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# U.S. AIRLINE LABOR AND EMPLOYMENT LAW

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# The Railway Labor Act



- The Railway Labor Act of 1926 [RLA], originally was confined to the railroad industry. In 1936, the RLA was amended to,
- . . . *cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transport-ing mail for or under contract with the United States Go-vernment, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers. . . .*

# The Civil Aeronautics Act



- The Civil Aeronautics Act of 1938 created the Civil Aeronautics Board [CAB], giving it jurisdiction over rates, routes, intercarrier agreements and mergers. When carriers were merged, the CAB imposed Labor Protective Provisions [LPPs] mandating equitable merger of seniority lists.

# The Airline Deregulation Act

- The Airline Deregulation Act of 1978 provided for the compensation of eligible airline employees who experienced loss of employment as a result of deregulation. However, this provision was never funded by the Congress.





# The Railway Labor Act

- The Railway Labor Act is administered by the three-member National Mediation Board [NMB], each of whom is appointed for a three-year term by the President with the advice and consent of the Senate. During their terms, board members may be removed only for “inefficiency, neglect of duty, malfeasance in office, or ineligibility.” No more than two of the three members may be affiliated with the same political party.
- 45 U.S.C. § 154 (2000)

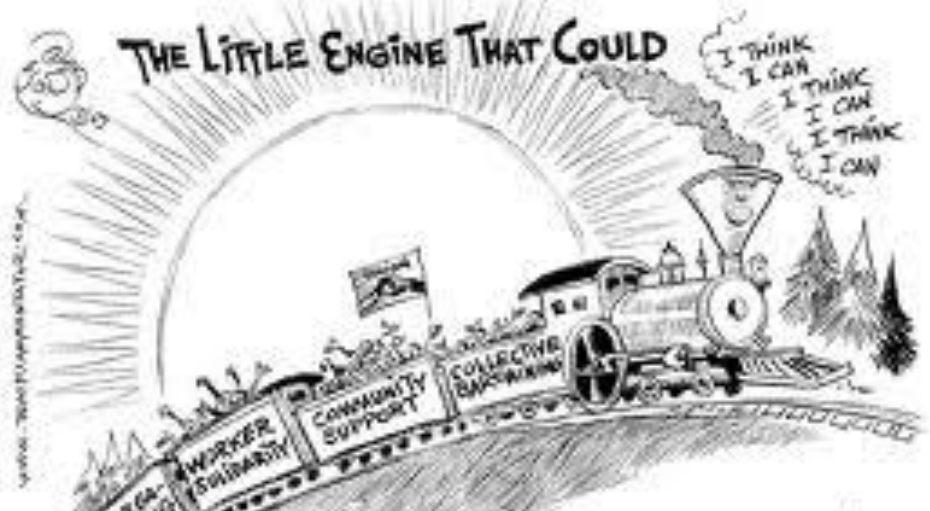


# Applicability of the RLA

Three broad issues are governed by the RLA:

- 1. Union representation;
- 2. Collective bargaining; and
- 3. Grievances.

The latter two are also described as major, and minor, disputes, respectively.



# Purposes of the RLA



- to avoid any interruption to commerce or to the operation of any carrier engaged therein;
- to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization;
- to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of the Act;
- to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; and
- 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 working conditions.



# Certification of a Craft or Class

- Unlike the NLRA, bargaining under the RLA is done on a “craft” basis rather than a geographical basis, by an occupational group of railroad or airline employees (e.g., machinists, dispatchers, pilots, or flight attendants), even when the employees are geographically segregated. The RLA provides, “Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class. . . .” A union may be certified by the NMB only on a system-wide basis—one which includes all members of that craft or class, regardless of their work location. To determine what constitutes a “craft” or “class”, the NMB examines the following criteria:
  - Functional integration;
  - A work-related community of interest;
  - Work classifications;
  - Common terms and conditions of employment;
  - Common salary and fringe benefit packages;
  - History of representation;
  - Seniority issues; and
  - Industry Boundaries.
- The largest airline unions are the Air Line Pilots Association, the International Association of Machinists, and the Association of Flight Attendants, all members of the AFL-CIO.



# Union Certification



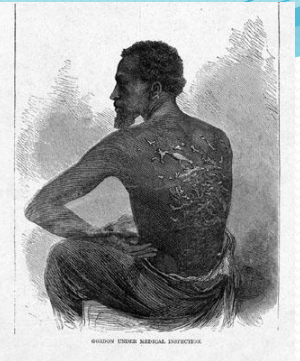
- Where a craft or class is unrepresented, the NMB usually requires that a union seeking to gain recognition as the bargaining representative submit an application to investigate a dispute (Form NMB-3) accompanied by authorization cards signed by at least 35% of the craft or class of employees. If the craft or class is already represented, authorization cards must be submitted by a majority of the craft or class.
- The NMB maintains confidentiality as both to the identity and number of card signers in support of a representative election.

# Elections



- The Railway Labor Act provides that the NMB “shall designate who may participate in the election and establish the rules to govern the election . . . .” Once the Board receives the NMB-3 application, it appoints a mediator to investigate the dispute. The mediator determines whether there is a sufficient showing of interest to hold an election, and assesses the validity of the cards submitted. If the mediator concludes there are an insufficient number of eligible cards, the case is dismissed. But if a sufficient number of cards has been filed to warrant an election, another union may petition to put itself on the ballot by filing cards from 35% of eligible employees.

# Laboratory Conditions



- The Railway Labor Act guarantees the right to organize and select a collective bargaining representative without interference, influence or coercion by the carrier. This means that a “free election atmosphere”, and the laboratory conditions essential to representation elections, must not be tainted. “Laboratory conditions” are required once the carrier first learns of the organizing drive.”
- The carrier may not deny, question, influence, coerce, or interfere in any way with the right of its employees to join or organize a union of their choice.
- The carrier may not engage in surveillance, polling, interrogation, or discharge, transfer or withhold benefits from an employee for his participation in union or organizing activities.
- Management’s conferring or withholding of a benefit during the organizing effort may be deemed improper carrier interference.
- Management threats or predictions that unionization will eliminate jobs or cause the carrier to liquidate the company are considered by the NMB to be an unlawful interference with laboratory conditions.
- Nor may an employer regularly question employees whether they have received their ballots, and what they have or intend to do with them.
- The carrier may not require that prospective employees sign any agreement to join or not to join a labor organization.

# Communications with Employees



- Isolated incidents are insufficient to establish a case of taint. Instead, there must instead by a “pattern” or a “systematic” effort to interfere with or improperly influence the election.
- As the U.S. Supreme Court noted, “Influence’ in this context plainly means pressure, the use of authority or power of either party to induce action by the other in derogation of what the statute calls ‘self-organization.’”
- A carrier has a First Amendment right to communicate its general views about unionism and its specific views about a particular union, so long as it does not threaten a reprisal or promise a benefit.
- The carrier also has the right to make objective predictions as to the impact it believes unionization will have upon the company.
- Small meetings with employees are not improper unless coercive, or they increase in frequency during an election.



# Remedies for Taint



- Normally, the NMB conducts a representation election by mail ballot, though it may conduct a ballot box election.
- If the employer taints the laboratory conditions the NMB seeks to create for an election, the NMB has broad discretion to impose a remedy “to eliminate the taint of interference on the election,” including gauging employee sentiment via means other than a secret ballot election.
- It may, for example, require a rerun election, extend the voting period, or in egregious cases, use the certification cards alone to certify a union.
- Remedies “are fashioned in accordance with the extent of carrier interference found.”
- An employee who is wrongfully discharged for pursuing union activities may bring an action against the employer seeking reinstatement, back pay, restored benefits, punitive damages, and/or restored seniority.



# Union Certification



- If a majority of eligible voters casts valid ballots approving union representation, the union with the majority of votes cast is certified as the collective bargaining representative.
- If a union requests an election and less than a majority vote for representation, or if a union renounces representation, the craft or class will become unrepresented.
- A carrier may voluntarily recognize a union prior to its certification, but it is under no obligation to recognize one that has not been certified by the NMB.

# Bar on New Election



- When a prior election has been held, absent “unusual or extraordinary circumstances,” the NMB may impose a qualified bar on a new election of the same craft or class of employees of the same carrier from one year on the date on which:
  1. less than a majority of eligible voters participated in the prior election;
  2. the Board dismissed the application on grounds that no dispute existed; or
  3. the Board dismissed the application after the applicant withdrew it.
- The NMB may also impose a two-year certification bar from the date of certification of a representative covering the same craft or class of employees.

# Majority of Votes?



- Prior to 2010, if a union requested an election and less than a majority of the class or craft voted for representation, or if a union renounced representation, the craft or class became unrepresented.
- The Obama Administration's NMB promulgated a rule requiring that only a majority of votes cast is necessary to establish a union, irrespective of whether a majority of employees cast votes.



# Duty of Fair Representation



- The union has a “duty of fair representation” toward its employees.
- This duty is a judicially created doctrine designed to protect individual employees against discriminatory treatment by their union.
- Thus, an employee’s union must pursue meritorious grievances in good faith, and pursue the interest of all employees fairly in negotiating a new contract.
- It must not favor one group of employees over another in bargaining with management.
- It must bargain fairly on behalf of minority union members by not negotiating a contract that excludes them from certain positions.
- However, because a union has to satisfy the collective needs of a diverse group of employees, it enjoys a certain amount of discretion in pursuing their interests, and breaches the “duty of fair representation” only when its conduct toward an employee is arbitrary, discriminatory, or in bad faith.

# Duty to Bargain in Good Faith



- Under the RLA, both the union and management have a duty to engage in collective bargaining in good faith.
- They are obliged to meet, confer with, and make reasonable efforts to achieve agreements resolving labor-management disputes.
- The RLA explicitly commands that it is the duty of labor and management “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 inside or outside of those agreements] in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and [its] employees. . . .”
- Absent the carrier’s bad faith in negotiating the initial collective bargaining agreement, the union may not engage in self-help prior to exhaustion of the RLA’s mandatory collective bargaining procedures.
- Management may not go around the designated employee representatives and attempt to bargain directly with its members.



# Types of Disputes



- Disputes under the RLA fall into one of three major categories:
  1. representation disputes,
  2. major disputes, and
  3. minor disputes.
- Each is handled under a different statutory dispute resolution procedure and has differing obligations regarding maintenance of the *status quo*; hence the categorization of the dispute may affect its ultimate outcome.
- The U.S. Supreme Court has observed that the “RLA subjects all railway disputes to virtually endless ‘negotiation, mediation, voluntary arbitration, and conciliation.’”



# Representation Disputes



- *Representation disputes* involve the selection of the employees' representatives for purposes of collective bargaining. Exclusive jurisdiction over this issue is vested in the NMB, which may define the scope of the carrier, define the appropriate "craft or class" for bargaining, specify the rules for conducting elections, and designate bargaining representatives.
- Representation disputes sometimes arise where carriers merge or acquire carriers or other entities. If the two companies are deemed to be a "single carrier," a union representing the workers of one entity often will attempt to assert representation of the workers of the other, even if the other is not unionized. The question often becomes: which union represents the employees?

# Major Disputes



- *Major disputes* involve the formation or modification of collective bargaining agreements [CBAs].
- CBAs address three major issues:
  1. wages,
  2. work rules, and
  3. working conditions.
- Major disputes are disputes with respect to “the formation of collective agreements or efforts to secure them”. A major dispute focuses on the terms an agreement should contain. These disputes are designed to be resolved through collective bargaining between the labor unions and management. The statute mandates a meet-and-confer process, with good faith negotiations, mediation, nonmandatory arbitration, and if all else fails, intervention by a Presidential Emergency Board.
- Until these procedures are exhausted, neither party may upset the *status quo* by engaging in self-help. A central purpose of the RLA is to avoid “any interruption to commerce or to the operation of any carrier engaged therein.” The US Supreme Court has described the *status quo* maintenance requirement as “an almost interminable process.”

# Collective Bargaining Agreements



- By their terms, CBAs remain in effect for a defined period, typically two or three years.
- But union contracts do not actually expire; instead, they reach an amendable date (i.e., a date on which the parties are required to negotiate a new contract).
- During the period when a new CBA is being negotiated, the existing CBA remains in effect, and neither labor nor management may engage in self-help until the procedures specified in the RLA have run their course.



# Negotiation of New CBAs

- As a union contract approaches expiration, labor and management typically begin negotiations for a new contract by exchanging proposals.
- If they cannot negotiate a settlement, the party seeking to change the existing contract may post a “Section 6 Notice” 30 days prior to any intended change, which triggers the collective bargaining process of the Railway Labor Act.
- Within 10 days of receipt of such notice, representatives of labor and management must agree on a time and place for such negotiations.
- The conference must begin within the 30 days, and the carrier may not change existing rules, working conditions or pay during this period.
- No time limits dictate the length of negotiations.
- Management and labor may negotiate for as long as they wish, and the *status quo* remains undisturbed during the entire period (i.e., the existing contract governs, and neither party may engage in “self-help” economic warfare).
- But if bargaining is terminated, a ten-day *status quo* period begins.
- If, during this period, neither side requests NMB mediation, nor does the NMB *sua sponte* offer mediation, then at the end of this period, either side may engage in self-help (i.e., the union can strike and/or management may change work rules, wages and benefits).

# Mediation



- If either party perceives an impasse, it may so inform the NMB, which ordinarily attempts to mediate the dispute, or recommends binding interest arbitration.
- Mediation continues as long as the NMB so requires.
- If, at its discretion, the NMB declares that the parties have reached an impasse, they enter a 30-day “cooling off” period, after which either side may engage in self help—the union may strike, and/or management may unilaterally impose lower wage/work rules and permanently lock out and replace any strikers.
- Once a strike has begun, management is free to hire replacements, and is under no duty to displace the new workers once the strike is over.
- But since the RLA’s dispute resolution procedures are “almost interminable,” this reality often brings the parties to compromise and settlement without strikes or lockouts.



# Presidential Emergency Boards



- In emergency situations (where a threatened strike or lockout would “deprive any section of the country of essential transportation service”), the NMB must notify the President, who may call an emergency board to investigate the facts. The emergency board shall submit its report to the President within 30 days after its creation. Neither party may engage in self-help until 30 days after the President receives the Board’s report—in effect giving the parties an additional 60-day cooling-off period beyond the aforementioned requirements. While common in major railroad strikes, until recently the creation of emergency boards historically has been an uncommon response to airline strikes.



**Bargaining Relationship Established  
(Voluntary recognition or NMB certification)**

**Bargaining Proposals Exchanged  
(Section 6 notices by labor and management)**

**Direct Bargaining  
(Meet and confer)**

**Full Agreement  
(Final resolution)**

**Interest Arbitration  
(Voluntary - final resolution)**

**Conferences Terminated  
(10 calendar days  
without mediation request)**

**NMB Mediation Invoked  
(By either party or NMB)**

**Self-Help Permissible  
(Non-violent)**

**NMB Mediation with  
Mediator and/ Board Member  
(Unlimited duration)**

**Full Agreement  
(Final resolution)**

**NMB Offer of Arbitration  
(Acceptance voluntary)**

**Arbitration Accepted  
(By both parties)**

**Arbitration Declined  
(By either party)**

**Interest Arbitration Process  
(Final resolution)**

**Thirty Day Cooling-Off Period  
(Mediation may continue)**

**Cooling-Off Period  
Expires without  
Agreement**

**Full Agreement  
(Final resolution)**

**Presidential Emergency  
Board Established  
(Self-help precluded  
- generally 30 days)**

**Self-Help Permissible  
(Non-violent)**

**PEB Report Filed  
(Self-help precluded  
for additional 30 days)**

**Full Agreement  
(Final resolution)**

**Self-Help Permissible  
(Non-violent)**

**Congressional Intervention  
(Ad hoc legislation  
- final resolution)**

# Frustration at the Process



- The RLA resolution of major disputes often leaves both management and labor frustrated, for neither can engage in self-help until the NMB process runs its full course.
- Labor is locked into an expired contract, with its wages set at levels determined years earlier.
- Management is faced with labor disarray, which manifests itself in labor slowdowns that drive costs up and revenue down.
- Since management at a large airline can ill afford to take a strike, it would prefer binding arbitration of disputes, while labor would prefer not to surrender its grasp of management by the throat.

# Minor Disputes



- While major disputes seek to create contractual rights, *minor disputes* seek to enforce them.
- Minor disputes are over grievances arising from interpretation and application of existing contract provisions.
- They are disputes with respect to an existing (or implied) agreement which relate “either to the meaning or proper application of a particular provision with respect to a specific situation or to an omitted case.”
- A dispute is minor if the contested action is “arguably justified” by the collective bargaining agreement or not “obviously insubstantial.”
- A minor dispute’s distinguishing feature is that it may be conclusively resolved via application and interpretation of the agreement.
- Minor disputes are “adjusted,” submitted to compulsory arbitration through the carrier’s internal grievance machinery, if necessary, all the way through the carrier’s System Board of Adjustment, which in most cases is final and binding on the parties.

# Airline Unions



- Though union members only made up less than 15% of workers in the United States (just over 10% if public-sector workers are excluded), unions are still a dominant force in the airline industry.
- Airline labor unions are formidable institutions. In 2012, the Air Line Pilots Association [ALPA] represented more than 50,000 pilots at 37 U.S. and Canadian airlines. ALPA represents the employees at all the largest U.S. airlines except American and Southwest Airlines.
- The International Association of Machinists and Aerospace Workers [IAM] has 830,000 members, of whom 150,000 work in various aspects of the aerospace industry. The IAM represents the machinists at United and US Airways.
- At all the largest airlines except Delta, flight attendants, and fleet service and ramp employees also are heavily unionized. The Association of Flight Attendants is the largest union in its profession, while the Transport Workers Unions represent dispatchers and most large U.S. airlines.
- No major carrier can withstand a prolonged strike (one in which pilots honor the picket line), for the number of replacement workers required would be vast and the FAA training requirements are stringent.

# The Post-Deregulation Environment



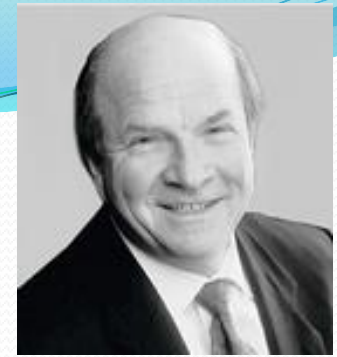
- With the advent of deregulation, the transportation industry suddenly found itself confronted with a labor crisis, when, for nearly four decades, labor/management relations had not been as contentious. After deregulation, and faced with intense competition from non-unionized new entrants, management of the established, but unionized, carriers suddenly needed to minimize operational costs and to maximize employee productivity and efficiency in order to compete.
- The older network carriers were (heavily) unionized. Carriers entering the market after deregulation were mostly non-union, with markedly lower labor costs. The competitive pressures on legacy carriers increased dramatically, causing some to go bankrupt and forcing others to find innovative ways to reduce their overhead. Key to reducing overhead in any business is often to trim the cost of labor through productivity improvements and/or cutting wages and benefits.



# Competitive Response

- The established carriers attempted to confine the impact of the low fares with revenue and inventory management, and retain high-yield traffic with various manipulations of computer reservations systems display, frequent flyer programs, travel agent commission overrides, and other anticompetitive practices.
- The major airlines also began to focus on cost containment, efficiency and productivity. Seat pitch was tightened. Hot meals became cold meals, then peanuts, on flights of less than 1,000 miles. But many costs, particularly fuel and equipment costs, as well as interest expenses, are beyond the control of the airlines.
- Ultimately, management found that it had little choice but to focus on costs that were conceivably pliable—labor costs, and perhaps more importantly, work rules, as well as distribution costs, including travel agent commissions. Labor and fuel are the airline industry's largest operating expenses.





# Delta's Project Leadership 7.5

- In 1994, Delta's CEO Ronald W. Allen announced "Project Leadership 7.5," an ambitious effort to reduce CASM to 7.5 cents in three years, which would slash its costs by \$2 billion annually, or 19% over the three years, much of it achieved by draconian (20%) cuts in its work force.
- Delta enjoyed more flexibility to outsource work and cut jobs and reduce benefits than many of its rivals because the company was not highly unionized (beyond its pilot's group), although such a dramatic change would radically alter the traditional Delta corporate culture of labor-management harmony.
- In 1994 and 1995, Delta eliminated 4,500 full-time customer service employees. However, by 1996, Delta discovered that its customer service had deteriorated intolerably, recalling nearly 500 baggage and cargo handling, fueling, ticket counter, gate agents and administrative support employees at Atlanta to coincide with its Summer Olympic Games.
- In 1997, Allen was forced to retire. But on the way out he was given a "\$4.6 million lump sum severance payment, a car, club dues, and an office on the other side of town that cost \$408,776 to design, build and furnish." In addition, he was to receive a \$765,600 annual pension. And if that were not enough, he was awarded a \$500,000 per year consulting contract (until July 2004)—"even if he can no longer consult because he is totally disabled or dead. . . ."



# The Southwest Factor

- By 1995, the average annual salary of the major U.S. airlines was \$58,944.
- Pilots who flew comparable jets at Southwest, American, Delta and USAirways were paid equivalent salaries—captains at Southwest made as much as \$140,000 per year; however, Southwest's pilots were paid for the hours they flew, and as a consequence clocked more than 70 hours per month in the cockpit, while the pilots at the other airlines clocked fewer than 50.
- The differences are attributable to two factors: (1) Southwest was the only major airline which flew a linear route system exclusively, resulting in significantly higher aircraft utilization ; and (2) Southwest's union contracts were negotiated much later than those of the other majors', and did not include as restrictive work rules.

# Trip Rigs and Duty Rigs

- At most major carriers, pilots are paid on the basis of “trip rigs” and “duty rigs,” which allow them to be paid on a time-on-duty or time-away-from-home basis.
- For example, United’s pilots are paid for 81 hours of work a month, yet the average flying time is only 53 hours.
- In 1995, TWA traded equity for work rule concessions increasing pilots to 75 hours of work for 75 hours of pay, compared with 51 hours of work for 75 hours of pay in 1993.



# The Bubble Years

- Unprecedented labor agreements were signed during the “bubble” years of the 1990s, when yields were high, and airline profits were robust. In baseball, the Texas Rangers signed a contract with free agent shortstop Alex Rodriguez for a salary of \$24 million a year. In commercial aviation, United Airlines signed a contract with its pilots union paying senior pilots \$300,000 a year for 12-14 days a month flight time – the best part-time job in the world. Both created a new paradigm of unrealistic and unsustainable expectations by other employee groups.
- When times are good, every industry-leading collective bargaining agreement is leap-frogged by another agreement raising the bar to yet another industry-leading contract. Mike Dubinsky of the Air Line Pilots Association said of labor-owned United Airlines, “We don’t want to kill the golden goose. We just want to choke it by the neck until it gives us every last egg.”

# Collapse



- Unfortunately, United was choked so severely that by 2003 it collapsed into bankruptcy. With labor accounting for nearly 40% of major airline costs, management attempted to persuade or coerce wage and work rule reductions, amending CBAs to eliminate scope clause restrictions on feeder operations, and deferring pension contributions.
- The unions at United agreed to a package of \$2.2 billion in annual savings in order to avoid liquidation or having the bankruptcy judge order abrogation of the CBAs.
- Also in 2003, American Airlines' unions agreed to \$1.8 billion in wage, benefit and work rule concessions to avoid bankruptcy.
- That year, US Airways unionized and non-union employees agreed to more than \$1 billion in concessions to avoid liquidations.
- Eventually, every major pre-deregulation interstate carrier stumbled into bankruptcy court.



# Outsourcing

- Continental and America West have out-sourced such functions as maintenance.
- ValuJet out-sourced heavy maintenance and reservations.
- United contracted out sky cap and janitorial services, and sold its flight kitchens to Dobbs, which gave it \$120 million, allowing it to avoid a \$71 million investment in upgrading and expanding kitchens, and to enjoy a \$320 million savings over 7 years. The 5,200 employees could seek a job with Dobbs, albeit at significantly lower wages.
- American Airlines created a centralized reservations office in low-cost Dublin, Ireland.
- Austrian Airlines out-sourced revenue accounting to India, and out-sourced heavy maintenance as well.
- A growing number of US airlines have out-sourced aircraft maintenance to Latin America.

# Two-tier wages



- In the 1980s, American Airlines pioneered the concept of “two-tiered” wage rates, whereby existing employees would continue to receive their existing salaries, but newly hired employees would be hired at a significantly lower wage rate. This reduced costs from a high of 8.17 cents per ASM in 1983, to 7.28 cents in 1986, resulting in after-tax profit margins of 4%-5% in 1988-89. American coupled this two-tiered wage system with profit sharing, giving employees a larger bonus check in years when the company did well (while, incidentally, denying shareholders dividends). This enabled American to enjoy relatively low-cost expansion, with significantly declining average costs. That gave it the opportunity to grow into the nation’s largest airline, for a time.
- But eventually, the newly hired employees made their displeasure with the lower wage rates known to union leaders, and the two-tiered system was eventually shortened, and in 1991, effectively bargained away. American’s costs rose 23% from their 1986 low, to 8.93 cents per ASM in 1992. American’s growth was abruptly halted, and the newly hired cockpit crewmembers were frozen in the right seat of the aircraft. Then CEO of American Airlines, Robert Crandall pledged: “Unless the world changes, we will never buy another airplane. We won’t replace the airplanes that wear out.”

# Eastern: Trading Wages and Work Rules for Board Seats



- On several occasions, Eastern Airlines asked its employees for wage and work rule concessions. Eastern Airlines' employees adopted the time-worn acronym for it—BOHICA (pronounced *bow-hee-ka*), or “Bend Over, Here It Comes Again.”
- In 1984, Eastern CEO (and former astronaut) Frank Borman surrendered labor three seats on Eastern's board of directors and 25% of the company's stock in exchange for wage and work rule concessions. Borman reluctantly agreed to the ESOP, saying it was tantamount “to putting the monkeys in charge of the zoo.”
- Eastern negotiated a “variable earnings plan” with labor, tying wages to the company's profitability. If earnings failed to reach a designated level, employees would earn only 96.5% of their salaries; if earnings exceeded a specified threshold, they would earn 103.5%. In essence, this created a new source of capital for the company, unsecured and without interest, sort of like shareholder equity.
- For a short while, the employees began to go the extra mile on behalf of the airline; but as earnings projections failed to materialize, morale plummeted, and labor-management acrimony grew. But the improved environment after Eastern's employees became equity owners gradually disintegrated, for it lacked real support by union leaders and rank-and-file workers.

# ESOPs

The advantages of Employee Stock Ownership Plans are:

- It can result in lower labor costs, which account for about 30-40% of airline operating costs;
- It can result in productivity gains;
- It can result in a higher level of service; and
- It can improve employee relations.

The disadvantages of labor ownership are:

- It requires compromise among different employee groups;
- It limits the options available to management;
- It enhances employee risk, due to the relative volatility of the value of stock vis-à-vis wages; and
- It creates complex regulatory and tax issues.

After creation of its ESOP, United Airlines conceded, “The new labor agreements and governance structure could inhibit management’s ability to alter strategy in a volatile, competitive industry by restricting certain operating and financing activities, including the sale of assets and the issuance of equity securities and the ability to furlough employees.”







# Strikes: TWA Flight Attendants



- After Carl Icahn took control of Trans World Airlines and negotiations over a new CBA failed, the flight attendants launched a 72-day strike. TWA remained operational by using 1,280 flight attendants who either did not strike or returned to work, and hiring and training approximately 2,350 new flight attendants. When the union capitulated and offered its 5,000 striking employees the opportunity to go back to work, TWA refused to displace the newly hired “scab” employees, a decision ultimately upheld by the U.S. Supreme Court. Hence, at the end of a strike, as vacancies arise, striking employees have the right to return to work and regain their former seniority. But the airline need not displace newly hired employees to allow the returning employees to resume their positions.
- *Trans World Airlines v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989).

# Strikes: United and American Airlines



- Dick Ferris' United Airlines took a machinists' strike in 1981, and a pilots' strike for 29 long days in 1985.
- Bob Crandall's American Airlines took a flight attendant's strike in 1993. In each case, the carrier paid a terrible price as embittered employees sabotaged service and thereby depressed high-yield business traffic. Even direct costs can be staggering. For example, the five-day flight attendants strike cost American Airlines \$190 million in after-tax earnings.

# Strikes



Lynne Sladky, AP

Carrier	Date of Strike	Work Group
United	Mar-Jun 1979	Mechanics, ramp, food, dispatch
Continental	Sep-Oct 1979	Flight Engineers
American	Nov 1979	Flight Instructors
Southwest	Jan-Feb 1980	Mechanics
Continental	Aug 83 – Oct 85	Pilots, mechanics, flight attendants
Pan Am	Feb-Mar 1985	TWU
Alaska	Mar-May 1985	Mechanics
United	May-Jun 1985	Pilots
TWA	Mar-May 1986	Flight Attendants
Continental	Mar-Dec 1989	Flight Attendants
Eastern	Mar 89-Jan 91	Mechanics
US Air	Oct. 1992	Mechanics
American	Nov. 1993	Flight Attendants
Northwest	Aug-Sept 1998	Pilots
Comair	Mar-Jun 2001	Pilots

# Presidential Intervention

- In 1993, President Clinton recommended the parties enter into binding interest arbitration to address an American Airlines' flight attendants' strike. President Clinton became the first chief executive since the 1960s to call for its establishment of a Presidential Emergency Board in the American Airlines pilots' strike of 1997, and with respect to Northwest's pilot negotiations the following year.
- President George W. Bush called emergency boards in 2001, to address potential strikes by Northwest Airlines' mechanics, American Airlines' flight attendants, and the following year United Airlines' machinists.



Carrier	Unions	Craft/Class	Created	Closed
Pan American World Airways, Inc.	TWU	mechanics, flight attendants, port stewards	09-30-66	10-30-66
American Airlines	TWU	multiple	07-27-66	08-27-66
Eastern, National, Trans World, and United Airlines	IAM	multiple	04-21-66	06-05-66
Pan American World Airways, Inc.	TWU	mechanics, ground service, stewards	08-14-62	09-13-62
American Airlines	TWU	unknown	06-20-62	08-11-62
Trans World Airlines, Inc.	FEIA	flight engineers	03-20-62	05-01-62
Eastern Air Lines, Inc.	FEIA	flight engineers	02-22-62	05-01-62
Pan American world Airways, Inc.	ALPA	pilots	11-10-61	12-10-61
Trans World Airlines, Inc.	ALPA	pilots	11-15-61	12-15-61
Trans World Airlines, Inc.	TWU	airline navigators	10-05-61	11-03-61
Pan American World Airways, Inc.	BRAC	multiple	03-18-60	06-02-60
Pan American World Airways, Inc.	TWU, Air Transport Division	mechanics, flight attendants, port stewards	04-22-59	06-15-59
American Airlines	ALPA	Pilots	06-19-58	09-03-58
Trans World Airlines, Inc.	FEIA	flight engineers	03-27-58	07-25-58
Eastern Air, World Air, United Air, NW Air, NE Air, Capital Air, National Airlines, Inc.	IAM	machinists and related	02-27-58	09-15-58
Eastern Air Lines, Inc.	ALPA	pilots	01-28-58	07-21-58
Eastern Air Lines, Inc.	FEIA	flight engineers	01-21-58	07-21-58
United Air Lines, Inc.	FEIA	flight engineers	11-06-52	01-02-53



# Nonstrike Work Actions



- Sometimes economic coercion takes the form of a work slowdown. Slowdowns are designed to coerce the employer to capitulate. They can include refusing to work overtime, sickouts, and a work-to-rule.
- Under FAA rules, a pilot can remove himself from duty if he is sick, stressed, or does not feel “fit to fly.”
- Work-to-rule involves slowing flight schedules by insisting on even minor repairs. For example, a pilot may refuse to fly an aircraft if a tray table does not latch in the upright position.
- Such acts cause a deterioration in on-time performance, and increase in passenger complaints, and a loss of passenger traffic and revenue.
- Where a union or its members engage in illegal self-help outside the RLA’s procedures, the airline may seek injunctive relief. A federal court will issue a temporary restraining order [TRO] where the airline proves: (1) the job action exists; (2) harm resulted therefrom; (3) the action is illegal under the RLA; and (4) the union is responsible.

# American Airlines Work Slowdown



- After its acquisition of Reno Air in 1998, American Airlines announced its intention to fly the two airlines separately on a temporary basis while Reno's aircraft, operations, and personnel were blended into American's.
- The Allied Pilots Association [APA] took the position that the failure to integrate the work forces, and their seniority lists, violated the Scope Clause in their CBA.
- A "sickout of massive proportions" began in February 1999, causing cancellation of more than 2,250 flights per day, a 12% decline in on-time performance, a 15% decline in passenger traffic, and a \$45 million loss of revenue.
- American sought and obtained a temporary restraining order against APA and its officers. Three days later, the court concluded that APA violated the temporary restraining order [TRO], was engaging in an illegal job action, and found APA liable for the \$45 million in losses incurred by American.
- However, where a union loses control of its members, liability for their "wildcat strikes" will not be imputed to the union.

# US Airways Work Slowdown



- In 2011, as US Airways management and its pilots were in negotiations on a new CBA as a result of the America West-US Airways merger, the pilots' union launched a "safety campaign" encouraging pilots to delay flight departures and training, and increase maintenance write-ups.
- The airline sought an injunction, arguing that this was really a work slowdown in violation of the *status quo* requirements of the RLA.
- The court concluded that the "slowdown tactics include[d] dramatic increases in pilot maintenance write-ups, pilot fatigue calls, taxi times, and pilot-induced departure delays. . . . [that resulted in] a significant decline in US Airways's on-time performance that . . . harmed the company's bottom line and its reputation." In issuing the injunction against the union, the court held that "The RLA demands that parties refrain from employing economic self-help from the moment a union is certified until the parties have exhausted the negotiation and mediation process provided for in the RLA."
- *US Airways v. US Airline Pilots Ass'n*, 2011 WL 4485797 at \*8 (W.D.N.C. 2011).

# 1981 Air Traffic Control Strike

In 1981, President Reagan fired 13,000 striking air traffic controllers. It was clear that Washington would not protect organized labor. The message was clear. The Republican White House would stand by management in its efforts to discipline labor.

Shortly thereafter, the U.S. Supreme Court handed down a decision that concluded that a company in bankruptcy did not abrogate labor law by unilaterally changing the terms of a CBA, and that the Bankruptcy Court should allow rejection of a CBA that burdens the state if “the equities balance in favor of rejecting the labor contract.”

- *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).



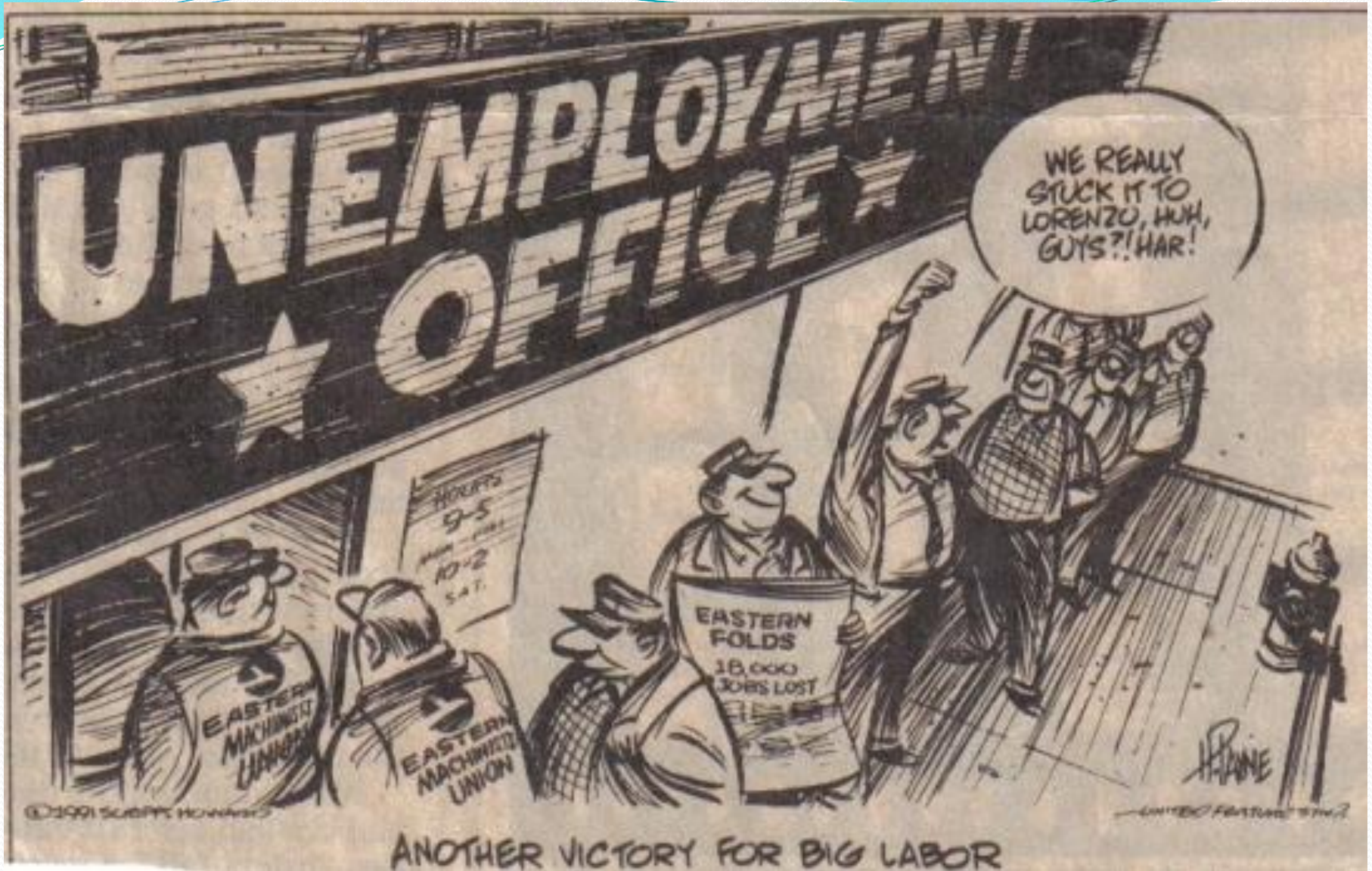


# 1983 Continental Airlines Bankruptcy



- Under CEO Frank Lorenzo, Continental filed for bankruptcy under Chapter 11 on September 24, 1983. He unilaterally reduced wages and changed work rules. The pilots began a strike which lasted for two years.
- In 1982, Continental spent 35% of its operating costs on labor (compared with an industry average of 37%); by 1984, labor costs comprised only 22% of Continental's costs.
- By busting its unions in its 1983 Chapter 11 bankruptcy, Continental lowered its unit costs to less than 8 cents a mile, although because it created so much labor animosity in the process, it suffered a formidable problem on the pricing side of the equation. Continental would effectively lose the ability to attract sufficient numbers of high-yield passengers.
- After Lorenzo's Texas Air took control of Eastern Airlines and began stripping it of assets, Eastern's unions launched a highly effective strike honored by most of its employees, and the crippled company was ultimately liquidated.
- Although Continental had lower labor costs than any other major airline (its available seat-mile cost was 8.35 cents, among the lowest in the industry), not even that kept it out of bankruptcy, as it entered Chapter 11 again in 1990, emerging again in 1993.
- Lorenzo insisted, "I'm not a union buster; I'm an airline builder."





ANOTHER VICTORY FOR BIG LABOR

# Congress Amends the Bankruptcy Code



In response, Congress amended the Bankruptcy Code to limit the circumstances under which the Bankruptcy Judge may alter the CBA. The Judge may only do so after the parties have engaged in good faith negotiations, and if he concludes that the balance of equities clearly favor rejection of the CBA. Specifically, five procedural steps are required under Section 1113 of the Bankruptcy Code:

- *The debtor must make a proposal to the union providing for modification of the CBA;*
- *The debtor must provide the union with relevant information to evaluate the proposal;*
- *The debtor must meet with the union and confer in good faith in an attempt to reach mutually satisfactory modifications to the CBA;*
- *After an application has been filed, the bankruptcy judge must schedule a hearing within 14 days (which can be extended by 7 days, or longer if all parties agree); and*
- *The court must make a ruling within 30 days of the beginning of the hearing unless all parties agree to an extension.*

Upon completion of these hurdles, the Bankruptcy Judge can reject the CBA if: (1) the debtor has made the modification proposal that satisfies the procedures described above; (2) the union refuses to accept the proposal without “good cause”; and (3) the balance of the equities clearly favors rejection of the CBA. Interim changes also may be made if “essential to the debtor’s business, or in order to avoid irreparable damage to the estate. . . .”

# Northwest Airlines' Bankruptcy

- Using these procedures, Northwest Airlines successfully abrogated its CBA with its flight attendants' union in its 2005 bankruptcy filing.
- The union responded by notifying Northwest that it intended to disrupt the carrier's operations with a tactic it dubbed "CHAOS" ("Create Havoc Around Our System").
- Northwest sought an injunction. The court granted the injunction, finding that Northwest abrogated (but did not breach) the CBA by successfully securing bankruptcy court approval under section 1113, that abrogation terminated the *status quo* created by that agreement, and that the union's strike would violate its duty under the Railway Labor Act [RLA] to use every effort to conclude a new agreement. Instead of striking, the RLA compelled the union to use "every reasonable effort" to conclude a new contract that would establish a new *status quo*.





# Allegheny-Mohawk LPPs

Prior to deregulation, LPPs were ordinarily applied by the Civil Aeronautics Board as conditions of airline merger approval. Originally imposed by the CAB in 1950, they came to be known as the *Allegheny-Mohawk* provisions, as they were reformulated in the decision approving the 1972 merger of those two airlines. Essentially, they provided employees adversely affected by an airline merger of the following rights:

- Displacement allowances for those having to move domiciles due to merger-related restructuring;
- Dismissal allowances for those furloughed as a result of mergers;
- The right to continued health benefits for furloughees;
- Reimbursement for personal losses resulting from mergers, such as forced home sales; and
- Guarantees that seniority lists would be combined in a fair and equitable manner.

From 1950 until 1978, LPPs were imposed by the CAB on 43 occasions.

The post-deregulation CAB and the USDOT refused to impose LPPs in any airline merger, advising unions to negotiate their own merger protections through collective bargaining.

*Allegheny-Mohawk*, 59 C.A.B. 45 (1972).

# LPPs in CBAs

- Typically, provisions addressing seniority integration are incorporated into the airline/union CBAs. Many CBAs of the legacy airlines included provisions mirroring the *Allegheny-Mohawk* seniority integration rules. They ordinarily provide for employee seniority integration in a “fair and equitable manner” through binding arbitration. Often, employees in merged airlines are integrated on a date-of-hire seniority basis or according to a formula established by the arbitrator (e.g., three from the acquiring airline, one from the acquired airline, based on date of hire). Sometimes, the seniority list of the weaker acquired carrier is stapled to the end of the stronger acquiring carrier.



# American Airlines' Acquisition of TWA



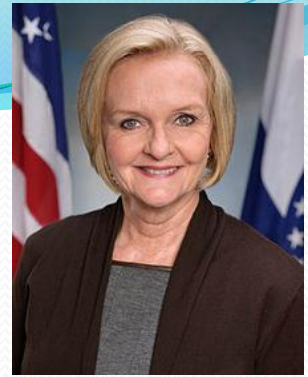
- The CBA between the Airline Pilots Association [ALPA] and TWA required “the fair and equitable seniority integration of employees in the event of a merger or acquisition of TWA”, or essentially *Allegheny-Mohawk* standards.
- In contrast, the CBA between the Allied Pilots Association [APA] and American Airlines required any newly hired pilots be “stapled” to the tail end of the American pilots’ seniority list.
- Once the dominant trans-Atlantic carrier, the post-Icahn TWA, having lost access to London Heathrow Airport, was perilously near liquidation. Hence, TWA’s unions had little bargaining leverage.
- When ALPA refused to agree to American’s insistence that the LPPs be removed from TWA’s CBA, TWA petitioned the Bankruptcy Court for rejection of the entire CBA under section 1113(c) of the Bankruptcy Code. ALPA and its local Master Executive Council [MEC] then agreed to eliminate the LPPs. As a result, the American Airlines acquisition of TWA went forward, and closed on April 10, 2001. American imposed a default seniority integration formula on the TWA pilots, whereby they were placed on the seniority ladder behind the American pilots hired prior to April 10, 2001.
- In 2001, TWA’s flight attendants also were stapled to the end of the seniority list, with the result that all 4,200 former TWA flight attendants were furloughed in 2003. More than 90% of them would have kept their jobs had the TWA attendants received date-of-hire seniority when the companies merged.

WE'LL NEVER  
FORGET



**TWA**

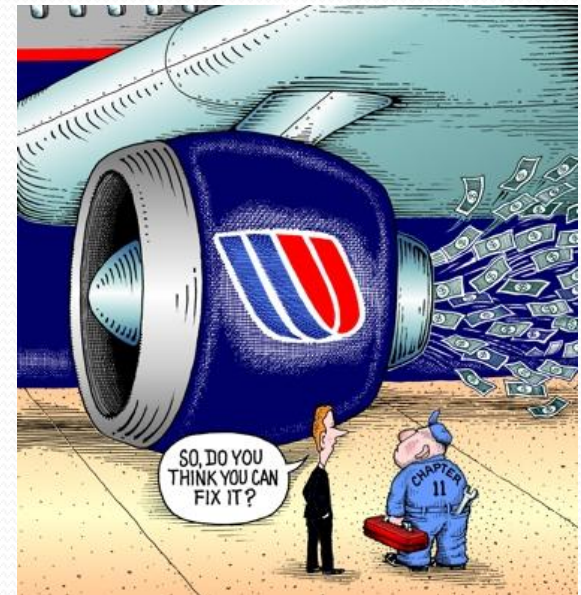
# McCaskill-Bond Seniority Protection Act of 2007



- As a result of the inequities employees suffered in the American-TWA merger, Congress passed the McCaskill-Bond Seniority Protection Act requiring the “integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and representatives of the employees affected. In the event of failure to agree, the dispute may be submitted . . .” to binding arbitration.
- The National Mediation Board [NMB] provides a list of seven names, and the parties alternatively strike names until one remains. The salary and expenses of the arbitrator are shared by the airline and the employee group or individual employees. The parties are free to agree to a different method or procedure of dispute resolution.
- If the employee groups are represented by a common union, that union’s internal policies regarding integration will be applied.

# Rights Dischargeable in Bankruptcy

The Bankruptcy Court's approval of a reorganization plan discharges and releases all pre-existing debts and claims. Many rights conferred in CBAs, including the seniority rights of integration upon merger with another airline, have been deemed rights of payment dischargeable in bankruptcy. Bankruptcy can also extinguish pending workers' claims against the carrier for example, in areas of employment discrimination or sex discrimination, where the Bankruptcy Court approves the sale "free and clear" of successor liability.







# Employment Discrimination

- Title VI of the Civil Rights Act of 1964, prohibits discrimination on the basis of **race, color, or national origin**; Title VII prohibits such discrimination in the context of employment.
- Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of **sex**.
- The Age Discrimination Act of 1975 prohibits **age** discrimination.
- Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 prohibit discrimination on the basis of **disabilities**.
- Title IX of the Education Amendments of 1972 and the Drug Abuse Office and Treatment Act of 1972 prohibit discrimination on the basis of **drug abuse**.
- The Comprehensive Alcohol Abuse and Alcoholism Prevention Act of 1970 prohibits discrimination on the basis of **alcohol abuse or alcoholism**.
- The Public Health Service Act of 1912, requires **confidentiality of alcohol and drug abuse patient records**.
- Section 1101(b) of the Transportation Equity Act for the 21<sup>st</sup> Century provides for **participation of disadvantaged business enterprises** in DOT programs.
- The Equal Pay Act of 1963 protects individuals who perform substantially equal work in the same company from **sex-based wage discrimination**.
- And, the Civil Rights Act of 1991 provides **compensatory and punitive damages and attorneys' fees in cases of intentional employment discrimination**.



# ***Types of Unlawful Employment Practices***

The aforementioned federal statutes declare it unlawful to discriminate in any area of employment, including:

- hiring and firing;
- compensation, assignment, or classification of employees;
- transfer, promotion, layoff or recall;
- job advertisements;
- recruitment;
- testing;
- use of company facilities;
- training and apprenticeship programs;
- fringe benefits;
- pay, retirement plans, and disability leave; or
- other terms and conditions of employment.

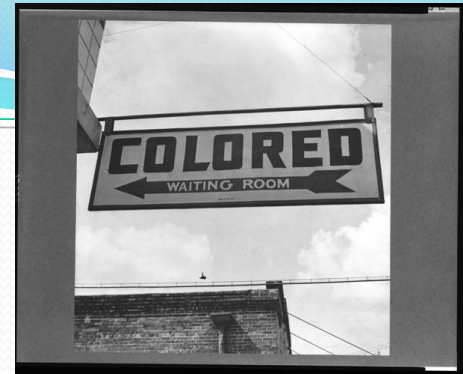


# Mixed Motive Cases

- Employment discrimination cases brought under Title VII fall in one of two categories— “mixed-motive” cases (or direct method), or “pretext” cases (or indirect method).
- In mixed-motive cases, the plaintiff must prove by direct or strong circumstantial evidence of discriminatory intent—the existence a prohibited discriminatory factor played a “motivating part” in an adverse employment action. As an example, plaintiff might prove that a decision-maker uttered discriminatory remarks evidencing hostility to a protected group, or that such remarks were issued by one who tainted the decision-maker’s judgment, if related to the decisional process on the adverse employment action. But if the discriminatory remarks are unrelated to the employment decision and amount to no more than “stray remarks,” discriminatory intent is not proven. If plaintiff proves discriminatory intent, the burden shifts to the defendant to prove that it would have made the same decision anyway. Usually, discriminatory motivation is proven by adducing policy documents, and/or statements or actions that exhibit a discriminatory attitude. More common are pretext cases.



# Pretext Cases



In pretext cases, courts use the burden-shifting framework for employment discrimination first articulated by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*. The framework for judicial assessment of a Title VII claim of discrimination under *McDonnell Douglas* involves a three-step process.

1. First, the plaintiff must establish a *prima facie* case of discrimination.
2. If s/he succeeds, the burden shifts to the defendant to show a legitimate, non-discriminatory justification for the employment action.
3. If the defendant does so, the burden shifts again to the plaintiff to prove that the reasons advanced by the defendant were specious, and that its true motivation was discrimination.

The ultimate burden of proof, however, resides with the plaintiff. 411

U.S. 792 (1973).

# United Airlines' Employment Policies



- During the 1960s and early 1970s, the standard practice among large commercial airlines was to hire only women as flight attendants. The airlines required their flight attendants to remain unmarried, to refrain from having children, to meet weight and appearance criteria, and to retire by the age of 35. Like other airlines, defendant United had a long-standing practice of requiring female flight attendants to maintain their weight below certain levels. After it began hiring male flight attendants in the wake of *Diaz v. Pan Am World Airways*, 442 F.2<sup>nd</sup> 385 (5<sup>th</sup> Cir. 1971), United applied maximum weight requirements to both male and female flight attendants. Flight attendants—a group comprised of approximately 85% women during the time period relevant to this suit—are the only employees United has ever subjected to maximum weight requirements.
- Between 1980 and 1994, United required female flight attendants to weigh between 14 and 25 pounds less than their male colleagues of the same height and age. For example, the maximum weight for a 5' 7", 30-year-old woman was 142 pounds, while a man of the same height and age could weigh up to 161 pounds. A 5' 11", 50-year-old woman could weigh up to 162 pounds, while the limit for a man of the same height and age was 185 pounds.





#### HOW TO STAND LIKE A MODEL

1. Keep your feet slightly apart, pointing forward.
2. Turn the feet in to the heels in about a 10 degree angle. Bring the knees back to the heels. The hips should be directly over the ankles. The shoulders should be directly over the hips.
3. The neck and head should be in a straight line with the spine. The chin should be tucked in. The shoulders should be relaxed and not rounded forward.
4. The arms should hang straight down from the shoulders. The hands should be at the sides of the hips.
5. The pelvis should be in a neutral position, not tilted forward or backward.
6. The feet should be flat on the floor, with the weight distributed evenly across the entire foot.



#### THE SEVEN POINTS OF POSTURE

- EARS**  
Draw together with the top of the head. Bring the ears back over the shoulders.
- CHIN**  
Tucked in to the base of the skull.
- SHOULDER**  
Down and relaxed.
- RIB CAGE**  
Expanded in all directions.
- STOMACH**  
Pulled in and held firm.
- PELVIS**  
Tucked in and tilted slightly forward.
- KNEES**  
Relaxed and slightly bent.
- FEET**  
Weight rests on the balls of the feet.