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THE 1926 RAILWAY LABOR ACT AND THE MODERN AMERICAN AIRLINE INDUSTRY: CHANGES AND "CHAOS" OUTLINE THE NEED FOR REVISED LEGISLATION

LISA CATHERINE TULK

I. INTRODUCTION

THE RAILWAY LABOR Act ("the RLA") has governed labor in the airline industry since the industry's infancy, and is tailored to unique aspects of the transportation system in the United States. The RLA recognizes that the transportation industry is vital to commerce and that interruptions in the operations of the industry due to labor disputes can paralyze American commerce until such disputes, which may be relatively minor, are resolved.

The airline industry has dramatically changed since the RLA was adopted. The industry has matured past infancy, undergone government deregulation, and faced modern competitive pressures in changing economies. Through all of this, however, the RLA has remained remarkably static while labor conditions and the importance of labor in the industry has changed. Labor is increasingly becoming a greater issue in airline operations as competitive pressures require increased efficiency and cuts in operating costs, and additionally, as bankruptcy becomes an increasingly common fate for major carriers.

In light of the changes to the airline industry, a real issue exists as to whether the RLA still meets the transportation industry's needs while adequately protecting the interests of organized labor. The checks and balances between airline management and labor unions still aim to promote continuity and stability in the airline industry, but disputes have increasingly resulted in otherwise illegal job actions because remedies are not readily available. Changes in the airline industry due to

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mergers, bankruptcies and lay-offs effectively force workers to restart their careers when they seek employment in a new company. Acquired workers are treated like junior employees, regardless of experience, in a system where seniority is everything. Although in many such cases an airline's metaphorical hands are tied by its obligations to honor labor contracts it has signed with its existing workforce, employees acquired by merger need some form of protection of their interests, which the RLA does not provide.

The airlines are increasingly seeking concessions from labor to achieve profitability, often causing disruption and straining relationships with their unions. This situation results from the economic competitive pressures the airlines face post-deregulation, especially in a down economy. However, secondary treatment of a workforce acquired by merger or purchased through bankruptcy liquidation should not be permitted. Toward this end, the RLA should be amended to reinstate the administrative Labor Protection Provisions, which have fallen by the wayside in the last fifty years.

Furthermore, the increased use of partial or intermittent strikes needs to be examined. Such tools are powerful leverage for labor unions, and thanks to a 1993 district court ruling, Association of Flight Attendants v. Alaska Airlines, employers are limited in what they can do to combat such techniques. However, no appellate court has addressed whether such techniques should be afforded "protected" or "unprotected" status under the RLA. This large, unsettled area of the law will likely become increasingly pertinent as labor unions realize the power of this weapon. The RLA ought to be modified now to deal with this emerging problem and to level the playing field between airline management and labor.

This comment will first examine the adoption of the RLA, followed by an examination of the changes in the airline industry that have revealed specific shortcomings in the RLA's statutory scheme to govern labor relations. Finally, this comment will suggest solutions to these shortcomings.

II. BACKGROUND: THE RAILWAY LABOR ACT

The Railway Labor Act is somewhat of a misnomer today as it applies to many transportation industries. Initially and unsur-
prisingly, the RLA applied solely to the railroad industry.\(^3\) Subsequent additions to the Act, however, have made it applicable to the airline industry as well.\(^4\)

**A. History of the RLA – Adoption and Intent**

The RLA originated as an agreement between railroad carriers and labor unions as a way to peaceably settle labor disputes in the absence of anti-strike legislation.\(^5\) Congress enacted the RLA in 1926, formally codifying this industry agreement, in recognition of the importance of the smooth operation of the transportation industry.\(^6\) Through the RLA, Congress imposes a duty on both employers and organized workers to maintain a relationship, even during disputes, thereby providing stability in the transportation industry and interstate commerce, to the extent that it is affected by the transportation industry.\(^7\) The RLA provides a procedural framework for collective bargaining and dispute resolution that is designed to minimize the potential for disputes that unnecessarily impede national transportation and commerce.

The airline industry was not subject to labor legislation until 1936 when a pilots’ union petitioned Congress for labor protection.\(^8\) At that time, two labor protection schemes existed that could have applied to the pilots’ union: the RLA or the more

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\(^{3}\) See 45 U.S.C. § 151.

\(^{4}\) See id. § 181.

\(^{5}\) Maureen F. Moore, *Hit and Run Strikes—Protected Activity or Suicidal Actions Under the Railway Labor Act?*, 59 J. Air L. & COM. 867, 869 (1994) (“After many frustrating attempts to pass a law to prevent strikes more effectively in the [railroad] industry, the representatives of labor and management met and drafted legislation to which they could both agree.”).


\(^{7}\) See 45 U.S.C. § 152 (imposing a duty on carriers and employees to “exert every reasonable effort” to “avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof”).

recently enacted National Labor Relations Act ("NLRA"). The NLRA focused more on workers' rights to unionize, not how a union interacts with an employer or the relationship between a company and its employees. The RLA, in contrast, prescribed procedures for employer-union dealings to promote stability, while offering workers some measure of protection. At the time of its adoption, commercial air travel was not significant enough to greatly impact interstate commerce and, therefore, preserving labor-management relations and providing ongoing industry stability were not pressing concerns. Despite the airline industry's small size relative to the railroad industry, its commonalities with other transportation industries covered by the RLA warranted application of the RLA to airline employer-labor interactions. As time passed, this proved to be a sage decision, as the need for industry stability increased with industry growth.

B. A PROCEDURAL FRAMEWORK FOR DISPUTE RESOLUTION

With its primary aim of "avoid[ing] any interruption to commerce or to the operation of any carrier," the RLA sets forth a comprehensive scheme to govern negotiations and disputes between air carriers and their labor unions. The procedures are divided into two categories: those for "major" disputes and those for "minor" disputes. Both sets of procedures aim to preserve the relationship between air carriers and their employees.

The RLA also governs the collective bargaining process, from certification of a union to represent a specific "class or craft," to preventing an employer from interfering with its employees' right to unionize. While unions that are negotiating an initial collective bargaining agreement receive little protection, status

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9 Id. § 151. The NLRA, as enacted in 1935, is also referred to as the Wagner Act, and bears many differences from the current NLRA, which encompasses changes made by the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959. Akbar, supra note 6, 574 n.20.
11 The terms "major" and "minor" disputes are not contained within the statute. Rather, they were first articulated by the Supreme Court in Elgin, J & E. Ry. v. Burley, 325 U.S. 711, 721 (1945), but are widely used in analysis of disputes arising between parties governed by the RLA.
quo provisions of the RLA prohibit unilateral changes to an agreement upon termination of the agreement or otherwise without going through proper dispute resolution channels, thereby ensuring minimal disruption to airline operations while an air carrier negotiates an agreement with a labor union.\textsuperscript{14} Perhaps the most important provision of the RLA mandates that any collective bargaining agreement entered into by a recognized union\textsuperscript{15} never expires.\textsuperscript{16} The initial collective bargaining agreement is subject to renegotiation of terms but will never require replacement.\textsuperscript{17} This mandate of permanency eliminates the possibility of upset during negotiation of subsequent collective bargaining agreements.

Issues arise, however, regarding interpretation and application of a collective bargaining agreement and regarding changes in the collective bargaining agreement which either an employer or a union wishes to make. Negotiations and disputes relating to an existing collective bargaining agreement require procedures to maintain operations, or the "status quo," until an agreement or resolution is reached. The RLA attempts to maintain the status quo during these periods, while still offering protection to both employers and employees. Accordingly, either party can invoke the protections of the RLA to maintain the status quo.\textsuperscript{18} The protections applicable to a specific situation, however, depend on whether the dispute is considered major or minor.

\begin{itemize}
\item \textsuperscript{14} See Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 156 (1969) (providing that the purpose of RLA Section 2 is to require that collective bargaining agreements between carriers and unions be changed only by the statutory procedures provided in the RLA).
\item \textsuperscript{15} To be a "recognized union" as the term is here used, the National Mediation Board must have certified the union elected by a recognized class of employees. Under the RLA, employees are classified based solely on their trade; therefore, the employee classes may be flight attendants, pilots, mechanics, or another group of tradesmen, but will never be a combination of occupations. See 45 U.S.C. § 152.
\item \textsuperscript{17} Schuler, \textit{supra} note 13, at 193 (citing \textit{Seaboard World Airlines}, 443 F.2d at 437).
\item \textsuperscript{18} See 45 U.S.C. § 156.
\end{itemize}
Regardless of whether a dispute is major or minor, all parties to an RLA-governed dispute have a duty to first attempt, in good faith, to settle their dispute before invoking the rights and procedural protections of the RLA. This duty is consistent with the RLA's relationship approach to dispute resolution, as the statute aims to preserve the relationship between an air carrier and its employees despite disagreements.

1. "Minor" Disputes

Employees cannot legally resort to self-help measures in "minor" disputes, which require submission to the National Air Transport Adjustment Board for arbitration. Employees may strike, after following the RLA's resolution-attempt procedures, in "major" disputes only. Under the RLA, minor disputes are those between transportation carriers and employee unions that arise from the interpretation or application of a particular provision of a collective bargaining agreement between the parties. Substantial litigation has arisen over what constitutes a minor dispute. The prevailing test comes from the Supreme Court's decision in Consolidated Rail Corp. v. Railway Labor Executives' Ass'n. In Consolidated Rail, the Court held that an employer's action gives rise to a minor dispute "if the action is arguably justified by the terms of the parties' collective-bargaining agreement." The Court went on to state that a dispute is not minor, but rather major, where "the employer's claims are frivolous or obviously insubstantial." The application of this test can vary slightly from jurisdiction to jurisdiction.

The RLA establishes the National Air Transport Adjustment Board ("NATAB") to exclusively arbitrate minor disputes. The

23 Id. at 307.
24 Id.
NATAB decisions are both final and binding on the parties.\textsuperscript{27} Federal courts have no authority to determine the merits of a minor dispute,\textsuperscript{28} and their authority to review decisions of the NATAB is distinctly limited.\textsuperscript{29} However, the courts can enforce arbitration agreements reached under NATAB processes, just as they have authority to enforce arbitration agreements or settlement contracts in any other context. But, the federal courts may also determine whether a specific situation constitutes a major or minor dispute and, therefore, may determine which RLA resolution procedure must be followed.\textsuperscript{30}

Federal courts have limited injunctive power in specific minor dispute situations.\textsuperscript{31} A court may require parties to maintain the status quo during resolution of a minor dispute, but the party seeking relief must first demonstrate irreparable injury before the court will grant the injunction.\textsuperscript{32} However, the minor dispute must be in arbitration before the NATAB in order for the court to be able to issue an injunction to maintain the status quo.\textsuperscript{33}

2. "Major" Disputes

A "major" dispute involves a change in the terms of a collective bargaining agreement or negotiation of a new collective bargaining agreement.\textsuperscript{34} For example, unilateral changes in wages, rules, or working conditions are generally major disputes.\textsuperscript{35} Renegotiation of collective bargaining agreements or negotiation


\textsuperscript{29} \textit{See} Bhd. of Maint. of Way Employees v. Soo Line R.R., 266 F.3d 907, 909-10 (8th Cir. 2001); Robinson v. Union Pac. R.R., 245 F.3d 1188, 1194 (10th Cir. 2001).


\textsuperscript{33} Westchester Lodge 2186 v. Ry. Express Agency, Inc., 329 F.2d 748, 753 (2d Cir. 1964).

\textsuperscript{34} \textit{See}, e.g., Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723 (1945).

\textsuperscript{35} \textit{See}, e.g., \textit{id}.
of new agreements are always considered major disputes for purposes of the RLA procedural framework.\textsuperscript{36}

The basis of the RLA framework addressing "major" disputes rests on what have been termed the "status quo" provisions of the RLA.\textsuperscript{37} These provisions prescribe mandatory periods when workers may not strike and airlines may not substantially change working conditions.\textsuperscript{38} These provisions aim to preserve normal operations of the airline for a maximized period and may be triggered by either the company or employees during negotiations or disputes, thus providing time for the parties to reach a resolution or agreement.

When a "major" dispute arises, the party who seeks to change the collective bargaining agreement has a duty to give written notice to the other party of its intent to change the agreement and what those changes may be.\textsuperscript{39} After notice is given, the parties meet to negotiate, in good faith, a resolution of the issue.\textsuperscript{40} During these negotiations, each side is required to maintain the status quo in the workplace, which may be for an indefinite period due to the unlimited time provided by the RLA for such negotiations.\textsuperscript{41} If the parties reach a resolution on their own, the RLA is no longer needed for guidance in the dispute, but if negotiations fail, the parties may invoke further procedures.

If a mutual resolution appears impossible to reach, the parties may request mediation by the National Mediation Board ("NMB"), and the status quo period is extended during the term of the mediation process.\textsuperscript{42} The airline may request mediation, which would prevent workers from engaging in disruptive action in an effort to leverage their bargaining position.\textsuperscript{43} Alternatively, the union may request mediation, which would prevent the company from changing working conditions without the union's consent.\textsuperscript{44} Accordingly, either side to a dispute may request mediation to gain protection of the status quo to prevent

\textsuperscript{36} Since renegotiation involves changing conditions of the agreement between the airline and the labor unions, a renegotiation will never be a minor dispute. By definition, interpreting an existing collective bargaining agreement does not cover formation of a new agreement. See, e.g., id.


\textsuperscript{38} Id.

\textsuperscript{39} Id.

\textsuperscript{40} Id.

\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} Id.

\textsuperscript{44} Id.
the other side from taking action to increase their bargaining leverage, or from taking any action which has not been agreed to and may lead to a drastic and damaging response by the other party.\textsuperscript{45}

The mediation phase of the RLA dispute resolution framework can be a protracted event. Mediation can take several years to conduct, and only when the NMB issues a release stating that further mediation would be futile are the parties released from mediation.\textsuperscript{46} During the entire period, both the airline and the unionized employees are required to maintain the status quo of the workplace, and any variations may be legally actionable.\textsuperscript{47} Maintenance of the status quo is required during a cooling-off period of thirty days after mediation release.\textsuperscript{48}

At the end of the thirty-day period, the President of the United States has the option of calling a Presidential Emergency Board to help resolve the dispute, which extends the status quo requirements for another sixty-day cooling-off period.\textsuperscript{49} If the President decides not to call the Presidential Emergency Board, then the parties may pursue self-help options after the thirty-day post-mediation period expires.\textsuperscript{50} Given the extensive consequences to national transportation and commerce implicated in airline union strikes, it is not unusual for the President to intervene if mediation fails to resolve a union dispute with a major carrier and reaches this phase.\textsuperscript{51} Either party may request this intervention, however, the President will often decline to intervene if the impact of the anticipated strike is insufficient to warrant his involvement.\textsuperscript{52} The federal government will not intervene unless an airline strike "threaten[s] substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service."\textsuperscript{53}

\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id. § 160.
\textsuperscript{50} Id. § 156.
\textsuperscript{51} When a major carrier is involved, the economic impact of a strike can be great, and political pressures may induce the President to act. See Mike Hughlett, \textit{Bush Could Ignore Pilots Strike}, \textit{Detroit Free Press}, Jan. 9, 2004, available at 2004 WL 56354137.
\textsuperscript{52} President Bush recently indicated that he would decline to intervene in an anticipated strike at Mesaba Airlines, a regional carrier servicing ninety cities and the sole carrier in twenty of those cities. Id.
\textsuperscript{53} Id.
Once the post-mediation cooling-off period is over, or the sixty-day cooling-off period if the President has intervened, the status quo requirements are lifted. Typically, this results in a strike or other work stoppage. The economic impact of airline strikes is not precisely known, but the total damages to an airline from lost revenues, from the expense of bringing in new workers and from the damages to workers from lost wages, can be significant even if the strike is brief. Although mandatory arbitration requirements or other anti-strike legislation were proposed even before the enactment of the RLA in 1926, no such requirements have been imposed on transportation industries covered by the RLA. As a result, unions have preserved their powerful economic threat of strike to counterbalance employer power, while inherent instability in the airline industry arises when carrying out the RLA negotiation and dispute resolution procedures.

C. LEGAL AND ILLEGAL SELF-HELP ACTIONS

The same procedures that the RLA uses to encourage stability in the airline industry during labor negotiations can frustrate unions seeking change. When faced with the prospect of having to wait years to implement change, unions may resort to illegal job actions to effectuate change in a reasonably timely manner. These job actions create leverage for the unions at the risk of temporarily destabilizing the airlines. However, despite the RLA’s attempts to maintain stability, such actions are not uncommon. Such actions force airlines to seek legal remedies to restore balance.

Recent examples of union self-help job actions abound. Consider the following examples of commercial disruption, air freight disruption, and small regional impacts:

54 See id. ("Comprehensive studies of damages from airline strikes don't exist, according to a 2003 report from the General Accounting Office, the investigatory arm of Congress.").

55 Damages to a major airline resulting from two days worth of a pilot strike was determined to amount to more than $45 million. See Am. Airlines, Inc. v. Allied Pilots Ass’n, 53 F. Supp. 2d 909, 937 (N.D. Tex. 1999), aff’d, 228 F.3d 574 (5th Cir. 2000).


57 See, e.g., Am. Airlines, Inc. v. Allied Pilots Ass’n, 228 F.3d 574, 577 (5th Cir. 2000).
In February 1999, American Airlines pilots' union orchestrated a sick-out that slowed and disrupted operations for over ten days, costing the airline more than $200 million and "needlessly disrupt[ing] the lives of hundreds of thousands of travelers." Over 2,500 pilots called in sick to work to protest the integration of Reno Air pilots into American's seniority lists after American acquired the small, western regional carrier.

In the fall of 1997, air freight pilots with Airborne Express refused to bid for unassigned scheduled flights in concerted opposition to the carrier's interpretation of old and new collective bargaining agreements. This constituted a self-help action over a minor dispute and, therefore, was illegal under the RLA.

In January 2004, Mesaba Airlines pilots were scheduled to go on strike to induce the regional carrier to match the benefits of other regional carriers. Talks had stretched over three years; the pilots could legally pursue self-help and were poised to take action. The airline canceled one evening's worth of flights, but in the eleventh hour, the parties reached a resolution.

In cases where a union or its workers undertake illegal self-help actions outside of the RLA's procedural framework to handle major disputes, the RLA provides for the airline to pursue injunctive relief. An airline can petition a federal district court to issue a temporary restraining order against the self-help action if the airline can prove that (1) the job action exists, (2) harm resulted, (3) the job action is illegal under the RLA, and (4) responsibility lies with the union. Only then will a court issue the restraining order.

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60 ABX Air, Inc. v. Airline Prof'l Ass'n of the Int'l Bhd. of Teamsters, 266 F.3d 392, 394 (6th Cir. 2001).
61 Id. at 398-99.
63 Id.
64 Id.
65 Indirectly, the RLA permits injunctive relief, but this is based on the careful interplay between the RLA and the Norris-LaGuardia Act. See Bhd. of R.R. Trainmen Enter. Lodge, No. 27 v. Toledo, P. & W. R.R., 321 U.S. 50, 58-60 (1944).
67 Id.
Although an illegal strike can cost an airline millions of dollars, the RLA does not provide for damages as a possible remedy.\(^6\) Although the RLA does not expressly so provide, an airline can, however, seek compensatory contempt damages from the union when the union fails to comply with the court's injunction.\(^6\) These damages are compensatory, not punitive, in nature, so their amount is limited to the airline's actual losses resulting from the illegal job action.\(^7\) Compensatory contempt awards have been upheld on appeal, at least in the Fifth Circuit, in *American Airlines v. Allied Pilots Ass'n*.\(^7\) The American Airlines pilots' union orchestrated a sick-out in February 1999 to protest the airline's acquisition of Reno Air and its attendant unresolved labor issues.\(^7\) American sought and obtained a temporary restraining order from the federal district court, which the pilots ignored for two days.\(^7\) American petitioned the district court for compensatory contempt damages to encourage the pilots' union to comply with the court's restraining order, and those damages were awarded in the amount of over \$45.5 million.\(^7\) The pilots' union challenged the award on the basis that the RLA contains no provision for damages arising from illegal job actions. The Fifth Circuit affirmed the award on the basis that courts normally have the power to enforce their orders through compensatory contempt, and this was merely an exercise of that power, which was neither inconsistent with the RLA nor violated Due Process rights of the union.\(^7\)

Compensatory contempt damages are rare, however, because federal restraining orders are usually sufficient to inspire union compliance.\(^7\) Any strike action implemented before a restraining order can be obtained is usually sufficient to increase the union's bargaining leverage, without causing devastating damage to the airline.


\(^7\) See Am. Airlines, Inc. v. Allied Pilots Ass'n, 228 F.3d 574, 585 (5th Cir. 2000).
D. Employer Response to Strikes: Permissible Self-Help and Available Remedies

The RLA aims to protect the relationship between an employer and its organized employees before, during, and after a dispute.\(^7\) This means that limits exist to the self-help that either party can seek. Traditionally, in non-transportation industries, if employees engage in an illegal strike, employers are permitted to seek their own method of self-help. In situations covered by the NLRA, these methods could include firing the workers engaging in the illegal job action. Under the RLA, however, airlines are generally not permitted to fire employees who engage in illegal strikes.\(^8\) To do so is believed to irreparably strain and damage the relationship between employers and their employees in an industry where stability of operations is vital not only to the company but to the nation. Instead, the employer's only remedies are to hire replacement workers, as it could under the NLRA, or seek injunctive relief if it believes that the strike is an illegal job action or otherwise does not comply with the RLA.\(^9\) If the procedural requirements have not been satisfied, the employer can obtain a court order either compelling arbitration in a "minor" dispute, or injunctive relief to enforce the status quo provisions of the RLA in a "major" dispute.

III. THE CHANGING AIRLINE INDUSTRY

Since the application of the RLA to airline workers' unions in 1936, the airline industry has undergone enormous changes due not only to technical advances and the maturation of the industry, but also due to government regulation, subsequent de-regulation, increased competitive pressures, and a changing marketplace. Numerous airlines have reorganized in bankruptcy, some several times, while others have simply folded permanently, leaving many of their workers without jobs. Downward fluctuations in the economy affect the airline industry, as businesses reduce travel spending and recreational travelers decrease their demand for air travel. Efficient airlines prosper in an economic downturn, while those with higher costs

\(^7\) Ass'n of Flight Attendants v. Alaska Airlines, 847 F. Supp. 832, 836 (W.D. Wash. 1993) ("One of the RLA's central goals [is] the preservation of the employer-employee relationship both during and after a strike.") (quoting E. Air Lines, Inc. v. Air Line Pilots Ass'n Int'l, 920 F.2d 722, 730 (11th Cir. 1990)).

\(^8\) See id.

\(^9\) See Am. Airlines, Inc. v. Allied Pilots Ass'n, 228 F.3d 574 (5th Cir. 2000).
must shave profit margins to be competitive but may become unprofitable while doing so. Finally, since 9/11 the face of air travel has completely changed, and airlines have financially borne many of the newly instituted safety requirements. To remain profitable in the modern age of air travel, airlines must increase their efficiency and decrease their operating costs. One major way that airlines decrease these costs is cutting labor costs through lay-offs or reductions in benefits.

The evolution of the airline industry is marked by two notable events, which functionally separate industry history into three distinct eras for analysis purposes. The first event marking a radical change in the airline industry was government deregulation of the airlines in 1978.  

This divides airline history into pre- and post-deregulation periods. The second major event, September 11, is much more recent, and its impact may not be so much a result of the event itself, but a result of the turmoil the airline industry was thrust into after that day. Therefore, airline history post-deregulation may also be divided into pre-and post-September 11. Each era will be examined in turn and the application and subsequent problems of the RLA will be discussed.

A. IN THE BEGINNING: 1936 THROUGH 1978

During the period when the government regulated almost every aspect of the airline industry, labor relations under the RLA had a greater measure of stability than they did after deregulation. While questions still existed about certain provisions under the RLA, and there were still the competing interests of airlines wanting to control costs and labor wanting to protect wages, benefits, conditions and job security, lower economic competitive pressures between airlines reduced the airlines' need for optimum efficiency. In fact, airline employees

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81 The recession of the economy, in conjunction with dampened demand resulting from passenger fear following the events on September 11, triggered a severe crisis in the airline industry that required a government bailout to the tune of $15 billion. See Matt Pinckney & David Cooper, Carty's Turbulent Stewardship, Fort Worth Star-Telegram, Apr. 25, 2003, at A16, available at 2003 WL 17390474.

benefited from stable and increasing wages, secure employment and good working conditions. In short, all was relatively quiet on the home front—at least until the end of government regulation.

B. Post-Deregulation: 1978 through 2001

Increased competitive pressures following deregulation ushered in dramatic changes in airline operations and employment. When the airline industry was deregulated, many new airlines formed, thereby increasing competition between airlines. In efforts to reduce operating costs, workforces were trimmed and, as a result, unemployment in the aviation industry increased. As time passed and the airline market grew increasingly competitive, mergers and bankruptcies became fairly commonplace in the industry, introducing new problems for labor.

Each airline has unions representing its employees, and those unions operate primarily on the basis of seniority. Seniority governs an employee’s position as it relates to company pay scale, benefits, entitlements, and other aspects of an employee’s working conditions. However, when an airline merges or folds due to bankruptcy, the seniority of its workers is often lost when they seek employment elsewhere. When an airline reorganizes in bankruptcy, it commonly disavows existing labor contracts and subjects workers to its unilateral demands to permit the airline to survive, all of which is condoned by a bankruptcy court.

1. Mergers

Airline mergers disrupt the seniority system of the acquiring airline by forcing integration of a new set of workers, often at the expense of the acquired employees. Historically, administrative entities such as the Civil Aeronautics Board (“CAB”) oversaw airline mergers and attempted to ensure fair treatment of the merging company’s employees. Now, mergers in the air-

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83 Id.
84 Id.
85 Id.
86 Id. at 123.
87 See id. at 119-21.
88 See id. at 114-15 (discussing the role of the CAB and its use of Labor Protection Provisions to ensure equitable treatment of employees). In 1984, the CAB’s authority to monitor mergers was transferred to the Department of Transportation, which never applied Labor Protection Provisions. Id. at 115. Five years later,
line industry are subject to the exclusive scrutiny of the Department of Justice, which will only challenge a merger on the basis of antitrust issues, but not on the basis of employee interests. This leaves employees to fend for themselves in merger situations, which often leaves them at the mercy of their new employer with little incoming protection.

As previously discussed, the National Mediation Board ("NMB") must recognize a labor union in order for the union to negotiate with an airline under the terms of the RLA. The RLA itself requires that a bargaining representative represent one craft or class of worker, and the craft/class may not have multiple bargaining representatives. When airlines merge, however, the bargaining representative for either the acquiring or acquired group of employees often changes. This occurs because the NMB mandates that upon the effective merger date, any union that represents employees of the acquired airline is "decertified" and is no longer recognized as the representative for that particular group of employees. This terminates the "permanent" collective bargaining agreement established originally by the now-decertified union, and the labor forces of the merging airlines must attempt to integrate.

Merging the workforces of two airlines strains labor relations within the group itself. The workers must decide which group will represent the newly-commingled employees in order to have a bargaining unit certified by the NMB that is authorized to negotiate with the merged airline. Competition and dispute over who should represent the new group can lead to strained relationships and bitter fights between old and new workers in the company. However, without a certified bargaining group, the

in 1989, the Department of Transportation lost authority to rule on airline mergers, and that responsibility went to the Department of Justice. Id. at 115-16.


acquired employees cannot make any progress in negotiating labor terms with management.

Even when a certified bargaining group is in place, incoming workers may feel slighted by their integration into the existing group. For example, in 2001, American Airlines ("American") acquired the assets of Trans-World Airlines ("TWA") in bankruptcy proceedings.\textsuperscript{94} This acquisition gave American, among other things, 1,778 flight attendants who were former TWA employees.\textsuperscript{95} Both American and former-TWA flight attendants were represented by the Association of Professional Flight Attendants ("APFA"), which reached an "Agreement on Seniority Integration" with American prior to the end of 2001.\textsuperscript{96} As part of this agreement, the former TWA flight attendants were moved to the bottom of the American seniority system.\textsuperscript{97} In March 2003, American sought cost-saving concessions from the APFA in the form of 2,550 "furloughed" flight attendants in order to avoid bankruptcy.\textsuperscript{98} Since furloughs were decided on the basis of seniority, with American furloughing the most junior employees first, all of the former TWA flight attendants were cut from American's ranks.\textsuperscript{99} Legal action followed, and the seniority system and the subsequent furlough decision were upheld, but the distress the former TWA flight attendants felt was clear.\textsuperscript{100}

Though it is unfortunate that employees acquired by the merger of two airlines are often placed at the bottom of the seniority scale regardless of their experience, the airlines have previous responsibilities to their established employees in those

\begin{quote}
\textsuperscript{94} Cooper v. TWA Airlines, L.L.C., 274 F. Supp. 2d 231, 236 (E.D.N.Y. 2003).
\textsuperscript{95} Id. at 238.
\textsuperscript{96} Id. at 236.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 237.
\textsuperscript{99} Id. at 238.
\textsuperscript{100} Id. at 251. It is particularly interesting to note that American flight attendants referred to the former TWA flight attendants as a "furlough cushion," meaning that existing employees had more job security as a result of relegating the incoming TWA employees to the bottom of the seniority system. \textit{Id}. at 244. This was not relevant to the court's findings in \textit{Cooper} but is another indication that acquired employees can be viewed as having inferior rights and benefits when entering an already unionized workplace and that perhaps they need to be afforded more protection.
\end{quote}
situations. The airline has collective bargaining agreements in place with their existing employees through the unions, and both parties must agree to changes to those agreements in order to avoid the time-consuming RLA dispute resolution procedures. No airline would want, or could afford, to spend several years in negotiation with its labor unions before completing a merger when material situation changes may occur in that time that may make the merger no longer feasible. The result is that the incoming workers have little bargaining leverage to avoid being placed at the low end of the seniority totem pole, and the acquiring airline has little incentive to upset the unions that represent existing employees, who likely outnumber the incoming workers.

2. Bankruptcy

Bankruptcy, like merger, is an event that can shake up an airline’s labor unions and their collective bargaining agreements. Bankruptcy for an airline can take two forms: liquidation under Chapter 7 of the Bankruptcy Code or restructuring under Chapter 11. Liquidation is rare and usually results in an asset sale, which, for the purposes of labor unions, usually operates much like a merger. Chapter 11 restructuring, however, presents new and different situations that can test the relationship between an airline and its labor unions as an airline tries to modify its contracts, agreements and obligations with all creditors in order to survive.

The effects of liquidation are similar to those of a merger. The loss of seniority, the secondary treatment of incoming workers, and the airline’s obligation to honor its pre-existing union agreements without regard for the impact it will have on the incoming workers are the same for a liquidation as for a merger. In fact, the example previously discussed from Cooper v. TWA Airlines 101 is a case where liquidation from bankruptcy resulted in the merging of two workforces when American Airlines acquired TWA’s assets.

Situations where an airline reorganizes under bankruptcy protection operate quite differently than merger situations. When a company seeks bankruptcy protection to reorganize, it gains the power to renegotiate obligations with its creditors. 102 While

101 Id. at 236.
102 Though a bankruptcy debtor does not explicitly have the right to demand contract modification in most cases, as a practical matter creditors will renegoti-
an airline’s creditors frequently include commercial lenders, employees are also creditors whose contract rights can be altered through bankruptcy proceedings. The goal of any reorganization is to provide enough financial relief to stabilize an airline, permit it to survive, and if the reorganization is successful, profit in the future. The question then becomes, how much should organized employees be required to sacrifice to achieve this relief?

Section 1167 of the Bankruptcy Code does not permit automatic rejection of collective bargaining agreements subject to the RLA without going through the RLA’s procedural framework. However, adherence to this requirement could mean that negotiations to modify the contracts could extend so long that the chances for the airline’s survival dwindle to impractical. In the alternative, an airline could simply reject its existing contracts. In 1984, Congress addressed this dilemma by enacting Section 1113 of the Bankruptcy Code to provide some protection to unionized employees without forcing an airline to go through the protracted RLA resolution procedures. The airline is still required to bargain in good faith with its labor unions before modifying or terminating a collective bargaining agreement, and the unions are required to have good cause for rejecting any proposed change to the collective bargaining agreement or otherwise risk termination of the entire agreement. Section 1113 expedites the entire negotiation and resolution process, and permits bankruptcy courts greater flexibility to help an airline reorganize and resume business on its own.

Despite the practical changes the Bankruptcy Code has made to the RLA dispute resolution process, bankruptcy is still a situation that the labor unions would like to avoid at great cost. For example, in April 2003 the board of American’s parent corporation authorized bankruptcy filing after losing $1.04 billion in the first three months of the year and a labor relations crisis that


looked like it would foil any hope for passing needed concessions to keep the airline out of bankruptcy. The airline had been on the edge of bankruptcy since February 2002, and only the unions' agreement to $1.6 billion in concessions kept the airline solvent. These concessions were undoubtedly more attractive to the labor unions than the possible aftermath of the airline declaring bankruptcy.

C. INDUSTRY-WIDE FINANCIAL CRUNCH: POST-SEPTEMBER 11, 2001

On September 11, 2001, the American air travel industry was brought to a screeching halt when all commercial and other non-military planes were grounded. Airports were shut down and flights were cancelled as the country sought to stabilize itself after terrorists employed commercial airplanes as ad-hoc bombs to attack the World Trade Center in New York City and the Pentagon in Washington, D.C. Anyone who has traveled by air since September 11 has seen changes in security measures, accompanying the implementation of a national Travel Security Administration. Baggage and passenger screening measures were increased, and airlines were forced to help cover the costs of the increased security measures.

One of the most serious consequences of September 11 for the airline industry was the resulting decline in air travel. This decline in demand stemmed from fear of repeat acts of terrorism and coincided with a general economic decline. Together, these two events created a new climate for commercial airlines one in which they were not competing for profits, but for survival.

In the days immediately following September 11, the airline industry was in chaos. Lost revenues from the multiple days that airlines were prohibited from operating in United States airspace sent the industry into a tailspin that threatened the solvency of major United States' airlines. On September 22, 2001, President Bush signed an emergency aid package, immediately

108 See id.
allocating $15 billion to keep the nation's air carriers flying. Following the reopening of financial markets after September 11, many airlines found themselves the target of massive stock sell-offs. Carriers that were profitable the year before were posting financial losses in the billions of dollars. Many airlines, including many of the major ones, have declared bankruptcy since September 11. Some have reorganized, some have disappeared, and all of them are facing a new threat—increased competition from low-cost, "no frills" airlines.

Southwest Airlines first made the "no-frills" airline approach both successful and profitable, but select regional carriers and some major-airline wannabes, like Jet Blue, have now adopted the approach. The idea is simple: take several hours worth of air travel, eliminate the notoriously questionable airline food, streamline operations wherever you can, and price your fares below the other major airlines. For Southwest, "streamlining operations" meant having a fleet of identical planes (Boeing 737s) to ease maintenance, eliminating assigned seating because it increases an airplane's gate time, serving drinks and peanuts instead of meals, and abandoning the hub-and-spoke model most airlines employ in favor of direct routes to most destinations. As a result, Southwest has been the only consistently profitable airline since September 11 and is a major threat to the ailing major U.S. air carriers.

With the current economic recession, consumer and business demand for air travel has declined. Travel is a luxury expenditure for most people and is quickly sacrificed during economic downturns. This leaves the major airlines especially

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110 Id.
111 American Airlines, the largest U.S. air carrier, had posted profits of $1.9 billion for 1998, $985 million for 1999, and $813 million for 2000. Id. In 2001, American posted losses of $1.7 billion. Id. The situation did not improve in 2002, as the airline went on to post further losses of $3.5 billion, "citing rising costs, slack demand, aftereffects of the terrorist attacks and competition from discount rivals." Id.
113 Id.
114 Id.
vulnerable to no-frills airlines that can offer lower fares because of lower operating costs. In turn, this increases financial pressure on other airlines, pushing them closer to insolvency. Many carriers look to concessions from labor to keep them afloat while they struggle to catch up with the lower-cost carriers.\textsuperscript{116} Labor unions are forced to agree to such concessions, or face bankruptcy reorganization or complete unemployment.

Many questions regarding the future of airline labor relations remain to be answered. When the economy rebounds and demand for air travel increases, how quickly will airlines repay the union concessions that enabled their survival? How long and how much profit will it take for American to repay workers the $1.6 billion in concessions that kept the company out of bankruptcy? It remains to be seen if current streamlining efforts will continue when the economy improves, or if traditional airlines will tolerate lingering inefficiencies and arguably unnecessary “frills” at the expense of their labor unions.

\section{IV. INTERMITTENT STRIKES: LEGAL OR ILLEGAL? AND WHAT DO THEY MEAN PROTECTED/UNPROTECTED?}

The most powerful aspect of the RLA is that while it is designed to prevent strikes in the airline industry, it still permits them to occur. Though the term “strike” is not found in the statute itself, the RLA implicitly protects airline workers’ right to strike once they satisfy the procedural safeguards of the negotiation and resolution processes. In cases of minor disputes, where striking is always illegal, or major disputes that have not followed RLA Section 6 procedures, intermittent strikes are treated just like regular strikes – illegal and subject to injunction.\textsuperscript{117}

A notably gray area of permissible airline union strike tactics are “intermittent” strikes under the RLA. For example, in 1993 Alaska Airlines flight attendants instituted a “Create Havoc Around Our System” (“CHAOS”) program, where flight attendants on specific flights would announce an hour before their flight departure that they intended to strike.\textsuperscript{118} The flight at-


\textsuperscript{117} See, e.g., Am. Airlines, Inc. v. Allied Pilots Ass’n, 228 F.3d 574, 577 (5th Cir. 2000).

The 1926 Railway Labor Act
tendants would then express their willingness, before the flights would leave, to return to work on their scheduled, or any other, flights. In each instance where this tactic was employed, Alaska Airlines declined the workers’ offer to return to service. Twenty-four striking flight attendants affected a total of seven flights over a one-month period. Of those flights, six were staffed by other Alaska Airlines employees and one was canceled.

The Association of Flight Attendants (“AFA”), who had organized the CHAOS campaign after contract negotiations progressed through the RLA dispute resolution framework and failed, sought an injunction to prevent Alaska Airlines from dismissing the CHAOS campaign participants in the future, and sought reinstatement with back pay and benefits to the flight attendants who were disciplined for their participation in the CHAOS program. The court granted the injunction to prevent Alaska Airlines from firing future CHAOS participants and required reinstatement of the discharged and indefinitely suspended flight attendants. However, Alaska Airlines could permanently replace striking employees if the replacements performed services as flight attendants prior to the striking flight attendants’ offer to return to work. Alaska Airlines would then have to reinstate the replaced flight attendant when positions became available that were not CHAOS-created.

In assessing the flight attendants’ request for an injunction, the court in Association of Flight Attendants v. Alaska Airlines was careful to note that although the National Labor Relations Act (“NLRA”) disfavors intermittent work stoppages, the only other court to address intermittent work stoppages in the RLA context declined to import the NLRA viewpoint. The Second Circuit, in Pan Am World Airways, Inc. v. International Brotherhood of Teamsters, did not decide whether an intermittent strike, such as the CHAOS campaign, was disfavored under the RLA and there-

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119 Id.
120 Id.
121 Id.
122 Id.
123 Id. at 834.
124 Id. at 838.
125 Id.
126 Id. at 835.
127 Id.
fore subject to employer retaliation. At issue in *Pan Am* was whether intermittent strike tactics were legal at all. The court held that intermittent strikes that take place during the self-help phase of the RLA resolution framework are legal and therefore not subject to injunctive relief. Under the NLRA, intermittent strikes are perfectly legal and not subject to injunctive relief, but they are considered "unprotected activities," leaving employers free to discharge or otherwise discipline strikers without fear of injunction.

"Partial strikes," often categorized with intermittent strikes because of their similar treatment under the NLRA, have rarely been legally used in the RLA context. A partial strike can take the form of a sick-out, slow-down, or work-to-the-rule concerted action, which is less than a full strike by labor unions. In the case of the American Airlines pilots' sick-out discussed earlier, the district court was free to grant injunctive relief to American Airlines and force their pilots back to work because the parties had not yet progressed to the self-help phase of the RLA framework, making the job action illegal. Use of partial strikes in the context of a minor disputes is likewise illegal. A court has yet to rule on the legality of partial strikes *per se* during the sanctioned self-help period provided by the RLA resolution framework. If NLRA principles are imported in this area of RLA interpretation despite *Alaska Airlines*, the use of partial strikes would be legal but disfavored. This interpretation would entitle employers to retaliate and employ self-help methods such as permanently replacing or discharging employees who participate in such strikes.

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129 See id.

130 *Id.*

131 *Id.*


133 See supra notes 58-59 and accompanying text. See generally Am. Airlines, Inc. v. Allied Pilots Ass'n, 228 F.3d 574 (5th Cir. 2000).

134 *Am. Airlines, Inc.*, 228 F.3d at 577 n.6 (citing Am. Airlines, Inc. v. Allied Pilots Ass'n, 53 F. Supp. 2d 909, 917 (N.D. Tex. 1999)).


136 See *Pan Am. World Airways, Inc.* v. Int'l Bhd of Teamsters, 894 F.2d 36, 40 (2d Cir. 1990) ("In any event, intermittent work stoppages are not unfair labor practices under the NLRA. Rather, some repeated, intermittent work stoppages are merely 'unprotected' activity that may legally be the cause of discharge or discipline by the employer.") (internal citations omitted).

137 Estreicher & Siegel, supra note 132, at 20.
It is clear that partial or intermittent strikes may be legal and are not subject to injunctive relief, but it is not clear whether, and to what extent, an employer may respond to such strikes, Alaska Airlines notwithstanding. If Alaska Airlines is the trend that the law will follow, airlines will have little in their arsenal with which to defend themselves against a powerful labor union weapon. Requiring airlines to reinstate previously suspended workers amounts to a mere slap on the wrist for union members.

V. STATUTORY REVISIONS NEEDED

The most glaring need for statutory revisions come from (1) the increase in airline mergers, which disrupt seniority systems for workers, and (2) the open question about the legality of intermittent, CHAOS-like strikes, which can disrupt the transportation industry over minor disputes. These issues represent ways that the airline industry has changed while the statutory scheme covering airline labor relations has not evolved to accommodate these changes, and each will be addressed in turn.

Notably, Congress has already addressed, at least in part, the inadequacies of the RLA as it deals with labor agreements between unions and airlines undergoing reorganization. As previously discussed, Congress modified the Bankruptcy Code to provide airline employees protection during Chapter 11 bankruptcy proceedings, which have the potential to disrupt established collective bargaining agreements without following RLA procedures. An airline's bankruptcy petition is no longer carte blanche to un-unionize, but rather a license to modify collective bargaining agreements as needed to allow survival.

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139 Alaska Airlines is the only case that addresses whether an intermittent strike is a protected or unprotected activity for purposes of determining permissible employer response. It was never appealed, and all other cases dealing with partial or intermittent strikes have been evaluated for their legality, not their protection status.

140 See Alaska Airlines, 847 F. Supp. at 837.


The addition of Section 1113 to the Bankruptcy Code provides a swifter mechanism for collective bargaining between labor unions and troubled airlines, but no longer permits outright rejection of existing labor agreements.  

A. Integrating Labor Forces

Gone are the days when airline employment meant a solid, life-long career with one company. Mergers, layoffs and bankruptcies can force workers to essentially restart their careers with a new employer, entering at the bottom rung of the ladder. New employees at an airline, regardless of their prior experience, are placed at the bottom of the seniority system in most cases. This leaves them under-compensated for their level of experience, but they can do little about it. They are represented by a union that has likely agreed to this arrangement in order to keep the remainder of its membership satisfied.

Currently, acquiring airlines often have to honor the employment contracts that they have made with their own unions or face breach of contract claims brought by labor. In many cases, the terms of the merger or the acquisition do not create any incentive for airlines or their existing labor unions to provide any protection for incoming workers. As a result, incoming workers are relegated to the bottom of the seniority totem pole despite having extensive experience and seniority with the acquired airline. Facing contract actions, the airlines are content to ignore the seniority of acquired employees, and as a result, they may employ many undervalued employees—ones making far less in salary or benefits than to which they are entitled by virtue of their experience.

The labor unions representing existing workers at an acquiring airline have little incentive to provide any protection to incoming workers. Generally, the number of incoming workers is far less than the number of existing workers, so a majority of the union’s resulting membership has no desire to protect the incoming workers. The incoming workers are thus relegated to the status of “furlough cushion” in many cases.

143 Id. § 1113(c)(2). For an extended discussion of Section 1113 and its expedited collective bargaining process, see Schoder, supra note 103, at 119-21.
145 Id. Incoming workers immediately placed at the bottom of the seniority system provide security for existing workers by artificially boosting their position in the seniority system. As a result, workers with less experience have more job
workers are underrepresented in the collective bargaining process by virtue of the decertification of their bargaining representative upon the date of merger or acquisition, and are thus at an unfair disadvantage.\textsuperscript{146}

With the increase in mergers and bankruptcy acquisitions in the airline industry, incoming workers need job protection and some assurance that they will not be effectively demoted to entry-level status merely because their airline merged with another or was acquired through bankruptcy liquidation. But problems with merging seniority systems in a fair manner can place labor unions and airlines in awkward positions. If required to negotiate a \textit{fair} seniority integration plan, unions could be seen as disloyal to their existing membership as a result of their efforts to secure job protections for workers who are not yet in their ranks. Airlines could find themselves the target of job actions or could trigger hostile relations with their labor unions if they attempt to force the union to integrate new union members at different ranks on the seniority scale. In fact, requiring airlines to merge the new employees into the seniority system in a fair manner may provoke the unions to attempt to block the acquisition or merger, or otherwise take action that may not be in the best interest of the airline as a whole.

Requiring a straight integration of the new seniority system into the existing seniority system as a matter of law is not as simple a proposition as it appears. The structure of airline seniority systems can vary significantly from airline to airline. For example, Delta Airlines has, in the past, used a two-tier seniority system, while Southwest Airlines' seniority system is single-tier but provides for employee-ownership options.\textsuperscript{147} There is no simple way to integrate two divergent systems, and it would require negotiation between the acquiring airline and the labor union representing its existing employees. The labor union representing the incoming employees would be excluded because it will be decertified by the time any agreement becomes effective. This places the process back at square one; the airlines would have

\textsuperscript{146} See supra notes 100-01 and accompanying text.

\textsuperscript{147} See Beth S. Adler, Comment, \textit{Deregulation in the Airline Industry: Toward a New Judicial Interpretation of the Railway Labor Act}, 80 NW. U. L. REV. 1003, n.213 (1986); see also Schoder, supra note 103, at 114.
no incentive to protect the incoming workers at the risk of upsetting existing labor relations, and the labor union would have no incentive to offer protections to employees it does not yet represent and who are likely a minority of its membership.

The problem of integrating seniority systems may seem daunting, but a simple way to protect incoming employees is to revive the Labor Protection Provisions ("LPPs") originally used by the Civil Aeronautics Board ("CAB"). Acquiring airlines face contract limitations on the benefits that they may extend to acquired employees depending on existing agreements that they may have with their labor unions. Providing an administrative entity that governs these relationships would take obligations of this nature outside of the realm of contract law and place it squarely in the hands of a neutral administrative body.

The LPPs that the CAB applied to merging airlines effectively protected acquired workers. The LPPs covered everything from seniority integration to moving expenses and supplemental pay for workers whose new jobs paid less than their old ones. No employees of the acquired company or acquiring airline would receive less than what they were entitled to under their existing labor contracts.

After deregulation, the CAB lost all authority to rule on airline mergers, and LPPs, although theoretically available for a time after merger authority was transferred, have never been imposed. Currently, the Department of Justice is the only administrative agency with authority to block airline mergers, but they have no authority to do so on the grounds of labor unfairness; the DOJ's only avenue to block a merger is to seek an injunction on antitrust grounds.

The NLRA has the National Labor Relations Board as its interpretive administrative agency, and as mergers and cases involving employees acquired en masse from airlines increase, the RLA needs a statutory administrative agency to oversee mergers and acquisitions to ensure fairness. Application of the LPPs is a solution that not only makes sense, but would represent a re-

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148 See Shoder, supra note 103, at 114.
149 See id. at 114-15 (discussing the role of the CAB and its use of LPPs to ensure equitable treatment of employees).
150 Id.
151 Id.
152 Id.
turn to stability for workers in the airline industry who may no longer be able to spend their entire careers with one airline.

B. LIMITING CHAOS

While the right to strike is a potent weapon in a labor union’s arsenal, it has long been recognized that rules must regulate when that weapon may be used. The RLA seeks to restrict use of the strike weapon to situations where the parties have exhausted all other resolution procedures. Other labor legislation, like the NLRA, recognizes that there are times when strike use is “protected” and other times when it is “not protected.” Intermittent strikes, however, differ from general strikes greatly in their impact on operations and the level of chaos they create for an employer.

Consider the Alaska Airlines CHAOS episode discussed earlier. The employer was faced with the possibility that a select few employees could strike, with little or no notice, for a short time. How does an employer prepare for such an event? What if the delivered strike is more severe than the anticipated strike? The airline is effectively at the mercy of the employees, if only for a short period of time. As seen from the American Airlines pilot sick-out in 1999, which cost the airline hundreds of millions of dollars in the span of a few days, damages from these tactics can be severe. As seen from Alaska Airlines, airlines can do little to combat the use of these techniques other than temporarily replace employees, as the airline is required to reinstate them when a job opening arises.

For labor unions, the partial strike tool is particularly appealing because while it causes airline operation disruption and increases the union’s bargaining leverage, partial strikes permit workers to still collect paychecks and receive benefits, whereas general strikes do not. If courts follow the Alaska Airlines ruling, the risks to striking workers are slight, making the probability of intermittent strikes greater than the probability of a general strike.

Nothing special about intermittent strikes warrants different treatment than cases arising under the NLRA’s non-transporta-

155 See supra notes 118-126 and accompanying text.
156 See Am. Airlines, Inc. v. Allied Pilots Ass’n, 228 F.3d 574, 577 (5th Cir. 2000).
157 See Ass’n of Flight Attendants, 847 F. Supp. at 838.
tion context. They are not a device that promotes stability in the airline industry, and therefore should not be excepted from standard application of NLRA principles to RLA cases. Rather, in the context of airline operations, CHAOS-like strikes can be more severe than in other contexts. Airlines run on a set time schedule, and missed flights mean missed revenues, delayed travel, delayed freight transport and other disruptions to interstate commerce. In Alaska Airlines, the partial strike included only a handful of striking workers at a given time, and the airline was able to find replacements for the striking flight attendants. But what if it had been more than a few workers at a time? What if the strikes had been more frequent? Placing an airline in the position of potentially facing a partial strike by a much larger number of its flight attendants and permitting the strikes to recur at random intervals places the industry in a dicey position. Eventually, as workers continually offered to return to service before their flights, the airline would take for granted the offer to return and would force flight attendants to follow through with their threats to disrupt flight service. But what could the airline do in response? Alaska Airlines suggests they should “permanently replace” the striking flight attendants. And then they must reinstate them.

Airlines should be permitted to discharge CHAOS-style striking workers for the sake of operations stability, if not to accord with NLRA principles. Permitting airlines to discharge workers in CHAOS situations would turn the intermittent strike tool into a kamikaze option for labor unions and would likely drastically reduce, if not completely eliminate, use of such tactics.

The text of the RLA currently does not contain the word “strike,” but perhaps it should. Congress should amend the statute to specifically reflect that certain activities are “protected” and “unprotected” in the parlance of the NLRA. Specifically identifying partial or intermittent strikes occurring in otherwise valid self-help periods as “unprotected” activity would force courts to accept that airlines should be able to respond to such tactics by discharging striking employees. This would explicitly overrule Alaska Airlines and drastically decrease the desirability of the partial strike tool for unions.

158 Id. at 833.
159 See id. at 837-38.
160 Id.
161 See 29 U.S.C. § 158 (setting forth “unfair labor practices” which provides the zones of protected and unprotected activity).
VI. CONCLUSION

In the post-deregulation age where airlines face an increasingly competitive marketplace and economic stress, the RLA is no longer adequate to ensure protection for airline employees. Workers can no longer expect to spend their entire careers with one airline, and provisions must exist to provide protection for workers when their employer has been liquidated or merged with another airline. The most practical solution to the problem is to reinstitute the LPPs previously applied to such situations, and to establish a separate administrative agency to govern airline mergers. In order to effectuate this change, however, Congress must act. Congress needs to authorize the establishment of such an entity and vest it with the power to apply LPPs in cases where workers' rights, benefits and status are in jeopardy as a result of merger or acquisition.

As competitive pressures increase, Congress must also act to curtail the ability of labor unions to engage in partial or intermittent strikes against airlines. Permitting partial or intermittent strikes, without permitting airlines to discharge workers engaging in them, disrupts the balance of power between labor unions and the airlines. This shift in the balance of power increases the likelihood that labor unions will disrupt airline operations with little notice, dramatically affecting interstate commerce. The judiciary has not adequately recognized and dealt with this problem, so Congress should act preemptively to return to airlines the ability to combat these intermittent strike techniques. Permitting airline employers to discharge striking workers would decrease, if not eliminate, the use of intermittent or partial strike tactics and restore stability to the industry.