2008


Lawrence J. Kelly

Follow this and additional works at: https://scholar.smu.edu/lbra

Recommended Citation

https://scholar.smu.edu/lbra/vol14/iss4/4
IS THAT “WHOOSH” YOU HEAR A NEW WHISPER-JET WHISKING ACROSS U.S. SKIES, OR THE PEROTVIAN “SUCKING-SOUND” OF JOBS LEAVING THE COUNTRY?

A REVIEW OF THE IMPACT OF US-EU OPEN SKIES AGREEMENT NEGOTIATIONS ON THE LEVERAGE, LIFESTYLE, AND LEGAL STANDING OF U.S. AVIATION LABOR

Lawrence J. Kelly*

I. OVERVIEW: THE GOALS OF THE NEW AGREEMENT, ITS CHANGE TO THE NATURE OF COMMERCIAL AVIATION, AND THE RESULTANT EFFECTS ON LABOR

AFTER four years of difficult negotiations,¹ the United States, the twenty-seven Member States of the European Union, and the European Community signed an historic, first stage,² comprehensive Open Skies Agreement.

* Former member of Airline Management and Captain, Dallas Texas, Research Fellow, Law Institute of the America’s (SMU, Dallas, Texas)


   “The EU ultimately agreed to a First Stage Air Transport Agreement with the United States that did not include an outright removal of the [U.S.] ownership and control restrictions. Rather, the Agreement included a provision that ‘ownership by nationals of a Member State or States of 50% or more of the total equity of a US airline shall not be presumed to constitute control of that airline. Such ownership shall be considered on a case-by-case basis.’ European negotiators were disappointed that the deal did not remove the 25 percent voting stock cap on U.S. airline ownership. The EU governments, however, reserved the right to later restrict U.S. airline access to its airports, or to withdraw from the Agreement altogether, should the United States not agree to further liberalization, particularly involving foreign ownership. The Agreement enters into force on March 30, 2008, with second-stage negotiations beginning no later than May 30, 2008.”


hensive Air Transport Agreement on April 30, 2007 (the "Open Skies Agreement" or "Agreement") to fundamentally alter the rules and the very nature of international air law and commerce. This Agreement, effective on March 30, 2008, markedly liberalizes (currently on a provisional, first-stage basis) the rules governing routes, capacity, and fares.

"The Parties shall review their progress towards a second stage agreement no later than 18 months after the date when the negotiations are due to start in accordance with paragraph 1. If no second stage agreement has been reached by the Parties within twelve months of the start of the review, each Party reserves the right thereafter to suspend rights specified in this Agreement. Such suspension shall take effect no sooner than the start of the International Air Transport Association (IATA) traffic season that commences no less than twelve months after the date on which notice of suspension is given."

Second-stage negotiations began in May 2008.

3. Id.

4. Valuable Open Skies Benefits: The Agreement would authorize every U.S. and every EU airline to:
   - fly between every city in the European Union and every city in the United States;
   - operate without restriction on the number of flights, aircraft, and routes;
   - set fares according to market demand; and
   - enter into cooperative arrangements, including codesharing, franchising, and leasing.

In addition, the Agreement fosters enhanced regulatory cooperation in regard to competition law, government subsidies, the environment, consumer protection, and security. It establishes a consultative Joint Committee through which the U.S. and the EU can resolve questions and further develop areas of cooperation.

Investment Measures: The Open Skies Plus framework of the Agreement would:
   - Allow U.S. investors to invest in a European Community airline, as long as the airline is majority owned and effectively controlled by a member state and/or nationals of member states;
   - . . . [make] clear that, under U.S. law, EU investors may hold up to 49.9 percent of the total equity in U.S. airlines, and on a case-by-case basis even more . . . ;
   - . . . [Open] the possibility for EU investors to own or control airlines from Switzerland, Lichtenstein, members of the European Common Aviation Area (ECAA), Kenya, and America's Open Skies partners in Africa without putting at risk such airlines' rights to operate to the United States; and lastly,
   - . . . [G]rant new traffic rights to EU carriers . . . [that would open] the door to cross-border airline mergers and acquisitions within the EU, which is possible today only if airlines are prepared to place their international operating rights in legal jeopardy.

Other Benefits: The Agreement erects a pro-growth, pro-competitive . . . framework that would:
   - [Eliminate] outmoded restrictive arrangements affecting London Heathrow airport, where U.S.-[British] service is now limited to only four airlines;
   - [Allow] EU airline transport of non-DOD USG passengers (employees and civilian-agency-funded contractors) and cargo on scheduled and charter flights between two foreign points and on all U.S.-EU routes not covered by a GSA "city pair" contract; and
   - [Allow] EU airline transport of cargo between the United States and all third (non-EU) countries, and transport of passengers between the United States and members of the ECAA as of the date of signature of the Agreement.
from the standards and limits followed since the inception of the International Civil Aviation Organization (ICAO) as a U.N. body to develop international standards for aviation, and the legal foundation establishing the rights of international air transport (Freedoms of the Air) established at the Chicago Convention of 1944. The Open Skies Agreement also replaces each of the separate and varied existing bilateral agreements between the United States and EU member states with a single document that controls air transport and commerce between the United States and all twenty-seven EU Member States. The goal professed by the U.S. Department of State for the Agreement is “significant economic benefit for America and Europe.” The State Department declares:

This pro-growth, pro-competition, pro-consumer agreement is a major breakthrough in transatlantic economic relations. The Agreement represents a ‘win/win’ for consumers, airlines, and communities on both sides of the Atlantic: increasing travel and transport options, catalyzing trade and employment growth, and enhancing people-to-people contacts. Consumers on both sides of the Atlantic will benefit from new air services that were not permitted in the past.

The U.S.-EU Open Skies Agreement fits in generally with U.S. trade policy calling for a greater liberalization in international trade and investment, and specifically for greater liberalization in the area of international transportation services.

---


7. U.S. Dep’t of State Fact Sheet, supra note 4.


10. See, e.g., Multilateral Agreement on the Liberalization of International Air Transportation, May 1, 2001, http://www.maliat.govt.nz (signed by Brunei Darussalam, Chile, New Zealand, Singapore, and the United States); see also U.S. Dep’t of State Media Note No. 2007/182, U.S. Signs OpenSkies Aviation Agreement with Canada, http://www.state.gov/r/pa/prs/ps/2007/mar/81645.htm (this Agreement was signed March 12, 2007); and, as part of the ongoing NAFTA process among the U.S., Canada, and Mexico, negotiations began in 2007 for a U.S.-Canada-Mexico OpenSkies agreement, see U.S. Dep’t of Transp. Office of Pub. Affairs, U.S., Canada, Mexico Aim to Liberalize Air Transport in 10 Years, (Apr. 27, 2007), http://www.america.gov/st/texttransenglish/2007/May/20070502164852jxjn6omnis0.7808649.html. Also, it should be kept in mind that the predecessors to the U.S.-EU Agreement were fifteen bilateral OpenSkies Agreements with various EU Member States.
The stated goals for the Agreement are laudable, but this first step of international deregulation (and its intended follow-on agreements) so completely changes the international commercial aviation regulatory structure of the past six decades that achievement of its intended goals cannot be certain. It is the first comprehensive deregulation of international airline capacity since the United States acquiesced to prevailing ICAO member preference for restricted market access that was less than complete "Freedom of the Air."  

The U.S.-EU Open Skies Air Transport Agreement begins with the declaration that it is moving away from the prevailing status quo by opening access to markets. It departs from the governmental constriction on capacity promoted by the British as "Order in the air" in 1944, and adopted in practice if not always in proclamation by the U.S. and ICAO members since 1950. Open Skies embodies the new philosophy that open access is now the proper approach to maximize benefits for consumers, airlines, labor, and communities on both sides of the Atlantic. The Agreement goes further to recognize the importance of "enhancing the access of their airlines to global capital markets" in order to support increased competition.

As stated in its twenty six articles and five annexes, the Agreement promotes an international aviation system based on competition among airlines in the market place with minimum government interference and regulation; facilitates the expansion of international air transport opportunities to include allowing new routes and frequencies; makes it possible for airlines to offer the traveling and shipping public competitive prices and services in open markets; and it intends to have all sectors of the air transport industry, including airline workers, operate under a liberalized agreement, while recognizing serious threats to aircraft security and ensuring the highest degree of safety and security in international air transport.

The Agreement does acknowledge the Chicago Convention on International Civil Aviation of 1944, but emphasizes a free market for global commercial aviation and asserts that "government subsidies may adversely affect airline competition and may jeopardize the basic objectives of the Agreement."

Additionally, the Agreement now adds to the basis of the Chicago Convention, the "importance of protecting the environment in developing and implementing international aviation policy" as well as "the im-

11. CHENG, supra note 5, at 20-21.
14. Id.
17. Id. at USA/CE/en 5.
18. Id. at USA/CE/en 6.
portance of protecting consumers, including the protections afforded by the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal May 28, 1999.’’ Ambitiously, the Agreement intends, beyond its practical applications to aviation, to have this “crucial economic sector” set a “precedent of global significance to promote the benefits of liberalization.”

But it is possible that the most significant outcomes from the Agreement may prove to be the unintended outcomes from such a dramatic change. The deregulation of domestic U.S. aviation in 1978 was a sudden and diametric change of comparable proportions. Many, including the founders of domestic U.S. airline deregulation, would argue that it wrought unexpected and undesirable outcomes. Until 1978 the U.S. domestic airline service under the control of the Civil Aeronautics Board (CAB) essentially paralleled ICAO philosophy of regulating routes and frequencies to control capacity. Commercial air transport was treated as a capital-intensive, vital national resource for commerce. Government controls on the market were considered necessary to ensure stable service gained by restricting capacity to levels which generally retarded competitive pressures to operate networks with unprofitable pricing or customer levels, or subsidized specified services which might be unsustainable under open-market conditions. The CAB could shelter owners from the hazards of unbridled competition, and afforded its labor groups the leverage to demand participation in the profits a protected market as well.

This paper explores how the new Open Skies Agreement and its intended supplements might affect the leverage, lifestyle, and legal standing of labor in U.S. aviation. The 1978 U.S. domestic aviation deregulation provides a good indicator for what one can expect the effects of international liberalization to be on the financial success and customer service of the U.S. aviation industry as a whole, and on its labor in particular.

While deregulation of the U.S. market has increased the number of cities with commercial jet service and lowered prices overall, it has also overtaxed the physical and human capacity of the system and destroyed the financial security of nearly every carrier in the industry. Given the goals of the Agreement to increase competition and expand markets, it is unlikely the current system can handle such increases without corresponding increases and improvements in the capacity of the air traffic system, airports, and the skilled labor that keep such huge capital investments productive. Section IV below will detail some indications that the current infrastructure is not sufficient for the increasing demands of unregulated markets.

19. *Id.*
20. *Id.*
22. See *Petzinger, supra note 21; see also Peterson & Glab, supra note 21.*
The Agreement also lists a goal of maximizing benefits for labor. Historically, though, opening restricted markets to new production sources with lower cost labor has depressed the wages and benefits of the formerly protected, more affluent workers. In recent years, such transfers have occurred not only at levels of textile or automotive manufacturing, but in highly educated skilled positions in computer and telecommunications engineering, and increasingly in legal research. It is possible the experiences of these industries may also be indicative of what lies ahead for U.S. aviation workers.

Traditionally, airline labor was able to demand participation in the controlled profits of regulated carriers. Extreme cutthroat competition as seen in the United States since deregulation in 1978 has decimated the financial security of the carriers and thus its workers as well. The Open Skies Agreement does not present any novel legal or commercial structure which indicates that liberalizing air travel between the United States and the European Union will avoid accelerating similar losses on a broader scale.

When U.S. routes and pricing were regulated, the costs of labor pay and benefits could more easily be passed on to the consumer than is the case in a highly competitive market without restriction to new entrants. Open Skies is intended to eliminate route restrictions and allow a theoretically unlimited combination of city pairs served by an unlimited number of carriers providing service between the United States and the European Union. The Agreement's proposed second stage intends to allow “cabotage” (allowing foreign carriers to fly domestic routes in other nations) which will expand unlimited rights to fly between cities within the United States. But there are actually physical restraints on the availability of landing and parking slots at desired destinations, as well as limits on the production volume of new aircraft and the current number of licensed pilots to fly them. The United States Federal Aviation Administration (FAA), ICAO, foreign governments, and the International Air Transport Association (IATA) are taking steps to increase the capacity and supply in these areas. The specifics of these programs, and whether they effectively meet growing demand, will have great impact on the marketability and leverage of the current U.S. government air traffic controllers and commercial airline labor force.

It is important to note that as monumental as this new Agreement's liberalization of traffic across the North Atlantic is, the ICAO's goal is greater than just U.S.-EU Open Skies. ICAO desires liberalization agreements within two years which will expand allowance of foreign direct investment, and allow for complete access by foreign air carriers to

all routes within the United States, rights known to ICAO members as the 8th degree of Freedom, or cabotage. Admittedly, one cannot predict the outcome of a future expansion purely based on a trend line of past events, but if the new Agreement seeks to broaden the changes brought by domestic deregulation, then lacking a counterbalancing change and improvement in other systemic features, an outcome other than more-of-the-same, is unlikely.

Using the 2008 U.S.-EU Open Skies Agreement as the primary reference point, this article explores potential significant factors in the movement to globally deregulate the aviation service of the United States, how they may be expected to benefit safety, service, security, availability, and cost, and whether that will ultimately benefit or harm the leverage and lifestyle of the current aviation labor force. In doing so, Part II will review the economic and legal basis of why global aviation was regulated, and how U.S. aviation labor leverage and law developed in a system that essentially modeled the original ICAO "Order in the air" philosophy. Part III takes a closer look at the goals and details of the Open Skies Agreement, and how treaty law may affect the existing protections or leverage provided to U.S. labor by the existing domestic law presented in part II. Then in Part IV, the genesis and effects of U.S. domestic deregulation is explored. This part looks at the financial condition of the airlines, and its affect on labor as well as the capability of the government to adequately support and monitor an unregulated market. Part V presents concluding observations.

In the near term, it is likely that an expansion of carrier or route options will increase the existing pressures on U.S. air carriers to depress costs and benefits while operating on the edge of insolvency in a competitive frenzy for market presence. Consolidations will accelerate as the laws allow. But in the longer term, as the Second Stage of the U.S.-EU Agreement and other complimentary global liberalizations are enacted, the potential increases that global aviation may adopt a common shipping industry method of avoiding taxes and labor regulations by restructuring the ownership and dominion of carriers who will base headquarters and labor supplies in foreign countries providing "flags of convenience." So long as technical, physical, and structural supports are enhanced to support expanded demand, and adequate quantity and quality of skilled labor is available, then this bold liberalization should successfully "shrink the world" by magnifying the service of impact of this critical industry. But current trends make fruition of such premises and outcome far from certain.

27. CHENG, supra note 5, at 15.
Familiarity with formative international aviation law, and with U.S. statutes controlling rights for labor in aviation, is instructive before analyzing the impact of the U.S.-EU Air Transport Agreement treaty taking force in March 2008 and its Second Stage being negotiated for enactment in 2010.

From the earliest days of commercial aviation, international air carrier financial liabilities were limited in order to assure profitability and thus encourage investment in the industry. In the United States, labor laws were passed in order to ensure that a willing supply of skilled aviators would enter and remain in an industry which possessed labor-management relations balanced enough to minimize disruptions of service in air transport. As the industry developed, laws intended to maintain a balance between workers' rights and profitable business opportunities for airline expansion or survival were directly superseded by or politically influenced by U.S. antitrust and bankruptcy laws.

While U.S. laws have been applied to balance rights of workers and owners to enhance stability and profitability in commercial aviation, the increasing globalization of markets in the past decade has increased the role of international collaborations such as the Organisation for Economic Co-Operation and Development (OECD) to enhance a similar balance between labor opportunity and rights and owner profit opportunities within and across foreign borders. The OECD promulgates Employment and Industrial Relations Guidelines for Multinational Enterprises.29

The premier guideline of international aviation until the revolution of Open Skies has been the Chicago Convention of 1944.30 The Chicago Convention and its supplements have controlled access to routes, frequencies, and fares to provide an "order in the air" to ensure the development of reasonably stable and profitable international air service.31

A. INTERNATIONAL REGULATION FOR PROTECTION: THE WARSAW CONVENTION OF 1929/1933

The Warsaw Convention laid the foundation for cooperative international regulation of aviation. In the burgeoning days of commercial aviation, the uncertainty in the reliability and safety of air travel was expressed by a phrase well known across Europe: "The layman flies, the

30. See Chicago Convention, supra note 5.
31. CHENG, supra note 5, at 21.
expert takes the train." To overcome such fear and bias, and to promote the benefits of aviation as a valuable resource for commerce worthy of investment and development as a major industry, thirty-two nations joined together to create a uniform and predictable legal regime with standards for operation and protection from potential devastating liabilities associated with an aircraft crash. The United States attended as an observer. The successful product of their efforts became a binding treaty in February of 1933 known as The Convention for the Unification of Certain Rules Relating to International Carriage by Air. Because the collaboration began in Warsaw, Poland in 1929, this multinational treaty is commonly referred to simply as the Warsaw Convention. The treaty is uncommon in that it does not principally bind national governments, but directly affects the legal rights of private human and corporate persons.

Today, 190 nations are signatories of the Warsaw Convention, making it the single most accepted private law treaty in history. Over the years it has seen many adjustments to adapt to the changing role and success of international transportation and commerce. The most substantial was the Montreal Convention of 1999. And although the U.S. Senate gave the original treaty little discussion before voting their consent in 1934, "as a treaty ratified by the U.S. Senate, the Warsaw Convention is the supreme law of the land in the United States, superseding inconsistent federal or state law, or carrier air waybills or tariffs."

33. Id.
34. PAUL S. DEMPSEY & MICHAEL MILDE, INTERNATIONAL AIR CARRIER LIABILITY: THE MONTREAL CONVENTION OF 1999 11 (McGill University Centre for Research in Air & Space Law 2005) (The original thirty-three drafting countries to the treaty were: Austria, Belgium, Bulgaria, Brazil, China, Czechoslovakia, Denmark, Egypt, Estonia, Finland, France, Germany, Great Britain, Greece, Hungary, Italy, Japan, Latvia, Luxemburg, Mexico, Norway, the Netherlands, Poland, Romania, Spain, Sweden, Switzerland, Union of South Africa, U.S.S.R., Venezuela, and Yugoslavia. Only twenty-three of these signed the convention in 1929. The United States merely had an observer and did not sign until 1934.).
35. Id. at 13.
38. DEMPSEY & MILDE, supra note 34, at 14.
39. See id.
40. See 78 Cong. Rec. 11,577 (1934).
The National Railway Labor Act regulates rights and the process of labor negotiations for United States commercial aviation. Just as the Warsaw Convention enhanced the development and expansion of aviation in commerce by providing a unified global standard for liability, workers in the United States sought legislation which would protect their livelihood. While the Warsaw Convention provided investors with predictable liability limits, and thereby facilitated capital investment and job creation, workers in the United States felt a similar need for a legal framework which would ensure enough income and work rule security for them to commit to a career in aviation. The congressional precedents with the railways provided the foundation for such a legal basis. Recognition that the railways provided a vital component of continental commerce, that the working conditions and hours were unique and demanding, and that contentious disputes between management and labor that crippled the efficiency of this vital trade did not benefit investors, customers, management, or labor, produced the Railway Labor Act of 1926.\textsuperscript{42} It was a heralded law of preemptive compromise produced by collaboration of leaders in the railway industry management and labor with the drafting legislators.\textsuperscript{43}

A refining amendment to the Act was passed in 1934 which created the National Mediation Board (NMB).\textsuperscript{44} The Board was given the power to settle disputes and certify legal representation for labor organizations.\textsuperscript{45} More frequently the Board functions as imposed arbitrator with compulsory authority for minor (disputes over interpretation or implementation of existing contracts) disputes, and provides a non-binding mediation role in major (new contract negotiation) disputes.\textsuperscript{46} A further amendment in 1936 expanded the Act, and the NMB’s responsibilities, to cover not only railway labor, but airline carriers and their unions as well.\textsuperscript{47}

In U.S. aviation today, if labor and management negotiations on a new contract reach an impasse with potential for strike, the NMB offers non-binding arbitration. If either party refuses, after a thirty day cooling off period, it is legal for labor to strike and it is legal for management to lockout labor or impose its own new work rules and compensation.\textsuperscript{48} But, if the NMB deems that such actions by labor or management are likely to "deprive any section of the country of essential . . . services,"\textsuperscript{49} it informs

\begin{itemize}
\item \textsuperscript{42} See Matthew A. Kelly, Labor and Industrial Relations: Terms, Laws, Court Decisions, and Arbitration Standards 98-102 (1987).
\item \textsuperscript{43} Id. at 98.
\item \textsuperscript{44} See 74 Cong. Ch. 6, February 13, (1935), 49 Stat. 22; see also 45 U.S.C.A. § 154 (West 2008).
\item \textsuperscript{45} Kelly, supra note 43, at 99.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} 45 U.S.C.A. § 155 (West 2008).
\item \textsuperscript{49} 45 U.S.C.A. § 160 (West 2008).
\end{itemize}
the President, whom the Railway Labor Act authorizes to appoint an ad hoc emergency board. The Act gives the Presidential Emergency Board investigative and fact-finding power with rights to subpoena and conduct public hearings. Within thirty days they must report to the President (recommendations are neither required nor prohibited). During the period of the board's investigation, and for an additional thirty days thereafter, both labor and management are legally obligated to maintain the terms of their existing contract.

While the regulations of the United States Federal Aviation Administration (FAA) do regulate safety and some service related functions in U.S. aviation, it is the Railway Labor Act that provides the primary legal structure which governs the opportunity and conduct of U.S. labor organizations in aviation to influence corporate control over their rates of pay, work rules, and working conditions. The constitutionality of Congress to create such controls was upheld under the commerce clause of the constitution in *Texas and New Orleans R.R. Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930).

If, after all the provisions for involvement of the NMB have been exercised, an acceptable resolution cannot be reached under the terms of the Railway Labor Act, and the President or Congress determine that either a strike action by unions or unfair contract terms imposed by a corporation may cause unacceptable disruption to interstate commerce, then special action by the President or Congress may be required to control the outcome of the impasse. A diagram of the process is presented below.

50. Id.
51. Id.
C. Early U.S. Legislation for Free Trade: The Anti-Trust Acts

The Railway Labor Act exists as but one part of a broader scheme of labor rights law for U.S. workers. The Sherman Anti-Trust Act of 1890 was not written as a labor law, but it was intended to prevent American corporations from becoming so powerful that their owners and managers held inequitable and unfettered controlled over free trade between states. By 1932 it was clear to Congress that legislation was needed to

54. Kelly, supra note 43, at 102
provide specific equitable rights for workers suffering under the strangle-
hold of big corporate America. To counter the court's skewed anti-la-
bor interpretations of the freedom of contract typified in *Lochner v. New
York*, 198 U.S. 45 (1905), and indiscriminate use of the Sherman Antitrust
Act by the courts to impose injunctions against labor organization ac-
tions, Congress passed the Federal Anti-injunction Act, also referred to
as the Norris-LaGuardia Act.

The National Labor Relations Act, also known as the Wagner Act, fol-
lowed in 1935 with the purpose of encouraging adhesion free collective
bargaining. Addressing a public policy concern from Ford's first plant
to recent labor actions, the Wagner Act also stated that unequal bargain-
ing power over labor harms the economy overall by aggravating business
depressions due to suppressed purchasing power of the laborers.

Various other antitrust focused Acts have been passed by Congress
since 1935 which increase or provide balance in the rights of management
and unions in collective bargaining; their ultimate goal being to preclude
"recurrent business depressions by depressing wage rates
and the purchasing power of wage-earners in industry." Notable
among them, was a provision of the Labor-Management Relations (Taft-
Hartley) Act of 1947. Taft-Hartley empowered the President to intervene
in labor disputes which affect a substantial part of an entire industry if the
nation's health and safety are imperiled. The Taft-Hartley Act also pro-
hibits strikes by federal employees.

The application of these laws in the Professional Air Traffic Controllers
Organization strike in the dawning years of U.S. domestic airline dereg-
ulation still impacts the opportunities for international deregulation into
the United States as well. Such impact will be discussed in greater detail
when addressing U.S. capacity limits later. While post Railway Labor
Acts do control public perceptions and corporate approaches to labor-
management interactions at private companies involved in interstate
commerce (and do impact commercial aviation), for the railroads and air-
lines themselves, the Railway Labor Act remains preemptive.

While such laws are intended to balance powers of contracting parties
and to equalize rights of the opposing interests in labor negotiations, the
U.S. government still holds the ultimate control if it feels interstate com-
merce will be harmed. In March 2001, with labor groups at four different
major U.S. airlines, each approaching impasse in negotiations (as labor
desired an increased share of historic airline profitability to recoup from
previous concessionary contracts), the President of the United States in-
tervened as the thirty day post NMB arbitration cooling off period ended

55. See id. at 102-105.
56. See id. at 105-106.
57. Id. at 107.
58. Id. at 107 (quoting the National Labor Relations Act of 1935).
59. KELLY, supra note 43, at 111.
60. Id. at 110.
61. Id. at 108.
and prohibited the Airline Mechanics Fraternal Association (AMFA) at Northwest Airlines from striking. More significantly, the President made the unprecedented proclamation that he would not allow any labor group to strike any airline in 2001. Similarly, there are other laws which can be applied to effectively usurp compensation negotiated by labor as well.


Shortly after the United States deregulated the airline industry in 1978, bankruptcy law was used to avoid the protections the Railway Labor Act was supposed to provide for aviation workers. Just as Congress outlawing a strike by air traffic controllers undercuts the controllers' leverage in negotiations, U.S. Bankruptcy laws can place a heavy thumb on the scale of labor-management equality in negotiations. Significantly impacting the employees at Continental Airlines, in their 1983 strike in response to management's unilateral imposition of new contracts immediately following declaration of Chapter 11 bankruptcy, was the ruling in NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984). The Court held that "the language 'executory contract' in 11 U. S. C. § 365 (a) of the Bankruptcy Code includes within it collective-bargaining agreements ... and that the Bankruptcy Court may approve rejection of such contracts by the debtor-in-possession upon an appropriate showing." Further, the Court decided "that a debtor-in-possession does not commit an unfair labor practice when, after the filing of a bankruptcy petition but before court-approved rejection of the collective-bargaining agreement, it unilaterally modifies or terminates one or more provisions of the agreement." Effectively, management had the trump card to erase all labor contracts.

Vehement reaction from labor unions across the nation resulted in the prompt passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984. The Act required an employer to submit proposed changes to a collective bargaining contract “necessary to permit the reorganization” for bankruptcy court review and approval before implementing. The Act has been upheld to preclude rejection of contracts for the convenience of management and creditors, and to require employers to conduct good faith negotiations with labor before requesting bankruptcy court approval of imposed conditions. Still, the most recent bankruptcies of United Airlines and U.S. Airways eliminated over $5 billion in unfunded retirement benefits.

63. Kelly, supra note 43, at 120.
65. Id.
67. Id.
In 2005, the Bankruptcy Judgeship Act and the Bankruptcy Abuse Prevention and Consumer Protection Act further limited management dominance in bankruptcy.\textsuperscript{70} The Acts limited retention payments to key executives in relation to employee pay, and allowed shortening periods for management exclusivity in planning reorganization and terminating lease contracts.\textsuperscript{71} In general, it made bankruptcy an even less desired option for management to handle financial difficulties. As a result, both Delta and Northwest Airlines filed for bankruptcy before the 2005 law took effect.\textsuperscript{72}

E. A Tempering International Influence: The Organisation for Economic Co-Operation and Development (OECD) Employment and Industrial Relations Guidelines for Multinational Enterprises

In 2000, OECD issued a revision to their non-binding guidelines for its 29 members.\textsuperscript{73} The OECD is an international collaboration whose member states infuse persuasive influence over the conduct of international business. Its guidelines attempt to mitigate the difficulty of obtaining international consensus establishing binding international law regarding various factions of commercial enterprise. The OECD's stated goal is "to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy."\textsuperscript{74} The guidelines are not a substitute for, nor do they override, applicable law. But, they may provide a guide for our expectations of how member states will be inclined to conduct future enterprises.

Thus, although lacking the force of U.S. labor and bankruptcy law, the OECD guidelines regarding labor relations and employment practices may restrain the choices acceptable for management in handling labor relations within U.S. owned airlines, or by foreign owned carriers expanding in the United States. They require honoring workers right to


\textsuperscript{72} Id.

\textsuperscript{73} Johnston, supra note 29 (The original Member countries of the OECD are Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The following countries became Members subsequently through accession at the dates indicated hereafter: Japan 28th April 1964, Finland 28th January 1969, Australia 7th June 1971, New Zealand 29th May 1973, Mexico 18th May 1994, the Czech Republic 21st December 1995, Hungary 7th May 1996, Poland 22nd November 1996, and Korea 12th December 1996).

\textsuperscript{74} Id. at 2
unionize and bargain collectively.\textsuperscript{75} But, discrimination with respect to employment or occupation of employees is allowed if it furthers established governmental policies which specifically promote greater equality of employment opportunities, or relates to the inherent requirements of a job.\textsuperscript{76} Further, the OECD guidelines in Part IV, Employment and Industrial Relations, call for employers to observe standards “not less favourable than those observed by comparable employers in the host country,”\textsuperscript{77} including “to the greatest extent practicable,”\textsuperscript{78} employing and training local personnel.

Sections six and seven of part IV are key regarding major changes to staffing and scope of operations. Section six requires that any changes by an enterprise which will have “major effects upon the livelihood of their employees,”\textsuperscript{79} particularly one involving collective lay-offs or dismissals, provide notice to employees and the government in order to allow mitigation of adverse effects. But perhaps section seven might contain the most significant limitation for the domestic U.S. airlines competing with lower cost structured foreign carriers in a post-cabotage United States:

In the context of bona fide negotiations with representatives of employees on conditions of employment, . . . not threaten to transfer the whole or part of an operating unit from the country concerned nor transfer employees from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise.\textsuperscript{80}

But again, these words only possess the strength of moral suasion; unlike the binding commitments of the major international treaties there is no court that enforces them.

F. “ORDER IN THE AIR”; INTERNATIONAL ROUTES, RATES, AND SERVICE: THE CHICAGO CONVENTION OF 1944

Even before the Second World War ended, it was apparent to the industrialized nations that aviation would play a major role in the international economic recovery from the war, and that it would also stand as a symbol and instrument of national policy and strength.\textsuperscript{81} The fifty-four nation signatories who gathered in Chicago sought to guide a post war expansion of the aviation industry that would be economically sound and harmoniously respectful of each nation's sovereign status.\textsuperscript{82} To facilitate

\textsuperscript{75} Id. at 21.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 22.
\textsuperscript{80} Id.
\textsuperscript{81} CHENG, supra note 5, at 19.
\textsuperscript{82} Id. at 499 (The signatory nations were: Afghanistan, Australia, Belgium, Bolivia, Brazil, Canada, Chile, China, Columbia, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Commonwealth, Poland, Portugal, Spain,
this, they felt that three principal areas of air commerce must have unified operations: routes, capacity, and tariffs (fares). Many feared that unrestricted access and capacity, or uncontrolled tariffs would induce cut-throat competition and strangle the industry before it regained any stable financial viability. This position was strongly held by the British in their White Paper on International Civil Aviation. As the Warsaw Convention served the stability of global aviation by limiting liability, the Chicago Convention became the predominate treaty to regulate international capacity and profitability.

In 1944, the United States was unquestionably the dominant industrial manufacturing powerhouse of the planet, leading the world in production of aircraft. In Chicago, the United States unsuccessfully pushed for relatively unrestricted access for all nations in the skies across the globe. They wanted all nations to be allowed to carry passenger to any other country, and pick up or discharge any number of passengers and cargo before continuing the flight on into a second foreign nation (termed the "fifth freedom" of the air). While such rights were agreed to for non-scheduled flights, only a dozen other nations accepted this broad liberalization for scheduled airlines. The Europeans knew they had a geographic advantage but severe resource limits compared to the United States. With over nine-tenths of the inhabited planet within a day's flying time of London, none of the major European nations expecting to fly the North Atlantic accepted such liberalization.

Countering the vision of the United States to allow nearly total freedom of the Air, the United Kingdom had pushed for "Order in the air." "Order in the air" was the prevailing (but not drafted into the Convention) view that regulation of capacity was required for industry stabilization. Because international air transport served a role as an instrument of national policy, many nations heavily subsidized air services and their national scheduled airline beyond economic justifications. "Order in the air" would result from rationed capacity and regulated rates.

The International Civil Aviation Organization (ICAO) was founded at the Chicago Convention of 1944 to foster the planning and development

83. Id. at 9.
84. Id. at 18.
85. Chicago Convention, supra note 5, Art. 5.
86. CHENG, supra note 5, at 602-609.
87. Id. at 3.
88. See id. at 602-609.
89. Id. at 19.
90. Id. at 21 (Order of the air was the British proposed counter position to the U.S. demand for full Freedom of the Air at Chicago. Four positions overall including the Canadian and Australian/New Zealand were brought to the Chicago Convention, for a nice summary of the interaction and resolution among them see I.H.Ph. Diederiks-Vershoor, AN INTRODUCTION TO AIR LAW 13-19 (2006)).
91. CHENG, supra note 5, at 19.
of air transport.\textsuperscript{92} Post war experience quickly showed even the United States that unlimited international rights to and beyond foreign countries, which the United States had pushed for at the Chicago Convention, was economically undesirable for the industry.\textsuperscript{93} By 1947 the United States withdrew from open allowance for the fifth freedom of the air.\textsuperscript{94} The United Kingdom presented the case for "Order in the air" protectionism to ICAO, claiming it was necessary because:

(d) The drive to eliminate competition in the struggle for supremacy, leads to artificial inflation of capacity, constant pressure to reduce fares below economic levels and other competitive devices.

(e) The tendency of each country to surround its international air transport with a protective ringed fence based on a restrictive policy in the grant of commercial rights stultifies the full development of efficient air services on an economical basis.\textsuperscript{95}

The United Kingdom's analysis of the aviation industry has proven to be valid and constant to this day, and particularly so in the United States' experience after the Airline Deregulation Act of 1978. Strict control of "fifth freedom" rights in tightly crafted nearly exclusively bilateral agreements remained until 2002 when the European Court of Justice ruled that nationality clauses in many of the bilateral agreements violated EU non-discrimination laws.\textsuperscript{96} This ruling was the opening that triggered productive negotiations on phase one of the U.S.-EU Open Skies treaty, which takes effect at the end of March of 2008. Moving away from prior protectionism, a stated goal of the Agreement is to minimize government interference and regulation.\textsuperscript{97}

III. DOMINANCE OF THE INTERNATIONAL TREATY: LEGAL AND COMPETITIVE IMPLICATIONS

The benefits or sacrifices of U.S. aviation labor have been greatly influenced by the protections of the U.S. labor, bankruptcy, and anti-trust laws. Therefore, how international laws may supersede existing U.S. laws is crucial to U.S. labor's bargaining leverage for pay, benefits, work rules, and participation in company decision making. Preeminence of international agreements may become more significant as the United States and

\textsuperscript{92} Chicago Convention, supra note 5.
\textsuperscript{93} CHENG, supra note 5, at 21.
\textsuperscript{94} Id. at 21.
\textsuperscript{95} Id. at 20.
\textsuperscript{97} U.S.-EU Air Transport Agreement, supra note 12.
European Union move from executing Phase I into Phase II of the Air Transport Agreement, and on to broader global treaties with other regions of the world in the coming years. This historic Open Skies expansion of multi-national harmonization, which affects 51 percent of all global flights, is only one significant piece of the International Civil Aviation Organization’s plan to “to create an environment in which international air transport may develop and flourish in a stable, efficient and economical manner without compromising safety and security.”

While this liberalization is noteworthy, bilateral agreements still exist for both the EU and the United States with nations in Asia and elsewhere in the world. Actions which might be legal in a purely U.S.-EU context, such as European multinational mergers, may still be prohibited by agreements held with other nations or regions. To date, global commerce treaties, which include aviation issues, have restricted their provisions to ancillary services, and have not impinged on control of route rights, frequencies, or fares.

Article seven of the Agreement does address “Application of Laws.” It allows that operations within each member state will follow existing laws for admission and air navigation of the member state. Article eight allows provisions for states to request safety reviews of other states and deny rights to those found below ICAO required standards and unable to meet those standards in a “reasonable” time. Mutual respect and support for the security provisions desired by each country are to be honored as well, and unsatisfactory compliance not remedied in fifteen days is cause for revocation of operating rights.

A. Treaty Preeminence

By its terms, the U.S.-EU Air Transport Agreement supersedes all prior bilateral agreements among signatories. This provision is a departure from previous agreements such as the U.S. – United Kingdom Bermuda II agreement which specified that U.S. anti-trust legislation would prevail. The new Open Skies agreement outlines broad commercial and financial liberalization and harmonization, but it does retain some specifications where the requirements of the treaty are not to supersede, European Union, United States, or member state laws. Article thirteen, Pricing, is one example where U.S. fares for routes within the E.U. must be consistent with Article one, section three of Council Regulation

100. Id. Art. 7.
101. Id. Art. 8.
102. Id. Art. 9.
103. AN INTRODUCTION TO AIR LAW, supra note 90, at 63.
LAW AND BUSINESS REVIEW OF THE AMERICAS [Vol. 14

(EEC) 2409/92 of 23 July 1992. As we move forward to the agreement’s second stage (Phase II) over the coming years it is noteworthy that any terms agreed to and ratified by the U.S. Senate will be binding upon all U.S. licensed corporations.

By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress.

Heightening the significance of the treaties prevalence over domestic law are this treaties dispute resolution provisions regarding interpretation or application of the treaty. Articles eighteen and nineteen establish binding decisions by the Joint Committee of the member states or appeal to a three member board of arbitration. These ruling powers are more controlling in many ways than those under the U.S. Railway Labor Act discussed in section I.B above. Thus the potential impact on U.S. labor of the Second Stage of the U.S.-EU Air Transport Agreement is enormous.

B. RELATED PLURILATERAL INTERNATIONAL AGREEMENTS: THE WTO AND GATS

While the World Trade Organization in its Annex 4(a) Agreement on Trade in Civil Aircraft, and its Annex 1B from the Uruguay Round of General Agreement on Trade and Services (GATS) include aircraft parts and related equipment, as well as maintenance and computer reservation services, they only address ancillary rights not directly related to the control of air routes or labor rights. The GATS Annex on Air Transport Services specifically excludes “traffic rights, however granted;

109. Id. at 1168.
110. AN INTRODUCTION TO AIR LAW, supra note 90, at 66.
or services directly related to the exercise of traffic rights . . .”111

C. GOALS FOR THE COMING TREATY AFFECTING LABOR ISSUES

Article twenty-one of the Agreement states the timetable and goals for Phase II.112 Among them is “provision of aircraft with crew.”113 At its most benign, this could simply refer to safety standards for minimum manning. But with the predicted shortage of licensed pilots,114 it could be used to support initiatives for a new universal and more rapid licensing for commercial aircrews.

Under the current ICAO system, pilots authorized to fly in an aircraft’s country of registration are legal to fly into any ICAO contracting nation. Already, ICAO is promulgating new Standards and Recommended Practices in its first major alteration to its Annex I on Pilot Licensing since 1944, called the Multi-Crew Pilot License.115 More drastically, the Open Skies “provisioning of aircraft with crew” could lead to global implementations of mandatory crew duty hours, and to legalizing aircraft fully staffed by labor from lowest cost foreign countries outside the company’s state of registry.

Also encouraged for development in Phase II will be increased foreign ownership rights, and further liberalization of air traffic rights.116 The later implies full open cabotage access to all flying within the United States. Open cabotage almost makes ownership inconsequential. Once a foreign registered corporation has full rights to establish a route structure within the U. S. market, there is limited need to take ownership of an American carrier.

IV. POTENTIAL CHANGES FROM “OPEN SKIES”: U.S. DEREGULATION’S EFFECT ON AIRLINES, CONSUMERS, AND LABOR AS A FORECAST

What guidance is available to forecast the impact of Open Skies leading to global access to the U.S. aviation market? While the GAO tried to answer that question by studying results of increasing numbers of parallel yet independent bilateral Open Skies agreements with foreign carriers buttressed with concurrent selective exclusions to anti-trust restrictions,117 perhaps the results of the U.S. domestic deregulation provide a more accurate barometer. Deregulation in aviation is an Act of Congress which lowered prices for the U.S. consumer. A look at the trends of globalization in other major U.S. industries and skilled labor groups may

111. Final Act, supra note 108, at 1188.
113. Id.
117. Transatlantic Aviation, supra note 96.
also predict the impact of such a drastic market change on the aviation labor group. This section explores how deregulation has affected U.S. consumers, its financial impact on the commercial aviation industry and its workers, and the ability of the government to support and effectively regulate such wholesale liberalization of market access and control. It closes with a look at legal coping mechanisms developed by air carriers and those which may be required to meet further liberalization.

The Government Accountability Office (GAO) reports that the median price of an airline ticket today (in constant dollars) is down forty percent since 1980. The number of flights within the United States has nearly quintupled since domestic deregulation began. Total industry revenue (in constant dollars) has more than doubled since 1978, however, profits for the industry overall have not increased. Pilots at established airlines today have only two-thirds the purchasing power they had in 1978. A host of ills raise questions of the Act’s benefit. Senator John McCain, as chairman of the United States Senate Committee on Commerce, Science, and Transportation, requested the U.S. Government Accountability Office (GAO) evaluate the impact of broad new regional Open Skies agreements between the United States and the entire European Union. The GAO anticipates potential benefits to U.S. consumers, airlines, and labor, but concedes there is the possibility that European airlines may consolidate, relocate, or create subsidiaries in lower cost new European Union member countries which would eliminate current jobs, reduce wages overall, and possibly decrease competition and consumer choice. They base this belief principally on the changes seen in the past fifteen years with the increasing number of independent bilateral U.S. Open Skies agreements with EU nations that carry small percentages of transatlantic traffic.

The GAO based their answers by looking at results of increasing numbers of parallel yet independent bilateral Open Skies agreements with foreign carriers with concurrent selective exclusions to antitrust restric-

120. Airline Deregulation, supra note 118, at 12.
121. See Id. at 12-14.
123. Transatlantic Aviation, supra note 96, at 18.
124. Id. at 1.
125. See id. at 14-36 (EU Member States with Bilateral U.S. OpenSkies Agreements since 1992 are: Netherlands’92, Austria’95, Belgium’95, Czech Republic’95, Denmark’95, Finland’95, Luxembourg’95, Sweden’95, Germany’96, Italy’98, Portugal’99, Malta’00, Slovakia’00, France’01, Poland’01).
tions. Perhaps a more appropriate indicator of the impact of sudden liberalization of the marketplace would be to look at U.S. aviation deregulation or other globalized major industries and answer some basic questions such as: Does the consumer have greater choice of product? Is the product quality improved? Has the price of the product relative to average income decreased? Does the new product enhance safety and security for the American consumer? Have the workers in the industry realized improved benefits or wages? If not, does the loss to those workers significantly harm the economy in general?

Only Southwest Airlines has prospered since the Airline Deregulation Act was passed, and just one single other major airline has managed to survive intact.\(^1\) Airlines have reduced and outsourced their maintenance to minimum levels on aging fleets, the air traffic system is overloaded, and on-time performance is at an all time low. Customers have literally been treated like cattle and held captive on unserviced airplanes.

This article will not expand into covering the effects of unbridled competition upon the aviation keystones of safety and security. Another study could be written on increasing concerns that runway safety and proper FAA safety oversight from maintenance to incident reporting are falling below adequate levels.\(^1\)\(^2\) And despite the oppressive presence of the Homeland and Transportation Security Administrations, lack of ability to effectively secure U.S. borders is unlikely to be improved by completely opening U.S. skies to anyone who wants to fly registered aircraft in and about the continental United States.

A. Remember Pan Am, Has any U.S. Carrier Really Survived Deregulation?

Since Supreme Court Justice Stephen Breyer (then an attorney on the staff of Senator Kennedy) and Senator Ted Kennedy determined to clean up the cronyism and corruption at the government’s Civil Aeronautics Board (CAB) in 1974,\(^1\)\(^2\)\(^8\) only a single major airline from that year is still flying in the U.S. today without having entered bankruptcy.\(^1\)\(^2\)\(^9\) As the follow up to eliminating the junket jewel of government administrative agencies, the CAB, Senator Kennedy showcased Yale economist Alfred Kahn to educate Congress and the American people on the purported need for, and benefits to be gained by, deregulating the airlines.\(^1\)\(^3\)\(^0\)

Since the Airline Deregulation Act of 1978 was passed, no fewer than


\(^{128}\) See Peterson & Glab, supra note 21, at 35-48.

\(^{129}\) Will, supra note 127.

\(^{130}\) See Peterson & Glab, supra note 21, at 46-48.
145 airlines in the U.S. have gone out of business. America's international flagship airline Pan American is now a relic of a bygone era. At least seventy-eight airlines started after 1978 have not survived under deregulation. Among the more famous on that list was employee owned Peoples Express; among the more infamous was Frank Lorenzo's cannibalistic Texas International. Before its collapse Texas International parent Texas Air Corporation held title to one of every five seats in the skies over the continental United States.

As a presidential candidate, Bill Clinton assessed U.S. deregulation of the airlines by stating that "we've wrecked the airline industry." Robert Crandall is widely considered to be among the most innovative and successful leaders of any airline in history. The former American Airlines Chief Executive Officer offered a more measured analysis of what deregulation did to the industry by stating in his famously direct and conclusive manner, "deregulation is profoundly anti-labor . . . there has been a massive transfer of wealth from airline employees to airline passengers."

B. PRESCIENT TRADE INDUCED CHANGES IN OTHER U.S. INDUSTRIES

Labor in other U.S. industries which have experienced global liberalization has experienced a similar loss of job security and participation in corporate profits. The auto industry is a prime example. But highly educated U.S. labor in areas such as telecommunications engineers and the legal profession have also seen the very services they created facilitate ownership's ability to transfer valuable jobs over to foreign-based work centers. The Air Transport Agreement mentions benefiting labor as a goal, but it does not provide operational or legal structures to ensure it. Similar shortcomings in the North American Free Trade Agreement resulted in indirect, but significant costs to U.S. workers and taxpayers. The experiences in other industries and with other agreements establish concerning trends of eliminating job opportunities which establish a middle class work force that forms consumers and taxpayers who sustain the American economic system.

Henry Ford institutionalized the assembly line and raced to supremacy in the auto industry with the philosophy that paying workers good wages, and providing good benefits gained worker loyalty, a superior quality product, and created a working class that would not only be producers, but could be consumers as well.

Back in 1973 it was the unexpected rise in oil prices by the Organization of Petroleum Exporting Countries (OPEC) that triggered the tumult

132. Id.
133. PETZINGER, supra note 21.
134. PETERSON & GLAB, supra note 21, at 11.
135. Id. at 127.
in the U.S. auto industry.\textsuperscript{137} In that year, the sixteen U.S. automakers produced over ten million vehicles.\textsuperscript{138} By 1982, U.S. auto production had dropped to just over six million, and Chrysler, propped up by federal loans, was struggling to survive.\textsuperscript{139} That year, while the auto industry pressured Congress to pass laws restricting United States import of foreign made cars, Honda built the first Japanese owned manufacturing plant inside the United States.\textsuperscript{140} By 1990 the U.S. population had increased 20 percent over 1973,\textsuperscript{141} but U.S. production of autos dropped more than 40 percent for the same period.\textsuperscript{142}

Much as Pittsburgh once was a mighty steel town, today Detroit is crumbling with the fall of the auto industry. The Detroit auto manufacturing area reports the highest unemployment in the nation.\textsuperscript{143} Correspondingly, defaults on home mortgages for the motor city are at the highest rate in the nation, nearly five times the national average.\textsuperscript{144} Personal bankruptcy in Michigan is at an all time high.\textsuperscript{145}

The unionized American autoworker has been displaced by direct competition of foreign carmakers producing abroad and at the foreign non-unionized plants outside Michigan. In the twenty years from 1978 to 1998, the number of United Automobile Workers of America members fell by over 67 percent.\textsuperscript{146} The 2007 contracts for the UAW cut even deeper; U.S. automakers claimed they had to slash previously guaranteed medical retirement benefits to remain viable competitors in the market.\textsuperscript{147} U.S. automakers intend to cut union jobs even further in the com-

\begin{thebibliography}{9}
\end{thebibliography}
Similarly at the U.S. airlines, management continues to push for further cuts in labor cost so they can remain viable competitors in their market. The Airline Industry Consortium has funded what they term “The Airline Data Project” at the Massachusetts Institute of Technology to indoctrinate the academic community, financial community, and news media on the factors the consortium wants “considered as the industry confronts consolidation, new competition and renegotiated labor contracts.” Their stated goals include “finding a new model for compensation that is durable and works to address the cyclicality of the industry.” This indicates a definite intent not to fly into the next decade following the status quo.

In the telecom industry, when the economic impact of the 9/11 terrorist attacks hit Wall Street, the market capitalization for telecom carriers had dropped by 2.9 trillion dollars. To survive, the industry went into extensive cost cutting that included massive layoffs and efforts to replace essential design and production at substantially lower costs. U.S. companies reduced costs by relying upon lower wage engineers imported from overseas, and by moving production and design to lower cost centers abroad, particularly in India. American engineers who created the ability to store, process, and transfer information across the globe in an instant, created the opportunity for U.S. companies to access and utilize similar skills and production from any location in the world.

Where some industries have found educated workers and stable, industry favorable governments outside the United States, other industries have followed. Even in the legal profession today, increasing numbers of firms are contracting legal research to India. As of 2006, over sixty firms outside the United States provide contract work to companies and legal firms inside the United States. At least eleven law firms with international presence, firms like Baker McKenzie and Clifford Chance, now also outsource a significant portion of their legal support work such as document review, processing, accounting, and information technology and basic administrative support.

This Agreement, like others before it, delineates rights and limits on owners, but does not delineate protections for U.S. labor. Broad agreements such as the North American Free Trade Agreement (NAFTA) inevitable sire unanticipated problems. Immigration control and boarder
security are key issues in U.S. politics now. While NAFTA liberalized the trade of goods and services, it did not standardize, unify, or harmonize a common legal structure for the free movement of labor.155

Nor did NAFTA provide for a unification of currency or capital and accounting systems as has the European Union. The collapse of the Mexican peso in 1994 and the falling international value of the U.S. dollar have also added complications for businesses trying to predict the future business market and plan investments. But the treaty does allow a legal remedy for foreign investors “unfairly harmed” by NAFTA regulations via extra-judicial special NAFTA tribunals which may award U.S. government funds in compensation.156 Labor or consumers are not afforded similar access to the tribunals.157 By 2004, $13 billion in claims had been made against the U.S. government.158 To gain political backing, business risk was legally passed to U.S. taxpayers. This is but another example of how treaty provisions can be crafted to persuade opposition to allow their passage, sometimes in ways which harm the American laborer.

Clearly the trend in high skilled professions is to follow the lead of lower skilled industries and take advantage of the lower costs available through contracting, partnering with, and possessing support operations in foreign countries. There is little reason to think that cash strapped U.S. airlines or established EU carriers would not take advantage of such opportunities. The U.S. Government Accountability Office report to Senator McCain acknowledged that possibility. The report also explained how the United States and European Union have already approached such leveraging during the decades of their separate deregulations and increasing, but independent, bilaterally limited Open Skies agreements to date.

C. PRICES ARE LOWER, MORE PASSENGERS ARE FLYING; ARE THEY BETTER SERVED?

So who is paying and who is gaining from U.S. deregulation? Some data would indicate the consumer has fared well, yet recently Congress is investigating FAA oversight, air traffic management, and creating a bill of rights for fair treatment of the traveling public on commercial airlines.159

156. Id.
157. Id.
158. Id.
The average airfare (adjusted for inflation) did drop by roughly a third from 1977 to 1992.\textsuperscript{160} Airline labor productivity from 1990 to 1997 rose over 25 percent.\textsuperscript{161} Some estimate that U.S. deregulation passengers realized savings of one hundred billion dollars in its first fifteen years.\textsuperscript{162} The number of people with service all across the nation has vastly expanded by the airlines hub and spoke system. The number of passengers carried by U.S. scheduled airlines was nearly five times greater in 2007 than in 1977.\textsuperscript{163}

But complaints of lost baggage and poor service are up as flight delays are at an all time high.\textsuperscript{164} And those delays are only recorded as being in excess of scheduled times. The airlines already add time for expected ATC delays into their posted schedules. Nor do mere delay numbers convey the problems caused when passengers on connecting flights arrive too late to make it on to their connecting flight. Without even considering the hassles and delays generated by the Transportation Security Administration inspections, the pre-deregulation excitement and glamour of jet travel has become a dreaded necessary evil for most of the traveling public.

D. UNREGULATED EXPANSION HAS EXCEEDED INFRASTRUCTURE CAPACITY

Unfortunately, the U.S. air traffic system capacity and the airport surface area in major cities have not expanded while in the words of premier airline analyst Michael Boyd:

Virtually every necessary upgrade to the ATC system is behind schedule, over cost estimates, and mismanaged. Worse, the FAA is not above simply “re-benchmarking” an overdue program, setting a new date for completion, and telling the world the project is “on time.” That type of management is precisely the reason many of today’s airline flights aren’t on time.\textsuperscript{165}

The current benchmark for a technology upgrade to our basic radar control system that was due in 2001 is 2012 with a 50 million dollar cost


\textsuperscript{162} Asif Saddiqi, \textit{supra} note 160.


With airports and controllers pushing the system too its limits nearly all day long, it increases the chances for an error that can lead to more than one aircraft being on a runway at the same time. Such incidents are rising to record levels and are on the National Transportation Safety Board’s (NTSB) “Most Wanted” list.\textsuperscript{167}

Beyond the hardware, the human side of the air traffic system is at a breaking point as well. The air traffic control staffing has never fully recovered from the presidential firings of nearly 10,000 air traffic controllers during the Professional Air Traffic Controllers (PATCO) strike of 1981.\textsuperscript{168} Now the bow wave of replacements is retiring at the rate of three per day, and two-thirds of the current staff are expected to be gone within eight years.\textsuperscript{169} Yet the FAA is just now beginning to fund major hiring efforts. The Government Accountability Office reports that the current shortage of controllers has resulted in controllers working maximum allowed hours up to six days a week.\textsuperscript{170}

The controllers vector aircraft flown by pilots who have lost their retirement funds in bankruptcies and taken large pay cuts since 9/11. Many of the pilots are also pushing themselves to the legal limits to keep up with their mortgage payments, the rising costs of energy, and college educations. The Vice-Chairman of the NTSB warns, “Operating or controlling an aircraft without adequate rest for the flight crew or controller presents an unnecessary risk to the traveling public.”\textsuperscript{171} Pushing the system and its people to the limit in an endeavor where safeguards are so vital is not a wise business practice, nor one that governmental regulation should incentivize. With the current resources and manpower intermittently maxed out, it appears there is no realistic hope for expansion of actual service capacity within the current major U.S. airport networks.

The supply of qualified pilots to safely man a vastly expanded system is in question as well.\textsuperscript{172} This may be the remaining strong card the pilots hold to resist further demands that they do work more hours for less pay and benefits. But it also increases the incentives for owners to alter the legal structure to enable them to generate large numbers of available certified labor from non-traditional sources.

Even today, copilot pay at commuter airlines is less than $20,000 per year starting and tops out around $34,000.\textsuperscript{173} The number of military
trained pilots available has dropped, and with barely cost of living wages, U.S. commuter operators are having trouble finding applicants for available jobs.\textsuperscript{174} Instead of raising pay and benefits to draw employees, companies are significantly lowering the experience requirements for the job. American Eagle has dropped requirements for new pilots down to only one hundred hours flight experience in a multiengine aircraft.\textsuperscript{175} Just as the U.S. high tech industry sought to deal with the financial pressures of overexpansion and huge market devaluation in the face of pressing needs for rapid growth to establish a survivable critical mass in the market place, the International Civil Aviation Organization has been involved in generating a new source of pilots.

While ICAO does not license pilots, their standards require that all member states recognize the licensing of any other state so long as minimums listed in Annex 1, Personnel Licensing, and the license is issued for flying an aircraft registered in the state that has issued the license.\textsuperscript{176} But ICAO has supported the creation of a new pilot training and license program to issue a new multi-crew pilot license (MPL). Major U.S. airlines still hire only pilots with several thousand hours of experience flying in actual aircraft to fly passengers on their large commercial jets.\textsuperscript{177} The MPL will certify a high school graduate, who has never flown before, to become a co-pilot on an airliner that requires more than one pilot in less than one year of primarily simulator based training.\textsuperscript{178} This reduction in "spin up time," coupled with the recent extension of mandatory pilot retirement age by ICAO and the FAA,\textsuperscript{179} should provide short-term relief to fill the gap.

But while the U. S. Federal Aviation Administration must allow foreign pilots with MPL licenses to fly airliners registered in their licensing country to fly into U.S. airports, the FAA does not issue multi-crew pilot licenses, and no U.S. registered aircraft will fly with such pilots. Thus, like offshore design and production for U.S. high tech companies, U.S. airlines may find that off-shore labor costs and work rules a more profitable choice to expand operations even within the United States. Open Skies may provide incentive to expand via foreign owned subsidiary operations flying into and through fully deregulated U.S. airspace in the coming years.

\textsuperscript{177} Scott McCartney, supra note 174.
\textsuperscript{179} Scott McCartney, supra note 174.
E. Deregulation Expansion Via Anti-Trust Exemption

As evidenced by the numerous bankruptcies that have occurred since deregulation, the airlines are unforgivingly ravenous for capital. When the scheduled departure time arrives, the inventory of unsold seats becomes lost product. As the United Kingdom predicted at the Chicago Convention in 1944, deregulation of capacity and access tends to result in near suicidal contests to establish a dominant market position and sell every seat via lowered prices.\textsuperscript{180} In the United States, the Department of Transportation (DOT) holds the power to exempt airlines from anti-trust law provisions.\textsuperscript{181} This power is exercised under the advisement of the U.S. Department of Justice, pursuant to the Sherman Antitrust Act and the Clayton Act.\textsuperscript{182} In 1987, the DOT allowed domestic carriers to collaborate in scheduling flights at major airports.\textsuperscript{183} The agency's apparent purpose was to resolve ever-mounting numbers of delays, as the understaffed air traffic control system was overwhelmed by the unconstrained, simultaneous scheduling of the ideal takeoff times by numerous airlines.\textsuperscript{184}

Traditionally, when restricted international routes became available, the airlines purchased them, along with the additional aircrafts to service the new routes.\textsuperscript{185} Airlines provide a “perishable” product through a complex symphony of labor-intensive services with huge fixed costs. With fares dropping dramatically, however, the airlines had less capital to finance such expansions. In 1987, United Airlines went from having no flights across the North Atlantic, to becoming a major player into that “global gem” of aviation—London’s Heathrow airport.\textsuperscript{186} The airline accomplished this expansion, at minimal cost, by simply “code-sharing” with British Airways.\textsuperscript{187} In the process, DOT let the saving grace of anti-trust immunity go global. Government intervention relaxing anti-trust immunities has allowed some airlines to compete and expand internationally with minimum expenditure via code-sharing agreements, while providing no benefits to their domestic labor.\textsuperscript{188}

The economic shock of the first Gulf War in 1991 wrenched the economic crunch on the industry even tighter. The U.S. airlines lost more money in the two years following the Gulf War than the sum total of all profits for the industry in the previous sixty years.\textsuperscript{189} As had a host of air carriers in the domestic market, Laker Air showed that even across the

\textsuperscript{180} CHENG, supra note 5, at 18-27.
\textsuperscript{181} See PETERSON & GLAB, supra note 21, at 216.
\textsuperscript{182} Transatlantic Aviation, supra note 96, at 18 n.21.
\textsuperscript{183} See PETERSON & GLAB, supra note 21, at 216.
\textsuperscript{184} See id.
\textsuperscript{185} See PETZINGER, supra note 21, at 333-35. The purchase of Eastern Airlines' South American routes by American Airlines in 1989 is an example of how attractive the restricted international routes can be when they become available.
\textsuperscript{186} PETZINGER, supra note 21, at 354.
\textsuperscript{187} Id. at 354.
\textsuperscript{188} See Transatlantic Aviation, supra note 96, at 16.
\textsuperscript{189} PETERSON & GLAB, supra note 21, at 298.
North Atlantic, cut-rate pricing could not sustain the capital requirements in an industry so affected by broader economic downturns.\textsuperscript{190} Traditional growth methods were no longer effective in a growing international climate of cutthroat competition for market presence.

Beginning in 1993, when the DOT felt that some U.S. airlines simply did not have the capital to generate an international system of the size required for competitive sustainability, the government expanded exemptions to the restrictions imposed by anti-trust law.\textsuperscript{191} Such immunity, aimed in part at effectively integrating networks and service with other international carriers, has only been allowed for alliances with foreign carriers registered in nations that have signed bilateral open skies agreements with the United States.\textsuperscript{192} This became the functional method for linking domestic deregulation into the expanding global networks until the new comprehensive U.S.-EU Open Skies Agreement.\textsuperscript{193}

As predicted by the United Kingdom in 1944, unregulated access to market entry aviation has lead to a fiscally suicidal competition for dominant presence. Deregulation has provided survivable conditions for only the most efficient, or temporarily advantaged, carriers while all others fly on the edge of stalling out of existence when external constrictions afflict the market. As a result, there is constant pressure to reduce all costs by providing the least acceptable service, labor is constantly treated as a burden rather than the core of production, and the air traffic system is overloaded to its physical limits. Deregulation was intended to enhance consumer choice through increased competition, but air service in the United States is about to collapse into only four major airlines. Government agency application of anti-trust immunity and bankruptcy law has been a dominant factor enabling the very existence of airlines through "deregulation."

VI. CONCLUDING OBSERVATIONS: WHERE WE ARE HEADED: POTENTIAL OUTCOMES FOR AMERICAN LABOR OF INTERNATIONAL LIBERALIZATION OF AVIATION

In remarks heralding the new U.S.-EU Open Skies Air Transport Agreement to the International Aviation Club, DEPUTY ASSISTANT SECRETARY FOR TRANSPORTATION AFFAIRS JOHN R. BYERLY stated that although this new Agreement, and the vast changes in global aviation of the past twenty years, and even the past twenty months, may seem extraordinary, "we haven’t seen anything yet."\textsuperscript{194}

\begin{itemize}
  \item \textsuperscript{190} See PETZINGER, supra note 21, at 188-89.
  \item \textsuperscript{191} See Transatlantic Aviation, supra note 96, at 18.
  \item \textsuperscript{192} Id.
  \item \textsuperscript{193} See U.S. Dept’t of State Fact Sheet, supra note 4.
\end{itemize}
For U.S. labor this likely means little relief from (or even an acceleration of) the trends from domestic deregulation. Broadening deregulation of U.S. skies to a global scale may incite a fiscally precipitous race to expand, and overload a system already overtaxing its capacity. As the total number of jobs keeps increasing, working conditions and pay for those jobs continues to fall. Industry profits will remain flat under the pressure from new entrants who continue to drive prices down to suicidal levels. Under these pressures, more carriers will go bankrupt or cease operations.

It could get even worse for U.S. labor; the Air Transport Agreement Phase II allowances could institute a new globally harmonized legal structure which, as has occurred in other U.S. industries, undercuts the legal support which provided labor leverage to sustain profitable careers under favorable work rules. The original Chicago Convention was not crafted from altruistic or purely business considerations, but was the product of vigorous political-power maneuvering including personal confrontations between Winston Churchill and Franklin Roosevelt. With fully open skies and legal authorization, airlines could potentially reincorporate and staff from more economically favorable nations.

A. Navigating Supraterrestrial Transformation

Phase II of Open Skies is but a first step as the world moves towards global harmonization of the aviation industry. The industry is ripe for revolutionary change. Information technology may have surpassed aviation as the medium compressing distance to create a meeting place for social and business interactions, and enhancing the interconnectedness and interdependence between nations. For aviation to keep pace with other rapidly advancing tools of international commerce, it will require investing in a single global integrated air travel system that is as seamless and unified as possible. If our government allows regulation or statute to unduly restrict that progress, the United States will lose business opportunities in the global marketplace. The need to move forward rapidly creates a temptation to pursue methods gaining that advance with insufficient minimum capital outlay. There is potential for massive outsource and offshore ownership of what has been an industry of American strength and leadership since the Wright Brothers first flight at Kitty Hawk.

We should evaluate such choices with a broad consideration of what constitutes progress. The aviation industry remains a field where the tools of technology and regulation must achieve a workable balance. It is an industry central to national security and the daily safety of great num-

bers of our citizens. We should look to advance global aviation in a manner which does not shortsightedly undermine the oversight and training required to guarantee this nation reliable, secure, and safe air transport service.

The aviation industry is important to American economic and strategic strength and prosperity. This necessitates measured resistance to regulatory arbitrage and social losses even as we pursue enticing economic liberalization. It seems possible that cost-conscious haste may result in business choices which exterminate another segment of domestic skilled labor. It seems imprudent that, while our government still fully controls policy and activity within our national borders, it should allow this race to benefit from global compression and interconnectedness at the lowest cost—a race that continues to consume the standard of living of the very workers who created the foundation for that progress.

B. MUCH MORE OF THE SAME: THE NEAR TERM OF EXPANSION WITHOUT EXPULSION

Just as U.S. carriers have seen new entrants, even those with much lower cost structures, come and go out of business, it is possible that the potential flood of new European carriers over U.S. skies will do nothing more than prolong the expansion in number of cities served and of flight frequencies being offered at prices under ever downward pressure. These dynamics keep the whole industry at minimal profits while labor watches its pay and benefits slowly dwindle. It is not surprising if labor unions sense that now may be the time for them to make their “last” stand to prevent losing their share of whatever prosperity the industry may achieve. Accordingly, the coming rounds of aviation labor negotiations may well require actions by the President or Congress to reach settlements.

Companies and countries preparations for this month’s start of Open Skies indicate they will move to expand and cut labor pay and benefits. Both European and U.S. airlines are moving toward newly allowed consolidations, international airports are being created or expanded, and entirely new international carriers are being launched. Businesses and nations are positioning themselves to be the ones in the industry who possess the “abundant factors which will benefit” as international aviation liberalizes.196

U.S. carriers such as Delta and Northwest or United and Continental are in serious discussions to consolidate. Like the Japanese did in the auto manufacturing industry, Britain’s Virgin Air is trying to establish it-

self using resources within the United States by establishing a presence with new U.S. based Virgin America. London's Heathrow airport has opened new slots, a new terminal, and is currently seeking approval to start on a new runway as well. At the same time, British Airways (BA) will challenge Ryanair's new trans-Atlantic discount service with its discount subsidiary—Open Skies. Furthermore, the merged Dutch KLM and Air France have acquired a stake in Alitalia, while Lufthansa-SAS has begun cross-oceanic acquisitions by buying a stake in the U.S. airline, JetBlue.

Indications are that organized labor will make a stand to avoid being cast aside in these coming expansions. They take the experiences with globalization of other formerly dominate U.S. industries, and the results of regional and world-wide trade liberalization, as examples that do not bode well for highly paid labor. In 2008, British Airways pilots voted overwhelmingly to conduct industrial actions if British Airway staffs their new OpenSkies airline with non-BA pilots. Realizing such actions would face protracted appeals in litigation, they have decided to seek EU-wide support for a change in applicable laws so that Article 43 of the Treaty of Rome might not be interpreted to prohibit such a job action.

Wisely recognizing that national legal authority is still essential if they are to prevail, "[t]he British Airlines Pilots' Association has successfully applied for a speedy High Court trial on the legitimacy of the proposed strike action by pilots in British Airways who are opposing the airline's plan to outsource their jobs." The pilots at American Airlines have already asked for the U.S. National Mediation Board to declare an impasse in their negotiations to recover the concessions they surrendered to avoid bankruptcy in 2003. Similarly, the pilots at Delta and Northwest Airlines have taken an active pre-merger role in negotiating labor agreements to an extent that could control whether those companies conclude

---


199. Clark, supra note 197.


a deal. The current tight supply of licensed pilots, and the increasing competitive need for airlines to provide frequency on key routes, may allow labor groups to successfully flex their leverage for the near term.

But with today’s tenuous economy and the strangling pressures of ever rising fuel costs, it is likely that the President or Congress – as the President demonstrated in issuing Executive Order 13205 to prohibit strikes in aviation in the Spring of 2001 – will have little tolerance for action by any group that puts additional strain on U.S. interstate or international commerce. It is most likely that for the coming year or two this industry will continue to see established carriers seek to battle an onslaught of new carriers by lowering costs in every conceivable area while expanding in every legal and fiscally conceivable manner. The government will not allow labor to recoup any decreased pay or benefits at the expense of consumers, and the air transport system performance will continue to deteriorate as the government attempts to allow market expansion in an air traffic control system which operates beyond its current staffing and physical capabilities.

C. A Whole New World: Aviation Truly Goes Global, and Jobs Go With It

There are already indications that the Air Transport Agreement could usher in an entirely new business model for providing air travel. Aviation’s gateway to the world, London’s Heathrow airport, is expanding physically and competitively as the United Kingdom unlocks its crown jewel to new carriers and new destinations. For the first time in history new scheduled low-cost carriers are attempting to provide point-to-point scheduled service across the North Atlantic. In opening the U.S. market to the EU aviation industry, we invite in a community that has enthusiastically employed the successful strategies of Southwest Airlines in the United States. Since 1994, the number of Southwest-style operators in the EU has gone from zero to sixty. With the service of EasyJet and RyanAir, the British now own more second homes in foreign countries, per capita, than any other nation. The opportunities to expand global service via alliances without any acquisition of new equipment or staff are about to expand significantly.

But even the liberalizations of the Second Stage of the U.S.-EU Air Transport Agreement in 2010, “Open Skies, Phase II,” are only a first

---

206. See id.
step in liberalizing restrictions among all nations on the globe. It is but
the catalyst for further agreements toward producing a truly seamless lib-
eralization and harmonization of all the world’s aviation markets. Even
now the Association of South East Asia Nations (ASEAN) is in negoti-
ations to create a single open skies agreement to cover all operations in
South East Asia. Japan has now unilaterally opened twenty-three of
its airports to unrestricted access to foreign carriers. Once the EU and
Asian nations harmonize, the consolidations between European carriers
will no longer be precluded by loss of routes and rights in Asia. As a
result, there will be virtually no limits on contracting labor from the low-
est-cost regions of the world to gain license and provide crews for aircraft
flying into any part of the world.

Countries and companies that plan to capitalize on these coming op-
portunities are already investing to establish the capability and reputation
to link the major commercial markets. Emirates airlines has made large
purchases of the world’s largest commercial production aircraft, the
Airbus 380 which can carry over 500 people, and is building a new airport
in Dubai to match the capacity of London’s Heathrow. Emirates is clearly positioning Dubai to become the new world center for a fully lib-
eralized system that links the Far East to the “Old” and “New” worlds.
India’s Jet Airways and Kingfisher Airline are crafting similar expansion
strategies for Mumbai and Bangalore, India.

Here in the United States, the legal framework intended to provide
workers some sense of financial security seems to be doing anything but
that. Both United and Delta Airlines remain in operation today largely
as a result of eliminating billions of dollars of promised retirement bene-
fits for their workers. Also, laws greatly affecting aviation have been
changed in record time. For example, although a provision raising the
airline pilot retirement age by five years did not include any validating
medical studies by the FAA and was not even an element of the original
House version of the FAA Reauthorization Act in July 2007, it was sin-
gle-lined as the Fair Treatment for Experienced Pilots Act and run
through Presidential signature into law in just two days—despite the fact
that it was voted down previously as a part of the rejected Senate version
of the FAA Reauthorization Act in November 2007. Furthermore, the
chief economist for the Air Transport Association, which represents U.S.
airline owners, concedes that a new round of bankruptcies may become a

207. Joseph C. Anselmo, Squeezing Less Out of More, AVIATION Wk. & SPACE TECH.,
208. Id. at 38-39.
209. Id. at 38.
210. Sandra Arnoult, Congress Makes Progress on Pilot Retirement Bill, ATW DAILY
Congress has since passed the Fair Treatment for Experienced Pilots Act, which
was subsequently codified at 49 U.S.C. § 44729.
consideration to combat rising unit costs.\textsuperscript{211}

In 1996, after a fiery crash and ruinous revelations of safety violations, the corporation known as ValueJet folded, only to have its assets resurrected under new management as AirTran.\textsuperscript{212} It is not beyond comprehension that, under the burden of ever rising oil prices and competitive pressure from new foreign carriers undercutting the cost structure of even the most frugal carriers in the United States today, management of existing U.S.-owned airlines might move beyond coping strategies employed in the past. Beyond mere alliance and code-share agreements with established foreign carriers, or availing themselves of bankruptcy debt and cost reductions, U.S. airlines could develop foreign subsidiaries in rising EU or Asian countries and conduct the bulk of their operations or growth through the subsidiary. Such tactics would be opposed by U.S. labor claims of violation of contract rights to carry all passengers of the parent company. This could drive the ultimate transformation where U.S. carriers could potentially liquidate themselves, shed expensive labor, and resurrect their physical assets under foreign registration and staffing.

The airline industry could transform to resemble the shipping industry which commonly sails under flags of convenience. The U.S. Government Accountability Office has noted that under full harmonization of laws, it might become economically attractive for European carriers to restructure under registration in emerging nations with forty percent lower labor costs.\textsuperscript{213}

Such dramatic change cannot happen in the next few years, but if the stated goals of Open Skies Phase II are enacted into treaty in their most liberal form, and EU-Asian liberalization and harmonization accelerate, it is a potential outcome. And although such a labor dump is in direct conflict with the guidelines of the OECD, those guides have no binding authority. In fact, when attempting to craft rules for the European Union’s Societas Europeae, no binding provisions were reached on employment contracts or pension schemes.\textsuperscript{214} When the legal force of Open Skies and its amendments force liberalization of the market, without providing mandates for either extended-term capital viability of air carriers entering markets or clear and enforceable protections for labor, today’s financially paralyzed U.S. carriers could see themselves withered as changing legislation allows airlines based or incorporated in the most minimally regulated, taxed, and labor protective nations to fly in and dominate our skies.

\begin{footnotesize}
\begin{enumerate}
\item[213.] Arnoult, \textit{supra} note 211.
\item[214.] FOLSOM ET AL., \textit{supra} note 196, at 960.
\end{enumerate}
\end{footnotesize}