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# Transportation Labor Relations: Contemporary Developments, Challenges, and Strategies

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# Transportation Labor Relations: Contemporary Developments, Challenges, and Strategies

## **Abstract**

Historically, labor costs have represented the largest cost component of the transportation industry. The industry is heavily unionized, and transport workers generally receive higher wages than the average industrial worker. Under federal economic regulation, carriers had little incentive to bargain hard to keep labor costs low. Restrictive entry policies and collective ratemaking resulted in near-uniform pricing among competitors. Increased labor costs were merely passed on to the consumers of transport services.

## **Disciplines**

Operations and Supply Chain Management

## **Comments**

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# Transportation Labor Relations: Contemporary Developments, Challenges, and Strategies

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**H**ISTORICALLY, labor costs have represented the largest cost component of the transportation industry. The industry is heavily unionized, and transport workers generally receive higher wages than the average industrial worker. Under federal economic regulation, carriers had little incentive to bargain hard to keep labor costs low. Restrictive entry policies and collective ratemaking resulted in near-uniform pricing among competitors. Increased labor costs were merely passed on to the consumers of transport services.

The advent of deregulation greatly changed the nature and level of competition in the transportation industry, as well as its structure. The number of certificated airlines increased from 29 in 1978 to

approximately 180 by 1986.<sup>1</sup> The number of trucking firms subject to Interstate Commerce Commission regulation increased from approximately 18,000 in 1980 to more than 30,000 by 1984.<sup>2</sup> Most of the new airlines and motor carriers were nonunion operators who enjoyed a significant cost advantage over existing carriers.

The influx of new, low-cost competitors, in conjunction with the pricing freedoms granted by Congress and the regulatory agencies, has had an adverse effect on the financial performance of the air and trucking industries. More than 120 airlines—large and small—have gone bankrupt since 1978.<sup>3</sup> Though its profits have generally improved since deregulation in 1980, the railroad industry has also experienced significant structural change, including major bankruptcies and the downsizing of carriers through abandonment and divestiture of track and facilities.

Ironically, given the pro-competition objective of deregulation, merger activity and industry concentration in each of the three modes of transportation have also increased. The five largest airlines have nearly 60 percent of the total domestic air passenger market, while the seven largest railroads generate more than 85 percent of industry revenues.<sup>4</sup> The financial pressures created by increased competition from low-cost, nonunion carriers, and the labor impacts of industry consolidation have produced some unprecedented responses from unions and management.

The question of how competition would affect union participation and strength was misunderstood, as evidenced by a 1980 study that concluded, "airline collective bargaining structure should continue to reflect the continued impact of the former regulatory structure."<sup>5</sup> Clearly this conclusion has not borne up to close scrutiny during the past 10 years. Economists and policy makers failed to predict the impact of increased competition on labor relations in transportation. This article examines some of deregulation's unintended effects in this realm.

1. Frederick J. Stephenson, Jr., *Transportation U.S.A.* (Reading, MA: Addison-Wesley Publishing Company, 1987), p. 373.

2. Peter A. Sussler, "The Labor Impact of Deregulation," *Employment Relations Today* (Summer 1986): 118-119.

3. Mary Lu Carnevale, "Presidential Air to End Pact Feb. 6 as Feeder for Continental at Dulles," *Wall Street Journal* (January 11, 1988), p. 8.

4. Chuck Hawkins and Aaron Bernstein, "Airlines in Flux: And Then There Were Five," *Business Week* (March 10, 1986): 107; Stephenson, pp. 128-129.

5. Reuben Kyle and Laurence Phillips, "Airline Deregulation: Did Economists Promise Too Much or Too Little?" *Logistics and Transportation Review* 21, no. 1 (1984): 17.

Major developments in labor relations and policy have occurred in three distinct areas: corporate strategy, collective bargaining, and federal labor protection policies. Transportation firms have implemented three controversial corporate strategies in an effort to reduce labor costs: Chapter 11 bankruptcy proceedings as a means to abrogate labor contracts, the creation of nonunion subsidiaries by union carriers, and outsourcing of various functions previously performed in-house. These strategies (and the courts' receptiveness to them) have prompted Congressional action to address labor's concerns about long-term ramifications for the collective bargaining process. While transportation firms were not the first to use these strategies, it is obvious that their involvement has been a major factor in the renewed and increased interest of both labor and Congress in the philosophic and legal issues surrounding them.<sup>6</sup>

#### CHAPTER 11 BANKRUPTCY

The use of bankruptcy proceedings to unilaterally abrogate or change collective bargaining agreements has frequently been challenged by labor in the courts. The source of the controversy lies in the conflict between Section 8(d) of the National Labor Relations Act, which stipulates that no party to a collective bargaining agreement may terminate or modify such an agreement except through procedures delineated within that act and Section 365(a) of the Bankruptcy Reform Act of 1978, which permits the firm in reorganization to unilaterally reject executory contracts subject to bankruptcy court approval. Although federal courts have consistently held labor agreements to be executory contracts not immune from Section 365(a), the criteria used to determine when to allow their rejection have generally been more stringent than those applied to ordinary executory contracts.<sup>7</sup>

In 1983 when Continental Airlines filed for Chapter 11 bankruptcy, the criteria in effect were those employed in the 1981 case *National Labor Relations Board v. Bildisco & Bildisco*. The *Bildisco* test requires the firm in Chapter 11 proceedings to demonstrate that the continuation of the collective bargaining agreements would be burden-

6. Mark S. Pulliam, "The Collision of Labor and Bankruptcy Law: *Bildisco* and the Legislative Response," *Labor Law Journal* 36, no. 7 (July 1985): 395.

7. Douglas Bordewieck and Vern Countryman, "The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors," *American Bankruptcy Law Journal* 57 (October, 1983): 315-317.

some to the estate (not necessarily fatal to the reorganization scheme) and that rejection of these agreements would assist the reorganization.<sup>8</sup> Additionally, the firm must make a factual presentation sufficient to allow the bankruptcy court to weigh the competing equities.<sup>9</sup> The Supreme Court, on February 22, 1984, upheld the *Bildisco* standards, and also held that the firm does not commit an unfair labor practice by unilaterally rejecting or changing the terms of a collective bargaining agreement after the bankruptcy petition has been filed but *prior* to the bankruptcy court's formal authorization of rejection.<sup>10</sup>

The Supreme Court's decision created a strong labor protest and prompted Congress to take immediate action. The Bankruptcy Amendments and Federal Judgeship Law of 1984 essentially preserves the standards for rejection established in *Bildisco*, but seemingly increases the bargaining obligation of the firm in bankruptcy. In addition, the act requires bankruptcy court approval *before* rejection can take place.<sup>11</sup> The requirement that court permission be obtained prior to rejection should increase the bargaining strength of labor, but the legislation contains many ambiguous or ill-defined phrases, the interpretation of which may render the law an ineffective safeguard against labor contract abrogation. The likely effect, however, is to make Chapter 11 filing a less tenable, therefore a less desirable, strategy.

#### THE ESTABLISHMENT OF NONUNION SUBSIDIARIES

Unionized companies in the airline and motor carrier industries have successfully employed the strategy of establishing nonunion subsidiaries to reduce labor costs. New York Air and Frontier Horizons, subsidiaries of Texas Air Corporation and Frontier Airlines, Inc., respectively, represent two recent examples of this strategy in the airlines. In the motor carrier industry, "double-breasting" proliferated to the point that one of the major goals of the Teamsters'

8. *Ibid.*, and Charles M. Roesch, "Collective Bargaining Agreements and the Bankruptcy Reform Act: What Test Should the Bankruptcy Court Use in Deciding Whether to Allow a Debtor to Reject a Collective Bargaining Agreement?" *University of Cincinnati Law Review* 51 (1982): 863.

9. The "balancing of equities" requires consideration of several factors. For details on these factors see Harvey Miller and Peter A. Langerman, "Once More Into the Breach?" *Management Focus* 31, no. 3 (May/June 1984): 14.

10. Pulliam, p. 392.

11. William A. Wines, "An Overview of the 1984 Bankruptcy Amendments: Some Modest Protection for Labor Agreements," *Labor Law Journal* 36, no. 12 (December 1985): 914.

Union in its last national labor contract negotiations, was to stop the further creation of nonunion trucking operations.<sup>12</sup> Carriers adopting this strategy should be aware of the potential problems and issues involved.

Any carrier that creates a "dual company" may potentially encounter problems with secondary boycotts or alleged violations of collective bargaining agreements. Cases involving secondary boycotts generally center on the issue of whether the dual company is a "single employer." A finding that the firm is a single employer legally allows the union to picket the nonunion subsidiary. If the dual company is also found to be a "single bargaining unit," the company may be forced to recognize the union as the exclusive bargaining agent of all similarly situated employees in subsidiaries or divisions owned or controlled by the employer.<sup>13</sup>

In determining whether a dual company is a single employer, the following criteria are used: interrelation of operations, common management, centralized control of labor relations, and common ownership. Of these criteria, the centralized control of labor relations usually receives the most careful scrutiny while common ownership is the least important criterion. Historically, the National Labor Relations Board (NLRB) has been more receptive to the nonunion subsidiary strategy than have the courts.

The criteria and standards developed by the NLRB and courts for determination of single employer status have been used almost without revision in double-breasting cases. Double-breasting cases also involve the determination of an appropriate bargaining unit. In order for the dual company to be declared a single bargaining unit, it must first be found to be a single employer.

The primary consideration in double-breasting cases is the community of interest among employees of the firm's component parts. If the nonunion subsidiary does not compete for the same customers or jobs as the unionized component, the NLRB and courts are not likely to find the dual company a single bargaining unit. Some competition between union and nonunion subsidiaries is permitted. The degree or

12. "Teamster Contract Talks Focus on Job Protection, Non-Union Operations," *Traffic World* (February 4, 1985): 12.

13. John M. Husband and T.J. Thompson, "Establishing and Operating Both Union and Nonunion Subsidiaries: A Trap for the Unwary," *Labor Law Journal* 34, no. 6 (June 1983): 332-333.

extent of allowable competition has not, however, been clearly defined.<sup>14</sup>

The issues surrounding nonunion subsidiaries have captured the interest of Congress, which is in the process of drafting a bill that would greatly curtail the use of the dual-shop strategy. The construction industry seems to be the target of this measure. Consequently, the motor carrier and airline industries are not likely to fall under the bill's purview.<sup>15</sup> Nonetheless, carriers must be cognizant of potential legal issues and constraints that may prevent future successful implementation of the dual-shop strategy.

#### OUTSOURCING

A relatively new strategy that has drawn strong protests from transportation unions is outsourcing, or contracting out service or work typically performed by the carrier's employees. A recent example of this strategy is the Burlington Northern Railroad's (BN) decision to lease locomotive power and contract out part of its locomotive maintenance. The Illinois Central Gulf Railroad had a similar but temporary arrangement with an outside contractor. Such arrangements conserve railroad capital and make available state-of-the-art equipment (and skills needed to maintain it). Additionally, railroad shops have become increasingly expensive to operate, making outsourcing an attractive alternative.<sup>16</sup>

BN's unions asked the company to negotiate the issue. When the carrier refused, the unions threatened to employ self-help, such as picketing, work stoppages, or strikes. The railroad successfully sought a court injunction against self-help in December 1986, and was itself enjoined from further outsourcing activity while the court considered the case. The court asked the Special Adjustment Board, an arm of the National Railway Adjustment Board established under the Railway Labor Act, to settle the dispute. The Board ruled in July 1987 that it had no jurisdiction over the case, and the injunction was extended.<sup>17</sup> The injunction was still in effect in late 1987.<sup>18</sup>

14. *Ibid.*, p. 334.

15. Thomas M. Stroh, "Trucking Will Not Come Under Dual-Shop Prohibitions," *Transport Topics* (May 25, 1987): 1, 3.

16. Gus Welty, "Labor Issues Will Heat Up," *Railway Age* (December 1986): 36.

17. Greg Borzo, "Ban on Union Self-Help Extended by U.S. Judge in Rail Maintenance Case," *Traffic World* (July 27, 1987): 60.

18. Andrea Chancellor, "Railroad-Union Dispute Still Pending in Court," *Journal of Commerce*. (September 18, 1987), p. 4B.



As the legality of outsourcing appears to depend heavily on the terms of existing labor agreements, it is likely that the issue will be a key one in upcoming rail contract negotiations. Airlines have expressed interest in the strategy as well. Eastern Airlines announced plans in June 1987 to spin off a subsidiary to perform its ground service work at airports around the country but was enjoined from doing so. American Airlines has a similar subsidiary, and different functions have been contracted out by a number of other airlines.<sup>19</sup>

#### TWO-TIER WAGE STRUCTURES

In the area of collective bargaining, two-tier wage pacts and employee participation programs are two of the most notable recent developments in transportation. High unemployment in the airline industry, the companies' financial difficulties stemming from the recession, and the intense competition with nonunion subsidiaries convinced unions representing employees of major airlines that concession bargaining was necessary. Two-tier wage structures, in which the top rate of pay for new employees is substantially lower than that for more senior employees, were the easiest form of concession for unions to grant since the entire burden of the lower tier was placed on prospective workers. All of which, as William Winpisinger, president of the International Association of Machinists and Aerospace Workers, noted in 1985, "puts the union in the awkward position of discriminating against its unborn members."<sup>20</sup>

American Airlines pioneered the two-tier wage system for the airline industry in 1983 in an effort to bring its labor costs more in line with those of low-cost competitors such as Continental. The early financial results of American's experiment were gratifying. The first year of the two-tier system resulted in \$100 million savings—6.7 percent of the company's total costs. By 1985, 25 percent of American's 26,400 workers were in the lower tier or "B" scale. By 1990 the company projects that 50 percent of their workforce will be "B" scalers.<sup>21</sup> Other airline executives, impressed with American's num-

19. "Eastern Airlines Planning Spinoff To Perform Ground Service Work," *Journal of Commerce* (June 26, 1987), p. 5B.

20. Irwin Ross, "Employers Win Big in the Move to Two-Tier Pay Spreads, but the Pioneer Firms Encounter Problems," *Wall Street Journal* (October 14, 1985), p. 1.

21. David Wessel, "Split Personality: Two-Tier Pay Spreads, but the Pioneer Firms Encounter Problems," *Wall Street Journal* (October 14, 1985), p. 1.

## TRANSPORTATION QUARTERLY

TABLE I—TWO-TIER CONTRACTS IN MAJOR AIRLINES

<i>Employee Group</i>	<i>Carrier</i>	<i>Year of Parity</i>	<i>Approx. Pay Reduction (In Percent)</i>	
Pilots:	Aloha	5	15	
	American	10	35	
	Delta	5	35	
	Eastern	5	14-43	
	Frontier	6	10	
	Piedmont	Captains-3		21
		Officers-none		28
	Republic	Future negotiations		11
	Trans World	Future negotiations		15
	United	Future negotiations		34-50
	USAir	5		40-45
	Western	Does not reach parity		25
	Attendants:	American	17	35
		Frontier	Does not reach parity	5-10
		Northwest	5	21-50
Pan Am		Does not reach parity	35	
Piedmont		6	20	
Republic		Future negotiations		30
United		6		20-25
USAir		6		20-30
Western		Does not reach parity		25 after fifth year
Mechanics:		Aloha	6	25
	American	12.5	40-45	
	Frontier	5	35	
	Northwest	5	21-50	
	Piedmont	6	20	
	Republic	3.5	25	
	Trans World	6	20	
	United	5	25	
	USAir	5	24	
	Western	6	25	

Sources: AIR Conference, March 1, 1986; Robert C. Lieb and James F. Molloy, "The Major Airlines: Labor Relations in Transition," *Transportation Journal*, Spring, 1987, pp. 17-29; Agis Salpukas, "The Two-tier Wage System is Found to be Two-Edged Sword By Industry," *New York Times*, July 21, 1987, pp. 1, 22-23D.

bers, followed suit. By mid-1987, 70 percent of all airline labor contracts had two-tier wage provisions (Table I).<sup>22</sup>

### "A" Versus "B" Scalars

Recent experience with two-tier pacts indicates two critical points: the length of time until the two tiers merge and wage parity is reached,

22. Robert C. Lieb and James F. Molloy, "The Major Airlines: Labor Relations in Transition," *Transportation Journal* (Spring 1987): 17-29; Agis Salpukas, "The Two-Tier Wage System is Found to Be Two-Edged Sword By Industry," *New York Times* (July 21, 1987), p. D22.

and morale problems associated with having two "classes" of employees. Under American Airlines' original pacts with pilots and flight attendants, the "A" and "B" scales were never to have merged. This fact has been a major point of contention in recent contract negotiations. The pilots' contract negotiated in February 1987, after almost a year of talks, made it possible for a "B" scale pilot to reach wage parity with the "A" scale after 10 years. The flight attendants' union is still contesting the proposed 17-year period for parity to be reached.

Although all bargaining concessions are controversial, two-tier wage structures create a special set of controversies. Because employees with the same job title and duties receive different wages for similar effort, the two-tier structure violates the basic tenet of equal pay for equal work.

The following conflicts indicate that the two-tier wage system is a double-edged sword for the airline industry, and as such must be handled gingerly.

*Turnover.* High pilot turnover and increasing difficulty recruiting highly-qualified pilots have resulted in a reduction in flight qualification requirements at some airlines.<sup>23</sup>

*Restiveness and Resentment.* The refusal by "B" scalers to perform certain in-flight tasks because "A" scalers are paid more for the same work could have passenger safety and service implications if the issue is not addressed.<sup>24</sup>

*Reduced Worker Loyalty.* Top-end employees speculate that management will get rid of them to reduce labor costs by replacing them with lower-paid second-tier employees.<sup>25</sup>

*Legal Challenges.* Some questions may be raised about whether unions breach the duty of fair representation by negotiating two-tier wage provisions, particularly if the lower tier would be disproportionately comprised of protected minority groups such as women and blacks.<sup>26</sup>

23. Salpukas, "The Two-Tier Wage System."

24. Shane R. Premeaux et al., "The Two-Tier Wage System," *Personnel Administrator* 31 (1986): 92-100.

25. James E. Martin and Melanie M. Peterson, "Two-Tier Wage Structures: Implications for Equity Theory," *Academy of Management Journal* 30, no. 2 (June 1987): 297-315.

26. John V. Jansonius and Kenneth E. Broughton, "Coping with Deregulation: Reduction of Labor Costs in the Airline Industry," *Journal of Air Law and Commerce* 49, no. 3 (1984): 501-553.

*Potential Financial Losses.* The Association of Professional Flight Attendants, the union representing the flight attendants at American Airlines, has mounted a "corporate campaign" against Equitable Life Assurance Society in an effort to persuade policy holders and pension fund members to demand ". . . that Equitable use its influence to get American Airlines to bargain fairly with its flight attendants and do away with two-tier."<sup>27</sup>

*Unwarranted Industry Overexpansion.* Some industry observers speculate that two-tier wage pacts provide airlines with the unwarranted incentive to add employees and overexpand operations in an industry already plagued by excess capacity.<sup>28</sup>

#### EMPLOYEE PARTICIPATION PROGRAMS

The trend toward concession bargaining is a good example of how competition affects strategy for both management and labor. Strategies are likely to differ from carrier to carrier depending on the extent of competition, the carrier's financial condition, and management's view of the future. For railroads and motor carriers, where industry-wide bargaining was the rule, concessionary bargaining has taken hold more slowly than in the airline industry. Approximately 25 percent of organized railroad companies and 50 percent of long-haul trucking firms have secured wage concessions.<sup>29</sup>

The unions' bargaining power and their ability to win the quid pro quo in return for cost concessions depend on how important the concessions are for the firm. Where concessions are important, unions generally try to gain job security. Failing that, unions may demand improvements in other areas, perhaps a participative management program or equity in the firm through an employee stock ownership plan (ESOP).

During the 1985 National Master Freight Agreement (NMFA) negotiations, an International Brotherhood of Teamsters survey showed that two-thirds of the rank-and-file membership opposed wage concessions. In an effort to assist failing carriers, Teamster leadership formulated an ESOP program, which, while not part of the

27. Association of Professional Flight Attendants, "Is Your Equitable Insurance or Pension Fund Underwriting Catastrophe for Others"? Brochure, Summer 1987.

28. Agis Salpukas, "The Two-Tier Wage Impact," *New York Times* (October 30, 1985), p. D1.

29. Peter Capelli, "Competitive Pressures and Labor Relations in the Airline Industry," unpublished working paper, February 1985, p. 5.

NMFA, gave individual companies a chance to reduce wages. While Teamster leaders did not expect that ESOPs would prevent the eventual bankruptcies of financially weak firms, the plan helped preserve Teamster jobs in those companies for a period of time. In the 1988 negotiations union leaders again must balance concerns of large company drivers for higher wages with job security interests of drivers at small carriers. The Teamster proposal would officially allow troubled companies to set up ESOPs in an effort to address this issue.<sup>30</sup> In the airline industry, ESOPs play an important role. Employees own 25 percent of Eastern, 13 percent of Pan American, and owned 33 percent of Western and 15 percent of Republic before they were acquired by Delta and Northwest, respectively.<sup>31</sup> The attempt by the pilots' union to buy United Airlines was a major factor in that company's reorganization of top management.<sup>32</sup>

The railroad industry has not had much success in initiating employee incentive programs, although declining employment and technical change has sparked interest in some forms of employee participation. Programs tend to emphasize problem-solving and decision-making processes such as task forces, labor-management committees, and quality circles. These programs appear to be implemented most frequently in railroads facing financial problems. The Milwaukee Road Quality Circle Project provides an excellent illustration of a successful program implemented in a financially weak company.<sup>33</sup>

Several types of barriers appear to interfere with satisfactory implementation of employee involvement programs. Because of their departure from traditional labor management relationships it may be difficult to institutionalize programs into the organization. One indication of a program's acceptance, or lack thereof is the extent to which middle managers are involved in the successful implementation of the program. Too often they find themselves squeezed between upper levels of management and rank-and-file workers as many traditional middle management tasks become potential subjects of group decision-making processes.

30. Aaron Bernstein, "The Teamsters: A Break in Forty Miles of Bad Road," *Business Week* (March 21, 1988): 90.

31. Capelli, "Competitive Pressures and Labor Relations," p. 18.

32. "Cancelled Flight: Allegis Shakeup Came as Stockholder Ire Put Board Tenure in Doubt," *Wall Street Journal* (June 11, 1987), pp. 1, 22.

33. See, for example, Ellen Foster Curtis, "Quality Circles in Transportation: The Milwaukee Road Experience," *Transportation Journal* 23, no. 3 (Spring 1984): 63-69.

Union perceptions as conveyed to rank-and-file workers are another potential barrier to the continued success of an employee involvement program. If the program smacks of an attempt to undermine the union, or appears to be a way to squeeze more productivity from workers in exchange for little tangible gain, the program is doomed from the start. The question may arise over whether employee involvement will last only until better economic times return to the company, at which time management will wrest decision-making authority from cooperative programs. Unfortunately the demise of Eastern Airlines' long successful employee involvement plan tends to support this type of concern.

Another potential stumbling block for employee involvement programs is the desire on the part of executives for quickly ascertainable, quantifiable results. Excessive emphasis on quick fixes can result in rapid disillusionment for everyone involved in the project. Many of the benefits that accrue from employee involvement manifest themselves in improved morale and a better work environment. A relatively long time may elapse before actual dollar savings become evident.

By and large, employee involvement programs in the transportation industry have not met with great success in terms of financial results or in improved long-term labor-management relations. Perhaps this is due to the fact that in most cases, programs began as last-ditch efforts to reverse financial losses. This may prove especially true in employee stock ownership plans. In the trucking and airline industries, ESOPs were established to stave off financial failure. This was not the reason for which Congress enacted the legislation that made ESOPs possible. In a recent survey of over 100 companies, conducted by the National Center for Employee Ownership, only one firm required wage concessions as a prerequisite for the formation of an ESOP. The report continues:

*While it is true that some ESOPs have been used as a last-ditch effort to save failing businesses, prevent hostile takeovers, or even induce employees to make wage concessions, the U.S. General Accounting Office reports that such cases account for only about 3 percent of all company plans. . . . By and large, then, ESOPs are started for the purposes Congress intended—such as allowing employees to become owners of profitable, closely held companies when a principal owner retires . . . or as an additional employee benefit.<sup>34</sup>*

34. Corey Rosen and Michael Quarrey, "How Well is Employee Ownership Working?" *Harvard Business Review* (September-October 1987): 126.

## LABOR PROTECTION ISSUES

Prior to economic deregulation, the Interstate Commerce Commission (ICC) and the Civil Aeronautics Board (CAB) routinely imposed labor protective conditions upon approved railroad and airline mergers, consolidations, acquisitions, and other carrier transactions.

The first statute to protect employees affected by railroad consolidations was the Emergency Railroad Transportation Act of 1933. Before its expiration in 1936, rail labor and management negotiated what remains to this day the basis for railroad labor protection—the Washington Job Protection Agreement of May 1936.<sup>35</sup> In 1940 the Interstate Commerce Act was amended to require the ICC to impose labor protection as a condition for approval of mergers, consolidations, line abandonments, and other similar transactions. Over the years the ICC developed and imposed a variety of formulae that specified compensation for employees who lost their jobs, were bumped to lower-paying jobs, or had to relocate to retain employment.

The CAB imposed similar conditions as a prerequisite for approving comparable airline transactions. Though the Civil Aeronautics Act of 1938 did not explicitly mandate such a requirement, the federal courts agreed that labor protection was inherent within the CAB's authority. The CAB's conditions generally mirrored those developed in the railroad industry, but were often modified as dictated by industry conditions.<sup>36</sup> These conditions were substantial as they generally guaranteed long-term employees they would be no worse off for at least 4 years after the transaction.

The degree of job protection provided railroad and airline employees affected by mergers, consolidations, etc., was unequalled in any other industry. Since deregulation, however, the labor protection posture of the regulatory agencies has changed significantly. The U.S. Department of Transportation (DOT), which assumed regulatory authority over airline mergers after the CAB was abolished, has not imposed labor protective conditions on any airline merger. The ICC has elected not to impose labor conditions on short-line railroads, those railroads created from the divested lines of major carriers. These

35. Paul Stephen Dempsey and William E. Thoms, *Law and Economic Regulation in Transportation* (Westport, CT: Quorum Books, 1986), p. 302.

36. Herbert R. Northrup, "Airline Labor Protective Provisions: An Economic Analysis," *Journal of Air Law and Commerce* 53, no. 3 (Winter 1987): 408.

developments have been challenged by labor in the courts, and have prompted legislative action by Congress.

Although the Airline Deregulation Act of 1978 provides protection in the form of financial assistance to employees who lose their jobs because of deregulation, Congress has never provided funds to effectuate the plan.<sup>37</sup> The act also gives employees with 4 or more years of tenure at an affected airline preferential hiring considerations at other airlines seeking new employees.<sup>38</sup>

Regardless of these statutory protection provisions, the advent of deregulation caused the CAB to alter its labor protection policy in merger cases. In the 1979 *National Airlines Acquisition Case*, the CAB announced it would order protective conditions only where required by "special circumstances." DOT continued this policy after the CAB was phased out and has not ordered labor protection clauses in any of the mergers it has reviewed. The key reasons for the change in policy are: (1) displaced employees now stand a greater chance of reemployment with another airline since deregulation removed significant institutional barriers to entry into the industry; and (2) the imposition of labor protection provisions could cause the purchasing carrier to cancel the transaction that would result in job losses, particularly in cases involving a financially troubled airline.<sup>39</sup> By virtue of a 1983 Department of Labor ruling, however, airline employees laid off because of mergers or acquisitions must be given the same rehiring preference as employees laid off for other reasons.<sup>40</sup>

Attempts to pass labor protection legislation in 1982 and 1986 were defeated in the Senate. However, in October 1987 both the House of Representatives (H.R. 3051) and the Senate passed bills that would require the imposition of labor protective provisions as a condition of approval for airline mergers unless the projected costs of protection would exceed the anticipated financial benefits of the transaction. The Senate version would also transfer the authority for imposing labor protective provisions from DOT to the Department of Labor. The enactment of this legislation is expected to have a chilling effect on merger activity in the airline industry due to the substantial costs associated with the protective provisions.<sup>41</sup>

37. Susser, p. 119.

38. Northrup, p. 415.

39. Ibid., pp. 416-417.

40. Allen R. Wastler, "Supreme Court Lets Stand Rehiring-Preference Rule Used in Airline Mergers," *Traffic World* (October 12, 1987): 45.

41. Northrup, pp. 404-405 and 455-459.



A similar development involving labor protection has occurred in the railroad industry. Since 1982 the ICC has routinely been refusing to order labor protective conditions on line sales by larger railroads to regional, or short-line carriers. This is consistent with federal law that does not specifically require such conditions for approval of line sales as it does for rail merger and abandonment proceedings.<sup>42</sup> Since deregulation, the number of short-line railroads has increased at a phenomenal rate. By 1987 more than 300 short-line carriers employing about 12 percent of the nation's total rail workers were in existence.<sup>43</sup>

Rail unions view the creation of short lines as the major carrier's primary strategy for reducing their labor forces without incurring substantial severance costs. The short-line spin-offs generally negotiate lower wage scales and more flexible work rules, and employ fewer workers than did the larger carriers who previously operated their lines. Major railroads contend that they are selling lines that would otherwise be abandoned and, thus, fewer rail jobs are lost. The strike against the Pittsburgh & Lake Erie Railroad (P&LE), and the subsequent landmark court rulings in favor of labor, illustrate the rail unions' dissatisfaction with the ICC's refusal to impose protective conditions.

The P&LE was a financially-troubled, 182-mile carrier with 750 employees. It was in the process of being sold to the Chicago West Pullman Transportation Corp., which had announced intentions to reduce the work force to one-third of the current employees, when the workers struck. Initially, a federal district court judge issued an injunction against the strike since the ICC had approved the line sale without protective conditions. However, in late October 1987 a three-judge appeals court panel ruled that labor unions are free to strike the P&LE under the Norris-LaGuardia Act, if the carrier fails to negotiate with them over its planned sale. The appeals court remanded the case to the district court judge to determine whether the proposed changes in work rules and conditions would require similar negotiations under the Railway Labor Act.

On November 23, the district court judge ruled that the Railway Labor Act supersedes the Interstate Commerce Act in matters involv-

42. David M. Cawthorne and Allen R. Wastler, "Labor Protection Legislation May Solve Shortline Sales Issue," *Traffic World* (September 1987): 4.

43. Frank N. Wilner, "Labor Protection Moves Seen Stunting Growth of Short Lines," *Traffic World* (October 12, 1987): 4.

ing employees, and directed the P&LE to comply with provisions of the Railway Labor Act by resolving the dispute with labor. The judge enjoined the railroad from altering its pay rules and working conditions until the dispute-resolution procedures outlined in the act were completed. On April 8, 1988, the 3rd Circuit Court of Appeals upheld the district court ruling. The 3rd Circuit Court's ruling has slowed some of the activity in rail line sales, and is likely to be appealed to the Supreme Court.<sup>44</sup>

Congress has also become involved in the short-line sales issue. The approved Senate bill that mandates labor protective conditions in airline mergers contains the wording of a proposed House bill (H.R. 3332) that would require the ICC to impose conditions on track sales.<sup>45</sup> The proposed legislation establishes a sliding scale of buyouts for workers who lose their jobs as a result of the line sale and sets a \$30,000 cap for the lump sum payment. Though these costs may be significant to a potential rail line purchaser, they are only a small fraction of the labor protection costs incurred in merger or abandonment proceedings. The bill also contains a provision that appears to establish the primacy of the Railway Labor Act over the Interstate Commerce Act in line sales costs, a provision that will not be palatable to the railroad industry.<sup>46</sup>

Another major reason for Congressional involvement in the short-line issue is the challenge labor has mounted against two of the ICC's decisions regarding establishment and usage of short-line subsidiaries. The more recent decision permits the Burlington Northern Railroad to establish a subsidiary, the Winona Bridge Railway, which has trackage rights over 1,860 miles of BN main line. An earlier decision allowed Guilford Transportation Industries to transfer its Boston & Maine and Maine Central railroads to another of its subsidiaries, the Springfield Terminal Railway. The unions contend that the railroads' primary objective in these cases was to circumvent mandated procedures delineated in the Railway Labor Act by changing work rules and pay scales through the creation or use of a separate company that is not bound by existing union contracts.<sup>47</sup>

44. Paul F. Conley, "Labor of P&LE Short Line," *Traffic World*, April 18, 1988, pp. 86-88.

45. Northrup, p. 459.

46. Cawthorne and Wastler, pp. 4-5.

47. Allen R. Wastler and Kathleen R. Keeney, "Labor Feathers Ruffled Over BN Subsidiary Move," *Traffic World* (December 7, 1987): 7-8; and Howard S. Abramson, "ICC Rejects Labor to Block BN Short Line," *Journal of Commerce* (January 19, 1988), p. 3B.

Through their unwillingness to provide protection for workers adversely affected by airline mergers and rail line sales, some on-lookers see DOT and the ICC as having abdicated their authority and involvement in dealing with labor matters. For their part, Congress appears to expect that management and labor will negotiate the labor terms of such transactions if the much needed industry and corporate restructurings are to continue. Toward that end, a more cooperative relationship between management and labor must be fostered to ensure successful negotiations. Under current adversarial conditions existing in the industries, progress will be difficult.

#### CONCLUSION

Greater reliance on market forces has produced significant changes in structure, operations, and competitive relationships in transportation, changes that have affected management-labor relations in ways that economists and policy makers failed to predict in their pre-deregulation analyses. Both management and labor have altered their bargaining positions in response to their new environment. Transportation executives have used strategies such as Chapter 11 bankruptcy, the formation of nonunion subsidiaries, and outsourcing of certain functions to take a hard stand against increasing wage levels and for more flexible work rules. Many unions, having suffered a decline in membership and bargaining strength, and having recognized the precarious financial condition of many transportation employers, have agreed to two-tier wage structures and other concessions, sometimes in return for employee participation programs. Congress and the courts have been active in reinstating labor protection in airline mergers and rail line sales. These actions will have a significant impact on the ability of carriers to reshape their companies and their industries.

This article has given a brief overview of some of the legal and operational challenges posed to transportation companies and unions by new approaches to labor relations and identified some of the potential issues that may arise as the industry continues to adapt to tremendous economic changes created by deregulation and competition. In order that both parties share in the burdens and benefits resulting from the new environment, it is apparent that more cooperation is required in the severely tested labor-management relationship.