Flying the Unfriendly Skies: The Effect of Airline Deregulation on Labor Relations

Laurie Schoder*

Table of Contents

* Ms. Schoder is a Juris Doctorate candidate at the University of Denver College of Law. She serves on the staff of the TRANSPORTATION LAW JOURNAL.

I. INTRODUCTION

In the years immediately preceding deregulation of commercial aviation, airline employees enjoyed steadily rising salaries, good working conditions, and job security. Such benefits were due in part to a stable industry, the increasing popularity of air travel, and government regulation.

Rather than simply fostering healthy competition, deregulation has resulted in a lack of profitability and declining customer satisfaction. Deregulation has injured employees and the public interest in a number of ways. Carriers have stumbled into bankruptcy, disavowed labor contracts, hired cheap labor in a market already glutted by lay-offs, and slashed fares to generate short-term profits used to buy out and cannibalize other carriers. Such activities, which have an obvious destabilizing effect on the industry and the employees of target carriers, cannot be viewed as consistent with public interest.

George Kourpias, President of the International Association of Machinists (IAM), blames deregulation and bad transportation policy for the loss of 400,000 aviation jobs.[1] Kourpias has joined other industry leaders in urging emergency governmental action to address the unemployment problem.

In the last few years, the face of the U.S. airline industry changed remarkably. As 1991 ended, domestic carriers registered some $2 billion in losses,[2] and the unemployment rate for pilots stood at 10 percent.[3] Pan American Airways and Eastern Airlines, both founded in 1927, were recently liquidated in bankruptcy proceedings.[4] Braniff, founded in 1934, was liquidated for the third time.[5] Trans World Airlines (TWA), founded in 1928, recently emerged from bankruptcy, as did Continental Airlines, for the second time. Midway Airlines, founded in 1978, and heralded as a triumph of deregulation, was also liquidated due to bankruptcy, and America West is still floundering. The remaining U.S.

1. *DOT May Propose Larger Commission on Industry Problems*, AV. DAILY, Feb. 11, 1993, at 238.

2. *More Stormy Weather for the Airlines*, AIR FORCE MAGAZINE, Mar. 1992, at 70.

3. Christopher P. Fotos, *Former Pan Am Workforce Faces Mixed Outlook in Uncertain Market*, AV. WK. & SPACE TECH., Dec. 16, 1991, at 32.

4. DONALD L. BARLETT & JAMES B. STEELE, AMERICA: WHAT WENT WRONG? 111 (1992).

5. *Id.*

airlines lost a record $4 billion in 1992.[6] Their current debt load is staggering, and stock of the major carriers has been downgraded to junk-bond status.

Since deregulation, many airline employees face stagnant or falling wages, increased work hours, declining benefits, and tenuous job security. Similar complaints are being voiced in the overall American workforce due to a weak economy. Yet many of the problems in the airline industry have been due to cut-throat competition among carriers, which has resulted in mergers, bankruptcies, and increased foreign investment. This section will explore some of the problems in airline labor relations which have arisen since deregulation.

A. Air Traffic Control Staffing

In 1981, the Professional Air Traffic Controllers (PATCO) went on strike to protest working conditions. President Reagan's subsequent termination of 11,500 of the federal employees had a lasting impact on the entire aviation industry. To cope with the loss of the experienced controllers, the Federal Aviation Administration (FAA) imposed scheduling restrictions, which continue today in the form of slot and gate allocation. Unfortunately, the restrictions occurred at a time when carriers were past the point of no return in implementing costly expansion plans. The PATCO strike exacerbated the decline in the industry's revenue and the downward trend in its collective bargaining agreements.[7]

Although the government has hired and trained 10,000 senior controllers to replace the ones fired as a result of the PATCO strike, the overall experience level of the workforce is less than it was in 1980.[8] Before the strike, 75% of controllers were rated at "full performance level" and were capable of carrying out all required controller functions.[9] Today, only 63% have the requisite skill to perform at that level.[10] Additionally, the traffic handled by controllers has increased from 30 million flights in 1980, to 38.5 million in 1991.[11] Current controllers have complained of worsening work conditions since the labor force was rebuilt following the PATCO strike.[12]

---

6. *NWA Results Push Industry Losses Past $4 Billion*, Av. Wk. & Space Tech., Feb. 8, 1993, at 30.

7. Jean T. McKelvey, Cleared for Takeoff 15 (1988).

8. *Controller Contract*, Av. Wk. & Space Tech., May 1, 1989, at 21.

9. *Aviation: Financial Condition of Airline Industry a Major Concern*, BNA Daily Report for Executives, Feb. 12, 1993, at 28.

10. *Id.*

11. *Id.*

12. *Controller Contract*, Av. Wk. & Space Tech., May 1, 1989, at 21.

A congressional investigation into aircraft cabin safety and crash survivability, prompted by the USAir-Skywest accident of February 1, 1991, found many problems with the nation's air traffic control system. The House report found inadequacies in controller workforce staffing levels, absence of staffing standards, and an unrealistic expectation of continuous error-free human performance under stressful working conditions.[13] The National Transportation Safety Board (NTSB) blamed the USAir-Skywest accident on improper air traffic control procedures, the FAA's failure to provide adequate policy direction and oversight of its air traffic control facility managers.[14]

Workers hired to replace the striking controllers opted for union representation in 1987. The National Air Traffic Controllers Association (NATCA) has expressed concerns about the impact the DOT's proposed "open skies" agreements with foreign nations will have on an already overburdened air traffic control workforce. Specifically, the controllers' association opposes the wording "open entry on all routes" and "unrestricted capacity and frequency." NATCA contends that trans-oceanic airspace traffic has risen significantly faster than air traffic control oceanic staffing. The FAA planned to hire only 128 controllers in fiscal 1993, and NATCA says it is doubtful any new controllers will be assigned strictly to oceanic control spots.[15]

B. Current State of the Airline Industry

Critics have consistently blamed rising labor costs for U.S. airlines' failure to prosper. In 1991, Transportation Secretary Samuel K. Skinner criticized unions for the rise in labor costs.[16] However, a report prepared by Ernst & Young showed that while airline salaries and benefits doubled between 1980 and 1990, employee compensation actually declined as a percentage of both total operating revenues and expenses. The areas commanding a larger bite of revenues were equipment rental costs, landing fees, advertising, and promotional costs, as well as travel agency commissions.[17] In 1980, labor costs accounted for 37.3% of total operating expenses.[18] By the second quarter of 1992, employee salaries and benefits had fallen to 29.89% of total operating expenses for

13. H.R. Rep. No. 501, 102d Cong., 2d Sess. 18 (1992).

14. *Id.*

15. *NATCA Cautions DOT on Airspace Needs Under 'Open Skies,'* Av. Daily, June 16, 1992, at 478.

16. *Salaries Have Doubled Since 1980; Other Expenses Grew Faster,* Av. Daily, July 29, 1991, at 173.

17. *Id.*

18. *Id.*

the major carriers, and only 21.97% for national carriers.[19] Despite this decline, many carriers, in their struggle to survive, are requesting further wage and benefit concessions from labor.

In October 1992, ailing TWA reached agreement with its three unions for wage and benefits concessions, and announced that $24 million would be cut from non-union and management compensation.[20] Under the agreement, workers receive a 45% ownership stake in the airline in exchange for employee concessions worth $660 million.[21] Pilots have been promised a 5% pay raise on the second anniversary of their contract, but only if verifiable cost savings result from specified work rule changes.[22] TWA emerged from bankruptcy reorganization in November of 1993, but it is still too early to tell if the employee ownership and concessions will make a substantial difference in stemming the carrier's financial hemorrhaging.

TWA's pension plan is estimated by the Pension Benefit Guaranty Corporation (PBGC) to be underfunded by $1.2 billion. PBGC is a federal agency created by the Employee Retirement Income Security Act of 1974 to guarantee payment of basic pension benefits earned by American workers and retirees participating in private pension plans. In November 1992, PBGC threatened to go after TWA'S CEO, Carl Icahn's personal assets outside of TWA if the deficit continued. In response, Icahn tentatively agreed to lend TWA $200 million and guarantee payments to TWA's pension plan.[23] Pension underfunding that is not guaranteed exposes workers and retirees to losses if their plans terminate. These potential losses may be reduced since any recoveries made by PBGC for the underfunding are shared with the participants. The PBGC publishes an annual list of the 50 most underfunded plans in order to assist workers, retirees, and creditors in putting more pressure on the companies to better fund their pension plans. Between 1991 and 1992, 11 of the companies that had been on the PBGC list improved their funding levels by higher contributions, investment performance, or mergers with well-funded plans.[24] TWA is not the only airline that showed up in the PBGC's top 50 list. While TWA's actual deposits amount to 85% of

19. *U.S. Major and National Carriers Labor Expenses, Second Quarter 1992*, Av. Daily, Sept. 29, 1992, at 553.

20. Bankruptcy Court, *Machinists Approve New TWA Worker Contracts*, Av. Daily, Sept. 11, 1992, at 439.

21. Adam Bryant, *Can Unions Run United Airlines?*, N.Y. Times, Dec. 9, 1993, at D1.

22. *PBGC Tries to Prod Icahn on Pension Underfunding*, Av. Daily, Sept. 10, 1992, at 433.

23. *Icahn Agrees to Lend TWA $200 Million*, Reuters Fin. Report, Nov. 18, 1992, available in LEXIS, Nexis Library, FinRpt File.

24. Christopher P. Fotos, *PBGC, TWA Creditors Reach Pension Fund Agreement*, Av. Wk. & Space Tech., Nov. 2, 1992, at 35.

its total pension obligation, Northwest has funded 82% of its obligation and United only 79%.[25]

Last year, Northwest Airlines narrowly avoided bankruptcy when its unions agreed to wage concessions in return for an ownership stake. The troubled carrier lost more than one billion dollars in 1992.[26] Burdened by an enormous debt load as a result of its $3.65 billion buyout in 1989, Northwest has been pruning its workforce in an attempt to return to profitability. The wage cuts proposed by management were 30% for pilots, 20% for flight attendants, and 18% for mechanics.[27] Management and union representatives finally agreed to $886 million in employee concessions over the next three years, in return for three seats on Northwest's 15-member board of directors and 37.5% equity interest in the company.[28]

USAir announced plans to lay off another 2500 workers by mid-1994, in addition to the 7000 employees terminated since 1990.[29] The airline indicated that further cost-cutting measures were necessary despite previous worker concessions slated to save the carrier $60 million in 1993. The prior wage cuts and work-rule concessions were negotiated with the International Association of Machinists and Aerospace Workers following a five-day walkout by union members.[30]

Delta Airlines, reversing a no-furlough policy in existence for 36 years, began furloughing an estimated 600 of its 9400 pilots.[31] Senior Vice President Thomas J. Roeck blamed "uneconomic fare programs" for damaging revenue. Roeck stated that the additional traffic generated by the fares had fallen "significantly short" of making up for lower fares.[32] The pilots, Delta's only unionized labor force, agreed in 1991 to a 16-month extension of their current contract and a two percent raise, well below former Secretary Skinner's critical prediction of ten percent annual raises for flight crews.[33]

United Airlines, American Airlines, and Northwest Airlines previously instituted two-tier wage scales for flight personnel in hopes of reducing overall labor costs. The plan has new hires starting at the lower B scale,

---

25. *Id.*
26. David Craig, *Critical Week for Northwest*, USA TODAY, June 28, 1993, at 1B.
27. James Ott, *Northwest To Union: Bankruptcy Possible*, AV. WK. & SPACE TECH., June 21, 1993, at 31.
28. Kirk Victor, *Pies in the Skies*, NAT'L. J., Oct. 9, 1993, at 2425.
29. *Id.*
30. James T. McKenna, *US Air To Save $60 Million With New Machinists Pact*, AV. WK. & SPACE TECH., Oct. 19, 1992, at 35.
31. *Delta Lays Off 136 Pilots in First Wave of Furloughs*, AV. DAILY, June 2, 1993, at 342.
32. Christopher P. Fotos, *Delta Plans Layoff, Other Cuts Following $506 Million Loss*, AV. WK. & SPACE TECH., Aug. 3, 1992, at 33.
33. *Id.*

then merging to the higher A scale after five years. Management apparently hopes for a high turnover rate in those first five years in order to garner some savings.

In 1993, American Airlines slashed approximately 1700 jobs in order to cut costs.[34] Despite such measures, American's Chairman Robert Crandall announced that an additional 5000 workers would be terminated by the end of 1994.[35] American's 21,000 flight attendants, in response to Crandall's call for further work-rule and wage concessions, walked off their jobs during the busy Thanksgiving holiday. The five-day dispute, the shortest U.S. airline strike since deregulation, was brought to an end by President Clinton's recommendation that both sides agree to binding arbitration.[36]

Meanwhile, United Airlines has implemented a sweeping cost reduction program designed to save $400 million a year by eliminating 2800 jobs and grounding 40 aircraft.[37] United lost $1.5 billion between 1990 and 1992.[38] As a result, shareholders began putting pressure on Chairman Stephen Wolf to make some changes. His response was a proposal to dismantle the airline into several regional carriers staffed with non-union labor, or to give employees an ownership stake in return for sweeping concessions.[39] Pilots and mechanics reacted by offering to take significant pay and benefit cuts in order to gain some corporate leverage. The workers agreed to take a 15.7% pay cut and lose 8% of their pension benefits for the next five years. In exchange, the company agreed to invest 53% to 63% of its stock in a special employee pension fund and give workers three seats on the 12-member board of directors.[40] The good news for the employee/owners was that they would be given "supermajority" voting rights on key issues such as acquisitions, mergers, and the sale of assets.[41] The bad news was that employee ownership would be allowed to decline over five years as retiring workers are issued pension stock.[42] Once the employee ownership stake falls below 50%, workers may find themselves right back where they started.

---

34. Dan Reed, *American Speeds Up Cutbacks*, DENVER POST, Sept. 15, 1993, at C1.

35. *Id.*

36. *Airline Strikes*, USA TODAY, Dec. 2, 1993, at 1B.

37. *UAL Posts $957 Million Loss for 1992, Wolf Cites 'State of Chaos,'* AV. DAILY, Jan. 29, 1993, at 165.

38. Byron Acohido, *Who's in Control — The Selling of United Airlines*, Seattle Times, Jan. 23, 1994, at D1.

39. *Id.*

40. Del Jones and Julie Schmit, *Airline Employees Taking Over*, USA TODAY, Dec. 20, 1993, at 1B.

41. Acohido, *supra* note 38, at D1.

42. *Id.*

Many carriers have adopted profit sharing and/or employee ownership options as a means of enticing workers into granting wage or benefit concessions. Previously, such plans were generally initiated by financially unstable carriers, and few workers actually benefitted.[43] At America West, employees were induced to work for less than their industry counterparts based on the assurance that their short-term sacrifices would reap long-term profits. New hires earning only $12,600 a year were required to purchase company stock with 20% of their salary.[44] America West employees owned about 30% of the company.[45] Now the airline is in bankruptcy and employee-owned stock is worthless. However, the use of employee stock ownership plans (ESOP) appear to be gaining momentum. Some type of employee ownership is now in place at TWA, Northwest, and Southwest Airlines. If approved by shareholders, United Airlines will boast the largest ESOP in the United States.[46]

The profit-sharing plan at Southwest Airlines is one of the employees' most lucrative benefits. Southwest has managed to consistently show a profit since 1973. This is due in no small measure to its unique approach under which it shuns the use of hub and spoke routes, operates no computer reservations system, serves no meals, and treats its employees like an extended family. The employee profit sharing plan presently contains about $121 million which employees cannot collect until they leave Southwest.[47] Even more unique is the fact that despite its low-cost operation, Southwest is 84% unionized.[48] Southwest's exemplary labor-management relations are demonstrated by the fact that the carrier's employee turnover rate in 1990 was only 7.8%. The carrier describes its pay structure as "somewhere in the middle of the pack," with B-737 pilot salaries starting around $35,000 a year and topping out at above $100,000.[49] At $43,150, the maximum pay afforded Southwest flight attendants is between $6000 and $24,000 more than any other major U.S. carrier.[50] Labor costs at Southwest are approximately 31% of its total operating expenses, compared with a mere 20% at Continental Air-

43. McKelvey, *supra* note 7, at 77-78.
44. *Former America West Flight Attendant Glad to be Represented by AFA at Hawaiian*, Flightlog, Oct./Nov. 1992, at 5.
45. Jones & Schmit, *supra* note 40, at 1B.
46. *Id.*
47. Henderson, *Southwest Airlines Company Profile*, Air Transport World, July 1991, at 32.
48. *Labor Blames LBOs, Government for Airlines' Woes*, Av. Daily, June 3, 1993, at 351.
49. Henderson, *supra* note 47, at 33.
50. Del Jones & Julia Lawlor, *Waiting in the Wings/Fliers May Want Savings Over Service*, USA Today, Dec. 2, 1993, at 1B.

lines.[51] Southwest would appear to be a perfect example of how an airline can be profitable without demanding concessions from labor.

Deregulation initially spurred a flurry of activity among low-cost, no frills airlines. The new carriers lowered their operating costs, in part, by flying used aircraft and hiring predominantly non-union employees. In response, major carriers reduced fares to the point of unprofitability. Unrealistically low fares, combined with new management challenges brought on by deregulation, eventually forced many carriers to bankruptcy or merger with a financially stronger carrier.

C. Significance of the Railway Labor Act

Before examining the current effects of mergers and bankruptcies on labor, one needs to understand the relationship between management and labor prior to deregulation.

Historically, airlines have been heavily unionized. Since Congress extended the provisions of the Railway Labor Act (RLA) in 1936 to cover employees of airlines engaged in interstate commerce, many of the same unions active in the railroad industry sought to organize airline employees. Airlines have a decentralized structure unlike any other major U.S. labor force, and seniority governs virtually every facet of the employees' wages and working conditions.[52]

The RLA embraced the belief that both parties should try to come to agreement without resorting to economic warfare and without the threat of binding arbitration.[53] Congress was interested in maintaining an undisrupted transportation system. It hoped to achieve this through the peaceful settlement of labor disputes.[54] The RLA was basically intended to aid in settling "disputes concerning rates of pay, rules, or working conditions," as well as "disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions."[55] The RLA imposes a duty "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes whether arising out of the application of agreements or otherwise."[56]

Under the RLA, only one form of representation is allowed, and that is by "craft" or occupational group. Individual crafts are then recognized as bargaining units for which the representation election is to be held.

---

51. *U.S. Major and National Carriers Labor Expenses, Second Quarter 1992*, Av. Daily, Sept. 29, 1992, at 553.
52. William F. Thoms & Frank J. Dooley, Airline Labor Law 9 (1990).
53. 45 U.S.C. §§ 151-163 (1988).
54. *Id.*
55. *Id.* § 151(a)(4), (5).
56. *Id.* § 152.

The union that prevails is then known as the exclusive "bargaining representative."[57] A new wrinkle that has surfaced since deregulation is the emergence of non-union airlines which cross-utilize their employees. In essence, employees in this situation do not belong to only one class. For example, airlines such as America West originally cross-trained their employees to act as reservationists, gate agents, ramp assistants, and flight attendants.

This novel approach would appear on the surface to be a useful way of managing the fluctuating demands on an airline's workforce; but where do these employees fit in under the RLA? If they desire representation, must they choose a single craft with which to affiliate? Under U.S. labor law, workers must choose between an independent union or no workplace representation at all.[58] Therefore, any kind of employee association which attempts to represent its unique cross-utilization abilities is not going to be recognized as a bargaining representative under the RLA. America West recently removed that obstacle when it abandoned the practice of cross-utilization, and required each employee to choose one craft in which to specialize.

II. MERGERS

Since the RLA demands exclusivity or one craft - one representative, what happens when two airlines merge? Before deregulation, the Civil Aeronautics Board was charged with approving mergers while at the same time assuring fair and equitable treatment of all employees affected by the merger.[59]

A. Application of Labor Protective Provisions

The Civil Aeronautics Board (CAB) adopted the Labor Protection Provisions (LPPs) that had been established for the railroad industry. These provisions provided guidance regarding the duty of both carriers and employees to settle disputes; the employees' right to organize and bargain collectively through representatives of their own choosing; prohibition against changes in pay, rules, or working conditions contrary to agreements; and a prohibition against coercing an employee to join or not join a labor union.[60] Emphasizing the unique nature of the airline industry, the CAB went beyond the railroad standards. The LPPs expanded coverage to include seniority integration, supplemental pay to

57. Thoms & Dooley, *supra* note 52, at 24.

58. *Id.* at 25.

59. Jonni Walls, *Airline Mergers, Acquisitions and Bankruptcies: Will the Collective Bargaining Agreement Survive*, 56 J. Air L. & Com. 847, 850 (1991).

60. 45 U.S.C. § 152 (1988).

employees forced into lower paying jobs, dismissal allowances, retention of fringe benefits for dismissed employees, payment of moving expenses, and binding arbitration of disputes between the airline and the employees about these provisions.[61]

The Board's policy allowed workers affected by a merger to avail themselves of the benefits provided by the CAB in the form of LPPs or severance benefits as provided by a collective bargaining agreement.[62] Under no circumstances were the employees to receive less than the amount they were entitled to under their respective labor contracts.

Before the enactment of the Airline Deregulation Act of 1978, the CAB routinely imposed LPPs as a condition of its approval of mergers and acquisitions under section 408 of the Federal Aviation Act, but less routinely as a condition to its approval of route transfers. When the Civil Aeronautics Board Sunset Act was passed in 1984, the CAB's authority to rule on airline mergers was transferred to the U.S. Department of Transportation (DOT). DOT took the position that LPPs would never be imposed as a condition of merger approval.[63] After deregulation, the DOT stated that it would only impose LPPs if: (1) they are necessary to prevent labor strife that would disrupt the national air transportation system, or (2) special circumstances of an acquisition or merger show that LPPs are necessary to encourage fair wages and equitable conditions.[64]

DOT intervention for either of these conditions has never occurred. Even the labor strike at Eastern, at the time one of the nation's major carriers, was not determined by the Department to constitute a threat to the U.S. transportation system.[65] With regard to the second condition, the DOT required labor to demonstrate that inequity in working conditions and wages exist, but, at the same time, allowed the airline to argue that compliance would seriously jeopardize financial and operational concerns.[66] Thus, the DOT would refuse to implement LPPs even upon a showing of labor inequity if the carrier could prove that it would be unprofitable to rectify the situation. Rather than become involved in such disputes, the DOT instead urged the affected parties to engage in collective bargaining.

On January 1, 1989, Section 408 of the FAA, which gave the Department of Transportation authority to rule on airline mergers and com-

61. William K. Ris Jr., *Government Protection of Transportation Employees: Sound Policy or Costly Precedent*, 44 J. AIR L. & COM. 509, 525 (1978).

62. Walls, *supra* note 59, at 851.

63. MCKELVEY, *supra* note 7, at 144-50.

64. William F. Thoms & Sonja Clapp, *Labor Protection in the Transportation Industry*, 64 N.D. L. REV. 379, 409 (1988).

65. *Id.* at 420.

66. *Id.*

petition issues, was deleted. Such authority was subsequently transferred to the Department of Justice (DOJ). In keeping with the DOT's policy that the public interest is best served by relying upon market forces without unnecessary government regulation, the DOJ's primary focus now is on antitrust implications of airline mergers.[67] Unlike the DOT, which could block a merger with an administrative fiat, the DOJ can only challenge the transaction by seeking an injunction in federal court.[68]

When DOJ analyzes a merger between two competing companies, one factor it looks at is the Herfindahl-Hirschman Index (HHI), which is used to measure market concentration before and after a merger. This is done by measuring an airline's share of enplanements against total industry enplanements, regardless of where it operates and who its competitors are. It is immaterial that an airline dominates a particular hub, as long as there are other airlines which could theoretically compete with it.[69] If the HHI comes up too high, indicating a heavy market concentration, DOJ will not recommend the merger be approved without mitigating circumstances. However, according to Margaret Guerin-Calvert, a former Justice Department economist, "unless there is a case of clearcut, overlapping hubs and there are major barriers to entry for a replacement of the merged carrier, [the] DOJ won't intervene."[70]

In February 1991, the DOJ did exercise its authority by threatening to enjoin United Airlines' proposed acquisition of bankrupt Eastern Airlines assets at Washington's National Airport.[71] The DOJ said the sale to United would violate antitrust law by lessening competition between Washington and other cities. At the time of the proposed acquisition, United operated 3000 of the 4400 monthly domestic flights at Washington's Dulles International Airport.[72] At the very least, this action demonstrates that the DOJ is willing to oppose some mergers where the DOT was not. The DOJ, however, has no authority to examine the interests of affected employees or invoke labor protection provisions.

---

67. Walls, *supra* note 59, at 857.

68. Bill Poling, *DOT Will Relinquish its Airline Antitrust Jurisdiction on January 1*, TRAVEL WEEKLY, Dec. 8, 1988, at 70.

69. Perry Flint, *Too Many Mergers, Too Little Competition; Airline Industry May be Over-concentrated*, AIR TRANSPORT WORLD, Jan. 1988, at 81.

70. Joan M. Feldman, *U.S. Airline Concentration Burden Shifts to Justice Department*, AIR TRANSPORT WORLD, Feb. 1989, at 37.

71. David Field, *Feds Fight United's Bid at National*, WASH. TIMES, Feb. 15, 1991, at C1.

72. *Id.*

B. Status of Collective Bargaining Agreements

When airlines merge, if disputes arise as to the identity and certification of a collective bargaining representative, such disputes fall within the exclusive jurisdiction of the National Mediation Board (NMB).[73] NMB policy specifies that any union representing employees of the acquired carrier is decertified as of the merger date.[74] Deregulation has spawned fierce competition not only among airlines, but among employee groups as well. The ensuing struggle for employee representation and determination of seniority between the merging groups has frequently led to animosity and strained employee relations. Some examples of mergers with significant labor relations difficulties include Northwest-Republic, Texas Air-Eastern, Delta-Western, and People Express-Frontier.

In the Delta-Western merger, Delta assured the DOT that it would offer Western's employees labor protection no less favorable than what they would receive if the DOT had imposed LPPs.[75] At the time of merger, Western's flight attendants were represented by the Association of Flight Attendants (AFA) while Delta's were non-union. In return for prior bargaining concessions by AFA, Western had agreed to a successorship clause whereby any successor or parent company was to be bound by the terms of the earlier contract.[76] However, Western's merger agreement with Delta did not claim to bind Delta to Western's existing collective bargaining agreement.[77] Delta's management was understandably reluctant to recognize the existence of a valid Western contract for fear of agitating Delta's non-union flight attendants or giving them ideas about organizing. Delta finally imposed its own "fair and equitable" solution which was unacceptable to the Western flight attendants.[78] The matter eventually resulted in litigation, which will be discussed below.

Seniority integration and wage scales among Western and Delta pilots should have been simpler to reconcile, since both groups were represented by the Air Line Pilots Association (ALPA). Even so, the ensuing disputes dragged on for so long that Delta sought to impose deadlines on the groups in an attempt to resolve the matter. Ultimately, this too ended up in litigation.[79]

The industry is replete with employee horror stories regarding mergers. The usual posture of the dominant carrier is to characterize its role

73. 45 U.S.C. § 152 (1988).
74. Walls, *supra* note 59, at 861.
75. McKelvey, *supra* note 7, at 151-60.
76. Association of Flight Attendants v. Delta Air Lines, 879 F.2d 906 (D.C. Cir. 1989).
77. McKelvey, *supra* note 7, at 151-54.
78. *Id.*
79. *Id.*

akin to that of a white knight, rescuing a failing airline, and in the process providing jobs for workers who would otherwise eventually find themselves standing in unemployment lines. The acquiring carrier is generally stronger and more likely to impose its present labor relations style on the weaker carrier. With regard to integration of seniority lists, management of the acquiring carrier contends that it must protect the interests of its present workforce. In fact, the acquiring carrier is obligated to honor its premerger contracts, if any, with its own employees.

So who protects the interests of the acquired employees? The authority to impose labor protection provisions was removed from the DOT and never conferred on the DOJ. Even if the acquiring airline agrees to some type of seniority integration, what happens when a single-wage scale carrier merges with a two-tier wage scale carrier? The government believes that all of these problems can be adequately resolved through the collective bargaining process and can even be addressed premerger through the use of successorship clauses.

Generally, successorship clauses fail with respect to representation protection. This is because of the NMB's position that mergers eliminate the acquired carrier's status as a separate operating entity, resulting in decertification of that union since it no longer represent a majority of their craft in the merged carrier.

Although the courts have refused to find that an existing collective bargaining agreement survives a merger, a recent decision holds that an independent union may be entitled to damages if the acquiring carrier breaches a successorship clause.[80] In *Association of Flight Attendants v. Delta Air Lines*, the union conceded that the NMB's decertification order precluded its right to represent Delta employees after the merger date.[81] The union claimed, however, and the D.C. Circuit Court agreed, that Delta should be ordered to arbitration regarding Western's alleged breach of its successorship clause.[82]

The question remains as to whether Delta is now "answerable in damages" for Western's failure to honor its contract.[83] The court declined to hold that a bargained-for successorship clause creates no legal rights or duties whatsoever. "Whether the successorship clause in this case creates any legal obligations is, of course, a matter within the province of the arbitrator."[84] The matter was remanded to the district court for an order to arbitrate.

80. Association of Flight Attendants v. Delta Air Lines, 879 F.2d 906 (D.C. Cir. 1989).
81. *Id.* at 909.
82. *Id.*
83. *Id.* at 917.
84. *Id.*

The federal court's ruling signals a small victory for employee groups whose representation is lost due to merger. The final outcome still depends upon the result of arbitration. The union could eventually receive a damage award, or the carrier may prevail in its assertion that the successorship clause was not intended to operate as a merger. Whatever the result, it will be a long time in coming. The Western-Delta merger was initiated in 1986. It has taken five years just to get that dispute to arbitration. Surely there is a better way. The approach taken by the DOT forced airlines contemplating mergers, and their respective employee groups, to engage in what routinely became protracted, hostile negotiations, typically ending in litigation.

Competition and consolidation have been shown to be the major factors responsible for the increase in legal expenses in the labor field.[85] Former Republic employees filed a class action suit against Northwest claiming they were denied their benefits under Republic's ESOP. As discussed previously, Western's pilots were dissatisfied with their integration into the Delta pilot group and brought suit against both Delta and ALPA. Pilots from TWA and Ozark sued TWA and ALPA.[86] Merging seniority lists rarely satisfies anyone, thus — in the absence of government imposed integration or binding arbitration — lengthy, expensive lawsuits will undoubtedly continue.

III. BANKRUPTCY

When a carrier files for bankruptcy, it often cuts fares and improves service in an attempt to draw more passengers. At the same time, management usually reduces the crew compliment to the minimum and requests employee wage and benefit concessions which workers feel compelled to concede in a frequently futile attempt to save their careers.

A. Rejection of Collective Bargaining Agreements

In the past, collective bargaining agreements were treated like any other executory contract, and were subject to rejection by an employer who filed for reorganization under Chapter 11 of the Bankruptcy Code.[87] Contracts under the RLA, however, were exempted from automatic rejection by Section 1167 of the Bankruptcy Code which provides: "Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor

85. Joan M. Feldman, *See You in Court; Airline Litigation Abroad*, Air Transport World, Apr. 1992, at 44, 47.

86. *Id.*

87. 11 U.S.C. § 365(a) (1988).

established by a collective bargaining agreement that is subject to the Railway Labor Act except in accordance with section 6 of such Act."[88]

Section 6 of the RLA sets forth the procedural rules for changing employee pay rates or working conditions. Carriers must give at least thirty day's written notice of any intended changes, and arrange a conference with employee representatives to discuss such changes.[89] The RLA expressly provides that changes in pay rates, rules, and working conditions agreed upon between airlines and their employees will be implemented only in the manner prescribed in the agreements themselves or pursuant to procedures specifically set forth in the RLA.[90]

In 1983, Continental Airlines filed for Chapter 11 protection. It announced the termination of two-thirds of its unionized employees (unilaterally abrogating its union contracts), implemented wage and benefit cuts of 50%, and dissolved seniority.[91] In response, Congress enacted section 1113 of the Bankruptcy Code on July 10, 1984.[92] Section 1113 provides an expedited form of collective bargaining specifically designed to insure that employers cannot use Chapter 11 solely to rid themselves of a union, but to allow modifications that are necessary for the company's survival.[93]

Section 1113 imposes an affirmative duty on the employer to bargain with the union prior to modification or rejection of its contract. The bankruptcy court in *In Re American Provision Co.* delineated nine requirements to be met by an employer seeking to reject a labor contract.[94] The nine tests are:

1) the debtor in possession must make a proposal to the union to modify the collective bargaining agreement;
2) the proposal must be based on the most complete and reliable information available at the time of the proposal;
3) the proposed modifications must be necessary to permit the reorganization of the debtor;
4) the proposed modifications must assure that all the creditors, the debtor and all of the affected parties are treated fairly and equitably;
5) the debtor must provide to the union such relevant information as is necessary to evaluate the proposal;
6) between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the union;

88. 11 U.S.C. § 1167 (1988).
89. 45 U.S.C. § 156 (1988).
90. *Id.* § 152.
91. Walls, *supra* note 59, at 883.
92. 11 U.S.C. § 1113 (1988).
93. Walls, *supra* note 59, at 883.
94. In Re American Provision Co., 44 B.R. 907 (Bankr. D. Minn. 1984).

7) at the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement;
8) the union must have refused to accept the proposal without good cause;
9) the balance of the equities must clearly favor rejection of the collective bargaining agreement.[95]

The language of Section 1113(b)(1)(A) requires the employer to submit a proposal "which provides for those necessary modifications in the employees' benefits and protection that are necessary to permit the reorganization of the debtor."[96]

Section 1113 appears to demonstrate a sincere congressional effort to provide some protection for airline unions whose companies reorganize through bankruptcy. At least wages and benefits can no longer be abolished arbitrarily and instantaneously upon the filing of a petition. However, the extensive bargaining which ordinarily precedes modification of an airline labor contract under the RLA may result in the airline asserting that continued maintenance of its union agreements is overly burdensome. Under the fourth provision of section 1113, an employer might benefit if it can convince the bankruptcy court that its financial plight is genuine.[97]

B. Section 43 of the Airline Deregulation Act

Aside from collective bargaining agreements, there are many other labor issues raised when an airline is forced to file a petition for bankruptcy. When a company goes out of business due to bankruptcy, the only government assistance available to its workers is unemployment compensation. When airline deregulation began in 1978, the federal government apparently anticipated that deregulation would inevitably have a detrimental effect on the industry's vast labor force. Congress enacted section 43 of the Airline Deregulation Act (ADA) based, in part, on such concerns. Section 43 was designed to provide certain benefits to dislocated airline employees for a period of up to ten years. Those benefits included monthly assistance payments to employees deprived of employment or adversely affected with respect to their compensation, assistance for relocation, and the duty of other carriers to hire qualified employees dislocated due to bankruptcy, merger, or other staff reduction.

In retrospect, section 43 was probably added to the ADA only to make it more politically palatable and to make its passage more likely. In reality, the assistance payments to be disbursed by the Secretary of La-

95. *Id.* at 909.
96. 11 U.S.C. § 1113(b)(1)(A) (1988).
97. Walls, *supra* note 59, at 888-90.

bor were never funded, and qualifying employees dislocated as a result of deregulation have yet to receive any monetary benefit required under section 43. The only portion of section 43 that employees were able to take advantage of, if they were aware of its existence, was the duty imposed on other carriers to give preferential hiring treatment to dislocated employees. Since the provisions of this section expired in 1988, any employees currently dislocated due to bankruptcy must fend for themselves.

C. Employee Protection in Route Transfers

On July 29, 1991, Senator Bob Graham (D-Fla.) introduced Senate Bill 1565 which proposed partially to revive section 43. Senate Bill 1565 was designed to amend the FAA Act of 1958 to ensure fair treatment of employees in route transfers. The bill proposed that the ten year limit on the duty to hire provision be extended to seventeen years. It also proposed that if a certificate transfer was approved, the carrier to which the authority transfer was granted was required to hire in each class or craft no less than the number of employees found by the Secretary as necessary to operate the route at the time of the transfer's approval. Such employees were to be hired from the carrier transferring the certificate in order of seniority.

The proposed legislation was assailed by major airlines and the DOT as likely to impose unnecessary costs on airlines seeking to acquire international routes.[98] According to James Callison, Vice President of Corporate Affairs for Delta Air Lines, the DOT would be required to engage in an "extensive, time-consuming, and complicated regulatory proceeding to determine the number of employees by class and craft that must be transferred as part of a final decision."[99] Callison said that if the proposed legislation had been law before Delta concluded its agreement with Pan Am, it would have most likely prevented the carriers from reaching agreement in a timely manner. As a result, employee prospects of being hired by an acquiring airline would be reduced.[100]

In light of such opposition, the odds that the original bill would pass were extremely remote. Therefore, in an attempt to salvage some of the bill, it was modified by Senator John Danforth (R-Mo.) and proposed as an amendment to the fiscal 1993 DOT Appropriations Bill H.R. 5518.

The amendment required that DOT may approve the transfer of foreign route certification only after finding that: (1) the employment plan required to be submitted by the acquiring carrier does not discriminate,

98. *Airlines, DOT Criticize Employee Protection Bill*, Av. Daily, May 4, 1992, at 198.
99. *Id.*
100. *Id.*

(2) reasonable attempts have been made by the acquiring carriers to provided employment opportunities for workers of the transferring carrier, and (3) the employment plan would not adversely affect the viability of the transaction.[101] The provision was dropped from the appropriations bill in an attempt to bring the spending levels within President Bush's $37 billion budget for transportation and avoid a veto.

D. The Importance of Seniority

The airline industry is peculiar with regard to its employee wages and benefits. Dislocated employees generally cannot take advantage of their experience and tenure when hiring on with another airline. Wages, hours, benefits are all based on seniority; but the only seniority that counts is seniority with that particular carrier. If crew members or mechanics want to relocate voluntarily to another airline, they will usually start at the lowest entry level no matter how much expertise they have, and work their way up the corporate ladder the same as someone with no previous experience.

When a carrier is forced to shut down due to bankruptcy, employees not only lose a steady paycheck, they lose all the seniority they have worked years to achieve. Veteran employees lose more than a job, they lose a career. This is poignantly illustrated by the final demise of once great Pan American Airways. Many of Pan Am's pilots and flight attendants were long-time veterans with fifteen, twenty, and sometimes forty years of experience.[102] The impact on them is overwhelming. They cannot find jobs to replace their salary, their pensions are in jeopardy, and they cannot afford health insurance.

Pan Am's pilot union has asked the DOT to impose LPPs on United in connection with its purchase of Pan Am's Latin American route system.[103] The union, a branch of ALPA, successfully negotiated an agreement with United's pilots that would allow 763 former Pan Am flight deck personnel to transfer to United. The highly senior Pan Am pilots would be placed at the bottom of United's seniority list. Further, they would receive only 50% of what they were earning before Pan Am went under.[104]

Pilots may fare better as a result of their specialized skills and a projected shortage of pilots due to military cutbacks. In particular, pilots of wide body jets with significant over-water experience should have little trouble finding employment if they are willing to relocate to foreign-based

101. Id.

102. Christopher P. Fotos, *Former Pan Am Workforce Faces Mixed Outlook in Uncertain Market*, Av. Week & Space Tech., Dec. 16, 1991, at 32-33.

103. *Pan Am Pilots Pushing DOT For Jobs at United*, Av. Daily, Mar. 17, 1992, at 464.

104. *Id.*

carriers. But they must start over at the bottom of the seniority ladder with respect to wages and working conditions. While they fare better than other airline employees in some respects, pilots still may encounter significant adversity as a result of dislocation from their jobs. One major problem experienced by many pilots in relocating is age discrimination.

E. Age Discrimination Claims

In 1967, Congress enacted the Age Discrimination Employment Act (ADEA) "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment."[105] To achieve these goals, the ADEA, among other things, makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age."[106] However, the ADEA provides an exception "where age is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business."[107] Pilots have become accustomed to being forced into retirement at age sixty in compliance with Federal Aviation Administration (FAA) requirements.

But what of the experienced forty-five-year-old pilot who finds himself unemployed due to bankruptcy and attempts to relocate to another airline? According to a decision by the federal court, he or she is not likely to be hired by American. In *Murname v. American Airlines*, the District of Columbia Court of Appeals upheld American's employment policy of not hiring pilots over the age of forty.[108] American had an "up or out" policy whereby the pilot must demonstrate the ability to move up to a captain's chair or be fired. The average time required to progress from flight engineer to pilot was sixteen years. American argued that persons over the age of forty would not get the experience necessary to operate its equipment safely. The court accepted this argument, finding the maximum age restriction to be a BFOQ "reasonably necessary to the normal operation" of the airline.[109]

The pilot in question might have a chance of being hired at United, however. In *Smallwood v. United Airlines*, also decided in 1981, the Fourth Circuit held that United did not show that its age restriction was a

105. 29 U.S.C. § 621(b) (1988).
106. *Id.* § 623(a)(1).
107. *Id.* § 623(f)(1).
108. Murname v. American Airlines, 667 F.2d 98 (D.C. Cir. 1981).
109. *Id.*

BFOQ.[110] Smallwood was forty years old and had ten years of experience in commercial jet operation when he applied for a flight officer position with United. United rejected his application on the grounds that it only considered pilots thirty-five years or younger. The court ruled that United's age restriction was not a BFOQ.[111] The issue of valid maximum age requirements appears to remain an open question.

IV. CABOTAGE

A new worry for U.S. airline employees is their status with respect to foreign ownership of their company. Foreign investment is already present in a number of U.S. carriers and is bound to increase as the world moves toward a more global economy. Workers concerned about the impact of an aggressive "open skies" policy with other countries have asked the DOT to take certain steps, before formal open skies negotiations begin, to prevent U.S. jobs from being lost to foreign workers.[112] Specifically, workers have pointed out that U.S. flag carriers are required to adhere to more stringent rules than most European flag carriers. Therefore, the employees argue, the U.S. should insist that any negotiations include identical requirements for all U.S. and foreign employees. Labor has also suggested that all agreements should be conditioned on some form of legal reciprocity for the employment of non-resident foreign nationals by each carrier whose country is a party to the negotiations. This suggestion is based on the fact that it is often legally impossible for U.S. citizens to obtain employment as flight attendants on foreign flag carriers even though foreign nationals residing outside the U.S. routinely obtain employment as flight attendants on U.S. flag carriers.[113]

With increased globalization of airlines, labor unions face a daunting task in merely maintaining the status quo for its rank and file. Increasingly, troubled carriers must choose between bankruptcy or acquisition by an international rival. The USAir-British Airways (BA) merger is but one example.

A. Anti-Labor Atmosphere

Sir Colin Marshall, BA's chief executive, has made clear his intention of operating the two carriers as one entity under British ownership. If he has his way, USAir employees should prepare for uneasy labor relations. U.K. airline employees currently endure an anti-labor corporate

110. Smallwood v. United Airlines, 661 F.2d 303 (4th Cir. 1981).

111. *Id.*

112. *Airline Job Safeguards Wanted In 'Open Skies' Negotiations*, Av. Daily, May 20, 1992, at 313.

113. *Id.*

and government environment. Even if a union has the support of 100% of the employees in a particular class or craft, there is no obligation for any U.K. employer to recognize that union for purposes of collective bargaining.[114]

Additionally, British Airways has developed a union-busting technique which would make Frank Lorenzo proud. BA creates subsidiary companies to directly compete with its own mainline operation. In Germany, BA created a "new airline" called Deutsche BA. Deutsche BA was created without any input from British Airways U.K. unions, and BA employees in Berlin lost their jobs as a result. The new airline was established as a non-union, low-cost carrier which will compete with the British Airways mainline operation in the rest of Europe, according to George Ryde, a spokesman for the Transport and General Workers Union.[115] BA has set up similar non-union regional carriers within the U.K., in a move that has helped make it the world's most profitable carrier, arguably at the expense of its workers.

In October 1992, BA acquired financially troubled Dan-Air. BA plans to restructure its acquisition into a new low-cost, short-haul subsidiary based out of London's Gatwick Airport.[116] As a result, 1600 of the nearly 2000 Dan-Air employees will lose their jobs. The remaining staff will be offered jobs with the new carrier, but at substantially lower salaries than they had at Dan-Air.[117]

In addition to union-busting tactics by foreign owners, labor must also face the threat of foreign investment by airlines in countries that can provide cheaper labor such as Korean or Singapore Airlines.

B. Foreign Ownership and U.S. Military Operations

Of even greater concern is how foreign investment will affect the Civil Reserve Air Fleet (CRAF). The Pentagon relied on twenty-two U.S. flag carriers to fly troops and equipment during the Persian Gulf war. Six foreign carriers were utilized for cargo transport only.[118] For purposes of national security, only crew members who were U.S. citizens were allowed to fly these missions. If the military is concerned about the citizenship of crew members flying its troops, what about the citizenship of the carrier itself? With the rising proliferation of foreign investment, will there

114. Molly Charboneau, *Global Dialogue, Global Understanding: British Flight Attendants Speak Out*, Flightlog, Oct./Nov. 1992, at 12.

115. *Id.*

116. Paul Beets & Daniel Green, *BA Agrees To Rescue Dan-Air: Rival Carriers Brand Deal As Uncompetitive - Up to 1,600 Jobs To Go*, Fin. Times, Oct. 24, 1992, at 1.

117. *Id.*

118. *More Stormy Weather for the Airlines*, Air Force Magazine, Mar. 1992, at 73.

be a sufficient number of domestically owned airlines to shoulder the burden?

Although the efforts of the civilian fleet were most obvious during the war, domestic commercial carriers routinely carry U.S. troops under the auspices of the Military Airlift Command (MAC). Not only must all crew members be U.S. citizens, some military contracts with the civilian carriers even require that all airline personnel involved with the operation of such flights receive secret military clearance.[119] Cutbacks in military spending are expected to create increased rather than diminished demand for the reserve fleet in certain areas, particularly with regard to smaller aircraft.[120]

V. SAFETY

While the number of accidents and fatalities has decreased in the last two years, everyone involved in the industry needs to be increasingly vigilant with regard to safety. It is estimated that by the year 2000, almost half the planes in the U.S. fleet will be over twenty years old.[121]

A. Substance and Alcohol Testing of Airline Employees

In 1988, the FAA instituted mandatory random drug testing.[122] The regulations adopted by the FAA require employee drug testing to be performed by both scheduled and unscheduled commercial air carriers. Employees required to be tested include pilots, flight attendants, disphers, maintenance personal, security or screening personnel, and air traffic controllers.[123] The regulations require pre-employment testing, post-accident testing, testing based on reasonable cause, and testing after return to duty following a leave of absence. Substances to be tested for are marijuana, cocaine, opiates, PCP, and amphetamines.[124] Random drug testing is also required and must be performed on a minimum of 50% of the workforce per year.

Employees challenged the regulations on the ground that the random testing constitutes an unreasonable search in violation of the Fourth

119. A MAC contract granted to American Trans Air to operate flights between Nellis and Tonopah Air Force bases required all civilian flight personnel to pass background checks and receive secret clearance.

120. Christopher P. Fotos, *ATA Seeks Better Charter Airline Image While Preparing for Stiffer Competition*, Av. Week & Space Tech., May 11, 1992, at 38.

121. *Geriatric Jets: Should Airlines Scrap Their Oldest Planes for Sake of Safety?*, Wall St. J., May 6, 1988, at 1.

122. 53 Fed. Reg. 47,024 (1988).

123. *Id.*

124. *Id.*

Amendment. The regulations were found to be reasonable by the Ninth Circuit in 1990.[125]

By October 28, 1992, DOT was to have established a mandatory alcohol-testing program for transportation employees.[126] Random alcohol testing was mandated by the Omnibus Transportation Employment Act of 1991. The DOT has decided that the best method of detection would be breath testing. Because of the lengthy implementation process, DOT was granted an extension.

Although labor challenged the constitutionality of drug testing, the impending implementation of alcohol testing has annoyed those in management as well. With many carriers fighting to control costs, the last thing management wants to see is additional labor related operational costs such as those associated with drug and alcohol testing. Random testing of flight crews at the 50% level currently costs carriers $1 million a week.[127]

Airline executives have asked the FAA to reduce the random drug testing from a 50% sampling to 10%, which they estimate would save $90 million a year.[128] This would appear to be more than adequate since less than 1% of all randomly tested airline employees in 1992 showed a positive result.[129] Thus far, the 50% sampling remains the standard, despite the fact that the FAA has decreased the random drug testing of its own employees to 25%. The upcoming alcohol testing program is also expected to involve a 50% annual sampling.

Labor relations expert Jerrold Glass said the random alcohol program is going to be extremely costly.[130] Glass estimated that random alcohol testing for flight crews will most likely be pre-performance testing while testing for drug abuse is usually post-performance. That means that a flight crew member normally scheduled to report one hour before flight time will be required to arrive at least thirty minutes earlier in order to undergo the alcohol test. If flight crews demand this additional time be considered duty time, the economic impact is obvious. Glass said "the

125. Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990).

126. *Regional Carriers Troubled by Potential Cost of DOT Alcohol Testing Proposal*, Av. Daily, Dec. 31, 1991, at 549.

127. Transcript of meeting of the National Commission to Ensure a Strong Competitive Airline Industry, July 19, 1993, Fed. News Service., July 19, 1993, *available in* LEXIS, Nexis Library, (comments of Randy Babbitt, President of the Air Line Pilots Association, on random drug testing).

128. *Rule Changes Would Pump $23 Billion Into Economy ATA Says*, Av. Daily, Aug. 20, 1992, at 309, (citing study done by Wharton Econometric Forcasting Associates for the American Transportation Association, released August 19, 1992).

129. *Airline Worker Drug Tests Are Less Than 1% Positive*, 4 Inside DOT & Transp. Week, No. 32, Aug. 13, 1993, *available in* LEXIS, Transporation Library.

130. Robert W. Moorman, *The Cost of Doing Business*, Air Transport World, Aug. 1992, at 90.

costs of alcohol testing could dwarf that of drug testing."[131] The Air Transport Association (ATA), which conducted a cost analysis, said that random alcohol testing could cost airlines $3.6 billion over the next five years.[132]

Flight attendants are considered by the FAA to be safety employees for purposes of alcohol consumption prohibitions, and are therefore subject to drug testing, which DOT requires only of safety-related employees.[133] Although Congress has not hesitated to adopt regulations concerning drug and alcohol use which it feels directly affect the safety of the traveling public, it has consistently failed to enact duty time limits for flight attendants.

B. Flight Attendant Duty Time Limits

Fatigue among airline employees is a serious safety problem. To prevent accidents due to fatigue, the FAA has established maximum duty times and minimum rest periods for pilots, flight engineers, air traffic controllers, mechanics, and disphers.[134] Since the 1970s, flight attendants have urged the FAA to include them in this protection. Flight attendants who are fortunate enough to have union representation can seek duty time limits through their collective bargaining agreements. However, with the proliferation of non-union carriers, the lack of federal guidelines poses a significant safety issue.

Flight attendants' safety responsibilities range from providing routine pre-flight briefings to emergency evacuations. In the event of an evacuation, they must rapidly determine which exits to use after assessing dangerous external conditions. They must use their physical as well as cognitive skills in deploying slides which may be damaged or malfunctioning, and assist passengers safely out of the exits. Flight attendants must cope with rapid depressurization, cabin fires, passenger illness or injury, attempted skyjackings, bomb threats, and other unusual situations. Since the U.S. commercial air fleet is the oldest in the developed world, cabin crews need to be even more vigilant throughout the flight for any signs of an impending emergency in the cabin. This necessity is clearly illustrated by two recent incidents. In the first incident, an Aloha Airlines' 737 lost much of its outer fuselage. In the other, a United Airlines' 747 lost a cargo door. Each aircraft had been in use for 19 years

131. *Id.* at 91.

132. *Rule Changes Would Pump $23 Billion into Economy, ATA Says, supra* note 129, at 309.

133. H.R. Rep. No. 128, 102d Cong., 2d Sess. 5 (1992).

134. *Id.* at 4.

and both incidents prompted a rapid depressurization and emergency evacuation.[135]

In the past 10 years, 94% of all major accidents involving U.S. carriers had survivors.[136] The fact that so many airline crashes are now survivable brings cabin safety in sharp focus. A flight attendant's ultimate responsibility is to ensure that all passengers who initially survive a crash are assisted to safety away from the aircraft. It is tragic to think that passengers who lived through a crash might die in the wreckage because the cabin crew was too fatigued to perform an emergency evacuation adequately.

The NTSB has urged the FAA to impose mandatory flight attendant duty times. Studies by the NTSB have identified fatigue as a contributing factor in rail, highway and marine accidents including the Exxon Valdez grounding in Alaska.[137] The Board recommended that DOT expedite a research program on the effects of fatigue and upgrade regulations governing hours of service for all transportation modes.[138]

The matter of excessive duty time is not hypothetical. Longer range aircraft, more international flights, and increased work rule concessions from labor have all contributed to longer duty days. Jet lag, rotating shifts, and changing time zones exacerbate the fatigue created by a series of work days that can last 12 or 14 hours or more, broken only by shortened rest periods. A rest period begins when the aircraft blocks in at the gate and ends when the flight attendant returns to the airport. It includes time in transit between airport and hotel, meals, attending to personal needs, and sleep. An eight hour rest period usually yields no more than four to five hours of sleep. Witnesses at subcommittee hearings in 1989 and 1991, testified to duty periods of up to fifty-three hours with little, if any, rest.[139] The NTSB report on the 1985 Galaxy Airlines accident in Reno, Nevada, disclosed that at the time of the accident the flight attendants had been on duty for over eighteen hours and were scheduled to continue for an additional seven hours.[140]

In 1989, the FAA conducted a study in which it reviewed flight attendant work records at five major, four national, seven regional, and five supplemental carriers. The study found industry-wide duty time and rest problems, including seventy-four cases in one month of domestic duty hours exceeding fourteen hours in the major carriers alone. With respect to regional carriers, the FAA identified 140 cases in one month where

135. Anthony Ramirez, *How Safe Are You in the Air?*, FORTUNE, May 22, 1989, at 75.
136. H.R. REP. No. 501, 102d Cong., 2d Sess. 1 (1992).
137. H.R. REP. No. 128, 102d Cong., 2d Sess. 6 (1992).
138. *Id.*
139. *Id.*
140. *Id.*

duty times exceeded fourteen hours.[141] Despite these findings, and the fact that twenty-three countries have established duty time limitations for flight attendants, the FAA has yet to promulgate such a rule.

In an attempt to fill the void, Congress proposed legislation establishing duty time limits for flight attendants as part of the 1993 Transportation Appropriations Bill. The legislation suggested limiting duty time on domestic and some international flights to fourteen hours with a minimum rest period of ten hours.[142] On September 24, 1992, the duty-time provision was removed from the appropriations bill due to a threatened veto by President Bush.[143]

U.S. carriers have consistently opposed flight attendant duty times based on cost considerations. Anthony Broderick, Federal Aviation Administrator for Regulation and Certification, estimated that record keeping alone would cost the airline industry $1 million a year.[144] The Air Transport Association estimated that the total monthly cost of flight attendant duty time limits would be approximately $2.5 million for an international carrier with 10,000 flight attendants.[145] This figure includes wage and benefit costs incurred by hiring additional flight attendants, as well as increased lodging and per diem expenses.

An FAA summary of evacuation and evacuation-related occurrences between 1975 and 1990 revealed over 40,000 occurrences in which flight attendant response was a factor in passenger survival.[146] Although it may seem unconscionable to put a value on human life, monetary figures are used to provide government officials with a benchmark comparison of the expected safety benefits of rulemaking actions. Accordingly, the value of every statistical fatality avoided in an airline accident is estimated at $1.5 million, while every serious injury avoided is estimated at $640,000.[147]

The Federal Aviation Act of 1958 demands the highest degree of safety from the airline industry and the FAA.[148] It does not allow *only* that safety which the airlines are willing to pay for. Executive Order

141. *Id.*

142. *Flight Attendant Duty Time Limits Killed by House and Senate Conferees*, BNA WASHINGTON INSIDER, Sept. 28, 1992, at 1.

143. *Id.*

144. *Limitations on Flight Attendant Duty Times: Hearing on H.R. 14 Hearing Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 102d Cong., 1st Sess. 8 (1991) (statement of Anthony Broderick, Federal Aviation Administrator for Regulation and Certification).

145. *Flight Attendant Duty Time Limitations: Hearings on H.R. 14 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 102d Cong., 1st Sess. 83 (1991).

146. *Id.* at 119.

147. *Id.* at 120.

148. Federal Aviation Act of 1958, Public Law 85-726, §§ 102-103, 72 Stat. 731, 740 (1958).

12,291, signed by President Reagan, requires that new regulations show a positive economic benefit before being issued. Because of the expense that fleet-wide safety improvements can entail, some safety measures may no longer be justified on a traditional cost-benefit basis. The order directs federal agencies to promulgate new regulations or modify existing ones only if potential benefits to society outweigh potential costs. However, unfavorable cost finding should not automatically exempt the airlines from providing the flying public with the highest possible level of safety.

There appears to be no logical difference between the risks posed by a flight attendant under the influence and an entire cabin crew too exhausted to respond to an emergency effectively. Both are intolerable safety hazards.

VI. CONCLUSION

In conclusion, labor disputes have soared since deregulation, and morale, along with benefits, has plummeted. Although the Airline Deregulation Act was intended to restrict government intervention in airline management and promote a *laissez faire* approach, it is obvious that the government is still actively exercising its regulatory functions by promulgating rules on everything from the color of airline crew uniforms (navy blue), to employee background checks, to drug and alcohol testing. Presumably such regulations are being enacted to protect the public interest and further safety.

Beginning with its response to the air traffic controllers strike in 1981, the government has leaned heavily toward management in the resolution of aviation-related labor disputes. This is its prerogative. But in the airline industry, where the well-being of the public is involved, the emphasis should be on putting passenger safety and comfort above politics bias. Moderate government intervention designed to establish a harmonious and stable work environment for aviation employees will be a step toward reaching this goal.