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MAKE AIRLINES GREAT AGAIN: WHY BANKRUPTCY WENT FROM A DIRTY WORD TO A STRATEGY, AND A PROPOSAL TO BRING IT BACK

KLAYTON SWEITZER HILAND*

THE U.S. AIRLINE INDUSTRY has a rich history of regulation, deregulation, competition, labor disputes, and solvency problems.[1] Airlines play an irreplaceable role in American society. The industry is responsible for over $1.5 trillion in U.S. economic activity annually, 10 million American jobs, and transportation of 2 million passengers each day.[2] More than 5% of

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1 *See* Athanassios Papaioannou, *The Duty to Bargain and Rejection of Collective Agreements Under Section 1113 by a Bankrupt Airline: Trying to Reconcile R.L.A. with the Bankruptcy Code*, 18 TRANSP. L.J. 219, 219–20 (1990).

2 *The Airline Industry*, AIRLINES.ORG, http://airlines.org/industry/#safety [https://perma.cc/5MGF-8Y5R].

the United States' gross domestic product is attributable to commercial aviation alone.[3] It is unsurprising, given its impact, that the industry has been subject to a fluctuating regulatory and legislative environment since the first U.S. commercial flight in 1914.[4] What is more interesting, at least to interested observers, is the unique history and interconnection of regulatory changes, competition, legislation, unionization, and bankruptcy in the industry.

This Comment will explore the history of the American airline industry, the related regulatory environment, labor relations, and insolvency challenges. Section II will discuss the current state of airline regulations, labor relations law, and the application of the U.S. Bankruptcy Code (Code). Specifically, it will explain the strategy of using the Code as a means for struggling airlines to gain the upper hand in labor disputes. Next, Section III will address some previously proposed alternatives to the current bankruptcy strategy for resolving difficult collective bargaining issues and ultimately find them lacking. Finally, Section IV will propose a radical new legislative solution for resolving labor disputes without resorting to bankruptcy protection.

I. HISTORY OF THE AIRLINE INDUSTRY, LABOR RELATIONS, AND INSOLVENCY

A. The Legislative and Regulatory Buildup

The commercial airline industry has changed drastically since a Benoist XIV flew one passenger over twenty-one miles of water to Tampa.[5] That first flight garnered over 3,000 spectators to watch takeoff.[6] Fast forward about 100 years: over three billion people flew in 2013.[7] This drastic change did not occur without overcoming significant obstacles.

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3 *Data & Statistics*, Airlines.org, http://airlines.org/data/ [https://perma.cc/ZB9L-YC54].

4 *The First Commercial Flight*, FirstFlightCentennial.org, http://www.first-flightcentennial.org/the-first-commercial-flight/ [https://perma.cc/Z6J2-VVK3].

5 If you think plane tickets are expensive now, take notice of the $400 ($5,000 in today's money) auction price for the first flight. *See id.*; Mark Johanson, *How The Airline Industry Has Evolved Over 100 Years Of Commercial Air Travel*, Int'l Bus. Times (Jan. 2, 2014 at 6:50 AM), www.ibtimes.com/how-airline-industry-has-evolved-100-years-commercial-air-travel-1524238 [https://perma.cc/FQP5-JUTK].

6 Johanson, *supra* note 5.

7 *Id.*

One of the first obstacles to commercial air transportation was a dispute over the ownership of the air. Prior to World War I, discussions of a state's authority over the airspace seemed unimportant.[8] After wartime use demonstrated the importance and benefits of aviation as a means of transporting both goods and people, the parties to the Paris Peace Conference chose to hold the Convention Relating to the Regulation of Aerial Navigation[9] to address international aviation concerns.[10] The convention was responsible for the International Commission for Air Navigation, one of the first international aviation regulatory bodies.[11] Although not applicable to the United States,[12] two important precedents were set. First, the air was no longer considered "free" but was instead subject to the authority of the nation lying under it. Second, international aviation activities were now regulated, which set the tone for future governance of the skies.[13]

In the United States, it did not take long for Congress to begin dabbling in aviation-focused legislation. The Air Mail Act of 1925 authorized the Postmaster General to contract with private carriers to transport mail and regulated the rates that could be charged for different air mail services.[14] In 1930, the Air Mail Act was amended by the McNary-Watres Act.[15] This amendment gave further powers to the Postmaster General, changed the contract bidding system, and altered the way mail contracts were paid,[16] resulting in increased incentives for carriers to haul pas-

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[8] James Patrick Baldwin, *Aviation Regulation – History and Practice*, JPB Transp., at Part One (Dec. 1, 2015), https://jpbtransconsulting.com/tag/paris-convention-of-1919/ [https://perma.cc/49MU-7K69].

[9] *See* International Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.T.N.S. 174 (no longer in effect).

[10] Baldwin, *supra* note 8, at Part One.

[11] *Id.*

[12] The United States failed to ratify and join the League of Nations and consequently was not a party to the convention. *Id.*

[13] *See id.*

[14] Air Mail Act of 1925, ch. 128, 43 Stat. 805 (1925) [hereinafter the Kelly Act].

[15] Act of April 29, 1930, ch. 223, § 3, 46 Stat. 259 (1930) [hereinafter the McNary-Watres Act].

[16] The legislation gave the Postmaster General the following abilities:

> (1) to pay the carriers on the basis of miles flown with mail or with specified space reserved for mail, thus for the first time relating air mail pay to service costs rather than revenues; (2) to increase (as well as to decrease) the original contract rates of compensation, under the route certificates, subject to specified limitations; (3) to make extensions or consolidations of routes without competitive bidding—a provision intended to authorize contracts for the de-

sengers along with the mail.[17] The new law also allowed Walter Brown, the Postmaster General, to consolidate airmail routes to three companies,[18] a foreshadowing anti-competitive result that would be repeated over the next several decades.

Mail-related laws were not the only regulatory measures implemented during this period. The first regulation of aircraft and carrier employees was the Air Commerce Act of 1926,[19] which touched on issues such as aircraft registration, altitude separation during flights, aircraft inspections, and minimum mental and physical standards for pilots to fly commercially.[20] Congress followed up by creating the Aeronautics Branch of the Department of Commerce, which was responsible for issuing Civil Air Regulations, and the Federal Aviation Commission to study regulations and recommend policies.[21] This evolving process led to the Civil Aeronautics Act of 1938[22] and the creation of the Civil Aeronautics Authority.[23] This new agency controlled all civilian aviation regulations for the federal government, including fares and routes, until it was split into two agencies in 1940.[24] The air transport industry struggled throughout this period, in part due to the "most varied and constantly changing regulation by Government ever accorded in so short a time to an industry."[25]

As World War II came to a close, the Chicago Convention of 1944 ushered in an era of international and bilateral[26] aviation agreements.[27] The International Air Transport Association was

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> serving passenger carriers without mail contracts, by way of subletting to them extensions of existing mail routes; (4) to consider, when issuing regulations along with route certificates, the need for "adjusting mail operations to the advances in the art of flying *and passenger transportation*"—the last three words being added by the new Act.

Frederick A. Ballard, *Federal Regulation of Aviation*, 60 HARV. L. REV. 1235, 1245 (1947) (emphasis in original).

17 Baldwin, *supra* note 8, at Part One.

18 *Id.*

19 Air Commerce Act of 1926, ch. 344, 44 Stat. 568 (1926) (repealed by Federal Aviation Act of 1958).

20 Baldwin, *supra* note 8, at Part Two.

21 *Id.*

22 Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938).

23 Baldwin, *supra* note 8, at Part Two.

24 The new agency was called the Civil Aeronautics Board (CAB). *Id.*

25 Ballard, *supra* note 16, at 1242.

26 For example, the United States and Britain signed the Bermuda Air Agreement in 1946. Baldwin, *supra* note 8, at Part Three.

27 *Id.*

formed in 1945 to create a non-governmental organization dedicated to promoting economical and safe air transportation amongst member carriers.[28]

After several mid-air collisions, it became apparent that the Airway Modernization Act of 1957,[29] passed in part to update air traffic control facilities, had been insufficient to prevent aviation accidents.[30] As a result, the Federal Aviation Act of 1958[31] was passed as a repeal of previous air commerce laws[32] and a comprehensive approach to the federal government's role in regulating air travel.[33] The Federal Aviation Act created the Federal Aviation Agency (FAA)[34] and sparked a twenty-year period of "strict economic regulation in the United States and government protectionism in the rest of the world."[35]

The first several decades of the airline industry's history were burdened with wide-reaching, inconsistent, and constantly changing legislative and regulatory action. This is unsurprising given how important the industry is to America's economy, society, and national security. While air travel had grown drastically over this period, after decades of protectionism and trying to find the right way to regulate the skies in America, politicians decided it was time for a radical new approach to governing aviation.

B. The Impact of Deregulation

The economics of the early airline industry depended heavily on the rates and routes set by government agencies.[36] The growth of the industry, new technology, and the introduction of new planes made this regulated arrangement untenable.[37] The introduction of larger aircrafts like the Boeing 747,[38] which

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28 *Id.*

29 Airways Modernization Act of 1957, Pub. L. No. 85-133, 71 Stat. 349 (1957).

30 Baldwin, *supra* note 8, at Part Four.

31 Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958) (codified as amended at 49 U.S.C. § 101).

32 The Air Commerce Act of 1926, Civil Aeronautics Act of 1938, and Airways Modernization Act of 1957 were all repealed by the Federal Aviation Act of 1958.

33 Baldwin, *supra* note 8, at Part Four.

34 Federal Aviation Act § 301(a); 49 U.S.C. § 106(a) (2018).

35 Baldwin, *supra* note 8, at Part Four.

36 *See* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938) (and accompanying text); Air Mail Act of 1925, ch. 128, 43 Stat. 805 (1925) (and accompanying text).

37 Baldwin, *supra* note 8, at Part Five.

38 Other significant aircrafts included the Lockheed L-1011 and the McDonnell Douglas DC-10. *Id.*

could carry significantly more passengers, made the Civil Aeronautics Board's regulatory role, specifically in setting prices, far more difficult.[39] Regulations made it harder for carriers to fill the seats, and "pricing policies were viewed as insufficient, resulting in high costs for the passenger."[40] These issues were exacerbated[41] by the 1970 recession and 1973 Arab oil embargo.[42]

The government's response to these systemic problems came in the form of a radical new approach to governing the airline industry: governing it less. When the Airline Deregulation Act of 1978 (ADA)[43] was passed, the goal was to create more competition in the airline industry as a replacement for the former dependency on federal agencies.[44] Specifically, the act was intended to "encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services[.]"[45] To the extent that airlines could not compete with each other and make their own decisions to operate efficiently, the ADA was effective. "For the first time in its history, the airline industry resemble[d] a truly competitive industry. Airlines [were] now free to set their own fares—up to 5% above or down to 50% below the standard industry fare level (SIFL)—without obtaining Civil Aeronautics Board (CAB) approval."[46] Rather than rely on government agencies, the industry made business decisions about which routes to service and how to discount rates to fill seats based on their own discretion.[47]

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39 *Id.*

40 *Id.*

41 The 1973 oil embargo hit airlines especially hard because fuel costs are one of the industry's largest expenses. *See The Industry Handbook: The Airline Industry*, INVESTOPEDIA, https://www.investopedia.com/features/industryhandbook/airline.asp [https://perma.cc/8SX3-7S2B].

42 Baldwin, *supra* note 8, at Part Five.

43 Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended at 49 U.S.C. § 1301) [hereinafter Airline Deregulation Act].

44 Stephen E. Creager, *Airline Deregulation and Airport Regulation*, 93 YALE L.J. 319, 320 (1983); Baldwin, *supra* note 8, at Part Five.

45 Airline Deregulation Act, pmbl.

46 Beth S. Adler, Comment, *Deregulation in the Airline Industry: Toward a New Judicial Interpretation of the Railway Labor Act*, 80 NW. U.L. REV. 1003, 1003 (1986) (alterations to the quotation made to represent the quote as a contemporaneous look back at the ADA's impact, whereas the article itself was written only a few years after its passage).

47 *Id.*

By 1985, as a result of this reduced regulatory control, the Civil Aeronautics Board was disbanded.[48] Since then, the United States has signed Open Skies agreements, which promote similar free market competition principles in the international aviation market, with 112 countries.[49] After more than fifty years of economic regulation, America had set the tone for the world in economic deregulation. Although economic deregulation seemed a logical solution to the problems posed by a highly regulated industry, it did not come without a cost. The ADA provided the industry with more freedom to operate, but the cost of more freedom, as is discussed below, is the possibility of failure.

C. Labor Before Deregulation

Labor unions have played a significant role in American history. The earliest recorded strike was in 1768, when tailors protested wage reductions.[50] As of 2015, the union membership rate was 11.1%, and the total number of union members in the United States was 14.8 million.[51] While overall union membership in the United States has dropped in recent years,[52] unions still play a critical role in several fields, including the airline industry.[53] Given their prominence and relative power in the industry, it is unsurprising that unions are often involved in strife and disputes with the carriers that employ their members.[54] Understanding the history of unions generally, and specifically in relation to the airline industry, will illustrate more clearly the legal issues addressed in this article and why the proposed solution would be beneficial.

Since the aviation industry's infancy, the federal government has struggled to find the right way to govern and regulate air-

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48 Baldwin, *supra* note 8, at Part Five.

49 *Id.*

50 *Labor Movement*, History.com, http://www.history.com/topics/labor [https://perma.cc/P38J-MCBK].

51 *A Brief History of Unions*, Union Plus, https://www.unionplus.org/page/brief-history-unions. [https://perma.cc/EB8K-9EMD].

52 The 2009 union membership rate was 12%, which declined to 11.1% in just six years. *Id.*; *Labor Movement*, *supra* note 50.

53 *See generally* Barry Hirsch, *Unions and Wages in the Airline Industry*, Int'l Air Transp. Ass'n (July 2007), https://www.iata.org/whatwedo/Documents/economics/Hirsch_Unions_Wages.pdf [https://perma.cc/K4UD-GEVR].

54 "It's a familiar bout for much of American industry—management and labor locked in strained negotiations amidst a weakened economy and softened bottom line . . . ." *Unions Threaten to Ground The Airline Industry*, Human Events (May 25, 2012 at 11:56 AM), http://humanevents.com/2012/05/25/unions-threaten-to-ground-the-airline-industry/ [https://perma.cc/98XH-TUN3].

lines.[55] Regulating the industry's relationship with labor, however, was a seemingly less tumultuous task. The Railway Labor Act (RLA),[56] originally passed in 1926 solely to regulate the railroad industry,[57] has governed the relations between air carriers and labor unions since its 1936 amendment.[58] While the industry overall has changed drastically since 1936, the RLA, even with its amendments, has remained substantially the same.[59]

The United States had been progressively moving toward more labor-friendly policies for years. The Clayton Act,[60] passed in 1914, was written in part to clarify that anti-monopoly policies in the Sherman Antitrust Act of 1890[61] do not apply to trade unions.[62] Likewise, the RLA was passed in response to a series of failed attempts to address labor issues in the railroad industry. The Transportation Act of 1920[63] created the Railway Labor Board, originally thought to be another step towards labor-friendly policies. Although this board was intended to settle labor disputes through proposed resolutions,[64] it was an evident failure just two years later. After the Railway Labor Board proposed a 12% wage cut for railroad workers, unions began to strike in 1922.[65] The workers, rail carriers,[66] and public lost confidence in the then-current system to keep the railroads running

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55 *See supra* Part I.A.

56 Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (now codified as amended at 45 U.S.C. § 151).

57 Lisa Catherine Tulk, Comment, *The 1926 Railway Labor Act and the Modern American Airline Industry: Changes and "Chaos" Outline the need for Revised Legislation*, 69 J. AIR L. & COM. 615, 616–17 (2004).

58 Railway Labor Act, amendments, ch. 166, 49 Stat. 1189 (1936) (amended to apply the Railway Labor Act to air carriers).

59 Tulk, *supra* note 57, at 615.

60 Clayton Act of 1914, 38 Stat. 731 (now codified at 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52–53).

61 The law's policy outlawing monopolizing activities was interpreted to apply to labor organizing. Sherman Antitrust Act of 1890, ch. 647 § 2, 26 Stat. 209 (1890).

62 As a reward for significant union support in the 1912 election, Woodrow Wilson pledged his support for workers' rights and even addressed the Teamsters Convention in 1914. Signing the Clayton Act into law was another "tip of the hat" to the Wilson-friendly unions. *1914: The Clayton Act*, TEAMSTERS (Apr. 22, 2015), https://teamster.org/news/2015/04/1914-clayton-act. [https://perma.cc/RS4S-DPPH].

63 Transportation Act of 1920, Pub. L. No. 66-162, 41 Stat. 456 (1920).

64 *Id.* §§ 301–308.

65 Stephen Millies, *The Great Railroad Strike of 1922*, WORKERS WORLD (Feb. 27, 2014), https://www.workers.org/2014/02/27/great-railroad-strike-1922/ [https://perma.cc/4TB6-L38K].

safely and on schedule.[67] The strike was quashed by the Harding administration, but unions had won a major victory by ushering in the RLA as a response.[68]

Ten years after the RLA began managing railroad labor relations, the United States chose to expand the act's reach to cover the airline industry. In 1936, a pilot's union, seeking to receive protections similar to those of their peers in other industries, urged Congress to pass labor protections for the airlines.[69] Although the National Labor Relations Act (NLRA) had been implemented in 1935,[70] Congress chose to extend the RLA to cover the relatively small, but growing, airline industry.[71] As discussed more extensively below, the RLA appeared more fitting than the NLRA, in part because of the RLA's specific dispute resolution procedures; this decision would greatly alter labor's effect on the airline industry.[72]

While airline employees began to unionize and collectively bargain under the RLA, the overall industry was adjusting to regulation under the Civil Aeronautics Act.[73] As discussed above, the regulatory scheme for the airline industry changed frequently.[74] Despite this, the RLA remained functionally stable for several decades. Though this seems counterintuitive, it makes more sense when considering it in light of the competing interests at play in labor disputes and how those interests are impacted by the general industry regulatory program. The primary regulatory component in every scheme implemented was that airlines did not have full freedom to set their own fares, rates, or routes serviced.[75] With revenues generally controlled by a government agency, air carriers did not need to compete on an effi-

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[66] Without any anti-strike laws, rail carriers saw the RLA as a "way to peaceably settle labor disputes" and ensure "smooth operation of the transportation industry." Tulk, *supra* note 57, at 617.

[67] "With skilled machinist striking, seventy-one percent of locomotives failed monthly inspections from August through September 1922." *Id.*

[68] *Id.*

[69] *Id.*

[70] National Labor Relations Act, ch. 372, 49 Stat. 449 (1935).

[71] Tulk, *supra* note 57, at 617.

[72] The NLRA, rather than prescribing specific procedures, "focused more on workers' rights to unionize, not how a union interacts with an employer or the relationship between a company and its employees." *Id.* at 617–18.

[73] *See* Baldwin, *supra* note 8, at Part Two; *supra* Part I.A.

[74] *See supra* Part I.A.

[75] *See* Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958); Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938); Air Mail Act of 1925, ch. 128, 43 Stat. 805 (1925); *see generally supra* Part I.A.

ciency basis.[76] Airlines instead competed on less fiscally relevant items such as service because "most airlines were pretty much guaranteed a profit."[77] As such, labor costs were less of a concern to air carriers who knew that their competition would not be able to undercut prices and put downward pressure on revenues. Airlines did not need to cut wages and benefits or push employees to work longer hours but could instead depend on industry wide revenue regulation to keep them profitable.[78]

The results of this system were generally positive for labor unions and their members. For example, when air carriers wanted to merge or transfer routes amongst each other, they would need approval from the CAB.[79] As a condition for approval, the CAB would regularly require the carriers to adopt Labor Protection Provisions (LPPs).[80] LPPs originated in the railroad industry but were expanded by the CAB to cover additional benefits in the airline industry.[81] Membership in various unions began to grow during this labor-friendly period, and during World War II, union membership was often associated with patriotism.[82]

Though the period between 1936 and 1978 produced generally "stable and increasing wages, secure employment[,] and good working conditions[,]" the gains did not always come easily.[83] Contract negotiations in 1948 between American Airlines and the Air Line Pilots Association (ALPA), for example, were

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[76] Tulk, *supra* note 57, at 628–29.

[77] For an interesting example of this, look up the colorful, lavish, and extensive menus provided on flights. Though it seems ridiculous to change carriers for something like this today, until the Airline Deregulation Act amenities and services like this were the primary points of competition. *See* Benet Wilson, *#FlashbackFriday 20 Airline Menus from the 1960s and 1970s*, TRIPSAVVY (July 28, 2017), https://www.tripsavvy.com/vintage-airline-menus-3860679 [https://perma.cc/CZ4A-2KJ3].

[78] *See* Tulk, *supra* note 57, at 628–29.

[79] Laurie Schoder, Note, *Flying the Unfriendly Skies: The Effect of Airline Deregulation on Labor Relations*, 22 TRANSP. L.J. 105, 114–15 (1994).

[80] *Id.*

[81] Additional new benefits included "seniority integration, supplemental pay to employees forced into lower paying jobs, dismissal allowances, retention of fringe benefits for dismissed employees, payment of moving expenses, and binding arbitration of disputes between the airline and the employees about these provisions." *Id.*

[82] "Patriotically, the maximum flying hour limitation was increased from 85 to 100. The number of ALPA [Air Line Pilots Association] members increased from 1,400 in 1940 to 5,730 at the end of World War II. 90% of all airline pilots were members." *The Beginning*, ALLIED PILOTS ASS'N, https://www.alliedpilots.org/AboutUs/The-Beginning [https://perma.cc/F5S4-UZNF].

[83] Tulk, *supra* note 57, at 628–29.

particularly difficult. The process, discussed in more detail below, required five months of unsuccessful negotiation followed by mediation, as provided in the RLA, before it resulted in improved working conditions and pay increases for some copilots.[84] When the contract became amendable the next year, it took more than two years to reach an agreement. The ALPA had "direct negotiations, mediation, arbitration rejected by [American Airlines], strike date set, and a Presidential Emergency Board appointed by President Truman on January 13, 1951."[85] Again, the long process lead to improvements in working conditions, including "maximum duty times" and "minimum off-duty breaks," and raises for both captains and copilots .[86] Though it required fourteen months, the 1955 ALPA negotiations resulted in, among other things, better retirement benefits for pilots.[87] A few years later, American Airlines pilots went on strike for twenty-two days to gain significant pay raises and changes to the maximum flight hours system.[88] Prior to the ADA, the RLA seemingly always produced contractual concessions on behalf of the airlines. In fact, analysis of wage differentials from before and after deregulation show that "airline workers received about a ten percent wage premium under regulation."[89]

However, regulation of the industry was not the only reason that unions often won labor disputes. In many ways, the procedures prescribed by the RLA, and the fundamental importance of air transportation in American society, put unions in a strong bargaining position.[90] Perhaps the best example is the 1966 International Association of Machinists (IAM) strike.[91] As profits grew for the industry, especially based on new jet technology, IAM members became upset after several years of stagnant wages.[92] After a year of negotiations and the expiration of the

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[84] *The Beginning*, *supra* note 82.

[85] *Id.*

[86] *Id.*

[87] The new benefits included the addition of a variable fund to the company retirement plan. *Id.*

[88] *Id.*

[89] David Card, *Deregulation and Labor Earnings in the Airline Industry* 35 (Nat'l Bureau of Econ. Research, Working Paper No. 5687, 1996), http://www.nber.org/papers/w5687 [https://perma.cc/J6ER-D8W7].

[90] RLA structure is discussed in detail in Part II, *infra*.

[91] *Today in Labor History: Airline Workers Strike in 1966*, PEOPLE'S WORLD (July 8, 2015, 11:28 AM), http://www.peoplesworld.org/article/today-in-labor-history-airline-workers-strike-in-196/ [https://perma.cc/6XN7-9KKW].

[92] *Id.*

IAM contract with five major carriers, the IAM members picketed 230 airports nationwide.[93] When the CAB allowed other carriers to expand service, the Transport Workers Union announced that they would not perform any additional work on planes or routes resulting from for the strike.[94] Emergency negotiations at the White House, called for by President Lyndon B. Johnson, lasted twenty-two days and resulted in a settled 4.5% annual raise for three years.[95] When IAM members voted to reject this settlement, late night mediation conducted by then-Assistant Secretary of Labor Jim Reynolds finally resulted in a 6% pay raise.[96]

The ability to strong-arm carriers combined with the comfort of government-regulated revenue allowed for significant and consistent gains for unionized airline employees before the enactment of the ADA. Given the forty years of labor success in a regulated industry, it is no surprise that unions "vehemently opposed the passage" of the ADA.[97]

D. Labor After Deregulation

While the ADA did not immediately erase labor gains under the RLA, it did fundamentally alter the priorities and bargaining positions of the parties. Unions opposed the ADA out of a blameless self-interest: unions feared the potential for an oligopoly in the industry caused by "unbridled competition, price slashing, and unemployment[.]"[98] These fears proved to be well-founded in the short term and continue to be a concern more than thirty-five years later.

Airlines were suddenly able to compete based on price and efficiency. New airlines formed, which stretched the market among more carriers and amplified the importance of increased competition.[99] Air carriers could no longer rely on luxurious service to fill their seats,[100] and the new demand for value pric-

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93 *Id.*

94 *Id.*

95 *Id.*

96 The fact that the President's original guidance was a 3.2% raise, the original settlement was a 4.5% raise, and the negotiations ended with an even greater wage increase, indicates the strong hold that unions had over the industry. *Id.*

97 Jonni Walls, Comment, *Airline Mergers, Acquisitions and Bankruptcies: Will the Collective Bargaining Agreement Survive?*, 56 J. Air L. & Com. 847, 852 (1991).

98 *Id.*

99 Tulk, *supra* note 57, at 629.

100 Rather than luxurious menus, passengers are now fortunate to get a package of Biscoff cookies. *See* Wilson, *supra* note 77.

ing put immense pressure on the previously guaranteed revenues.[101] To maintain their bottom lines, air carriers began focusing more on limiting operating costs and expenses, resulting in rising unemployment.[102] Because airline employees were so well-paid, they became an immediate target for cost cutting.[103] Between 1980 and 1990, earnings declined approximately 10% for airline employees in all fields.[104]

These new factors in the industry were exacerbated by overall economic recession and rising energy prices.[105] Immediately after deregulation, the cost of fuel tripled.[106] Airlines scrambled to cut fuel costs through capital expenditures, investing heavily in new planes and technology.[107] These investments, however, required taking on large debts.[108] Managing new interest expenses and the heightened risk of insolvency that accompanies highly leveraged firms were often more important to carriers than accommodating the wishes of an expensive labor force.[109]

Apart from the wage depression effects, deregulation had a significant impact on other labor issues. One of the major gains for unions during the era of regulations was the limitation on the hours worked per month.[110] Though FAA regulations capped pilot hours, for example, at eighty-five hours per month, collective bargaining agreements made under the RLA often set lower limits.[111] In the ten years after deregulation, pilots began reporting an average of 41.8 hours per week, up thirteen percent from 1979.[112] Other airline employees experienced a similar rise, which served to somewhat offset gains made prior to deregulation.[113]

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101 *See* Tulk, *supra* note 57, at 629.

102 *Id.*

103 Card, *supra* note 89.

104 "Microdata from the 1980 and 1990 Censuses show a ten percent decline in the relative earnings of airline workers after deregulation, with roughly similar declines for industry-specific occupations (pilots and flight attendants) and general occupations (managers and secretaries)." Card, *supra* note 89, at Abstract.

105 *See* Baldwin, *supra* note 8, at Part Five.

106 Katherine Van Wezel Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 STAN. L. REV. 1485, 1489–90.

107 *Id.*

108 Many of these capital expenditures included larger planes and jets that were capable of carrying more passengers while minimizing overall fuel usage. *Id.*

109 *Id.*

110 *See The Beginning*, *supra* note 82.

111 Card, *supra* note 89, at 19.

112 *Id.* at 20.

113 *Id.*

The desire to maintain profitability was not the only cause of labor woes after the ADA. The CAB was disbanded a few years after deregulation,[114] and its remaining authority was adopted by other federal agencies with less labor-friendly policies.[115] Under the new system, LPPs were left to the collective bargaining process rather than imposed as a merger condition.[116] As a result, employees not represented by the acquiring carrier's certified union were often left unprotected by a labor system that only obligates carriers to negotiate with certified representatives.[117]

Negotiating itself has become more difficult as well. With more at stake and less wiggle room in the carrier's budget, collective bargaining contracts now take longer to finalize. Between 1978 and 1989, the median contract negotiation took nine months.[118] As time progressed, the number of contracts in place before the amendable date slowly declined.[119] "[T]he number of contracts that required more than 24 months to negotiate more than doubled" between 1990–2002, relative to 1978–1989.[120] To make matters worse, evidence indicates that negotiating in the era of deregulation is made even more challenging and lengthy "if the economic conditions facing the bargaining parties change significantly once bargaining has started."[121] Because the RLA bars self-help during the contract amendable period—at least "until the National Mediation Board releases them and the cooling-off periods expire"—these lengthy negotiations can delay use of labor's most effective strategies.[122]

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114 Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (1984).

115 The authority to grant merger requests, for example, was given to the U.S. Department of Transportation. Civil Aeronautics Board Sunset Act, § 3(e). This department abandoned the practice of requiring LPPs as a condition for merger acceptance. *See* Schoder, *supra* note 79, at 115.

116 Walls, *supra* note 97, at 856.

117 *Id.*

118 U.S. GOV'T ACCOUNTABILITY OFF., GAO-03-652, AIRLINE LABOR RELATIONS: INFORMATION ON TRENDS AND IMPACT OF LABOR ACTIONS 10 (2003) [hereafter GAO REPORT].

119 *Id.*

120 *Id.*

121 Andrew von Nordenflycht & Thomas A. Kochan, *Labor Contract Negotiations in the Airline Industry*, 25 MONTHLY LABOR REV. (July 2003), *available at* https://www.bls.gov/opub/mlr/2003/07/art3full.pdf. [https://perma.cc/3B4P-HFXC].

122 *Id.* at 19.

Despite the relatively bleak picture painted here, the entirety of post-deregulation labor history is not fire and brimstone. There were some silver linings, relatively speaking, for individual workers in the industry. For example, when workers were displaced from the industry, they tended to fare about as well as any other person suffering unemployment.[123] Between 1984 and 1994, displaced airline workers experienced a decline in wages in their new jobs but not significantly more than those in other industries.[124] There are some cases of wage gains as well, especially in recent years. For example, United Airlines agreed to increase the pay of 30,000 union workers by 30% over the course of five years in 2016.[125] The pilot union had similar success, gaining a 16% raise within a year and a 2% raise after another year.[126] The Teamsters and Delta Air Lines pilot union, on the other hand, recently rejected offers of a 33% wage increase over six and a half years and 20% raise over four years, respectively.[127] Since 2010, overall airline industry compensation has grown by $24 billion.[128] At least in recent years, union members have fared well despite the pitfalls of deregulation.

Even in the years immediately after deregulation, unions were still a powerful force, capable of significant harm to carriers and the industry when their demands were not met.[129] By focusing on participation in the process of managing the carrier, many unions were able to protect their members.[130] For example, in 1985, the pilots for United Airlines blocked an attempt to ac-

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123 *See* Card, *supra* note 89, at 3–4.

124 *Id.*

125 Chris Isidore, *United Airlines and Union Agree to 30% Wage Hikes Over Five Years*, CNNMONEY (Apr. 4, 2016 7:57 PM), http://money.cnn.com/2016/04/04/news/companies/united-airlines-union-deal/index.html [https://perma.cc/G692-4HS5].

126 *Id.*

127 *Id.*

128 Ted Reed, *Is the Airline Industry the Last Place Where Labor Has Something to Celebrate?*, FORBES 2 (Sept. 4, 2017, 8:56 AM), https://www.forbes.com/sites/tedreed/2017/09/04/on-labor-day-airline-industry-boasts-record-profits-strong-unions-and-yes-labor-organizing/#a8c66e662c42 [https://perma.cc/Q64D-UR9R].

129 "Contrary to trends in the rest of the economy, the propensity of airline workers for unions seems remarkably robust." Card, *supra* note 89, at 23.

130 "The unions' goal, and strategy for survival, was participation . . . [U]nions [sought] participation in major corporate investment decisions in order to protect the viability of their employers and their members' jobs." Stone, *supra* note 106, at 1490–91.

quire Frontier Airlines.[131] Granted, this move led to Frontier going bankrupt and over 520 ALPA pilots losing their jobs, but it demonstrated labor's ability to derail carrier efforts to grow the bottom line at union expense.[132] Between 1978 and 2003, unions struck the airlines a reported sixteen times.[133] Beyond that, there were ten court-recognized work actions other than strikes, including strategies like sickouts, slowdowns, work stoppages, and overtime refusal.[134] Unions were still active and, though perhaps not as effective as before deregulation, were still able to advocate for the workers they represented.

This is not a comprehensive history of labor unions in the airline industry. Nor, for that matter, is it a conclusive list of the impacts deregulation has had on labor relations in the United States. It is, however, a brief overview that demonstrates the competing interests, concerns, and priorities of air carriers and unions, as well as the general trends since deregulation. One important component yet to be addressed is what happens when neither labor nor airlines win: bankruptcy.

E. Bankruptcy in the Airline Industry

While not an absolute rule, the regulatory era of aviation history was blessed with relative financial stability for air carriers.[135] This was not the case after Congress passed the ADA. Between 1990 and 2011, 189 airlines filed for bankruptcy protection.[136] Since then, several more airlines have utilized the Code in response to financial distress, with the most recent[137] being Hawaii Island Air on October 17, 2017.[138] In a competitive market, there will always be winners and losers.[139] While there are nu-

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[131] Kenneth Labich, *America's Most Arrogant Union*, Fortune Mag. (Nov. 10, 1986), *available at* http://archive.fortune.com/magazines/fortune/fortune_archive/1986/11/10/68255/index.htm [https://perma.cc/UW3Y-84NK].

[132] *Id.*

[133] GAO Report, *supra* note 118, at 42.

[134] *Id.*

[135] *See supra* Part I.A.

[136] *American Joins Long List of Airline Bankruptcies*, Boston.com (Nov. 29, 2011), http://archive.boston.com/business/articles/2011/11/29/american_joins_long_list_of_airline_bankruptcies/ (last visited Aug. 26, 2018).

[137] This is as of February 2, 2018.

[138] Jon Hemmerdinger, *Hawaiian Carrier Island Air to Cease Operations*, Flight Global (Nov. 10, 2017), https://www.flightglobal.com/news/articles/hawaiian-carrier-island-air-to-cease-operations-443109/ [https://perma.cc/HJ36-PPT4].

[139] The term "survival of the fittest" has been used to argue that bankruptcy is a sign of healthy competition in a market. For an argument that this principle is not truly applicable in the airline industry, see Kristina McQuaid, Comment, *Delta*

merous causes of the nearly 200 bankruptcy filings, there are some distinct trends that can be identified.

The first major cause of these bankruptcies is the decline in revenues after deregulation.[140] The causes of declining revenues, however, take many forms. Business travelers, previously the staple customer for air carriers, have given way to leisure travelers who are more price sensitive.[141] With the CAB's fare regulation out of the way, new market entrants could, and existing carriers would have to, compete based on price.[142] The growing passenger capacity that accompanied capital and technology improvements[143] has also pushed ticket prices down; airlines have an incentive to maximize their profit per flight, and adding a discount-priced customer without incurring any incremental cost is an effective strategy.[144] This was especially challenging for existing carriers because new airlines "were nonunion operations, not subject to union work rules or pay scales" and thus could underbid for customers.[145] Downward pressures on revenue were immediately troublesome to airlines after deregulation and continue to push carriers toward insolvency today.

Though the new revenue challenges of a competitive market are not unique to airlines and may not be enough to break a carrier on their own, airlines are also greatly exposed to fluctuating operating costs. More specifically, many airlines live and die on the price of oil and fuel, which is generally the industry's second largest expense.[146] Prior to deregulation, a rise in fuel costs could be offset by the CAB adjusting fares industry-wide, allowing carriers to maintain their profit margins without being underbid by competitors.[147] It is no surprise that airline profit-

& Northwest File for Bankruptcy: Is It Time to Ground A Major Airline?, 29 HOUS. J. INT'L L. 663, 689 (2007).

140 *See supra* Part I.D.

141 McQuaid, *supra* note 139, at 668.

142 Walls, *supra* note 97, at 853–54.

143 *See supra* note 108 and accompanying text.

144 McQuaid, *supra* note 139, at 668.

145 Stone, *supra* note 106, at 1490.

146 "[F]uel is an airline's second largest expense. Fuel makes up a significant portion of an airline's total costs, although efficiency among different carriers can vary widely." *The Industry Handbook: The Airline Industry*, *supra* note 41.

147 To get a sense of the volatility of oil prices and how difficult it is for airlines to budget effectively, see *Crude Oil Prices–70 Year Historical Chart*, MACROTRENDS, www.macrotrends.net/1369/crude-oil-price-history-chart [https://perma.cc/5QS5-RHVA].

ability often mirrors the unpredictable price of oil.[148] Based on 2010 cost structures, analysts argue that the "break-even point, beyond which airlines cannot make a profit, exists when the world oil price is around US $80 per barrel." After deregulation, and continuing through today, highly volatile oil prices have brought the airline industry to its knees and driven many carriers into bankruptcy. For example, the bankruptcy of Braniff International Airways[149] has been largely blamed on a massive rise in fuel costs.[150]

Despite the impact that fuel costs have on the industry, the deciding factor in a carrier's solvency is typically its labor costs. By 2002, around the time of a smattering of airline bankruptcies,[151] "[l]abor's share of total expenses reached a modern-day high of 37%."[152] Trans World Airlines, for example, went bankrupt in 2001 largely due to a contract with the IAM that required them to keep unnecessary and expensive maintenance facilities open.[153] US Airways filed for bankruptcy in 2002.[154] Though there were multiple causes, labor opposed the acquisition attempt by United Airlines in 2000 that could have kept the

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148 This is illustrated effectively in the graph of the AMEX Airline Index and the US Gulf Coast Kereosene-Type Jet Fuel Spot Price. *See* Adam Levine-Weinberg, *Are Lower Oil Prices Already Hurting Airline Revenue?*, THE MOTLEY FOOL (Dec. 10, 2014, 10:20 AM), https://www.fool.com/investing/general/2014/12/10/are-lower-oil-prices-already-hurting-airline-reven.aspx [https://perma.cc/3FSG-Q8J2].

149 For a comprehensive and entertaining review of Braniff's financial woes, see pressmin, *Enterprise—Tailspin (Brainiff Airlines)—1983*, YOUTUBE (Aug. 30, 2016), https://www.youtube.com/watch?v=2nw4evfi_pU [https://perma.cc/RF9V-BG5J].

150 Though not the only cause, fuel prices derailed Braniff's plans for expansion and drove a net loss of $377 million between 1979 and 1982. Ron Scherer, *Why Braniff International's Colorful Career Has Ended*, CHRISTIAN SCI. MONITOR (May 14, 1982), https://www.csmonitor.com/1982/0514/051477.html (last visited Aug. 26, 2018).

151 Trans World Airlines, US Airways, and United Airlines were some of the major carriers driven into insolvency between 2001 and 2002.

152 This share of costs dropped to 25% in 2006, in large part due to the rise in fuel costs. Barry Hirsch, *Unions and Wages in the Airline Industry*, INT'L AIR TRANSP. ASS'N (July 2007), https://www.iata.org/whatwedo/Documents/economics/Hirsch_Unions_Wages.pdf [https://perma.cc/J76S-UTK7].

153 *See* Elaine X. Grant, *TWA—Death Of A Legend*, ST. LOUIS MAG. (July 28, 2006, 12:00 AM), https://www.stlmag.com/TWA-Death-Of-A-Legend/ [https://perma.cc/87YF-R7JP].

154 *US Airways Files for Bankruptcy*, NBC (Aug. 13, 2004, 11:41 AM), www.nbcnews.com/id/5982378/ns/business-us_business/#.Wn9TVUxFxXB [https://perma.cc/P3QA-VZ3R].

carrier afloat.[155] United Airlines filed for Chapter 11 protection in 2002 but was unable to emerge from bankruptcy without eliminating pensions and reducing wages to save $2 billion.[156] Even when labor costs are not the driving force behind insolvency, they can be an impediment to recovery. The September 11 attacks threw the industry into turmoil. In response, the Air Transportation Stabilization Board gave America West a $379.6 million loan guarantee but "demanded severe limits on labor costs."[157] The role that unions play in causing financial distress is not merely increasing a carrier's labor expense, though they do that quite effectively[158] and often with the support of various levels of government.[159] Union efforts to increase participation in corporate decisions,[160] such as mergers and acquisitions, can also force carriers into bankruptcy.

Again, this discussion does not begin to cover all of the examples or causes of airline insolvencies. The intention is to demonstrate how common bankruptcy has become and illustrate some of the underlying issues that must be addressed when discussing solutions. A better understanding of all the factors involved will hopefully make analysis of the related laws more effective. In turn, the proposed solutions will be more likely to create greater financial stability in the airline industry.

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155 Floyd Norris, *The Markets: Market Place; Stalwart Investors in US Airways Stand to Gain Vindication, but Probably No Big Celebration*, N.Y. TIMES (May 24, 2000), www.nytimes.com/2000/05/24/business/markets-market-place-stalwart-investors-us-airways-stand-gain-vindication-but.html?scp=1&sq=us+airways+ual+merger&st=nyt.

156 *Timeline of United Airlines' Bankruptcy*, USA TODAY (Feb. 1, 2006, 7:32 AM), http://usatoday30.usatoday.com/travel/flights/2006-02-01-united-timeline_x.htm [https://perma.cc/9W5L-PZXC].

157 Sally B. Donnelly, *Air Support*, TIME (Nov. 24, 2003), http://content.time.com/time/magazine/article/0,9171,1006304,00.html.

158 Philadelphia's municipal airport recently conditioned their lease with several airlines on a mandatory minimum wage of $12 per hour, following the union-friendly examples set by San Francisco and Los Angeles. Lydia DePillis, *Airport Workers Steadily Gaining Back Lost Ground on Wages*, WASH. POST (June 18, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/06/18/airport-workers-steadily-gaining-back-lost-ground-on-wages/?utm_term=.366ce08bd939 [https://perma.cc/3Y53-E3V7].

159 For an analysis on the legality of these types of conditions, see Klayton Sweitzer Hiland, Case Note, *War and (Labor) Peace: How LAX and the Ninth Circuit Changed the Rules of Engagement for Airline Service Providers and Organized Labor*, 83 J. AIR L. & COM. 145 (2018).

160 *See* Stone, *supra* note 106.

II. STATE OF THE LAW

A. Railway Labor Act

The stated purposes of the RLA are to prevent service disruption, ensure the right for labor to organize, and settle disputes.[161] To that end, the law establishes a series of bilateral duties. Both carriers and their employees have a duty to "exert every reasonable effort to make and maintain agreements" and to "settle all disputes" arising out of labor relations and negotiations.[162] Understanding the structure of this process is crucial to analyzing its application in practice.

First, the RLA distinguishes between different types of disputes and delegates resolution of those disputes to different authoritative boards.[163] "Representation disputes" over the identity of a collective bargaining representative are addressed by the National Mediation Board (NMB). The National Railroad Adjustment Board[164] handles "minor disputes,"[165] which are those issues that "grow[ ] out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."[166] "Major disputes" involve establishing or amending a collective bargaining agreement that addresses "rates of pay, rules[,] and working conditions."[167] For the purposes of understanding the role of collective bargaining, this Comment will focus specifically on major dispute resolution under the RLA.

Major dispute resolution is directed, at least initially, into negotiations between representatives for both the carrier and the employees.[168] These representatives are to be chosen without interference by the other party and are selected through majority vote based on craft or class.[169] At any point in time during the process, either party may refer any dispute to the NMB,[170] which

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161 Railway Labor Act, 45 U.S.C. § 151a (2018).

162 *Id.* § 152.

163 Walls, *supra* note 97, at 858–59, n.62.

164 45 U.S.C. §§ 153, 184.

165 *See* Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711, 722 (1945), adhered to on reh'g, 327 U.S. 661 (1946).

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

167 Walls, *supra* note 97, at n.62.

168 *Burley*, 325 U.S. at 722.

169 Any disputes as to who the representatives are for a class are decided by the National Mediation Board. *Id.*

170 45 U.S.C. § 154 (2018).

in turn will provide mediatory services and hopefully reach a settlement.[171] Should that fail, the NMB must encourage, but may not mandate, that the parties submit the dispute to arbitration.[172] If that is refused, the NMB declares a thirty-day "cooling off"[173] period, during which the parties can either settle or choose to attend arbitration; the status quo of the parties in terms of pay, rules, working conditions or established practices must otherwise be maintained.[174] Alternatively, the RLA allows the NMB to notify the President of the United States if the dispute cannot be settled and "threaten[s] substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service."[175] The President may in turn create an emergency board (PEB) for the purposes of investigating and reporting on the situation.[176] Recommendations from the PEB are not binding, and a subsequent thirty-day cooling-off period marks the end of the dispute resolution process outlined in the RLA.[177]

Built into this process are periods of time in which notice has to be given, conferences have to be scheduled, and mandatory cooling-off periods during which self-help is prohibited.[178] By statutorily elongating the process, especially with mandatory cooling-off periods, the RLA puts particularly intense pressure on carriers that are struggling financially. Often times, lenders will refuse credit to carriers who are unable to guarantee cuts to labor costs.[179] As discussed previously, the average length of negotiations has risen significantly over the last several decades.[180] To illustrate the impact of even a week's delay in obtaining relief, consider the example of American Airlines. In 2010, a year

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171 *Id.* § 155.

172 *Id.*

173 Mark C. Stephens, Comment, *Losing Lift and Creating Drag! The Effect of National Mediation Board Execution and Railway Labor Act Court Decisions on the Collective Bargaining Process in the Airline Industry: A Union Perspective*, 15 TEX. WESLEYAN L. REV. 141, 144 (2008).

174 45 U.S.C. § 155.

175 *Id.* § 160.

176 *Id.*

177 Stephens, *supra* note 173, at 144–45; von Nordenflycht & Kochan, *supra* note 121.

178 *See* 45 U.S.C. §§ 155–160 (2018); von Nordenflycht & Kochan, *supra* note 121.

179 Generous as it is with corporate welfare and subsidies, even the U.S. federal government has been known to require labor cuts before aiding a struggling airline. Donnelly, *supra* note 157.

180 *See supra* Part I.D; GAO REPORT, *supra* note 118, at 10.

before filing for bankruptcy, American Airlines paid out $6,227,000,000 in wages, salaries, and benefits.[181] This equates to $119,750,000 per week just to cover payroll expenses. In just the last two years, three major airlines agreed to a $3.3 billion increase in labor-related operating costs.[182] For carriers desperately in need of payroll credit or short term capital infusions, having to wade through a long process to get any possible concessions on an amendable contract can be enough to sink them.[183]

All of this is not to say that unions deliberately prolong negotiations in an attempt to induce bankruptcy. Quite the opposite: there are many examples of labor willingly taking pay and benefits cuts in an attempt to keep an airline afloat.[184] However, when a contract is not yet amendable or a union is unwilling to make the concessions necessary for an airline to remain profitable, there is only one remaining option for the carrier: bankruptcy.

B. The U.S. Bankruptcy Code

The Code[185] was enacted in 1978 and amended in 1984 in an "attempt to conform the bankruptcy laws to prevailing business realities."[186] Since then, the law has been amended numerous times, often to address additional business realities as they develop. The Code has many important components, but Chapter 11 reorganization will be the focus of this discussion. This portion of the Comment will provide a brief look at specific code

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181 American Airlines, Inc., Annual Report (Form 10-K) 40 (Feb. 16, 2011), *available at* https://www.last10k.com/sec-filings/aal/0000950123-11-014740.htm# [https://perma.cc/Q63K-PPVN].

182 Justin Bachman, *Higher Fuel and Labor Costs Mean You'll Pay More to Fly in 2017*, Bloomberg (Jan. 5, 2017, 3:00 AM), https://www.bloomberg.com/news/articles/2017-01-05/higher-fuel-and-labor-costs-mean-you-ll-pay-more-to-fly-in-2017.

183 Braniff's CEO described the challenge the airline faced, as struggling carrier, coming up with enough cash to make payroll every two weeks. *See* pressmin, *supra* note 149 and accompanying video.

184 *See* Paul Stephen Dempsey, *Airline Bankruptcy: The Post-Deregulation Epidemic*, McGill Univ. Inst. of Air & Space L. 47 (2012), https://www.mcgill.ca/iasl/files/iasl/aspl613_paul_dempsey_airlinebankruptcies2012.pdf [https://perma.cc/D45P-842G].

185 Bankruptcy Code, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

186 Jeffrey S. Heuer & Musette H. Vogel, *Airlines in the Wake of Deregulation: Bankruptcy As an Alternative to Economic Deregulation*, 19 Transp. L.J. 247, 257 (1991).

provisions, how the law has changed, and an example of the Code's use in practice.

Chapter 11 of the Code has several purposes. First, it protects debtors by automatically staying most debt collection activities.[187] Second, it provides debtors an opportunity to reorganize their debt and capital structure with the goal of returning a solvent business to the marketplace.[188] Third, it intends to find equitable outcomes for creditors, stockholders, and the public at large.[189] Most importantly, at least for the purposes of this Comment, it allows debtors a way out of contracts, like collective bargaining agreements, while minimizing the impact on the debtor's employees.[190] Chapter 11 often allows a "debtor in possession"[191] to retain control over the company while moving through the bankruptcy process and gives the debtor in possession powers similar to those of a bankruptcy trustee.[192] This means that the management of the company often remains in place during the reorganization process.[193]

Once an airline files for bankruptcy, it may face a good faith challenge;[194] when the high cost of labor is the driving force behind the bankruptcy, a union challenge is especially likely. An early example of this type of challenge is the Continental Airlines bankruptcy.[195] Three separate unions filed a motion to dismiss the bankruptcy proceedings, claiming that Continental was abusing the Code to reject the existing collective bargaining agreements.[196] The court found that "[n]either the sole nor primary purpose of the filing was to reject these executory con-

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187 11 U.S.C.A. § 362 (West 2018).

188 Heuer & Vogel, *supra* note 186, at 257–58.

189 *Id.*

190 *Id.*

191 11 U.S.C. § 1101 (2018).

192 *Id.* § 1107.

> Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under Section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in Sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

193 Debtors in possession can be challenged by a "party in interest" in an appearance before the bankruptcy court if there is a question as to their fitness to continue operating the company. *Id.* § 1107.

194 *Id.* § 1129(a)(3).

195 *In re* Cont'l Airlines Corp., 38 B.R. 67, 71–72 (Bankr. S.D. Tex. 1984).

196 *Id.* at 71.

tracts[,] although it is clear that at filing Continental Airlines expected to be able to do this under the provisions of that law."[197] The motion to dismiss the bankruptcy proceedings was denied.[198] This case illustrates an important, and seemingly valid, concern that many unions have about air carriers filing for bankruptcy: are the carriers just using the Code to circumvent the RLA and avoid making good on their collective bargaining agreements?

In the Continental Airlines bankruptcy, the carrier intended to rely on Section 365 of the Code[199] to reject the collective bargaining agreements as executory contracts.[200] Unions, in cases like these, often tried to argue that Section 1167[201] prevented the rejection of collective bargaining agreements but were unsuccessful for a variety of reasons.[202] The Supreme Court eventually addressed the tension between the Code and the RLA in the 1984 case of *National Labor Relations Board v. Bildisco & Bildisco*,[203] in large part due to "[t]he rising number of bankruptcies that was the consequence of the early 80s recession[.]"[204] The Court found that, despite the Board's rules, bankruptcy courts "should permit a debtor in possession to reject a collective[ ]bargaining agreement upon a showing that the agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract."[205] Additionally, the Court found that "a debtor in possession does not commit an unfair labor practice when, after the filing of a bankruptcy petition but before court-approved re-

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197 *Id.* at 71–72.

198 *Id.* at 72.

199 11 U.S.C. § 365 (2018).

200 *In re Cont'l Airlines Corp.*, 38 B.R. at 72.

201 "Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act except in accordance with section 6 of such Act." 11 U.S.C. § 1167.

202 Papaioannou, *supra* note 1, at 224 (internal citations omitted).

> One court gave emphasis to the fact that section 1167 appears in Subchapter IV of Chapter 11 which explicitly states that it covers only railroad employees. Another court relied on the past history of section 1167 which derives from Section 77(n) of the Bankruptcy Act of 1898. The latter provided that "No judge or trustee acting under this Title shall change the wages or working conditions of railroad employees except in the manner prescribed in sections 151 to 163 of R.L.A."

203 465 U.S. 513 (1984).

204 Papaioannou, *supra* note 1, at 228.

205 *Nat'l Labor Relations Bd.*, 465 U.S. at 535 (internal quotations omitted).

jection of the collective[ ]bargaining agreement, it unilaterally modifies or terminates one or more provisions of the agreement."[206]

The result of this case was obviously not well received by the unions, who saw the result as a threat to their future bargaining positions as well as carriers' willingness to "sacrifice policies enhanced by labor law adjudication for the survival needs of the company."[207] In response to extensive union lobbying efforts, an amendment was made to the Code in 1984.[208] Section 1113 of the Code now allows for rejection of collective bargaining agreements under the RLA only after following a set procedure.[209] After filing a Chapter 11 petition, the debtor in possession or trustee must:

> make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modification in the employees benefits and protections that are *necessary to permit the reorganization* of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably.[210]

This proposal must be accompanied with all "relevant information as is necessary to evaluate the proposal."[211] The parties must then negotiate in good faith in an attempt to reach an agreement.[212] Absent such settlement, the court may only approve the rejection of a collective bargaining agreement if it finds that the union has refused to accept the carrier's proposal without good cause and the "balance of the equities[213] clearly

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[206] *Id.* at 516–17.

[207] Papaioannou, *supra* note 1, at 232.

[208] *Id.* at 233.

[209] 11 U.S.C. § 1113 (2018).

[210] *Id.* (emphasis added).

[211] *Id.*

[212] *Id.*

[213] The following is a non-exclusive list of equities to consider:

> (1) the likelihood and consequences of liquidation if rejection is not permitted; (2) the likely reduction in the value of creditors' claims if the bargaining agreement remains in force; (3) the likelihood and consequences of a strike if the bargaining agreement is voided; (4) the possibility and likely effect of any employee claims for breach of contract if rejection is approved; (5) the cost-spreading abilities of the various parties, taking into account the number of employees covered by the bargaining agreement and how various employees' wages and benefits compare to those of others in

favors rejection of such agreement."[214] The court must make this ruling within thirty days of the hearing.

Another important part of this amendment is the possibility for the court to authorize the trustee to "implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement."[215] This is only allowed if it is essential to the debtor's business or to avoid irreparable damage to the estate. Crucially, this component of the amendment is an acknowledgement that a labor contract can often sink a company into insolvency and prevent its reemergence as a viable business. Likewise, it recognizes that immediate changes may be necessary to prevent full collapse. As discussed previously, and as will be discussed in more detail below, the lengthy negotiation process under the RLA and the difficult process of reorganization, without immediate relief, can spell the end of an airline.[216]

The American Airlines (AMR) bankruptcy in 2011 provides an effective example. AMR filed for bankruptcy in 2011 after losing $1 billion that year and over $10 billion since 2001.[217] AMR negotiated with its unions and came to amicable settlements with all parties except the pilots union, the Allied Pilots Association (APA).[218] After a three-week trial and ongoing negotiations, AMR was forced to file a motion under Section 1113 to reject the collective bargaining agreement because the proposed modifications were not accepted by the APA.[219] The court found the APA's rejection of the modifications to be without "good cause," denying APA arguments that AMR must merge with another airline.[220] It also found that the proposed reorganization plan was not fatally flawed despite being remarkably similar to AMR's prior business plans.[221] Most important, for the purposes of this Comment, is the court's acknowledgment that the only two "significant additions from American's prior 'Cor-

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> the industry; and (6) the good or bad faith of the parties in dealing with the debtor's financial dilemma.

In re AMR Corp., 477 B.R. 384, 448 (Bankr. S.D.N.Y. 2012).

214 11 U.S.C. § 1113(c).

215 *Id.* § 1113(e).

216 *See supra* Part II.A.

217 *In re AMR Corp.*, 477 B.R. at 394.

218 *Id.* at 393.

219 *Id.*

220 *Id.* at 415.

221 *Id.* at 416.

nerstone Strategy' "[222] were "the purchase of new aircraft and *the labor savings proposed in this Section 1113 proceeding*."[223] The court agreed with AMR that, despite the APA's contention that labor costs were converging towards industry standards, it was necessary to reject the existing collective bargaining agreement and make changes to pay and benefits.[224]

As discussed above, one of the stated purposes of the Code is to "conform the bankruptcy laws to prevailing business realities."[225] One of those realities, as the court noted in the AMR case, is "that the airline industry labor contract negotiation process is inherently uncertain and the results of labor contract negotiations are difficult to predict."[226] Another of those realities is that the RLA collective bargaining and dispute resolution processes are lengthy and expensive, which can make it harder to obtain the necessary profitability or financing to stave off a bankruptcy filing.[227]

III. IS THIS THE BEST WE CAN DO?

Using the Code to reject burdensome collective bargaining agreements has become a common practice in the industry. Even when airlines do not file the bankruptcy petition, the threat of a bankruptcy filing, and the collateral consequences to unions, is a common issue in labor negotiations.[228] Critical analysis of the Section 1113 process leads to the following questions: (1) Is this process effective for promoting financially viable air carriers?; (2) Is there a better, entirely alternative solution to the conflict between labor interests and carrier solvency?; and (3) If the current process is effective, can the principles behind the process be extended to better facilitate financial stability in the industry?

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[222] The "Cornerstone Strategy" was a focus on AMR's major flight hubs. *Id.* at 418.

[223] *Id.* at 416 (emphasis added).

[224] *Id.* at 423.

[225] Heuer & Vogel, *supra* note 186, at 257.

[226] *In re AMR Corp.*, 477 B.R. at 423 (internal quotations and brackets omitted).

[227] Lenders often condition capital infusions on cuts to labor costs, which are often difficult to guarantee during collective bargaining and dispute resolution. *See* Donnelly, *supra* note 157.

[228] Union concessions started with financially troubled carriers "to try to stave off bankruptcy" but spread to solvent carriers. Stone, *supra* note 106, at 1543.

A. Is This Process Effective?

When evaluating the effectiveness of the Section 1113 procedure, it is important to keep in mind that for the process to begin, the carrier must be in such financial distress that bankruptcy protections become necessary. Once a petition is filed, in order to reorganize under Chapter 11, the airline must be able to make a good faith claim for the necessity of its proposed business plan.[229] Even with the benefits of debt restructuring and rejection of collective bargaining agreements, a bankruptcy petition is not always successful.

For example, many airlines that enter Chapter 11 reorganization soon cease operations. Frontier Airlines, Eastern Airlines, Pan American World Airways, American Trans Air, and Skybus Airlines are just some of the major airlines that were forced to cease operations after filing for bankruptcy.[230] Several other airlines have been repeat bankruptcy customers, such as US Airways and Sun Country Airlines.[231] In other cases, carriers are only able to reemerge as fiscally viable entities through merger or acquisition transactions.

There are, however, major success stories stemming from Chapter 11 reorganizations. Northwest Airlines was able to abrogate its agreement with a flight attendants union, among others, without incurring damages liability for a breach.[232] Through this process, Northwest was able to cut labor costs by about $1.4 billion per year.[233] Perhaps the best example is American Airlines. After acquiring the bankrupt Trans World Airlines in early 2001, significant debt, an excess of employees, and the September 11 terrorist attacks pushed American Airlines into Chapter 11 before the end of the year.[234] After successfully rejecting the collective bargaining agreement with the pilots and amicably modi-

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229 11 U.S.C. § 1129(a)(3) (2018).

230 *U.S. Bankruptcies and Service Cessations*, AIRLINES FOR AM., https://web.archive.org/web/20160528074046/http://airlines.org/data/u-s-bankruptcies-and-services-cessations/ [https://perma.cc/N9RX-ZVZC].

231 *US Airways Files for Bankruptcy*, *supra* note 154; David Phelps, *Cambria Deal Gives New Life to Sun Country*, STAR TRIBUNE (July 21, 2011, 12:39 AM), www.startribune.com/cambria-deal-new-life-to-sun-country/125906638/ [https://perma.cc/8N5Y-4U88].

232 *In re* Nw. Airlines Corp., 366 B.R. 270, 275 (Bankr. S.D.N.Y. 2007).

233 Martin Moylan, *Northwest Airlines Projects It'll be Worth $7B Post-Bankruptcy*, MPR NEWS (Feb 15, 2007), https://www.mprnews.org/story/2007/02/15/nwaplan [https://perma.cc/N25N-VQF7].

234 Ally Schmidt, *American Airlines Overview: The Past, the Crisis, and the Recovery*, MARKET REALIST (July 15, 2016, 12:40 PM), https://marketrealist.com/2016/06/

fying agreements with other unions,[235] American Airlines merged with US Airways.[236] Since then, AMR stock has gone from $25.25 per share on October 1, 2013, to $48.36 per share on February 9, 2018.[237] Looking to American Airlines as an example, it is clear that rejecting a collective bargaining agreement through the bankruptcy process can be a major catalyst for future success and financial viability.

Though not the primary concern here, the process for rejecting an agreement through Section 1113 is not an inequitable one with respect to labor unions. Given the choice between a bankrupt airline that is forced to cease operations, resulting in 100% unemployment, and the necessary[238] alterations to become financially viable, the choice for unions is clear. Moreover, the blow to union wages and benefits is often softened by employee participation in corporate profit sharing. For example, Northwest employees were able to garner about $1.5 billion through a profit sharing deal with the airline.[239]

The Section 1113 process is obviously effective, at least to serve its intended purpose. It allows the carrier to obtain the relief necessary to gain solvency. It protects the interests of employees by allowing as many workers as is feasible to keep their jobs, albeit at lower rates of pay. The system works and clearly provides an important benefit to the industry, but it is not necessarily the best possible solution.

B. Is There a Superior Alternative?

One suggested alternative to the Section 1113 process for rejecting a collective bargaining agreement is a legislative rewrite to require mandatory alternative dispute resolution to modify or

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american-airline-group-look-evolution-company [https://perma.cc/X4V2-XGL4].

235 *In re* AMR Corp., 477 B.R. 384, 393 (Bankr. S.D.N.Y. 2012).

236 The merger was challenged by other airlines and the Department of Justice. For more details, see Bart Jansen, *Justice Department Challenges American-US Airways Merger*, USA Today (Aug. 13, 2013, 10:51 AM), https://www.usatoday.com/story/travel/news/2013/08/13/justice-american-us-airways/2647545/ [https://perma.cc/VA9W-QWVJ].

237 *American Airlines Group Inc.*, Market Watch, https://www.marketwatch.com/investing/stock/aal/charts (last visited Aug. 26, 2018).

238 Rejection of the collective bargaining agreement can only occur if the proposed modifications are necessary to the carrier's viability. 11 U.S.C. § 1113 (2018).

239 Moylan, *supra* note 233.

reject an agreement.[240] The article proposing this rewrite would have Section 1113 read: "The debtor in possession, or the trustee if one has been appointed, may only reject or alter a collective bargaining agreement if the parties mutually agree to these terms through negotiation, mediation, or any other alternative dispute resolution forum that the parties mutually agree upon."[241] The theory behind this proposal is that Section 1113, as it currently stands, "takes away the union's voice and allows the court to impose management's terms on a collective bargaining agreement. By amending [Section] 1113 to require cooperation, it restores the power balance between unions and management."[242] Carriers would, in turn, be "saved from liquidation or a forced merger[,] and thousands of pilots and flight attendants [would be] able to keep their jobs—albeit with some sacrifices."[243]

While this theoretical legislative fix may have some ethical, moral, or equitable appeal to those with overly union-sympathetic tendencies, the reasoning and assumptions that underwrite its proposal do not stand up to scrutiny for a variety of reasons. First and foremost, there is an assumption in this proposal that carriers and unions have not already gone through an extensive negotiation, mediation, or arbitration process. However, the RLA already requires that any collective bargaining agreement, upon its creation and through its amendment, go through an extensive and time-consuming process of negotiation and mediation.[244] Assuming that the carrier was unable to garner the necessary concessions to avoid or otherwise emerge from bankruptcy through the RLA process, it is highly unlikely that re-mediating the same issue, with the same parties and the same stakes, will result in sufficient labor cost reductions to keep the airline running. It is worth noting again that under the current Section 1113 process, carriers must meet with unions to negotiate the proposed alterations to their agreements outside of the judicially sanctioned rejection process.[245] If both parties

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[240] Max Schatzow, *An Alternative Universe to § 1113 of the Bankruptcy Code: The Mediation Between American Airlines and Its Workforce*, 10 RUTGERS BUS. L. REV. 1 (2013).

[241] *Id.* at 5.

[242] *Id.* at 19.

[243] *Id.* at 20.

[244] 45 U.S.C. §§ 154, 155 (2018).

[245] "[T]he trustee *shall* meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory

knew that the carrier was in distress when negotiating amendments to the collective bargaining agreement, it is nonsensical to believe that a legislatively-forced second round of negotiations or mediation would yield a different result.

The next flaw in the reasoning behind this proposition is believing that a moderated, less management-friendly result is preferable to a judicially-sanctioned rejection through the current Section 1113. Rejecting a collective bargaining agreement is only possible when it is *necessary* for the carrier to stay in business.[246] Presumably, the proposed mediation alternative would result in fewer labor concessions and therefore inherently fall short of the necessary cost reductions to successfully reorganize under Chapter 11. This proposed alteration to Section 1113 would, at a minimum, risk mediating a carrier into reorganization failure, and at the maximum, guarantee continued insolvency.

Another serious flaw with the proposed legislative fix is the potential for even longer, more drawn out reorganization processes. As discussed previously, lengthier negotiations mean maintaining the untenable status quo agreement for an unacceptably long time.[247] Lenders, investors, and possible merger or acquisition partners will likely avoid stepping in until they know what labor cost reductions they can expect.[248] The relative uncertainty of the proposed mediation process, as compared to the guarantee of necessary concessions through the judicial rejection process, will also make financing the reorganization more difficult and force any carriers emerging from bankruptcy to carry a more burdensome debt and interest expense. This is contrary to the purpose and principles of the Bankruptcy Code.[249]

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modifications of such agreement." 11 U.S.C. § 1113(b)(2) (2018) (emphasis added); *see In re* AMR Corp., 477 B.R. 384, 393 (Bankr. S.D.N.Y. 2012).

[246] "[W]hich provides for those *necessary* modifications in the employees benefits and protections that are *necessary* to permit the reorganization of the debtor . . . ." 11 U.S.C. § 1113(b)(1)(A) (emphasis added).

[247] *See supra* Part II.A.

[248] *See* Administrative Office of the U.S. Courts, *Chapter 11 – Bankruptcy Basics*, UNITED STATES COURTS, www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics [https://perma.cc/SMV6-MCEK]; Donnelly, *supra* note 157.

[249] "Chapter 11 has multiple purposes[, one of which is] . . . to return the debtor to the marketplace as a viable enterprise." Heuer & Vogel, *supra* note 186, at 257.

Finally, this proposed solution does not adequately address the diverging interests of the individuals and parties involved in a potential mediation.[250] Union representatives are incentivized to minimize concessions, to prioritize the union over the company, and to return both fiscal and moral victories to their members.[251] Often times, even amongst unions themselves, interests diverge as each union's representative attempts to push the necessary concessions onto another class of workers.[252] Were union representatives to behave otherwise, they would risk their replacement, both individually as the negotiator and the union itself as the certified bargaining representative. Carriers, of course, would enter mediation with the intention of reducing labor costs to a sustainable and solvent level. With these diverging interests, it is hard to see any way, beyond negotiators abrogating their client's interests, that mediation could produce the necessary results to return a carrier to solvency.[253]

Mandatory mediation, as an exclusive replacement to the judicially-sanctioned rejection in Section 1113, is not a viable alternative for carriers attempting to reorganize under Chapter 11.

IV. A RADICAL SOLUTION

A. Can We Avoid Bankruptcy?

Just because the current Section 1113 process is effective and generally results in more financially stable and solvent air carriers emerging from bankruptcy does not mean that the process is perfect. The most glaring flaw in the process is its own existence: the law requires a carrier to declare bankruptcy and seek Chapter 11 reorganization before it can make the necessary changes to its labor contracts. While utilizing the Code to reject agreements and reduce labor costs has become a popular strategy since deregulation, it has been primarily out of necessity rather than preference.[254] The law creates a metaphoric scenario where a person hanging from the edge of a cliff is not assisted

250 The article proposing this solution does discuss, in passing, the different ways that interests are displayed publicly and privately but does not address the fundamental divergence of the interests. *See* Schatzow, *supra* note 240, at 15–16.

251 *Id.*

252 *Id.*; *The Beginning*, *supra* note 82.

253 This is, in fact, the outcome of the hypothetical mediation scenario proposed as an alternative to the current Section 1113. *See* Schatzow, *supra* note 240, at 15–16.

254 In fact, carriers try desperately to avoid having to enter bankruptcy. *See* pressmin, *supra* note 149 and accompanying video.

until only a single finger on a single hand is left holding the person from certain death. Meanwhile, those capable of ensuring the person's survival stand by and watch, withholding assistance until the very last moment.

This Comment proposes, as opposed to both Section 1113 and the mandatory mediation alternative discussed above,[255] that the RLA be amended to allow for unilateral rejection of collective bargaining agreements outside the bankruptcy process. The proposed amendment may read:

> Notwithstanding sections 155 and 156, a carrier may unilaterally reject the terms relating to rates of pay, rules, and working conditions of a collective bargaining agreement upon a showing to the court, the National Mediation Board, or the duly appointed arbitration board that: (1) The carrier is in a state of financial distress such that insolvency is reasonably likely, (2) The terms sought to be rejected are a substantial cause of the financial distress, (3) The management has made a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which is reasonably tailored to alleviate the risk of insolvency, and (4) the authorized representative of the employees has refused to accept such proposal without good cause.

The proposal made here is a radical departure from both legislative and judicial precedent but is one that recognizes and accommodates the realities of the airline industry.

It is an unquestionable truth that bankruptcy has consequences. It is a long and demoralizing process, it destroys credit ratings, and it sends negative signals to investors.[256] When a major player goes bankrupt, it often impacts the financial stability of the entire industry.[257] Assuming that bankruptcy is something that carriers, unions, and the industry as a whole want to avoid, it makes sense to provide an avenue for carriers to re-establish

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[255] *See supra* Part III.B.

[256] When the risk of bankruptcy increases, investors sell off stock rapidly to minimize losses. *See* Simone Foxman, *CHART OF THE DAY: American Airlines Has Taken a Big Round-Trip Flight*, BUS. INSIDER (Nov. 29, 2011, 9:25 AM), http://www.businessinsider.com/chart-of-the-day-american-airliness-big-round-trip-flight-2011-11 [https://perma.cc/GK37-MBUX].

[257] The Lehman Brothers bankruptcy, followed by the investment banking collapse of 2007–2008, is but one example. *See* Nick Mathiason, *Three Weeks that Changed the World*, THE GUARDIAN (Dec. 27, 2008, 7:01 PM), https://www.theguardian.com/business/2008/dec/28/markets-credit-crunch-banking-2008 [https://perma.cc/K9SA-MX8H].

manageable labor costs without being driven into bankruptcy by them.

This proposal may seem detrimental to the balance of power in the carrier-labor relationship established by the RLA. However, this proposal does not allow for any unique advantages not already available to the carriers under Section 1113. The carrier must still show that they are in financial distress and that burdensome labor agreements are a substantial cause of that distress. The carrier must still propose an alteration to the unions, and that proposal must be rejected without good cause. The primary difference is that, under Section 1113, the carrier must already be bankrupt, making the dispute about whether rejecting the agreement is necessary to emerge from bankruptcy. Under this proposed amendment, the carrier must be in financial distress and near insolvency, and the dispute is whether rejecting the agreement will allow the carrier to avoid the need for bankruptcy protections. As the largest controllable cost to an airline, labor costs will inevitably have to be reduced when times are tough. It is preferable, for all parties, to ensure that happens before bankruptcy takes place.

This amendment would also foster financial stability in the overall industry. If investors and lenders know that struggling airlines will have a last opportunity before incurring the costs of bankruptcy, they will be more likely to provide capital infusions to the carrier. This solution is especially appealing to unsecured creditors, who would be far down on the list of asset recipients should the carrier go bankrupt and be liquidated. In the case of American Airlines, the primary changes that allowed for reorganization and a merger with US Airways were the rejection and restructuring of collective bargaining agreements.[258] If the merger was beneficial to both US Airways and American Airlines, there is no reason why American Airlines should have had to enter bankruptcy to get the labor concessions necessary to make the merger viable.[259] Alternatively, if an acquisition is undesirable to either the carrier or the union, the opportunity for a carrier to regain its footing by reducing labor costs outside of the bankruptcy process may be enough to stave off a hostile takeover.

Moreover, this proposal is consistent with judicial precedent that directors of a corporation acting in the "zone of insol-

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258 *In re* AMR Corp., 477 B.R. 384, 416 (Bankr. S.D.N.Y. 2012).

259 *See generally id.*

vency"[260] continue to owe fiduciary duties "to the entity they serve and to the shareholders of such entity," whereas "creditors become the principal constituency" upon a corporation's bankruptcy.[261] Because directors owe the fiduciary duty of loyalty to the carrier and its stockholders, they have an obligation to take every action possible to ensure that the carrier remains profitable for the benefit of those parties.[262] This proposed amendment would allow one final alternative to relinquishing the carrier and its owners to the benefits of creditors.

It is highly likely that this proposal will not be received well by those who are ideologically aligned with union interests. That is of little concern, however, because at the point where high labor costs have pushed a carrier to the brink of bankruptcy, there is nothing that would be well-received by unions. The purpose of this amendment would not be to make any one party happy but rather to deal with the inevitability of bankruptcy without having to incur the fiscal, managerial, and market-signaling costs. Unions have historically, on occasion, been willing to accept concessions when necessary to keep an airline functioning.[263] This amendment merely ensures the same outcome without relying on the union's willingness to sacrifice.

V. CONCLUSION

The airline industry grew dependent on government regulation to ensure profitability until it was deregulated in 1978. Prior to deregulation, labor was able to make substantial gains under the RLA because cost controls were not a priority. Since deregulation, however, the industry has been volatile and plagued with bankruptcies. As a response, the Code was amended to create a

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260 Barbara R. Parlin, *The Zone of Insolvency: A Trap for the Unwary*, HOLLAND & KNIGHT (Mar. 14, 2008), https://www.hklaw.com/publications/The-Zone-Of-Insolvency-A-Trap-for-the-Unwary-03-14-2008/ (last visited Aug. 26, 2018).

> While there are no precise definitions as to when a solvent company enters the zone of insolvency, fiduciaries should assume they are operating in the zone of insolvency if the failure of a proposed transaction is reasonably likely to cause a company to become insolvent, or if it is reasonably foreseeable that the corporation will have ongoing trouble paying its creditors as a class.

261 *Id.*

262 "When a corporation is insolvent, however, its creditors take the place of the shareholders as the residual beneficiaries of any increase in value." N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007).

263 *See* Dempsey, *supra* note 184, at 47.

process for unilaterally rejecting a collective bargaining agreement when it is necessary for successful reorganization. One proposed amendment to the Code suggested mandatory mediation as a replacement for the agreement rejection provision. That suggestion, however, is unrealistic and provides no benefit beyond the current RLA process. The reduction of labor costs for financially distressed carriers is a necessity, and the current bankruptcy rejection process is effective for that purpose.

The proposal of this Comment, which is essentially an extension of the Code's principles to amend RLA provisions, would allow for the agreement rejection process to take place outside of the bankruptcy court system. It would address the inevitability and necessity of labor cost reductions without incurring the harms of filing for bankruptcy. In that way, the RLA can promote more financial stability in the industry and address the realities of a volatile and fragile American airline industry.