.S.C. §§ 151-169 (1976)). In particular, section 7 of the Act recognizes the right of employees to engage in connected activities. *Id.* § 157. Section 8(a) of the Act protects employees from employer interference with, or discrimination based upon the exercise of, Section 7 rights. *Id.* § 158(a).

⁵¹ See, e.g., *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233-36 (1963).

⁵² Act of August 9, 1955, Pub. L. No. 84-330, 69 Stat. 624 (1955).

⁵³ S. REP. NO. 1256, 84th Cong., 1st Sess., reprinted in 1955 U.S. CODE CONG. & AD. NEWS 2873.

⁵⁴ For the purposes of this discussion, only the provisions of Pub. L. No. 84-330 dealing with striking are relevant. Section 1(3) of the act, regarding asserting the right to strike, is of questionable constitutionality, and has been held invalid by at least one court. See *National Ass'n of Letter Carriers v. Blount*, 305 F. Supp. 546 (D.D.C. 1969), *appeal dismissed*, 400 U.S. 801 (1970).

ment;⁵⁵ (2) a requirement that prospective employees execute an affidavit stating that they are not striking;⁵⁶ and (3) criminal sanctions for violation of the section of the law prohibiting the employment of strikers.⁵⁷

Section 1 of Public Law No. 84-330,⁵⁸ reads in relevant part as follows:

[N]o person shall accept or hold office or employment in the Government of the United States . . . who—

(3) participates in any strike . . . against the government of the United States. . . .⁵⁹

Section 2 of Public Law No. 84-330,⁶⁰ reads in relevant part as follows:

[E]very person who accepts office or employment in the Government of the United States . . . shall, . . . execute an affidavit that his acceptance and holding of such office or employment does not or (if the affidavit is executed prior to acceptance of such office or employment) will not constitute a violation of the first section of this Act. Such affidavit shall be considered prima facie evidence that the acceptance and holding of office or employment by the person executing the affidavit does not or will not constitute a violation of such section. . . .

The language of section 2 indicates that the affidavit required by that section was intended by Congress to be a sworn disclaimer of an applicant's status as a striker at the moment of accepting employment. The affidavit was not intended to relate in any way to the employee's conduct after accepting a position with the government. The initial codification of section 2 of the Act omits the parenthetical language of the statute, as does the later statutory recodification of the section.⁶¹

⁵⁵ Act of August 9, 1955, Pub. L. No. 84-330, § 1(3), 69 Stat. 624 (1955) (codified at 5 U.S.C. § 7311).

⁵⁶ *Id.* § 2 (codified as amended at 5 U.S.C. § 3333).

⁵⁷ *Id.* § 3 (codified at 18 U.S.C. § 1918).

⁵⁸ *Id.* § 1.

⁵⁹ *Id.* § 1(3).

⁶⁰ *Id.* § 2.

⁶¹ Pub. L. No. 89-554, 80 Stat. 424 (1966) (codified as amended at 5 U.S.C. § 3333 (1976)).

These omissions, however, change neither the meaning nor the import of the section. Principles of statutory construction require that precedence be given to original statutory language to the extent that any conflict exists between the language of a statute and subsequent codifications.⁶²

Section 3 of Public Law No. 84-330, codified at 18 U.S.C. § 1918, provides that any person violating section 1 of that act shall be guilty of a felony, and shall be fined or imprisoned. Upon a cursory reading of the above laws, it would seem that section 3 of Public Law No. 84-330, in making the violation of section 1 (prohibiting strikers from accepting or holding government employment) a felony, makes it a felony for federal employees to go on strike. A closer examination of the time frame encompassed by section 2 shows this assumption to be incorrect.

Section 2 requires the execution of an affidavit relating to present conduct⁶³ if a position is accepted concurrently with the execution of the required affidavit, or future conduct⁶⁴ if a position is to be accepted after executing the affidavit. The affidavit is, therefore, an affirmation that at the exact time when a person accepts government employment, he is not then striking against the federal government. The affidavit of

⁶² Where a conflict exists between a codification and a statute, the statute will prevail. *See, e.g., United States v. Dunham Concrete Products Inc.*, 475 F.2d 1241 (5th Cir.), *reh. denied*, 477 F.2d 596 (5th Cir.), *cert. denied*, 414 U.S. 832 (1973); *American Export Lines Inc. v. United States*, 290 F.2d 925 (Ct. Cl. 1961).

When statutes are revised, consolidated, or recodified, it will not be inferred that Congress intended to change their effect, unless such an intention is clearly expressed. *See, e.g., Muniz v. Hoffman*, 422 U.S. 454 (1975).

Additionally, the language of the codification of section 2 (5 U.S.C. § 3333) indicates that the required affidavit is to be a disclaimer of present striker status, not future striker status. This section requires the affiant to state that his "acceptance *and* holding" of a position will not violate the strike prohibition, not that his "acceptance *or* holding" will not violate the prohibition. The "acceptance *and* holding" language is indicative of one particular point in time, the time that a person is initially hired. (emphasis added)

⁶³ If the affidavit is executed prior to acceptance of such office or employment, the employee must execute an affidavit that his acceptance and holding of such office or employment "does not . . . constitute a violation." Act of August 9, 1955, Pub. L. No. 84-330, § 2, ch. 690, 69 Stat. 624, 624-25 (1955).

⁶⁴ If the affidavit is executed prior to acceptance of such office or employment, the employee must execute an affidavit that his acceptance and holding of such office or employment "will not . . . constitute a violation . . ." *Id.*

nonstriker status relates solely to the time that a person is initially hired by the government.

Because section 2 states that the affidavit is evidence that section 1 has not been violated, section 1 must also relate solely to the time of initial hiring. It seems that an applicant violates section 1 if he accepts an offer of employment from the government while he is on strike. Such an interpretation is in accord with the stated purpose of Public Law No. 84-330, to prohibit the employment by the government of persons engaging in strikes.

The mandate of section 1 can also be read to enjoin the executive branch from hiring strikers, instead of preventing strikers from accepting positions. In that case, a federal manager violates the proscription of section 1 by hiring a person he knows to be striking against the government. Additionally, there are those who say that the statute makes it a crime for federal employees to strike. The vague and confusing language of Public Law No. 84-330 causes due process problems by forcing federal employees to guess at the law's meaning.⁶⁵ This vagueness makes the law void as a penal statute.⁶⁶ Consequently, the controllers did not violate a *valid* penal statute when they went on strike.

The affidavit required by Public Law No. 84-330, the only relevant proscription in the statute, was not violated by striking controllers, because they were not striking at the time they were initially hired by the government. The controllers, however, were required to sign an affidavit which was not based upon Public Law No. 84-330. The affidavit controllers were required to sign by the Office of Personnel Management (OPM) states that the affiant not only "is not" participating in a strike against the government, but "will not" participate in such a strike. Such an affidavit as to future actions is not required by Public Law No. 84-330, and OPM had no other legal authority upon which to base the requirement; therefore,

⁶⁵ Compare, *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, (D.D.C. 1969), *aff'd.*, 404 U.S. 802 (1970).

⁶⁶ See, e.g., *Colautti v. Franklin*, 439 U.S. 379, 390 (1979); *Buckley v. Valeo*, 424 U.S. 1, 77 (1976).

the affidavit was an illegal, *ultra vires*, action by the OPM.

The affidavit in question was signed by controllers due to the misrepresentations made to them by OPM regarding the legal necessity of executing such an affidavit. They were under the mistaken belief that signing such an affidavit was a prerequisite to becoming an air traffic controller. It is contrary to public policy to enforce an affidavit which was wrongfully required. Therefore, the affidavit signed by the controllers is a nullity.

IV. PATCO'S DEFENSE

Having set forth the legal and factual background in which PATCO and its members engaged in a strike against the federal government, PATCO's defense can be analyzed. The defense is intended as a justification, not as an apology.

A. *No Alternatives to Striking Existed on August 3, 1981*

As previously discussed, the FAA not only had no intention of trying to resolve its serious internal labor relations problems relating to controllers, it refused to admit that any problems existed.⁶⁷ Consequently, controllers received no help from FAA management in resolving the employment problems.

The FLRA provided no reasonable alternative, either. Whatever may have been the basis for PATCO's doubts concerning the efficacy of the FLRA-supplied remedies, such doubts proved justifiable as the strike progressed. During the strike, the FLRA denied that it alone had the authority to: (1) adjudicate unfair labor practice strikes,⁶⁸ arguing that such authority was shared with the federal courts;⁶⁹ or (2) seek injunctions against PATCO in federal court.⁷⁰ The FLRA took these positions even though it had previously argued success-

⁶⁷ See *supra* notes 28-43 and accompanying text.

⁶⁸ Pursuant to 5 U.S.C. § 7116(b)(7)(A), it is an unfair labor practice for a federal sector labor union to engage in a strike.

⁶⁹ Brief for *Amicus Curiae* Federal Labor Relations Authority, *Air Transp. Ass'n v. PATCO*, appeal docketed, No. 81-7447 (2d Cir. June 22, 1981).

⁷⁰ *Id.*

fully in two district courts that its exclusive jurisdiction over unfair labor practices precluded district courts from asserting jurisdiction.⁷¹

PATCO argued during the strike⁷² that FLRA jurisdiction over unfair labor practices, such as strikes, preempts federal courts from asserting jurisdiction over federal sector strikes without FLRA initiation, exactly like the exclusive jurisdiction over unfair labor practices held by the National Labor Relations Board prevents federal courts from asserting jurisdiction over private sector unfair labor practices.⁷³ FLRA exclusive jurisdiction over unfair labor practice strikes would preclude parties other than the FLRA from successfully invoking district court jurisdiction to adjudicate or enjoin federal employee strikes.⁷⁴ If the FLRA had asserted its exclusive jurisdiction over unfair labor practice strikes during the PATCO strike, only one action would have been brought against PATCO, instead of sixty-six, and millions of dollars of contempt fines would not have accumulated against PATCO.

As a last resort, PATCO brought the existence of its dispute with the FAA into the public arena in the hope that the weight of public opinion would be brought to bear against the FAA. To do this, a strike was necessary. Due to the failure of all other avenues of relief by August 3, 1981, PATCO and its members had virtually no choice but to strike. Their complaints were not being heeded, and the pressures on controllers went unabated. As the Honorable J. Skelly Wright, United States Circuit Judge, has written in commenting on the ban on federal sector strikes:

If the inherent purpose of a labor organization is to bring the

⁷¹ Clark v. Mark, No. 79-CV-777 (N.D.N.Y. Aug. 27, 1980); National Fed'n of Fed. Employees, Local 1263 v. Commandant, Defense Language Inst., 493 F. Supp. 675 (N.D. Cal. 1980).

⁷² See, e.g., Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Renewed Motion for Entry of Judgment on Civil Contempt, United States v. PATCO, No. 81-1805 (D.D.C., filed Aug. 3, 1981).

⁷³ See, e.g., San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); Buckley v. American Fed'n of Television & Radio Artists, 496 F.2d 305 (2d Cir.), cert. denied, 419 U.S. 1093 (1974).

⁷⁴ See, e.g., National Fed'n of Fed. Employees, Local 1263 v. Commandant, Defense Language Inst., 493 F. Supp. 675, 681 (N.D. Cal. 1980).

workers' interests to bear on management, the right to strike is, historically and practically, an important means of effectuating that purpose. A union that never strikes, or which can make no credible threat to strike, may wither away in ineffectiveness.⁷⁵

B. *President Reagan Broke His Word*

PATCO and its members were relying upon President Reagan to remedy the egregious conditions under which they worked. According to the text of a letter released by PATCO,⁷⁶ President Reagan, as a candidate for the presidency, wrote a letter to PATCO President Robert Poli expressing awareness of the "deplorable state of our nation's air traffic control system."⁷⁷ Reagan pledged to replace obsolete equipment, and to adjust manning levels and working hours.⁷⁸ He also pledged to work with the controllers in a "spirit of cooperation" and "harmony."⁷⁹ In exchange for these promises, Reagan received PATCO's support during the 1980 elections.⁸⁰

Even though President Reagan was aware of the root causes of controller dissatisfaction, he did nothing prior to the PATCO strike to upgrade air traffic control equipment, change the hours worked by controllers, or improve controller morale. Reagan's inflexible, severe decision to resolve the PATCO strike by firing striking controllers is certainly not in keeping with his promise to work with the controllers in a constructive manner to help solve their problems. The President's actions prior to and during the PATCO strike were a repudiation of the promises he made in return for PATCO's support during the 1980 presidential campaign.

⁷⁵ *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, (D.D.C.) (Wright, J., concurring), *aff'd.*, 404 U.S. 802 (1971).

⁷⁶ *N. Y. Times*, Aug. 10, 1981, at D10, col. 2.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

C. *The Government Violated the Law*

President Reagan, the Secretary of Transportation and the Administrator of the FAA, broke the law prior to, and during, the PATCO strike. They did this by bargaining with PATCO over various aspects of controller compensation. It is illegal to bargain over conditions of employment for federal employees which are already provided for by existing laws.⁸¹ Therefore, it is contrary to law to negotiate over (a) pay for federal employees,⁸² (b) the maximum legal amount of annual pay for federal employees,⁸³ or, (c), the amount of premium pay for nightwork to which federal employees are entitled.⁸⁴ The government illegally negotiated with PATCO on all of these subjects.

By knowingly conducting collective bargaining in an area that is forbidden by law, the FAA and DOT introduced an extralegal element into their labor dispute with PATCO. They carried the dispute into a "gray area" in which politics, not the law, dictated the limits of their dispute, and the limits of allowable actions.⁸⁵ Having put aside certain laws governing federal sector labor relations, the government should be estopped from claiming that PATCO and individual air traffic controllers violated the law. The government was *in pari delicto* in relation to PATCO. The government did not come into the PATCO strike with clean hands, and should not now be heard to complain that air traffic controllers alone have ignored relevant laws. The President does not have any greater right than the average citizen to choose the laws which he will obey.

D. *The Government Refused to Bargain in Good Faith*

⁸¹ 5 U.S.C. §§ 7102(2), 7103(a)(14)(C) (1976).

⁸² 5 U.S.C. § 5332(a) (1980).

⁸³ 5 U.S.C. § 5308 (1976).

⁸⁴ 5 U.S.C. § 5545 (1976 & Supp. III 1979).

⁸⁵ See Summers, *Public Sector Bargaining, Problems of Governmental Decision-making*, 44 U. CIN. L. REV. 669, 669-73 (1975) for a discussion of the role played by political considerations in public sector labor relations.

With PATCO

Prior to the strike, the government refused to submit counterproposals to PATCO's bargaining offers.⁸⁶ Secretary Lewis flatly refused to bargain with PATCO after the strike began, despite PATCO's requests.⁸⁷ PATCO was still a certified exclusive representative at that point. The government's refusal to bargain with PATCO was not justified; its allegations that PATCO was engaging in an illegal work stoppage did not relieve it of the duty to bargain.⁸⁸ The government was, in essence, revoking PATCO's certification as an exclusive representative months before the FLRA could do so pursuant to law. As was stated by the Honorable Harold Greene, United States District Judge, in commenting on the government's refusal to bargain: "If the President or the Secretary of Transportation are saying that the union no longer exists as far as we are concerned, we won't negotiate with them, we have no further bargaining relationship with them, isn't that the same as decertification?"⁸⁹

E. The President Arbitrarily Enforced The Law

The President allowed striking controllers to return to work if they did so prior to midday on August 5, 1981. In so doing, the President violated the proscription against allowing striking federal employees to be employed by the government.⁹⁰ He also implicitly allowed controllers to remain on strike for an additional two days.

According to Secretary Lewis, the controllers' strike ended on August 5, 1981.⁹¹ Therefore, no controllers were on strike longer than three days. It is not any worse to be on strike for three days instead of two and the difference is certainly not

⁸⁶ See *supra* note 12 and accompanying text.

⁸⁷ Regional Director's Letter, *supra* note 10, at 2.

⁸⁸ See Veterans Administration Hospital, 4 Fed. Lab. Rel. Auth. No. 59 (1980).

⁸⁹ Statement by J. Harold Greene during oral argument in *United States v. PATCO*, No. 81-1806 (D.D.C., filed Aug. 3, 1981); PATCO Appeal to FLRA General Counsel of Refusal to Issue Complaint at 7-9, Fed. Lab. Rel. Auth. No. 3-CA-2729.

⁹⁰ 5 U.S.C. § 7311 (1976 & Supp. III 1979); 18 U.S.C. § 1918 (1976). See *supra* notes 52-66 and accompanying text.

⁹¹ See *supra* note 24.

enough to justify firing some employees while allowing others to return to work.

The President arbitrarily decided that some strikers had broken the law and others had not. He was enforcing the law pursuant to his own notions of political expediency, not according to the letter of the law. Federal employees cannot be expected to know when striking will be allowed and when it will be punished, if the laws are enforced according to whim and caprice. President Reagan was engaging in the type of arbitrary reinstatement of striking employees based upon anti-union animus which has been prohibited in the private sector by the Supreme Court.⁹²

F. *The Government Has Tried to Destroy PATCO*

The government filed legal actions against PATCO, its officers and members in sixty-six different federal judicial districts.⁹³ Requests for contempt fines followed requests for injunctive relief.

An adequate scheme for protecting the government from strikes is established by the Civil Service Reform Act of 1978.⁹⁴ Pursuant to 5 U.S.C. § 7123(d), the FLRA can obtain a temporary restraining order in a district court, enjoining the commission of unfair labor practices (such as strikes), while its own administrative procedures are pending. The FLRA received just such an injunction during the PATCO strike.⁹⁵

There is no valid reason why the government could not have relied upon section 7123(d) to enjoin the controllers' strike instead of proceeding in sixty-six different courts at once. The needless legal onslaught had two purposes - tying the hands of PATCO's counsel, and forcing PATCO to spend huge amounts of its resources defending against sixty-six separate legal actions.

The government attempted to stretch due process to the

⁹² See, e.g., *NLRB v. Brown*, 380 U.S. 278 (1965).

⁹³ See *supra* note 21.

⁹⁴ Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). See, e.g., 5 U.S.C. §§ 7116(b)(7)(A), 7118(a)(7), 7123(a), 7123(d) (Supp. III 1979).

⁹⁵ *Graham v. PATCO*, 524 F. Supp. 160 (D.D.C. 1981).

breaking point by amassing the vast resources of the Justice Department, the Executive Branch, and the White House against a relatively small labor union.

V. CONCLUSION

The idea that government employees are different from other types of workers is without foundation . . . the government as an employer, should be no more sovereign than other employers.⁹⁶

Letter from Representative John Conyers to the *New York Times*, 8/13/81

We recognize . . . [the right to strike] . . . in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States, which may result from the exercise of such right.⁹⁷

Senator Robert Taft

More than anything else, the PATCO strike has pointed out "the inherent, irresolvable conflict between giving public workers the right to bargain, on the one hand, and declaring strikes by such workers illegal, on the other."⁹⁸ Airline pilots and flight attendants can strike. So can electricians and machinists working for airlines. Utility company employees, railroad workers, and others whose services are no less essential than those of air traffic controllers, can strike. As the Honorable United States Circuit Judge Harry T. Edwards has stated: "[i]t outrages modern notions of industrial democracy to relegate a large segment of the work force to dependence upon the conscience of the government."⁹⁹

Most Americans think of the Executive Branch only in rela-

⁹⁶ N. Y. Times, Aug. 13, 1981, at 22, col. 3.

⁹⁷ 93 CONG. REC. 3835 (1947).

⁹⁸ N. Y. Times, Aug. 8, 1981, at 6, col. 6.

⁹⁹ Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 361 (1972).

tion to its role as a regulator. It is also an employer of millions of Americans. Just as the government should have no more rights as an employer than a private employer, so federal employees should have the same rights and privileges as their private sector counterparts. Until such equality is reached, the events of August 1981 are bound to be repeated.

**Comments, Casenotes
and
Statute Notes**

