# The Failure of the Railway Labor Act

120 years ago, the rail industry was linking American cities and promoting American commerce. This vital national resource was necessary for the growing, post-war nation to become the economic titan of the 20th Century.

Things were not smooth on the railway labor front. Burdened with high fixed costs, rail management frequently changed the pay and working conditions of its employees, prompting wildcat strikes. Armed troops were often summoned to quell labor unrest and put down violence.

It didn't take much in the way of prescience to understand this feature of labor relations was at odds with the growing industrial needs of a rising nation, so Congress passed a series of laws aimed at streamlining labor unrest. Most were considered failures until the Railway Labor Act was passed.

In that agreement between industry and labor, it was decided that each party needed to relinquish its primary tactic in attempts to secure its own interests: labor would organize into official unions along craft and class lines, and agree to a series of burdensome conditions that needed to be met before engaging in labor stoppages; and management would not interfere with union operations and representation, while also agreeing not to unilaterally change the pay and working conditions of employees without meeting the same burden as the union.

Unlike labor contracts that fall under NLRB, where both parties are largely free to engage in activities in their own interest at the conclusion of the contract, those collective bargaining agreements in rail (and eventually airline) industries would carry past any deadline by requiring both parties to still act as if they were in force, thus maintaining a "status quo" in the working environment. This purpose was ostensibly to prevent disruptions in commerce that relied upon the rail system of the United States. The theory being that small disputes would be prevented from swelling into large disputes.

The law, as most laws, was crafted by industry. What industry gave up in terms of ability to unilaterally change working conditions and coerce employees away from union membership, it gained in terms of greatly reduced exposure to labor stoppages. All industries that have very high capital costs (such as rail and air)

are vulnerable to cash-flow interruptions. Labor disruptions are magnified in such an environment. Management had just crafted a tool that would remove, or largely shield, their Achilles' Heel.

When a RLA contract came to be renegotiated during times of higher employee leverage, management could feign "good faith bargaining," but drag its feet. It had relatively little incentive to achieve a deal under such circumstances, since it would be raising its costs. The RLA simply afforded management the ability to defer that cost.

Labor was not without its tools. Under this arrangement, labor could also feign maintaining the "status quo," while slowing down, or "working to the rule." Eventually, both sides would grow weary of this war of attrition and achieve peace by crafting a new working agreement. It was a flawed system that worked, especially in a regulated environment. Each side was allowed to "cheat" in small part and US commerce suffered a little, but not greatly.

Airline deregulation hit in the late 1970s, and Frank Lorenzo entered the scene with big dreams of slashing his own employee costs and undercutting the high cost structure of rival airlines. He knew it would be against the law to simply decree his new cost structure, and that the RLA prevented him from imposing it at the conclusion of an employee contract. He needed a way to unilaterally impose his grand vision on his employees without running afoul of the RLA.

He started a non-union carrier and began buying stock in unionized carriers. Eventually, he had control over Continental and Eastern - both unionized carriers. He now had the ability to shift assets from one airline to another, thus creating a distressed financial condition in the unionized carriers. Eventually, he filed for bankruptcy and allowed the US Bankruptcy Court to do for him what the RLA prohibited him from doing himself.

The strict seniority system in the US carriers put tremendous pressure on Continental employees to save their airline. If Continental had been liquidated, its employees would have been jettisoned into the marketplace, where they would have been treated as brand-new employees at rival airlines. This environment was one where Robert Crandall promised to expand his airline (American), but only if the new employees were paid "B-Scale" wages and benefits.

It would have been a double-whammy for adrift ex-Continental employees, and Lorenzo knew it.

What Lorenzo could not achieve at the bargaining table, he attained in bankruptcy court. The RLA had been circumvented. How did ALPA (the largest pilot union in the US) respond? By telling Continental pilots to "work under protest," as Lorenzo kept his financing together to eventually break the ill-fated strike.

Congress responded by changing some bankruptcy laws, giving the appearance that it was labor friendly, but in the financial free-for-all of the 1980s, those laws were weak and interpreted as only requiring that management give the appearance of "good faith bargaining," as it smashed employee contract after employee contract in federal bankruptcy court.

The same holds true today, but only worse. Airline employees are the only unionized employees in the US that are prohibited from striking if their contract is unilaterally changed. Unionized employees under the NLRB are allowed to walk off the job at the conclusion of their contract, and rail employees under the RLA are exempted from having their contracts changed by bankruptcy proceedings, as they fall under Section 1167 of the bankruptcy code, rather than Section 1113. Simply said, if you want to find liquidity in reducing unionized employee compensation, airline employees are the most inviting target - they can't fight back. You get a free shot.

The Federal Bankruptcy Court of Southern New York is the preferred venue for airlines to file for bankruptcy. This court has sustained an unbroken record of dismantling airline employee contracts, and has faithfully issued ruling after ruling in favor of management. It has issued a ruling, in the case of the Northwest Airlines Flight Attendants, that establishes how the RLA is only applied selectively, and large portions of other labor law prohibiting judicial interference in collective bargaining agreements do not apply.

This is a venue where the airlines would certainly like to confine the discussion of collective bargaining agreements, since the chosen venue conducts itself like an extension of the executive boardroom, rather than a court of law. Should this wrinkle in the law (airline employees are subject to unilateral amendment/rejection of their RLA agreements, but are enjoined from striking in

response to such action) be appealed to the United States Supreme Court, the airlines stand to lose a large part of their legal arsenal.

In *Detroit and Toledo Shoreline Railroad Co. v. United Transportation Union*, 396 U.S. 142, 155 (1969), the Supreme Court opined about the RLA in the following manner:

> *"Only if both sides are equally restrained can the Act's* [Railway Labor Act] *remedies work effectively."*

Since the unbroken string of empirical evidence from the Southern New York District Court shows that the RLA is to be applied selectively, and then only at the behest of management and the creditors, it stands to lose a great deal if one of their tortured opinions is reviewed against the facts.

The current "law of the land" (as far as the jurisdiction of Southern New York goes) is in the case of the Northwest Airlines Flight Attendants, who rejected tentative agreements with the airline, and served notice of their right to engage in "self-help." The court initially concluded that the RLA and Norris-LaGuardia Act prohibited the court from interfering with the normal process of the consequences of a unilateral rejection of the collective bargaining agreement.

This was appealed and overturned. The reasoning behind the reversal was somewhat convoluted, but was essentially tethered to the idea that a work action, by a labor group of a carrier in bankruptcy, would harm creditors, the public, and the airline. As such, the bankruptcy provisions would override the concerns of the union.

In other words, the natural consequences of the airline's actions are too detrimental to allow.

This has been the preferred tactic of airline management over the past several years. They are free to take drastic action, and are allowed a defacto "consequence-free environment" to operate by an activist court and activist National Mediation Board.

Rather than allow the victims of their intentional recklessness the ability to take action to entice management away from such dire actions, the courts and

mediation boards simply restrain the employee response and allow management to operate undaunted.

We saw this in the arbitration where American Airlines pilots petitioned to exercise a clause in their contract, allowing them the ability to force AMR Corp. to downsize its pilot-outsourcing operation, American Eagle Airlines, if the amount of "active" American Airlines pilots fell below 7300. The arbitrator argued that allowing APA (the pilot union representing American Airlines pilots) the ability to force the drawdown of American Eagle, it would do irreparable harm to American Airlines, its passengers, and ultimately the pilots of American Airlines.

The end result? The arbitration board counted furloughed pilots, including deceased pilots or pilots flying for other airlines, such as Jet Blue, as "active pilots." This kept the number of "active" American Airlines pilots above 7300.

This is outcome-based law, which is another way of saying "the absence of law." As long as management can super-size their malfeasance, the courts will be there to force employees to clean up the mess.

We have now come full-circle and have returned to the condition we had in the 19th Century rail industries, but under the guise of bankruptcy and public interest. Management has effectively found a way to get all they want from the RLA, while denying employees any means of getting what they want. Unilateral imposition now has to go through the black-robed marionettes, rather than directly from the executive suite.

Doubtful? Go look at the devastation in airline pilot contracts over the past decade, since the reliable enjoining of unions from engaging in low-grade work actions (slow-downs, sick-outs, work-to-rule, etc.).

Now, go look at the compensation of airline executives over the same timeframe. If airlines have been in financial peril, you wouldn't know it by looking at the compensation packages of airline executives.

The problem is the law, and so is the solution.

This will not come easy. The Railway Labor Act is protected by many powerful

interests in Washington. The rail employees want to keep the law the way it is, since they are under section 1167 of the bankruptcy code, making their contracts untouchable. The large labor organizations don't want to revisit changes the labor law, since the only group harmed is airline employees. ALPA is too busy spending mainline pilot dues money trying to organize flying for the very airlines being used to outsource mainline pilot flying (ALPA is quickly becoming the "regional airline" union). Congress doesn't want to rock the boat in an election year or in a non-election year, since comfort and status-quo are the two highest imperatives for Congressional reelection. Financiers certainly like the RLA/1113 combo, because it represents free money from employee pensions and earnings.

As long as pilots are there to "take one for the team," the law works just fine for everyone else.

Who is going to get things changed? When the typical pilot gets done looking at his running shoes, sulking, and impotently complaining about how the law is stacked against him, he can look in his bathroom mirror. Looking back, will be the person that must change things.

When several thousand airline pilots decide they have had enough, they will get things changed, but not a moment before.

As long as pilots are content to let their impotent unions do the work for them, nothing will change. The unions value their relationships in Washington too much to jeopardize them for the purposes of improving the careers of those that pay their exorbitant salaries and expense accounts.

Either way, the status-quo will change. Pilots will not endure this forever. As we said in October of 2010:

> *The reservoir of pilot sufferance is not infinite nor is this safe harbor of pilot patience an area where management should think it can operate indefinitely.*

The RLA was created to deal with the natural consequences of injustice, borne of opportune caprice. It worked as long as both sides approached the situation with restraint and some sense of honor. That framework no longer exists, as unions have been stripped of their relevance by the courts, Congress, and their own

political ambitions. The labor situation is such that a catastrophic failure is imminent, which will logically result in widespread disorder in a vital national resource.

Pilot unions are only interested in continuing to play out a hand they know they will lose. The salaries and expense accounts of their leadership will have the least risk if they continue to provide hospice care for a dying profession, rather than leverage their contacts to change things for the better. This is NOT leadership, but cowardice masquerading as relevance.

As long as pilots are content to behave according to a set of rules that ensures their defeat, everyone will smile and reassure them in their efforts. Once pilots decide to unite, take matters into their own hands, and take the fight to the doorsteps of those that benefit from pilot indifference, the law will change.

It is time to make those luxuriating in the comfort of pilot concessions, and pilot docility to feel the discomfort of having the status quo change.

We are citizens.
We have the power levers in our hands.
We can unite.
We shall prevail.

Welcome to Phase III of OPERATION ORANGE.

THIS IS OUR TIME.

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