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Whose Rights Are They Anyway? Solving the Problem of Extraterritorial Assertions of Authority in the Aviation Industry

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WHOSE RIGHTS ARE THEY ANYWAY? SOLVING THE PROBLEM OF EXTRATERRITORIAL ASSERTIONS OF AUTHORITY IN THE AVIATION INDUSTRY

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ABSTRACT

The lack of a clear and consistent federal standard across the country harms both airline carriers and aviation employees—carriers who grapple with a myriad of regulations and airline employees who are unsure of their rights and how to exercise them. As states with expansive labor laws continue to assert extraterritorial authority to enforce their laws on airline workers who may only temporarily pass through their borders, the confusing thicket of conflicting state and federal laws only worsens. There is a clear need for an updated federal framework that takes into account the airline industry and the needs of workers in the present day; while the Railway Labor Act of 1926 (RLA) may have served its purpose in stabilizing the nascent airline industry in the 1930s, the aviation industry has outgrown its usefulness. To replace the RLA and standardize the labor rights of workers in the aviation industry, this Comment proposes amending Title 49 of the U.S. Code (Title 49) to include a chapter on labor. Because of the direct impact of the labor rights of airline workers on the safety of the aviation industry, legislation dealing with these rights falls squarely within the purview of the Federal Aviation Administration (FAA). Through the proposed amendment, the aviation industry will be made safer, workers will receive greater protections, and the squandering of judicial economy through needless litigation over the thicket of conflicting local, state, and federal law will cease.

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I. INTRODUCTION

FOR MOST EMPLOYEES, the question "Where do I work?" is not one that ever comes to mind. But for some workers, particularly those in the airline industry, a thicket of conflicting local, state, and federal laws, along with work that regularly takes them across state lines, raises serious questions about where exactly the work is being performed—and more importantly, what rights and protections apply. While workers can be certain that some federal laws like the Fair Labor Standards Act of 1938 (FLSA) or Railway Labor Act of 1926 (RLA) apply to them no

matter where they work in the country, the applicability of state and local labor laws that provide additional protections like California's wage and hour laws or New York City's paid sick leave law is much less certain. This confusion has only been magnified by some states' recent assertions of extraterritorial authority to apply their wage and hour laws to workers located outside of their borders. In light of this uncertainty and the growing number of cases stemming from it, there exists a clear need for legislative intervention to preempt conflicting state and local labor laws and to bring uniformity to the field.

Part II of this Comment provides the historical background of federal wage and labor law, with a particular focus on how it has developed for workers in the railway industry, and how that history shaped the field of airline labor law. Part III examines the current state of the conflicting federal, state, and local laws, the recent cases arising out of such conflict, and the assertions of extraterritorial authority. Part IV advocates for nationwide uniformity in labor law for aviation workers, divorcing the labor rights of airline workers from the RLA, and outlines the policy implications of letting the current thicket of conflicting laws worsen. Part V proposes an amendment to Title 49 of the U.S. Code (Title 49) that would grant the Federal Aviation Administration (FAA) the authority to regulate the labor of airline workers and establish a comprehensive framework of labor and wage laws that will preempt state and local regulations.

II. HISTORICAL BACKGROUND

Though the development of labor law in the United States has a long and storied history dating back to the slave trade, the modern statutory framework finds its roots in several critical pieces of legislation in the early twentieth century. Prior to the passage of these seminal pieces of legislation, courts around the country were striking down protections for workers as unconstitutional, including laws limiting the number of hours an employee could work in 1905,[1] prohibiting conditioning employment on an agreement to not join a union in 1915,[2] prohibiting child labor in 1918,[3] and establishing minimum wage standards for women and children in 1923.[4] Subsequent

[1] Lochner v. New York, 198 U.S. 45, 64 (1905).
[2] Coppage v. Kansas, 236 U.S. 1, 26 (1915).
[3] Hammer v. Dagenhart, 247 U.S. 251, 276 (1918).
[4] Adkins v. Children's Hospital, 261 U.S. 525, 561–62 (1923).

acts like the National Labor Relations Act of 1935 (NLRA)[5] and the FLSA[6] were radical grants of rights and protections to employees in a legal environment that had previously been inimical to them. These two acts built on the foundations of others like the RLA,[7] which provided much needed protections only to workers in certain industries—that is, the railroad industry, and later, airline industry. These acts, and the subsequent court decisions upholding them, signaled a sea change in American jurisprudence toward protecting the rights of workers and, to this day, serve as the foundation of labor law in the United States.

A. Foundations of Airline Workers' Rights in the United States: The Inherited History of Railway Workers' Collective Bargaining

One of the first instances of collective bargaining and its subsequent suppression by the judiciary came out of Pennsylvania in the late 1700s. There, a group of shoemakers formed a proto-union to respond to the increasing labor hardships of an industrializing society and to secure fair wages for its members.[8] This union, however, did not have a long lifespan, and after just ten years, a suit was brought against members of the union for the criminal charge of conspiracy in *Commonwealth v. Pullis*.[9] Eight of the union's leaders were found guilty of the crime of illegally conspiring to raise their wages, effectively criminalizing unions in Pennsylvania.[10] The result of *Pullis* left the legal status of unions in question in other parts of the country, and there were at least eighteen other instances of early union members being prosecuted for conspiracy over the course of the next three decades.[11]

It would not be until 1842 that a court would declare that labor unions were in fact legal enterprises and not criminal conspiracies.[12] That case, *Commonwealth v. Hunt*, coincidentally also dealing with shoemakers, set the stage for the legality of collec-

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[5] National Labor Relations Act, 29 U.S.C. §§ 151–69.

[6] Fair Labor Standards Act, 29 U.S.C. §§ 201–03.

[7] Railway Labor Act, 45 U.S.C. §§ 151–88.

[8] Walter Nelles, *The First American Labor Case*, 41 Yale L.J. 165, 166–67 (1931).

[9] 3 Doc. Hist. 59 (Phila. Mayor's Ct. 1806); Omar Swartz, *Defending Labor in* Commonwealth v. Pullis*: Contemporary Implications for Rethinking Community*, 8 Holy Cross J.L. & Pub. Pol'y 79, 80 n.10 (2004).

[10] *Id.* at 80.

[11] Edwin E. Witte, *Early American Labor Cases*, 35 Yale L.J. 825, 826 (1926).

[12] Commonwealth v. Hunt, 45 Mass. 111, 136 (1842).

tive bargaining in the United States,[13] and Chief Justice Shaw's majority opinion is widely regarded as "the Magna [Carta] of American trade-unionism."[14] In *Hunt*, Chief Justice Shaw made the distinction between the mere *concept* of a combination of workers seeking to use collective bargaining to regulate their wages—a union—and the *methods* a union might employ to secure higher wages or other protections.[15] By drawing such a line, Chief Justice Shaw reframed the debate from whether a union itself amounted to an illegal conspiracy to whether the objectives sought by the union and methods used to accomplish such objectives were themselves legal.[16] Though the debate over the precise demarcation of when union action crosses into illegal territory continues to this day, Chief Justice Shaw's formulation would prove highly influential, with only three conspiracy cases in the subsequent twenty years brought against workers.[17] Though Chief Justice Shaw laid the groundwork for the legality of unions and their ability to strike lawfully, his opinion would do little to stem oncoming tides of conflict between workers and their employers in an increasingly industrial society.[18]

Strikes would prove to be the tool of choice for American workers in combatting poor working conditions, low wages, and overall governmental hostility to the interests of workers.[19] The tensions between workers and their employers came to a head in 1877, when workers—frustrated with repeated pay cuts, shouldering the burden of an economic depression, and the efforts of employers to stifle the potency of unions—staged what would be the first nationwide strike in American history, with estimates of nearly 500,000 workers walking out from their jobs in July 1877.[20] Characterized as the "Great Strike" or the "Great Insurrection," the strikes of July 1877 began along America's extensive railroad system.[21] No longer constrained to a mere local group of disgruntled shoemakers like the unions in *Pullis* and *Hunt*, the Great Strike involved workers of the railroad corpora-

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[13] *Id.*

[14] LEONARD LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 183 (1957).

[15] Witte, *supra* note 11, at 828.

[16] *Id.*

[17] LEVY, *supra* note 14, at 206.

[18] Witte, *supra* note 11, at 828.

[19] MICHAEL A. BELLESILES, 1877: AMERICA'S YEAR FOR LIVING VIOLENTLY 144 (2010).

[20] *Id.* at 145.

[21] *Id.*

tions—some of the largest and most influential corporations in America at the time—the same corporations that played a critical role in America's rapid industrialization.[22]

The increased stakes and heightened impacts of the railway worker strikes resulted in an increase in the severity of the response—this time, rather than taking the striking unions to court, corporate leaders resorted to force almost immediately.[23] When local police forces and state militias—many of them holding sympathies to the cause of the striking workers[24]—were unable or *unwilling* to enact the will of corporate leaders, the leaders turned to recently inaugurated President Rutherford B. Hayes.[25] Indebted to the corporate leaders who had supported his presidential campaign, President Hayes authorized federal troops to suppress the strikes—a rarely used option—and the Great Strike marked the first time federal troops were used on a nationwide scale to quash a strike.[26]

President Hayes's decision to acquiesce to the demands of railway corporations and authorize the use of federal force would ultimately end the strikes, but not without bloodshed,[27] destruction of property,[28] and the garnering of much public support for the unions.[29] The victory of the corporations would prove to be a Pyrrhic one, as the landscape of labor relations had been forever changed.[30] It had become clear to the workers that they could not rely on the current governmental institutions to side with their interests over those of the wealthy railway owners,[31] and it had become clear to the nation's elite that the influence and power of a unified working class could have devastating results for the country.[32]

Responses to the new landscape were mixed; some industrialists raised wages in order to keep their workers happy and loyal,[33] while others like Andrew Carnegie saw only the dangerous aspects of unions and conditioned hiring workers on their

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[22] *Id.* at 145–46.
[23] *Id.* at 145.
[24] *Id.* at 149.
[25] *Id.* at 146.
[26] *Id.* at 145–46.
[27] *Id.* at 175.
[28] *Id.* at 155–58.
[29] *Id.* at 156.
[30] *Id.* at 190.
[31] *Id.* at 179.
[32] *Id.* at 175.
[33] *Id.* at 168.

agreement to not join one[34]—a practice that would later become known as a "yellow-dog contract."[35] Workers who had lost faith in elected public officials turned to the ballot box in order to secure their rights.[36] And, having witnessed the existential threat that a striking railway workforce imposes on the country's economy,[37] it became imperative for the political leaders to prevent such a massive strike from occurring again. The federal government's early attempts to mediate the interests of the railway owners and workers would take place through a series of failed legislation that ultimately culminated in the still extant RLA in 1926.[38]

B. The Lead Up to Modern Law Governing Airline Employees: Background to the Railway Labor Act

Still hot on the heels of the Great Strike of 1877, political leaders in state governments had great incentive to encourage harmonious resolution of disputes between unions and employers. To facilitate such resolution, several states began passing legislation to arbitrate labor disputes as early as 1878, though the state statutes ultimately proved to be feckless.[39] However, these statutes provided the groundwork for a federal statute's inception. Given the recent history of railway strikes and the railway industry's susceptibility to such strikes, the impact those strikes had on the national economy, and the fact that railways were clearly engaged in interstate commerce, it is of little surprise that the first federal law on labor arbitration would arise in the context of railway labor disputes.[40] As a result, President Grover Cleveland signed into law the Arbitration Act of 1888 (Arbitration Act), which provided an arena for voluntary arbitration of railway labor disputes.[41] However, much like the previously ineffective state laws, voluntary arbitration failed to solve the disagreements between the unions and railway owners: in the Arbitration Act's ten-year lifespan, voluntary arbitration was

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[34] *Id.* at 154.

[35] Joel I. Seidman, *The Yellow Dog Contract*, 46 Q.J. Econ. 348, 348 (1932).

[36] Bellesiles, *supra* note 19, at 187–88.

[37] *Id.* at 175.

[38] Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. Fla. L. Rev. 373, 386 (1983).

[39] *Id.* at 380–81.

[40] *Id.* at 382.

[41] *Id.*; Arbitration Act of 1888, Pub. L. No. 64-252, 39 Stat. 721 (1888) (repealed 1898).

not used once.[42] The Arbitration Act's requirement of impartial and disinterested mediators, slow-moving bureaucracy, and inability to bring both sides to the table resulted in a wholly ineffective piece of legislation, which was quickly replaced.[43]

The Arbitration Act's follow-up, the Erdman Act of 1898 (Erdman Act),[44] sought to correct the deficiencies of the Arbitration Act.[45] The Erdman Act removed the requirement of having impartial mediators and established a permanent commission with the power to prevent strikes and firings during an investigation.[46] With the exception of a single failed attempt to invoke an arbitration proceeding, the Erdman Act was not used at all during the first eight years of its existence.[47] But this changed beginning in 1906, and it was invoked in sixty cases from 1906 to 1913.[48] The most important change was perhaps the ability to appeal arbitration rewards to federal courts.[49] Unfortunately, the increased use resulted in increased disapproval of the Erdman Act, as decisions affecting millions of dollars and thousands of workers were often made by an outside mediator with little to no knowledge of the industry.[50] Eventually, dissatisfaction with the mediators' decisions led to both unions and railway leaders refusing to use the Act, and threats of an incoming strike galvanized Congress to pass yet another version of the bill.[51]

The 1913 edition of the legislation, the Newlands Labor Act (Newlands Act),[52] again sought to correct perceived deficiencies in the previous versions, this time establishing a permanent three-member board of remediation and conciliation utilizing mediators from within the industry.[53] This version received more use than previous iterations, handling seventy-one disputes between 1913 and 1917, though it ran into an impasse in 1916 after unions asserted that their demand for an eight-hour

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[42] Nolan & Abrams, *supra* note 38, at 382.
[43] *Id.* at 383.
[44] Erdman Act of 1898, ch. 370, 30 Stat. 424 (1898) (repealed 1913).
[45] Nolan & Abrams, *supra* note 38, at 383.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 383–84.
[49] *Id.* at 385.
[50] *Id.* at 384.
[51] *Id.*
[52] Mediation, Conciliation, and Arbitration Between Carriers and Employees, ch. 6, 38 Stat. 103 (1913) (repealed 1926).
[53] Nolan & Abrams, *supra* note 38, at 384–85.

workday was not a question suitable for the three-member board to resolve.[54]

With the threat of yet another strike mounting, Congress passed the Adamson Eight-Hour Act of 1916 (Adamson Act),[55] which established an eight-hour workday and overtime pay for railway workers.[56] Fervently contested by railway owners, the Adamson Act was litigated all the way up to the Supreme Court, and, in 1917, the Supreme Court upheld the ability of Congress to regulate the workday and overtime compensation for interstate railway workers,[57] a surprising change of pace for a Court that had struck down New York's attempt to limit the amount of hours worked in a bakery to ten hours a day as unconstitutional just twelve years prior.[58]

While the goings-on of the railway industry had largely been an insular affair, in 1918, the mounting need for a nationally unified railway entity due to the demands of World War I resulted in the nationalization of the railway industry under the Railway Administration Act.[59] The nationalization of the country's railway system would last a few years, until 1920, when the railways returned to private ownership.[60] However, the relative harmony in which railways operated for the years of nationalization signaled that improvements still could be made to the Newlands Act, and as a result, Congress passed yet another version, the Transportation Act of 1920 (Transportation Act).[61]

The Transportation Act, however, largely regressed from the improvements made in previous iterations, with both labor unions and railway executives seeking to replace the legislation.[62] The Transportation Act mandated use of arbitration proceedings, but the decisions were ultimately toothless because they were not legally enforceable.[63] However, contrary to prior laws, the Transportation Act was widely used, and the newly established board was inundated with nearly 14,000 cases over its five-

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[54] *Id.* at 385.

[55] Adamson Eight-Hour Act, Pub. L. No, 64-252, 39 Stat. 721 (1916) (current version at 49 U.S.C. §§ 28301–02).

[56] Nolan & Abrams, *supra* note 38, at 385.

[57] Wilson v. New, 243 U.S. 332, 359 (1917).

[58] Lochner v. New York, 198 U.S. 45, 63–64 (1905).

[59] Railway Administration Act, Pub. L. No. 65-107, 40 Stat. 451 (1918) (repealed 1920); Nolan & Abrams, *supra* note 38, at 385.

[60] *Id.*

[61] *Id.*; Transportation Act, Pub. L. No. 66-152, 41 Stat. 456 (1920).

[62] Nolan & Abrams, *supra* note 38, at 386.

[63] *Id.* at 385.

year lifespan.[64] The dissatisfaction from both railway owners and union officials led the parties to begin drafting their own version of the law, which was then proposed to Congress.[65] That version was ultimately passed in 1926 as the RLA.[66]

The RLA, further amended in 1934 to fix some deficiencies and again in 1936 to include the airline industry within the Act's purview, remains the governing law over labor relations in both the railway and airline industries to this day.[67] The RLA governs the handling of disputes within the industries, utilizing a single organization, the National Railroad Adjustment Board (Board).[68] As a result of comprehensive negotiations, the RLA contains significant concessions for both sides: labor unions largely gave up their ability to strike without first going through the Board, but gained the ability to sue employers in federal court for violations of the RLA.[69] The ability to bring suits for violation of the RLA on their own volition distinguishes railway and airline workers from most other employees in the country, who are subject to the NLRA of 1935, which gives the National Labor Relations Board exclusive standing to sue.[70] This right is a direct result of the long-fought history of railway workers in the early stages of an industrializing United States.

While the 1934 amendments sought to correct several deficiencies of the original Act, the 1936 amendments were added to extend the Act to the fledgling airline industry.[71] The RLA was extended to the airline industry for a myriad of reasons: similar to the railway industry, the airline industry dealt with inter-

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[64] *Id.*

[65] *Id.* at 386.

[66] *Id.*; Railway Administration Act, Pub. L. No. 69-257, 44 Stat. 577 (1926) (current version at 45 U.S.C. §§ 151–88).

[67] Nolan & Abrams, *supra* note 38, at 386.

[68] *Id.* at 387.

[69] *Id.* at 387–88.

[70] *See* National Labor Relations Act, 29 U.S.C. § 152(2).

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or *any person subject to the Railway Labor Act* as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Id. (emphasis added).

[71] A. J. Harper II, *Major Disputes Under the Railway Labor Act*, 35 J. AIR L. & COM. 3, 3 (1969).

state commerce, making it ripe for federal legislation, and the airline industry had an immediate need for thorough and effective regulations, which the RLA could provide.[72] By doing so, it established uniformity between the industries.[73] Additionally, by 1936, nearly every other facet of the airline industry was subject to close regulation, and there was no compelling reason to exclude labor from the norm.[74] However, while the RLA undoubtedly provided a much-needed framework at the industry's emergence, the airline industry has continued to be burdened by a system that was not designed with its needs in mind.[75] As will be discussed in Part IV.A, the modern needs of the airline industry have only exacerbated its growing pains within the framework of the RLA, and either an amendment to existing federal frameworks or a new statute is required to adequately respond to the current landscape.

C. Non-Union Labor Law Developments: The Rise and Fall of the *Lochner* Era

While the development of the RLA was largely a fifty-year process of iterative legislation insulated from other labor developments in the United States, the modern rights of both railway and airline workers are further enmeshed in a broader net of protections, combining the RLA, Supreme Court precedent, and other federal legislation such as the FLSA of 1938.

Around the same time that the Supreme Court upheld the Adamson Act in 1917, limiting the working day of railway employees to eight hours, the Court had been consistently striking down other extensions of protections to workers.[76] Dubbed the "*Lochner* era" after the Court's ruling in *Lochner v. New York* (striking down a state law limiting the working day to ten hours), the Court's decisions in this era were characterized by a laissez-faire approach to the labor market.[77] Strictly protecting the principle that individuals were free to enter into contracts of

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[72] *Id.*

[73] *Id.*

[74] James B. Frankel, *Judicial and Regulatory Decisions*, 18 J. Air L. & Com. 461, 461–62 (1951).

[75] *Id.* at 477–79.

[76] *See supra* Part II.

[77] Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. Rev. 1, 15–17 (1991).

their choice, the *Lochner* Court rejected the idea of a "paternal government" interfering with the liberty of contract.[78]

However, the *Lochner* era began on shaky ground, as it was not fully supported by precedent, and it would be a mere three decades before the *Lochner* jurisprudence fully collapsed in 1937.[79] The laissez-faire principles undergirding the *Lochner* era stood at odds with an earlier ruling in *Holden v. Hardy*, which upheld regulations preventing individuals from contracting in ways that harmed themselves.[80] In fact, it would only be twelve years before *Lochner*'s specific holding regarding the validity of maximum hours legislation would be overruled, though the pernicious logic behind its reasoning would persist.[81] In *Bunting v. Oregon*, the Court upheld a state law limiting the working day to ten hours and providing time-and-a-half overtime for hours worked past the limit, overruling the particular holding in *Lochner*.[82]

Despite *Bunting* overturning *Lochner*, the era would continue with some of its most notorious decisions in the years to come. Just a year after *Bunting*, the Court struck down a federal law prohibiting the sale of products made by child labor in interstate commerce in *Hammer v. Dagenhart*.[83] The decision in *Adkins v. Children's Hospital* soon followed, where the Court struck down another federal law providing protections for workers, this time mandating a minimum wage for female employees in the District of Columbia.[84] Grasping at straws to distinguish the decision from that of *Bunting*, the Court focused on the difference between laws regulating wages and those regulating hours as sufficient grounds to differentiate it from *Bunting*.[85] The *Lochner* era's tenuous grasp of logic would soon lead to its downfall, and the overruling of *Adkins* sounded the death knell of the era. In 1937, the Court heard yet another case regarding the minimum wage, and in *West Coast Hotel Co. v. Parrish*, the Court struck the killing blow to the *Lochner* jurisprudence and upheld a minimum wage.[86]

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[78] *Id.* at 9.
[79] *Id.* at 52.
[80] *Id.* at 19.
[81] *Id.* at 19–20.
[82] *Id.* at 19–20, 19 n.78; Bunting v. Oregon, 243 U.S. 426, 439 (1917).
[83] 247 U.S. 251, 276 (1918).
[84] Adkins v. Children's Hosp., 261 U.S. 525, 560–61 (1923).
[85] *Id.* at 550–51.
[86] W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

With the looming threat of the Court striking down labor regulations finally over, hardly a year elapsed between the fall of the *Lochner* era and the passage of a comprehensive set of federal labor regulations. The FLSA established a national base level minimum wage, prohibited the employment of children, capped the work week at forty-four hours, and provided time-and-a-half overtime pay on work past the cap—a monumental expansion of worker protections, and one that President Franklin D. Roosevelt characterized as the most important piece of New Deal legislation next to the Social Security Act.[87] The FLSA would be challenged shortly after on the grounds that it could not proscribe child labor given the precedent of *Hammer v. Dagenhart*, and the Supreme Court was given a chance to strike down the FLSA. However, in *United States v. Darby Lumber Co.*, the Court unanimously upheld the FLSA, abolishing the last vestiges of the *Lochner* era and overturning *Hammer*.[88] While the FLSA has been amended many times since its passage, the core of the legislation nonetheless persists as the national bare minimum of worker rights and protections for employees engaged in interstate commerce.

III. CURRENT STATE OF THE LAW

Bolstered by both the RLA and the FLSA, in addition to applicable state and local laws, it would seem at first glance that airline workers must be some of the most protected workers in the country. While airline workers benefit in some areas from the years of collective labor bargaining that led to the passing of the RLA, the RLA was written with railway workers in mind, and it continues to be a poor fit for the airline industry. For employees in the airline industry, the multi-jurisdictional nature of their work, combined with conflicting state and local laws and the lack of a uniform federal standard to preempt such laws, subjects airline workers to a confusing thicket of inconsistent laws that can obfuscate their rights.

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[87] Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, MONTHLY LAB. REV. Dec. 2000, at 32, 32, 36; *see also* Jared Bernstein & Ross Eisenbrey, *Eliminating the Right to Overtime Pay*, ECON. POL'Y INST. (June 25, 2003), https://www.epi.org/publication/briefingpapers_flsa_jun03/ [https://perma.cc/V49R-7LTK].

[88] United States v. Darby Lumber Co., 312 U.S. 100, 116–17 (1941).

At odds with the age-old legal maxim of *ubi jus ubi remedium* (where there is a right, there is a remedy),[89] there can be no remedy if a worker does not know that she has that right to begin with. Especially given the fact that federal legislation like the RLA or FLSA merely sets out the bare minimum protections that are often exceeded by state and local laws like California's wage and hour law[90] or Washington's Paid Sick Leave Act (PSLA),[91] an airline worker uncertain of her rights may in fact end up with fewer protections than a worker who never leaves the city or state and is certain of her rights.

A. The Barren Field: A Lack of Clear Federal Preemption

A critical issue for a worker in determining her rights is the lack of clarity on what laws apply when and the overall absence of unambiguous federal protections. On the whole for workers outside of the airline industry, the lack of federal preemptive standards tends to benefit workers given the bare minimum standards presented in the federal statutes and the additional protections workers receive through more comprehensive state and local laws. Many states have passed higher wage and hour rates than the FLSA base level, with twenty-nine states (plus Washington, D.C., Guam, and the Virgin Islands) exceeding the federal minimum wage.[92] The ability of states to pass higher standards was clearly an intentional feature of the FLSA and is laid out in § 218(a) of the Act. Colloquially referred to as the "savings clause," the FLSA states that "[n]o provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance" establishing a higher minimum wage or shorter maximum work week.[93] As has been held by the Third Circuit, "the statute's plain language evinces a clear intent to *preserve rather than supplant* state law."[94] The savings clause allows states and local municipalities to ex-

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[89] Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 Wash. L. Rev. 67, 71, 78 n.47 (2001).

[90] Cal. Code Regs. tit. 8, § 11090 (2020).

[91] Wash. Rev. Code § 49.46.210 (West 2020).

[92] *See Consolidated Minimum Wage Table*, U.S. Dep't of Lab.: Wage & Hour Div. (Jan. 1, 2020), https://www.dol.gov/agencies/whd/mw-consolidated [https://perma.cc/5YX7-RP4X].

[93] 29 U.S.C. § 218(a).

[94] Knepper v. Rite Aid Corp., 675 F.3d 249, 262 (3d Cir. 2012) (emphasis added); *see also* Spoerle v. Kraft Foods Glob., Inc., 614 F.3d 427, 430 (7th Cir. 2010) ("According to § 218(a), . . . state law supersedes the collective bargaining agreement.").

tend greater protections to workers in their jurisdiction than would otherwise be available through the FLSA.

Though the RLA does not have a corollary to the savings clause, the Supreme Court has repeatedly instructed that RLA preemption "extends only as far as necessary to protect the role of labor arbitration in resolving [collective bargaining agreement] disputes."[95] In line with this precedent, the RLA only preempts state law when a state law claim arises entirely from or requires construction of a collective bargaining agreement.[96] As such, the RLA does not preempt state law claims to enforce rights independent of a collective bargaining agreement, such as minimum labor standards.[97]

Since neither the FLSA nor the RLA preempt state law in the vast majority of circumstances, this would ordinarily simplify the analysis—a worker is subject to the standards in the RLA or FLSA, then any standards in the state or municipality of her job that exceed the federal baseline. However, this analysis is confounded when an employee does work in multiple jurisdictions, such as an employee who spends most of her time working in Dallas, Texas, but who attends a trade conference in Los Angeles, California. In that scenario, the labor laws of both Dallas and Texas would apply to the worker as she does her work in Dallas, but when she arrives in Los Angeles, she becomes subject to the laws and protections of California and local laws of Los Angeles. As the Supreme Court has held, "[a] basic principle of federalism is that each state may make its own reasoned judgment about what conduct is permitted or proscribed within its borders."[98] This principle was upheld in *Sullivan v. Oracle*, where the California Supreme Court held that the California Labor Code's overtime protections applied to work performed in California by out-of-state plaintiffs on short-term trips.[99]

However, dealing with airline employees who can potentially cross hundreds of state borders in each pay period pushes this scenario to its logical extreme, with potentially multiple different and conflicting labor standards applying to employees

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[95] Alaska Airlines, Inc. v. Schurke, 898 F.3d 904, 913–14 (9th Cir. 2018) (en banc), *cert. denied*, 139 S. Ct. 1445 (2019); *see also* Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 262–64 (1994); Lingle v. Norge Div. Magic Chef, Inc., 486 U.S. 399, 413 (1988).

[96] Matson v. United Parcel Serv., Inc., 840 F.3d 1126, 1132–33 (9th Cir. 2016).

[97] *Norris*, 512 U.S. at 256.

[98] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003).

[99] Sullivan v. Oracle Corp., 254 P.3d 237, 241 (Cal. 2011).

within a span of minutes. This issue is only confounded further by states that then assert extraterritorial jurisdiction to apply their wage and hours laws to workers who are neither residents of the state nor employees of a resident employer. The RLA's inability to deal with this problem through federal preemption only furthers the need to divorce the airline industry from this outdated and ill-fitting piece of legislation.

B. The Sticky Hand: Extraterritorial Assertion of State Wage and Hours Laws

Some states have begun to apply their wage and hour statutes to employees who live or work outside of the state's jurisdiction. Unlike the FLSA, which expressly limits its application to work performed within the United States and its territories,[100] many state wage and hour statutes hold no such geographic limitations. There have been four categories of these laws being applied extraterritorially to: (1) "out-of-state employees working in-state for resident employers"; (2) "out-of-state employees working out-of-state for resident employers"; (3) "resident employees working in-state for out-of-state employers"; and (4) "resident employees working out-of-state for resident employers."[101]

First, in terms of laws being applied extraterritorially to out-of-state employees working in-state for resident employers, California,[102] Illinois,[103] and Massachusetts[104] have extended their protections to all instances of work performed in the state,

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[100] 29 U.S.C. § 213(f).

> Employment in foreign countries and certain United States territories: The provisions of sections 206, 207, 211, and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act . . . ; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.

Id.

[101] Deborah F. Buckman, Annotation, *Extraterritorial Application of State Wage and Hours Laws*, 29 A.L.R. 7th, art. 7 (2017).

[102] Maez v. Chevron Texaco Corp., No. C 04-00790 JSW, 2005 WL 1656908, at *2, *8–9 (N.D. Cal. July 13, 2005) (rejecting Defendant's argument that California law was inapplicable); Sullivan v. Oracle Corp., 254 P.3d 237, 243 (Cal. 2011).

[103] Adams v. Catrambone, 359 F.3d 858, 863 (7th Cir. 2004) (applying Illinois law).

[104] Dow v. Casale, 989 N.E.2d 909, 913 (Mass. App. Ct. 2013).

regardless of the resident status of the employee. Second, for out-of-state employees working out-of-state for resident employers, Kansas,[105] Kentucky,[106] and Washington[107] have held that their state wage and hour statutes may apply to protect employees who may never have even set foot in the state as long as their employer was based in that state. Third, instances of resident employees working in-state for out-of-state employers and having access to the wage and labor laws of the state have been found in some capacity in Connecticut,[108] Delaware,[109] and Massachusetts.[110]

The fourth category, and perhaps the most relevant category for workers within the airline industry, deals with the extraterritorial assertion of wage and labor laws for resident employees working out-of-state for a resident employer. So far, California,[111] New York,[112] Pennsylvania,[113] and Washington[114] have extended such rights in some capacity. *Bernstein*, out of the Northern District of California, dealt precisely with the issue of whether flight attendants, who are based in California but spend only about a quarter of their time in the state, have access to the broad protections provided by California's wage and labor laws.[115] The court held that the workers fell under the protec-

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[105] Harlow v. Sprint Nextel Corp., 574 F. Supp. 2d 1224, 1226–27 (D. Kan. 2008) (applying Kansas law).

[106] Himmelheber v. ev3, Inc., No. 3:07-CV-593-H, 2008 WL 360694, at *11 (W.D. Ky. Feb. 8, 2008) (applying Kentucky law).

[107] Woods v. Mitchell Bros. Truck Line, Inc., No. 3304-6-II, 2008 WL 496803, at *2 (Wash. Ct. App. Feb. 26, 2008).

[108] Goldberg v. Goodwill Indus., No. CV054009642, 2006 WL 224124, at *14–15 (Conn. Super. Ct. Jan. 3, 2006).

[109] Redick v. E Mortg. Mgmt., LLC, No. 11-1260-GMS-CJB, 2013 WL 1089710, at *1–2, *41–42 (D. Del. Mar. 15, 2013).

[110] Taylor v. E. Connection Operating, Inc., 988 N.E.2d 408, 409 (Mass. 2013).

[111] Bernstein v. Virgin Am., Inc., 227 F. Supp. 3d 1049, at 1055–56, 1063–64 (N.D. Cal. 2017) (applying California law); Tidewater Marine W., Inc. v. Bradshaw, 927 P.2d 296, 309 (Cal. 1996).

[112] Heng Guo Jin v. Han Sung Sikpoom Trading Corp., No. 13-CV-6789 CBA LB, 2015 WL 5567073, at *25–26 (E.D.N.Y. Sept. 21, 2015) (denying summary judgment on Defendant's extraterritoriality argument because "[n]either party has briefed the choice of law analysis").

[113] Truman v. DeWolff, Boberg & Assocs., Inc., No. 07-01702, 2009 WL 2015126, at *10–11 (W.D. Pa. July 7, 2009) (noting that "[n]othing within the language of the statute implies that work performed in a foreign country by a Pennsylvania resident does not deserve the same protections as work performed within Pennsylvania by the same resident and for the same company").

[114] Bostain v. Food Exp., Inc., 153 P.3d 846, 858 (Wash. 2007); Miller v. Farmer Bros. Co., 150 P.3d 598, 606 (Wash. Ct. App. 2007).

[115] *Bernstein*, 227 F. Supp. 3d at 1060.

tion of California's laws and rejected the idea that "job situs [is] the dispositive factor to determine whether California's wage and hour laws apply."[116] This view, read in conjunction with the California Supreme Court precedent coming out of *Sullivan v. Oracle*, covers both those who are based in the state but perform the majority of their work outside the state, and those based outside the state who perform some work within the state.[117]

The holdings in *Bernstein* and *Sullivan* were reinforced in *Goldthorpe v. Cathay*, which dealt with pilots who were based in California but spent the majority of their time either in federal airspace or outside the country.[118] The court held that the pilots were still under the protection of California's wage and hours laws, reasoning that there was:

> no categorical rule that California's wage and hour protections can only apply if most of an employee's work is performed within the state, and the presumption against extraterritorial application does not prevent the application of California wage and hour law to transportation workers based in California who travel interstate. Absent such a categorical rule, and absent the presumption against extraterritorial application, it is difficult to think of a reason why California law should not apply in this situation. After all, California's wage and hour laws . . . were designed to protect workers, and to prevent employers from exploiting their bargaining advantage by denying workers fair wages and tolerable working conditions. Courts must construe these laws "with an eye towards the purposes [they] were meant to serve, and the type of person they were meant to protect."[119]

While this bodes well for airline workers who live or frequently work in California, what of airline workers across the country?

For airline workers in Washington, the question is much more complicated, and they only receive the benefits of Washington's PSLA if they are a "Washington-based" employee.[120] This is an ad hoc determination and considers a multitude of factors such as: (1) where the employment agreement was made; (2) the employee's domicile; (3) the location of the employer's base of operations; (4) the location of the employee's base of operations;

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[116] *Id.* at 1059–60.

[117] Sullivan v. Oracle Corp., 254 P.3d 237, 243 (Cal. 2011).

[118] Goldthorpe v. Cathay Pac. Airways, 279 F. Supp. 3d 1001, 1005 (S.D. Cal. 2018).

[119] *Id.* at 1004–05 (internal citations omitted).

[120] Air Transp. Ass'n Am. v. Wash. Dep't Lab. & Indus., 410 F. Supp. 3d 1162, 1168 (W.D. Wash. 2019).

(5) whether the employer maintains a work site in Washington; (6) whether the employee leaves Washington as part of the job; (7) where work assignments come from; (8) where supervisors are located; (9) the amount of work done in Washington; and (10) the length of the contract to work in Washington.[121] Though Washington is willing to give less weight to certain factors depending on the circumstances, e.g., "[f]or flight crew, who do not spend very much time working in any one place, [Washington Department of Labor & Industries] has indicated that location of work is given less weight," even a seemingly dispositive factor like being domiciled at a Washington airport would not be enough to grant flight crew protections under the law without satisfying other factors.[122] Given the relative stringency of Washington's determination for granting protections compared to the leniency of California's, it does not take much to imagine a scenario in which an airline worker whose base of operations is out of a Washington airport and who is a resident of Washington, but whose employer is based out of California and who frequently travels to California as a result, receives much greater protections under California labor laws than those of her own home state of Washington.

Thus arises the problem of extraterritorial jurisdiction—though California is seeking to increase the rights and protections of workers, the thought that an out-of-state domiciled and working employee would have greater protections in California than in her home state runs contrary to common sense. And a right without the knowledge that one has it is hardly a right at all.

Additionally, this confusion harms employers as well as employees. While employees may not know their rights, the only thing they lose for that ignorance is their ability to exercise the right. However, the stakes are much higher for airline corporations, who can rack up massive civil liability to their employees if found to have violated provisions of either the FLSA or state law.[123] In the case of *Bernstein*, Virgin Airlines racked up over $85 million in backpay and civil and statutory liabilities.[124] Employers are stuck wading through the murk to try to figure out

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[121] *Id.*

[122] *Id.*

[123] *E.g.*, John Petrick, *Virgin America Calls Bid for $85M in Wage Case 'Excessive'*, LAW360 (Nov. 15, 2018), https://www.law360.com/articles/1102248 [https://perma.cc/7SZM-6PN7].

[124] *Id.*

which laws are applicable to their employees, which quickly becomes a Sisyphean task as their workers may work in any number of states in a single pay cycle. The only recourse airlines have against potential wage and hour violations would be to adopt the highest standard of all the jurisdictions where they do business, which could become a financially ruinous undertaking.

C. The Coverage Gap: Inadequacies in the Federal Aviation Administration Act

At approximately 9:00 a.m. on June 30, 1956, United Airlines Flight 718 and Trans World Airlines Flight 2, both regularly scheduled passenger flights to the Midwest, took off from Los Angeles International Airport.[125] A mere hour and a half later, the two planes collided over the Grand Canyon, destroying both aircraft and resulting in the deaths of all passengers and crew, with 128 lives lost.[126] Both pilots followed the existing protocol and reported to communication stations that they would be flying over the Grand Canyon at the same altitude at the same time, but the flight controller with that information was under no obligation to inform the pilots of their impending crash course.[127] In the pre-FAA world, it was the responsibility of the pilots alone to keep clear of other aircraft.[128] This crash went down in history as the deadliest commercial aviation collision at the time and marked the first instance of a commercial airline collision resulting in more than 100 deaths.[129] However, the deaths were not completely in vain, as public outrage over the outdated and ineffective air traffic control system that resulted in the crash would galvanize the creation of the Federal Aviation Agency (later known as the FAA).[130]

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[125] Nat'l Transp. Safety Bd., Rep. No. SA-320/1-0090 Midair Collision, Accident Investigation Report, Trans World Airlines Lockheed 1049A N6902C and United Air Lines Douglas DC-7 N6324C, Over the Grand Canyon, Arizona, June 30, 1956, ¶¶ 2, 7 (1957), https://www.fss.aero/accident-reports/look.php?report_key=1251 [https://perma.cc/L3DP-QTAL].

[126] *Id.* ¶ 1.

[127] *1956 Grand Canyon Airplane Crash a Game-Changer*, CBS News (July 8, 2014), https://www.cbsnews.com/news/1956-grand-canyon-airplane-crash-a-game-changer/ [https://perma.cc/N4XY-RF8P].

[128] *Id.*

[129] *Grand Canyon Collision Declared a National Historic Landmark*, Grand Canyon Visitor Ctr. (May 1, 2014), https://explorethecanyon.com/grand-canyon-collision-declared-a-national-historic-landmark/ [https://perma.cc/ZMV3-59HN].

[130] *Id.*

Just two years after the 1956 Grand Canyon collision, President Dwight D. Eisenhower signed the Federal Aviation Act of 1958 (FAAct) into law.[131] The FAAct's purpose was to regulate the safety and efficiency of the airways, providing a comprehensive series of regulations that covered most aspects of the airline industry.[132] The agency would later become known as the FAA when it was consolidated into the Department of Transportation (DoT) in 1967, and the FAA continues to be the governing body for commercial airline regulation and standards.[133]

The field of airline safety was uniquely ripe for federal regulation because air travel takes place almost entirely within federal jurisdiction, requires more coordination than any other form of public transportation, and poses the largest risk to safety when done carelessly.[134] "Regulation on a national basis is required because air transportation [itself] is a national operation."[135] As the court in *Montalvo* held, "[t]he FAA, together with federal air safety regulations, establish complete and thorough safety standards for interstate and international air transportation that are not subject to supplementation by, or variation among, states."[136] In other words, the FAA is used to preempt the entire field of aviation safety—"[f]ield preemption occurs if federal law 'thoroughly occupies' the 'legislative field' in question, i.e., the field of aviation safety. . . . Such a purpose properly may be inferred . . . where the federal interest in the field is sufficiently dominant."[137] The Third Circuit succinctly summarized it as follows: "[F]ederal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation."[138] Despite the FAA's broad authority in the field of air safety, the administration is entirely silent on the issue of wage and labor laws for employees within its industry.

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[131] *A Brief History of the FAA*, FED. AVIATION ADMIN. (Jan. 4, 2017), https://www.faa.gov/about/history/brief_history/#birth [https://perma.cc/9QAN-7B9V].

[132] Federal Aviation Act, Pub. L. No. 85-726, pmbl., 72 Stat. 731, 731 (1958).

[133] *A Brief History of the FAA*, *supra* note 131.

[134] Montalvo v. Spirit Airlines, 508 F.3d 464, 473 (9th Cir. 2007).

[135] *Id.*

[136] *Id.* at 474.

[137] Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 367 (3d Cir. 1999).

[138] *Id.*

IV. THE NEED FOR REFORM IN AIRLINE LABOR LEGISLATION

In an industry where nearly every facet is now closely regulated on a federal level, the thicket of conflicting and confusing law surrounding airline labor rights is truly an anomaly. This Comment proposes adding federal legislation that would expressly preempt state wage and hour laws. The current system fits poorly within the RLA, causes needless litigation, and obfuscates the rights of workers. A uniform legislative framework will better provide for the needs of workers, increase the overall safety of the industry, and minimize litigation between workers and airlines over disagreements about pay and rights.

A. Taking the Training Wheels Off: The Airline Industry Has Outgrown the RLA

Though the RLA may have provided a useful legal framework for the airline industry in the 1930s, changes in society, new technological advancements, and the growth of the industry as a whole have evinced a need for an updated legal framework tailored to the needs of the airline industry. Two critical factors interfere with the RLA's ability to serve the needs of the airline industry: its bespoke past and its age.

Not only have there been massive changes to the industry in the interim, but the 1936 amendment to the RLA bundled the rights of airline workers into an act "designed by and for the railroad industry."[139] As discussed in Part II, the RLA was the particular product of half a century of railway strikes, negotiations between railway unions and owners, and legislative attempts to balance the interests of the parties, and the final draft of the RLA itself was written *by* the railway unions and owners together.[140] The unique past of the RLA makes it especially unsuitable for application to a new industry, and whether it actually provided a benefit to the nascent aviation field is subject to some controversy, as other transportation industries developed labor protections without the need of specialized treatment like the railroad industry.[141] Because the RLA was drafted to deal with the specific intricacies of railway labor relations, it contains several oddities that were the result of concessions made in ne-

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[139] James B. Frankel, *Airline Labor Policy: The Stepchild of the Railway Labor Act*, 18 J. Air L. & Com. 461, 461 (1951).

[140] *Id.* at 466–67.

[141] *Id.* at 471.

gotiations between unions and owners. For example, as early as 1952, commentators were concerned with the RLA's inapplicability to a fledgling industry:

> the lack of a remedial forum for both employees and employers that can expertly administer the relationships intended by the [RLA] and both interpret and enforce its provisions is a basic weakness. . . . Such a framework would not seem to be conducive to the development of the most sensible labor-management relations in a new and growing industry, however satisfactory in the more stabilized railroad industry.[142]

Second, not only was the RLA drafted to deal specifically with the railway industry, but it was drafted close to a century ago with few amendments. The airline industry of the modern-day shares little in common with its predecessor in 1936—it has faced changing levels of regulation and deregulation, has encountered technological developments, and has struggled to deal with bankruptcies and mergers.[143] In addition, the impact of the September 11th terror attacks permanently changed the landscape of the airline industry, with air carriers being forced to shoulder many of the costs of compliance with increased safety regulations.[144] These changes have reached the critical point where "the RLA is no longer adequate to ensure protection for airline employees."[145]

This is not a problem that is necessarily unique to the RLA—the need to respond to changes in the rapidly evolving aviation field spurred the Montreal Convention of 1999 (Montreal Convention). With striking similarities to the need to replace the outdated RLA and standardize labor rights for workers throughout the country, the Montreal Convention supplanted the outdated Warsaw Convention of 1929 (Warsaw Convention) and standardized the field of airline liability on international flights.[146] The Montreal Convention was an acknowledgement that the concerns that faced the start of the airline industry in the early twentieth century—at the Warsaw Convention, the

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[142] Malcolm A. Macintyre, *The Railway Labor Act—A Misfit for The Airlines*, 19 J. AIR L. & COM. 274, 288 (1952).

[143] Lisa Catherine Tulk, *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, 627 (2004).

[144] *Id.* at 628.

[145] *Id.* at 645.

[146] Convention for the Unification of Certain Rules for International Carriage by Air preamble, *opened for signature* May 28, 1999, T.I.A.S. 13038, 2242 U.N.T.S. 309.

concern was limiting liability in order to foster growth of the nascent industry[147]—were not the same concerns that faced the present industry. For many of the same reasons that the RLA needs to be updated or replaced, calls to ratify the Montreal Convention over the Warsaw Convention focused on the present system of fractured and disparate laws depending on the jurisdiction, and the ability of a uniform standard to "simplify, clarify and expedite the fair resolution of [disputes]."[148]

And, much like the Warsaw Convention, the RLA's inadequacies have led to a fractured field of law because there is no unifying authority. The RLA only preempts state law when a state law claim arises entirely from or requires construction of a collective bargaining agreement.[149] As such, the RLA does not preempt state law claims to enforce rights independent of a collective bargaining agreement, such as minimum wage standards or sick leave.[150]

Nearly a century old, the RLA simply cannot do enough to support the modern-day aviation industry, and ought to be replaced. Part V proposes new legislation that would supplant the RLA and bring the labor rights of workers in the aviation industry into the twenty-first century.

B. The Intersection of Labor Laws and Passenger Safety: Increased Protections for Airline Workers Will Directly Translate into Increased Safety for Passengers

The airline industry is uniquely situated as one of the most closely regulated industries in the country, and the vast majority of its operations are conducted within federal jurisdiction—the airspace. Airlines are heavily regulated by the FAA, which was formed in order to have a single, uniform system for regulating airline safety after a series of fatal crashes between civilian and military aircraft.[151] The catastrophic impact of mismanaged flights was the key impetus in forming the FAA, and the Supreme Court has characterized FAA regulations as striking "a delicate balance between the safety and efficiency" of planes in

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147 E. Airlines, Inc. v. Floyd, 499 U.S. 530, 546 (1991).

148 David E. Rapoport & Hans Ephraimson-Abt, *A 73-Year Odyssey: The Time Has Come for a New International Air Liability System*, 2002 Issues Aviation L. & Pol'y 22,151, 22,171 (2002).

149 Matson v. United Parcel Serv., Inc., 840 F.3d 1126, 1132 (9th Cir. 2016).

150 Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 256 (1994).

151 Montalvo v. Spirit Airlines, 508 F. 3d 464, 471 (9th Cir. 2007).

the sky and maintaining protections for persons on the ground.[152] This delicate balance and the interdependence of the safety of persons in the sky and on the ground justified the requirement of a "uniform and exclusive system of federal regulation if the congressional objectives underlying the [FAAct] are to be fulfilled."[153]

However, one facet of airline safety has slipped through the cracks and has not been regulated by the FAA—sick days and vacation days of airline staff. While perhaps not what immediately comes to mind when one thinks of airplane safety—considering devices such as oxygen masks, parachutes, and chairs that function as floatation devices—pilot fatigue represents "one of the biggest threats to air safety."[154] Hardly a decade has passed since the tragic crash of Continental Flight 3407 outside of Buffalo, New York in 2009.[155] Fatigue was cited as a cause of the crew's failure to adequately respond to the rapidly declining plane, which ended up stalling and plunging into a house—killing the pilots, flight attendants, all the passengers, and a man on the ground—resulting in fifty deaths overall.[156] While the odds of a commercial flight crashing are extremely low, "figures show that 80% are a result of human error, with pilot fatigue accounting for 15–20% of human error in fatal accidents."[157] In the accident report conducted on the crash, the National Transportation Safety Board compared fatigue impaired performance with alcohol impairment:

> [S]leep loss is at least as potent as ethanol in its performance-impairing effects and two hours of sleep loss equates to a breath ethanol concentration of approximately .05% . . . correlat[ing] prolonged wakefulness with impairment, such that being awake for 16 hours is equivalent to a .05 [blood alcohol content].[158]

Despite the clear link between crew fatigue and increased risk of harm, the FAA has not stepped in to guarantee sufficient time

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[152] City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638–39 (1973).

[153] *Id.* at 639.

[154] Keith Moore, *Pilot Fatigue 'One of the Biggest Threats to Air Safety'*, BBC NEWS (Oct. 11, 2012), https://www.bbc.com/news/health-19837178 [https://perma.cc/85FJ-4FFE].

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] NAT'L TRANSP. SAFETY BD., NTSB/AAR-10/01, PB2010-910401, ACCIDENT REPORT, LOSS OF CONTROL ON APPROACH COLGAN AIR, INC. OPERATING AS CONTINENTAL CONNECTION FLIGHT 3407, at 3 (2009).

off for airline crews. This leaves states and municipalities to fight with airline corporations over the amount of leave allowed.

Dispute over Washington's PSLA centered around this concern.[159] In addition to the risk presented by fatigue, the district court in Washington also considered how the airline's unforgiving time-off policies led to the increased spread of germs, as "flight attendants have attested to working while sick to avoid acquiring [demerits]."[160] This led to "research show[ing] that flight attendants' interactions with passengers make them both the most likely source and recipient of disease on flights."[161] And, in past attempts to alleviate this problem during the 2009 H1N1 "Swine flu" outbreak, the Association of Flight Attendants (AFA) raised concerns with the FAA and the House Subcommittee on Aviation that airline carriers should be required to "allow flight attendants with flu-like symptoms themselves to call in sick without risk of discipline."[162] The AFA turned to seeking federal intervention due to its concern that "airline management [was] more concerned with the appearance of flight attendants than with the health of the public and the flight crew."[163] Without a definite federal standard to guarantee labor protections for workers, history has shown that airline carriers will sacrifice the health of passengers and crew if it benefits their bottom line.

In Washington, though the airlines described being forced to comply with the PSLA as an unreasonable burden, evidence from when airlines were first subjected to New York City's Earned Sick Time Act (ESTA), which has similar provisions to the Washington law, showed that "for the first two years after Virgin began complying with ESTA, cabin crew delays only increased by .16 percentage points, an amount that is almost irrelevant compared to the Airlines' overall delay rates of 15 to 20 percent."[164] With empirics showing that the airlines' argument of the unreasonable burden to comply was without merit, the

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159 Air Transp. Ass'n Am. v. Washington Dep't Lab. & Indus., 410 F. Supp. 3d 1162, 1166 (W.D. Wash. 2019).

160 *Id.* at 1177.

161 *Id.*

162 Courtney Clegg, *The Aviation Industry and the Transmission of Communicable Disease: The Case of H1N1 Swine Influenza*, 75 J. AIR L. & COM. 437, 460–61 (2010) (citing *Aviation Consumer Issues: Emergency Contingency Planning and Outlook for Summer Travel: Hearing Before the Subcomm. on Aviation of the H. Comm. on Transp. and Infrastructure*, 111th Cong. 22–24 (2009) (statement of Patricia A. Friend, International President, AFA)).

163 *Id.* at 461.

164 *Air Transp. Ass'n Am.*, 410 F. Supp. 3d at 1176.

court in Washington held that airline workers were under the protection of its PSLA.[165] This same debate rages on in New York City over the city's ESTA, as both Delta[166] and American Airlines[167] fight against complying with it.

Without federal intervention through legislation, airline carriers have shown they will continue putting the health and safety of crew, passengers, and people on the ground at risk. Airline carriers will go to any measure to maximize profits at the cost of safety with no hesitation. The FAA is primed to combat this type of profit-over-safety mindset, and a congressional grant of authority to amend Title 49 to include some sort of provision in line with either Washington's PSLA or New York's ESTA would end the debate over the amount of leave given to workers, increase safety, decrease the spread of germs, and combat the issue of pilot fatigue.

C. Navigating the Maze: The Current Thicket of Confusing and Contradicting State and Local Law Results in Needless Litigation Costs

The litigation in *Bernstein* is a quintessential example of litigation as deadweight loss—an economic term describing an inefficient allocation of resources that results in a cost to society as a whole.[168] That is to say, it is a needless waste of time, money, and judicial economy. Embroiled in a multi-year class action wage lawsuit with its former flight attendants for failure to pay for all hours worked, overtime or provide accurate wage statements, and waiting time penalties to discharged employees, Virgin Airlines (Virgin) continued to rack up costs as it (1) paid its own legal fees; (2) was sanctioned to pay the legal fees of the class action plaintiffs as a result of its misconduct in discovery;[169] and, ultimately, (3) paid approximately $77 million to members of the class—nearly double from the starting amount of $45.4 mil-

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[165] *Id.* at 1177.

[166] Linda Cheim, *NYC Insists Paid Sick Leave Law Doesn't Harm Delta*, Law360 (May 1, 2020), https://www.law360.com/articles/1269513 [https://perma.cc/K9NF-NGKZ].

[167] Reenat Sinay, *American Airlines Challenges NYC Paid Sick Leave Law*, Law360 (Aug. 1, 2019), https://www.law360.com/articles/1184444/american-airlines-challenges-nyc-paid-sick-leave-law [https://perma.cc/Z7WH-9KFQ].

[168] Alicia Tuovila, *Deadweight Loss*, Investopedia (Sept. 24, 2019), https://www.investopedia.com/terms/d/deadweightloss.asp [https://perma.cc/4D4V-W9P5].

[169] Bernstein v. Virgin Am., Inc., No. 15-cv-02277-JST, 2018 U.S. Dist. LEXIS 201712, at *14 (N.D. Cal. Nov. 28, 2018).

lion in damages and restitution for wage and hour violations as a result of civil and statutory penalties.[170] And while these costs were mostly avoidable—namely, if Virgin had paid its employees legally, or at the least complied in the discovery process—Virgin ultimately will not be the party responsible for paying the fees, as that cost gets passed on to society through increased costs to consumers.

While it is certainly plausible that Virgin was genuinely mistaken as to the correct amount to pay its flight attendants who worked in California as a result of the thicket of overlapping and conflicting law discussed in Part III.B, that does not excuse the bad faith dealing the business engaged in over the course of the lawsuit. However, in a world with a clear, uniform, federally preemptive statute instead of the hodgepodge of state regulations, this lawsuit may have not existed at all. Virgin is far from the first corporation embroiled in a suit like this, however—wage and hour class action suits are an increasingly common tool for low wage employees to fight back against predatory employers and are by far the most common type of class action claim filed in federal court.[171] In 2017, employers paid out over $1.2 billion in wage and hour lawsuits,[172] and while Virgin's $77 million judgment may seem like a paltry amount in comparison to the total, it represents nearly one-fifteenth of the total amount paid out by all employers across the country that year.

Federally preemptive legislation can be used to stem the increasing tide of wage and hour class action lawsuits. With a clear and national uniform standard, employers are aware of the exact amount that will be owed to each employee without having to figure out the different wage and hour calculations for employees in each state. And, under a clear and uniform standard, employees know exactly how much they should be earning, allowing them to monitor their income for discrepancies and notify their employer as soon as a discrepancy is noticed, thereby alleviating the need for massive class-action lawsuits. Increased information would only serve to benefit both parties, more effi-

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[170] Bernstein v. Virgin Am., Inc., 365 F. Supp. 3d 980, 985, 993 (N.D. Cal. 2019).

[171] Daniel V. Dorris, *Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U. CHI. L. REV. 1251, 1251–52 (2009).

[172] *Wage and Hour Claims: 2018's Top Litigation Risk For Employers*, THATCHER L. FIRM BLOG (Feb. 9, 2018), https://www.thatcherlaw.com/blog/2018/02/wage-and-hour-claims-2018s-top-litigation-risk-for-employers.shtml [https://perma.cc/V2MR-X5PY].

ciently putting wages back in the workers' pockets to begin with, saving employers money that would otherwise go to fighting wage-and-hour class actions, and keeping price lower for consumers as a result.

V. PROPOSED AMENDMENT TO TITLE 49

This Comment proposes an amendment to Title 49, which governs transportation laws, establishes the DoT,[173] and is the current source of the FAA's authority.[174] Given the FAA's wide control of all aspects of aviation safety, and the massive safety implications of labor standards in the industry, as discussed in Part IV.B, an amendment to Title 49 will solve the current gap in the FAA's coverage of safety regulations. Placing labor under the ambit of Title 49 falls squarely within its policy goal of "assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce."[175] This Comment proposes adding a new chapter to Title 49 (Transportation), Subtitle VII (Aviation Programs), Subpart III (Safety). The following proposed amendment is modeled after Washington's PSLA,[176] with modifications made to align it with the language in Title 49.

Chapter 455—Paid Sick Leave (§§ 45501–45504)

§ 45501. Paid Sick Leave—Every air carrier[177] must provide each of its airmen[178] or flight attendants[179] paid sick leave as follows:

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[173] 49 U.S.C. §§ 101–727. Subtitle I of Title 49 establishes the DoT, its goals, and its duties. *Id.*

[174] 49 U.S.C. §§ 40101–50105. Subtitle VII of Title 49 sets out regulations for the aviation industry. *Id.*

[175] 49 U.S.C. § 40101(d)(1).

[176] WASH. REV. CODE ANN. § 49.46.210 (West 2020).

[177] 49 U.S.C. § 40102(a)(2) (defining "air carrier" as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.").

[178] 49 U.S.C. § 40102(a)(8). Title 49 defines "airman" as

> an individual—
>
> (A) in command, or as pilot, mechanic, or member of the crew, who navigates aircraft when under way;
>
> (B) except to the extent the Administrator of the Federal Aviation Administration may provide otherwise for individuals employed outside the United States, who is directly in charge of inspecting, maintaining, overhauling, or repairing aircraft, aircraft engines, propellers, or appliances; or
>
> (C) who serves as an aircraft dispatcher or air traffic control-tower operator.

Id.

(a) An airman or flight attendant accrues at least one hour of paid sick leave for every forty hours worked as an airman or flight attendant. An air carrier may provide paid sick leave in advance of accrual provided that such front-loading meets or exceeds the requirements of this section for accrual, use, and carryover of paid sick leave.

(b) An airman or flight attendant is authorized to use paid sick leave for the following reasons:
   (1) An absence resulting from an airman's or flight attendant's mental or physical illness, injury, or health condition; to accommodate the airman's or flight attendant's need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or an airman's or flight attendant's need for preventive medical care;
   (2) To allow the airman or flight attendant to provide care for a family member with a mental or physical illness, injury, or health condition; care of a family member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or care for a family member who needs preventive medical care; and
   (3) When the airman's or flight attendant's place of business has been closed by order of a public official for any health-related reason, or when an airman's or flight attendant's child's school or place of care has been closed for such a reason.

(c) An airman or flight attendant is authorized to use paid sick leave for absences as a result of domestic violence as defined in Title 34 of the United States Code.[180]

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[179] 9 U.S.C. § 44728(g) (defining "flight attendant" as "an individual working as a flight attendant in the cabin of an aircraft that has twenty or more seats and is being used by an air carrier to provide air transportation.").

[180] *See* 34 U.S.C. § 12291(a)(8).

> The term "domestic violence" includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

Id.

(d) An airman or flight attendant is entitled to use accrued paid sick leave beginning on the ninetieth calendar day after the commencement of his or her employment.

(e) Air carriers are not prevented from providing more generous paid sick leave policies or permitting use of paid sick leave for additional purposes.

(f) An air carrier may require airmen or flight attendants to give reasonable notice of an absence from work, so long as such notice does not interfere with an airman or flight attendant's lawful use of paid sick leave.

(g) For absences exceeding three days, an air carrier may require verification that an airman or flight attendant's use of paid sick leave is for an authorized purpose. If an air carrier requires verification, verification must be provided to the air carrier within a reasonable time period during or after the leave. An air carrier's requirements for verification may not result in an unreasonable burden or expense on the airman or flight attendant and may not exceed privacy or verification requirements otherwise established by law.

(h) An air carrier may not require, as a condition of an airman or flight attendant taking paid sick leave, that the airman or flight attendant search for or find a replacement worker to cover the hours during which the airman or flight attendant is on paid sick leave.

(i) For each hour of paid sick leave used, an airman or flight attendant must be paid the greater of the minimum hourly wage rate established in this chapter or his or her normal hourly compensation. The air carrier is responsible for providing regular notification to airmen or flight attendants about the amount of paid sick leave available to the airman or flight attendant.

(j) Unused paid sick leave carries over to the following year, except that an air carrier is not required to allow an airman or flight attendant to carry over paid sick leave in excess of forty hours.

(k) This section does not require an air carrier to provide financial or other reimbursement for accrued and unused paid sick leave to any airman or flight attendant upon the airman or flight attendant's termination, resignation, retirement, or other separation from employment. When there is a separation from employment and the airman or flight attendant is rehired within twelve months of separa-

tion by the same air carrier, whether at the same or a different business location of the air carrier, previously accrued unused paid sick leave must be reinstated and the previous period of employment must be counted for purposes of determining the airman or flight attendant's eligibility to use paid sick leave under subsection 45501(d) of this section.

§ 45502. Family Member Defined—For purposes of this chapter, "family member" means any of the following:

(a) A child, including a biological, adopted, or foster child, stepchild, or a child to whom the airman or flight attendant stands in loco parentis, is a legal guardian, or is a de facto parent, regardless of age or dependency status;
(b) A biological, adoptive, de facto, or foster parent, stepparent, or legal guardian of an airman or flight attendant or the airman or flight attendant's spouse or registered domestic partner, or a person who stood in loco parentis when the airman or flight attendant was a minor child;
(c) A spouse;
(d) A registered domestic partner;
(e) A grandparent;
(f) A grandchild; or
(g) A sibling.

§ 45503. Limitations on Policies—An air carrier may not adopt or enforce any policy that counts the use of paid sick leave time as an absence that may lead to or result in discipline against the airman or flight attendant.

§ 45504. Air Carrier Retaliation—An air carrier may not discriminate or retaliate against an airman or flight attendant for his or her exercise of any rights under this chapter including the use of paid sick leave.

VI. CONCLUSION

The lack of a clear and consistent federal standard across the country harms both airline carriers and aviation employees—carriers as they grapple with a myriad of regulations and airline employees who are unsure of their rights and how to exercise them. There is a clear need for an updated federal framework that takes into account the airline industry and the needs of workers in the present day; the RLA served its purpose in stabilizing the nascent airline industry in the 1930s, but the aviation industry has outgrown its usefulness. To replace the RLA and

standardize the labor rights of workers in the aviation industry, this Comment proposes amending Title 49 to include a chapter on labor. Because of the direct impact of the labor rights of airline workers on the safety of the aviation industry, legislation dealing with these rights falls squarely within the purview of the FAA. Through the proposed amendment, the aviation industry will be made safer, workers will receive greater protections, and the squandering of judicial economy through needless litigation over the thicket of conflicting local, state, and federal law will cease.


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