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COPING WITH DEREGULATION: REDUCTION OF LABOR COSTS IN THE AIRLINE INDUSTRY

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WITH PASSAGE of the Airline Deregulation Act of 1978,[1] Congress radically altered the manner in which the nation's air carriers conduct business. An industry accustomed to extensive government regulation and oversight was suddenly exposed to the economic and market freedoms enjoyed by most American industries.[2] Not surprisingly, the few years that have elapsed since deregulation have been the

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[1] Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified at 49 U.S.C. §§ 1301-1552 (Supp. II 1978)).

[2] Prior to 1978, the airline industry was governed by the Civil Aeronautics Act of 1938 and subsequently the Federal Aviation Act of 1958. Under the regulatory scheme fostered by these statutes, the Civil Aeronautics Board (CAB) exercised tight control over the entry of new carriers for service on domestic routes. Additionally, the CAB was responsible for enforcing the air carriers' statutory obligation to serve both large and small communities, certifying air carriers for service to new markets, setting rates and fares, and enforcing the prohibition against unfair competition by airlines. For a thorough discussion of pre-1978 airline regulation, see W. JORDAN, AIRLINE REGULATION IN AMERICA (1970). The Airline Deregulation Act of 1978 removed virtually all restrictions on airline domestic route systems. Certified airlines are now free to begin service to a new market without extensive government involvement. 49 U.S.C. § 1551(a)(1) (Supp. III 1979). There is similarly little interference with a carrier's right to discontinue service to a community. *Id.* § 1371(j)(1). Although a new carrier must still be licensed by the CAB, the only requirement pressed by the CAB is a showing of "fitness" to serve as an air carrier. *Id.* § 1388(b)(1)(B). Finally, the CAB has lost most of its control over freight rates and passenger fares. *Id.* § 1551(a)(2). The CAB is scheduled to go out of existence on January 1, 1985. *Id.* § 1551(a)(4). For a detailed discussion concerning provisions of the Airlines Deregulation Act, see Callison, *Airline*

most turbulent years in airline history.[3]

Perhaps the most conspicuous post-deregulation change in the industry is the proliferation of new carriers.[4] Until 1978, interstate airline travel was dominated by ten major carriers,[5] and the Civil Aeronautics Board (CAB) was extremely sparing in the licensing of new carriers.[6] In the past four years, by contrast, several new carriers have been established and a number of previously intrastate carriers have expanded into interstate service.[7] For the most part, the new interstate air carriers are non-union and have decidedly lower labor costs than their older rivals.[8] Most of the new carriers also operate at lower cost by flying second-hand aircraft, refusing to integrate ticketing and transfer services with other airlines, and by leasing less expensive airport facilities.[9]

As a consequence of the rapid entry of relatively low overhead airlines into the market and the removal of CAB control over fares and route structures, the industry has experienced

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Deregulation — Only Partially a Hoax: The Current Status of the Airline Deregulation Movement, 45 J. AIR L. & COM. 961 (1980).

[3] The impact of deregulation on the airline industry has been a popular subject with journalists and academics. For a thorough discussion and analysis of this topic, see J. MEYER, AIRLINE DEREGULATION: THE NEW ENTREPRENEURS (1984). *See also* J. NEWHOUSE, THE SPORTY GAME (76-83) (1982); Brigance, *Turbulence in the Skies*, DALLAS, Jan. 1984, at 41; *Toward New Policies For the Airline Industry*, 6 ANNALS AIR & SPACE L. 219 (1981); *Challenges Reshape Airline Structure [Aftermath of Deregulation]*, AV. WEEK & SPACE TECH., Nov. 3, 1980, at 50.

[4] *See Upstart Airlines Are Stinging the Big Carriers*, TIME, Dec. 12, 1983, at 50; *New Wrinkles: The Upstart Airline Era*, 109 FLYING 40 (Aug. 1982).

[5] In alphabetical order, the major interstate carriers historically have included American, Continental, Delta, Eastern, Frontier, Northwest, Ozark, Pan Am, Republic, Trans World, United, and U.S. Air. Braniff International, historically one of the major interstate air carriers, formally declared bankruptcy and ceased operations on May 13, 1982. Braniff resumed operations, on a much smaller scale, March 1, 1984. Continental Airlines filed for protection under Chapter 11 of the Bankruptcy Code in 1983, but did not completely cease air service.

[6] In a recent interview, Southwest Airlines' President Herb Kelleher pointed out that in 1938 "the same trunks were carrying 90 percent of the business and when deregulation occurred in 1978 the same trunks were still carrying the same 90 percent." Brigance, *supra* note 3, at 45.

[7] *See generally* CAB, CIVIL AERONAUTICS BOARD STAFF REPORT: COMPETITION AND THE AIRLINES, at 125-34 (1982).

[8] J. NEWHOUSE, *supra* note 3, at 79; *Upstart Airlines Are Stinging the Big Carriers*, *supra* note 4, at 50-51; *Deregulation and Recession Realities Causing Major Shift in Labor Relations*, AIR TRANSPORT WORLD, Dec. 1981, at 44-46.

[9] *See CAB*, *supra* note 7, at 165-94.

immense price competition in major air markets.[10] For most major carriers, the struggle to preserve their market share has meant sometimes charging fares that are not adequate to maintain profitability.[11] In addition to price competition, the prolonged downturn in air traffic due to the early 1980's recession, limitations on landings and takeoffs imposed as a result of the 1981 air traffic controllers' strike,[12] and high interest payments on newly acquired aircraft also have contributed to airline financial troubles.[13]

Successive years in the red have compelled the major airlines to find ways to reduce labor costs. At least two major airlines have set up non-union subsidiaries in order to compete on equal terms with their new non-union competition.[14] Some of the more troubled airlines have filed for protection under chapter 11 of the Bankruptcy Code in an attempt to be freed from costly collective bargaining agreements and other obligations.[15] Finally, most major carriers have tried to exact

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[10] The fare wars phenomenon has been frequently commented upon in the news media. *See, e.g.*, *For Airlines Deregulation a Mixed Blessing*, U.S. NEWS & WORLD REP., May 31, 1982, at 69 (major airlines slashing fares on transcontinental flights); Wall St. J., Apr. 7, 1983, at 38, col. 4 (TWA Cut Fares Between St. Louis and Four Other Cities Because of New Competitor, Air One); Wall St. J., Jan. 20, 1983, at 23, col. 5 (Air Florida Inaugurates a "Match or Beat" Fare Plan); Wall St. J., Feb. 8, 1982, at 18, col. 3; Wall St. J., Dec. 1, 1982, at 7, col. 2 (The latest offers of $99 fares are expected to be prelude to renewal of year ago fare wars); *See generally*, CAB, *supra* note 7 at 196-214.

[11] *The Aftermath of Deregulation*, VENTURE, Sept. 1982, at 50; Wall St. J., Jan. 5, 1983, at 25, col. 3; Wall St. J., July 1, 1982, at 1, col. 5.

[12] In Aug., 1981, the Professional Air Traffic Controllers Organization (PATCO) called a strike affecting virtually all commercial airlines in the United States. The initial effect of the strike was a severe cutback in the volume of traffic that could be handled by the nation's busiest airports. Wall St. J., Aug. 7, 1981, at 21, col. 3. Subsequently, the government discharged all striking traffic controllers who did not heed an order to return to work and established emergency rules restricting takeoffs and landings at the nation's 22 largest airports. The Federal Aviation Administration regained the capability to handle pre-strike traffic levels in April, 1983. Telephone interview with Gene Barlow, FAA Air Traffic Services Department (Feb. 16, 1984).

[13] One financial bright spot for airlines in recent years has been the stabilization and, recently, the decline of jet fuel costs. Wall St. J., Mar. 28, 1983, at 10, col. 4. More recently, increased traffic at higher fares has produced sizeable profits for some large carriers and the prospects for a profitable 1984 appear strong. N.Y. Times, Jan. 19, 1984, at 25, col. 3. Given the number of variables affecting airline costs and the industry's vulnerability to sizeable losses, however, continued improvement in the economic picture of most carriers cannot be taken for granted.

[14] *See infra* text accompanying notes 17-125.

[15] *See infra* text accompanying notes 126-129.

concessions from unions to lower wages and enable more flexible and efficient use of employees.[16] This article will examine these approaches to lowering airline costs within the contours of traditional labor law and will evaluate the impact of deregulation on collective bargaining in a predominantly unionized industry.

I. DOUBLE-BREASTED AIRLINES

The first noteworthy post-deregulation move to reduce labor costs was by Texas International Airlines in 1980. Until February, 1980, Texas International was controlled by Jet Capital Corp., and its operations were substantially unionized. In February, 1980, however, Jet Capital Corp. formed a holding company named Texas Air Corp. which assumed ownership of Texas International. At the same time, New York Airlines, Inc. was formed with ownership also vested in Texas Air Corp. After this restructuring, Texas International continued to operate in its traditional markets on a unionized basis while New York Air commenced operations in the northeastern United States on a non-union basis.[17] The obvious purpose of this form of corporate restructuring, some-

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[16] *See infra* text accompanying notes 173-281.

[17] The facts surrounding formation of New York Air are set forth in Air Line Pilots Ass'n v. Texas Int'l Airlines, 656 F.2d 16, 17-18 (2d Cir. 1981). This case arose after Texas International and New York Air refused the Air Line Pilot Association's (ALPA) request for recognition as bargaining representative for New York Air pilots. In its complaint, ALPA alleged that Texas International and New York Air should be regarded as a single carrier for representation purposes and that failure to recognize the union as representative of New York Air pilots constituted a violation of the employer's duty to maintain the collective bargaining agreement and to bargain with ALPA under Railway Labor Act (RLA) §§ 2, First and 2, Ninth, 45 U.S.C. §§ 152, First and 152, Ninth (1976), respectively. ALPA also alleged that Texas International unlawfully was interfering with the right of New York Air pilots to choose a bargaining agent and was unilaterally changing terms and conditions of employment. Since a representation dispute was at the core of ALPA's allegations, the district court dismissed the action on the grounds that the National Mediation Board (NMB) had exclusive jurisdiction under RLA § 2, Ninth, 45 U.S.C. § 152, Ninth (1976). Air Line Pilots Ass'n v. Texas Int'l Airlines, 502 F. Supp. 423 (E.D.N.Y. 1981). The Second Circuit affirmed dismissal of the action, although it expressed concern over the fact that the representation dispute differed from the types of disputes traditionally handled by the NMB. Air Line Pilots Ass'n v. Texas Int'l Airlines, 656 F.2d 16, 24 (2d Cir. 1981). Currently, the issue of whether New York Air and Texas International should be treated as a single carrier is pending before the NMB.

times referred to as "double breasting," was to enable Texas Air Corp. to operate competitively with non-union commuter airlines in some of the high density northeastern markets.[18] This effort has been challenged by the Air Line Pilot's Association (ALPA), and the issue of whether New York Air can operate as a non-union airline is currently pending before the National Mediation Board (NMB).[19]

More recently, Frontier Holdings, Inc., the parent corporation of unionized Frontier Airlines, has formed a second carrier named Frontier Horizons which operates with non-union personnel.[20] By operating non-union, the holding company believes that Frontier Horizon will be more competitive with other new carriers serving a number of major cities from Denver's Stapleton Airport.[21] The International Association of Machinists and the Airline Employees Association filed petitions with the NMB challenging the new airline's status as an entity separate from Frontier Airlines.[22]

The establishment of a subsidiary corporation that denies recognition to an incumbent union at the parent corporation or sister corporation is not a per se violation of federal labor

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[18] AV. WEEK & SPACE TECH., Sept. 15, 1980, at 34; BUS. WEEK, Dec. 29, 1980, at 44-45.

[19] *See supra* note 17.

[20] *See* Woodburg, *Small Birds in a Big Sky*, TIME, Dec. 12, 1983, at 50-51; *Frontier Holdings Forms Second Airline Subsidiary*, AV. WEEK & SPACE TECH., Aug. 15, 1983, at 33; Daily Lab. Rep. (BNA) No. 5, Jan. 10, 1984, at A-14.

[21] Glenn L. Ryland, President of Frontier Holdings, estimates that Frontier Horizons will be able to operate at six cents per available seat mile (ASM). This contrasts with Frontier Airlines' current operating costs of nine cents per ASM. AV. WEEK & SPACE TECH., Aug. 15, 1983, at 33. For average ASM costs of some other air carriers, see *infra* note 194.

[22] NMB Cause No. 5570 (Jan. 1984). *See* 11 NMB 16 (1983). Additionally, unions representing Frontier employees have formed a coalition to protest the creation of Frontier Horizon. Daily Lab. Rep. (BNA) No. 5, Jan. 10, 1984, at A-14. On January 31, 1984, the Air Line Pilots Association and Frontier Holdings, Inc. entered into an agreement precluding the holding company from establishing any other non-union carrier besides Frontier Horizon. The agreement limits Frontier Horizon to operation of no more than 7 aircraft. See Gallagher, All in the Family: Affiliated Airlines and the Single Carrier Issue, ALI-ABA Airline Labor Law Course Materials (1984). Ability to control expansion of Frontier Horizon has been a major obstacle in negotiations between Frontier and the Association of Flight Attendants, despite the agreement Frontier reached with ALPA. *See* The Denver Post, May 26, 1984, at 10, col. 2.

law.[23] Rather, a subsidiary or affiliated company may lawfully refuse recognition to the union so long as operations of the two companies are sufficiently separate.[24] Either the *New York Air* case or *Frontier Horizons* case currently before the NMB will explain for the first time to what length a unionized air carrier must go in setting up a non-union subsidiary airline.[25] Under well-established decisions by both the National Labor Relations Board (NLRB)[26] and the NMB,[27] however, it is apparent that unionized air carriers must make a substantial commitment to autonomy of the new airline if it is to avoid being bound to the existing airline's labor contract. It is also apparent that the threat of such double breasting has become an important subject in collective bargaining between airlines and unions.[28]

A. *Labor Management Relations Act Principles Governing Maintenance of Separate Employer Status in Commonly Owned Companies*

Although airline labor disputes are generally governed by the Railway Labor Act (RLA),[29] the law relating to double breasting has developed largely in cases decided by the NLRB under the Labor-Management Relations Act (LMRA).[30] The principles developed by the NLRB in these cases provide a helpful analog for examining the restraints that will probably apply to the creation of non-union affiliate airlines under the RLA.[31] The LMRA prohibits an employer

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[23] The National Labor Relations Board (NLRB) and federal courts consider common ownership evidence that two nominally separate companies constitute a single employer, but that factor alone is generally not enough for a finding of single employer status. *See, e.g.*, J.M. Tanaka Constr. Co. v. NLRB, 675 F.2d 1029 (9th Cir. 1982); Carvel Co., 226 N.L.R.B. 11 (1976); Gerace Constr., Inc., 193 N.L.R.B. 645 (1971).

[24] *See, e.g.*, North Carolina State Ports Auth., 9 N.M.B. 398 (1982); Frank N. Smith Assoc., 194 N.L.R.B. 212 (1971).

[25] *See supra* note 17.

[26] *See infra* text accompanying notes 30-73.

[27] *See infra* text accompanying notes 74-121.

[28] *See infra* text accompanying notes 122-125.

[29] 45 U.S.C. §§ 151-181 (1976).

[30] 29 U.S.C. §§ 141-197 (1976).

[31] *See, e.g.*, Trans Int'l Airlines v. International Bhd. of Teamsters, 650 F.2d 949, 959 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981) (stating that for purposes of analogy it

from simultaneously operating union and non-union companies by making it unlawful for an employer to "refuse to bargain collectively with the representatives of its employees."[32] Over the past fifteen years, refusal-to-bargain charges against companies have arisen most frequently in the construction industry when a unionized company has created a second company to bid on non-union construction projects.[33] In determining whether these double-breasted operations are violative of the LMRA,[34] the NLRB has scrutinized the relationship between the two companies to determine whether they are sufficiently separate and distinct to preclude a finding that both companies constitute a "single employer."[35]

As discussed below, four principal factors govern analysis in this area: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control.[36] Although few gen-

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is appropriate to refer to the NLRA for assistance in construing the RLA); Pan-Am World Airways v. International Bhd. of Teamsters, 275 F. Supp 986 (S.D.N.Y. 1967), *aff'd*, 404 F.2d 938 (2d Cir. 1969) (stating that while cases decided under the NLRA are not controlling under the RLA, they offer a cogent analogy in the solution of similar problems); International Assoc. Mach. & Aerospace Workers v. National Ry. Labor Conference., 310 F. Supp. 905, 913 (D.D.C. 1970) (stating that while the NLRA cannot be imparted wholesale into the railway labor arena, it may be referred to for assistance in construing the RLA).

32 Labor-Management Relations Act (LMRA), § 8(a)(5), 29 U.S.C. § 158(a)(5)(1976).

33 *See generally* FEDERAL PUBLICATION INC., DOUBLE-BREASTED OPERATIONS IN THE CONSTRUCTION INDUSTRY (1983). There clearly may be other motivations for establishing a non-union company, but the traditional dichotomy in the construction industry between projects performed with union labor and projects performed non-union offers a motivation for dual operations not present in most industries.

34 LMRA, § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976). In addition to a charge under section 8(a)(5), the double-breasted issue may come before the NLRB as a result of an unfair labor practice charge filed by an employer alleging that a union violated LMRA, § 8(b)(4), 29 U.S.C. § 158(b)(4) by placing pickets at a non-union employer's jobsite in order to force the employer to sign a collective bargaining agreement.

35 *See generally* Bornstein, *The Emerging Law of the "Double-Breasted" Operation in the Construction Industry*, 28 LAB. L.J. 77 (1978); Penfield, *The Double-Breasted Operation in the Constuction Industry*, 27 LAB. L.J. 89 (1976); Comment, *Double-Breasted Operations in the Construction Industry: A Search For Concrete Guidelines*, 6 U. DAYTON. L. REV. 45 (1981).

36 *See infra* text accompanying notes 40-73. *See also* Local 627, Int'l Union of Operating Eng'rs v. NLRB, 518 F.2d 1040, 1045-46 (D.C. Cir. 1975), *aff'd in part, rev'd in part sub nom.* South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs, 425 U.S. 800 (1976), *on remand*, Peter Kiewit Sons' Co., 231 N.L.R.B. 76 (1977), *aff'd sub. nom.* NLRB v. Al Bryant, Inc., 711 F.2d 543, 551 (3rd Cir. 1983); NLRB v. DMR

eralizations may be drawn concerning application of the above four factors, a handful of well-established guidelines are relevant to virtually every case presenting the single employer issue. First, common ownership alone is insufficient to establish single employer status.[37] Second, the single most important factor is common control over labor relations.[38] Finally, the ultimate goal in applying the four-factor test is to determine whether there exists an overall arms-length relationship between the formally unintegrated companies.[39]

1. *Interrelation of Operations*

Interrelation of operations refers to the functional elements of business common to both companies. Given the number of businesses and industries subject to LMRA jurisdiction, it is unrealistic to construct an exhaustive list of criteria indicative of interrelatedness.[40] In general, however, since the essence of business is sales of a product or service, customer relations

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Corp., 699 F.2d 788, 791 (5th Cir. 1983); Carvel Co., 226 N.L.R.B. 111 (1976); Parklane Hosiery Co., 203 N.L.R.B. 597, 612 (1973).

[37] *See, e.g.*, J.M. Tanaka Constr. Co. v. NLRB, 675 F.2d 1029 (9th Cir. 1982); Offshore Express, Inc., 267 N.L.R.B. 72 (1983); Carvel Co., 226 N.L.R.B. 111 (1976); Gerace Constr., Inc., 193 N.L.R.B. 645 (1971). Even where there is no element of common ownership, two companies may be required to recognize a union as bargaining agent for a unit of employees on grounds that the companies are "joint employers." *See* NLRB v. C.R. Adams Trucking, Inc., 718 F.2d 869 (8th Cir. 1983). The "joint employer" test is essentially the same as the single employer test, except that greater scrutiny is usually applied to analysis of the three remaining relevant factors.

[38] *See* Western Union Corp., 224 N.L.R.B. 274, 277 (1976), *aff'd*, 571 F.2d 665 (D.C. Cir. 1978); Gerace Constr. Co., 193 N.L.R.B. 645 (1971).

[39] Local 627, Int'l Union of Operating Eng'rs v. NLRB, 518 F.2d 1040, 1045-46 (D.C. Cir. 1975), *aff'd on this issue sub nom.* South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs, 425 U.S. 800 (1976). *Accord* Penntech Papers, Inc. v. NLRB, 706 F.2d 18 (1st Cir. 1983), *cert. denied*, 104 S. Ct. 237 (1983); Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055 (1st Cir. 1981); NLRB v. Don Burgess Constr. Corp., 596 F.2d 378 (9th Cir. 1979).

[40] In one case, Frank N. Smith Ass'n, 194 N.L.R.B. 212 (1971), 21 factors were listed: (1) identity of supervisors; (2) interchange of employees; (3) procedures for job estimating; (4) source of paychecks; (5) identity of accountant; (6) identity and source of employees; (7) type of work performed; (8) type and source of equipment; (9) vacation policy; (10) telephone listing; (11) advertising; (12) bookkeeping and record keeping; (13) client referrals; (14) bidding; (15) source of credit; (16) membership in employers' association; (17) identity of officers and directors; (18) source of executive compensation; (19) number of employees; (20) hiring procedures; and (21) location of offices. *Id.* at 214-16.

and account management are particularly relevant to single employer analysis. For example, in the 1979 case of *Los Angeles Marine Hardware Co. v. NLRB*,[41] the Ninth Circuit Court of Appeals highlighted the fact that two companies shared substantially the same customer base in determining that the companies were substantially integrated.[42] More recently, in *Penntech Papers, Inc. v. NLRB*,[43] the fact that a parent corporation purchased all of a subsidiary's products and did all billings for the subsidiary weighed heavily in the First Circuit Court of Appeals' determination that the two companies were a single employer.[44]

Shared facilities and equipment can also be extremely damaging to a claim that two companies are separate. In *Al Bryant, Inc.*,[45] one individual owned two companies engaged in the drywall finishing business. Both companies were housed in the same facility and overhead costs were split in proportion to the gross volume of business done by each. Additionally, equipment was shared by the two companies under a compensation formula based on allocation of capital depreciation. Noting that these compensation formulas did not reflect fair rental value for facilities and equipment, the NLRB refused to characterize the companies' relationship as "arms-length."[46] The Third Circuit Court of Appeals affirmed the Board's decision.[47]

Finally, centralization of administrative services for two companies is frequently given special emphasis when analyzing the interrelation of operations. Joint bank accounts, tax returns, payroll preparation, clerical support, and professional services all evidence that the companies' operations are

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41 602 F.2d 1302 (9th Cir. 1979).

42 *Id.* at 1305. *See also* P.A. Hayes, Inc., 226 N.L.R.B. 230 (1976)(alter ego status found where new company possessed 80 per cent of prior company's customer base).

43 706 F.2d 18 (1st Cir.), *cert. denied*, 104 S. Ct. 237 (1983).

44 *Id.* at 25.

45 260 N.L.R.B. 128 (1982), *enforced*, 711 F.2d 543 (3rd Cir. 1983).

46 *Id.* at 139. Sharing of equipment and facilities will generally not undermine a claim that two companies are separate, so long as reasonable compensation is paid. *See* Gerace Constr., Inc., 193 N.L.R.B. 645, 646 (1970); Howard Jenks, d/b/a Glendora Plumbing, 165 N.L.R.B. 101 (1967).

47 NLRB v. Al Bryant, Inc., 711 F.2d 543 (3d Cir. 1983).

highly integrated.[48] In *Penntech Papers, Inc. v. NLRB*,[49] the Third Circuit Court of Appeals viewed centralized purchase of supplies and materials as evidence of interrelatedness.[50] A ready conclusion from the NLRB and federal court cases discussing interrelation of operations is that successful double breasting requires careful separation of all phases of the companies' business operations.

2. *Centralized Control of Labor Relations.*

As previously mentioned,[51] centralized control of labor relations is the most important factor in determining whether two companies constitute a single employer under the LMRA.[52] Most often when the single employer issue arises there is one entity or individual with the *ability* to control decision-making at all levels of both companies. For this reason it is important to note that the Board usually focuses on *actual* control over labor relations in its analysis.[53] To determine if there is genuine centralized control over labor relations, the Board generally examines the day-to-day personnel opera-

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[48] *See supra* note 40.

[49] 706 F.2d 18, 25 (3rd Cir. 1983).

[50] *Id.* at 25.

[51] *See supra* text accompanying note 38.

[52] In at least one case, the NLRB suggested that this factor alone may suffice to establish single employer status. *See* Peter Kiewit Sons' Co., 206 N.L.R.B. 562 (1973), *rev'd*, 518 F.2d 1040 (D.C. Cir. 1975), *aff'd in part, rev'd in part sub nom.* South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs, 425 U.S. 800 (1976), *on remand*, 231 N.L.R.B. 76 (1977), *aff'd*, 595 F.2d 844 (D.C. Cir. 1979). In later cases, the Board has withdrawn from this view. *See* Edward J. White, Inc., 237 N.L.R.B. 1020 (1978); Appalachian Constr., Inc., 235 N.L.R.B. 685 (1978). One recent decision indicates that lack of centralized control over labor relations will preclude a single-employer finding unless there is an extreme degree of interrelation of operations. *See* Offshore Express, Inc., 267 N.L.R.B. 72 (1983).

[53] *See* Offshore Express, Inc., 267 N.L.R.B. 72 (1983) (two companies not single employer where neither has input into work rules of other company); Appalachian Constr., Inc., 235 N.L.R.B. 685 (1978) (single employer found where daily supervision for two companies carried out by same men); Tabernacle Sand & Gravel Corp., 232 N.L.R.B. 957 (1977) (two companies constitute single employer where same individuals are responsible for labor relations at both companies); Gerace Constr., Inc., 193 N.L.R.B. 645 (1971) (separate labor policies and fringe benefits package rebuts single employer claim). *But see* Penntech Papers, Inc. v. NLRB, 706 F.2d 18, 26 (1st Cir. 1983), *cert. denied*, 114 L.R.R.M. 2648 (1983) ("critical test" is present and apparent means to control labor negotiations).

tions of the subject companies.[54]

Actual control over labor relations may be established by a variety of evidence. For example, showing that the same individuals exercise power to hire, fire, and direct workers at both companies is considered strong evidence of centralized labor relations.[55] Similarly, the Board will consider whether supervisors in both companies are subject to control by the same person,[56] whether the new company's personnel policies and practices are substantially similar to those of the pre-existing operation,[57] and whether one company provides administrative and clerical services to the other company for carrying out personnel relations.[58] Possession of authority by the same person(s) to negotiate labor contracts for both companies is also considered strong evidence of centralized control over labor relations,[59] especially when other evidence of active control over day-to-day personnel matters is present.[60] The variety of means for establishing common control over labor relations is well-illustrated by the Board's decision in *Tabernacle Sand & Gravel Corp.*,[61] upholding an administrative law judge's inference of such control based upon substantial interrelation of operations and common identity of company officers and directors.[62]

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[54] *See* Al Bryant, Inc., 260 N.L.R.B. 128, 140 (1982), *enforced*, 711 F.2d 543 (3rd Cir. 1983); Gerace Constr., Inc., 193 N.L.R.B. 645, 650 (1971). *See also* NLRB v. C.R. Adams Trucking, Inc., 718 F.2d 869 (8th Cir. 1983).

[55] *See* N.L.R.B. v. C.R. Adams Trucking, Inc., 718 F.2d 869, 870 (3rd Cir. 1983).

[56] *See* Frank N. Smith Ass'n, 194 N.L.R.B. 212 (1971).

[57] *See* Edward J. White, Inc., 237 N.L.R.B. 1020 (1978).

[58] *See* Western Union Corp., 224 N.L.R.B. 274 (1976), *aff'd sub. nom.* United Tel. Workers v. NLRB, 571 F.2d 665 (D.C. Cir. 1978).

[59] *See* Safety Elec. Corp., 239 N.L.R.B. 40 (1978); H.S. Brooks Elec., Inc., 233 N.L.R.B. 619 (1980), *supplemented*, 247 N.L.R.B. 619 (1980).

[60] *See* H.S. Brooks Elec., Inc., 223 N.L.R.B. 889 (1977), *supplemented*, 247 N.L.R.B. 619 (1980).

[61] 232 N.L.R.B. 957 (1977)..

[62] *Id.* at 960. *See also* Edward C. Kelly Co., Inc., 230 N.L.R.B. 337 (1977). One commentator has listed the following factors frequently relied upon as evidence of common control over labor relations:

> (1) Whether both operate on a closed shop basis; (2) whether both entities are operated with regard to craft lines; (3) whether pay rates are the same; (4) whether the two entities maintain separate health and workmen's compensation policies; (5) whether the same individuals conduct high-level labor relations policies; (6) whether each firm has separate job

3. *Common Management*

The NLRB's analysis of common management as a factor in determining single employer status, like its analysis of centralized control of labor relations,[63] is concerned with the actual makeup of management rather than one individual or entity's ability to control makeup of the management and executive team. Interlocking directorships are considered evidence of common management,[64] but a far more important consideration is the extent of overlap among the companies' corporate officers.[65] Moreover, even where there is considerable overlapping of officers and directors, the absence of interrelated operations may preclude a single employer finding.[66] Conversely, evidence that an individual exercises significant managerial responsibility in the normal operations of both companies is highly suggestive of single employer status.[67]

> supervisors; (7) whether different individuals hire and control job supervisors; (8) whether vacations are administered by separate individuals; (9) whether separate individuals have authority to enter into, or refuse to enter into, union agreements; (10) whether different individuals possess the power to hire and fire; (11) whether different individuals control pay scales; (12) whether the companies maintain different fringe benefit plans; (13) whether one company renders services to the other for the administration of labor relations policies, and, if so, whether that company is compensated for these services; and (14) whether the individual who initially established the labor relations policies of the non-union entity also played an active role in labor relations for the union firm.

Comment, *supra* note 35, at 62-63.

[63] *See supra* text accompanying notes 52-62.

[64] *See, e.g.*, Penntech Papers, Inc. v. NLRB, 706 F.2d 18 (1st Cir.), *cert. denied*, 104 S. Ct. 237 (1983); Carpenters Local No. 213, 201 N.L.R.B. 23 (1973); Gerace Constr., Inc., 193 N.L.R.B. 645 (1971).

[65] In Western Union Corp., 224 N.L.R.B. 274 (1976), *aff'd sub. nom.* United Tel. Workers v. NLRB, 571 F.2d 655 (D.C. Cir.), *cert. denied*, 439 U.S. 827 (1978), there was some overlapping of directors among a holding company and its subsidiaries. The Board, however, held that the fact that each subsidiary had its own president and vice president precluded a single employer finding. 224 N.L.R.B. at 276.

[66] *See* Chippewa Motor Freight, Inc., 261 N.L.R.B. 455 (1982).

[67] *See* Alle Arecibo Corp., 264 N.L.R.B. 163 (1982); Carpenters Local No. 213, 201 N.L.R.B. 23 (1973). Regular sharing of employees by a supervisor working for both companies will generally result in a single employer finding. *See* Edward J. White, Inc., 237 N.L.R.B. 1020 (1978); Tabernacle Sand & Gravel Corp., 232 N.L.R.B. 957 (1977); Edward C. Kelly Co., Inc., 230 N.L.R.B. 337 (1977).

4. *Common Ownership*

Common ownership, the final element of the four-factor test for determining single employer status, rarely is decisive.[68] Since common ownership is usually the reason for beginning single employer analysis,[69] emphasis on this as evidence that two companies are a single employer would frequently obviate the need for looking at further evidence.[70] Nevertheless, common ownership is some evidence of single employer status and the weight attributed to this factor varies depending on the degree of commonality[71] and the size of the companies at issue. Common ownership will be more persuasive evidence of single employer status with regard to a small business than with large corporations. This is due to the greater likelihood that owners of a small business are involved in day-to-day business operations and personnel management.[72] Finally, common ownership may be found to exist

[68] *See supra* text accompanying note 37.

[69] A few well-known corporate structures give rise to most double-breasting issues. One popular approach is to set up the new company as a wholly-owned subsidiary of the pre-existing company. Under uniform corporation law, companies will be regarded as separate unless the subsidiary is merely the alter ego or agent of the parent company or was established to avoid legal obligations of the parent. The wholly-owned subsidiary approach is restricted by many labor contracts that prevent the signatory employer from owning another company in the same line of business.

A second form of double-breasting involves creation of a holding company to own the pre-existing company and new company as dual subsidiaries. This approach is preferable to the parent subsidiary approach since it allows for greater separation between management of the two operating companies. To a lesser extent than with parent-subsidiary double-breasting, this approach may also be precluded by provisions of an existing labor contract. Both Texas Air Corp. and Frontier Holdings, Inc. followed the holding company approach in establishing non-union carriers. *See supra* notes 17-22 and accompanying text. Another form of double-breasting, peculiar to the construction industry, involves establishment of separate divisions within a company to perform on either a "merit" basis or a union basis. *See generally*, DOUBLE-BREASTED OPERATIONS IN THE CONSTRUCTION INDUSTRY, *supra* note 33, at 42-54 (1983).

[70] *See, e.g.*, Western Union Corp., 224 N.L.R.B. 274, 275 (1976), *aff'd sub. nom.* United Tel. Workers v. NLRB, 571 F.2d 665 (D.C. Cir.), *cert. denied*, 439 U.S. 827 (1978).

[71] Common ownership does not have to be complete in order to be considered evidence that two companies are a single employer. *See* Edward J. White, Inc., 237 N.L.R.B. 1020 (1978). Common ownership as a factor will be far more persuasive, however, if ownership is substanially concentrated in one individual or entity.

[72] *Compare* Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055 (1st Cir. 1981) (family ownership of holding company and two small subsidiary companies is evidence that subsidiaries are a single employer) *with* American Fed'n of Television & Radio Artists

even though legal ownership is technically spread among a number of individuals or entities if the individuals or entities typically act on a unified basis.[73]

B. *Single Employer Issue Under the Railway Labor Act*

Labor relations in airlines engaged in interstate commerce are governed by the Railway Labor Act (RLA),[74] rather than the LMRA,[75] and enforcement of the RLA is vested in the NMB. At least two provisions in the RLA give the NMB authority to decide when legally separate companies are to be treated as one for union representation purposes. First, under section 2, Fourth, of the RLA,[76] a majority of employees in a certain craft or class at a carrier have the right to choose an agent for representation in collective bargaining.[77] Second,

v. NLRB, 462 F.2d 887 (D.C. Cir. 1972) (communications divisions of the vast Hearst Corporation are not a single employer).

[73] *See, e.g.*, DMR Corp., 258 N.L.R.B. 1063, *remanded on other grounds*, NLRB v. DMR Corp., 699 F.2d 788 (5th Cir.), *cert. denied*, 104 S. Ct. 164 (1983); Bryar Constr. Co., 240 N.L.R.B. 102 (1979); Safety Elec. Co., 239 N.L.R.B. 40 (1978).

[74] 45 U.S.C. §§ 151-163 (1976).

[75] 29 U.S.C. §§ 151-206 (1976).

[76] 45 U.S.C. § 152, Fourth (1976).

[77] *Id.* In the Railway Labor Act context the term "craft or class" is generally used instead of bargaining unit to refer to a group of employees that constitute an appropriate representation group. A group of employees is appropriate for representation if they work for the same carrier and perform the same or related job functions. Under the RLA, crafts or classes are organized on a system-wide basis, rather than being limited to one facility or geographical location. *See* Ground Services, Inc., 8 N.M.B. 112 (1980); Georgia Ports Authority Marine Dock, 5 N.M.B. 269 (1970). The fact that a properly elected union will represent employees throughout the airline's system adds special importance to the definition of "carrier" under the RLA. For jurisdictional purposes, "carrier" is defined in 45 U.S.C. § 151, First (1976). The section provides that a "carrier" is any:

> express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any services (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': Provided, however, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation

section 2, Ninth, of the RLA[78] requires the NMB to determine what employees constitute a craft or class and to "designate who may participate in the election."[79]

In early decisions concerning union representation of employees in commonly owned or affiliated companies, the predominant factor looked to by the NMB was reporting to the Interstate Commerce Commission (ICC). Companies that reported separately to the ICC were presumed to be separate employers.[80] This limited analysis soon gave way to a more expansive inquiry, however, as the NMB began to migrate toward the NLRB's approach to single employer analysis.[81] *New York Central Railroad Co.*,[82] decided in 1941, marked this new era of NMB inquiry into the operational relationship of commonly owned carriers.

In *New York Central*, the NMB was asked to determine whether the New York Central Railroad Co. and several small subsidiary railroads should be treated as a single carrier for representation purposes.[83] Evidence presented to the NMB showed that the New York Central and the subsidiary

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> now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board, or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term 'carrier' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilties therefor, or in any of such activities.

Id. Airlines were expressly included within this definition of "carrier" by 45 U.S.C. § 181 (1976).

78 45 U.S.C. § 152, Ninth (1976).

79 *Id.*

80 *See* Saint Louis-Southwestern System, N.M.B. Case No. R-54 (1934).

81 See *supra* text accompanying notes 36-73 for NLRB's approach to single employer analysis.

82 1 N.M.B. 197 (1941), *aff'd sub nom.* Switchmen's Union v. National Mediation Board, 135 F.2d 785 (D.C. Cir.), *rev'd on other grounds*, 320 U.S. 297 (1943).

83 The smaller railroads involved in *New York Central* included the Boston & Albany R.R., the Cleveland, Cincinnati, Chicago, & St. Louis R.R., the Michigan Central R.R. and the Toledo & Ohio Central Ry. These companies were not subsidiaries of New York Central in terms of stock ownership; rather, the smaller railroads each had given long term leases on railroad tracks and facilities to New York Central. Switchmen's Union v. National Mediation Board, 135 F.2d 785, 787 (D.C. Cir.), *aff'g*, New York Central R.R., 1 N.M.B. 197 (1941).

railroads operated as a unified railway system, that common executive officers served both the New York Central and its subsidiary companies and that there were many instances of merged seniority rosters.[84] Thus, even though the subsidiary railroads filed separate annual financial reports to the ICC, the NMB held that the New York Central and its subsidiaries constituted a single carrier for representation purposes.[85] In enforcing the NMB's decision, the Court of Appeals for the District of Columbia explained: "[T]he [RLA] deals with relations between carriers and employees engaged in performing transportation, and was obviously intended to apply to operating carriers, not to bare corporate entities which exist only for the purpose of receiving rentals and distributing the proceeds . . . ."[86]

In the past four decades, a handful of NMB decisions have elaborated on *New York Central's* emphasis on system wide integration of operations. The first significant single carrier decision by the NMB after *New York Central* was *San Antonio, Ulvalde & Gulf Railroad Co.*,[87] which emphasized the importance of payroll preparation, seniority lines, and corporate accounting.[88] There, even though the San Antonio, Ulvade and Gulf Railroad Co. (SAUG) and its parent company[89] were operated with a great deal of coordination in railway operations, and shared many of the same executive and operating officers, the NMB held that SAUG was a separate entity for representation purposes.[90] The NMB was persuaded

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[84] *Id.* at 789-90.

[85] *Id.* at 787.

[86] *Id.* at 790.

[87] 2 N.M.B. 157 (1950).

[88] *Id.* at 160-62.

[89] The San Antonio, Ulvade and Gulf Coast R.R. (SAUG) was a subsidiary of the Missouri-Pacific R.R. The single employer issue in this case arose from a petition by the Order of Railway Conductors of America (ORC) to investigate a representation dispute between it and the Brotherhood of Railway Trainmen (BRT). The ORC sought an election among most conductors at SAUG, who traditionally had been represented by the BRT. In opposition to an election, the BRT asserted that SAUG was not a separate employer and that any election involving SAUG employees would have to be a part of an overall unit of Missouri-Pacific R.R. employees and all subsidiary companies. *Id.* at 157.

[90] *Id.* at 168.

that SAUG's control over routine labor relations matters, its history of collective bargaining as a separate employer, and its separate accounting and financial reporting practices justified its treatment as a separate employer from its parent company.[91]

In more recent years, the NMB has addressed the single carrier issue in cases involving commonly owned air carriers. *Air Florida, Inc.*,[92] decided in 1979, involved a petition by the International Association of Machinists and Aerospace Workers (IAM) to certify a bargaining class consisting of employees from Air Florida and its subsidiary, Air Sunshine. The NMB did not make a determination on the single carrier issue, but in returning the petition to the NMB hearing officer for resolution of the bargaining class question, the NMB listed the following factors as relevant to determining whether Air Florida and Air Sunshine were a single employer for representation purposes:

> 1. Background information about the operations of the two carriers, including numbers and types of aircraft and employees revenues and schedules.
> 2. Information regarding the transition from intrastate to interstate carriage, the acquisition of Air Sunshine by Air Florida, and future plans.
> 3. Location of facilities.
> 4. Interlining and/or leasing agreements between Air Florida and Air Sunshine.
> 5. Interchange of personnel and maintenance work.
> 6. The extent to which there are common ownership, officers, directors and employers and sharing of payroll and computer facilities.
> 7. History of collective bargaining.[93]

The seven factors listed in *Air Florida* were never applied to a determination of the single carrier status of Air Florida and Air Sunshine, since Air Sunshine was subsequently merged

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[91] *Id.* at 166-167.
[92] 7 N.M.B. 61 (1979).
[93] *Id.* at 62.

into Air Florida and all indicia of separateness removed.[94] Nevertheless, *Air Florida* illustrates that, like the NLRB, the NMB is most concerned with actual interrelation of operations among commonly owned companies and common exercise over labor relations policies and practices.[95]

The NMB's 1980 decision in *Republic Airlines*[96] echoes *Air Florida's* emphasis on control over labor relations. The dispute in *Republic Airlines* arose from Republic's acquisition of Hughes Air West, and its plans to operate Hughes Air West as a subsidiary known as Republic West d/b/a Republic. Mechanics of Hughes Air West were represented by the Aircraft Mechanics Fraternal Association (AMFA), and Republic mechanics were represented by the IAM.[97] After the acquisition of Hughes Air West, however, Republic planned to recognize the IAM as representative for mechanics of both Republic Airlines and Republic West.[98] Accordingly, in its petition to the NMB, AMFA asserted that Republic West would be a separate carrier and that the AMFA should retain its right to represent Republic West mechanics.[99] Republic, on the other hand, contended that the two airlines would be operationally integrated and should be treated as one for representation purposes.[100]

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[94] *Id.*

[95] *See supra* notes 36-39 and accompanying text. NMB concern with common control over labor relations is also expressed in Air Lift Int'l, Inc., 4 N.M.B. 142 (1967). There, in determining that employees of Air Lift and another carrier that had been acquired by Air Lift, Slick Airways Division of the Slick Corporation, should be treated as one bargaining unit, the NMB explained:

> [W]here an issue arises relating to "carrier status" . . . the Board must of necessity take into consideration, among other factors, whether or not the employees of the carrier or carriers have, in fact, been merged and are subject to the direction of a single management having the sole authority to supervise and direct the manner of rendition of the services of those employees.

Id. at 145.

[96] 8 N.M.B. 49 (1980).

[97] *Id.* at 50.

[98] *Id.* at 52.

[99] *Id.* at 51.

[100] *Id.* Republic's position was precisely the opposite of the position an airline would take if it were trying to go double-breasted. Republic's reasons for desiring to operate Republic West as a subsidiary instead of merging it into Republic were primarily tax-related. Hughes Air West had a 40 million dollar tax loss that could be carried for-

The NMB agreed with Republic and denied AMFA's petition to clarify Republic West as a separate carrier. A significant factor in the NMB's analysis was Republic's intention to hold Republic West and itself out to the public as a single airline and to operate as a single transportation system with through-service across the Republic and Republic West route system.[101] The NMB further noted that labor relations for both airlines would be handled by Republic, that Republic West would have no labor relations staff of its own, and that the two airlines would eventually have an integrated payroll and reservation system.[102] In concluding, the NMB stated that "[t]he CAB may approve of a two corporation set-up for purposes of economic regulation, however, this Board may pierce the corporate veil for purposes of *rational labor-management relations*."[103]

The phrase "rational labor-management relations" has been used by the NMB in other single carrier cases in recent years.[104] In *Ground Services, Inc.*,[105] the United Brotherhood of Carpenters and Joiners of America (Carpenters) petitioned the NMB for resolution of a representation dispute involving aircraft maintenance and service employees of Ground Services, Inc. (GSI) at the Fort Lauderdale-Hollywood International Airport.[106] GSI is an aircraft servicing company operating at several major airports in the United States under

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ward if it retained its separate legal identity but which would be lost if it were merged into Republic. Additionally, Hughes Air West was a recipient of a 7.5 million dollar annual inflation-adjusted subsidy from the U.S. government. Republic was not eligible for this subsidy. *Id.* at 53.

[101] *Id.* at 55. The NMB stated that it no longer approved the position it had taken in the railroad industry where some affiliated railroads with highly integrated operations were considered separate carriers for representation purposes. *See, e.g., San Antonio*, 2 N.M.B. 157 (1950), *discussed supra* in text accompanying notes 87-91.

[102] *Republic Airlines*, 8 N.M.B. at 55.

[103] *Id.* (emphasis supplied).

[104] One commentator has suggested that the phrase "rational labor-management relations" is now the key concept in NMB's single employer analysis. Gallagher, *All In The Family: Affiliated Carriers and the Single Carrier Issue*, ABA-ALI AIRLINE LABOR LAW COURSE MATERIALS (1982). Emphasis on this phrase suggests NMB single employer analysis focuses on whether the carriers operate as one transportation system and manage employees as though they are a part of a single transportation network.

[105] 8 N.M.B. 112 (1980).

[106] *Id.*

contract with many airlines.[107] The issue raised by the Carpenters' petition was whether GSI was a joint employer, along with the relevant airline, at each airport where GSI had aircraft maintenance contracts.[108]

Again relying on the phrase "rational labor-management relations,"[109] the NMB held that, for representation purposes, GSI employees should be considered employees of the particular airline whose aircraft they are servicing.[110] The NMB rejected its usual system-wide approach to class or craft-unit determinations, emphasizing that "[d]ay-to-day operations are tailored to local conditions, and are not highly centralized because it is the airlines which control GSI's work, and that work varies considerably by city and by airline."[111] Given the airline's control over day-to-day work of GSI employees, the NMB considered it inappropriate to certify GSI as a single employer for representation purposes.[112]

One recent decision illustrates the degree of separateness necessary to satisfy the NMB that a newly established entity is not a single employer along with its creator. NMB services were invoked in *North Carolina State Ports Authority*[113] when the International Longshoremens Association (ILA) filed a petition alleging a representation dispute concerning employees of the North Carolina State Ports Authority (Ports Authority) and North Carolina Port Railway Commission (Railway Commission).[114] For several years, the Ports Authority operated a railway system and the ILA was recognized as representative of dock workers and security guards employed by the railway system.[115] When the state of North Carolina es-

[107] *Id.* at 113.
[108] *Id.* at 117.
[109] *Id.* at 116.
[110] *Id.* at 117.
[111] *Id.* at 116.
[112] *Id.* at 117.
[113] 9 N.M.B. 398 (1982).
[114] *Id.*
[115] Ultimate recognition of the ILA was preceded by repeated NMB and federal court proceedings concerning the status of the Ports Authority as a "carrier" and a myriad of other legal issues. *See* International Longshoreman's Ass'n v. North Carolina Ports Auth., 511 F.2d 1007, 1008 (4th Cir. 1975).

tablished the Railway Commission, however, the Ports Authority transferred all railroad facilities to the Railway Commisssion and ceased railroad operations. The Railway Commission hired only two Ports Authority employees and refused to recognize the ILA.[116]

The ILA contended that the creation of the Railway Commission by the state of North Carolina was an attempt to circumvent the employer's duty to recognize the union as bargaining agent for railway employees.[117] The ILA argued that the effort should fail on grounds that the Ports Authority and Railway Commission operated as a unified transportation system and constituted a single carrier.[118] In response to the ILA allegations, the Railway Commission argued that it was a distinct and separate operating entity because (1) it performed the same start-up operations that would be expected of any new carrier, such as acquiring rights of way, negotiating contracts, and hiring personnel; (2) Railway Commission employees were not subject to control or supervision by Ports Authority management; (3) the Railway Commission prepared its own payroll and billing records; (4) Railway Commission business and banking tansactions were conducted separately from the Ports Authority; and (5) Railway Commission and Ports Authority offices were geographically and organizationally separate.[119]

Based on findings of fact supporting the Railway Commission, the NMB held that the Ports Authority and Railway Commission were separate carriers for representation purposes.[120] The NMB attributed little significance to the union's suggestion that the state's sole motivation for creating the Railway Commission was to deny Ports Authority employees effective collective bargaining representation.[121] The lesson that can be inferred from *North Carolina State Ports Authority* is that the RLA will not prevent an existing carrier

[116] *Ports Auth.*, 9 N.M.B. at 399.
[117] *Id.*
[118] *Id.*
[119] *Id.* at 406-08.
[120] *Id.* at 409.
[121] *Id.*

from establishing a new carrier for the purpose of operating non-union so long as the existing carrier is prepared to vest the carrier with substantial operating and management autonomy.

C. *Contract Restrictions on Double-Breasting*

Texas Air Corporation's formation of New York Air[122] and the difficulty encountered by some major airlines competing with non-union carriers in busy air markets has made double-breasting an important subject in collective bargaining in the early 1980's. At least one carrier, United, benefited from the double-breasting controversy by obtaining concessions from the ALPA in exchange for an agreement not to establish a non-union subsidiary to operate in well-travelled routes in the midwest and northeast.[123] Other airlines that have agreed not to go double-breasted include Western and Flying Tiger.[124] Notably, no federal court, or the NMB, has determined whether a "New York Air" clause is a mandatory subject of bargaining that may be insisted upon by a union to the point of impasse in collective bargaining. Nevertheless, a restriction on an employer's right to establish a separate company in the same line of business is not a type of provision generally considered a mandatory subject of bargaining and probably cannot be compelled by a union.[125]

D. *Conclusions*

The NMB's forthcoming decisions in the *New York Air* and

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[122] *See supra* notes 17-18 and accompanying text.

[123] For a discussion concerning United's contract negotiations with the ALPA leading to agreement on the "non-double-breasting" clause, see Northrup, *The New Employee Relations Climate In Airlines*, 36 INDUS. AND LAB. REL. REV. 167, 173-74 (1983).

[124] *See* Gallagher, *All In the Family: Affiliated Airlines and the Single Carrier Issue*, in ABA - ALI AIRLINE LABOR LAW COURSE MATERIALS 294 (1983).

[125] A "New York Air" clause that prohibits a carrier from establishing an affiliate or subsidiary that operates non-union is a permissive subject of bargaining, but probably is not mandatory. *See* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); Japan Air Lines Co. v. International Ass'n of Machinists, 538 F.2d 46 (2d Cir. 1976). *See also* Gallagher, *supra* note 124, at 294. A union cannot insist on bargaining over a non-mandatory subject or go on strike in support of its position on a non-mandatory subject of bargaining.

Frontier Holdings double-breasting cases should significantly clarify what degree of separateness is necessary to go double-breasted in the airline industry. Existing NMB and NLRB authority indicates, however, that double-breasting will not succeed if the resulting two airlines are to be operated as an integrated transportation system. In the final analysis, airline double-breasting is most likely to survive NMB scrutiny if the existing company is content to operate the new carrier as a transportation system that is not coordinated with or designed to facilitate the transportation system of the existing carrier. Accordingly, the value of double-breasting as a means to reduce overall labor costs is minimized by the duplication of costs in such matters as airport gate leasing, personnel administration, advertising, and a variety of other administrative operations. Creation of a non-union affiliate or subsidiary is most inappropriate for financially troubled air carriers that would be burdened further by high start-up costs.

II. AIRLINE BANKRUPTCY

Creating a non-union subsidiary airline to reduce overall labor costs is an option open only to financially sound carriers. Some of the more troubled airlines, by contrast, have had to resort to far less attractive measures in order to reduce labor costs and, hopefully, survive. In May of 1982, Braniff Airways filed for reorganization under Chapter 11 of the Bankruptcy Code[126] and completely ceased operations.[127] More recently, Continental Airlines sought similar relief, although, unlike Braniff, it continued to operate.[128] The rejec-

[126] 11 U.S.C. §§ 101-1300 (Supp. III 1979).

[127] *In re* Braniff Airways Inc., 25 Bankr. 216, 219 (Bankr. N.D. Tex. 1982). After filing for reorganization, Braniff rejected its collective bargaining agreements. Braniff resumed operations in March, 1984 as a subsidiary of the Hyatt Corporation. Dallas Morning News, March 2, 1984, at 1, col. 1. Braniff will continue to recognize the unions which represented Braniff employees prior to bankruptcy, but its renegotiated labor contracts are much more favorable to the airline. 106 MONTHLY LAB. REV. 38 (1983).

[128] Daily Lab. Rep. (BNA) No. 12, Jan. 19, 1984, at A-5. In *In re* Continental Airlines Corp., [1983-1984 Transfer Binder] BANKR. L. REP. (CCH) 69,604 (Bankr. S.D. Tex., Jan. 17, 1984), it was held that Continental did not act in bad faith against its employees when it filed for bankruptcy, ceased operations for three days, and then

tion of collective bargaining agreements covering many of Continental's employees was, according to the airline's management, a cornerstone of its ability to continue operations.[129] Although a bankruptcy court has the authority to relieve an employer of obligations under a labor contract,[130] bankruptcy does not automatically enable an employer to reduce its labor costs. This section will discuss the limitations and conditions on bankruptcy relief for financially troubled airlines.

A. *Interplay of Railway Labor Act and Bankruptcy Code*

Section 6 of the Railway Labor Act[131] establishes a detailed procedure governing mid-term rejection or change in contractual terms or conditions of employment made by a carrier covered by a collective bargaining agreement.[132] With pas-

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resumed operations with fewer employees who were paid at substantially reduced levels of pay and benefits.

[129] 144 LAB. REL. REP. (BNA) 224, 224-25 (Nov. 21, 1983). Philip J. Bakes, Vice President and Chief Operating Officer of Continental Airlines, stated that the primary reason for Continental's financial problems was that its "labor costs were well out of line with costs of much of our competition." *Id.* Bakes further explained that Continental was paying pilots an average of g $89,000.00 per year in salary and benefits for 55 hours of flying time and 78 hours of total duty time per month, while the competition paid its top pilots $33,000 per year for 83 hours per month of flying time. Continental's flight attendants were compensated at the rate of $39,000.00 per year, double what the competition paid. *Id.* A January 17, 1984, Memorandum Opinion of the U.S. Bankruptcy Court for the Southern District of Texas, *In re* Continental Airlines Corp., Consol. Case No. 83-04019-142-5 (Bankr. S.D. Tex., Jan. 17, 1984) also cited Continental's labor costs as a primary reason for the airline's financial woes.

[130] Bankruptcy Reform Act of 1978, 11 U.S.C. § 365(a) (Supp. III 1979). Prior to the passage of the Bankruptcy Reform Act of 1978, the power to reject executory contracts was found in 11 U.S.C. § 313 and section 516 of the Bankruptcy Act of 1898, which provided that a court could permit rejection of executory contracts of the debtor upon notice to the parties to the contract.

[131] 45 U.S.C. § 156 (1976) [hereinafter cited as "RLA"].

[132] *Id.* 45 U.S.C. § 156 provides as follows:

> Carriers and representatives of the employees shall give at least thirty days written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by

sage of the Bankruptcy Reform Act of 1978,[133] Congress created some confusion over the application of section 6 of the RLA to airline bankruptcy. Section 77(n) of the previous Bankruptcy Act unequivocally stated that "[n]o judge or trustee acting under this Act shall change the wages or working conditions of *railroad employees* except in the manner prescribed by the Railway Labor Act."[134] By contrast, the counterpart to section 77(n) in the Bankruptcy Code of 1978, section 1167,[135] 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."[136] Even though this section appears in a sub-part of the Code that expressly applies only to railroads,[137] some commentators have argued that its broader language precludes cancellation of airline obligations under a collective bargaining agreement in a Chapter 11 reorganization case.[138]

This interpretation of section 1167 was rejected by the Bankruptcy Court in *In re Braniff Airways*.[139] The court reasoned that the change in wording between section 1167 and its predecessor in the old Bankruptcy Act was merely the result of a change in statutory organization and that there was

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> either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

Id.

133 Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1330 (Supp. III 1979)).

134 11 U.S.C. § 205(n) (repealed) (emphasis added).

135 11 U.S.C. § 1167 (Supp. III 1979).

136 *Id.* (emphasis supplied).

137 Section 1167 appears in subchapter IV of chapter 11 of the Bankruptcy Code of 1978. 11 U.S.C. 103(g) expressly states that "Subchapter IV of chapter 11 of this title applies only in a case under such chapter concerning a railroad." *Id.*

138 *See* Simon, *Labor Relations In the Airline Industry Under the Bankruptcy Code*, in ABA-ALI AIRLINE LABOR LAW COURSE MATERIALS 318-21 (1983).

139 25 Bankr. 216 (Bankr. N.D. Tex. 1982).

no indication that Congress intended a change in the law.[140] As a result of *Braniff Airways* and Congress' inclusion of section 1167 in a sub-part of the Code expressly limited to railroads, it is unlikely that any bankruptcy court will defer to section 6 of the RLA in airline bankruptcies.[141]

B. *General Considerations Concerning Bankruptcy Rejection of Labor Contracts*

A financially troubled company has an option between two types of proceedings under the Bankruptcy Reform Act of 1978.[142] Under Chapter 7, a company may go out of business and liquidate its assets for distribution to the creditors.[143] Chapter 11 of the Code, by contrast, provides the debtor with the opportunity to reorganize its debts and to remain in business.[144]

To facilitate reorganization, section 365(a) of the Code gives a trustee in bankruptcy the power, subject to court approval, to assume or reject executory contracts of a debtor.[145] The term "executory contract" has routinely been inter-

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[140] *Id.* at 217. *See also In re* Continental Airlines, No. 83-04020-142-5 (Bankr. S.D. Tex. Jan. 17, 1984).

[141] In NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188 (1984), the Supreme Court stated in dictum that "[s]ection 1167 . . . expressly exempts collective bargaining agreements subject to the Railway Labor Act." *Id.* at 1194. The authors submit that the Court did not intend to suggest that airlines are included in the section 1167 exemption, but merely adopted the statutory language without consideration of the Code's clear restriction of section 1167 to railroads.

[142] 11 U.S.C. § 109(b), (d). *See* Comment, *The Bankruptcy Law's Effect on Collective Bargaining Agreements*, 81 COLUM. L. REV. 391 n.4 (1981).

[143] 11 U.S.C. §§ 701-66 (Supp. III 1979).

[144] The procedure for reorganization is initiated by the filing of a petition with the Bankruptcy Court which automatically stays creditor action against a debtor. 11 U.S.C. § 362. This enables the debtor to confer with its creditors to negotiate a compromised plan for repayment. Meanwhile, the court may either appoint a trustee to run the business or may allow the debtor to continue operations as a debtor in possession. 11 U.S.C. §§ 1104, 1107(a). The House Report explaining section 1107(a) states that the provision is intended to place a debtor in possession in the shoes of a trustee. With the exception of investigative duties, the debtor is given all the rights, powers and duties of a Chapter 11 trustee. H.R. REP. NO. 595, 95th Cong., 1st Sess. 404 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5902.

[145] 11 U.S.C. § 365(a) (Supp. III 1979) provides: "Except as provided in sections 765 and 766 of this title and in subsection (b), (c) and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." *Id.*

preted by the courts to include collective bargaining agreements,[146] but there is considerable controversy over the standard that should govern rejection of obligations created by a labor contract.[147] With regard to most executory contracts, rejection by a trustee is proper simply by finding that rejection would be in the best interest of the debtor.[148] As a result of the RLA and LMRA provisions protecting the interests of persons covered by a collective bargaining agreement,[149] however, labor contracts are accorded a level of importance not shared by other types of executory contracts.[150]

The purpose of a reorganization is to restructure the business' finances by extending or reducing its debts in order to provide for financial rehabilitation of the business.[151] The

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146 *In re* Bildisco, 682 F.2d 72 (3d Cir. 1982), *cert. granted sub. nom.* NLRB v. Bildisco & Bildisco, 103 S. Ct. 8082 (1983); Brotherhood of Ry. and Airline Clerks v. REA Express, Inc., 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975); Shopmen's Local Union No. 455 v. Kevin Steel Prod., Inc., 519 F.2d 698 (2d Cir. 1975).

147 *See* Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement*, 80 MICH. L. REV. 134 (1981).

148 *Bildisco*, 682 F.2d at 79.

149 See *supra* notes 131-132 and accompanying text for a discussion of the protective provision of the RLA. Section 8(d) of the NLRA (codified at 29 U.S.C. § 158(d) (1976)) provides:

> [T]he duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification: (1) serves a written notice upon the other party to the contract . . . ; (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications; (3) notifies the Federal Mediation and Conciliation Service . . . [and] . . . any State or Territorial agency established to mediate and conciliate disputes . . . ; (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later . . . . [T]he duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditons contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Id.

150 *Bildisco*, 682 F.2d at 79.

151 Nicholas v. United States, 384 U.S. 678, 687 (1966); Meyer v. Commissioner, 383 F.2d 883, 890 (8th Cir. 1967); *In re* Penn Fruit Co., 92 L.R.R.M. 3548 (E.D. Pa. 1976); H.R. REP. NO. 595, 95th Cong., 1st Sess. 220 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6179.

Bankruptcy Code's reorganization procedures primarily seek to protect three interests: (1) the debtor's interest in continuing operation; (2) the employee's interest in remaining employed; and (3) the creditor's interest in repayment.[152] Clearly, to the extent that Chapter 11 facilitates continued business operations and employment opportunities, the goals of the Bankruptcy Code and federal labor laws are compatible.[153]

The conflict in bankruptcy and labor policies arises principally from changes in terms and conditions of employment under reorganization and in the union's ability to act as the employee's agent for collective bargaining.[154] Since rejection of a collective bargaining agreement by a debtor in possession is a unilateral act, many urge that such rejection violates the RLA and LMRA.[155] Courts that have addressed the interplay between federal labor law and the Bankruptcy Code have tried to accomodate the interests of employees both in continued employment and in retention of contractual terms and conditions of employment.[156]

C. *Judicial Standards Governing Rejection of Collective Bargaining Agreements*

The legal standard to be employed by the courts in accommodating the often conflicting interests of bankruptcy and labor law has been the subject of considerable debate and

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[152] *See generally* H.R.REP. NO. 595, 95th Cong., 1st Sess. 220 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963.

[153] *See supra* text accompanying note 151. H.R. REP. NO. 595, 95th Cong., 1st Sess. 220 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6179.

[154] *See generally*, Bordewick & Cantryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANKR L.J. 293 (1983).

[155] *See* Los Angeles Marine Hardware Co., 235 N.L.R.B. 720, *enforced*, 602 F.2d 1302 (9th Cir. 1979). In *Los Angeles Marine Hardware*, the court affirmed the Board's holding that an employer cannot alter mandatory terms during the effective period of a contract without consent of the union, and that repudiation of mandatory contractual terms without the union's consent during the term of the contract is not excused because the employer acted in good faith or was motivated solely by economic necessity. *Id.* at 1307.

[156] *See infra* text accompanying notes 157-171.

commentary.[157] The debate, at least from a judicial perspective, was resolved in 1984 by the Supreme Court's decision in *NLRB v. Bildisco & Bildisco*.[158] The high court granted certiorari to resolve a conflict among the circuit courts over the appropriate standard for Chapter 11 rejection of a labor contract.[159] Initially, the *Bildisco* Court held that collective bargaining agreements are executory contracts subject to the provisions of the Bankruptcy Code.[160] The Court reasoned that any inference that all labor contracts are exempt from scrutiny under the Bankruptcy laws is rebutted by section 1167 of the Code,[161] which expressly exempts contracts negotiated under the Railway Labor Act.[162]

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157 *See generally* Simon, *supra* note 138; Comment, *supra* note 142; Note, *supra* note 147.

158 104 S. Ct. 1188 (1984).

159 The Third Circuit in *In re* Bildisco, 682 F.2d 72 (3rd Cir. 1982), *cert. granted sub. nom.* NLRB v. Bildisco & Bildisco, 103 S. Ct. 784 (1983), adopted the "balancing of equities" test utilized by the Second Circuit in Shopman's Local Union No. 455 v. Kevin Steel Prod., Inc., 519 F.2d 698 (2nd Cir. 1975). In *Kevin Steel* the court required a thorough scrutiny and careful balancing of the competing equities between the debtor employer and the creditor union before rejection of the labor contract could be permitted. This standard was adopted by the Eleventh Circuit in *In re* Brada-Miller Freight Sys., 702 F.2d 890 (11th Cir. 1983). By contrast, the Second Circuit in Brotherhood of Ry. Employees v. REA Express, Inc., 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975), adopted a strict standard requiring a debtor in possession to demonstrate that its reorganization will fail unless rejection of the union contract is permitted.

In the context of airline bankruptcy, the standard governing rejection of a collective bargaining agreement by a bankruptcy trustee or debtor in possession was also discussed in *In re* Braniff Airways, 25 Bankr. 216, 218-19 (Bankr. N.D. Tex. 1982). There the Bankruptcy Court held that evidence that Braniff's IAM contract was burdensome to the Braniff estate and that rejection of the contract would assist Braniff's organization was sufficient grounds for challenging the labor contract. *Id.* at 220-21. Before rejecting the contract, however, the court held it necessary to balance the employee claims that would arise from rejection by giving consideration to the employees' "ability to convert intangible rights into liquidated amounts, the claims of all other creditors, the rights of the employees in the context of our national labor policy, the sacrifices being made by others, and the preservation of jobs." *Id.* at 219. Based on substantial evidence of Braniff's dire financial straits, difficulty in restructuring the debt, and the possibility that it could not resume operations if labor costs were not reduced, Braniff was allowed to reject its labor contract with the IAM. *Id.* at 221.

160 *Bildisco*, 104 S. Ct. at 1194-95.

161 11 U.S.C. § 1167 (Supp. III 1979).

162 *Bildisco*, 104 S. Ct. at 1194-95. *See supra* text accompanying notes 132-141. The Court's dicta suggests that both railway and airline labor contracts are encompassed by the § 1167 exemption. In fact, section 1167 is exclusively a railroad provision and does not apply to airlines.

Turning to the standard governing bankruptcy rejection of collective bargaining agreements, the Court unanimously affirmed the Third Circuit determination that rejection is proper if it is determined that the contract burdens the estate and that the equities balance in favor of rejection.[163] Factors included in the balancing of equities include "the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditor's claims that would follow from affirmance and the hardship that would have on [the creditors], and the impact of rejection on employees."[164] The Court emphasized that before acting on a petition to reject or modify a labor contract, the Bankruptcy Court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution.[165] The Supreme Court expressly rejected the stringent test formulated in *Brotherhood of Railway and Airline Clerks v. REA Express, Inc.*,[166] which conditioned rejection of a labor contract on a showing that survival of the business hinges on rejection.[167]

A more difficult issue for the Supreme Court was whether a debtor in possession violates sections 8(d) and 8(a)(5) of the LMRA[168] by unilaterally rejecting or modifying[169] a collective bargaining agreement before receiving formal approval from the Bankruptcy Court. Justice Rehnquist, writing for a 5-member majority, declared that the National Labor Rela-

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[163] *Bildisco*, 104 S. Ct. at 1196. The Supreme Court expressed agreement with the test applied by the Second Circuit in Shopman's Local Union No. 455 v. Kevin Steel Prod., Inc., 519 F.2d 698 (2d Cir. 1975) and the Eleventh Circuit decision in *In re* Brada-Miller Freight System, 702 F.2d 919 (11th Cir. 1983). *Bildisco*, 104 S. Ct. at 1196.

[164] 104 S. Ct. at 1197.

[165] *Id.* at 1196-97. For the text of Section 8(d) of the LMRA 29 U.S.C. § 158(d)(1976), see *supra* note 149. Section 8(a)(5), 29 U.S.C. § 158(a)(5) provides that it is an unfair labor practice "to refuse to bargain collectively with the representatives of his employees . . . ." *Id.*

[166] 523 F.2d 164, 167-69 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975).

[167] *Bildisco*, 104 S. Ct. at 1195.

[168] 29 U.S.C. § 158(a)(5) (1976).

[169] *Bildisco*, 104 S. Ct. at 1199. Although the Court used the word "modify," it is not clear whether Chapter 11 enables a debtor in possession to unilaterally revise a contract, as opposed to rejecting it outright.

tions Board is precluded from applying section 8(d) to a debtor in possession since the practical effect of such action would be to require adherence to the terms of the contract.[170] Justice Rehnquist acknowledged that this holding undermines the National Labor Relations Act policy of protecting labor negotiations,[171] but explained that this decision does not relieve the debtor of all its obligations under federal labor law. To the contrary, the debtor in possession remains an "employer" within the meaning of the Act, and must bargain with the union about any new contract.[172]

D. *Propriety of Airline Bankruptcy as an Approach to Reducing Airline Labor Costs.*

The rejection of a collective bargaining agreement is an extreme approach to reducing labor costs and should be undertaken only in extraordinary economic circumstances. Most courts consider mid-term cancellation of a collective bargaining agreement a violation of the letter and spirit of federal labor law, and for this reason, bankruptcy courts must carefully scrutinize any petition seeking rejection of a collective bargaining agreement. Nevertheless, unions representing employees of financially troubled carriers must recognize the importance of helping a troubled carrier back to profitability

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[170] *Id.*

[171] *Id.* at 1200-01.

[172] *Id.* at 1201. Justice Brennan, writing for the 4-member minority, emphasized that there was no provision in the Bankruptcy Code permitting an employer to violate sections 8(d) and 8(a)(5). *Id.* at 1201, 1203 (Brennan, J., concurring in part and dissenting in part). Allowing a debtor in possession to unilaterally reject a labor contract, in Justice Brennan's view, fails to accommodate the goals of the National Labor Relations Act and gives unwarranted importance to the purposes of the Bankruptcy Code. *Id.* at 1208-09. Finally, the minority reasoned that section 8(d) would require adherence to the labor contract only until the Bankruptcy Court gives permission to reject, and that in extreme cases most unions will give concessions necessary to keep the employer in business. *Id.* at 1210. Justices White, Marshall, and Blackmun joined in Justice Brennan's opinion.

In the aftermath of the *Bildisco* decision, the House of Representatives passed House Bill 5174 which would overrule *Bildisco* by conditioning rejection of a labor contract on a showing that continued obligations under the contract will force the employer out of business. Bankruptcy reform legislation that would overrule *Bildisco* is currently meeting resistance in the Senate. Daily Lab. Rep. (BNA) No. 63, Apr. 2, 1984, at A8.

and agree to contract modifications necessary to insure successful reorganization.

III. UNION CONCESSIONS IN COLLECTIVE BARGAINING

Bankruptcy and double-breasting are extreme responses to competitive pressures in the deregulated airline industry and clearly are not appropriate for all major carriers. Unions representing airline employees[173] also have an interest in the financial health of the major carriers and are in a position to assist in reducing labor costs. Given the relatively high wages negotiated by airlines and unions during the years of regulation, as well as cumbersome restrictions on workforce management, the most obvious means for reducing airline labor costs is through collective bargaining. In fact, most airlines have benefited from union concessions since deregulation, and for the most part, these concessions have been obtained without having to survive a strike.[174] This section will discuss two significant labor-management agreements intended to reduce airline labor costs and will conclude with a summary of actual airline-union contractual settlements during the past two years.

A. *Union Consent to Two Pilot Crews*

The first major union concession to airlines after deregula-

[173] Several large unions represent the employees in various crafts and classes in the major airlines. The largest union representing pilots is the Air Line Pilots Association (ALPA). Pilots of American Airlines are represented by the Allied Pilots Association (APA). Ground service employees and mechanics are primarily represented by the International Association of Machinists and Aerospace Workers (IAM), the International Brotherhood of Teamsters (Teamsters), and the Transport Workers Union (TWU). The larger unions representing flight attendants include the TWU, the Independent Union of Flight Attendants (IUFA), the Independant Federation of Flight Attendants (IFFA), and the association of Professional Flight Attendants (APFA). The TWU also represents a large segment of the industry's baggage handlers, as does the Brotherhood of Railway, Airline and Steamship Clerks (BRAC). Finally, ticket and reservation agents and office personnel are represented by the Airline Employees Association (ALEA) at many airlines. The foregoing clearly is not an exhaustive list of the unions involved in representation of airline employees.

[174] *See* 48 NMB ANN. REP. 20 (1982). Despite a large number of contract renewal negotiations in 1982, fewer strikes were called against airlines in 1982 than in any year since 1966. *Id.*

tion involved the number of pilots required to operate the prevalent Boeing 737 and McDonnell-Douglas DC-9 aircraft.[175] Although the FAA certified these aircraft for two pilot crews in the early 1960's,[176] ALPA was sucessful in reaching agreements requiring three pilot crews with most major carriers. Pilots are the highest paid unionized employees in the airline industry and it is very costly to operate commercial aircraft with three pilots.[177] During contract negotiations in 1969, United Airlines and ALPA reached a stalemate on pilot crew size and eventually agreed to submit the issue to arbitration.[178] To the surprise of United,[179] the three member arbitration panel[180] determined that United's fleet of 737's could not be safely operated without three pilot crews and, therefore, ruled for the union.[181] During the 1970's, most airlines continued to use three pilot crews in large commercial aircraft.

The issue of pilot crew size resurfaced in 1979 when ALPA members at Wien Air Alaska went on strike over a variety of bargaining subjects, including union insistence on three pilot

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[175] Other aircraft that have been the focus of the two pilot crew size debate in recent years include the Boeing 757 and 767, McDonnell-Douglas DC-9 "Super 80" and the Airbus Industries A-310. The Boeing 727 and 747 and the McDonnell-Douglas DC-10 have uniformly been operated with three pilot crews. The precise issue concerning medium size commercial jets such as the Boeing 737 is whether the third cock pit crew member must be a pilot, or whether a non-pilot flight engineer can fill the third seat. For an excellent discussion of the crew size issue, see Northrup, *The New Employee Relations Climate in Airlines*, 36 INDUS. AND LAB. REL. REV. 167 (1983).

[176] O'lone, *Evaluation Plan May Decide 737 Crew*, AV. WEEK & SPACE TECH., Dec. 18, 1967, at 32.

[177] *See* Weisner, *The Public Wins One*, FORBES, Dec. 8, 1980, at 33-34. ALPA naturally wants to maximize available work for pilots and also is interested in assuring maximum flight hours for pilots who must fly in order to keep their license. *See* Northurp, *supra* note 175, at 171.

[178] *737 Flight Crew Ruling Could Have Broader Applications*, AV. WEEK & SPACE TECH., Apr. 6, 1970, at 38.

[179] Professor Northrup reported that United consented to arbitration merely as an appeasement to ALPA, so the union could find an honorable way to escape its assistance on three pilot crews and still reach an agreement with United. *See* Northrup, *supra* note 175, at 171 n.17.

[180] Arbitrators Silvester Garrett, Charles Killingsworth, and Arthur Ross made up the arbitration panel.

[181] The unreported arbitration decision was rendered in April, 1970. *See 737 Flight Crew Ruling Could Have Broader Applications*, *supra* note 178.

crews for most of the airline's fleet.[182] The strike persisted for several months as striking Wien pilots received ALPA strike benefits equaling their full salary. Pursuant to section 44 of the Airline Deregulation Act of 1978,[183] however, President Carter appointed an emergency board in November, 1978, to make recommendations for settlement of the ALPA strike against Wien.[184] Early in 1979 the three-person emergency board[185] recommended that Wien's 737's be flown with two pilot crews. Subsequently, ALPA consented to two pilot crews at Wien when the airline agreed to increase pilot salaries and give displaced pilots first claim on job openings.[186]

The Wien-ALPA strike settlement in March, 1979, did not end the crew size controversy. Despite its agreement to use two pilot crews in Wien Air Alaska's 737 aircraft, the union threatened a one day nationwide strike on March 2, 1981, to protest the FAA's certification of the McDonnell-Douglas DC9-80 for two pilot crews.[187] Again, a presidential taskforce was established to analyze the crew size issue.[188] In July, 1981, the taskforce announced its conclusion that the new line of Boeing 757 and 767 planes and the McDonnell-Douglas DC9 "Super 80" could safely be operated with two pilot crews.[189] ALPA accepted the task force conclusions and most 737, 757, 767 and DC9-80 aircraft are now operated with two

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182 45 NMB ANN. REP. 28-29 (1979).

183 Section 44 of the Airline Deregulation Act, 92 Stat. 1753, directed the President to establish an emergency board to assist in resolution of the ALPA strike against Wien Air Alaska.

184 Section 10 of the RLA, 45 U.S.C. § 160 (1976), empowers the president to establish an emergency board upon notification from the NMB that a labor dispute threatens "[s]ubstantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service." The NMB determined that the Wien Air Alaska strike did not threaten interruption of essential transportaion services and did not recommend the creation of an emergency board to the President. *See* 45 NMB ANN. REP. 28-29 (1979). Section 44 of the Airline Deregulation Act effectively overruled the NMB's decision not to recommend emergency board procedures to President Carter.

185 The emergency board appointed by President Carter included Paul N. Guthrie, Ralph W. Yarborough, and Lawrence E. Siebel.

186 45 NMB ANN. REP. 28-29 (1979).

187 Wall St. J., July 6, 1981, at 7, col. 3.

188 North, *Presidential Panel Starts Crew Complement Study*, AV. WEEK & SPACE TECH., Apr. 13, 1981, at 36.

189 47 NMB ANN. REP. 8 (1981).

pilot crews.[190]

B. *Two-Tier Wage Structure*

ALPA assent to two pilot crews in the 737 and DC9-80 aircraft has benefited many major carriers in recent years, but further reduction in labor costs for unionized air carriers has depended on success in collective bargaining by individual carriers. One of the more imaginative plans for reducing overall labor costs was negotiated by American Airlines and the Transport Workers Union (TWU) in March, 1982. American's contract with the TWU retains relatively high salaries and favorable working conditions for its 10,500 current employees that belong to the TWU, but allows the company to set salaries for new employees that are competitive with newer non-union carriers such as Southwest, Muse, and People Express.[191] On November 7, 1983, American's 4,000 pilots agreed to a similar plan,[192] as did its 6,000 flight attendants in December, 1983.[193]

This "two-tier" wage structure is intended to gradually reduce American's overall labor costs without having to establish an all new airline or ask for sacrifices by current employees.[194] While lower overall labor costs undoubtedly

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[190] United Air Lines' longstanding dispute with ALPA over pilot crew size for its large fleet of 737's was resolved in favor of the airline in June, 1981, when the ALPA chapter at United voted in favor of two pilot crews. The United pilots' assent to two pilot crews may be attributed to concern over United's competition from non-union carriers, such as Midway and New York Air. Significantly, the United-ALPA contract negotiated in 1981 included an agreement by the airline not to establish a non-union subsidiary or affiliate carrier. *See* Northurp, *supra* note 175, at 174. See also *supra* text accompanying notes 122-125 for a general discussion of "New York Air" clauses.

[191] *What Labor Gave American Airlines*, BUS. WEEK, March 21, 1983, at 33. Dallas Morning News, Nov. 20, 1983, at 1H, col. 3. At the time of this writing, Western Airlines was also considering proposing a two-tier wage plan to the unions representing its employees. Wall St. J., Feb. 15, 1984, at 1, col. 6.

[192] Dallas Morning News, Nov. 20, 1983, at 1H, col. 3; Daily Lab. Rep. (BNA) No. 217, Nov. 8, 1983, at A-7.

[193] Daily Lab. Rep. (BNA) No. 250, Dec. 28, 1983, at A-3. Northwest Airlines and the union representing its flight attendants reached agreement on a two-tiered wage plan in April 1984. *See* note 262 *infra* and accompanying text. United Airlines and its flight attendants agree to a two-tier wage plan in March 1984. *See* note 279 *infra* and accompanying text.

[194] Dallas Morning News, Nov. 20, 1983, at 1H, col. 3. An indication of the cost savings American hopes to realize as its two-tier wage structure unfolds is illustrated by

will result from prolonged use of a two-tier wage system, some commentators predict long range morale problems as a sizeable force of second-tier employees become resentful toward their higher paid co-workers who perform identical tasks.[195] One commentator succinctly explained the weakness of two-tier wage systems to be that "when you are starving, you eat anything you can, human nature being what it is. But when you are not starving any more, you start looking around at what other people are eating."[196]

In addition to speculation about the long range effectiveness of two-tier plans, there is concern over potential legal problems as two-tier plans mature.[197] First, new employees who are dissatisfied with their pay rates may challenge the two-tier system as a breach of union duty to fairly represent the interests of all employees.[198] Second, new employees belonging to minority groups that have been underrepresented in the employer's workforce or in particular job catagories may challenge the two-tiered system as discriminatory.[199]

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comparison of its costs per available seat mile (ASM) with that of some of American's non-union competition. In November, 1983, American's cost per ASM was 8.14 cents. By contrast, Dallas based Southwest Airlines' and Muse Airlines' respective costs per ASM were only 5.99 cents and 5.24 cents. *Id.* For additional comparison airline costs, see *That Daring Young Man and His Flying Machine*, INC., Jan., 1984, at 42, 46.

[195] *See* Comments of Professor Peter Cappelli and labor economist Sar Levitan in Daily Lab. Rep. (BNA) No. 244, Dec. 19, 1983, at C-1.

[196] *Id.* (quoting Graef Crystal of Tower, Perrin, Foster and Crosby). It must be emphasized that the long range effect of two-tier wage plans has never been scientifically studied or determined. In the case of American Airlines, however, some important considerations increase the probability of success. First, the enormous size of American's work force removes the degree of resentfulness that would be felt among new employees in a smaller work place who arguably are more stigmatized by lower pay for identical work. Secondly, the disparity in compensation rates among carriers in the airline industry clearly supplies a legitimate reason for adoption of two-tier wage plan by American. Third, many employees who will be hired at lower salaries by American will be individuals who were furloughed or discharged by financially troubled airlines and, at least initially, will view employment at lower rates of pay as better than no employment at all.

[197] *See* Comments of Professor Clyde Summers in Daily Lab. Rep. (BNA) No. 244, Dec. 19, 1983, at C-1.

[198] One airline executive interviewed by the author referred to this as the "rights of the unborn" issue. See *infra* text accompanying notes 200-225 for a discussion of the duty of fair representation.

[199] See *infra* text accompanying notes 226-237 for a discussion of employment discrimination.

1. *Duty of Fair Representation*

Unions owe a duty of fair representation (DFR) to all employees they represent.[200] A necessary premise to the argument that two-tier wage plans are inconsistent with a union's DFR is that the DFR is owed to future employees.[201] No court has held that a union must consider the interests of future employees when negotiating a labor contract, but there is some authority supporting the claim that future employees are protected by the DFR. First, courts have uniformly held that a union breaches its DFR by negotiating a contract provision that discriminates against employees belonging to protected minority groups.[202] Discriminatory contract provisions, such as a contract provision locking a disproportionately large group of minority employees into lower paying job classifications,[203] clearly may have a prospective effect and harm the interests of future employees. In *Bell & Howell v. NLRB*,[204] the District of Columbia Court of Appeals stated that the DFR is breached by union involvement in negotiation of a contract clause that discriminates against employees or "potential employees" on account of race or

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200 The duty of fair representation under the RLA is derived from RLA, § 2, Fourth, 45 U.S.C. § 152 (1976), which vests unions enjoying majority support in a bargaining unit with the right to exclusively represent employees in that unit. *See* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). The duty of fair representation proscribes arbitrary or perfunctory conduct by a union in negotiating, administering, or enforcing a labor contract. *See* Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983) (under NLRA); International Bhd. of Elec. Workers v. Foust, 439 U.S. 892 (1979) (under NLRA); Harrison v. Union Transp. Union, 530 F.2d 558 (4th Cir.), *cert denied*, 425 U.S. 958 (1975) (under RLA). For a thorough discussion of the standards governing union exercise of the duty of fair representation, see Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973).

201 In the contract negotiation context, the duty of fair representation is generally explained as requiring the union to protect the collective interests of all bargaining unit employees. *See* Humphrey v. Moore, 375 U.S. 335, 342 (1964); Smith v. Huffman Refrigerator Co., 619 F.2d 1229, 1235-36 (8th Cir. 1980).

202 Jackson v. Seaboard Coast Line R.R., 678 F.2d 992 (11th Cir. 1982); Farmer v. A.R.A. Services, Co., 660 F.2d 1096 (8th Cir. 1981); Sears v. Bennett, 645 F.2d 1365 (10th Cir. 1981); Dickinson v. United States Steel Corp., 439 F. Supp. 55 (E.D. Penn. 1977), *vacated in part on other grounds*, 616 F.2d 698 (3rd Cir. 1980).

203 *See, e.g.*, Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1017-18 (11th Cir. 1982).

204 598 F.2d 136 (D.C. Cir. 1979), *cert. denied*, 422 U.S. 942 (1979).

sex.[205]

Aside from cases involving invidious discrimination against minorities, the strongest authority supporting extension of the DFR to future employees is the Second Circuit Court of Appeals decision in *Jones v. Trans World Airlines*.[206] The dispute in *TWA* involved a clause agreed to by TWA and the International Association of Machinists and Aerospace Workers (IAM) in contract renewal negotiations in 1970. This clause defined seniority as length of service in a position that was included in the bargaining unit covered by the agreement.[207] The TWA bargaining unit represented by the IAM included guards, but historically had not included passenger relations agents.[208] Plaintiffs in *TWA* were a group of passenger relations agents who lost their seniority, in relation to guards, when the bargaining unit represented by IAM was expanded to include passenger relations agents in 1970.[209] Despite the seniority clause's distinction based on union membership and length of inclusion in the bargaining unit, the district court held that the seniority clause was not a product of unfair representation.[210] Specifically, the court held that no duty was owed to plaintiffs since they were not bargaining unit mem-

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[205] *Id.* at 147.

[206] 495 F.2d 790 (2d Cir. 1974).

[207] *Id.* at 794.

[208] *Id.* at 793.

[209] *Id.* at 795. The Second Circuit did not explain how passenger relations agents came to be included in the bargaining unit. *Id.* In the 1970 negotiations, the IAM and TWA agreed to an expanded definition of the bargaining unit to include passenger relations agents. As the court pointed out, however, RLA, § 2, Fourth, 45 U.S.C. § 152 (1976), guarantees majority free choice concerning union representation. *TWA*, 495 F.2d at 797. An agreement between a union and employer clearly could not bind passenger relations agents to inclusion in the bargaining unit. Presumably, the Second Circuit considered the passenger relations agents an accretion to the guard unit, but there is no discussion of this by the court. As generally applied, the accretion doctrine provides for automatic extension of union representation rights to new employees joining a pre-existing bargaining unit so long as there is no objective evidence that the union has lost majority support. *See generally* C. MORRIS, THE DEVELOPING LABOR LAW 37 (2d Ed. 1983). Moreover, the NMB never specifically certified the bargaining unit to include passenger relations agents and there is no indication that passenger relations agents were given an opportunity to participate in an NMB conducted election. *TWA*, 495 F.2d at 793.

[210] 495 F.2d at 792-93.

bers when the contract was negotiated.[211] In reversing this decision, the Second Circuit held this basis of distinction to be overly broad. The court stated:

> [I]t is clear that a union may conduct itself in a manner so arbitrary or malicious vis-a-vis an outside group that it exceeds the limit imposed by the duty of fair representation . . . . Thus, the district court gave the duty of fair representation too narrow a scope when it assumed that in no circumstance did the IAM have a duty not to discriminate against non-unit members.[212]

Although *TWA* and *Bell & Howell* indicate that a union's DFR may extend to future employees,[213] union liability[214] for agreeing to a two tier wage system also requires evidence that the union's conduct was arbitrary or in bad faith neglect of the interest of future employees.[215] A 1981 decision by the Eighth Circuit Court of Appeals, *Johnson v. Airline Pilots In the Service of Northwest Airlines,*[216] illustrates the burden employees must satisfy to show that differential treatment under a labor contract is the result of unfair union representation.

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[211] *Id.*

[212] *Id.* at 796-97.

[213] Another case indicating that the DFR protects future employees is Emmanuel v. Omaha Carpenters Dist. Council, 560 F.2d 382 (8th Cir. 1977). There, an agreement between a union business agent and contractor limiting the contractor's right to hire from outside the union hiring hall was declared a product of unfair union representation. *Id.* at 385. In addition to violating the applicable collective bargaining agreement, the court held that the side agreement between the business agent and contractor unreasonably restrained the employment opportunities of experienced carpenters who otherwise would have been called directly by the employer. Accordingly, the court held the side agreement was a breach of duty of fair representation. *Id.*

[214] *Id.* The duty of fair representation is a statutory obligation arising from the union's status as exclusive bargaining representative. *See supra* note 200. Section 301 of the Labor Mangement Relations Act, 29 U.S.C. § 185 (1976), enables employees to sue an employer for breach of a labor contract in particular circumstances, but an employer clearly does not owe a duty to employees not to agree to a contract provision that is injurious to employees, so long as the provision is not otherwise unlawful.

[215] Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983); International Bhd. of Elec. Workers v. Foust, 439 U.S. 892 (1979); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Vaca v. Sipes, 386 U.S. 171 (1967). The DFR is frequently interpreted to preclude discriminatory union conduct, but only when the discrimination is invidious or the union's conduct is hostile to a particular group. *See, e.g.*, William v. Pacific Maritime Ass'n, 617 F.2d 1321 (9th Cir. 1980); Goclowski v. Penn Central Transp. Co., 571 F.2d 747 (3rd Cir. 1977).

[216] 650 F.2d 133 (8th Cir.), *cert denied*, 454 U.S. 1063 (1981).

Plaintiffs in *Johnson* were former Northwest pilots who were furloughed in 1970 and never recalled.[217] Although the contract in existence when plaintiffs were furloughed in 1970 preserved the pilots' seniority and recall rights for only five years, a 1975 Letter of Understanding extended plaintiffs' seniority and recall rights until June 30, 1978. In April, 1978, recall notices were sent to 20 pilots, but the recall notices were soon cancelled by the airline when the pilots union called a strike against the airline on April 29, 1978.[218] A new agreement was executed by Northwest and the pilots union on August 15, 1978, but it did not extend the seniority and recall rights of laid-off employees.[219]

Plaintiffs alleged two separate breaches of the union's DFR. First, plaintiffs challenged the union's decision to strike at a time when the airline was recalling laid off pilots and the pilots' seniority was about to expire. Second, plaintiffs alleged that the union did not make a fair effort to preserve seniority and recall rights during 1978 contract negotiations.[220]

The union was awarded summary judgment on both claims of unfair representation.[221] In affirming the award of summary judgment, the Eighth Circuit emphasized that there was no evidence that the April 29, 1978, strike was called in bad faith or to undermine plaintiffs' recall opportunities.[222] The court held that union knowledge that the airline was recalling many laid off employees to work and that their seniority would soon expire if they were not soon returned to work did not provide an adequate basis for inferring that the strike was called arbitrarily or in bad faith.[223]

The union's failure to protect plaintiffs' seniority rights in

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[217] *Id.* at 134.

[218] *Id.* at 135. The 1975 labor contract became "amendable" on July 1, 1977. Negotiations toward a new contract began in April of 1977 and continued for approximately one year before the strike was called on April 29, 1978. *Id.*

[219] *Id.*

[220] *Id.* at 136.

[221] Johnson v. Airline Pilots Ass'n of Northwest Airlines, No. 4-79-238, slip op. (D. Minn. 1979).

[222] 650 F.2d at 136-37.

[223] *Id.*

contract negotiations was also condoned by the court. When contract negotiations involve competing interests among groups of bargaining unit employees, the court indicated that a union enjoys broad discretion to determine the best interests of the overall bargaining unit. It stated:

> Where a union must negotiate meritorious but conflicting claims, "and no clear showing has been made of bad faith in making a choice between [two or more] claims, it cannot be said that in making the choice it made, the union unfairly represented one group."[224]

Applying this standard, the *Johnson* court held that the pilots union fairly relinquished the recall rights of laid-off employees in order to reach a contract beneficial to working pilots.[225]

Thus, even if a union's DFR extends to future employees, a union has a great deal of discretion in balancing the interests of current employees against the interests of future employees. In the airline industry, where companies have widely varying labor costs and consistent profitability is elusive, a union's DFR clearly does not constrain implementation of a two-tier wage plan. On the other hand, in companies with significant underrepresentation of protected minorities in affected job categories, potential liability should discourage both the union and employer from agreeing to compensation of future employees at rates lower than current employees.

2. *Employment Discrimination.*

A universally recognized means of proving unlawful discrimination under title VII of the Civil Rights Act of 1964[226] and section 1981 of the Civil Rights Act of 1866[227] is by evidence that an employment policy or practice disporportionately harms a protected minority.[228] Employees hired after implementation of a two-tier wage plan may contend that

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[224] *Id.* at 137 (quoting Bucholtz v. Swift & Co., 609 F.2d 317, 327, (8th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980)).

[225] *Id.*

[226] 42 U.S.C. §§ 2000e - 2000e-17 (1976 & Supp. IV 1980).

[227] 42 U.S.C. § 1981 (1976).

[228] *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 80-205 (2d ed. 1983).

they are receiving lower rates of pay than other employees on account of their race, national origin, sex or other minority group status.[229] If workforce statistics substantiate that the relevant minority group was underrepresented prior to implementation of the two-tier wage plan, both the employer and union[230] conceivably could be found to have unlawfully discriminated against the minority employees hired at lower rates.

A recent Eleventh Circuit Court of Appeals decision, *Jackson v. Seaboard Coastline R.R. Co.*,[231] exemplifies the disparate impact theory of employment discrimination in the context of collective bargaining. The plaintiffs in *Seaboard*, black carmen helpers employed by the railroad company, contended that the union unlawfully discriminated against them by negotiating a contract provision that locked them into lower paying jobs.[232] The bargaining unit involved in *Seaboard* was composed of employees in four job categories: carmen, carmen apprentices, helper apprentices, and carmen helpers. Carmen were the highest paid employees in the bargaining unit and the position of carmen apprentices and helper apprentices enabled employees to automatically progress to the carmen position.[233] By contrast, the carmen helper position, which was composed entirely of black employees, did not pro-

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229 Applicability of the disparate impact theory of discrimination is not well established under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979). In Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), the court held that age discrimination may be proved by evidence of disparate impact, but other courts have expressed concern over this form of proof in age cases on grounds that age is a progressive condition that does not lend itself to broad-based statistical comparisions. *See, e.g.*, Williams v. City & County of San Francisco, 483 F. Supp. 335 (N.D. Ca. 1979). Other courts have reasoned that disparate impact analysis is inappropriate in age cases since motive and intent are more important factors than in other discrimination cases. *See, e.g.*, Kephart v. Institute of Gas Tech., 630 F.2d 1217 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981).

230 A union, as well as employer, may be held liable for backpay in actions under title VII and section 1981. Union liability for backpay and actions under the Age Discrimination and Employment Act, 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979), and Equal Pay Act, 29 U.S.C. § 206(d) (1976), has not been established. *See generally* Jansonius, *Allocation of Backpay Liability for Violation of Employee Rights*, 36 OKLA. L. REV. 745 (1983).

231 678 F. 2d 992 (11th Cir. 1982).

232 *Id.* at 997.

233 *Id.* at 996-97.

vide for automatic progression and effectively restricted black employees to lower paying positions.[234] After determining that the railroad had historically discriminated in hiring by placing black applicants only into lower paying job categories, the district court entered judgment against the union on grounds that the collective bargaining agreement perpetuated the employer's discriminatory hiring practices by limiting promotional opportunities of employees in the lower paying job classifications.[235] The Eleventh Circuit affirmed the judgment and award of back-pay liability against the union.[236]

Seaboard illustrates that a union and as well as an employer, may be held liable for negotiating a collective bargaining agreement that has a disparate impact on minority employees, even if the disparate impact is traceable to the employer's discrimination in hiring.[237] Accordingly, a two-tier wage plan is troublesome to the extent that the employer's workforce is underrepresented by certain protected minority groups at the time the two-tier wage plan is implemented. The extent of this problem is a matter that can only be determined on a company-by-company basis at the time a two-tier wage plan is being considered.

C. *Concession Bargaining*

Two trademarks of collective bargaining in the airline industry prior to 1978 were continually higher wages and salaries for airline employees and relative uniformity in contracts negotiatied by major carriers. Post-deregulation collective bargaining has not resulted in lower labor costs for every major carrier, but the predictability of higher wages and salaries has, at least in recent years, been shattered. In the following pages, the dynamics of contemporary collective bargaining in the airline industry will be illustrated by a summary of con-

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[234] *Id.* at 996-98.

[235] *Id.* at 997-98.

[236] *Id.* at 1016.

[237] *See also* Farmer v. ARA Servs., 660 F.2d 1096 (6th Cir. 1981); Tooley v. Martin-Marietta Corp., 648 F.2d 1239 (9th Cir. 1981); Sears v. Atchison, Topeka, & S.F. Ry., 645 F.2d 1365 (10th Cir. 1981).

tracts negotiated by major carriers in recent years.[238]

1. *American Airlines*

American's two-tier wage plan, discussed earlier,[239] is among the most novel contract provisions negotiated by an airline either before or after deregulation. At the same time that American's flight attendants agreed to this plan, they also agreed to higher health care plan deductibles and incentives for early retirement.[240] Wages for flight attendants were increased by six per cent effective retroactive to March 2, 1983, with additional four per cent increases scheduled for July, 1984, and August, 1985.[241] The agreement includes an increased hours guarantee and restrictions on part time work.

American's 1983 contract with the Allied Pilots Association does not include any work hour changes,[242] but the pilots did agree to forego scheduled wage increases. Instead of receiving a seven per cent increase in November, 1983, as planned, the pilots will receive a three per cent raise in March of 1984. The pilots also agreed to an increase in their health care plan deductibles, contingent upon an increase in the consumer price index beyond a specified level. In exchange for the pilots' concessions on these fixed costs, the airline has agreed to establish a profit sharing plan.[243]

In contrast to its agreement with the flight attendants and pilots, American's 1983 agreement with the TWU grants significant flexibility to the company in using part time employees and cross-utilizing employees.[244] The union's concessions

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[238] For a discussion of the dynamics of concession bargaining, see Levine & Levengood, *Productivity and Wage Concessions: Current Bargaining Issues for U.S. Airlines*, 9 EMPLOYEE REL. L.J. 308 (1983). *See also* 107 MONTHLY LAB. REV. 36 (Jan. 1983).

[239] *See supra* notes 192-199 and accompanying text.

[240] Daily Lab. Rep. (BNA) No. 250, Dec. 28, 1983, at A-3.

[241] *Id.*

[242] *Id.*

[243] Daily Lab. Rep. (BNA) No. 217, Nov. 8, 1983, at A-7.

[244] Greater flexibility in work scheduling and job assignments are a common theme in airline concession bargaining. Considering the considerable flexibility in work force management enjoyed by non-union carriers and the fact that union concessions on job assignments and scheduling do not require a decrease in take home pay, this is a particularly attractive source for lowering airline labor costs. To the extent that flexible

to management rights in directing the work force are balanced by a 21.4 per cent pay increase for mechanics and ground service workers over the three years of the contract, guaranteed employment during the life of the contract, and pension supplements to employees who retire early.[245] Despite the 21 per cent pay increase to current workers over the three year term, American estimates that its current contract with the TWU will result in an average annual five per cent decrease in labor costs for TWU members during the term of the contract.[246]

2. *Delta Airlines*

Despite uncommonly poor financial performance in recent years, Delta has continued to enjoy a very positive relationship with its employees.[247] In 1982, Delta's 36,000 employees, which are largely non-union, contributed some $30,000,000 to purchase a new airplane for the company. More recently, corporate officers voluntarily reduced their compensation as a result of the company's first loss in 36 years.

Delta's 3,811 pilots are the only major work group at Delta represented by a union. In August of 1983, ALPA agreed to an 18 month contract extension which includes a wage freeze and allows Delta to assign overtime to pilots at only one location. Previous rules had required overtime to be granted on a system-wide basis. This change now allows the company more flexibility in assigning overtime work to pilots.[248]

3. *Eastern Airlines*

Financially troubled Eastern Airlines experienced a most unusual collective bargaining year in 1983. To avoid a

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work scheduling interferes with stability of defined crafts and classes, however, unions logically can be expected to object to this form of concession.

[245] *What Labor Gave American Airlines, supra* note 191, at 33-34.

[246] *Id.* This overall decrease in labor costs, if it materializes, will be a product of flexibility in directing employees, the two-tiered wage program, and reduced benefits costs.

[247] Delta attributes its recent poor financial performance to the cost of acquiring a large fleet of new 737 aircraft, not to excessive labor costs. Brigance, *supra* note 3 at 43.

[248] Daily Lab. Rep. (BNA) No. 156, Aug. 11, 1983, at A-8.

threatened strike by IAM in April, 1983, the airline agreed to a contract increasing wages of the airline's mechanics and ground service workers by 21 per cent retroactive to January 1, 1983, with total increases of 32.4 per cent over the three year span of the contract.[249] This controversial agreement[250] enabled the airline to avert a strike, but substantially increased the airline's labor costs and pushed the airline further into debt.

On the verge of bankruptcy later in 1983,[251] Eastern was successful in reaching agreements with IAM, TWU, and ALPA on an agreement designed to substantially reduce the airline's short term labor costs. This agreement requires mechanics and flight attendants to give up 18 per cent of their pay over a twelve month period and for pilots to sacrifice 22 per cent of their pay during the same period.[252] In exchange for the concessions, Eastern will pay the employees in stock, thereby turning over approximately 25 per cent of company ownership to the employees within one year. Eastern employees will also be able to select four persons to sit on the company's 21 member board of directors.[253]

4. *Frontier Airlines*

Frontier's contracts with the Association of Flight Attendants and Airline Employees Association became amendable in May of 1982, and the parties are currently involved in contract negotiations.[254] The airline has requested a 10 per cent pay cut, as well as certain productivity concessions. So far, the flight attendants union has rejected both of these requests. On May 25, 1984, a voting majority of flight attendants approved a strike if an agreement was not reached with

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[249] Daily Lab. Rep. (BNA) No. 70, Apr. 11, 1983, at A-4.

[250] Federal Reserve Chairman Paul Volker cited the Eastern-IAM agreement as one of a number of large contract settlements considered by Mr. Volker to be a threat to continued low inflation. Daily Lab. Rep. (BNA) No. 72, Apr. 13, 1983, at A-3.

[251] Dallas Morning News, Dec. 9, 1983, at 4E, col. 4.

[252] BNA-Collective Bargaining Negotiations & Contracts, Dec. 22, 1983, at 1.

[253] English, *Companies Learn to Live with Unions in Board Rooms*, U.S. NEWS & WORLD REP., Jan. 30, 1984, at 63; BNA-Collective Bargaining Negotiations & Contracts, Dec. 22, 1983, at 1; Daily Lab. Rep. (BNA) No. 237, Dec. 8, 1983, at A-9.

[254] Daily Lab. Rep. (BNA) No. 5, Jan. 10, 1984, at A-7, A-8.

Frontier by June 1, 1984.[255] Frontier's contract with IAM became amendable in December of 1983, and bargaining is currently underway.

Frontier's 700 pilots are represented by ALPA, whose contract runs through May of 1985. In June, 1983, however, ALPA negotiated a three per cent pay reduction for its 900 pilots over a fifteen month period and increased maximum flying hours. More recently, the company and the union have engaged in further contract negotiations but have declined to specify the content of their dialogue.[256]

Frontier Horizon, a new non-union carrier set up by the holding company that owns Frontier Airlines, began operations on January 9, 1984. Urging that it has damaged employee morale, threatened job security and violated existing collective bargaining agreements, a coalition of unions representing employees at Frontier is challenging the carrier's decision to establish the non-union airline.[257]

5. *Northwest Airlines*

In June, 1982, Northwest reached an agreement with the IAM ending an approximately one month strike by the airline's mechanics, baggage handlers, food service workers and security personnel.[258] The principal issue separating Northwest and the IAM was use of part time workers. The strike-ending agreement provided union membership with wage increases approximating 25 per cent over a 38-month period. Northwest also dropped its proposal to hire part time workers, and in turn, the Union consented to increased management flexibility in assigning workers to a variety of jobs.[259]

More recently, in November, 1983, ALPA and Northwest negotiated a three year contract that froze wages until January 1, 1984. Pilots received pay increases of 7.5 per cent on that date, and will receive 6.5 per cent in 1985, and 3 per cent

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[255] The Denver Post, May 26, 1984, at 1D, col. 2.

[256] *Id.*

[257] *Id. See supra* text accompanying notes 20-22.

[258] 48 NMB ANN. REP. 48-49 (1982).

[259] *Id.*

in 1986.[260] Under the November, 1983 contract, Northwest pilots may be required to fly 83 hours per month as compared to 75 hours per month under the expired contract.[261]

Northwest again narrowly averted a strike in April, 1984 by reaching a last minute agreement with its flight attendants, represented by the Aerospace and Allied Employees Local 2747. Under the new 3 year contract, flight attendants hired after January 1, 1984, would be paid 30 per cent less than the base rate for employees hired before that date. Lower tier employees would advance to the higher pay rate on their sixth anniversary of employment with Northwest. The starting rate of pay under the new contract would be $13,730 compared to the previous rate of $15,192. On July 1, 1985, the starting rate for flight attendants would increase to $14,160. The new contract was ratified by union membership in May, 1984.[262]

6. *Pan American World Airways*

For the most part, Pan Am's 1983 negotiations have dealt with the extension of a 1981 pay cut of 10 per cent agreed to by the Teamsters, TWU, and IUFA.[263] Pursuant to the Pan Am agreement with the Teamsters, covering clerical and ground service workers, employee pay rates were increased to 95 per cent of the rates that prevailed before the 1981 wage cuts, effective April 1, 1983.[264] Employees were restored to full rates on January 1, 1984, but a 25 cent per hour cost of living adjustment scheduled for January, 1982, was deferred another two years.[265] Pan Am also agreed to establish a profit sharing plan for Teamsters' covered employees.[266]

Pan Am's mechanics and ground service employees, represented by the TWU, also were restored to 95 per cent of their 1981 pay levels pursuant to the 1983 contracts. TWU em-

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260 106 MONTHLY LAB. REV. 72 (1983).

261 *Id.*

262 Daily Lab. Rep. (BNA) No. 94, May 15, 1984, at A-2.

263 106 MONTHLY LAB. REP. 72 (1983).

264 *Id.*

265 *Id.*

266 *Id.*

ployees were fully restored to 1981 pay levels on January 1, 1984, and on January 1, 1985, TWU employees at Pan Am will receive three wage increases and two cost of living adjustments that were originally deferred under the 1981 contract until January 3, 1982, and July 4, 1982.[267]

Flight attendants at Pan American agreed, in January, 1983, to a 10 per cent reduction in wages for 15 months. The flight attendants also agreed to certain changes in work rules intended to give management greater flexibility in scheduling flight attendant work hours. Finally, as a result of the concession granted Pan Am, not only did the membership of all five major unions at Pan Am collectively receive representation on the company's board of directors, but employees also gained a stock investment plan giving them one dollar of company stock for every five dollars of lost earnings.[268]

7. *Republic Airlines*

Labor negotiations at Republic Airlines in 1983 resembled 1983 negotiations at Eastern Airlines. Earlier in the year IAM and Republic agreed on substantial wage increases for the airline's mechanics.[269] Subsequently, in November, 1983, IAM and other major unions representing Republic employees consented to a temporary 15 per cent pay cut affecting a large majority of Republic employees.[270] Thereafter, in December, 1983, Republic proposed extension of the 15 per cent pay cut through 1986.[271] As of April 5, 1984, only ALPA had accepted extension of the pay cut.[272] The Coalition of Unions of Republic Airlines have counterproposed establishment of an employee stock ownership plan.[273] Republic proposed a stock ownership plan tied into company profits, but the Coalition of Unions of Republic Airlines is opposed

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[267] *Id.*

[268] U.S. NEWS & WORLD REP., Jan. 30, 1984, at 63.

[269] 106 MONTHLY LAB. REV. 72 (1983).

[270] *Id.*

[271] *Id.*

[272] Daily Lab. Rep. (BNA) No. 62, March 30, 1984, at A-8.

[273] Daily Lab. Rep. (BNA) No. 248, Dec. 28, 1983, at A-8; Daily Lab. Rep. (BNA) No. 246, Dec. 21, 1983, at A-5.

to a stock ownership plan contingent upon company profitablilty. The plan proposed by the unions calls for an immediate contribution of newly issued Republic common stock carrying sole voting rights.[274]

8. *Trans World Airlines*

In November of 1983, ALPA ratified a 20-month agreement in behalf of TWA's pilots, reducing their pay to 10 per cent for a fifteen month period. The pilots also agreed to a 20 per cent reduction in vactions, a 25 cents per hour cut in expense money, and more flexible hours which permits TWA to schedule pilots for 70 to 80 hours in-flight hours per month.[275] In exchange, TWA has given the pilots greater job security and restored pay concessions previously accepted by low-seniority workers in order to avoid layoff.[276] TWA is currently negotiating for similar concessions from IAM and the Independent Federation of Flight Attendants.[277] In early 1983, TWA reduced the pay of 5,100 non-union salary employees by 10 per cent and indefinitely postponed all salary and benefit increases. The airline announced plans to reduce its labor force from 29,500 to 26,000 employees.[278]

9. *United Airlines*

Flight attendants at United agreed to a two-tier wage plan in March, 1984. Existing flight attendants will receive a 6 per cent wage increase over the 37 month span of the contract, but new flight attendants will start at a level approximately 25 per cent less than the previous base rate. New flight attendants will advance to the upper tier after 5 years of service.[279]

In 1982, United and its 14,000 employees belonging to the

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[274] Daily Lab. Rep. (BNA) No. 248, Dec. 28, 1983, at A-8.

[275] *Id.*

[276] BNA-Collective Bargaining Negotiations & Contracts, Dec. 8, 1982, at 1.

[277] In January, 1984, the Independent Federation of Flight Attendants rejected a TWA proposal calling for $28.5 million in pay cuts over an 18-month period. Daily Lab. Rep. (BNA) No. 18, Jan. 27, 1984, at A-11.

[278] Daily Lab. Rep. (BNA) No. 231, Nov. 30, 1983, at A-8.

[279] Daily Lab. Rep. (BNA) No. 49, March 13, 1984, at A-6.

IAM agreed to a 28-month contract providing for approximately an 18 per cent wage increase during the life of the contract. The contract also provided substantial increases in pension benefits and health care. This contract becomes amendable in November, 1984.

10. *USAir*

Effective April 1, 1983, flight attendants at USAir agreed to a contract calling for a 9.27 per cent raise over the 17-month period of the contract. The flight attendants also received a 5 cents per hour increase in per diem pay in both 1983 and 1984, and maternity leave was extended from three to six months. The new contract does not include any work rule changes for the flight attendants.[280]

In December, 1982, USAir and ALPA agreed to a 30-month contract providing for a 3.75 per cent increase in December, 1982, a 5.25 per cent increase in December, 1983, and a 4 per cent increase in December, 1984. As with the flight attendants, USAir increased the per diem 5 cents per hour both for 1983 and 1984. The 1982 contract increased maximum sick leave accrual from 140 to 150 hours.[281]

Earlier in 1982, USAir and IAM reached an agreement on a 28-month contract covering mechanics and other ground service employees. During the 28-month term of the contract, IAM employees at USAir will receive a 24.8 per cent wage increase. Terms of the IAM-USAir contract are similar to terms of the United Airlines-IAM contract also negotiated in 1982.[282]

11. *Western Airlines*

Unions representing Western Airlines employees have accepted a "partnership plan" under which the company's ten thousand employees will receive stock totaling 32.4 per cent of the company in exchange for bargaining concessions.[283]

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[280] Daily Lab. Rep. (BNA) No. 53, March 17, 1983, at A-1.
[281] BNA-Collective Bargaining Negotiations & Contracts, Dec. 23, 1982, at 1.
[282] Daily Lab. Rep. (BNA) No. 165, Aug. 25, 1982, at A-6.
[283] Daily Lab. Rep. (BNA) No. 220, Nov. 14, 1983, at A-7, A-8.

Western's labor cost cutting program also includes a profit sharing plan. Most employees will participate in the distribution of 15 per cent of pre-tax profits of the first $25 million of pre-tax profits and 20 per cent of company profits exceeding $25 million.[284] The plan will be extended by Western if profits are less than $2 million during 2 of the 3 years of the plan.[285]

Under the plan, pilots will receive an 18 per cent pay cut, management will take a 12.5 per cent cut and other workers will receive a 10 per cent pay reduction. A coalition of the unions representing Western's employees will also designate two representatives to serve on the company's board of directors.[286] Western management anticipates a $41.7 million dollar payroll savings during the first year of the plan with additional savings in coming years.

D. *Union Concessions in Perspective*

Concession bargaining has been the airline industry's most common approach to reducing labor costs since deregulation. Although some concessions, such as American's two-tier wage plan and agreements concerning flexible job scheduling and assignments, are designed to have a long term effect, most union concessions to the major air carriers will not facilitate a prolonged reduction in labor costs. Unless there is a significant increase in labor costs for airlines that are currently nonunion, however, major carriers that fail to reduce the percentage of revenues spent on labor costs over the years to come will find it increasingly difficult to be competitive.

IV. CONCLUSION

Deregulation of the airline industry has resulted in a duality in labor costs among the nation's air carriers. Older airlines with a long history of collective bargaining have been forced to compete with new airlines paying substantially

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[284] CALIF. BUSINESS, March 1984, at 55.

[285] *Id.*

[286] For a detailed discussion concerning Western's efforts to reduce operating costs, see Wall St. J., Feb. 15, 1984, at 1, col. 6.

lower wages and enjoying greater flexibility in employee scheduling and job assignments. All of the major carriers have attempted to reduce overall labor costs in recent years to be more competitive with new non-union carriers, and some have gone so far as Chapter 11 reorganization to escape burdensome obligations under their collective bargaining agreements. There remains a sizeable difference in labor costs among the airlines, however, and the number of new non-union carriers is increasing. Because the airline industry is labor intensive and unusually competitive, the long term prospects for retention of significant market share by the major carriers appears remote if the duality in industry labor costs continues unabated. In the long run, success or failure of airline deregulation may turn on the ability of major airline management and labor to establish parity in labor costs throughout the industry.