Review of Labor Law Developments in the Transportation Industries

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Over the past year, there have been no marquee labor law decisions in the transportation industries. Nevertheless, in air, rail, trucking and maritime, there continue to be important labor issues that hold the attention of labor law specialists on both sides of the table.

- In the railroad industry, the major Class I carriers are engaged in a round of multi-employer collective bargaining with the rail brotherhoods. This time around, all the major railroads are bargaining together, and the outcome of these negotiations may go far to define the future structure of labor management relations in the railroad industry.
- In the airline industry, most of the major carriers are involved in collective bargaining negotiations with one or more of the labor organizations representing major groups of employees. Unlike the rail industry, these negotiations take place on a carrier by carrier basis. Major open issues include the White House's willingness to appoint Presidential Emergency Boards ("PEB") in airline labor disputes. The prospect for a PEB procedure, if direct bargaining and mediation fail, can and will affect the dynamics of bargaining.

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Will there be a third act to the drama before the curtain rises on economic self help?

- The labor organizations in the airline industry are developing alternatives to a full fledged strike. A particularly eponymous tactic is called "CHAOS." The ability of the employers to deal with these strike alternatives will have an important effect on the collective bargaining process. The United Airlines experience this summer illustrates the public's impatience with uncertain reliability.
- At the intersection of the trucking and airline industries is an ongoing dispute over the statutory border between the Railway Labor Act and the National Labor Relations Act. The labor dispute involves a group of drivers employed by Emery Worldwide Airlines in connection with a priority mail contract with the United States Postal Service. The Teamsters Union contends that they are subject to the NLRA and the employer argues that they are employees of an air carrier and covered by the Railway Labor Act. The dispute has bounced between the NLRB and the National Mediation Board and is currently pending before the NMB for a decision that will be transmitted to the NLRB. This dispute raises the fundamental issue of whether all employees of any air carrier are subject to the Railway Labor Act. Alternatively, can an air carrier or railroad employ some groups of employees subject to the RLA and other groups of employees subject to the National Labor Relations Act. Historically, virtually all employees of airlines and railroads were covered by the Railway Labor Act, even when the functional relationship to the airlines operation was most attenuated.
- The trucking industry continues to be a spectator in what seems to be a continuing election process within the International Brotherhood of Teamsters. The first election to be conducted under the new rules approved by the Federal Court will take place during the fall of 2001. Delegates to the IBT Convention that will precede the election are actively campaigning. In some respects, this is a primary for the main event which is likely to involve incumbent James Hoffa and challenger Tom Leedham from Oregon. The recent death of Judge Edelstein, who administered the election process that was developed under the consent decree in *United States v. Teamsters Union* creates another dimension of uncertainty. The identity of the District Judge who will succeed Judge Edelstein may well determine the practical impact of the consent decree on the Teamsters Union and the Trucking Industry.
- The Maritime Industry has put the long running containerization

dispute more or less behind it. The issues du jour in that industry are attempts by the IBT and the ILWU to organize grayaged drivers servicing the dock areas. Are they employees or independent contractors? Thus far the administrative decision seem to have favored the latter, but the union organizing efforts seems to be a continuing one, particularly in the Northwest.

SOME INTERESTING COURT DECISIONS

Behind the headlines, there have been a number of court decisions in the transportation industry that are of interest to labor law practitioners. A brief description and analysis of several of the more significant ones appear below.

In *Air Line Pilots Ass'n v. Northwest Airlines Inc.* the U.S. Court of Appeals for the District of Columbia examined whether an employer could be required to bargain with a union about its practice of insisting on an arbitration clause for claims of employment discrimination as a precondition to employment.[1] In this case, Northwest Airlines had a policy of requiring newly hired pilot trainees to sign a document titled "Conditions of Employment." Sometime in 1995, Northwest Airlines added an arbitration clause into the Conditions of Employment, which required its new pilots to submit all claims of employment discrimination to binding arbitration.[2] Northwest Airlines also introduced several other new conditions into its Conditions of Employment.[3] Upon learning of the arbitration clause and the other provisions, the Air Line Pilots Association ("ALPA") the representative of Northwest's pilots argued that the employer violated the Railway Labor Act 45 U.S.C §151 et. seq. when it unilaterally added the new provisions. ALPA claimed that the arbitration clause was unlawful because Northwest Airlines had not collectively bargained with ALPA for it. In the alternative, the ALPA argued that the arbitration clause violated the employee's statutory right to submit claims of employment discrimination to the courts. ALPA filed suit seeking an injunction to prevent Northwest from continuing to use the arbitration provision.

The U.S. Court of Appeals for the District of Columbia in a decision that was affirmed by the full court, ruled that Northwest Airlines could retain the arbitration provision in its Conditions of Employment. In

1. Air Line Pilots Ass'n v. Northwest Airlines Inc., 199 F.3d 477 (D.C. Cir. 1999).
2. *Id.* at 480.
3. The other conditions included: (1) setting the pilots monthly salaries during the probationary period; (2) requiring pilots to submit to a medical examination if Northwest believes he or she can no longer perform essential job functions; (3) acknowledging that Northwest can change various working conditions at its option. Air Line Pilots Ass'n v. Northwest Airlines Inc., 199 F.3d 477 (D.C. Cir. 1999).

reaching its decision, the U.S. Court of Appeals looked to two previous rulings by the U.S. Supreme Court on waiver of claims of employment discrimination. First, the Court of Appeals examined the Supreme Court's ruling in *Alexander v. Gardner-Denver Co.*[4] In *Alexander*, the Supreme Court held that a union cannot waive the rights of the employees it represents to bring a claim of statutory discrimination in a judicial forum. The U.S. Court of Appeals also analyzed a more recent opinion by the U.S. Supreme Court on employee waiver of statutory forums for employment discrimination claims in *Gilmer v. Interstate/Johnson Lane Corp.*[5]In *Gilmer*, the Supreme Court held "an individual employee may himself validly agree in advance to binding arbitration of a statutory claim he may later have against his employer."[6] Applying the holdings of *Alexander* and *Gilmer* together, the Court of Appeals in *ALPA v. Northwest* found that each employee may individually decide whether he or she wants to agree to submit claims of employment discrimination to arbitration. This is a matter between the employer and new employees. It is not a subject for collective bargaining.

The real significance of the *Air Line Pilots* case is that it creates a limitation for a union's ability to negotiate on behalf of newly employed pilots. According to the ruling in this case, a union cannot negotiate to prevent an employer from imposing an employment discrimination arbitration clause similar to the one created by Northwest Airlines. In effect, the Court of Appeals found that the collective bargaining agreement process has no role with respect to the individual claims of discrimination.

In *Bishop v. Air Line Pilots Ass'n* the U.S. Court of Appeals for the Ninth Circuit examined whether the Air Line Pilots Association violated the RLA when it unilaterally modified its procedures for ratifying collective bargaining agreements.[7] In *Bishop*, the Plaintiffs were pilots at Wings West.[8] Prior to this litigation, the National Mediation Board had concluded that Wings West and three other regional airlines (Flagship, Executive and Simmons) were for RLA purposes a single employer operating as American Eagle.[9]

After the NMB's decision, ALPA became the bargaining representative for the four American Eagle carriers. ALPA created a master executive council ("MEC") to negotiate a consolidated collective bargaining

4. Alexander v. Gardner, 415 U.S. 36 (1974).

5. Gilmer v. Interstate/Johnson Lane Co., 500 U.S. 20 (1991).

6. *See Cole v. Burns Int'l Security Services.*, 105 F.3d 1465, 1478. (citing *Gilmer* for the general rule that statutory claims are fully subject to binding arbitration, at least outside of the context of collective bargaining.)

7. Bishop v. Air Line Pilots Ass'n, No. 98-16652, 2000 U.S. App. Lexis 3270 (9th Cir. March 1, 2000).

8. *Id.*

9. *Id.*

agreement. The MEC adopted a resolution to seek a single collective bargaining agreement and a unified seniority list. Shortly after the creation of the MEC, American Eagle announced that it was preparing to introduce new planes into its fleet. American Eagle and ALPA reached a tentative agreement for a unified seniority system, which needed to be ratified by the pilots. However, the pilots at one airline, Wings West voted to reject the seniority system agreement. Nonetheless, the vote totals from all four airlines indicated that a majority of the pilots had voted in favor of the seniority agreement. The MEC and ALPA agreed to modify the ratification procedures so that if a majority of the total American Eagle pilots voted for the seniority system, it would be binding on all four of the regional airlines. ALPA notified its pilots about the new ratification system. The seniority system agreement was ratified by a total of 62% of all of American Eagle's pilots.

The Plaintiffs were members of Wings West Airlines who had voted against the agreement and alleged that the ALPA violated its duties under the Railway Labor Act by negotiating a single agreement for all four airlines. According to the Plaintiffs, the ALPA favored pilots at Simmons and Flagship and pressured the other pilots to vote to ratify the agreement. In addition, the Plaintiffs claimed that the ALPA changed the ratification process to create a favorable outcome for the seniority agreement. The ALPA countered that it was seeking a comprehensive unified agreement that would end what the ALPA perceived was a practice of pitting one airline's pilots against another in collective bargaining. Did ALPA violate its duty of fair representation when it imposed the collective bargaining agreement and seniority lists on all four regional airlines?

The Court continued a long line of precedent to the effect that a union's representation of its members is highly deferential.[10] In addition, the Court noted that "a union's interpretation of its own rules, regulations and constitution is entitled to a high degree of deference."[11] The Plaintiffs were unable to demonstrate that the ALPA acted out of self interest or contrary to the union's best interest. According to the Court, it was a reasonable goal for the ALPA to seek a unified collective bargaining agreement for all four airlines. The Wings West pilots had neither veto power or the right to opt out of the agreement.

In *Express One International v. National Mediation Board* the U.S. District Court in Texas considered whether the National Mediation Board ("NMB") conducted an adequate investigation into allegations

10. *Id.*

11. Bishop v. Air Line Pilots Ass'n, No. 98-16652, 2000 U.S. App. Lexis 3270 at *7 (9th Cir. March 1, 2000).

that there had been interference with the "laboratory conditions" required in a union representation election.[12] In this case, flight deck employees of Plaintiff Express One were preparing to vote on union representation. Thirty-nine days before the election, a mysterious message appeared on the aviation bulletin board of America Online ("AOL") under the screen name of Express One. The message purported to discourage employees from selecting union representation.[13] Express One immediately sent a message to its flight deck employees stating that it had nothing to do with the AOL message. Shortly thereafter, Express One contacted the National Mediation Board ("NMB") requesting the issuance of a subpoena to AOL to determine who posted the message. Three days before the date for the vote count, the NMB established a hearing schedule on the subpoena issue. The International Brotherhood of Teamsters ("IBT") won the election and Express One objected to the election results arguing that the AOL posting had created election interference. After hearing both Express One's and the IBT's positions on the subpoena issue, the NMB decided that the AOL posting did not interfere with the election. Express One filed suit against the NMB claiming that it had failed to adequately investigate its claim of election interference under 45 U.S.C. §152 of the Railway Labor Act.

The U.S. District Court found the NMB satisfied its investigation duties under the Railway Labor Act and Express One was required to engage in collective bargaining with the IBT. The Court noted that "An NMB investigation is. . . not required to take any particular form."[14] The Railway Labor Act does not specify the type of investigation that needs to occur. Finally, the Court found that if the NMB had conducted an investigation regardless of whether it was thorough, its duties would be satisfied.

The significance of the *Express One* case is that a reviewing court will not intrude very deeply into the NMB's decisions during a representation election. It will not second guess the "effectiveness" or "thoroughness" of the procedures used by the NMB in an election investigation. According to the District Court, all that is required is a finding that the NMB conducted some form of investigation. Even if the investigation is limited, the NMB's findings or nonfindings will stand.[15]

12. Express One Int'l v. Nat'l Mediation, 2000 U.S. Dist. Lexis 7963 (N.D. Tex. June 7, 2000).

13. Specifically, the message said "For you local union supporters, I'd be watching your backs. We know who most of you are posting your anti-company propaganda. We're not stupid." Express One Int'l v. Nat'l Mediation, 2000 U.S. Dist. Lexis 7963 at *2 (N.D. Tex. June 7, 2000).

14. *Id.* at *3.

15. *But see*, U.S. Airways, Inc. v. Nat'l Mediation Brd., 177 F.3d 985 (D.C. Cir. 1999).

In *Burlington Northern and Santa Fe Railway Co. v. Brotherhood of Maintenance of Way Employees*, the U.S. District Court in Texas examined whether three different forms of injunctive relief should issue in response to a strike over a minor dispute.[16] This litigation began when the union protested what it contended was a change in the status quo and the employer contended was an arbitral ("minor") dispute. Soon after, BMWE struck over the disagreement. BNSF obtained a temporary restraining order to halt the strike several hours later. The matter was submitted to arbitration, and the arbitrator decided the dispute that had led to the strike. After the arbitrator's decision, BNSF filed a motion for summary judgment seeking a permanent injunction to prevent any future strikes over the specific issue that prompted the May 12, 1998 strike. BNSF also sought a general injunction to prevent future strikes over any disputes that may arise over application of seniority and qualification rules in the collective bargaining agreement. Finally, BNSF sought an injunction requiring BMWE to give 72 hours advance notice before commencing any strike. BMWE filed a motion for summary judgement claiming that BNSF was not entitled to a permanent injunction to prevent future strikes.

Before discussing the Court's decision, it is important to define the major differences between "major" disputes and "minor" disputes. According to the U.S. Supreme Court, a minor dispute "may be conclusively resolved by interpretation of an existing agreement between labor and management."[17] Conversely, a major dispute, "arises when the carrier makes a unilateral change in rates of pay, rules, or working conditions of its employees as provided for in the collective bargaining agreement."[18]

The District Court declared that the dispute between BMWE and BNSF was a minor dispute under the RLA. Therefore, BMWE's strike on May 12, 1998 was illegal under the RLA. Because there was a strong threat of a future strike, the Court ordered an injunction to prevent BMWE employees from striking over the rules dispute that precipitated the May 12 strike or disputes involving the same issue.

The District Court refused to issue an injunction to prevent future BMWE strikes over any disputes arising over other applications of the same rules. The District Court looked to the fact that the Norris-LaGuardia Act has a strong policy against enjoining the activities of labor unions.[19] According to the Norris-LaGuardia Act a labor injunction must

16. Burlington N. and Santa Fe Ry. Co. v. Bhd. Of Maint.of Way Employees, 93 F. Supp. 2d 751 (N.D. Tex. 2000).

17. Consol. Rail Corp. v. Ry Labor Executives Ass'n, 491 U.S. 299, 305 (1989).

18. *Id.* at 302.

19. *See, e.g.*, Burlington N. R.R. Co. v. Bhd. Of Maint. of Way Employees, 481 U.S. 429, 437 (1987).

be limited to "a prohibition of such specific acts."[20] The District Court reasoned that BNSF's request was ambiguous because it could not define the specific circumstances or factual scenario under the rules that would precipitate a strike. According to the Court, BNSF needed to make a more specific request relating to the rules for an injunction to issue.

The District Court also refused to grant BNSF's injunction request to require BMWE to give 72 hours notice before commencing a strike. The District Court determined that the advance notice requirement was unwarranted because the BMWE had only struck against other railways three times in the previous eight years and one of the strikes was over a minor dispute.

More recently, in *Norfolk Southern Railway Co. v. Brotherhood of Locomotive Engineers* the U.S. Court of Appeals for the Fourth Circuit examined whether a damages remedy was appropriate in an RLA minor dispute.[21] In this case, Norfolk Southern Railway filed a claim for $250,000 damages which resulted from the five-hour strike.[22]

The Court of Appeals for the Fourth Circuit classified the disagreement between the union and the employer as a minor dispute and held that "a damages remedy for a minor dispute is at odds with the structure and purpose of the RLA... and the remedy would detract from the Act's requirement that minor disputes be resolved through bargaining or compulsory arbitration."[23] In reaching its decision, the Court of Appeals conducted an extensive review of the RLA's legislative history and the statutory framework, particularly portions of the Act dealing with minor disputes. The Court found no reference to a damages remedy. The parties to a labor dispute must attempt to settle their minor disputes by conference, and if that fails either side may refer the dispute to compulsory arbitration before the Adjustment board.[24]

The Court of Appeals also relied on the U.S. Supreme Court's decision in *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R. Co.*, which held that federal courts could enjoin rail strikes when they were over with arbitral disputes.[25] The Supreme Court was silent on the issue of monetary damages related to minor disputes. In addition, the Fifth and Sixth circuits had already addressed this issue and held that a

20. 29 U.S.C. §109 (2000).

21. Norfolk S. Ry. Co. v. Bhd. of Locomotive Engineers, No. 98-1332, 2000 U.S. App. Lexis 14222 (4th Cir. June 22, 2000).

22. *Id.* at *3. The damages were for payment of overtime wages, the payment of wages to employees who were not productive on the day of the strike, and costs associated with the delay of freight trains.

23. *Id.* at 29.

24. 45 U.S.C. § 153 (2000).

25. Bhd. of R.R. Trainmen v. Chicago River & Indiana R.R. Co., 353 U.S. 30 (1957).

damages remedy would be inappropriate in a minor dispute situation.[26] After reviewing the text of the RLA and previous case law, the Court of Appeals found there was no justification for a damages remedy in a minor dispute.

The Court of Appeals analyzed two additional U.S. Supreme Court decisions which examined whether a party could be awarded an implied remedy not specifically defined in a statute. In *Franklin v. Gwinnett County Public Schools*, the Supreme Court examined whether it could imply a remedy not specifically provided for in a statute.[27] The Supreme Court noted that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[28] According to the Supreme Court, a reviewing court considering whether to imply a remedy must "evaluate the state of the law when the legislature passed the statute."[29] In *Gebser v. Lago Vista Independent School District*, the Supreme Court further elaborated by noting that a reviewing court must consider whether an implied damages remedy would frustrate the purposes of the statute.[30] The Court in *NS* decided that both tests favored rejecting the damages remedy because it would be inconsistent with the regime of collective bargaining that is central to the RLA.

In *Slay Transportation Co. Inc.* the National Labor Relations Board examined whether the common law agency test should be applied to determine if a group of 71 truck drivers were employees or independent contractors.[31] The drivers owned their own tractors which they leased to Slay Transportation, the employer. All drivers were required to display Slay's logo on their tractors and follow various company procedures.

In deciding to apply the common law agency test to determine independent contractor or employee status, the National Labor Relations Board relied on the U.S. Supreme Court decision in *NLRB v. United Insurance Co. of America*.[32] In *United Insurance*, the Supreme Court noted "the obvious purpose of [the Taft-Hartley Act] was to have the board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act."[33] In addition, the NLRB looked to its own previous decision in *Roadway Package System*

26. *See*, CSX Transp., Inc. v. Marquar, 980 F.2d 359 (6th Cir. 1992); *see also*, Burlington N. R.R. Co. v. Bhd of Maint. of Way Employees, 961 F.2d 86 (5th Cir. 1992); *see also*, Louisville & Nashville R.R. Co. v. Brown, 252 F.2d 149 (5th Cir. 1958).

27. Franklin v. Gwinett County Pub. Sch., 503 U.S. 60 (1992).

28. *Id.* at 71.

29. *Id.*

30. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284 (1998).

31. 2000 N.L:R.B. Lexis 548.

32. Nat'l Labor Relations Bd. v. United Ins. Co. of Am., 390 U.S. 254 (1968).

33. *Id.*, at 256.

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Inc. which applied the common law agency test.[34]

According to the common law agency test, to determine whether an individual is an employee or an independent contractor, one must consider: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; (j) whether the principal is or is not in the business.[35]

In the present situation the NLRB found that the truck drivers were employees. The NLRB looked to the fact that the employer controlled driver work standards through training, testing, and dispatch operations and procedures. In addition the NLRB was persuaded by the fact that, "all drivers are given specific instructions as to the manner in which they are to perform their tasks including where loading or unloading will take place, when they are to be available for loading or unloading and the time the product must be delivered."

The significance of this case is that the NLRB will use the common law agency test to determine whether individuals are employees or independent contractors.

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34. 1998 N.L.R.B. 628.
35. Restatement (Second) of Agency, §220, 485-86 (1958).