Recent Decision

Air Line Pilots Association, International v. United Air Lines, Inc.

I. INTRODUCTION

On August 1, 1985, the United States District Court for the Northern District of Illinois, Eastern Division, handed down its decision in *Air Line Pilots Association, International v. United Air Lines, Inc.*.[1] The case grew out of certain unresolved back-to-work issues relating to a month-long pilot's strike.[2] In late September 1986, the decision was affirmed in part and reversed in part by the Court of Appeals for the Seventh Circuit.[3]

The Court of Appeals upheld the District Court's determination that United Air Lines' ("United") attempted strike-related rebid of pilot positions violated the Railway Labor Act ("RLA"),[4] but that the hiring of per-

1. 614 F. Supp. 1020 (N.D. Ill. 1985).
2. *Id.* at 1023.
3. Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc., 802 F.2d 886 (7th Cir. 1986).
4. 45 U.S.C. §§ 151 *et seq.* (1982).

manent, fleet-qualified replacement pilots at guaranteed salaries did not.[5] It reversed the District Court's conclusion that trained "pre-hires," whose reporting date corresponded with the first day of the strike and who chose to honor the picket lines, were employees under the RLA.[6] The effect of this reversal was the rejection of the group's entitlement to preferential reinstatement for subsequently available positions.[7]

The purpose of this paper is to provide a detailed examination of the Seventh Circuit's decision through its application of provisions of the RLA to the arguments of the parties.

II. Background of the Decision

A. *Parties*

Air Line Pilots Association, International ("ALPA") is an unincorporated labor organization which is the exclusive collective bargaining representative under the RLA for United's pilots.[8] Representation of United's pilots is controlled by the UAL-MEC (Master Executive Council) which consists of three members elected from each of nine pilot domiciles.[9]

United is a corporation whose principal place of business and headquarters are located in the Northern District of Illinois.[10] It is authorized to engage in the business of providing interstate and foreign air service pursuant to certificates of public convenience and necessity issued under the Federal Aviation Act of 1958, as amended.[11]

B. *Events Preceding the Strike*

Over the years, ALPA and United have successfully negotiated collective bargaining agreements. The agreement in effect prior to the strike was executed in October 1981. Its duration was for two years with automatic renewal each October 1 thereafter, unless one of the parties served a written notice of change at least sixty days prior to October 1.[12] By agreement, both parties extended the October 1, 1983 deadline to April

5. *Supra* note 3, at 917.
6. *Id.*
7. *Id.*
8. Complaint Under the Railway Labor Act at 1, Air Line Pilots Ass'n Int'l v. United Air Lines, Inc., 614 F. Supp. 1020 (N.D. Ill. 1985) (docket #85C4765).
9. Findings of Fact, *Air Line Pilots Ass'n., Int'l*, *supra* note 1, at 1023. United pilots operate from bases known as domiciles from which a pilot's assignment begins and ends. As of the strike date these domiciles were: Chicago, Cleveland, Denver, Honolulu, Los Angeles, San Francisco, Seattle, Miami, and Washington. *Supra* note 3, at 891.
10. Complaint at 1.
11. 49 U.S.C. §§ 1303-1542 (1982).
12. *Supra* note 1, at 1024. The RLA requires a party in receipt of a notice seeking change in the agreement affecting pay, rules and working conditions to give at least 30 days written notice to the other. 45 U.S.C. § 156 (1982).

1984.[13]

In January 1984, both parties served written notice of change. The significant issues for negotiation included: new-hire pay rates, incumbent pilot compensation and assignment of cockpit seats.[14] However, as time went on it became apparent that the toughest issue on the table was United's request for a "new-hire pay scale." United believed that this was essential to make it cost-competitive with other airlines.[15]

Because the parties could not resolve this issue, the services of the National Mediation Board ("NMB") were invoked in August 1984.[16] As negotiations continued into the fall of 1984 with the NMB, United also began to develop a contingency plan in the event of a strike. The objectives of this "Operations Adjustment Plan" were to break the strike on terms beneficial to United.[17] The plan as communicated to United Pilots included changes designed to lure strikers across the picket lines. One such change was the so-called "super-seniority" plan to allow working pilots the right to bid for positions opened up by the strike thus "leapfrogging" over more senior striking pilots.[18] Another was to hire permanent, fleet-qualified replacement pilots at guaranteed annual salaries of $75,000 for Captains and $50,000 for First Officers. These salary levels were promised even if the replacements were later reassigned to lower post-strike positions.[19]

At the same time these contingencies were being contemplated, United which had last hired new pilots in 1977-1979, began to feel the pinch of a pilot shortage.[20] In an effort to correct this deficiency, while at the same time not jeopardize "new-hire pay scale" negotiations, United decided to "pre-train" several hundred applicants ("the Group of 500") who would be offered "formal employment" once a cost-competitive agreement had been secured.[21] These student pilots executed a "Flight Officers Training Agreement" which provided flight training without charge and thirty dollars per day for expenses during the course of training. Under the terms of the contract, student pilots were required to agree that they were not to be employees of United, but would "constitute a pool

13. *Supra* note 1, at 1024.

14. *Id.*

15. *Id.* The Court stressed that though United had an operating profit of over $500 million in 1984, there had been losses over the last five years. *Id.*

16. The RLA provides that either party may request the services of the NMB, or the NMB may proffer its services, *sua sponte*, whenever a major dispute is not adjusted by the parties in conference. 45 U.S.C. § 155 (1982).

17. *Supra* note 1, at 1025.

18. *Supra* note 3, at 893.

19. *Id.*

20. *Supra* note 1, at 1025.

21. *Id.* at 1025-1026.

of trained candidates for Flight Officer employment which United Air Lines may employ, if need, within twelve months of graduation."[22]

On April 15, 1985, the NMB, after eight months of negotiations, declared an impasse.[23] The next day the thirty-day "cooling off" period began.[24] During this period United offered employment to approximately 347 of the Group of 500 who had completed training. Their report date was May 17, 1985, "whether or not there was a strike".[25] Subsequent communications to these trainees confirmed that employment would be effective May 17, 1987, and specifically requested that they report to United's Training Center in Denver, Colorado at 0800 hours, May 17.[26] Although testimony in the District Court revealed that United had not intended that the Group of 500 be "cross-overs" in a strike, as the deadline approached United informed them that "if they did not work on May 17, they would not work for United in the future."[27]

On May 16, 1985, ALPA filed an action in District Court alleging that United had violated, or was about to violate, several provisions of the RLA through actions taken during the contract negotiations, as well as its implementation of the "Operations Adjustment Plan."[28] At 12:01 a.m. (EDT) on May 17, 1985, ALPA declared a strike of United's pilots;[29] that same day ALPA filed motions for preliminary injunctions pursuant to the Norris-Laguardia Act.[30]

By May 20, 1985, United resumed negotiations with ALPA and within two or three days concluded a tentative agreement on the "new-hire pay scale."[31] Accord as to the terms of back-to-work agreement proved more difficult. It was not until June 14, 1985 that the UAL-MEC ratified both the tentative economic agreement and the back-to-work agreement, thus ending the strike. Both parties agreed that ALPA's unresolved claims concerning the Group of 500, the pilot rebid and salaries for the permanent replacement pilots would be pursued by ALPA in Federal

22. *Id.* at 1026. Prior to this agreement, student pilots were considered employees from the first day of training, paid at rates established under the existing agreement and accrued seniority from the date of hire.

23. *Supra* note 3, at 893.

24. The RLA prohibits any changes in pre-dispute rates of pay, rules, or working conditions for 30 days after the NMB has notified the parties in writing that mediatory efforts have failed. 45 U.S.C. § 155.

25. *Supra* note 1, at 1027.

26. *Id.*

27. *Id.*

28. Complaint at 2-7.

29. *Supra* note 1, at 1023.

30. 45 U.S.C. §§ 101 *et seq.* (1982). ALPA sought to enjoin United from, *inter alia*, hiring outside permanent replacement pilots, direct dealings with its pilot employees and any unilateral changes in rates of pay, rules or working conditions. Complaint at 7-8.

31. *Supra* note 1, at 1037.

Court.[32]

C. STATUTES

During the course of its deliberation, the Court of Appeals focused on the interrelationship and applicability of two statutes: The Railway Labor Act[33] and the National Labor Relations Act.[34] Though both statutes were designed to avoid the disruptive effects of industry work stoppages by promoting the peaceful resolution of labor disputes, they grew out of significantly different labor-management relationships. Therefore, the mechanisms set up to accomplish a common end were considerably different under each act.

1. THE RAILWAY LABOR ACT

The Railway Labor Act of 1926 was, in effect, a "private treaty."[35] It was drafted by a committee of railroad executives and representatives of railroad labor, jointly presented to Congress, and overwhelmingly passed in the House of Representatives and the Senate.[36]

In 1934 the RLA was amended to bar "yellow dog" contracts,[37] and to restrict company-dominated unions. Additionally, rail carriers were precluded from influencing employee choice of representation as well as required to negotiate with certified representatives.[38] The amendments also established the National Mediation Board (NMB) as an independent executive branch agency to which the parties could look for help in stalled negotiations.[39]

In 1932 ALPA began lobbying efforts to bring the airlines under the RLA.[40] Although no carrier offered opposition to this move,[41] it was not until 1936 that RLA coverage was extended to the airline industry.[42] The airlines were finally included because of concern about the substantial economic effects resulting from labor disputes and strikes in that

32. *Id.* at 1023.

33. *Supra* note 4.

34. 29 U.S.C. §§ 151 *et seq.* (1982).

35. Arouca & Pruitt, *Transportation Labor Regulation: Is the Railway Labor Act or the National Labor Relations Act the Better Statutory Vehicle?* 36 LAB. L.J. 145, 149 (1985).

36. C. REHMUS, THE NATIONAL MEDIATION BOARD AT 50 4 (1984).

37. A contract whose terms require a worker not to join a union as a condition of employment.

38. REHMUS, *supra* note 36, at 6.

39. 45 U.S.C. § 154, First (1982). The NMB is composed of 3 members appointed by the President, not more than two of whom can be of the same political party. *Id.* Simultaneously created was the National Board of Adjustment to deal with disputes involving interpretation and application of existing agreements.

40. REHMUS, *supra* note 36, at 9.

41. *Id.*

42. 45 U.S.C. § 181.

industry.[43]

The RLA provides an orderly procedure for handling both major and minor disputes.[44] The thrust is toward voluntary settlement of issues, with an emphasis on mediation, if the parties cannot themselves adjust.[45]

A step-by-step process for major disputes is triggered by a thirty-day written notice of intended change in the agreement by one of the parties.[46] Parties who cannot settle a dispute concerning rates of pay, rules or working conditions may invoke the services of the NMB, or the NMB may proffer its services, if it finds a labor emergency exists.[47] If the NMB cannot resolve the controversy, it shall encourage, but not mandate, mutually agreed upon arbitration.[48] Assuming arbitration is rejected and no emergency board is created by the President, the parties must adhere to a thirty-day cooling-off period during which time neither may make major changes.[49]

In order to provide for orderly settlements, the *status quo* must be maintained pending exhaustion of all statutory procedures.[50] However, when this process fails "the policy of all natural labor legislation is to let loose the full economic power of each." For labor it is the "cherished right to strike;" for management it is the right to operate or at least try to operate.[51]

2. *The National Labor Relations Act*

In sharp contrast to the equal bargaining positions of railroads and their employees, the NLRA attempted to address problems in industries creating "great danger to workers and consumers" by the proliferation of employer-dominated unions.[52] Introduced as the Wagner Bill on March 1, 1934, in the face of industry hostility, the NLRA necessarily focused on

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43. Rehmus, *supra* note 36, at 10.

44. These terms are not specifically used in the statute. However, the courts have determined that major disputes involve intended changes in agreements affecting rates of pay, rules or working conditions. Minor disputes, on the other hand, pertain to differences over what has already been agreed upon, that is, employees' grievances on interpretation or application of the contract. *Empresa Ecuatoriana De Aviacion*, S.A. v. District Lodge No. 100, 690 F.2d 838, 842-843 (11th Cir. 1982), *cert. dismissed*, 463 U.S. 1250 (1983).

45. Rehmus, *supra* note 36, at 29.

46. 45 U.S.C. § 156 (1982).

47. *Id.* at § 155, First.

48. *Id.*

49. *Id.*

50. Florida E. Coast Ry. Co. v. Brotherhood of R.R. Trainmen, 336 F.2d 172, 181 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965).

51. *Id.*

52. National Labor Relations Board, 1 Legislative History of the National Labor Relations Act at 15 (1949).

enforcement.[53] To that end it set out certain activities which constituted unfair labor practices[54] and created an administrative agency, the National Labor Relations Board (NLRB), to prevent them.[55] The NLRA also created a duty, enforceable by the NLRB, on both parties to bargain in good faith.[56]

The NLRA was modeled after the RLA to the extent that it required employers to recognize duly chosen employee representatives and to deal with those representatives to reach satisfactory collective bargaining agreements.[57]

In 1947, the NLRA was amended by the Labor-Management Relations Act ("LMRA"), also known as the Taft-Hartley Act.[58] The LMRA was designed to solve two problems which remained despite the original Act: to reduce industrial disputes and to put employers and unions on equal footing.[59]

The NLRB prohibits, as does the RLA, either party from modifying an existing agreement until certain procedures have been followed. The party desiring change must:[60]

(a) serve written notice on the other 60 days prior to the contract expiration or 60 days before it proposes to make such change;
(b) offer to meet with the other party to negotiate a new or modified contract;
(c) notify the Federal Mediation and Conciliation Service within 30 days after written notice of the existing disputes;
(d) continue in force all the terms of the existing contract for 60 days after notice is given, or the expiration of the contract, whichever is greater.

Although labor's right to strike is explicitly recognized in the NLRA,[61] economic action by either side prior to the expiration of the 60 days is considered an unfair labor practice.[62] Claims may be brought to the NLRB which has the power to issue a complaint and hold a hearing on the matter.[63] The NLRB may also petition any U.S. Court of Appeals to en-

53. *Id.* at 1.
54. *Id.* at 3-4; 29 U.S.C. § 158 (1982).
55. *Id.* at 4-5; 29 U.S.C. § 160 (1982).
56. 29 U.S.C. § 158(d). Though the duty is implied in the RLA under 45 U.S.C. § 152, First, it seems to be just as enforceable as that of the NLRA. However, the absence of a specialized administrative agency and the courts' general hands off approach to the RLA has meant much less government intervention. *Supra* note 35, at 152.
57. However it should be noted that the NLRA specifically excluded anyone subject to the RLA from its coverage. 29 U.S.C. § 182.
58. 29 U.S.C. §§ 141 *et seq.* (1982).
59. *Id.* at §§ 141(b), 151.
60. *Id.* at § 158(d).
61. *Id.* at § 163.
62. The NLRA sets forth what constitutes unfair labor practices by both employers and unions. *Id.* at § 158(a), (b).
63. *Id.* at § 160(a), (b).

force its decision.[64]

In addition to the NLRB, the Taft-Hartley Act created the Federal Mediation and Conciliation Service to be used as a last resort by the parties.[65] The service may become involved in a controversy only where the dispute would cause substantial interruption to commerce.[66] In the event that a strike would cause a threatened or actual emergency, the Act provides a method for enjoying it.[67]

III. ARGUMENTS OF THE PARTIES

As stated earlier, three issues which grew out of the strike of ALPA against United were submitted for judicial determination. The first issue was United's strike plan to allow working pilots an opportunity to bid for vacancies left by striking pilots. The second issue involved United's hiring of permanent replacement pilots at guaranteed salaries. The final issue concerned the status of certain trained pre-hires (the Group of 500) whose reporting date was that of the strike, but who refused to cross the picket lines. Intertwined throughout the arguments on specific issues was the parties' basic disagreement about the applicability of the provisions of the NLRA to an industry covered by the RLA.

A. APPLICABILITY OF THE NATIONAL LABOR RELATIONS ACT TO PARTIES SUBJECT TO THE RAILWAY LABOR ACT

1. UNITED'S ARGUMENT: The most fundamental error committed by the District Court was its almost exclusive reliance on authorities interpreting the NLRA rather than the RLA.[68] The RLA is *sui generis* and cannot be read in *pari materia* with the provisions of the NLRA.[69] Citing a number of Supreme Court cases, United reiterated the maxim that the "nature and history of the transportation industry distinguished the RLA from the NLRA."[70] Quoting *Board of Railroad Trainmen v. Jacksonville Terminal Co.*, United pointed out that this history established that "the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes."[71]

Nowhere were the differences between the two acts more dramatic

64. *Id.* at § 160(3).
65. *Id.* at § 172.
66. *Id.* at § 173(b).
67. *Id.* at §§ 176, 178.
68. Appellant's Brief at 21-22, Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc., 802 F.2d 886 (7th Cir. 1986) (docket #85-2726, 2833).
69. *Id.* at 21.
70. *Id.* at 22.
71. 394 U.S. 369, 383 (1969).

than the statutory mechanisms for dealing with dispute resolution.[72] The RLA left the entire settlement to non-compulsory adjustment.[73] After the parties have exhausted the process calling for self-adjustment and mediation, they are free to resort to self-help measures.[74] These measures were inexplicit in the RLA, but absent specific standards, the more acceptable answer was to allow the parties to "employ the full range of whatever economic powers they can muster so long as its use conflicts with no other obligation imposed by law."[75]

United further noted that the NLRA, by contrast, continuously regulates the parties even after a bargaining impasse is reached by way of specific statutory "unfair labor practices."[76] Concluding that these proscriptions were in response to the embryonic nature of industries covered by the NLRA, United rejected the idea that such protection extended to the lawfulness of a carrier's exercise of its self-help rights.[77]

2. ALPA'S ARGUMENT: The purposes of both the NLRA and RLA identically protect employees' right to self-organize, to bargain collectively through their own representatives, and the right to belong to a labor union without suffering discrimination.[78] The RLA amendments which prohibited employer interference with those rights and the NLRA were introduced within the same month.[79] ALPA asserted that in the Senate debate, Senator Wagner himself confirmed the close relationship between the two acts.[80] Therefore, ALPA reasoned, those provisions of the NLRA containing identical terms and statements of purpose were entitled to "substantial consideration in determining the scope of RLA protection."[81]

B. Status of the Pre-Hire Pilot Trainees

1. UNITED'S ARGUMENT: The District Court reached its high-water mark in misinterpreting the RLA when it concluded that the pre-hire trainees were employees as of May 17, 1985. First, United contended, the District Court erred when it held that United violated Section 2, Fourth, of the RLA which prohibits employers from forcing employees to reject

72. Appellant's Brief at 24.
73. *Id.* at 25.
74. *Id.*
75. *Id.* at 26-27 (quoting *Board of R.R. Trainmen*, *supra* note 71, at 392-393).
76. Appellant's Brief at 25-26.
77. *Id.* at 27.
78. Appellee's Brief at 25, Air Line Pilots Ass'n Int'l. v. United Air Lines, Inc., 802 F.2d 886 (7th Cir. 1986) (docket #85-2726, 2833).
79. *Id.* at 26-27.
80. *Id.* at 27.
81. Specifically, ALPA pointed out that the sec. 7 Statement of Purpose in the NLRA was identical to sec. 7 of the RLA. Additionally, sec. 8(a)(3) of the NLRA and sec. 2, Fourth, of the RLA, both prohibited employer efforts to discourage union membership. *Id.* at 25 n.7.

union membership.[82] It further challenged the Court's reliance on the NLRA's unfair labor practice provisions for guidance in interpreting this section.[83] The legislative history of the 1934 amendments to the RLA confirmed, United argued, that Section 3, Fourth, was not intended to "state a broad charter of employee rights comparable to the unfair labor practices catalogued in the (NLRA), but was intended solely to prevent employers from coercing employees into joining unions favored by the carrier."[84]

Even if the RLA could be so broadly read, Section 2, Fourth, protected "employees" only.[85] The RLA specifically defined employees as "every pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers subject to its continuing authority to supervise and direct the manner of rendition of his service."[86]

The District Court held that none of the pre-hires were employees of United on May 16, but that they were on May 17. However, those of this group who did not report on May 17 never performed any work for United. Instead, they refused to perform any work and were never subject to United's continuing authority to control.[87] To support its claim, United cited an NMB decision, *Air Micronesia*, which involved trainees such as the Group of 500. In that case the NMB held:

> Clearly, a person who has been trained in the hope of a future job offer, but is free in interim to seek any other employment, and whose present availability is unknown, is not a person subject to the carrier's "authority to supervise and direct the manner of rendition of his service."[88]

2. ALPHA'S ARGUMENT: The District Court's application of the concept of common law offer and acceptance was correct in this case. The Group of 500 accepted unconditional offers of employment with an effective date of May 17, 1985. United merely confirmed that the trainee's change to permanent status would occur on the specified date.[89] This theory, ALPA contended, was consistent with the RLA definition of employee which "subsumed the common law background in which the employment concept developed."[90] Moreover, United's attempt to require the Group of 500 to cross the picket lines in order to physically report to

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82. Appellant's Brief at 29.

83. *Id.* at 30.

84. *Id.* at 31 (quoting Brady v. Trans World Airlines, Inc., 223 F. Supp. 361, 365 (D. Del. 1963), *aff'd*, 401 F.2d 87 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969)).

85. *Id.* at 34.

86. 45 U.S.C. § 181.

87. Appellant's Brief at 34.

88. 10 N.M.B. 11, 15 (1982).

89. Appellee's Brief at 32-33.

90. *Id.* at 33.

work was contrary to the policies of the RLA.[91]

ALPA challenged United's interpretation of the RLA definition of employee. It asserted that the absence of work or supervision was not determinative, since none of the strikers were supervised by United during the strike.[92] ALPA also noted that the Court of Appeals, in *Nashville, Chatanooga and Saint Louis Railway v. Railway Employees Department*,[93] had recognized as employees furloughed workers who performed no work for the carrier.[94]

ALPA distinguished the present case from that of the trainees in *Air Micronesia*[95] who had only the mere hope of an offer if an opening arose sometime in the future.[96] The Group of 500 had completed substantially the same training as other United new hires, had accepted United's offer of employment and even returned to Denver to report to work as requested.[97]

Additionally, ALPA challenge United's unique treatment of the Group of 500 as violative of the *status quo* provision of the RLA prohibiting either party from unilaterally changing rules, rates of pay or working conditions after service of a notice of change.[98] Further, ALPA argued, refusal by United to employ the Group of 500 who honored the picket lines was a violation of the RLA. Requiring them not to join a strike was tantamount to an agreement not to join a labor organization, because United was aware strikebreakers would not be allowed to become members of ALPA.[99]

B. COURT OF APPEALS: The Court of Appeals decided to give a *de novo* review of the District Court's conclusion on the Group of 500.[100] It reasoned that since there was no dispute regarding factual findings, the question was whether the District Court had applied the proper legal standard to those facts.[101]

The Court agreed with United that the RLA clearly and specifically defined employee. It relied on a plain meaning statutory construction and held that the RLA definition excluded giving the Group of 500 employee status.[102] The Group of 500 were "not seeking to resolve issues which arose during their employment nor (were) they concerned about benefits

91. *Id.* at 34.
92. *Id.* at 35.
93. 93 F.2d 340, 343 (6th Cir. 1937), *cert. denied*, 303 U.S. 649 (1938).
94. Appellee's Brief at 35.
95. *Supra* note 88.
96. Appellee's Brief at 39.
97. *Id.* at 38.
98. *Id.* at 40.
99. *Id.* at 45-46, n.28.
100. *Supra* note 3, at 911.
101. *Id.* at 910.
102. *Id.* at 912-913.

which accrued during that period. Rather, they [were] trying to interpret the RLA broadly so that they [would] be deemed employees even though they never began working for their alleged employer."[103] Absent a clear legislative intent to the contrary, the language of the RLA was conclusive.[104]

The Seventh Circuit also rejected ALPA's argument that requiring the Group of 500 to cross the picket line was tantamount to an agreement not to join a labor union. The Court held United was not responsible for discipline imposed by ALPA on its potential members.[105]

The Court declined to get to ALPA's argument that the special employment terms for the Group of 500 was a violation of the *status quo* provision of the RLA. That provision was intended to protect the *status quo* of rates of pay, rules and working conditions of "employees." The Group of 500 were never employees.[106]

C. Strike-Related Rebid

1. UNITED'S ARGUMENT: The strike-related rebid of the airlines was a lawful exercise by United of its post-exhaustion right to self-help.[107] United pointed out that even under NLRA "cross-overs" could be treated the same as any other permanent replacements hired by United and allowed to remain in their post-strike jobs.[108] Further, the rebid was the first step in United's rebuilding of the airlines. There was a strong business necessity not only to induce "cross-overs" but also to allow United to determine which jobs would need filling.[109]

United dismissed the District Court's use of cases interpreting the NLRA as helpful in determining a carrier's right to self-help. In doing so, United distinguished the present case from that of *NLRB v. Erie Transistor*,[110] in which the Court held that super-seniority so egregiously impaired the striking employees' rights that the harm far outweighed the employer's interest in continuing to operate. In that case the non-strikers were given a 20-year seniority bonus. Here, United argued, the rebidding pilots did not receive any seniority bonus and, thus, no insulation against layoffs in the event of a furlough.[111] To allow ALPA the use of its own economic weapons without a reciprocal right by United to rebuilt the air-

103. *Id.* at 912.
104. *Id.* at 913.
105. *Id.* at 915, n.20.
106. *Id.* at 917.
107. Appellant's Brief at 49.
108. *Id.*
109. *Id.* at 50.
110. 373 U.S. 221, 236-237 (1963).
111. Appellant's Brief at 53.

line, not only denied United the self-help provision of the RLA, but also interfered with its business judgment as to the best way to run the airline.[112]

United denied that its actions discriminated against strikers. The bid procedure was as consistent as it could be with United's practices.[113] Further, since the 1981 agreement had by its terms expired, benefits such as seniority rights had also terminated. Therefore, both parties were free to rock the boat.[114]

United's final argument on this issue was that ALPA, because of certain activities, was ineligible for injunctive relief on the question of the rebid because of "unclean hands."[115]

2. ALPHA'S ARGUMENT: The award of the bids, which amounted to "super-seniority," was illegal because of its potentially harmful effects on Union membership and activities. The rebid constituted reward for the loyal nonstriker and punishment for the strikers.[116]

United's argument, based on the theory that the rights to the rebid existed because of an expired contract, did not apply. Although all strikers had returned to their pre-strike positions, United still intended to implement the rebids when vacancies arose. Therefore, they constituted a discriminatory award of "super-seniority" during the terms of a new contract.[117] The issue was not what United could do during the strike, but what it planned to do after the strike was over.[118]

3. COURT OF APPEALS: The Court of Appeals accepted that it was inevitable during a strike that self-help measures employed by either party would adversely affect the other. The job of the Court, it continued, was to determine "whether the appropriate balance between competing rights was achieved."[119]

The District Court did not err in relying on cases interpreting the NLRA to conclude that United's rebid was unlawful. In order to be lawful under the RLA, self-help measures had to be shown to be reasonably

112. *Id.* at 52.

113. *Id.* at 16-20. The projected vacancies were advertized and awarded in order of seniority. The bids also did not result in a large number of junior pilots occupying better paying line positions. United pointed out that even before the strike, some eligible pilots failed to bid for higher positions because they preferred their present schedule. *Id.* at 18.

114. *Id.* at 57-60.

115. Appellant's Brief at 60-72. Specifically cited were ALPA's conditioning its contract ratification on a satisfactory back to work agreement for the flight attendants who honored the picket lines; a campaign to discourage travel agents by threats of a strike; and abuse of sick leave.

116. Appellee's Brief at 53.

117. *Id.* at 54-55, n.37.

118. *Id.* at 57.

119. *Supra* note 3, at 896-897.

necessary to keep the carrier operating.[120] In this case a business necessity was not shown for the rebid, since during the strike not a single position was filled as a result of it. On the other hand, the rebid did significant harm to the pilots who chose to strike.[121]

To United's final argument the Court admitted that the Norris-Laguardia Act disallowed injunctive relief to a party with "unclean hands."[122] However, United has produced no convincing evidence that ALPA had not bargained in good faith nor that any of ALPA's pre-strike activities, cited by United, were unlawful or harmed the airline.[123] Assuming, without deciding, that ALPA's activities were unlawful, the public interest imperatives of the RLA could "override the Norris-Laguardia Act's prohibition against granting injunctive relief to a party with 'unclean hands'."[124]

D. Permanent Replacement Pilots at Guaranteed Salaries

1. UNITED'S ARGUMENT: Salary offers to fleet-qualified, permanent replacement pilots were a lawful exercise of self-help and were supported by a legitimate business justification during the strike.[125] These salaries were designed to attract qualified replacements. They were in line with pay scales for comparable experience and training and, therefore, did not disadvantage striking pilots.[126] The salaries, in order to be effective to induce permanent replacement pilots to work during the strike, had to continue in effect after its end. Clearly, United argued, "an inducement is meaningless if it automatically terminated the moment the union chooses to end its strike."[127]

2. ALPA'S ARGUMENT: United's "super pay" contract with the permanent replacement pilots violated both the RLA's requirement to bargain in good faith and its prohibition against discriminatory employer conduct.[128]

United's duty to bargain in good faith required prior negotiations with ALPA over its decision to offer super-pay rates.[129] Moreover, even assuming, *arguendo*, a legitimate justification for such inducements, United discriminated against union members when it extended these salaries be-

120. *Id.* at 898 (citing *Florida E. Coast Railway*, *supra* note 50).
121. *Id.* at 898-899.
122. 29 U.S.C. § 108 (1982).
123. *Supra* note 3, at 902-904.
124. *Id.* at 904.
125. Appellant's Responsive Brief at 51-60, Air Line Pilots Ass'n Int'l. v. United Air Lines, Inc., 802 F.2d 886 (7th Cir. 1986) (docket #85-2726, 2833).
126. *Id.* at 52.
127. *Id.* at 62.
128. Appellee's Brief at 58.
129. *Id.* at 58-59.

yond the strike.[130] The permanency of the "super pay" was an ever-present reminder of the rewards for those who chose not to engage in protected activity and severely undermined future collective bargaining negotiations.[131]

3. COURT OF APPEALS: There is no question, the Court concluded, that United had the right to hire permanent strike replacements.[132] Therefore, ALPA's argument that United's offer to these replacements represented a *per se* violation of the duty to bargain in good faith was without merit.[133] As was acknowledged in *Capitol-Husting v. NLRB*, "[it] is settled that this duty does not extend to the terms and conditions of employment for replacements of striking pilots."[134]

The Seventh Circuit held that guaranteed salaries did not discriminate against striking pilots. The record showed that the salaries were less than those offered to similarly situated pilots before the strike.[135] Under the new contract, striking pilots retained their old positions at their same salaries. The guaranteed salaries had no effect on this. Additionally, guaranteed salaries had an identical effect on non-striking pilots.[136]

ALPA's argument that the guaranteed salaries should terminate at the end of the strike was misplaced. The Supreme Court has held that federal law does not preempt a permanent replacement's right to sue an employer to enforce a promise of employment.[137] In the present case, therefore, the RLA was not a bar to United's promise of a guaranteed salary to its replacement pilots.[138]

IV. COMMENTS AND CONCLUSIONS

Of the three judicial determinations made concerning the unresolved strike-related issues, by far the most controversial was that relating to the status of the Group of 500.

The Seventh Circuit, adhering to a strict statutory interpretation of the RLA definition of employee, held that the Group of 500 had to cross a picket line and physically report to work in order to establish the employer/employee relationship. In doing so it rejected the applicability of an NLRB case, on point, which concluded that a person may become an

130. *Id.* at 59.
131. *Id.* at 60.
132. *Supra* note 3, at 907.
133. *Id.* at 908.
134. 671 F.2d 237, 246 (7th Cir. 1982).
135. *Supra* note 3, at 908.
136. *Id.* at 909.
137. *See* Belknap, Inc. v. Hale, 463 U.S. 491 (1983).
138. *Supra* note 3, at 910.

employee, even if he refused to report to work because of a strike.[139]

If the reasoning of the Court of Appeals were carried to its logical conclusion, arguably the Group of 500 could have reported to work, immediately thereafter joined the strike, but at that point, have been statutorily protected from employer retaliation for participating in it. Absurd as this result may seem, the Seventh Circuit is not alone in its refusal to borrow from cases interpreting the NLRA where they directly conflict with the plain language of the RLA. The Fourth Circuit has held that such cross-use is appropriate to clear up statutory ambiguity, but is proscribed when "one statute contains a plain provision that the other does not."[140]

It is inevitable that the courts will continue to observe their canons of statutory construction so long as the exclusive language of the two acts exists. The solution to such interpretation, therefore, must necessarily be a legislative one. As some observers have noted, the separate development of the RLA and the NLRA grew out of "historical circumstances that are irrelevant in today's world."[141] Given the similar substantive provisions of both acts, perhaps it is time, as another observer noted, that the issue of consolidation of the RLA and the NLRA should be discussed.[142]

POSTSCRIPT

ALPA filed a petition for *certiorari* on the issue of the Group of 500 with the U.S. Supreme Court. The Group of 500 remained as United employees pending the decision. When *certiorari* was denied[143] ALPA and United met to negotiate the fate of the Group.

The result of the negotiations was a Letter of Agreement signed by ALPA and United on April 3, 1987. United agreed to extend employment offers to the Group of 500 with an adjusted seniority date from May 17, 1985 to November 9, 1985. The significance of this was to make the Group junior to all strike replacement pilots. ALPA agreed never to challenge the agreement in court, before an arbitrator or in future contract negotiations. Each member of the Group who accepted employment was required to sign a release forever discharging ALPA and United from any

139. NLRB v. New England Tank Indus., Inc., 302 F.2d 273 (1st Cir. 1962), *cert. denied*, 371 U.S. 875 (1962).

140. Nelson v. Piedmont Aviation, Inc. 750 F.2d 1234, 1237 (4th Cir. 1984), *cert. denied*, — U.S. —, 105 S. Ct. 2358 (1985).

141. H. LEVINSON, C. REHMUS, J. GOLDBERG & M. KAHN, COLLECTIVE BARGAINING AND TECHNOLOGICAL CHANGE IN AMERICAN TRANSPORTATION 466-467 (1971).

142. Arouca and Perritt, *supra* note 35, at 166.

143. Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc., 55 L.W. 3361, — U.S. — (1987).

claims or lawsuits relating to the Agreement.[144]

Gay M. Burrows

144. Letter of Agreement Between United Air Lines, Inc. and The Air Line Pilots in Service of United Air Lines As Represented by The Air Lines Pilots Association, International (April 3, 1987).