Articles

"Share the Pain, Share the Gain":[1] Airline Bankruptcies and the Railway Labor Act

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I. INTRODUCTION

Clearly, the general public perceives the airline industry as a troubled institution. From the much ballyhooed "price wars" to the frequent labor disputes, media images bombard the public, emphasizing the precarious condition of the industry. The bankruptcy proceedings of ma-

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1. Jill Hodges, *Machinists Union Made All-out Effort to Get Members to Approve Accord*, Star Trib., August 26, 1993 at D1 (button circulating among Northwest Airlines' union's employees).

jor national and international air carriers[2], coupled with the inability of many of these airlines to emerge successfully from Chapter 11[3] reorganizations, has sent troubling signals to the American public about the financial health of the airline industry.

Tension between labor and management interests is an important factor in industry economic woes. In an attempt to compete in the post-deregulation era, airline managers focused on perceived exorbitant labor costs; and dedicated themselves to sharply reducing those costs, hoping to achieve levels of business efficiency necessary for economic prosperity. They met with varying degrees of success.[4]

Following the Supreme Court decision in *NLRB v. Bildisco & Bildisco*,[5] airline executives began to view bankruptcy proceedings as a method of ridding themselves of onerous collective bargaining contracts.[6] Labor groups, however, have strongly objected to these measures.[7] They were partially vindicated when Congress added § 1113[8] to the Bankruptcy Code in 1984,[9] which allows management to reject a collective bar-

2. Athanassios Papaioannou, *The Duty to Bargain and Rejections of Collective Agreement under Section 1113 by a Bankrupt Airline: Trying to Reconcile R.L.A. with Bankruptcy Code*, 18 TRANSP. L.J. 219 (1990). "[M]ore than 120 airlines have gone into bankruptcy since 1978. . . Air Florida, which went bankrupt in July, 1984, was the eighteenth largest certified air carrier in the U.S. Braniff Airlines which filed for bankruptcy reorganization in May, 1982 employed among 9,000 employees and was among the largest air carriers. When Continental Airlines petitioned for reorganization in September, 1983, it employed 12,000 employeees and was heavily unionized. Another recent example is the Eastern Airlines bankruptcy. Eastern was once ranked at the top of the carrier. . ." *Id.* at 220.

3. 11 U.S.C. §§ 1101-1174 (1988).

4. For example, Continental emerged from years in bankruptcy and fully rehabilitated itself. Jeffrey S. Heuer & Musette H. Vogel, *Airlines in the Wake of Deregulation: Bankruptcy as an Alternative to Economic Regulation*, 19 TRANSP. L.J. 247, 282 (1991). Eastern Air Lines failed in its reorganization efforts, and went out of business in January, 1991. Tom Wicker, *Friendlier Skies?*, N.Y. TIMES, March 13, 1991, at A25.

5. 465 U.S. 513 (1984) (permitting rejection of a collective bargaining agreement where debtor can demonstrate that the agreement burdens the estate, and that the equities balance in favor of rejection).

6. *See infra* note 68 and accompanying text.

7. *See generally* J. Keith Bryan, Comment, *Expiration of Retiree Benefit Plans During Reorganization: A Bitter Pill for Employees*, 9 BANKR. DEV. J. 539, 555 (1993) ("Organized labor quickly mounted a lobbying effort in reaction to the *Bildisco* decision by enacting § 1113 of the Code") (footnotes omitted); and Anne J. McClain, Note, *Bankruptcy Code section 1113 and the Simple Rejection of Collective Bargaining Agreements: Labor Loses Again*, 80 GEO. L. J. 191, 192 (1991).

8. 11 U.S.C. § 1113 (1988 & Supp. III 1991).

9. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1330); *as amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3114 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (codified as

gaining agreement only if three requirements are satisfied. First, management has to make a proposal to the labor group representatives which provides for only the most needed modifications in employee benefits that are necessary to permit reorganization. Second, the labor groups have to refuse the proposal without good cause. Third, the balance of the equities have to clearly favor rejection of the agreement.[10]

It is the premise of this article that the strictures of § 1113 do not go far enough in protecting labor interests in bankruptcy proceedings; leaving these interests unprotected reduces the chances of a successful reorganization of the debtor airline. Undergirding this premise is the jurisprudential observation that federal labor and bankruptcy laws co-exist in a considerable degree of tension. On one hand, the Railway Labor Act, which controls airline labor practices,[11] stresses the need for increased labor participation in the bargaining process through "purposely long and drawn out" dispute resolution procedures.[12] On the other hand, the reorganizational chapter of the bankruptcy code emphasizes speedy financial rehabilitation of the debtor.

These two goals often conflict with each other. For example, a bankrupt airline's quickest way out of Chapter 11 might be to pay lip service to the procedural safeguards of § 1113, while at the same time, imposing drastic cuts in employee benefits and work rule changes.[13] Alternatively, labor's most effective strategy might be to drag out the contract negotiations as long as possible in an effort to increase bargaining leverage.[14] A resolution of these conflicting strategies demands a weighing of the labor and bankruptcy policy objectives in the context of airline bankruptcies. Generally, bankruptcy courts have placed greater emphasis on ensuring that a financially troubled airline successfully emerges from bankruptcy proceedings. Such results detrimentally affect the Chapter 11 proceedings of airlines because they tend to weaken labor/management relations.

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amended in various sections of 11 U.S.C.); Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2865 (codified as amended in various sections of 11 U.S.C.); Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); and, Treasury, Postal Service and General Government Appropriations Act of 1990, Pub. L. No. 101-509, 104 Stat. 1389 (codified as amended in various sections of 28 U.S.C.) [hereinafter Bankruptcy Code or Code].

10. 11 U.S.C. § 1113 (1988) (detailing the requirements the court must find to accept an application for rejection of a collective bargaining agreement).

11. 45 U.S.C. §§ 151-188 (1982 & Supp. V 1987) [hereinafter RLA or Act]. The RLA applies to the airline industry through 45 U.S.C. § 161 (1982).

12. Brotherhood of Ry. & S.S. Clerks v. Florida E. Coast Ry., 384 U.S. 238, 246 (1966).

13. In the process, such strategy will surely increase tensions between labor and management.

14. *See* generally Katherine van Wezel Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 STAN. L. REV. 1485, 1487 (1990).

For this reason, the RLA should be construed more expansively by bankruptcy courts.

This article examines the recent history of three airlines—Continental, Eastern, and Northwest—their descent into near financial collapse, and their different strategies for reorganization.[15] Then, using the contours of the RLA as a guide, this article proposes alternatives that offer both management and union lawyers, as well as bankruptcy judges, a road map for effectuating workable reorganizational plans. Part II focuses on exactly why bankruptcy courts should concern themselves with the important national interests at stake in a healthy airline industry. Part IIIA discusses the effects the Airline Deregulation Act of 1978[16] has had on the airline industry. Part IIIB details the current state of the industry and Part IIIC examines the crucial importance of labor relations in airline bankruptcies. Part IV then briefly discusses the main points of the RLA. Finally, Part V provides a case study of Continental's, Eastern's, and Northwest's financial problems, and analyzes labor, management, and judicial strategies. Parts VI and VII conclude with an analysis of the various methods bankruptcy courts mimic the successful labor/management cooperation at Northwest and adopt a broader reading of the RLA while developing a keener appreciation of the policy objectives and philosophical assumptions upon which it is based.

II. Bankruptcy Courts as Courts of Equity

Bankruptcy law is equitable in nature.[17] Thus, bankruptcy courts possess the broad range of powers and responsibilities traditionally associated with courts of equity.[18] As courts of equity, they can take into consideration issues that are of pressing national concern.[19] A healthy

15. Due to the enormous amount of litigation generated by these disputes, this article will only be able to focus on select, but representative, cases.

16. Pub. L. No. 95-504, 92 Stat. 1705 (codified in various sections of 45 U.S.C.) [hereinafter Deregulation Act].

17. "The district court and the bankruptcy court as its adjunct have all the traditional injunctive powers of a court of equity." S. Rep. No. 989 at 51, 1978 U.S.C.C.A.N. at 5787, 5837; H.R. Rep. No. 595 at 342, 1978 U.S.C.C.A.N. at 5963, 6298.

18. Sec. and Exch. Comm'n v. United States Realty and Improvement Co., 310 U.S. 434, 455 (1940) ("A bankrupcty court is a court of equity . . . and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act. A court of equity may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public interest.").

19. *See* Carroll et al. v. President and Comm'rs of Princess Ann et al., 393 U.S. 175 (1968) ("Judgment as to whether the facts justify the use of the drastic power of injunction necessarily turns on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise."); *But see* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984) (the Bankruptcy Code "does not authorize free-wheeling consideration of every conceivable equity"); and Midlantic Nat'l. Bank v. New Jersey Dep't. of

airline industry is of utmost national concern; Congress clearly articulated this in the Deregulation Act.[20] It therefore follows from these elementary principles that when faced with airlines in bankruptcy, bankruptcy courts should exercise their discretion to stretch equitable remedies to their limit.

Despite the need for change in the manner bankruptcy courts handle airline bankruptcies, there are inherent limitations in the bankruptcy system that should be noted. For one, bankruptcy courts can only address a small portion of the problems of a troubled industry; specifically, airlines in Chapter 11 proceedings. Nor can bankruptcy courts cannot assume the role of the old regulatory system[21]—they are neither equipped for this task nor would they desire to.

A court's ability to effectively deal with an airline bankruptcy is also limited by the fact that organizations tend to file for bankruptcy long after they really need it.[22] Regardless of the aspirations of the Code,[23] a social stigma still attaches on the debtor with the filing of the bankruptcy petition.[24] Moreover, waiting until the last minute to file tends to exacerbate an already bad situation.[25] However, while these limitations are formidable, bankruptcy courts can improve their ability to effect successful reorganizations in airline bankruptcies.

III. The Nature of the Airline Industry Since Deregulation

A. Purpose of the Airline Deregulation Act

Congress enacted legislation regulating the nation's nascent airline industry in 1938.[26] Congressional intent behind this legislation was the

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Envtl. Protection, 474 U.S. 494, 514 (1986) (Rehnquist, J. dissenting) ("The Bankruptcy Court may not, in the exercise of its equitable powers, enforce its view of sound public policy at the expense of the interests the Code is designed to protect.").

20. *See infra* notes 26-34 and accompanying text.

21. *See infra* notes 26-31 and accompanying text.

22. Douglas G. Baird, The Elements of Bankruptcy 244 (1993) ("Bankruptcy filings happen too late rather than too soon.").

23. *See generally* 11 U.S.C. § 525 (1988) (codifying the results of Perez v. Campbell, 402 U.S. 637 (1971), which held that a State frustrated the Congressional policy of a fresh start for a debtor where it refused to renew a driver's license because of an unpaid, discharged tort judgment); and S. Rep. No. 589, 95th Cong., 2d Sess. 5787, 6076 (1978).

24. As well as a very real economic one. *See infra* notes 160, 178 and accompanying text

25. *See generally* Douglas G. Baird & Thomas H. Jackson, Cases, Problems, and Materials on Bankruptcy 37-43 (2d ed. 1990) (discussing theoretical concerns with bankruptcy law and the competing interests of creditors and debtors).

26. Congress passed the Civil Aeronautics Act of 1938; in 1958, its name was changed to the Federal Aviation Act, codified at 49 U.S.C. § 1301 et seq.

At least in part, Congress' action can be seen as a response to the disasterous consequences of interstate commerce that resulted from the fiece anti-competitive business practices of the great late 19th-century railroads. Heuer & Vogel, *supra* note 4, at 250.

promotion of stability in an industry deemed vital to the nation's economic prosperity.[27] Although this policy was later attacked as "highly anti-competitive,"[28] the regulations were recognized by some as a beneficial source of stability as the industry was maturing.[29] As the U.S. economy evolved following the post-World War II boom, regulation grew less attractive; many even called for the its elimination.[30]

Congress conducted hearings on the subject in which a majority of experts criticized the regulatory system.[31] One of the most compelling arguments was delivered by John Robson, former Chairman of the Civil Aeronautics Board (CAB), who said that regulation was not achieving its goals because it:

> [I]nduced costly inefficiencies through overscheduling, overcapacity, competition in frills and equipment races. . .. It has not provided the environment or the incentives for the basic price competition. Because of these inefficiencies, and the regulatory system's insulation of labor-management bargaining, neither the airline investor nor the consumer has fully reaped the potential benefits of the industry's enormous past productivity gains and growth. Nor has financial regulation produced a financially strong airline industry.[32]

Largely on the strength of such testimony, Congress enacted reform legislation in 1978.[33] The resultant Deregulation Act stressed competition among carriers and encouraged "low-fare" carriers to enter the market. It was hoped that the addition of more airlines would result in lower fare costs, and thus open the sky to more of the American public.[34]

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27. Heuer & Vogel, *supra* note 4, at 251. "The regulatory scheme called for regulation of three economic areas: 1) airline entry/exit of the market, inclusive of the power to grant certification to enter the market, approval, allocation and assignment of routes, and service to certain communities; 2) rates and air fares; and 3) anti-trust." *Id.*

28. H.R. Rep. No. 1211, 95th Cong., 2d Sess. 3737, 3738 (1978).

29. *Id.*

30. Heuer & Vogel, *supra* note 4, at 251. "Regulation of the airline industry was desirable when the economic environment after the Depression was favorable and technology was rapidly changing. Forty years later, deregulation became favorable because the economic environment caused sluggish productivity, moderate traffic growth and rising costs." *Id.*

31. *Aviation Regulatory Reform: Hearings Before the House of Representatives Subcomm. on Aviation*, 94th Cong., 1st Sess. 62, 74 (1977).

32. *Id.* at 70.

33. Heuer & Vogel, *supra* note 4, at 253. "The relevant parts of the [Deregulation] Act required the following: 1) Federal subsidization for air carriers in small communities with a prohibition against discontinuing essential service until the CAB can find a satisfactory replacement. 2) Fares falling within a 'zone of reasonableness' are not suspendable or subject to the jurisdiction of the CAB or the Department of Transportation upon the dissolution of the CAB. 3) Two or more carriers may not merge if unlawful according to the consolidation and merger guidelines in the Act." *Id.*

34. H.R. Rep. No. 1211, 95 Cong., Sess. 3737, 3768 (1978) (Rep. Elliot H. Levitas's (D-Ga.) commented that, "[t]he time has come to move decision making to the private boardrooms of the industry and away from the lawyers, economists, and beuracrats at the CAB. Free enterprise has served our country well, and it is time to move the airline industry into a more competitive

B. CURRENT STATE OF THE AIRLINE INDUSTRY

While the goals of the Deregulation Act appeared attainable, the results have not been what Congress had hoped for. Today, the state of the airline industry is, if anything, precarious. A number of factors have contributed to the current situation including a tremendous debt burden;[35] an expensive and unreliable fuel supply;[36] the cyclical nature of the industry;[37] drastically under-funded pension plans;[38] and very high labor costs.[39]

Perhaps the Act's biggest disappointment, however, is that the number of airline actually decreased.[40] As the legislative history of the Deregulation Act indicates, Congress hoped that by easing the CAB entrance requirements for airline carriers, the public would benefit from lower fares; the new carriers would "police" the market.[41] Excessive regulations, it was believed, impeded the access of new airlines, and their removal would allow for more entrants into the industry. The drafters of the Deregulation Act believed in the mystical concept of the "free market;" that it could better protect the vital national interests in a healthy airline industry than a staid bureaucratic department. Now, fifteen years after the passage of the Deregulation Act, the airline industry is even more susceptible to the dangers of oligopolistic and monopolistic

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arena where it will have an opportunity to grow in a period of healthy and profitable competition. The ultimate beneficiary will be the consumer, the traveling public.").

35. Michele M. Jochner, *The Detrimental Effects of Hostile Takeovers, Leveraged Buyouts, and Excessive Debt on the Airline Industry*, 19 TRANSP. L.J. 219, 220 (1990) ("[A]n industry which has been marginally profitable during most of the 1980's cannot afford to be saddled with the mountain of debt which can result from hostile takeovers or leveraged buyouts (LBOs)"). *See also* Sheets & Dworkin, *A Dogfight for Dominance of the Skies*, U.S. NEWS & WORLD REPORT, Sept. 11, 1989, at 54 (as of 1989, the debt of the entire airline industry had been estimated at about $15 billion).

36. *Id.* at 220. *See also* Heuer & Vogel, *supra* note 4, at 254 (blaming the rise in airline fuel costs on the OPEC oil embargo).

37. *Id.* at 220. A cyclical industry is one that fluctuates with the cycles of the economy.

38. *See PBGC Soon May Take Action on Eastern's Underfunded Plans*, BNA BANKR. L. DAILY, April 25, 1990. "According to PBGC, [Eastern] airline's seven defined benefit pension plans have a total unfunded liability of $1.1 billion. The plans cover 50,000 participants." *Id. See also* Bryan, *supra* note 7.

39. *See* Stone, *supra* note 14, at 1489 n.26 (quoting from ELIZABETH E. BAILEY ET AL., DEREGULATING THE AIRLINES 27-37 (1985); AIRLINE DEREGULATION: THE EARLY EXPERIENCE (J. Meyer & C. Oster eds. 1981)). "In 1978, labor costs were 47.1% of airline total costs for domestic operations. In 1981, they comprised 39.8% of the total." *Id.*

40. *See generally* Bill Poling, *Senate Subcommittee Ponders Decreasing Number of Airlines*, TRAVEL WEEKLY, March 5, 1992 at 7; and Andrew R. Goetz & Paul S. Dempsey, *Airline Deregulation Ten Years After: Something Foul in the Air*, 54 J. AIR L. & COM. 927, 931-33 (1989) (noting that in 1978, the six largest carriers accounted for 71% of domestic traffic, and in 1987, the six largest accounted for 79%).

41. Heuer & Vogel, *supra* note 4, at 253.

pricing.[42]

C. The Centrality of Labor Management Relations in Airline Bankruptcies

In the post-Deregulation period, airline managers scrambled to cut costs in an attempt to make their airlines profitable.[43] This was a formidable task, as oil prices had tripled in response to the Organization of the Petroleum Exporting Countries (OPEC) oil embargo and the energy crisis of the mid 1970s.[44] Thus, the logical strategy for airline executives was to "go after" labor expenses. For managers, the reason was obvious—labor expenditures were consuming 47.1% of the total costs of the industry in 1978.[45] Through a variety of mechanisms, airline management slashed the 47.1% cost figure down to 34% in 1992.[46] Still, labor expenses represent a significant outlay, and are the only real cost that airlines in trouble can bargain down. For example, an airline on the brink of financial collapse cannot get oil suppliers to reduce the going-rate for airline fuel nor can they have their jets serviced less often. For these reasons, labor costs—in addition to union work rules—have been the principal concern of the reorganizational struggles of bankrupt airlines.

Accordingly, the challenge is to determine ways in which bankruptcy courts can effectuate a greater number of successfully reorganized airlines, while considering the ultimately unified interests of management and labor in the future of their airline. One way bankruptcy courts can meet this challenge is to interpret the RLA more broadly than it has been in the past.[47] By design, the RLA grants greater participation rights to unions in bargaining contexts.[48] Such a forward-looking, cooperative model of management-labor relations is vital for airlines seeking to emerge from, or avoiding, Chapter 11 bankruptcy.

IV. A Short Primer to the Railway Labor Act

Congress passed the RLA in 1926.[49] In 1936 the Act was broadened to include the airline industry.[50] The stated policy objectives of this law

42. *Id.* at 255.

43. Stone, *supra* note 14, at 1490.

44. *Id.* at 1489. ("Between 1978 and 1980, the price of airline fuel increased three-fold.").

45. *Id.* at 1489 n.26.

46. Kevin Kelly et al., *Northwest's Sigh of Relief Has Rivals Groaning*, Bus. Wk., July 26, 1993, at 84.

47. *See infra* discussion of Continental Air Lines and Eastern Air Lines.

48. Stone, *supra* note 14, at 1486; *See infra notes* notes 49-62 and accompanying text.

49. Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-188 (1988).

50. Railway Labor Act, ch. 166, 49 Stat. 1189 (1936) (codified as amended at 45 U.S.C. §§ 181-188 (1988).

were:

(1) [t]o avoid any interruption to commerce or to the operation of any carrier engaged therein;

(2) 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;

(3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter;

(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;

(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.[51]

The latter two policy objectives have given rise to one of the RLA's most noticeable traits: the dichotomy between "major" and "minor" disputes.[52] Depending upon how they are characterized, the RLA contains an extensive variety of procedures for resolving labor disputes. The Act provides no standard for making such characterizations, however, so a great deal of judicial energy is expended on resolving these abstract distinctions.[53]

For "major" disputes, § 156 of the RLA controls. It provides that the party seeking to change a substantive term of the collective bargaining agreement must give the other side at least 30 days written notice.[54] The Act then mandates a period of bargaining between the carrier and its employees over the proposed change. If this fails to resolve the dispute, either party may summon the National Mediation Board (NMB), or the NMB can offer its services *sua sponte*.[55]

While the NMB mediates a dispute, neither party may engage in hostile economic actions.[56] If the agency finds that its mediation efforts have failed, it then advises the parties to accept binding arbitration. If this

51. 45 U.S.C. § 151 (1988).

52. Nowhere in the RLA are the terms "major" and "minor" used; they were first articulated by the Supreme Court in Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711 (1945) (employing the terminology of the railway industry).

53. Beth S. Adler, *Deregulation in the Airline Industry: Toward a New Judicial Interpretation of the Railway Labor Act*, 80 NW. U.L. REV. 1003, 1005 (1986).

54. 45 U.S.C. § 156 (1988).

55. 45 U.S.C. § 155 (1988). The NMB's main authorities are to mediate disputes between labor and management in the airline and railroad industries, and to conduct union certification elections in those industries. 45 U.S.C. § 152 (1988).

56. So that unions cannot strike, and employers cannot institute the proposed changes in rates of pay, or work rules. 45 U.S.C. § 156 (1988).

offer is rejected by either side, a statutorily-imposed "cooling-off" period of 30 days is imposed, during which the status quo must be maintained.[57] After the expiration of this 30-day period, economic war may begin: the union is free to strike, and the company can unilaterally institute the changes it sought in its earlier written notice.[58]

Focusing on the interpretation of existing collective bargaining agreements, "minor" disputes are subject to a less stringent set of procedures. In these cases, the parties argue their position before an arbitration panel known as an adjustment board, which is made up of an equal number of labor and management designees.[59] Unless a party can raise a legitimate claim of unfair representation, the decision reached by the adjustment board will bind the parties.[60]

As noted, the RLA's dispute resolution mechanisms include both compulsory bargaining and "cooling-off" periods. The policy reason for these time-consuming procedures was articulated by the Supreme Court:

> [S]ince disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.[61]

Hence, it is clear the Act envisages a workplace where labor possesses a substantial power to influence major corporate decisions; management cannot unilaterally impose serious changes in the workplace without either securing labor's consent or enduring the "almost interminable"[62] statutorily-proscribed negotiations. These provisions of the RLA embody the concept of "workplace democracy"—a concept with crucial ramifications for financially troubled airlines.

V. Case Studies of three Troubled Airlines

A. Continental

In the years following the passage of the Deregulation Act, Continental Airlines suffered tremendous financial losses totaling over a half-

57. 45 U.S.C. § 155 (1988).

58. However, before the "economic war" commences, the President of the U.S.—after finding the dispute threatens any region of the nation of essential transportation service—may convene a panel to offer its recommendations on how the dispute should be resolved; and as this panel gathers its information, each side must maintain the status quo for an additional sixty days. 45 U.S.C. § 160 (1988).

59. 45 U.S.C. § 184 (1988). In the event that the panel deadlocks, an impartial member is appointed to break the tie. T. Kheel, Labor Law § 50.02, at 50-40 (rev. ed. 1984).

60. Adler, *supra* note 53, at 1008.

61. Detroit & T. Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 150 (1969).

62. *Id.* at 149.

billion dollars.[63] These losses compelled the airline, one of the major domestic carriers,[64] to file a voluntary Chapter 11 petition on September 24, 1983.[65] Indicative of the centrality of labor costs to the decision to file for bankruptcy protection, Continental and Texas International waited just three days before filing a joint motion to the bankruptcy court to reject their collective bargaining agreement.[66] Upon the filing of the bankruptcy petition, Continental unilaterally imposed new wage rates and work rules[67]—comparable to new low-cost airlines—in apparent violation of the RLA.

In response, the Air Line Pilots' Association (ALPA), the Union of Flight Attendants (UFA), and the International Association of Machinist and Aerospace Workers (IAM) filed motions seeking to dismiss Continental's involuntary bankruptcy proceedings as a bad faith filing.[68] The unions argued that the "sole, or at least the primary purpose in filing was to reject these agreements and that Continental Airlines has not shown that it intends to reorganize through and by a Plan of Arrangement."[69] While the unions acknowledged the dire financial condition of the airline, and were willing to agree to the dollar amount of concessions requested by the airline, the "apparent feeling of distrust of management"[70] prevented the reaching of a voluntary settlement.

The bankruptcy court denied the union' request, however, and allowed the Continental bankruptcy proceedings to go forward. The court's conclusions differed from those of the union on the basis that Continental had suffered a worse financial crisis in the winter of 1982-3 than the present crisis; the court determined that Continental had exhausted its cash reserves in the earlier crisis, and was thus unable to weather its current financial troubles.[71] Also, the court felt that Continental had not entered these proceedings lightly, but rather, it had filed for bankruptcy as a matter of corporate survival: "Had the airline not

63. *In re* Continental Airlines Corp., 38 B.R. 67, 69 (Bankr. S.D. Tex.). In 1979, the airline lost $27.4 million; in 1980, $76.8 million; in 1981, $138.6 million; in 1982, $119.9 million; in 1983 (up to Sept. 24, the date of filing), $159.2 million. *Id.*

64. Goetz & Dempsey, *supra* note 40.

65. *In re* Continental Airlines Corp., 38 B.R. at 69. Jointly filing with Continental Airlines Corporation were the related entities: Continental Airlines, Inc., Texas International Airlines, Inc., and TXIA Holdings Corporation. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* The provision in the Code which condemns bad faith filings is § 1129(a)(3). That section reads, "(a) The court shall confirm a plan only if all of the following requirements are met:. . . (3) The plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3) (1988).

69. *In re* Continental Airlines Corp., 38 B.R. at 71.

70. *Id.* at 70.

71. *Id.*

filed its Chapter 11 proceedings when it did, it would not have been flying for very much longer, its 6,000 remaining employees would now be out of a job or working elsewhere, and its ability to reorganize would have been further seriously impaired."[72] The court further noted that if this voluntary proceeding was dismissed, the Unsecured Trade Creditors Committee had advised the court that it would automatically file an involuntary proceeding.[73]

In addition, this court dismissed implicit concerns that the unilateral rejection of the collective bargaining agreement would violate the RLA. It noted:

> Indeed, this court feels that the Railway Labor Act and the Bankruptcy Code are compatible. Each has a special and a separate purpose. . .A number of cases had already held that collective bargaining agreements can be rejected by a Chapter 11 debtor under the provisions of the prior Bankruptcy Act under certain circumstances. But the Congress did not see fit to provide otherwise in the language of the Bankruptcy Code. This must have been intentional on the part of Congress; although differences still exist among authorities as to what circumstances are required to be shown before such agreements can be rejected.[74]

While the court stated that the RLA and the Bankruptcy Code were compatible, it did not explain how it had reached this conclusion.

Indeed, the court's own holding shows that while it acknowledged the compatibility of the two statutes, the policies of the bankruptcy law clearly predominated. The court allowed Continental to reject a collective bargaining agreement and impose unilateral changes in working conditions—both clearly forbidden by the RLA[75]—with only a showing of financial troubles, and without the mandatory bargaining imposed by the RLA.[76]

The next piece of litigation in the Continental bankruptcy also witnessed a clash between the statutory policies of the Code and the RLA.[77] The dispute centered over the efforts of the International Brotherhood of Teamsters, Airline Division (IBT) to be certified as the bargaining representative of the Fleet Service and Passenger Service employees.[78] The

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72. *Id.*

73. *Id.* at 71. As Continental filed for Chapter 11 protection, it "had $42 million in unsecured trade debts which it had not paid timely and which it could not pay in full." *Id.* at 70.

74. *Id.* at 71.

75. 45 U.S.C. § 156 (1988).

76. *Id.*

77. Continental Airlines Corp. v. National Mediation Bd. (*In re* Continental Airlines Corp.), 40 B.R. 299 (Bankr. S.D. Tex. 1984).

78. *Id.* at 301. The IBT notified the National Mediation Board of its intention on October 1, 1982. "This application was apparently precipitated by notification of Texas International Airlines, one of the mergees in the Continental/Texas International merger, to the IBT that, on

NMB processed the IBT's application, held hearings concerning proper employee "craft or class" designations, issued orders concerning those determinations,[79] and "put its administrative wheels in motion for purposes of conducting [an] election."[80] As those wheels were turning, Continental filed its voluntary bankruptcy proceedings, and one month later, sought the invocation of the automatic stay against further NMB proceedings.[81]

The bankruptcy court limited its decision to whether the automatic stay provision of the Code[82] applied to the actions of the NMB in the instant case.[83] The court ruled that it did since the NMB proceedings did not fall under the "police or regulatory power" exceptions to the automatic stay embodied in § 362(b)(4).[84] The court's ruling relied on the fact that the "police or regulatory power" exceptions dealt with the enforcement of laws regarding health, welfare, morals, or safety, and not to "administrative or regulatory laws that directly conflict with the control or reorganization of the res or property."[85] In the opinion of the court, the NMB's lack of enforcement power[86] distinguished it from the National Labor Relations Board (NLRB), which possesses enforcement power; in prior bankruptcy cases, the NLRB had fit within the exception to the automatic stay.[87]

The importance of this case lies principally in the fact that, unlike the previous case, the bankruptcy judge acknowledged the tensions between the RLA and the Code. The court stated:

> At the outset of this analysis, let it be said that this Court is acutely aware that a significant part of the litigation in the Continental Chapter 11 matters stem from a perceived conflict between the federal labor statutes and histori-

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the merger date, all of the employees in the crafts represented by the Teamsters would become subject to Continental's employment policies and its agreement with the union would no longer be effective." *Id.*

79. *Id.* "On August 11, 1983 the NMB issued an Order involving craft/class determination holding that the facts required that the affected employees of Continental be grouped into two separate crafts or classes for purposes of a potential election." *Id.*

80. *Id.*

81. *Id.* Continental also filed a motion with the NMB to stay proceedings or in the alternative to reconsider the factual findings made by the Board. The NMB rejected Continental's position, finding that the airline remained "subject to the Railway Labor Act and that a stay of the representation case would deny the employees their rights under that Act." *Id.* at 301-2.

82. 11 U.S.C. § 362 (1988).

83. *In re* Continental Airlines Corp., 40 B.R. at 301.

84. 11 U.S.C. § 362(b)(4) (1988) states: "(b) The filing of a petition . . . does not operate as a stay. . . . (4) . . . [against] the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. . . ." 11 U.S.C. § 362(b)(4) (1988).

85. *In re* Continental Airlines Corp., 40 B.R. at 305.

86. 45 U.S.C. § 155 (1988).

87. *In re* Continental Airlines Corp., 40 B.R. at 305.

> cal labor policy of our nation, and the federal bankruptcy statutes and the problems relating to the debtor's employees rights which may be affected by the debtor's exercise of its statutory right of reorganization.[88]

The court posited no solution to this conflict, but merely observed that its resolution would occur on a case-by-case basis in adversary proceedings.[89]

The next labor-management dispute in the Continental bankruptcy involved the Air Line Pilots Association's (ALPA) scheduling of disciplinary hearings for 317 Continental pilots on the same day in Washington, D.C.[90] The bankruptcy court had little trouble in finding this a blatant attempt by the union creditor[91] to harass the debtor's reorganization efforts, and issued an order enjoining the union from proceeding with those hearings.[92] The court then suggested that the disciplinary hearings be conducted over a 30 to 60 day period.[93]

Of interest for purposes of this article, the court situated the tension between the federal labor and bankruptcy law policies. Thus:

> The Court finds that under equitable principles, it is under an obligation to balance the equities of the interests of the parties and to attempt to reach an accommodation between the various statutes if possible. The focus is therefore upon whether the debtor, the assets of the estate and the interests of the substantial creditor's groups and the equity security holders will suffer more from the denial of the relief requested than would the interest of the Unions from the granting of relief.[94]

Again, a bankruptcy court declares itself bound by equitable principles to weigh the competing interests of the RLA and the Code. It does so, however in only the most cursory fashion, considering only factors that are important in bankruptcy law, e.g., whether the union action would harm the debtor's estate, creditors or equity security holders.

The last relevant chapter in the Continental bankruptcy proceedings was an appeal heard in the United States District Court from the above discussed bankruptcy court opinion holding that the NMB's union certification procedures at Continental were subject to the automatic stay pro-

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88. *Id.* at 303.

89. *Id.*

90. Continental Air Lines, Inc. v. Air Line Pilots Association (*In re* Continental Airlines Corp.), 43 B.R. 127, 128 (Bankr. S.D. Tex. 1984). All of the hearings were scheduled for April 24, 1984 at 10 o'clock in the morning. *Id.*

91. *Id.* The court noted that "ALPA appears to be a creditor of CAL and its Chapter 11 estate."

92. *Id.* at 128-9.

93. *Id.* at 128.

94. *Id.* at 129.

visions of the Code.[95] The district court held the invocation of the automatic stay improper, and ordered it lifted.[96] In the course of its "regrettably long opinion,"[97] the court articulated some important rationales in its "equitable balancing" of the competing federal policies behind the labor and bankruptcy laws.

First, the court briefly noted that Continental's bankruptcy did not remove it from the jurisdiction of the RLA.[98] The Court later expanded upon this position: "Continental's invocation of shelter under the Bankruptcy Code should neither relieve it of its obligation of noninterference[99] nor rob its employees of their representational rights."[100] The court surveyed the law of labor relations in the airline industry and concluded that Continental lacked a legitimate interest—within the meaning of the RLA—in the outcome of the representational dispute.[101] The NMB proceedings thus could not properly be considered "proceedings against the debtor" for purposes of the automatic stay.[102]

Second, in the court's opinion, the union and the NMB did not fit the definition of "creditors" as set forth in § 101(9).[103] The union and the NMB did not possess a "right to payment";[104] the RLA[105] entitled them instead, a right to compel Continental to the bargaining table by means of a civil injunction.[106]

In concluding, the court rejected Continental's argument in favor of the automatic stay because it would unduly delay the NMB certification proceedings of the IBT. In ruling for the NMB, the court accorded greater weight to the "RLA's premium on speedy resolutions free from carrier interference,"[107] than Continental's claim that such actions would unduly burden its reorganization efforts, an argument which the bank-

95. National Mediation Board v. Continental Airlines Corp. (*In re* Continental Airlines Corp.), 50 B.R. 342 (S.D. Tex. 1985).

96. *Id.* at 374.

97. *Id.*

98. *Id.* at 348. "[T]he RLA specifically provides that "[t]he term 'carrier' includes . . . any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier.' 45 U.S.C. § 151 (1988). *Id.*

99. The court uses "noninterference" in reference to the selection of the employee's bargaining representatives.

100. *In re* Continental Airlines Corp., 50 B.R. at 351 (footnote omitted).

101. *Id.* at 350.

102. *Id.* at 351.

103. 11 U.S.C. § 101(9) (1988).

104. *In re* Continental Airlines Corp., 50 B.R. at 353.

105. 45 U.S.C. § 152 (1982).

106. *In re* Continental Airlines Corp., 50 B.R. at 353-4. The United States District Court here furthered the notion that the IBT and the NMB were not creditors by noting, "[t]he U.S. Supreme Court has emphasized that the RLA does not compel carriers to reach any agreement with their employees' certified representative." *Id.*

107. *Id.* at 370.

ruptcy court below found so persuasive.[108]

B. Eastern Air lines

The disputes comprising the Eastern Air Lines bankruptcy proceedings also involved the debtor airline and its unions. Eastern Air Lines filed a voluntary Chapter 11 petition on March 9, 1989,[109] only five days after their mechanics, represented by the IAM, began a primary strike. The mechanics' strike was supported by Eastern's pilots, who were represented by ALPA.[110]

Eastern had been attempting to negotiate new collective bargaining agreements with these unions, keeping in mind the possibility that if these talks were unsuccessful, the airline would be acquired by Texas Air.[111] However, Eastern did come to terms with ALPA after months of intensive negotiations.[112] The agreement, consisting of only four handwritten pages, did not explicitly address the effects significant changes in the corporate structure had on the rights of Eastern's employees. The court noted that, "[t]he parties were unclear on the material terms . . . [of the] Labor Protective Provisions ('LPPs'). That provision, in its entirety, read: 'LPP's & Takeover: Similar to TWA—need to work out between EAL/ ALPA legal counsel.'"[113]

After a bit of legal wrangling, the parties submitted their hastily-drafted provision to the arbitrating body specified in the bargaining agreement. On the day before Eastern filed for bankruptcy, the arbitrator entered his draft order. He concluded that "the parties' cryptic language evinced an agreement to incorporate into their collective bargaining agreement sections 2(a), 3 and 13 of the LPPs applied to airline employees by the Civil Aeronautics Board (CAB) in the Allegheny-Mohawk airline merger in 1972."[114] The issue of the LPPs gained prominence with the acquisition of Eastern by Texas Air. The ALPA argued that due to certain transactions between Eastern and Continental, which was owned by Texas Air, the LPPs of the bargaining agreement had been triggered, and therefore, should be invoked.[115]

The pilots' union petitioned the bankruptcy court in two separate

108. *In re* Continental Airlines Corp., 40 B.R. at 299.

109. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines, Inc.* (*In re* Ionosphere Clubs, Inc.), 114 B.R. 379, 383 (S.D.N.Y. 1990).

110. *Id.*

111. *Id.* at 382.

112. *Id.*

113. *In re* Ionosphere Clubs, 114 B.R. at 382-3.

114. *Id.* at 383. *See* Allegheny Mohawk Merger, 59 C.A.B. 22 (1972).

115. *In re* Ionosphere Clubs, 114 B.R. at 384.

actions.[116] The union first argued that the automatic stay of § 362 did not apply to the arbitrator's decision since it had been reached the day before Eastern had filed for bankruptcy.[117] Additionally, it requested relief from the automatic stay "to commence a new arbitration proceeding to 'implement' the [arbitrator's] decision."[118] ALPA's second action sought to gauge the effect of Texas Air's purchase of Eastern, and various pre-petition "asset transactions" between Eastern, Continental, and Texas Air; it sought to determine whether these actions constituted a "merger" pursuant to § 2(a) of the LPP.[119] ALPA maintained that in the event that a merger did occur, it would be entitled to damages, "and more significantly, to the merger, or 'integration' of the pilot work forces of Continental and Eastern."[120]

The bankruptcy court ruled against the union on both counts. It held that ALPA had not established the necessary cause[121] in order to obtain relief from the automatic stay, even though it allowed the formal entry of the arbitrator's award.[122] Also, the court found the union's second action—a request for arbitration to determine whether the Continental/Eastern dealings had triggered the LPPs of the collective bargaining agreement—could not be maintained since it would "usurp the bankruptcy court's critical role in the reorganization proceedings, affect special bankruptcy interests, and thwart the goal of judicial speed and economy [necessary to rehabilitate Eastern]."[123] The bankruptcy court feared the arbitration proceedings requested by ALPA would be an expensive affair, believing that arbitration might result in a "substantial" money judgment for the union.[124] At no time did the bankruptcy court focus on the terms of the collective bargaining agreement between Eastern and ALPA, or whether that agreement called for the resolution of the current disputes through arbitration.[125]

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116. *In re* Ionosphere Clubs, Inc., 105 B.R. 765 (S.D.N.Y. 1989); and *In re* Ionosphere Clubs, Inc., 105 B.R. 773 (S.D.N.Y. 1989).

117. The alternative argument to the union's first pleading was a request for relief from the automatic stay, in order to enable the arbitrating body to complete the arbitration process by formally promulgating the arbitrator's decision.

118. *In re* Ionosphere Clubs, 114 B.R. at 384.

119. *Id.*

120. *Id.*

121. *Id. See* 11 U.S.C. § 362 (d)(1) (1988): "(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay (1) for cause, including lack of adequate protection of an interest in property of such party in interest. . ." 11 U.S.C. § 362(d)(1) (1988).

122. *In re* Ionosphere Clubs, 105 B.R. at 771.

123. *Id.*

124. *Id.* at 772.

125. *In re* Ionosphere Clubs, 114 B.R. at 385.

Yet another dispute arose between Eastern and ALPA that raised difficult labor law issues in a bankruptcy context. On September 1, 1989, some six months after Eastern filed, ALPA filed a lawsuit[126] in federal district court to set aside Eastern's practice of "wet-leasing"—renting out planes and crews from competing airlines to fly Eastern routes. The complaint sought both a termination of this practice, and restitution to ALPA-represented Eastern Air Line pilots.

In response, Eastern petitioned the bankruptcy courts for relief. The court granted Eastern's petition for an injunction, and pursuant to §§ 362 and 105 of the Code, enjoined the union's lawsuit.[127] The bankruptcy court acknowledged ALPA's argument that the only procedure by which a Chapter 11 debtor could reject or modify a collective bargaining agreement lay in § 1113.[128] However, it did not directly address the union's concerns that Eastern's wet-leasing program accomplished a substantial modification of the agreement without going through the procedural safeguards of § 1113.[129]

Immediately preceding those rulings, ALPA decided to end its sympathy strike[130] in support of the striking mechanics and return to work. The resulting flurry of legal proceedings left United States District Court for the Southern District of New York grappling with a host of issues, "[E]ach bear[ing] on the larger question of when and in what forum collectively bargained-for rights may be enforced against an employer who has sought protection from creditors in bankruptcy."[131] The district court saw the litigation in the following terms:

> 1. Does section 362(a) of the Bankruptcy Code automatically stay actions to enforce a collective bargaining agreement, where the debtor has not sought rejection or alteration of the terms of the agreement under section 1113 of the Bankruptcy Code?
>
> 2. If section 362(a) stays such actions, did the Bankruptcy Court abuse its discretion in refusing ALPA's request for relief from the stay to arbitrate the LPP merger dispute?
>
> 3. If section 362(a) does not stay such actions, did section 105 of the Bank-

126. ALPA v. Eastern, No. 89-1823 (S.D. Fla. filed Sept. 1, 1989).

127. *In re* Ionosphere Clubs, 105 B.R. at 777. The court held that the unions' action ran afoul of § 362(a)(3), because it blocked "Eastern in its rebuilding efforts by controlling the manner in which it uses its assets." *Id.*

128. *See supra* notes 5-10 and accompanying text.

129. *In re* Ionosphere Clubs, 114 B.R. at 386.

130. The RLA, unlike the NLRA, does not bar secondary boycotts, loosely known as sympathy strikes. *See* Burlington N.R.R. v. Brotherhood of Maintenance of Way Employees, 481 U.S. 429 (1987) (holding that secondary boycotting by employees covered by the RLA cannot be enjoined); and 29 U.S.C. § 158(b)(4)(i) (1982) (secondary boycotts by NLRA-covered employees are an unfair labor practice).

131. *In re* Ionosphere Clubs, 114 B.R. at 387.

ruptcy Code nevertheless authorize the Bankruptcy Court to enjoin the wet-leasing suit?[132]

After an extensive review of the workings of the automatic stay,[133] the purposes of § 1113,[134] and a review of the Supreme Court decision in *NLRB v. Bildisco & Bildisco*,[135] as well as the Congressional response to that decision culminating in the passage of § 1113 of the Code,[136] the court noted that "the very point of section 1113 was to prevent employers from using the act of a bankruptcy filing to obtain an automatic 'breathing spell' from their labor obligations, although the stay promised just such a spell with respect to other obligations."[137] The district court vacated the lower court's refusal to lift the automatic stay to permit arbitration of the LPP dispute. It also reversed the lower court's decision enjoining ALPA from prosecuting its wet-leasing action against Eastern.[138]

The final chapter in the Eastern bankruptcy proceedings involves *International Assoc. of Machinists and Aerospace Workers v. Eastern Air Lines, Inc.*[139] Arising out of the Eastern Air Lines machinists strike, this case clearly illustrates the difficulty bankruptcy courts face in balancing the competing policy interests of bankruptcy and labor laws.

In this case, Eastern alleged that the striking machinists had committed numerous torts throughout the 15-month long dispute,[140] and sought injunctive relief from the bankruptcy court.[141] The bankruptcy court granted Eastern's request and enjoined IAM from engaging in certain strike-related activities.[142]

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132. *Id.*
133. *Id.* at 389-90.
134. *Id.* at 390-92.
135. *Id.* at 392-94.
136. *Id.* at 394-95.
137. *Id.*
138. *Id.* at 406.
139. 121 B.R. 428 (S.D.N.Y. 1990).
140. The district court detailed the tortious acts: "At LaGuardia Airport in New York, IAM members stormed Eastern's facilities, discouraged customers from patronizing Eastern's flights and interfered with non-union employee's efforts to report to work. Specific unlawful acts at the Eastern terminal included flooding bathrooms, interfering with skycaps assisting passengers and sabotaging baggage conveyor belts with 'crazy glue.' Harassment was commonplace during this strike. The bankruptcy court found that strikers called passengers 'scab' and 'cheap ass' while telling them to have a 'shit flight,' that they would be 'killed' and not to forget their 'body bag.'" *Id.* at 431 (footnotes omitted).
141. *Eastern Air Lines, Inc. v. Int'l Assoc. of Machinists & Aerospace Workers, AFL-CIO (IAM)* (*In re* Ionosphere Clubs, Inc.), 108 B.R. 901, 909 (Bankr. S.D.N.Y. 1989).
142. *In re* Ionosphere Clubs, 121 B.R. at 431. "The strikers were not allowed, among other things, to shout, bang or clap in a disruptive way, to trespass onto Eastern property, engage in mass picketing that interfered in any way with Eastern employees' and passengers' use of the public roads, or vandalize and assault property or persons." *Id.*

The union appealed, urging that the injunction violated provisions of the Norris-LaGuardia Act, which divests, to a considerable extent, the power of federal courts to issue injunctions in labor disputes.[143] After reviewing the history of the dispute between IAM and Eastern, the district court noted that Eastern had refused the NMB's voluntary request to meet with IAM in a further arbitration proceeding.[144] The bankruptcy court found this refusal reasonable given Easter's dire financial problems. The district court, however, noted that "presumably every party's decision not to arbitrate is predicated on its perception of its economic benefit,"[145] and since Eastern had not exhausted every possible means of settling its dispute with IAM,[146] it had forfeited its right to a federal court injunction against the union.[147] Hence, the bankruptcy court's order was vacated.

As noted, bitter conflicts characterized the labor-management dispute throughout Eastern's bankruptcy proceedings.[148] In such an atmosphere, the chances for a successful bankruptcy were slim indeed, and in 1989, the airline ceased operations.[149] Without the active participation of labor in the reorganization process, such a result was probably inevitable. The next case study, however, provides an illuminating contrast and an alternative to bankruptcy.

C. Northwest Airlines

Once the nation's fourth largest carrier,[150] Northwest's descent into financial chaos came about largely as the result of a leveraged buyout, engineered in 1989 by Al Checchi and Gary Wilson, former executive officers of the Marriot Corporation.[151] The buyout left Northwest with an obligation to make repayments on $3.7 billion of principal—by 1999—to a financial group led by the Bankers Trust New York Corporation.[152]

Following the buyout, Northwest—dubbed "Northworst" because of its poor performance—lost a total of $618 million in 1990 and 1991; in-

143. *Id.* at 434. "The NLGA [Norris-LaGuardia Act] provides 'No court of the United States . . . shall have jurisdiction to issue any injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter.'" *Id.*

144. *Id.* at 430.

145. *Id.* at 436.

146. Namely, in refusing the NMB's voluntary arbitration request.

147. *In re* Ionosphere Clubs, 121 B.R. at 435.

148. Bridget O'Brien, *Feud Between Bryan, Lorenzo Explains Much, But Not All,* Wall St. J., March 6, 1989, at A4.

149. Wicker, *supra* note 4.

150. *Northwest Airlines Plans a Stock Offering*, N.Y. Times, Jan. 19, 1994, at D4.

151. Adam Bryant, *At Northwest, Chairmen Defend a Turbulent Ride*, N.Y. Times, Aug. 19, 1993, at D1.

152. David Phelps & John J. Oslund, *NWA Executives Dismiss Rumors of Bankruptcy*, Star Trib., Feb. 20, 1993, at A1.

dustry analysts also predicted a $300 million loss for the company in 1992.[153] A variety of culprits were to blame for the airline's poor performance, chiefly, the overall airline industry slump, and the "near-insane summer fare war" of 1992.[154] In spite of these obstacles, the airline seemed determined to right itself and by 1992, it had finished first in on-time performance ratings, was steadily improving baggage loss rates, and had boosted its advertising budget by 50%.[155]

Regardless of these initiatives, however, the prospects of bankruptcy seemed imminent.[156] Northwest's management strenuously denied these rumors, as even the vaguest suggestions of a financial crisis could cripple their efforts to overhaul the airline.[157] In addition to eroding consumer confidence, a bankruptcy filing would place a number of constraints on the management of the company.[158] Northwest was not adverse, however, to using the threat of a bankruptcy filing to compel their unions to the bargaining table.

Because of their massive debt burden, Northwest was vulnerable to a downturn in the economy. Unlike its capital-rich rivals, Northwest could ill afford a slump in passenger travel;[159] a certain portion of its earnings were marked for debt repayment and failure to make those payments could lead to the commencement of involuntary bankruptcy proceedings.[160] Following negotiations, with its various unions, however, labor agreed to important concessions.[161] Northwest was then able to refinance its debt and reached an agreement with a consortium of banks and lending institutions to defer most of its debt-related payments of $1.5 billion until 1997.[162] This postponement was directly linked to the agreement reached by labor and management.[163]

Instead of taking the traditionally hostile management approach to

153. Kevin Kelly et al., *The Seatbelt Sign Flashes for KLM and Northwest*, BUS. WK., Nov. 30, 1992, at 80.

154. Kevin Kelly et al., *A Midcourse Correction for Northwest*, BUS. WK., July 13, 1992, at 110.

155. *Id.*

156. *Id.*

157. *Id.*

158. *See generally* 11 U.S.C. § 363(c)(3) (1994) (permitting a debtor to complete only transactions which are "in the ordinary course of business, without notice or a hearing"); and 11 U.S.C. § 364 (1994) (requiring a debtor to obtain bankruptcy court approval for the acquisition of most types of credit).

159. *See supra* note 37 and accompanying text.

160. 11 U.S.C. § 303 (1994) (setting out the procedural requirements for the commencement of an involuntary bankruptcy case).

161. *See infra* notes 164-173 and accompanying text.

162. *Northwest Air, Airbus in Loan Deal*, REUTER BUS. REP., Aug. 5, 1993.

163. *Id.*

unions,[164] Northwest's management sought a "work-out" with their biggest cash outlay—labor—and in the process, hoped to avoid the significant costs and risks of bankruptcy. In negotiations with their six labor unions,[165] Northwest attempted to wrest some $886 million worth of wage cuts, vacation curtailments, and work rule changes, spread over three years, that promised to increase efficiency. The deal with the airline pilots' union called for the union to "invest" $365 million into the company; $304 million would come from direct wage reductions, and $61 million was to be saved with work rule changes.[166]

In consideration for these cuts, the agreement provided that union employees would receive a 30% equity share in the company, with the possibility of increasing that share to 37.5%.[167] Northwest provided for this equity interest by issuing to its employees a new class of preferred stock, which could be redeemed for the corporation's common stock or, in 10 years, for an amount equal to the cost cuts.[168] Perhaps most importantly, the airline granted labor three seats[169] on the Board of Directors, and agreed that a quorum of five of the fifteen board seats could effectively halt major corporate decisions.[170] Assuming that labor could make the requisite alliances, the unions, in effect, had been granted a broad veto power over the operation of the company.[171] The agreement included a provision that called for the employees' equity share in the company to rise to 50.5% if the airline did not raise an additional $500 million in new equity.[172] Another provision prevented top management from

164. *See generally* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 1-6 (1976).

165. Jill Hodges, *NWA's Negotiations with Unions Seen as Making Labor History*, STAR TRIB., Feb. 3, 1993, at D1. The six unions had bargained collectively as the Labor Leadership Forum. *Id.*

166. *Northwest Airlines and Pilots Agree on $365 Million "Investment" Package*, BNA PENSIONS & BENEFITS DAILY, July 9, 1993.

167. *Machinists at Northwest Question Whether Pilots' Agreement Improves on Rejected Pact*, BNA DAILY LAB. REP., July 8, 1993.

168. *Northwest Airlines Sets Restructuring Pacts*, REUTER BUS. REP., August 6, 1993.

169. Jill Hodges & David Phelps, *NWA Finalizes Concessions Deals with Last Two Unions*, STAR TRIB., July 31, 1993. The Teamsters—representing flight attendants, the Air Craft Technical Support Association, and the International Association of Machinists—each were given the power to name a director to the Board. *Id.*

170. Kevin Kelley & Aaron Bernstein, *Labor Deals That Offer a Break from "Us vs. Them"*, BUS. WK., Aug. 2, 1993, at 30. Such major corporate decisions would include asset sales, financing plans, or bankruptcy filings. *Id.*

171. *Id.* Labor assumed they could make the necessary alliances.

172. *Machinists at Northwest Question Whether Pilots Agreement Improves Rejected Pact*, BNA DAILY LAB. REP., July 8, 1993. *See also* Neal St. Anthony & John J. Oslund, *Northwest Poised to Peddle Stock; Airline's Pitch to Potential Investors Is Timed Just Right*, STAR TRIB., Jan. 31, 1994, at D1 (the proposed sale of some $400 million in common stock of Northwest in early 1994 would satisfy this provision; but this public offering would also dilute employee ownership to around 22% of the company).

pulling their equity in the corporation until 1997. This insured that management would not profit from the sacrifices made by the unions and commit them to the long term survival and success of the airline.[173]

Through these negotiations with unions, lenders and suppliers, Northwest effected a bankruptcy[174] without actually utilizing the bankruptcy process. By taking a different approach, Northwest saved itself the significant costs associated with a bankruptcy filing.[175] However, averting bankruptcy came with a price-tag as well, in the form of fees charged by suppliers and lenders for debt deferral,[176] and accumulated interest on Northwest's debt.[177] Accordingly, some bankruptcy attorneys argued that Chapter 11 afforded Northwest greater protections than did its refinancing package.[178] That view, however, fails to fully appreciate the negative ramifications of a bankruptcy filing on public confidence in the debtor company, and by extension, the possibility of financial recovery. In addition, this position takes an unnecessarily myopic view of airline bankruptcies; the industry as a whole benefited from Northwest's prudence. It has long been argued that bankrupt airlines "damage other carriers by initiating unexpected, steep fare cuts to raise quick cash and stimulate traffic."[179] And as Northwest could surely attest,[180] the fragile airline industry most certainly did not need another price war.

VI. Analysis

In the Northwest "bankruptcy outside of bankruptcy" proceedings, labor and management sat down at the bargaining table only after both sides realized that the future of their airline was at stake. Further, both sides appreciated that the other had a significant interest in ensuring the profitability of that future. Not every financially-troubled airline, however, can structure its negotiations so as to avoid the bankruptcy process; traditionally hostile labor relations in the airline industry are often the blame for these failures.[181]

173. BNA Daily Lab. Rep., *supra* note 172.

174. In the sense of a collective reorganization designed to maximize the firm's chances of survival for the benefit of creditors, equity-holders, and workers.

175. Such costs include: a tarnished image, associated lost revenues, and restraints on management discretion.

176. Dale Kurschner, *Key Pieces of Debt Deferral Plan Eludes NWA*, Minneapolis-St. Paul CityBusiness, Vol. 11, No. 5, at 1 ("Pratt & Whitney [a supplier] wants Northwest to pay more than $100 million in fees in return for deferral of payments on [the debt]. . . . Upwards of $200 million in fees and additional stock dividends tied to restructuring or debt deferral could be paid to financing sources under Northwest's plans to defer some of its debt payments to 1997.").

177. *See* 11 U.S.C. § 502(b)(2) (1994) (making unmatured interest unavailable to creditors).

178. Minneapolis-St. Paul CityBusiness, *supra* note 176.

179. *Northwest Airlines Sets Restructuring Pacts*, Reuter Bus. Rep., Aug. 6, 1993.

180. *See supra* note 154 and accompanying text.

181. *See supra* note 164 and accompanying text.

When a pre-bankruptcy workout cannot be effectuated, bankruptcy courts must attempt to equitably resolve the issues that separate management and labor; both of whom, after all, desire the same ultimate objective—the resurrection of a healthy airline. As evidenced in the litigation surrounding the Continental and Eastern Air Line bankruptcies, the legal disputes were primarily focused on the competing policies behind the federal labor and bankruptcy laws. While labor laws seek to preserve employees' rights to bargain collectively, bankruptcy law emphasizes getting the troubled company on its feet quickly.

While there appears to be a basic conflict between the objectives of the Bankruptcy code and the RLA, Congress has provided no clear mandate as to which objective should prevail. It is the opinion of this author that bankruptcy courts place too much emphasis on the bankruptcy priorities of the dispute before them, and do not give sufficient consideration to the federal labor interests involved. If one statute is considered inferior to the other, this tends to weaken the credibility of that statute by the people whom it supposedly protects. In other words, as the Code continues to trump the RLA, labor's belief in the bankruptcy process—as well as their confidence in their future with the debtor firm—will be irrevocably shaken.

This would be a crucial mistake. As with other labor intensive industries, the survival of an airline embroiled in bankruptcy proceedings depends on the active involvement of labor. The results of the Continental and Eastern bankruptcies as compared to the Northwest "bankruptcy outside of bankruptcy" lend credence to this proposition.[182] As bankruptcy courts show a greater regard for the substantive and procedural aspects of the RLA, the greater involvement of unions in the reorganization effort will result in more successful airline reorganizations.

VII. Conclusion

This article has repeatedly stressed that the enmity between labor and management interests poses a serious threat to the continued vitality of the airline industry, as measured by the number of airline carriers servicing the United States.[183] As airlines encounter turbulent financial conditions,[184] labor disputes have the potential to make the economic ride even bumpier. For airlines in bankruptcy proceedings, they can prove disastrous.

To avert this problem, all interested parties—bankruptcy courts, as well as management and labor lawyers—need to abandon their adver-

182. *See supra* note 4.
183. *See supra* note 40.
184. *See supra* notes 35-42.

sarial approach to labor relations; an attitude which many commentators argue sabotages America's industrial efficiency.[185] The recent negotiations at Northwest represent a good model for future management-labor negotiations. Realistically, however, not every labor dispute can be resolved in such an amicable fashion. Thus, bankruptcy courts must undertake efforts designed to implement these forward-looking labor-management negotiations.

Obviously, this article does not mean to suggest that mere judicial decrees can wipe clean the often-times bitter and rancorous slate of labor-management history. Instead, bankruptcy courts should strive to foster the recognition—on both sides of the negotiating table—that one side's financial interests are inextricably tied up with the other's. While this rather nebulous goal could be reached in a variety of methods,[186] bankruptcy courts must now truly balance the competing federal policies which underpin the labor and bankruptcy laws. Although such a position seems counter-intuitive to the financial sense of airline management, this article observes that such management "victories" are hardly worth the distrust they engender among a debtor airline's labor groups.

185. *See supra* note 164 and accompanying text.

186. Perhaps "consciousness-raising" sessions might prove effective.