# *Roe vs. Wade*
# *Jacksonville Bulk Terminals vs. Longshoremen*
# *Allied Pilots Association vs. AMR Corporation*

## Why APA Should *Petition For a Writ of Certiorari* With the Supreme Court

*"Though force can protect in emergency, only justice, fairness, consideration and cooperation can finally lead men to the dawn of eternal peace."*
*-President Dwight D. Eisenhower*

Q: What does the abrogation of a Railway Labor Act union contract under §1113 have in common with the most divisive issue of our time and a Cold War era political protest?

A: The matter of §1113 rejection is "capable of repetition, yet evading review," just as in the other two cases, and is an exception to the Constitution, Article III "cases and controversies" limitation to judicial review.

On December 7, 2012, the Allied Pilots Association (hereafter APA) ratified a "consensual agreement" coerced in the Bankruptcy Court of the Southern District of New York. Because a "consensual agreement" brought an end to the dispute created by the abrogation of its 80 year collective bargaining agreement (CBA) by the officers of AMR Corporation, the legal team for

the APA has stated they will drop their legal pursuit of the protection of their CBA under the Railway Labor Act (hereafter RLA) and 11 USC §1113. It was their argument that (a) their contract had expired and thus §1113 had no contract to reject, and (b) the RLA mandates that both sides, not just the APA, must abide by the prevailing "status quo" at the time the dispute was formed (2007).

The dropping of the legal appeals is due to the legal doctrine of the United States that states the judiciary is not allowed to hear cases that are theoretical in nature, but must be either a "case or controversy," which is to say an adversarial dispute for which there has been no resolution between the parties. Since APA has "consented" to the terms handed to them by the corporation via the District Court, no controversy exists. The case is moot and the courts are closed to the matter.

Or are they?

The Supreme Court has taken unto itself the ability to hear certain cases with particular qualities in the interest of justice. The case of a dispute, long since resolved, found its way to both the appellate court and the Supreme Court, which read:

> In some instances, despite the fact that the immediate dispute has been resolved, it may still be appropriate for a court to consider the litigation. *See G. Gunther, Cases and Materials on Constitutional Law 1578 (9th ed. 1975).* **If it is probable that similar cases will arise in the same fashion in the future and the underlying dispute will, as a result of similar occurrences, evade judicial review, there is a sufficient case to satisfy the constitutional requirement**. *Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).* However, if the case is not presented as a class action, mootness can be avoided only if the challenged action is in duration too short to be litigated fully prior to its cessation or expiration and there is a reasonable expectation that the same complaining party would again be subjected to the same action. *Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975); Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975).*
>
> The loading or unloading of a vessel requires but a day or two. If an injunction is issued against loading or unloading, unless this court grants a stay order, the vessel will have departed before an appellate court can review the injunction. **Thus, the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration**.
>
> Unlike the situation in *General Electric Co. v. Local Union 191, 443 F.2d 608, 610 (5th Cir. 1971), vacated and remanded, 398 U.S. 436, 90 S.Ct. 1883, 26 L.Ed.2d 384 (1970),* **where we found "no possibility of a recurrence of strikes" and the contract had expired, in the instant case there is a real possibility of the recurrence of work stoppages absent judicial intervention. Therefore, the second part of the jurisdictional test is satisfied: there is a reasonable expectation that the same**

> **complaining party will be subjected to the same action again**.
>
> The policy of the ILA continues. The Soviet Union's troops remain in Afghanistan. Unless we review the injunction now, **the controversy is capable of repetition in a fashion that would again evade review**.[1][emphasis added]

This is the legal doctrine of "*capable of repetition, yet evading review*." The APA would have to show that it is likely to be subject to the same controversy in the future and have a time frame insufficient to allow for the wheels of justice to turn the matter. Other factors are present to make the case sufficiently ripe for review.

In our opinion, the case of *Allied Pilots Association vs. AMR Corporation, Adv. Pro. No. 12-01094 (SHL)* (hereafter *APA vs. AMR*) **meets both standards**.

First, the issue of repeatability for the APA must be met. In this area, the facts support this to be a continuing area of controversy, not only for APA, but all airline labor unions, since airline labor unions are the only category of organized labor in the United States that is subject to unilateral abrogation of their agreement, but still being bound by §152-First of the RLA that states they must maintain the integrity of the operation of the airline under all reasonable exertions.[2]

The current coerced "consensual agreement" between APA and AMR contains a provision that AMR or its successor not avail itself to §1113 mechanics for a period of three years. This is in the context of a six year agreement, so it logically follows that APA could very well find itself, yet again, marching to the contractual gallows under the Second Circuits interpretation of what constitutes "status quo." If this were to happen again, it would, once again, be in a timeframe too short for judicial review outside of the Second Circuit, unless APA wished to bring upon itself, and its membership, more "uncertainty and pain" for having the temerity to question the Second Circuit's phantom-like standards of what constitutes "status quo" and the mythical perpetuity of agreements under the RLA.

The past decade was witness to this interpretation of the law coming into full bloom from the nascent applications in the various Frank Lorenzo bankruptcies. This area of controversy is accelerating, not waning.

---

[1] *NEW ORLEANS STEAMSHIP ASSOCIATION v. GENERAL LONGSHORE WORKERS, ILA and JACKSONVILLE BULK TERMINALS, INC. v. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION Nos. 80-3111, 80-5089. United States Court of Appeals, Fifth Circuit. Sept. 25, 1980. Reviewed by U.S. Supreme Court JACKSONVILLE BULK TERMINALS v. LONGSHOREMEN, (1982) 457 U.S. 702*

[2] See Captain Arnold D. Gentile, Government Affairs Chairman, US Airline Pilots Association, *Protecting Employees In Airline Bankruptcies*, Statement Before The Subcommittee On Commercial and Administrative Law, Committee On the Judiciary, US House of Representatives, December 16, 2009, available at www.operationorange.org/gentile091216.pdf

Secondly, the *APA vs. AMR* controversy must be of a short enough time frame to evade review. In the case of *Roe vs. Wade*, Justice Blackmon cited that the short duration of human gestation made it unlikely that the issue of abortion could be fully adjudicated in the courts without the case being rendered moot. Citing the doctrine of "*capable of repetition, yet escaping review*," Article III "cases and controversies" (hereafter Article III) limitation was waived. The gears of justice tumble sufficiently slow to allow a practical review of an actual controversy of this nature, due to the 9 month period for the entire drama to play out.

The case of *Roe vs. Wade* shows how *certiorari*[3] can be granted in a seemingly moot case. It is not our purpose to debate the underlying morality nor the legal conclusions drawn from the case, as those issues have been extensively debated for the previous forty years in every conceivable forum. This is not one of those forums. The only issue we seek to explore is the precedent used for granting *certiorari*, as the justification for granting such has almost identical underlying factors.

It is noteworthy that the federal bankruptcy code limits airline restructuring under 11 USC to 18 months. In the case of *APA vs. AMR*, the APA contract was not rejected until the 9th month of the proceedings, leaving a scant few 9 months (the same for the issue in *Roe vs. Wade*) for the case to be heard and adjudicated through the courts. Given that the Second Circuit Court of Appeals has already ruled in *NWA vs. AFA* that such a rejection is permissible under the law,[4] the case of *APA vs. AMR* would have to be heard by the appellate courts and then granted *certiorari* by the US Supreme Court, further allowing the two-year timeframe typical of such review. In the case of the AMR bankruptcy (2011), the period from the §1113 rejection of the collective bargaining agreement to the final chance for the pilot union to agree to be part of the reorganization as a full creditor was four months (August to December 2012), substantially shorter than the period relevant in *Roe vs. Wade*.

In *Jacksonville Bulk Terminals v Longshoremen*, the US Supreme Court granted *certiorari* to a case the Fifth Circuit had used a similar "capable of repetition, yet escaping review" exemption to Article III "cases and controversies." By this grant of *certiorari* to the Fifth Circuit, it logically follows that the US Supreme Court agreed with the Article III exemption.

Unlike APA and AFA, the other union contracts heard in the Second Circuit were not rejected, but renegotiated in the coercive framework of 11 USC §1113, thus an actual rejection was never the subject of a controversy. In the case of APA, the matter did make it to rejection, spurring a legal challenge to an actual controversy under the law.

---

[3] Certiorari (sir-she-uh-rare-ee) is the doctrine of having a superior court compel a case forward for review. United States law allows that the various "circuit courts" (ie. The Second Circuit, The Ninth Circuit, etc.) act as proxy for the Supreme Court of the United States, and normally treats their findings as final. In certain instances (less than 2%), the Supreme Court can issue a *writ of certiorari* to review a case and standardize the findings across the entire network of circuit courts. This takes a minimum of 4 Justices to vote for *certiorari*.

[4] *Northwest Airlines Corp. v. Ass'n of Flight Attendants-CWA, AFL-CIO (In re Northwest Airlines Corp.)*, 483 F.3d 160, 175 (2d Cir. 2007).

Having the High Court answer these questions out of "*capable of repetition, yet escaping review*" serves a high public purpose of keeping the integrity of all provisions of the RLA, as well as the integrity of the corporate restructuring process under 11 USC. Absent *certiorari*, both the RLA and bankruptcy procedures will be imperiled, unless it is the policy of the government that **only the unions must face such a dire legal landscape** - again a concept abhorrent to both the RLA and the provisions in bankruptcy requiring the process be equitable as reasonable for all creditors.

The only way for the APA to participate in "good public policy" would be for them to accept their bankruptcy claim as part of a coercive "consensual agreement" and allow all the parties involved in the airline reorganization to fulfill their roles within the proscribed 18 month period, while simultaneously keeping alive their dispute with the §1113 process in hopes of a High Court overturning of the interpretation of the statute. The APA knows they will not find favor within the Second Circuit, as *NWA vs. AFA* is the governing case. This would allow the Supreme Court the ability to deal with the issue once and for all.

There are three questions APA needs answered in the Supreme Court. All are perishable, but go to the heart of the entire reorganization process against the backdrop of the RLA:

1. Was there a contract at the time of the §1113 filing, or did it expire in May of 2008, and the parties were merely acting out the "status quo" of the last set of conditions that existed at the time §156 notice was filed, thus making the §1113 process inapplicable to rejecting a contract that no longer exists?

2. If a contract did exist (perpetual contract unique to the RLA), does the airline have the right to reject a contract under the RLA, since management has a legal mandate to exert every effort to make and keep agreements?

3. If §1113 nullifies the conditions in §152-First of compelling the parties to make and keep agreements, and since the Supreme Court in *Detroit and Toledo Shoreline Railroad vs. UTU*, 396 U.S. 142 (1969) (hereafter *Detroit and Toledo*) stated that "*Only if both sides are equally restrained can the Act's remedies work effectively,"* does that allow APA to deploy its economic weapons in response?

These are questions that need to be answered prior to the next round of contract negotiations at the larger airlines, since the industry and government have shown that §1113 and abuse of the dispute resolution mechanisms (politically motivated delays and blanket issuance of PEBs) are the preferred ways of keeping airline labor from acting in a manner that would halt the erosion of the economic well-being of its membership. There is little to suggest that the RLA's mechanisms will be used with the utility intended by its authors, since the "winning strategy" of §1113 contract abrogation will be the preferred method of action until it is shown to be ineffective or is removed by the Supreme Court.

# Is There A Contract to "Reject?"

The APA argues the collective bargaining agreement (CBA) ceased to exist as of May 1, 2008, per the language in the agreement, and as such 11 USC §1113 had no contract to reject, and the "status quo" would have to be maintained by AMR. The presiding judge in the AMR bankruptcy disagreed. The relevant text in the CBA concerning the duration of the agreement reads:

> This Agreement shall become effective May 1, 2003, except as otherwise dated herein, and shall continue in full force and effect until May 1, 2008, and shall renew itself without change until each succeeding May 1 thereafter, unless written notice of intended change is served in accordance with Section 6, Title 1, of the Railway Labor Act, as amended, by either party hereto at least sixty (60) days prior to May 1, 2008, or May 1 of any subsequent year.[5]

The plain reading of the text is in order. Note that the agreement stated that it has an origination date (May 1, 2003) and "*shall continue in full force and effect until May 1, 2008...*"

**First question**: According to the text (not the wishful and outcome-based reading of the text, but the actual language itself, as agreed to by both parties), what event causes the "full force and effect" to cease continuation?

A: May 1, 2008.

**Second question**: Are there provisions in the text (not the RLA, but the actual text as agreed to by the parties) that would cause the agreement to persist beyond May 1, 2008?

A: Yes. The text states the agreement will continue with full force and effect after May 1, 2008 "*unless written notice of intended change is served in accordance with Section 6, Title 1, of the Railway Labor Act, as amended, by either party hereto at least sixty (60) days prior to May 1, 2008, or May 1 of any subsequent year*."

**Third question**: Was proper notice of intended change served, thus rendering void the ability for the agreement to "*continue in full force and effect*" after May 1, 2008?

A: Yes. The parties agree that a notice of intended change, as contemplated by Section 26.C of the CBA, was properly served under Section 6 of the RLA. More specifically, American issued a letter on July 21, 2006, stating that it wished to exercise its right to "commence negotiations to make changes in rates of pay, rules and working conditions for flight deck crewmembers covered by the current Agreement."[6]

[5] *Allied Pilots vs. AMR*, pp 3-4
[6] ibid, pg. 4

**Fourth question**: Does judge Lane cite relevant text within the RLA to justify the Second Circuit's view that the agreement perpetuates, by a matter of law, beyond the May 1, 2008 date specified in the agreement?

A: No. Judge Lane references *NWA vs. AFA*, and *Manning vs. American Airlines*, cases in the Seventh Circuit, and even a case to the contrary to his understanding from the Ninth Circuit, but he did not cite one jot from the RLA where the RLA created a new class of contracts that would persist beyond a date specified therein, as a matter of law. Furthermore, the citations from other case law were centered around an incomprehensible and enormously vague idea that respecting the status quo (a term that only appears once in the entire RLA) changes the definition of duration to one of being indefinite.

It is difficult for many in the industry (and the federal bench acts as if they are part of the labor relations structure of the airlines) to set aside longstanding and misguided "conventional wisdom" when the text does not support such convention. This is the case with the "perpetual contract" misnomer that has permeated the entire industry. Nowhere in Lane's opinion, nor any Circuit Court opinion, is there citation of the text within the RLA that creates a new class of "super contract" that trumps the actual text within the agreement itself as to the duration of the contract.

The judge is making the same mistake (and we believe it to be intentional) many in the industry make by assuming that the "status quo" is to be construed as a "perpetual contract." It means nothing of the kind. All it requires is that the parties to a major dispute (and §156 negotiations are treated as major disputes) must maintain the status quo prevailing at the time the dispute was created in order to protect the counter-party interest, and the interest of not interrupting commerce over resolvable disputes. If not for this provision in the RLA, each major dispute would immediately devolve into an unwieldy mess that would threaten the very purpose of the RLA (see discussion on *Detroit and Toledo* below).

Judge Lane must support the existing case law and reputation of the Second Circuit, no matter what disjointed legal doctrine descends from such support. If the APA is correct in their interpretation of the matter, the only way he saves the legal paradigm of the Second Circuit is to say that §1113 allows for management to abrogate the RLA's status quo mandate. He is going to have a difficult time selling that concept since his Circuit Court has held that labor is required to maintain such provisions of the RLA. While it may be relatively ludicrous to posit that the RLA's status quo provisions be maintained, even though the agreement is rejected wholesale, it is absolutely untenable, even for this Circuit, to take the position that the status quo is only incumbent on one party, when the RLA is repeatedly quite specific to the contrary. There is a limit to raw judicial activism and Lane knows he is teetering on the edge of it. *Certiorari* fixes this.

# 7300 Revisited

Has American Airlines, and the System Board of Adjustment recently held that agreement do, in fact, terminate and are renewed by agreement?

We believe so.

In the case of the arbitration over the cockpit crewmember floor, American Airlines took the position that the exclusion of all pilots by way of seniority merger, negotiated in the 1997 agreement was not applicable in the contract negotiated in 2003. Justification for this was the fact there had "been no mergers since the May 1, 2003 effective date of the most recent agreement…"[7] The pertinent contract language for this section had been proposed for modification by a failed 2000 Tentative Agreement, but in the absence of ratification, the 1997 language persisted unchanged into the 2003 agreement.

American Airlines contended that there was a "new agreement" and all terms therein would be interpreted from the vantage point of 2003, rather than when the language was inserted (1997). Since the mergers had occurred in 1998 and 2001, rather than post-2003, the Reno Air and TWA pilots were no longer exempted to the count for the cockpit crewmember floor.

A legitimate question is raised with this interpretation, namely "Is it a new agreement, or the continuation of an ongoing agreement?" If the agreement is indeed ongoing and perpetual, the conditions existing at the time the language was inserted would be the conditions against which they would be interpreted, since that is where the "meeting of the minds" took place. If the agreement is fragmented and terminated and reborn by time and negotiation, then the argument positing that the terms are reviewed against the time the "new" agreement was made gains validity.

American maintains, and the arbitration upheld, the position that the contract is "new" when it is ratified, rather than continued and modified by new language with times specified for formal renewal. If this is the proper interpretation, and the APA must abide by such an interpretation to their detriment, why is this view of the nature of RLA contracts not present when deciding if §1113 can "reject" a contract that has an end time? If agreements have new origination dates, does it not follow that they must likewise have an end dates, or are agreements under the RLA only terminated by §1113 or under liquidation bankruptcy proceedings? Such an interpretation is absurd. The industry and courts are muddying the distinctions between a perpetual contract and an additional obligation to abide by the status quo at the onset of the dispute until a new agreement can be made. Essentially, the term "status quo" is being interpreted as "perpetual contract," and only in situations favorable to management.

The underlying factor in the arbitrator's consideration of this matter was that the fear that

[7] Grievance No. P-28-08, *Allied Pilots Association and American Airlines, Inc.*, pg. 5

application of the specific contract language, namely that if the company failed to keep 7300 non-merged pilots on their seniority list, the APA could use the contractual framework to draw down the operations of AMR American Eagle.

> *Finally, termination of American's commuter operation, as sought by APA, would have substantial adverse effects on American's business, including the reduction in flying opportunities for APA represented pilots.*[8]

The idea that the airline operation must go unabated at all costs rears its head. Even with the plain language in the contract, to which American Airlines agreed in 1997 as a condition of increased small-jet operating authority, it is overruled by an adherence to a wraith-like standard of what constitutes a agreement and what does not. In all recent cases, the standard is applied against the very contractual terms beneficial to labor in support of management's refusal to properly staff the operation to account for valid contractual application.

This interpretation presumes that APA did not wish to use the 7300 cockpit crewmember floor language to protect the jobs of its membership, as American Airlines states the language was not designed to accomplish.[9] This interpretation, as upheld in arbitration, would presume that APA entered into this language with the understanding that American Airlines could furlough every pilot on the property, save one, and expand the commuter carrier operation unabated - a preposterous notion that is insulting on its face, yet nonetheless passing for sound interpretation in the next-gen RLA legal adjudication paradigm. The "meeting of the minds" is the legal standard under US law, not the tortured, outcome-based interpretations of contractual provisions that would give the union lawful leverage in near-term disputes.

We see the matter of determining if a contract still exists for a §1113 hearing to reject rests on the idea of the perpetuity of the agreement. The agreement itself says that it ends, and the only restriction put on by the RLA is that both sides would be obligated to act in a manner that preserves the conditions at the time the dispute was created (§156 notice by the airline). The Second Circuit courts have attempted, with success, to create law out of whole cloth in a fairly naked attempt to deny labor any advantage under the already one-sided negotiating paradigm.

Judge Lane stated as much in his opinion:

> But the APA's position would bar the availability of Section 1113 to such cases where the statute is arguably most relevant. *See N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation . . . beneficial recapitalization could be jeopardized if the debtor-in-possession were saddled automatically with the debtor's prior collective-bargaining agreement.")[10]

---

[8] ibid, pg. 6
[9] ibid, pg. 5
[10] *Allied Pilots vs. AMR*, pg. 19

The purpose is to reorganize the debtor, and it must be the position of the Second Circuit to hold this standard above any other law. We see this in their double-sided approach to responsibilities under the RLA, and whether or not the §1113 provisions are even applicable. No matter what, the provisions are construed against that of labor, thus creating an enormously vague part of the law where vagaries need not exist if the textual application of the law were to find preeminence over the "Heads I win, tails you lose," standard the Second Circuit is famous for administering.

If the authors of the RLA had intended for the RLA to create a new form of contract law, would it not be reasonable to believe they would have included enough text to settle the matter, given that they would be trailblazing into an entire new body of law? Additionally, if the contract was indeed perpetual, despite its internal contradiction, why bother with the idea of the "status quo" in §156 negotiations, since the contract itself would govern the situation?

The RLA itself has the following text discussing the requirements for the parties to maintain the existing working conditions, rules, and pay during §156 proceedings:

> In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.[11]

Such a passage is wholly nonsensical if there exists a "perpetual contract." §156 merely states that neither party may change the conditions during the dispute process. If a perpetual contract did exist, why would it be necessary to state the manifestly obvious that the parties may not change the terms?

Does §157 (proffer of binding arbitration) function as the terminus of this "perpetual contract," and if so, where does the text state as much?

Nowhere in the RLA does it specify that a new type of contract is created, especially with the power to deny the very contents therein, yet this is the clumsy insistence of an activist court, functionally adding enormously vague text to a document it so strictly adheres to when enjoining mischievous "dripping job actions" by airline pilot unions.

Additionally, *certiorari* need be granted to this issue due to the "circuit split" referenced in Lane's opinion. The Ninth Circuit holds the textual view of the nature of contract perpetuity and the status quo obligations under the RLA,[12] It can be reasonably theorized that the airlines file

[11] 45 USC Chapter 8, §156 (also known as "Section 6 of the RLA")
[12] *Int'l Ass'n of Machinists and Aerospace Workers v. Aloha Airlines, Inc.*, 776 F.2d 812 (9th Cir. 1985)

for bankruptcy reorganization exclusively in the Second Circuit because the case law is known to be friendly to them, and they do not wish to create any more of a "circuit split" than already exists, so as to minimize risk of *certiorari* being granted in this issue. If the law were clear in the matter, the airlines would file in a wider range of circuits with predictable results as they do when seeking injunctions against pilot mischief regarding "dripping job actions."

# Detroit and Toledo Shoreline Railroad vs. UTU

One of the most cited Supreme Court cases in application of RLA law is *Detroit and Toledo*. This was a controversy involving a railroad's unilateral changing of conditions of work in the absence of language to the contrary, and the unions suit to stop the practice. This is one of the most defining cases on the issue of what constitutes "status quo" in matters pertinent to major disputes under the RLA.

During the drama associated with the §1113 rejection of the APA contract, the APA conducted a strike vote of its membership, which is the prelude to issuing a threat to strike. Immediately, AMR issued a statement that such a strike would be illegal in the Second Circuit. Additionally, the presiding judge in the AMR bankruptcy issued his own statement that agreed with the AMR statement:

> *The diminished likelihood of a strike also weighs in favor of approving rejection of the agreement.* ***The Second Circuit has held that following rejection of a collective bargaining agreement, it would be unlawful for labor to strike until the bargaining process set forth in the Railway Labor Act has been exhausted.*** *See Northwest Airlines Corp. v. Ass'n of Flight Attendants-CWA, AFL-CIO (In re Northwest Airlines Corp.), 483 F.3d 160, 175 (2d Cir. 2007).*
>
> *Following rejection of the agreement, therefore, both management and a union under the Railway Labor Act such as the APA would be required to continue negotiating in good faith.*[13] [emphasis added]

Judge Lane, the presiding judge in the AMR bankruptcy proceedings, quotes extensively from *Detroit and Toledo* when justifying the long and interminably drawn out nature of major dispute resolution under the RLA, but he very conspicuously omits any reference to the following passage from the very same ruling dealing with subject matter at the heart of the controversy before him:

> *To achieve its goal, the union invoked the procedures of the Act. The railroad, however, refused to maintain the status quo and, instead, proceeded to make the disputed outlying assignments. It could hardly be expected that the union would sit idly by as the railroad rushed to accomplish the very result the union was seeking to prohibit by agreement.* ***The***

[13] Hon. Sean Lane, *Memorandum of Decision*, United States Bankruptcy Court 11-15463-shl, Doc 4044, pg. 98, http://amrcaseinfo.com/pdflib/4044_15463.pdf

> ***union undoubtedly felt it could resort to self-help if the railroad could, and, not unreasonably, it threatened to strike****. Because the railroad prematurely resorted to self-help, the primary goal of the Act came very close to being defeated. The example of this case could no doubt be multiplied many times. It would be virtually impossible to include all working conditions in a collective-bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others. When the union moves to bring such a previously uncovered condition within the agreement, it is absolutely essential that the status quo provisions of the Act apply to that working condition if the purpose of the Act is to be fulfilled.* ***If the railroad is free at this stage to take advantage of the agreement's silence and resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. Only if both sides are equally restrained can the Act's remedies work effectively****.*[14]

Had Judge Lane quoted this paragraph from the very same decision, it would have laid bare how the Second Circuit is out of agreement with our nation's highest court. From this passage in the *Detroit and Toledo* decision, we can objectively and confidently conclude the following:

- The Supreme Court believes that a strike response to a unilateral change in the working conditions, even in the absence of language preventing such a change, is "not unreasonable."

- The premature actions of the company (unilateral change of the status quo) came close to defeating the primary goal of the RLA.

- The example in *Detroit and Toledo* is not unique to itself and could be repeated many times, hence the judiciaries often quoting of this decision in subsequent "status quo" disputes. ("*The example of this case could no doubt be multiplied many times.")*

- If the company is free to exercise "self-help" (acting in its own unilateral interests), the union can not be expected to hold back its own economic weapons, which include striking.

- The only way the RLA can function as intended is if both sides are equally restrained.

This is wholly out-of-step with the Second Circuit's interpretation and shows the circuit court to be engaged in judicial advocacy, a fact not overlooked by airlines when choosing a venue for filing for court supervised reorganization. The Second Circuit believes that management seeking to use the 11 USC §1113 provisions in the law absolve itself from the restraints in the RLA, yet the RLA persists to restrain the union in responding to such a change in their working conditions.[15] The circuit court's irresponsible interpretation of this area of the law, **with full knowledge and understanding of *Detroit and Toledo***, stand as the gravest threat to the

[14] *Detroit and Toledo Shoreline Railroad vs. UTU*, 396 U.S. 142 (1969)
[15] *Northwest Airlines Corp. v. Ass'n of Flight Attendants-CWA, AFL-CIO (In re Northwest Airlines Corp.)*, 483 F.3d 160, 175 (2d Cir. 2007).

continuance of the RLA as a means of effectively governing labor relations and disputes in the airline industry. How much longer before airline pilots seek to change the law in a fashion reflective of the abuses they have endured under such application, and do so by a means that will be beyond the ability for even the Supreme Court to effectively contain?[16] Our nation's founding philosophy is steeped in a tradition of rejection of tyranny, and it is not unreasonable for pilots to view their situation as a microcosm of the larger scale events of that founding. If the courts will deny the pilots the legitimate use of their "economic weapons," their only alternative will be to deploy political weapons.[17]

How can both sides be "equally restrained," as is the opinion of the Supreme Court in *Detroit and Toledo*, if one side must withhold the reasonable use of its "economic weapons" when the other side has no such limitation on acting out the very behavior the RLA seeks to eliminate (unilateral imposition of pay, rules, and working conditions)? If the only remedy against such an action is for an individual employee, not acting in concert with his unionized peers, to "vote with his feet" and leave the employ of the airline, the lasting effect of such §1113 proceedings is that a de-facto "lockout" has occurred, and only those willing to work under the newly imposed pay, rules, and working conditions are allowed employment. In fact, this method of a "dripping lockout" is of unquestioned value to the airline, since in a genuine lockout, the airline would endure crippling economic harm due to the operation being shut down by its own actions. In this "dripping lockout," the airline is capable of replacing workers at a rate that does no harm to the airline.

Is this what the drafters of the RLA had in mind? Was this the "meeting of the minds" between the rail tycoons and the unionists when they brokered the RLA "peace treaty?"

We believe the Second Circuit is overreaching in this area and is becoming increasingly clumsy and brazen in skirting the RLA's provisions, while overzealously enforcing them when pilots attempt their own "dripping job actions," such as sick-outs, refusal of voluntary overtime, using contractually earned sick leave, and conducting work-to-rule/regulation campaigns. Again we ask, how is this keeping with the High Court's opinion in *Detroit and Toledo* that:

> *If the railroad is free at this stage to take advantage of the agreement's silence and resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. Only if both sides are equally restrained can the Act's remedies work effectively.*

The Supreme Court must weigh in on this matter to defend its own integrity in as much as district courts may assess civil damages and contempt citations for pilot unions not enthusiastically carrying out provisions of the injunctions they issue, lest they become a toothless entity.

---

[16] See OPERATION ORANGE, *OPERATION ORANGE: Illegal Action or Protected Activity?*, www.operationorange.org/our1stA.pdf

[17] www.operationorange.org

# If a Contract Exists, Can It Be Rejected in Accordance With the RLA?

The RLA was developed to bring calm to the tumultuous arena where railroad tycoons and brass knuckled unionists would do battle, holding the national commerce in the balance. Many attempts at a workable law failed miserably until the RLA was introduced. The great compromise was that each side to a collective bargaining agreement would have to lay aside their primary weapons and allow a more reasoned and deliberate approach to dispute resolution to take place, with the government serving as a facilitator and peace keeper. Unions would agree to give release authority for strikes and work actions to the government and railroads would be prohibited from unilaterally changing the pay, rules, and working conditions of the employees and also being prohibited from interfering with the unionization of employees and potential employees, to the point of *criminal sanction* against the officers of the carrier.[18]

It was a system that worked reasonably well as long as **both parties** behaved in a reasonable manner. In the case of the airlines, each side played games with one another, but as long as the games remained relatively contained and tame, nobody cared much. Management would use the "status quo" provisions of the RLA to stall during negotiations, frustrating union leaders and their positions, and taking a passel of "hostages" (furloughed employees) as negotiations were about to ramp up, while unions responded with low grade "work to rule" campaigns to jump-start the negotiations.

This balance of power persisted until two events changed things decidedly in the favor of management. The second of which was the realization by management that they can have the federal bench enjoin with a sledgehammer approach any low grade "dripping work actions" by the unions. This was most famously illustrated in the case of a 1999 "sick-out" by American Airlines pilots in response to the addition of conditions in their working agreement relating to the integration of a recently acquired airline - Reno Air. In this case, Judge Joe Kendall charged the union officers to use all reasonable actions to end the sick out. The union complied with the letter of the order, but in the opinion of the judge, had not done "everything" they could. The snippets from his opinion made headlines across the country with statements such as telling the union that when he is finished with them, their strike fund will fit securely in the overhead of a Piper Cub aircraft.[19]

Since then, the courts have enjoined Delta for failure to view voluntary overtime as mandatory, United for using sick leave and "flying the contract," and US Airways for conducting a "work to rule" safety campaign designed to slow down the airline.

However, the most important change to the balance of power under the RLA occurred in 1983 when Frank Lorenzo was asset stripping Continental Airlines and took his pilots to a strike. He

[18] 45 USC Chapter 8, §152-Tenth
[19] citation needed

used the 11 USC provisions to reject the pilot contract and impose his own working terms. Once airline management saw that bankruptcy was the way around the RLA, the race to the bottom was on. This hit with full force in the post 9-11 era as every major network airline with a history of poor to mediocre labor relations sprinted to bankruptcy court in New York to impose new conditions on the employees - RLA be damned.

That brings us to *APA vs. AMR*, the latest chapter in this legal tragedy.
§152-First of the RLA provides the following text:

> *It shall be the duty of all carriers, their officers, agents, and employees to* ***exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise****, in order 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.*[20] [Emphasis added]

This is the text in the RLA the courts use to enjoin any "dripping job actions" by the unions. It is uniformly applied in compliance with the actual text and plain meaning of the RLA. There is no reason to believe the High Court need to clarify the issue, as the written law and case law are clear and in unison, as well as being uniformly applied across the network of courts.

The question in this matter concerns the applicability of this section to the preferred "works-around" used by the parties to the RLA agreements. Can the courts enjoin unlawful union activity designed to skirt an absolutist interpretation of the §152-First language, and if so, does this approach also apply to management? From the opinion issued in *Detroit and Toledo*, we believe both sides are equally restrained in the matter and therefore management is responsible under this section as much as labor.

Since it is the duty of both labor **and management** to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions,…" the APA offered as a means to settle the ongoing dispute final and binding arbitration in the bankruptcy dispute. The company rejected such an offer to make the agreement, preferring the wholesale rejection of eight decades of agreements via §1113.

It is no secret in the industry that the stability provisions of the RLA tend to favor management in cases where they are not seeking wholesale bankruptcy, thus the industry tends to hide behind the stability provisions in the RLA to "kick the can" down the road to more favorable negotiating conditions. It is difficult to believe this is in keeping with the intent of the RLA, but it has been a regular feature of the RLA for decades. The employees used to play their games, like "work to rule" and the like, but the courts have taken a sledgehammer to such activity since 1999. Thus, the stability provisions are now a raw managerial asset in negotiating working agreements under the RLA.

[20] 45 USC Chapter 8, §152-First

This is evident in all three major airline pilot contract negotiations in 2012, where Delta pilots rushed to agreement to avoid the extensive delays inherent in the RLA process,[21] as their peers at United, American, and US Airways had been. United's MEC sent out a letter[22] explaining that if they do not ratify their tentative agreement, they could be stuck in the morass of the RLA mediation for upwards of another year. The RLA is the biggest tool used by management, because they love the inherent bias against labor that the combination of §152-First and the various stability provisions of the RLA give them.

Funny how such advocacy for duties to keep the most doctrinaire reading of the operation of the carrier intact is suddenly and conspicuously absent when the company is filing for reorganization in federal bankruptcy court.

§152-First, provides that, not only the employees must steadfastly maintain the integrity of the operation of the carrier ("in order 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"), it also mandates that the company "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to **settle all disputes**, whether arising out of the application of such agreements or **otherwise.**"

Otherwise? Settle all disputes? The carrier has a duty to maintain agreements and settle all disputes, whether arising out of the agreements or otherwise? This is the minor/major dispute distinction in the RLA, but it also does not give exemptions for other law. If "otherwise" is vague enough to encompass everything that doesn't arise under the agreement (minor dispute), then how is it specific enough to exclude §1113?

The Second Circuit says that it is so, without citing text to justify it, instead relying on the internal pollination of its own bizarre and opportunistic interpretation of conventional wisdom with other likewise foundationless edicts. This occurs while ignoring the glaring contrary opinion of the Supreme Court in *Detroit and Toledo* in a manner that would rewrite Exodus to have only 6 Commandments, conveniently leaving out prohibitions against theft, blasphemy, adultery, and perjury.

That being the case, if the courts are to lift other law above the RLA's provisions for one party, and the Supreme Court holds that the act is to be interpreted as requiring "equal restraint," would that not indicate that the Second Circuit's interpretation of the abrogation exception to be in error? How could it not?

The "bankruptcy gambit" fails on both prongs of the mandate in §152-First - that it fails to maintain agreements and it likewise fails to settle the dispute in the manner prescribed by the act.

---

[21] Captain O'Malley, Timothy, Delta MEC Chairman, *Chairman's Letter for Monday, May 21, 2012*, http://dal.alpa.org

[22] Captains Pierce and Heppner, ALPA MEC Chairmen for Continental and United, letter dated November 30, 2012

However, the Second Circuit holds in *NWA vs. AFA* that the union is still bound by §152-First and §152-Seventh, and §156, even though it is bound in solitude. The various District Courts have held that union mischief designed to pressure the change of contract language in their favor is a direct violation of these provisions.

As was said in *Detroit and Toledo*:

> *Because the railroad prematurely resorted to self-help, the primary goal of the Act came very close to being defeated.*

Is not the act of one party resorting to self-help, by any means, a way for the RLA to be defeated? If so, as the Supreme Court has said, then how does the Second Circuit interpretation of the issue square with the High Court's imposed concern? It does not. The Second Circuit is engaged in selective application, intentionally vague interpretations, and outcome-based reasoning.

If the RLA is to be partially trumped by §1113, neither body of law references that fact or why only one party is given relief under §152-First, *et seq*.

# Can The Union Strike In Response?

The Second Circuit justifies their position by parsing definitions between functional synonyms. The legal standard in the Second Circuit relies on the contracts being "abrogated" rather than "breached."[23] If the definition of "abrogated" denotes wholesale rejection, but "breached" merely implies a failure to obey, keep, or preserve something such as a law, trust, or promise, what is the difference when it comes to agreements? Is "abrogation" permissible under the RLA, and if so, what is the relevant text authorizing it? Under what conditions is the union also allowed to "abrogate" a contract, by not just violating one part of it, as is the case in an illegal job action, but instead, go for the entire package and refuse to abide by any part of the agreement and impose its own terms? If not, why does the Second Circuit insist on justification due to "abrogation," rather than saying that §1113 law trumps RLA law, and doing away with disingenuous manipulation of functional synonyms?

The answer is obvious: if the §1113 law were to be preeminent for the company, it would also be preeminent for the union, releasing them from the bindings of the RLA and allowing them unfettered access to their entire arsenal of economic weapons, as was in the case of the Hostess bakers unions in their §1113 bankruptcy "abrogation."

The question of whether or not the union would be allowed use of its economic weapons in response to a string of decisions that (a) assumed the contract did persist beyond the duration

[23] *Northwest Airlines Corp. v. Ass'n of Flight Attendants-CWA, AFL-CIO (In re Northwest Airlines Corp.)*, 483 F.3d 160, 175 (2d Cir. 2007).

clause, and (b) the courts could reject the contract without regard for the RLA's prohibition, still is a matter for the High Court to determine. The law and previous High Court decisions, to say nothing of the tortured nature of the reasoning in the Second Circuit belying the obvious consequences to such an attack on the pay, rules, and working conditions of the Allied Pilots Association, would indicate strongly that if the APA made good on its strike threat, it would be consistent with the longstanding application of the law.

First, there is the matter of how §152-First relates to the union using its economic weapons in defense of their pay, rules, and working conditions. In *Detroit and Toledo*, the Court opined that it would be "not unreasonable" for the union to resort to self-help, including that of a strike, if the company resorted to "self-help" (unilateral change in pay, rules, or working conditions) first. In the case of *APA vs. AMR*, the company took action to change the terms of the working agreement outside the provisions of §156 of the RLA, which is considered a criminal offense in §152-Seventh, and §152-Tenth of the RLA, subjecting the officers to fines and imprisonment, with each day constituting a separate offense.

The authors of the RLA stipulated criminal offenses in the act for willful violation of the prohibition against the unilateral change in the pay, rules, and working conditions outside the terms of the agreement therein or under §156 of the RLA, or the interference of unionization efforts by the employees. This makes sense, since the RLA required unions to lay aside their principle weapons in the interest of making peace under the act. If the authors went through the trouble to define such activity as criminal, with each day constituting a separate criminal offense, one would be on firm ground to suggest this is a very serious foundational principle of the act. How is it that the cavalier dismissal of this provision by §1113, yet holding labor accountable to §152-First, is remotely defensible, given the textual silence in both bodies of law and the glaring exhortation not to touch the employee contract in the RLA?

It isn't and that is why the Supreme Court said as much in *Detroit and Toledo*. They knew that if both sides were not equally restrained, and management was seen as having ease of skirting §152-Seventh and §152-First, labor would rightly believe it had been betrayed by the very concept of the RLA, and resort to using the full spectrum of its economic weapons without regard for temperance in the law. The Supreme Court held that the foundations of the RLA were fragile and must be rigorously defended against any attack, just as the district courts have zealously ferreted out mischievous "dripping job actions" by the pilots since 1999.

The courts have yet to cite one passage from the RLA giving them the authority to abrogate, breach, reject, jettison, repeal, dismiss, cast off, cull, crush, quash, annihilate, suppress, modify, disgorge, shred, torch, terminate, slice, dice, chop, crop, or in any other manner violate the integrity of the contracts negotiated under the auspices of the RLA. The very law the courts so rigorously enforce - namely the duty for each party to make and maintain agreements - is suddenly absent without explanation in every pertinent rendering of a judicial opinion in the matter.

# NMB Malfeasance

There is another player in this drama. While the responsibilities of the courts, labor, and management have been explored, the role of the government must also be addressed.

While the judiciary is largely disinterested in the political interplay in the elected branches of government, discussion of the abdication of the duty of the government is pertinent to paint the bleak legal portrait faced by labor in these issues.

The RLA exists to protect the government's interest in promoting reliable commerce along its lines. As such, the government's statutory duty is to hold the strike weapon in trust for labor, and adjudicating minor disputes arising out of agreements made under the auspices of the act. There also exist provisions for the government to act as the entity of record for matters relating to official unionization efforts and formal dispute resolution.

If the NMB were to become polluted by politics, especially at the behest of management's desires under the RLA, it would be very easy for the NMB to fracture the delicate balance necessary to prevent the RLA's primary purposes from being defeated.

Labor has long suspected that the NMB has chosen sides and outcomes, all to the detriment of labor. The justification for such is that the economy is too fragile to allow any of the carriers to temporarily shut down to force a resolution in a labor dispute. This is obviously welcome news to airline executives around the country, since they need only spin scary tales about how unreasonable labor is and how acquiescing to labor's desire to access their economic weapons will harm innocent bystanders in the economy.

The situation has deteriorated so severely that the NMB is no longer bashful about the situation and has told labor leaders that they no longer have access to the weapons they entrusted to government to hold.

The Communications Director for the APA, First Officer Thomas Hoban, recently posted on the APA's pilot messaging boards the following admission of the fact:

> *Comm*[sic] *Air and and Spirit are "apples to oranges" comparators and illustrate that the NMB is willing to let a very small carrier, whose impact on the national economy is negligible take it to a strike. It's very unlikely if not improbable that we'll every*[sic] *see any group of unionized employees that work for a large carrier allowed to strike.* ***The NMB has stated this in private meetings with APA leadership. The long term effect of this policy is to effectively neuter a weapon that we had taken for granted****. Once again, its sucks to be us.*[24] [emphasis added]

[24] Challenge and Response, *A Response To Captain Cutter*, 12/4/2012 6:12:11 AM

The APA is not the only source for such an admission. The UAL MEC (pilot union for United Airlines) published a letter, dated November 20, 2012 that had the following to say about the issue:

> ***Even more disconcerting are the political considerations that some believe now play a role in the decisions of the independent agency of the NMB****. These issues are not new to the industry, and in the past many people in the industry questioned the efficiency of the NMB mediation process. To address these concerns, President Clinton established the Dunlop Committee in 1994 to research and report on these issues. After successfully implementing the recommendations of that report, the NMB in 2009 commissioned a second committee called the Dunlop II Committee involving industry stake holders. The Dunlop II Committee issued its report in April 2010- coincidently just one month prior to the United and Continental merger announcement. The Dunlop II report (attached with hi-lights) discusses several issues, but the heart of the report is in one paragraph that describes the overarching criticism of NMB mediated negotiations:*
>
> > *the Board sometimes fails to forcefully and effectively manage the process This was particularly evident during the last decade when many thought there was little credible threat of a release from mediation being issued by the Board. [emphasis added, Dunlop II, pg. 5-6]*
>
> *This short but frank statement reveals a seismic flaw in the application of the RLA. Without the credible threat of a Proffer of Arbitration, and hence the threat of release, the negotiating parties do not share a balanced uncertainty.* ***If one side is fairly certain that a proffer will not occur, then that impacts their motivation to negotiate in good faith****. For example, in a positive bargaining environment, if the company believed that its bargaining performance was not subject to the consequences of increased uncertainty, then low performance might result. In fact, excruciating slow progress would work to the company's advantage in two ways. First, a delayed agreement avoids the cost increase of an improved contract. Second, excessive delay could ultimately soften the resolve of the Pilot group and prompt bargaining positions that reflect unbalanced uncertainty. If a credible threat of release does not exist, then the RLA favors one party over the other.*
>
> *During the United and Continental JCBA negotiations, the many thoughts of those involved in the negotiations, both directly and indirectly, very much reflected the above accusation from the Dunlop II Report.* ***When the topic of release came up, many insiders mentioned the reasons why release was not credible- we are too big to strike, it is an election year, the economic conditions do not allow for a potential shutdown, etc., etc. Oddly and interestingly, it was not the company that offered such sentiment, but others in the industry, and even experts inside ALPA. Even members in the MEC structure privately acknowledged that this was the reality. Clearly the airline industry as a whole maintained a negative paradigm about the possibility of release, and that paradigm was aiding the company and hurting the pilots. This no release paradigm was the heart of the problem in our negotiations.***[25] [emphasis added]

[25] Hebinick, Rob, *Observations on NMB Mediated Negotiating Dynamics,* November 20, 2012

If the "independent" NMB process has been admittedly polluted by politics, and the NMB is admitting to the pilots that they have no intention of ever letting them have access to the release mechanism specified in the RLA, what is a pilot union to do? In order to abide by the law, the pilots must accept a perversion of the manifestly obvious underlying philosophy of the RLA, namely that while the union is allowed to organize, it has no means of effectively defending itself against the onslaught of all the other principles aligned against its purposes. It is absurd on its face that the Congress would write the RLA in a manner that provided for intricate and involved union activity, as a means to improve and protect the livelihoods of the employees, yet denying them all the means to bring about such a result. The question becomes, "Why bother to unionize in the first place?"

The political infection of the NMB is shown as early as March of 2001, when President Bush issued an executive order blocking a strike by NWA mechanics and told a Sioux Falls, Iowa audience that he would take "the necessary steps" to block walkouts at any major carrier for the entire year.[26] This represented only the second time since 1966 that a president would order unionized employees to stay on the job. The previous instance was, once again, at the expense of the American Airlines pilots in February of 1997, where their strike was broken 15 minutes after it began, passing any momentum in the process back to AMR management. Maintaining endless negotiations almost always benefits management and gaining the ability to activate economic weapons of service interruption generally benefits labor.[27] The RLA is geared to limit the ability for labor to activate such mechanisms, so when they are finally cleared through the seemingly endless process, it is a catastrophic blow to take back such freedoms. What ends up being detrimental to labor is likewise beneficial to management.

While there is no mechanism for the courts to instruct the NMB to release the unions in a specific manner, it is nonetheless noteworthy that the statutory standard the NMB is supposed to use is "prompt." With pilot contract negotiations lasting 3-6 years after the agreement had expired, on average, and with that length of time increasing, is not an elastic term such as "prompt" likewise interpretable as an equally elastic term, such as "reasonable exertion?"

# Coercion to Prevent Judicial Review

It is our argument that the legal sanctions faced by pilot labor under the combination of the RLA and §1113 serve a decidedly cynical purpose, and that is to ensure the entire process evades judicial review.

The very nature of the catastrophic loss to be suffered by APA, in the event of a rejection of the coerced "consensual agreement," has the effect of being developed for the purpose of ensuring the matter consistently evades review by the Supreme Court out of an abuse of Article III. When the matter affects hundreds of thousands of unionized employees, the integrity of the RLA's

[26] Zuckerman, Laurence, *Bush Issues Order Preventing Strike By Airline Union*, NEW YORK TIMES, March 10, 2001
[27] Hebinick, *op cit*

underlying philosophy, and the High Court's own opinions in the matter (*Detroit and Toledo*), *certiorari* brings about resolution and closure for all involved.

No union wants the new contract or the "claim," but takes them because it was forced to do so because the original contract was rejected - a process that has not been fully adjudicated. They are choosing from the better of two bad alternatives - alternatives that were created through the misapplication of §1113 and the RLA, and which the reality for the union in the event of rejection of the "consensual agreement" is arbitrary and ruinous terms imposed by a "term sheet." Subsequent to the conclusion of bankruptcy proceedings, the prevailing legal opinion is that the union would be in an environment where the company would no longer account to the courts and could change the working conditions at will, seemingly daily, without regard for any stability provisions of the RLA.

The only way for APA to prevail on its case would be for them to risk ruinous conditions in the event their petition failed, or for the other creditors in the process to face extremely complicated "unwinding" of positions the bankruptcy court approved with the idea the pilot union would be the only party not entitled to participation in the claims and reorganization process.

There are only two options that do not put all parties on a collision course with these outcomes:

> 1) the union must absorb unilateral amending of their contract with little or no rights in pushing back against the seemingly unwavering support the court grants the debtor in such instances. This serves to allow the creditors to look toward future employee compensation, and past deferred compensation (pensions), as the primary source of collateral for the capitalization of the airline. This concept is foreign to other industries where financiers secure the assets of the company, or capital market derivatives (hedging products) as security for their loans. (present understanding in the Second Circuit)
>
> 2) prohibition on unilateral amendment of the union contract during bankruptcy in accordance with the principal underlying philosophy and plain text of the RLA. Creditors would deal with airlines with the foreknowledge that the employee compensation will not serve as collateral for the capitalization of the airline, with the bankruptcy process reflecting that understanding. (preferred understanding)

# "Uncertainty and pain"

The Chief Pilot of American Airlines, Captain John Hale, issued a statement to his pilots that faced a future of "uncertainty and pain"[28] if they did not ratify the pending coerced "consensual agreement." Is this the environment envisioned by the authors of the RLA? Is threatening "pain" for over 9000 pilots, if they do not knuckle under to the §1113, a valid way to keep High Court

[28] Captain Hale, John, *Flight Department Hotline*, August 3, 2012

review from occurring? If both sides are to be treated equally under the RLA, what is the situation where the pilots can tell the airline that they face a future of "pain" if they do not acquiesce to their one-sided and court-enforced interpretation of the negotiating framework? This was taken by almost all pilots as being a naked threat.

"Uncertainty" is understood because both parties are in uncharted waters with the full rejection of the APA collective bargaining agreement, but using the term "pain" shows the decidedly one-sided nature of the proceedings and smacks of deliberate intimidation for purposes of perpetuating an injustice. By issuing such a threat that seeks, among other things, the pilots to abandon their legal rights under the RLA and under Article III, does that rise to the level of criminal interference with the union under §152-Tenth?

Threats as these serve to quash appeals of the judicial interpretations of these provisions, since there is a high price to be paid for asking the questions. As we mentioned above, other parties may also be forced to pay a high price for the question to be asked, and this would go to benefit the party that may be operating on thin legal ground by avoiding the disinfecting powers that sunshine brings.

To use a poker analogy, the legal process allows the airline to raise the pot high enough that union has no reasonable means of calling, even if the airline is holding a "2-7 off-suit,"[29] against a pair of Jacks for the union. The stakes are so high that no reasonable union leadership can, in good faith to its membership, risk being on the wrong side of a decidedly murky, and increasingly hostile area of the law. This has the effect of making the union's rights under the RLA nothing more than an ability to slow, but neither stop nor reverse, the rapacious appetites of managerial edicts for concessions in pay, rules, and working conditions. The past 30 years is testament to that reality.

The APA did petition for the dispute to be resolved by binding arbitration and AMR denied participation in that arbitration, since it knew the outcome would be more favorable in the Second Circuit if they were to push for a §1113 rejection. Such a rejection would enable them to impose terms at will, rather than have terms imposed by an arbitrator. In this case, it is manifestly obvious that the APA wished to achieve and maintain an agreement and the company wished to push for a unilateral imposition. Only the APA's position is consistent with the philosophical underlayment of the RLA. While the APA was being coerced into "agreeing" to the "Last Best Final Offer" from AMR Corporate executives, it was only doing so as an alternative to a court ordered destruction of 80 years of collective bargaining under the RLA. It is unreasonable to believe that this is the vision of the authors of the RLA.

[29] A "2-7 off-suit" is considered the weakest hand to be dealt to a player in the popular poker game, "TEXAS HOLD 'EM and the only viable way of winning with such a hand is to "bluff the pot" high enough that the opponents must "fold" before the hands are compared.

# Unscrambling the Omelet

It is also good public policy[30] to get the airlines reorganized (provided the reorganization was not a sham bankruptcy designed for nothing more than forcing employees to give what they never would have voluntarily given at §156 negotiations, such as SCOPE of flying, pension, etc.) so that commerce can benefit from a more efficient system. For APA to keep their "case and controversy" alive for the sole purpose of High Court review, the reorganization process would necessarily be harmed and delayed until the review is complete. This would go against the Congressional mandate that the process be swift (18 months in duration).

Forcing the union to forego participation in the reorganization process, setting aside 90% of their claim on the estate of the debtor, just to ask an for a small chance at *certiorari*, is neither justice nor good public policy. In the event of *certiorari* only in the instance of a persisting "case or controversy," the Supreme Court would be in the unenviable position of having to either uphold the Second Circuit, ruining the union and sparking thousands of lawsuits from the membership, or being forced to "unscramble the omelet" after the other principles in the bankruptcy have already decided the disposition of the debtor's estate.

Is it the intention of the Supreme Court that it encourage union recalcitrance in District Court bankruptcy proceedings and the unnecessary complication and wholesale ruination of tens of thousands of the very people necessary to uphold the operation of the airline under the RLA? We think not.

# Follow The Money

"Follow the money" is an often used truism when investigating why things unfold the way they do. In the controversy of the "bankruptcy gambit,[31]" following the money is a worthwhile endeavor.

It is noteworthy to stipulate that while employee pay, rules, and working conditions have deteriorated in 30 years, many of the airlines themselves have also fallen on financial austerity, seemingly justifying the reduction in employee compensation. However, if the view is observed from the vantage point of executive compensation, the picture appears quite different.

Executives are the "brains" behind the operation, and as such, make all the decisions. Judging from the disparity between the financial performance of the airline, and the compensation of the executive suite, it would appear the current generation of executives are running the airline

[30] "good public policy" is a reference to the benefit of having a functioning air transportation system, and is not to be taken as an approval of airline pilots having to agree to coerced working conditions.
[31] "Bankruptcy gambit" is a term coined by OPERATION ORANGE to denote the strategy of airline management to use the bankruptcy process as a means to force labor concessions while also putting themselves in a position to receive much of the wealth of the newly reborn airline.

industry for their own benefit, rather than that of the shareholders and creditors. 11 USC has consistently allowed executives to use its mechanisms to gut employee compensation and emerge with a financial windfall of their own. Often times it was the executive team that presided over the long slide into bankruptcy itself. From their point-of-view, the airlines are doing quite well, and the bankruptcy process rewards, rather than punishes, the tendency to run airlines in this manner. Is this good public policy?

Qui bono? Not the public, employees, nor shareholders, but the executives.

Many may see this in terms unique to their own priorities, and employees are no different. Their view is that the combination of the RLA and §1113 serve but one purpose, and that is to transfer wealth from the aggregate of employees to the executives under the color of law.

Additionally, when all the legal filings and perturbations are stripped away from the analysis, the final result boils down to the fact the executives that filed for bankruptcy got fabulously wealthy from the process, while the employees suffered harshly in terms of pay, rules, and working conditions. The lawyers and bankers may see this as a complicated process, and it is, but the employees see the process as nothing more than a means to transfer wealth from their accounts to those of the airline executives - legalized grand larceny.

Given how §1113 represents substantial "free money" for executives, it is unreasonable to expect them to look past such opportunities, given how cooperative the courts have been helping executives extract such landmark concessions that wind up as landmark executive compensation. In other words, the "bankruptcy gambit" is here to stay, unless the courts strip that ability out of the Second Circuit's interpretation.

During the hearings concerning the 1999 sick-out by APA represented pilots, Judge Joe Kendall referred to the APA as "extortionists" whose tactics mirrored those of the "five families of New York." While Judge Kendall made quite a name for himself with such inflammatory remarks in his decision, it is also interesting to note that it is management that has used the §1113 process to extort concessions from employees, especially pilots. After the voluntary reorganization at AMR Corporation from 2003-2008, management took extraordinarily lucrative bonuses for periods of anorexic profitability in a much larger sea of red ink, all the while pilots gave up large sections of their working agreement, including pay, rules, and working conditions. When pilots dug into positions designed to defend their scope of flying, the company filed bankruptcy and extracted those concessions behind the snarling and remorseless coercion of Judge Sean Lane's courtroom. As the American Airlines VP of Flight Operations stated in his August 3, 2012 "Flight Department Hotline," the pilots would face "uncertainty and pain" if they did not ratify the managerial dream sheet, known as the "Last Best Final Offer," which included many of the concessions the union was defending in §156 negotiations that had been ongoing for 5 years.[32]

[32] §152a (4)(5) of the RLA states: *(4) to provide for the **prompt** and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the **prompt** and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or*

The executives of AMR Corporation stand to gain $300-600 million in compensation and equity in the new reorganized American Airlines,[33] just as Glenn Tilton personally benefited somewhere around $70 million for his brief time at United Airlines, doing nothing more than confronting the unions and extracting concessions through §1113.[34] Both United pilots and American pilots had their compensation severely reduced, and in the case of United Airlines, the equity the pilots had purchased with their DEFINED CONTRIBUTION retirement account over the previous decade (ESOP) was entirely wiped out, with new stock being issued to the executives.

This is using the auspices of the courts to accomplish what Judge Joe Kendall accused the officers of APA of doing when they were, much like in *Detroit and Toledo*, attempting to not sit idly by while management took advantage of silence in the working agreement and was forcing in language not negotiated by the parties in §156 negotiations (acquisition of Reno Air and the protocols for applying the working agreement).

Who are the extortionists?

# The Natural Consequences of Selective Application

It is easy to take a populist approach to the matter of pilot compensation, since pilots for large network carriers have traditionally been compensated well above the national mean. Reducing wages and working conditions to the mean is seen as a politically savvy move, since the complaints can be countered with pointing out the obviously higher than average standard of living **some** pilots enjoy. This would be a valid comparison if the skill level, aptitude, and responsibilities were also tightly tethered to the mean, but they are not. If the pilot labor pool is so important that an entire body of law must be constructed to ensure its reliable application, it logically follows that a skill requiring decades to develop is going to naturally command compensation well above the mean. Using the perversion of an already intrusive law to keep

---

*working conditions.* [emphasis added]
While the term "prompt" is obviously subjective in nature, so is the term "reasonable." If unions are going to be held to a very narrow interpretation of "reasonable" in their duty under §152-First, does the interest of inherent fairness under the law, to say nothing of the underlying philosophical framework of the RLA, likewise obligate the NMB to more narrowly define "prompt" in the same context? When negotiations have a lifespan longer than the underlying agreement, which themselves were artificially extended due to the coercive structure of §1113, "prompt" becomes meaningless at best and farcical at worst.

[33] Sorkin, Andrew, *American Airlines and US Airways Dance Around a Merger*, NEW YORK TIMES, July 9, 2012

[34] See Smith, Hedrick, *Can You Afford To Retire?*, PBS FRONTLINE, May 16, 2006, http://www.pbs.org/wgbh/pages/frontline/retirement/

compensation artificially low is a situation likely to devolve into a host of unintended consequences such as the market not producing enough pilots to meet demand, uncontrolled wildcat strikes, loss of concern over the professional nature of piloting, dangerous reduction in the skill level of the pilots, etc.[35] [36] [37]

This is not good public policy, especially against the backdrop of the industry issuing public statements about how they are on the precipice of the "talent cliff" in pilot labor - where they are unable to obtain sufficient experience at the current RLA/§1113/court mandated pricing paradigm. If you want your "catastrophic breakdown" of the air transportation industry, you need look no further.

Absent conscription (a preposterous idea), the airline industry is going to be faced with severe interruptions, affecting commerce in ways unimagined by the framers of the RLA. This can be prevented by the murky areas of the law being clarified by the High Court, allowing the pricing mechanism for such labor to freely float upward to attract talent back into the industry, since the lopsided coercive nature of the Second Circuit's interpretation of the law would no longer serve to artificially depress the price of unionized pilot labor - a product the RLA enthusiastically supports the formation thereof.

Selective application of the law is at the heart of this entire controversy, and since the selectivity is always in the direction of benefiting management and crippling labor, it is not bewildering why labor is growing increasingly cynical of the entire process and is exploring wildcat actions as their last resort.

As it has been said in the Senate of the United States, when debating the various early 20th Century labor laws, "*A man must work in order to live. If he can express no control over his conditions of employment, he is subject to involuntary servitude."*[38] Since the only power unions have under the present Second Circuit interpretation of the RLA is to slow, but neither stop nor reverse the concessionary slide, it is reasonable to believe the current law leaves labor with no control over the conditions of employment, other than voting with their feet in a condition that mimics a lock-out.

When labor believes the entire bulwark of laws and court opinions are construed against them, and they have no hope of fair treatment, this is the very thing that justifies such a belief. Such despair naturally results in sick-outs, work-to-rule, safety campaigns, slow downs, and other generally uncooperative behavior, which have all been reliably enjoined by a court system seemingly indifferent to the underlying injustices it is helping to perpetrate. While the courts

---

[35] See Carey, Susan, *Airlines Face Acute Shortage of Pilots*, WALL STREET JOURNAL, November 12, 2012. This was caused by a decade of offensive bankruptcies and has sent the economic signal to the potential next generation of pilots that such a vocation is not worth pursuing.
[36] See O'Brien, Miles, *Flying Cheap*, PBS FRONTLINE, February 9, 2010
[37] See Sullenberger, Chesley, *Congressional Testimony*, February 24, 2009
and, Skiles, Jeffery, *Congressional Testimony*, February 24, 2009
[38] Senate Report 163,72d Congress, 1st Session, p. 9

have been successful keeping the lid on the building pressure, it is not reasonable to believe it can continue indefinitely.

Government has, as its first instinct, to ensure compliance with its laws. This is one of the primary purposes of government power, but if the concept is blithely applied, without regard for how underlying pressures of resentment of such compliance can accumulate, the situation may erupt in a fashion not easily remedied by acceptable governmental action.

It has been the purpose of OPERATION ORANGE to avoid such a build up of seething resentment by pilots by having the obvious "pressure release" mechanisms of the RLA fully functioning. If not, employees may undertake wildcat actions against the adamant protestations of their union, employer, the courts, and government. While the courts will reliably enjoin such provisions, the situation may become so hopeless that pilots may act as if they have nothing to lose, leaving the courts with overly cumbersome and unwieldy edicts to cease and desist such activity. This concept would ricochet around the industry, and since the abdication of adherence to a hopeless set of laws would be at the foundation for such an activity, it would cause a catastrophic breakdown in the reliability of the transportation infrastructure and a complete annihilation of the RLA and any subsequent attempt at resurrecting the act under a different name, probably for a time best measured in decades or generations. It would put the government in a position to become overly abusive against a wide swath of the employees, risking extensive damage to its own credibility, no matter the outcome; the government could ill-afford to succeed any more than it could afford to fail. Forcing pilots back into the cockpits at bayonet point would indicate that an admission of a complete loss of control is long overdue.

This serves to clarify the reasons the length of post-contractual negotiations have been steadily leaping upward. When the duration of bankruptcy-imposed contracts exceeds the duration the employees would wish by a factor of two or three, and then the post-agreement negotiations again double such time, these agreements are lasting upwards of 4 to 5 times that of historical agreements. This only serves to increase the list of items the employees need to address in contract talks, since it has been many years since the parties last had a meaningful agreement on working conditions. In the case of APA, they last had an "agreement" under the threat of an imminent 11 USC filing 9 years ago. This was on top of an "agreement" that was already 5 years old, and having been forced by a PEB. Prior to that, it was 1991 (21 years ago) that the APA negotiated a contract without the coercive use of the process, or the credible threat thereof. The current "agreement" will extend the length of the imposed nature of the working conditions out another 6 years, in addition to whatever length management can "kick the can" during §156 negotiations. When a pilot's career is typically twenty to thirty years, and the process is also measured in that timeframe, pilots at American Airlines may only see one true "freely" negotiated contract during their entire tenure. That presumes management no longer avails itself to unilateral amendment in the §1113 process, which is a far fetched notion, given the recent history of the issue and the recent history of executive compensation.

Granting *certiorari* in this instance and overturning the "bankruptcy gambit" would go a long way to reestablish parity in this ecosystem created by the RLA, and would be wholly consistent with the High Court's opinion in *Detroit and Toledo*. The High Court can end the judicial

mischief, rebirth the RLA, bring balance to the pilot market, and end the decades-long war the lower courts or Congress should have ended in 1983.

The Allied Pilots Association must, in the interest of the well-being of their membership, as well as for justice for all pilots, use their unique controversy (having their contract abrogated, rather than merely threatened with abrogation) to settle the issue once and for all. The interests of justice, parity, safety, and common human decency will be served by a enthusiastic *petition for a writ of certiorari*.

The career you save will be your own, that of 9000 dues paying members, and the entire profession.

For more information, please visit www.OPERATIONORANGE.org