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**THE NOT SO FRIENDLY SKIES: PILOTS' ATTEMPT TO
CLAIM EMPLOYER COLLUSION WITH RIVAL PILOTS
UNION DURING COLLECTIVE BARGAINING
FAILS IN *BECKINGTON***

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THE RAILWAY LABOR ACT (RLA)¹ allows airline employees to unionize and unions to act on the employees' behalf during collective bargaining.² During negotiations, the unions have a duty of fair representation (DFR) to every employee they represent.³ If a union breaches this duty, its members have a "judicially implied" cause of action against the union.⁴ However, courts vary in how far they are willing to imply other causes of action under the RLA.⁵ In *Beckington v. American Airlines, Inc.*, the Ninth Circuit reviewed a request to imply a cause of action against employers for collusion with a competing union during negotiations.⁶ The court "decline[d] the invitation,"⁷ creating a possible split with the Seventh Circuit.⁸ This Casenote argues that the Ninth Circuit's reluctance to read employer collusion liability into the RLA was correct for three reasons: (1) the Seventh Circuit's reasoning is shaky at best; (2) in the years since, no court has found employer–union collusion or been able to articulate a legal test for finding such collusion; and (3) the impact of possible employer collusion on the airline industry

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¹ 45 U.S.C. §§ 151–88 (2018).

² *Beckington v. Am. Airlines, Inc.*, 926 F.3d 595, 597 (9th Cir. 2019).

³ *Id.* at 597–98.

⁴ *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 47 (1979).

⁵ Compare *Beckington*, 926 F.3d at 598, with *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1283 (7th Cir. 1985).

⁶ *Beckington*, 926 F.3d at 604.

⁷ *Id.*

⁸ See *United Indep. Flight Officers*, 756 F.2d at 1283.

would be burdensome at best, ruinous at worst, and contrary to Congress's intent for enacting the RLA.

The RLA was enacted in 1926 to ensure the economy would not be further interrupted by the strikes that had plagued railroads for decades.⁹ Ten years later, the RLA was amended to include the burgeoning airline industry.¹⁰ To prevent strikes, the RLA requires that airlines and employees “exert every reasonable effort to make and maintain” collective bargaining agreements and to settle all disputes “with all expedition.”¹¹ Further, before either party takes action against the other, they must negotiate, attend mediation with the National Mediation Board, face possible review by the Presidential Emergency Board, and finally, submit to mandatory cooling-off periods.¹² Because of these complex provisions, it is rare to see a strike affect U.S. airlines—before 2019, the last was in 2010.¹³

The dispute in *Beckington* centers on “a bitter seniority” battle between two competing pilots unions.¹⁴ In 2005, US Airways merged with America West Airlines, and the merged airline (that kept US Airways' name) needed to determine the seniority of its merged employees.¹⁵ US Airways left the negotiation of the pilots' seniority to the Air Line Pilots Association (ALPA), which represented the pilots for both airlines pre-merger.¹⁶ However, shortly after takeoff, the pilots found themselves soaring through unforeseen turbulence. Unable to settle on a seniority list of their own, ALPA arranged for arbitration between the two sets of pilots.¹⁷ The resulting seniority list—known as the Nicolau Award—appeared more advantageous for the America West pilots.¹⁸ Before the merger, US Airways employed a greater

⁹ U.S. FED. R.R. ADMIN., HIGHLIGHTS OF THE RAILWAY LABOR ACT (“RLA”), AND THE U.S. DEPARTMENT OF TRANSPORTATION’S (“DOT”) ROLE IN RLA DISPUTES I (2012); see also *The Great Railroad Strike*, N.Y. TIMES, July 21, 1877 (“There are indications that the rebellion, if such we may call it, will affect most of the lines of railroad travel between the East and the West, and will seriously impede the movement of freight”).

¹⁰ See 45 U.S.C. § 181 (2018).

¹¹ *Id.* § 152, First–Second.

¹² See generally *id.* §§ 152–60.

¹³ See Alison Sider & Doug Cameron, *Labor Troubles Cloud Outlook for U.S. Airlines*, WALL ST. J. (July 18, 2019), <https://www.wsj.com/articles/labor-troubles-cloud-outlook-for-u-s-airlines-11563454033> [<https://perma.cc/5MRC-WHHF>].

¹⁴ *Beckington v. Am. Airlines, Inc.*, 926 F.3d 595, 600 (9th Cir. 2019).

¹⁵ See *id.* at 600–01.

¹⁶ *Id.*

¹⁷ *Id.* at 601.

¹⁸ See *id.*

number of pilots, and unhappy with the Nicolau Award, the former US Airways pilots used their numbers to leave ALPA, create a new union known as the US Airline Pilots Association (USAPA), and vote in USAPA as the official union of the merged US Airways pilots.¹⁹ Moving forward in negotiations with US Airways, USAPA ignored the Nicolau Award and pushed for terms that favored the former US Airways pilots.²⁰

The America West pilots eventually sued USAPA, claiming that it breached its DFR under the RLA because it ignored the Nicolau Award in its negotiations with US Airways.²¹ The district court found for the America West pilots, but the Ninth Circuit vacated the judgment, holding that the claim would not be ripe until there was a single agreement with the airline for determining seniority.²² Afterward, US Airways filed for a declaratory judgment asking if it would “be liable for assisting in a breach” of USAPA’s DFR if it entered into an agreement that did not include the Nicolau Award provisions.²³ The district court did not advise US Airways because the claim was not ripe; but the court noted that USAPA’s actions had it nearing a no-fly zone because it was bound by the earlier agreement that led to the Nicolau Award, and it should be attempting to negotiate with US Airways based on the award.²⁴ Some years later, with two seniority lists still in place, US Airways began planning a merger with American Airlines (American).²⁵ Before merging, the airlines, USAPA, and the union for American’s pilots agreed to reach a single seniority list, and if negotiations failed, to undergo arbitration under the McCaskill-Bond Amendment.²⁶ Negotiations failed and the groups entered arbitration with the appointed panel.²⁷ In 2016, the panel issued a decision and methodology for integrating seniority lists that did not include the decade-old Nicolau Award provisions because the situation

¹⁹ *Id.*

²⁰ *See id.*

²¹ *Id.*

²² *Addington v. US Airline Pilots Ass’n (Addington I)*, 606 F.3d 1174, 1179–82 (9th Cir. 2010).

²³ *Beckington*, 926 F.3d at 601; *see* *US Airways, Inc. v. Addington (Addington II)*, No. CV-10-01570-PHX-ROS, 2012 WL 5996936, at *3 (D. Ariz. Oct. 11, 2012).

²⁴ *Addington II*, 2012 WL 5996936, at *4–5.

²⁵ *Beckington*, 926 F.3d at 601.

²⁶ *Id.* at 602; *see* 49 U.S.C. § 42112 note (2018) (Labor Integration) (setting out the duties of airlines regarding labor when merging).

²⁷ *Beckington*, 926 F.3d at 603.

had “changed . . . dramatically” and, during litigation, courts “have uniformly declined to impose” the award.²⁸

Finally, in 2017, the current lawsuit took flight when former America West pilots claimed American colluded with USAPA during the failed negotiations that led to arbitration.²⁹ Relying on the Seventh Circuit’s decision in *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*,³⁰ the district court “appeared to accept” that an airline could be liable for colluding with a union under the RLA.³¹ However, the district court granted American’s motion to dismiss based on the former pilots’ failure to properly allege “collusion.”³² The America West pilots appealed, and the Ninth Circuit affirmed, holding that the RLA does not support a liability claim against an employer for colluding with a union during negotiations.³³

The Ninth Circuit stated that nothing in the RLA “supports an expansion . . . to impose liability on an employer solely for its ‘collusion’ in a union’s breach of duty.”³⁴ While airlines owe their employees some duties under the RLA, nothing in the statute contemplates imposing liability on an employer for colluding with a union when the union breaches its DFR.³⁵ Indeed, the RLA’s process for collective bargaining puts the employer on one side of the table and the employees’ union on the other; the two sides must “approach each other as respectful adversaries,” each with duties to their respective constituents.³⁶ The court noted that because the RLA does not contain the word “collusion,” the pilots must have used the term colloquially.³⁷ In the context of finding liability, collusion is “a synonym for ‘conspiracy,’” which is when multiple parties make an agreement to violate a duty they owe to another party.³⁸ This conclusion, coupled with the notion that each party represents separate entities during negotiations (the airline to its investors, and the union to

²⁸ *Id.*

²⁹ *See id.*

³⁰ 756 F.2d 1274 (7th Cir. 1985).

³¹ *Beckington*, 926 F.3d at 603–04.

³² *Beckington v. Am. Airlines, Inc.*, No. CV-17-00328-PHX-JJT, 2018 WL 1400074, at *6 (D. Ariz. Mar. 20, 2018), *aff’d*, 926 F.3d 595 (9th Cir. 2019).

³³ *Beckington*, 926 F.3d at 609–10.

³⁴ *Id.* at 604.

³⁵ *Id.*; *see also* 45 U.S.C. § 152 First, Third, Fourth (2018) (various duties imposed on airlines).

³⁶ *Beckington*, 926 F.3d at 605.

³⁷ *Id.* at 606.

³⁸ *Id.*

its members), led the court to hold that an employer cannot collude during collective bargaining because “an employer owes no duty to individual employees during collective bargaining.”³⁹

Unlike the Ninth Circuit, the Seventh Circuit in *United Independent Flight Officers* implied that an employer could be liable for collusion even though no statutory provision or court precedent supported such a finding.⁴⁰ In *United Independent Flight Officers*, the pilots union was suing United Airlines for terms set forth in pilot benefit plans and the negotiations that surrounded the creation of the plans.⁴¹ Typically, when employees sue both their union and their employer in a hybrid action under the RLA, they sue their employer for breach of contract—for violating a preexisting employment agreement—and also their union for breaching its DFR.⁴² Hybrid actions have been recognized under Section 301 of the Labor Management Relations Act⁴³ since the Supreme Court held that it covers breach of contract claims between employees and employers.⁴⁴ While Section 301 does not apply to RLA employers, the Supreme Court has also allowed hybrid actions under the RLA if employees sue their union and their employer when the dispute “resulted from a breach of the DFR by the union.”⁴⁵

However, in *United Independent Flight Officers*, the employees sued their union for its DFR breach and merely included their employer for being a party to the union’s breach.⁴⁶ As such, *United Independent Flight Officers* was not the typical hybrid action allowed under the RLA or Section 301. The Seventh Circuit acknowledged that *United Independent Flight Officers* was not a typical hybrid action by the employees.⁴⁷ After so recognizing, the

³⁹ *Id.*

⁴⁰ *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1283 (7th Cir. 1985).

⁴¹ *Id.* at 1275.

⁴² See John E. Sanchez, *Jury Trials in Hybrid and Non-Hybrid Actions: The Equitable Clean-Up Doctrine in the Guise of Inseparability and Other Analytical Problems*, 38 DEPAUL L. REV. 627, 629–34 (1989) (discussing hybrid actions under the RLA and the NLRB).

⁴³ Labor Management Relations Act, Pub. L. No. 80-101, § 301(a), 61 Stat. 136, 156 (1947) (codified at 29 U.S.C. § 185(a) (2018)) (creating a cause of action between unions and employers).

⁴⁴ Sanchez, *supra* note 42, at 636; see also *Smith v. Evening News Ass’n*, 371 U.S. 195, 201 (1962).

⁴⁵ Sanchez, *supra* note 42, at 636–37.

⁴⁶ *United Indep. Flight Officers*, 756 F.2d at 1275–76.

⁴⁷ *Id.* at 1283 (“UIFO does not bring a direct claim against United . . . as is usually the case in what have come to be known as ‘[hybrid] DFR/301’ cases”).

court should not have even considered the employees' collusion claim against their employer.⁴⁸ The Seventh Circuit's tenuous conclusion is made even weaker because it held the union had not breached its DFR to the employees.⁴⁹ The court further noted the "conceptual anomaly that would arise" if the employer was found liable when the union was not.⁵⁰ Despite this assertion, the court went on to opine that when negotiations occur between an employer and a union that does not necessarily imply collusion; however, it also does not preclude a finding of collusion merely because a negotiation was taking place.⁵¹

The confusion caused by *United Independent Flight Officers* is apparent when reviewing decisions from courts that try to rely on its reasoning and continually fail to articulate a workable legal test for finding employer–union collusion. Some decisions following *United Independent Flight Officers* accept that employers may be held liable for collusion outside the typical hybrid action but have failed to then find employer misconduct that rose to the level of collusion.⁵² One such case, from a district court in the Ninth Circuit, relied on another case involving United Airlines to note that when dealing generally with one party being liable for another's breach of duty, "conduct that rises to the level of 'collusion' almost certainly suffices."⁵³ However, the employer was not found liable for collusion because the employees only proved that the employer knew certain facts about the union's activities that might show the employer had knowledge the union was breaching its DFR.⁵⁴ Apparently, the district court did not feel that such knowledge rose to the level of collusion.

Other courts considering hybrid actions note that employers may only be liable for collusion when the union has been found

⁴⁸ *Beckington v. Am. Airlines, Inc.*, 926 F.3d 595, 609 (9th Cir. 2019).

⁴⁹ *See United Indep. Flight Officers*, 756 F.2d at 1283.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See, e.g., Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 361–62 (D.C. Cir. 1999); *Krakowski v. Am. Airlines, Inc. (In re AMR Corp.)*, No. 11-15463 (SHL), 2018 WL 2997104, at *26–28 (Bankr. S.D.N.Y. June 12, 2018), *aff'd*, 610 B.R. 434, 448–49 (S.D.N.Y. Oct. 2, 2019); *Am. Airlines Flow-Thru Pilots Coal. v. Allied Pilots Ass'n*, No. 15-cv-03125-RS, 2015 WL 9204282, at *2–3 (N.D. Cal. Dec. 17, 2015).

⁵³ *Am. Airlines Flow-Thru Pilots Coal.*, 2015 WL 9204282, at *3 (citing *Rakestraw v. United Airlines, Inc.*, 765 F. Supp. 474 (N.D. Ill. 1991), *aff'd in part, rev'd in part*, 981 F.2d 1524 (7th Cir. 1992)).

⁵⁴ *Id.*

guilty of breaching its DFR.⁵⁵ These courts cite *United Independent Flight Officers* for the premise that to find an employer liable for collusion “it is essential that the union be found to have violated its duty.”⁵⁶ This Casenote posits that because the decisions considering *United Independent Flight Officers* have been unable to coalesce around a single principle, the Seventh Circuit’s reasoning is not as strong as the Ninth Circuit’s in *Beckington*. The Ninth Circuit refused to write employer liability into the RLA’s statutory text.⁵⁷ This is the proper conclusion; if Congress finds that employer collusion becomes an increasingly concerning problem, it can amend the RLA to include such a prohibition.

Even though courts have repeatedly relied on the premise of *United Independent Flight Officers*, none have articulated a legal test for finding actions that rise to the level of collusion.⁵⁸ One court considered two standards simultaneously: “employer[s] somehow act[ing] improperly,” and the employer merely having knowledge that the union had breached its DFR to the employees.⁵⁹ In comparison, when the district court in *Beckington* found that the former America West pilots failed to allege collusion, it used a standard defined as “bad faith, discrimination or hostility.”⁶⁰ In its opinion, the Ninth Circuit noted other proposed standards for employer collusion and was not convinced that any of them were sufficient without a statutory definition of collusion.⁶¹ The Ninth Circuit’s consideration of this aspect further strengthens the argument it presents in *Beckington*; rather than adding to the confusion without offering a workable solution, the Ninth Circuit correctly reasoned that it could not “transform a theory of union liability into a theory of employer liability” in accordance with the RLA.⁶²

The discussion above shows the soundness of the Ninth Circuit’s legal argument in *Beckington*, but the outcome may be even more important because it has real-world effects on one of the largest industries in the country. The most recent report by the FAA estimates that the airline industry accounts for 5.1% of

⁵⁵ See, e.g., *Bishop v. Air Line Pilots Ass’n, Int’l*, No. C-98-359 MMC, 1998 WL 474076, at *18 (N.D. Cal. Aug. 4, 1998); *Caudle v. Pan Am. World Airways, Inc.*, 676 F. Supp. 314, 323 (D.D.C. 1987).

⁵⁶ *Bishop*, 1998 WL 474076, at *18; see also *Caudle*, 676 F. Supp. at 323.

⁵⁷ *Beckington v. Am. Airlines, Inc.*, 926 F.3d 595, 605 (9th Cir. 2019).

⁵⁸ *Id.* at 609.

⁵⁹ *Davenport v. Int’l Bhd. of Teamsters*, 166 F.3d 356, 362 (D.C. Cir. 1999).

⁶⁰ *Beckington*, 926 F.3d at 604.

⁶¹ *Id.* at 609.

⁶² *Id.*

United States GDP, generates \$1.6 trillion per year, and employs 10.6 million Americans.⁶³ The *Beckington* decision is vital to this booming industry because it is one of the most unionized in the country; as of 2018, three of the big four carriers' employees were over 70% unionized.⁶⁴ Delta, with only 18% unionization (pilots represented by ALPA),⁶⁵ has experienced a fair share of criticism for its recent attempt to dissuade its flight attendant and ramp service personnel from also unionizing.⁶⁶ With such a large percentage of unionized employees and the long history of the RLA, the author feels confident that both airlines and the unions who negotiate with them are familiar with the "industry's complex labor laws."⁶⁷ Collective bargaining under these laws is already an "elaborate, time-consuming process."⁶⁸ If the *Beckington* court had accepted the former America West pilots' contention that American could be liable for collusion, the process would become even more time-consuming and elaborate because airlines would act even more cautiously to protect themselves from liability. This outcome would not only directly cost the airlines financially,⁶⁹ it would cost them the goodwill they have accumulated in recent years. In a time when the public has witnessed the chaos caused by the strike of British Airways' pilots,⁷⁰ experienced the inconvenience of Boeing's 737 MAX groundings,⁷¹ and because all four major U.S. carriers are get-

⁶³ FED. AVIATION ADMIN., THE ECONOMIC IMPACT OF CIVIL AVIATION ON THE U.S. ECONOMY: ECONOMIC IMPACT OF CIVIL AVIATION BY STATE, at 3 (2017) (citing data from 2014).

⁶⁴ Ted Reed, *JetBlue, United and Delta Face Union Pressure as Airlines Remain a Labor Stronghold*, FORBES (Feb. 2, 2018), <https://www.forbes.com/sites/tedreed/2018/02/02/jetblue-united-and-delta-face-union-pressure-as-airlines-remain-a-labor-stronghold/#3c787a8cfd7> [<https://perma.cc/F8HG-62F8>]; see also THE GLOBAL AIRLINE INDUSTRY 277–78 (Peter Belobaba et al. eds., 2009).

⁶⁵ THE GLOBAL AIRLINE INDUSTRY, *supra* note 64, at 279 tbl.10.1; Reed, *supra* note 64.

⁶⁶ Christine Hauser, *Video Games and Drinks, or Union Dues? Delta's Pitch Draws Fire*, N.Y. TIMES (May 10, 2019), <https://www.nytimes.com/2019/05/10/business/delta-union-video-games.html> [<https://perma.cc/NZ5Z-EXJH>].

⁶⁷ See Sider & Cameron, *supra* note 13.

⁶⁸ U.S. FED. R.R. ADMIN., *supra* note 9, at I.

⁶⁹ See Sider & Cameron, *supra* note 13 (even a few workers' actions are "hugely disruptive.").

⁷⁰ Tariro Mzezewa, *What the British Airways Pilot Strike Means for Travelers*, N.Y. TIMES (Sept. 9, 2019), <https://www.nytimes.com/2019/09/09/travel/british-airways-pilot-strike.html> [<https://perma.cc/A3EU-BHG2>].

⁷¹ David Gelles, *Boeing 737 Max Needs Full F.A.A. Review, Crash Families Say*, N.Y. TIMES (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/business/boeing->

ting ready to enter collective bargaining with the pilots unions,⁷² airlines can hardly afford any more negative press or financial stress. Given these considerations, the *Beckington* decision can be seen as beneficial to the airline industry even outside its legal context.

In conclusion, because the RLA was enacted to ensure the country's economy would no longer be hindered by numerous and drawn-out strikes in the rail and airline industries, the Ninth Circuit's reluctance to impose employer liability for collusion is correct and should be followed by other courts. By holding that an airline cannot be liable for conduct under the RLA absent a correctly filed hybrid action against both the airline and the union, the *Beckington* court correctly interpreted the RLA as currently written, ensuring that airlines can continue providing the services Congress was so eager to protect when originally enacting the RLA.

737-max-faa-recertification-stumo.html?searchResultPosition=10 [https://perma.cc/LZ3E-4RHS].

⁷² Sider & Cameron, *supra* note 13.