Protecting Airline Employees, Protecting the Public Interest

Bob Graham
ARTICLES

PROTECTING AIRLINE EMPLOYEES,
PROTECTING THE PUBLIC INTEREST

Hon. Bob Graham*

I. INTRODUCTION

From 1990 to June 1992, the U.S. Department of Labor has allocated $25.2 million in federal funds to retrain airline industry employees who lost jobs as a result of airline bankruptcies.1 The

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* United States Senator, D-Fla. Senator Graham would like to gratefully acknowledge the work of Ann Elise Hardison in completing this project.

collapse of two airlines, Eastern Airlines\textsuperscript{2} and Pan American Airlines\textsuperscript{3} resulted in a loss of over 14,000 airline jobs in Florida alone, a 51 percent decrease in air transportation employment for the area.\textsuperscript{4}

As a United States Senator from Florida, I have naturally taken a great interest in the airline industry and the people whose jobs depend on it. Historically, limited government intervention has fostered harmony in the airline industry, benefitting the greater public interest by maintaining a stable employment environment and ensuring uninterrupted commerce. This paper briefly reviews the evolution of federal government involvement in certain airline industry transactions and the merits of legislation proposed which calls for continued government intervention on behalf of labor in specific air route transactions.\textsuperscript{5}

II. CONGRESSIONAL ACTION ON BEHALF OF AIRLINE LABOR IN ROUTE TRANSACTIONS

A. Pre-Deregulation Congressional Action

Congressional interest in regulating transportation industry employment practices as a means of protecting the public interest has its


\textsuperscript{4} Letter from Frank Scruggs, Secretary, Florida Department of Labor and Employment Security, to Barbara J. Carroll, Grant Officer, Office of Grants and Contracts Management of the U.S. Department of Labor (Feb. 20, 1992).

In recent years, in addition to major airline bankruptcies, mergers have been occurring between international and American airlines. Janice Castro, \textit{Air Wars}, \textit{TIm}, Nov. 23, 1992 at 38-39. Some of the examples of the most recent mergers are those between KLM Royal Dutch Airlines and Northwest Airlines, and the proposed mergers between Continental Airlines and Air Canada, and most recently, British Airways and USAir. \textit{Id}. (This proposal was rejected by the United States because of disagreements with England over the opening of British markets. \textit{See Richard W. Stevenson, British Air Halts Plan to Purchase Big Stake in USAir}, N.Y. TIMES, Dec. 23, 1992, at A1). One of the major concerns surrounding these mergers is the effects they will have on U.S. jobs. Castro, supra, note 4 at 38-39 (quoting, Robert Crandall, Chairman of American Airlines, predicting that the British Airways-U.S. merger will send American jobs to London); \textit{see generally Agis Salpukas, Northwest Is Laying Off 1,043 More to Cut Costs}, N.Y. TIMES, Jan. 5, 1993, at D4.

\textsuperscript{5} S. 1565, 102d Cong., 1st Sess. (1991). S. 1565 was introduced to the Senate on July 26, 1991. The proposed bill was to amend the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1557 (1988), in order to ensure fair treatment of airline employees in connection with route transfers. However, S. 1565 was never enacted. For the text of this bill, \textit{see infra}, Appendix A.
 origins in the constitutional right granted to Congress to regulate interstate commerce. 6 To protect the public's interest in a free and uninterrupted flow of goods, Congress has developed a body of labor law designed to ensure the amicable resolution of labor disputes so as to prevent work stoppages. 7

For example, the Railway Labor Act of 1926, 8 which today governs labor relations in the airline industry, prescribes a prompt and orderly method for ending disputes concerning rates of pay and rules regarding working conditions for certain employees engaged in interstate commerce, and reflects Congressional intentions to avoid any interruption to commerce or to the operation of any carrier engaged therein. 9 The Fair Labor Standards Act of 1938 10 was premised on Congressional findings that the existence of labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well being of workers, threatens to burden commerce and the free flow of goods. 11

Congressional regulation of the airline industry began in 1926 with the enactment of the Air Commerce Act. 12 The first compre-

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hensive legislation regulating labor relations in the industry was the 1938 Civil Aeronautics Act\textsuperscript{13} which further forwarded the public interest in ensuring uninterrupted commerce and safe transportation by imposing economic regulations on the industry and establishing some basic protections for airline labor, such as maximum duty time and minimum pay requirements.\textsuperscript{14} It also subjected air carriers to the provisions of the Railway Labor Act.\textsuperscript{15}

Again in 1958, Congress enacted legislation regulating civil aviation so as to provide for the safe and efficient use of airspace by both civil and military aircraft.\textsuperscript{16} In addition to creating a structure for controlling entry and exit to the industry and regulating fares, the law established a process of approval for airline consolidations, mergers, and acquisitions.\textsuperscript{17} The Civil Aeronautics Board ("CAB") was given authority to approve a consolidation, merger, purchase, lease, operating contract, or acquisition of control if the Board determined that doing so was in the best public interest.\textsuperscript{18} The "public interest" test includes concern for the status of employees affected by the merger.\textsuperscript{19} Congress gave the Board authority to impose terms and conditions deemed "just and reasonable" on a route transaction to avoid work stoppages and to foster an amicable, and therefore safer, working environment for the flying public.\textsuperscript{20}

During the nearly forty years for which the CAB had the responsibility for approving airline consolidations, mergers, and related transactions, it regularly exercised its power to impose terms and

\begin{footnotes}
\textsuperscript{17} 49 U.S.C. § 1378(a) (1988).
\textsuperscript{18} 49 U.S.C. § 1378(b) (1988).
\textsuperscript{19} United-Western Acquisition of Air Carrier Property, 11 C.A.B. 701, 708 (1950), \textit{aff'd sub nom.}, Western Airlines \textit{v.} CAB, 194 F.2d 211 (9th Cir. 1952).
\textsuperscript{20} 49 U.S.C. § 1378(b) (1988). This section provides in part:
Unless, after a hearing, the Board finds that the transaction [consolidation, merger, acquisition of control] will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall, by order, approve such transaction, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe . . . .
\end{footnotes}
conditions on air carriers on behalf of airline labor. These mandated terms and conditions have been commonly known as "labor protective provisions," and include such requirements as integration of seniority lists, relocation assistance, and allowances for displacement or termination.

In 1961, the CAB set the precedent for the type of labor protective provisions to be imposed in the case of a merger, thereby granting route authority to a new carrier, in the United-Capital Merger Case. The mandated conditions of the merger included allowances to displaced employees based on the employee's salary and length of service, as well as integration of seniority lists, relocation of assistance, and arbitration of disputes. In 1972, these provisions were standardized in the Allegheny Mohawk Merger Case.

Three years later, in a 1975 decision, the CAB outlined their rationale for labor protective provisions in the airline industry.

The extraordinary exercise of the Board's discretionary power to invoke conditions for the protection of air carrier employees — protections not enjoyed by the great bulk of the U.S. labor force — does not turn on considerations of general employee welfare. Rather, it must be shown that the extent of employee impact is so great as to jeopardize the continued stability and efficiency of the operations of the affected carrier in terms of the ongoing relationship between a carrier and its labor force.

22. The original case in which the CAB implemented "labor protective provisions" was United-Western Acquisition of Air Carrier Property, 11 C.A.B. 701, aff'd sub nom., Western Airlines v. CAB, 194 F.2d 211 (9th Cir. 1952). In support of its decision to uphold labor protective provisions, the CAB relied on the ICC's upholding of similar provisions in the context of the railroad industry. For further support, the CAB relied on the Supreme Court decision, United States v. Lowden, 308 U.S. 225 (1936), in which the Court gave special consideration to "the national interests in the stability of the labor supply available . . . ." United-Western, 11 C.A.B. at 708.
23. Walls, supra note 21, at 851.
25. Thomas & Dooley, supra note 24, at 152.
29. Id.
B. Post-Deregulation Congressional Action

The landscape of the domestic airline industry changed dramatically when Congress voted for deregulation in 1978. The goal of deregulation was to stimulate competition, thereby providing more service and lower fares for airline passengers. The new law rewrote the public interest test which regulated the entry and exit of carriers into the market and substantially forced the CAB to retreat from regulating price route structures, route entry and exit of carriers, and a variety of air services. The CAB adopted the policy that airline employees covered by union contracts should now rely on the collective bargaining process for protection in the event of a merger. Since collective bargaining agreements do not survive a merger, the result of this policy is that employees have no protection, either from the labor protective provisions, or from the collective bargaining agreement. The public interest definition however, continued to


The Act was adamantly opposed to by organized labor. The opposition stemmed from a prediction that deregulation would cause unbridled competition, price slashing and unemployment leaving an oligopoly in control. This prediction ultimately bore itself out. P. DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION, 38-40 (1989). The cost cutting that accompanied deregulation was often borne by labor. Airline Labor Policies Change in Deregulated U.S. Industries, AV. WEEK & SPACE TECH., Nov. 12, 1984 at 190.

For a more general discussion of deregulation, see Michael A. Katz, The American Experience Under the Airline Deregulation Act of 1978 — An Airline Perspective, 6 HOFSTRA LAB. L.J. 87, 93-95 (1988) (discussing the rush of entrants, and subsequent exits, into the airline industry and development of the "hub and spoke" system, and such gimmicks as frequent flyer plans in order to create product loyalty).


33. See e.g., Piedmont-Empire Acquisition, DOT Order No. 86-1-45 (1986) (denying imposition of labor protective provisions because the level of airline employee benefits should be determined by the collective bargaining process); Texas Int'l-Nat'l Acquisition, DOT Order No. 79-12-163 (1979) at 67.

34. Walls, supra note 21, at 855. In 1985, the CAB's authority to approve mergers and
include references to the need to ensure “fair wages and equitable working conditions” and an allowance for the CAB to modify the terms of a transaction to ensure such transaction is in the public interest.

In considering the legislation, the Senate Commerce Committee debated the potential effects deregulation would have on airline labor. The Committee stated in a report accompanying the bill that “. . . Congress, on behalf of the American People, must ensure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority - the airline employees and their families who have relied on the present system.” To fulfill this sense of obligation to labor, the Committee debated whether to create a system of government-financed compensation for displaced workers or to require carriers moving into new markets to provide job opportunities to those displaced by the transactions. The decision was made to authorize monthly assistance payments to individuals whom the Secretary of Transportation determined had been employed for at least four years by an air carrier and whose job was lost as a result of a bankruptcy or major contraction of an air carrier.

Senator Edward Zorinsky (D-NB) argued in dissenting comments on the Committee report, “I find it abhorrent that the nation’s taxpayers are being called upon to bail out the executives of the nation’s airline industry for their bad business decisions by compensating their employees.” Zorinsky advocated giving displaced workers priority

acquisitions shifted to the Department of Transportation (“DOT”). 49 U.S.C. § 1378 (1988). The DOT decided to impose labor protective provisions, “only where necessary to prevent labor strife that would disrupt the nation’s air transport system.” Midway-Air Florida Acquisition, DOT Order No. 85-6-33 (1985). In a fashion similar to the CAB after deregulation, the DOT made known its preference for collective bargaining taking care of labor disputes, as opposed to government regulation. Id. In spite of the lack of protection this leaves workers in the event of a merger, this policy has been adopted by the federal courts. E.g., Airline Pilots Ass’n v. Department of Transp., 791 F.2d 172 (D.C. Cir. 1986). In 1989, the DOT’s authority in this area was transferred to the Department of Justice. 49 U.S.C. § 1551(a)(7) (1988).

39. Id. at 113-17.
in the hiring process of expanding carriers and a revised version of his proposal was included in the law.\textsuperscript{42} This provision, commonly referred to as the “Duty to Hire” provision, provided that any individual who met the eligibility for assistance requirements in the dislocated worker’s program discussed above would have the first right of hire, regardless of age, in his occupational specialty by any other air carrier hiring additional employees for a period of ten years.\textsuperscript{43} The law required the Secretary of Transportation to encourage negotiations between air carriers and representatives of eligible employees with respect to rehiring practices and seniority.\textsuperscript{44} However, the labor protective provisions were never fully implemented by the Secretary of Labor due to legal disputes over a “legislative veto” provision of the act.\textsuperscript{45}

During the Senate floor debate on the bill, the sense of the Senate became clear when it defeated an amendment by Senator Orin Hatch (R-UT) to strike the employee protection provision and substitute, “It is the policy of the United States not to approve employee protective provisions.”\textsuperscript{46} The amendment was resoundly defeated, 85-7.\textsuperscript{47} However, the Senate also exercised caution in its level of government-financed assistance to the work force by defeating (54-37) an amendment offered by Senator John Danforth (R-Mo.) which attempted to broaden the employee protective provisions.\textsuperscript{48}

In 1985, the U.S. Department of Transportation [hereinafter “DOT”] assumed responsibility for administering section 1378 of the Federal Aviation Act in 1985 in accordance with the Civil Aeronautics Board Sunset Act of 1984.\textsuperscript{49} The change in command was ac-

\begin{enumerate}
\item Id.
\item 124 CONG. REC. 10682 (1978).
\item Id.
\item Id. at 10681.
\item 49 U.S.C. § 1551(b) (1988).
\end{enumerate}
accompanied by a change in policy on the question of labor protective provisions. The DOT, under the Reagan Administration, implemented a new measuring stick for determining if and when labor protective provisions were needed. The new policy was outlined in 1985 by Matthew V. Scocozza, Assistant Secretary of Policy and International Affairs for the DOT, in testimony before the Senate Subcommittee on Aviation.

Scocozza testified that, in the deregulated airline industry, labor strife on one airline would not, except in unusual circumstances, threaten the stability of the entire air transportation system. Therefore, he argued, the goal of unencumbered commerce having been ensured by the act of deregulating the airlines, is that private parties to proposed transactions should be left to negotiate any issues free of government intervention.

In sharp disagreement with the new Administration policy, Representative Norman Mineta (D-Ca) and 34 members of the House Public Works and Transportation Committee introduced legislation on May 15, 1986 to require the Secretary of Transportation to impose labor protective provisions to mitigate adverse consequences of mergers, acquisitions, and other major transactions which have an impact on airline employees. The bill was debated and passed the House with bipartisan support by 329-72 on September 16, 1986. However, sentiment in the Republican-controlled Senate was more in line with the Reagan Administration policy, and legislation similar to the...
Mineta proposal was procedurally blocked by a 49-49 vote.56

III. NEED FOR ADDITIONAL CONGRESSIONAL ACTION

The result of allowing the free market to control entry and exit into the airline industry has resulted in nearly every U.S. airline company either changing ownership, being threatened with a takeover, or going bankrupt.57

Of the U.S. carriers formed after deregulation, only one survives—America West.58 Nine large airlines now control nearly 94 percent of


57. Kenneth R. Sheets & Peter Dworkin, A Dogfight for Dominance of the Skies, U.S. NEWS & WORLD REP., Sept. 11, 1989, at 54. Since deregulation, mergers have occurred at an astounding rate in the United States. Continental Airlines alone is a composition of Continental, Texas Air, Texas International, New York Air, People's Express (which in itself was a combination of Frontier, Britten, and PBA), Eastern (which had acquired Braniff's Latin American Routes) and Rockey Mountain Airlines. Paul Stephen Dempsey & Andrew Goetz, Airline Deregulation Ten Years After: Something Foul in the Air, 54 J. AIR L. & COM. 927, 938-39 (1989). Additionally, Delta and Western merged to form Delta, USAir is comprised of USAir, PSA, and Piedmont. Northwest Airlines is a result of mergers between Northwest and Republic (which itself is comprised of Northwest Central, Southern, and Hughes Airwest). Id.

Airline mergers have occurred with such frequency, and have had such a profound effect on the industry, that even Alfred Kahn, appointed as chairman of the CAB in 1978 by President Carter, and a major proponent of deregulation, criticized the Department of Transportation for its indefensible complacency in permitting some of these transactions. Alfred Kahn, Airline Deregulation - Mixed Bag, But a Clear Success Nevertheless, 16 TRANSP. L.J. 229, 234 (1988); see also, Dempsey & Goetz, 54 J. AIR L. & COM. at 940 (elaborating on Kahn's criticism of the Department of Transportation, recognizing that the allowance of individual airlines developing hubs in certain cities causes such a concentration in those cities that it forces other airlines out, and results in monopolistic effects, such as higher prices).

Several foreign airlines have also made connections with U.S. counterparts or at least have proposed to do so. Janice Castro, Air Wars, TIME, Nov. 23, 1992 at 38-39. Most recently, British Airways proposed to buy a 44% ownership of Pittsburgh-based USAir for $750 million. Id. (This proposed merger was eventually rejected by the United States because of disagreements over the opening of British markets to American companies. See Richard W. Stevenson, British Air Halts Plan to Purchase Big Stake in USAir, N.Y. TIMES, Dec. 23, 1992, at A1.) KLM Royal Dutch Airlines owns a 49% equity stake in Minnesota-based Northwest Airlines. Castro, supra, note 57 at 38-39. A group of investors led by Air Canada have proposed to invest $450 million in Continental Airlines (which is currently in Chapter 11 proceedings). Id. In spite of this merger, Northwest is still having financial difficulties. Agis Salpukas, Northwest is Laying Off 1,043 More To Cut Costs, N.Y. TIMES, Jan. 5, 1993, at D4. Singapore Airlines and Swissair each own 5% of Delta's stock and American and Canadian Airlines International have held talks. Castro, supra note 57 at 38-39. These world-wide negotiations in the airline industry are so prevalent that the Airline Monitor's Greenslet expects six or eight key global alliances to take shape before the end of the decade. Id.

58. Anthony L. Velocci, Jr., Tight Money Putting Financial Noose on America West, Continental and TWA, AV. WEEK & SPACE TECH., Apr. 6, 1992 at 40.
The market share of the five largest airlines has grown from just above 60 percent in 1978 to 73 percent in 1990. Since 1990, U.S. airlines have lost $6.5 billion, more money than they have made in all of their history.

The fate of People's Express is a good example of the state of the industry post deregulation. The airline opened in 1981 as a no-frills, low cost flier. Larger competitors began offering discounter fares and chipping away at People's Express markets and by 1986, the small airline was in financial difficulty. Frontier Airlines failed in their attempts to take-over People's Express, but Texas Air Corporation succeeded in taking-over People's Express just before it would have run out of cash.

Texas Air then took over Eastern Airlines, but Eastern was forced to file for bankruptcy protection on March 9, 1989 and failed to emerge from bankruptcy, liquidating on January 19, 1991. Texas Air, now renamed Continental Airlines Holdings, filed for Chapter 11 protection on December 3, 1990.

Since deregulation, over 150 airlines have filed for bankruptcy, with Eastern Airlines, Midway Airlines and Pan American World Airways all liquidating in the course of the last year. In the summer of 1992, Continental Airlines, Trans World Airlines,

59. Christopher P. Fotos, American's Fare Cuts Fuel Attacks on Transportation Policy, AV. WEEK & SPACE TECH., June 15, 1992, at 41. The big three airlines in the United States are United, American, and Delta.
63. Id.
64. Id.
65. Id.
66. Id.
68. Id.
74. In re Continental Airlines, 928 F.2d 127 (9th Cir. 1991).
and America West all remained in Chapter 11 Bankruptcy. The costs to the airline industry from this major restructuring have been, in large part, passed on to labor and, ultimately, to the American taxpayer in the form of unemployment compensation payments and worker retraining benefits. Management has repeatedly implemented furloughs, asked for pay cuts and other concessions from labor. Labor representatives, such as the Air Line Pilots Association, the AFL-CIO, and the International Association of Machinists, have continued to seek Congressional intervention to save jobs and benefits for their members. In testimony before the Senate Aviation Committee in 1986, a representative of three major unions testified, 

"Employees are economically injured with the implementation of every route transfer, every merger, and every acquisition. Until enhancement of the Deregulation Act of 1978, the CAB imposed the so-called Allegheny-Mohawk conditions or its predecessor formulae in each such case. It is our position that the Congress should require their imposition in all such future cases. Every ground which supported their use in the past exists today. Indeed, with the air transport industry in near chaos with the predatory competition that exists among the carriers, such protective arrangements are more necessary today than ever before."

In a 1986 hearing of the House Committee on Public Works and Transportation, Congressman Norman Mineta eloquently reiterated the chief reason for the historical government involvement in labor-man-

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78. Dempsey & Goetz, supra note 57, at 943.
80. Dempsey & Goetz, supra note 57, at 943.
agreement relations in the air transportation industry.\textsuperscript{83}

Although airline safety is subject to Government regulation, Government inspectors cannot directly oversee every flight or every maintenance action . . . . An airline work force which is being treated unfairly and which is operating under a state of siege with management may be unable to give its full attention to safety. For these reasons, the Airline Deregulation Act\textsuperscript{84} and subsequent legislation have included provisions to ensure fair treatment of airline employees.\textsuperscript{85}

IV. REDEFINING THE “PUBLIC INTEREST” REQUIREMENT FOR INTERNATIONAL ROUTE TRANSACTIONS

Due to the direct impact of international route transfers from one airline to another on thousands of Floridians and New Yorkers, Senator Alfonse D’Amato and I introduced legislation (S. 1565) in July 1991 similar to the proposal put forward by Senator Zorinsky nearly 15 years ago.\textsuperscript{86} Identical legislation was offered in the House of Representatives by Representative Tom Manton (H.R. 3138)\textsuperscript{87} and Representative Dante Fascell (H.R. 3173).\textsuperscript{88}

The goal of the legislation was to broaden the current narrow interpretation of the “public interest” test requirement for approval of international route transactions to include imposition of employee job protections. First, the bill requires that if jobs become available as a result of an air carrier acquiring new route authority, the carrier must offer those jobs first to the individuals who previously flew the route.\textsuperscript{89} Secondly, the bill extends the “Duty to Hire” provisions of the original Airline Deregulation Act of 1978 until 1995.\textsuperscript{90} S. 1565
does not mandate wage or work rule requirements or establish an elaborate system of federal compensation for dislocated workers.

On April 30, 1992, Senator Wendell Ford convened a hearing of the Senate Subcommittee on Aviation to review the merits of S. 1565. Witnesses included Senator D'Amato and myself, representatives of labor, industry, and the Administration.

Through testimony given by the Assistant Secretary for Policy and International Affairs, Jeffrey Shane, the DOT maintained in its testimony that the airline industry is deregulated and, therefore, job protection provisions are inappropriate. "We see no justification for those burdens," Shane testified. "The airline labor market is working well, and there is no evidence that government intervention is needed to avoid disruptions to the national air transportation system."94

While this argument may be appropriate in the context of the domestic airline industry which has been largely deregulated, it is not relevant to legislation aimed specifically at international route authority transfers. The international airline industry remains highly regulated by numerous acts of Congress.95 Before an air carrier can fly a plane from the United States to a foreign country or vice versa, it must receive the DOT approval through a process outlined by the


93. Id.

94. Id.

95. Examples of U.S. laws pertaining to international aviation include: The Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1557 (1988), which provides for the Civil Aeronautics Board as an agency of the United States, and creates the Federal Aviation Agency to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of airspace by both civil and military aircraft, as well as having other purposes; the International Aviation Facilities Act, 49 U.S.C. §§ 1151-1185 (1988), which is intended to encourage the development of an international system adapted to the needs of the foreign commerce of the United States as well as having other purposes; and the International Air Transportation Fair Competitive Practices Act of 1974, 49 U.S.C. § 1159(b) (1988), which amends the Federal Aviation Act of 1958 to deal with discriminatory and unfair competitive practices in international air transportation. Title IV, Section 1371(a) of the Federal Aviation Act of 1958 states that no air carrier shall engage in any air transportation unless there is in force a certificate issued by the Civil Aeronautics Board authorizing such carrier. Section 1371 details the certificate application and authorization process. On January 1, 1985 authority was transferred from the Civil Aeronautics Board to the Department of Transportation, in accordance with Section 1601 of the Federal Aviation Act of 1958.
Federal Aviation Act of 1958. Once approval is granted, the DOT remains highly involved in implementation of that authority.

Shane's argument also ignores the fact that the executive branch has also taken positions supporting regulation of labor in the airline industry, such as the mandatory retirement age for pilots required by the Code of Federal Regulations.

Shane's testimony further argued that it is in the best public interest for the DOT to become involved on labor issues only if the stability of the national air transportation system is threatened or special circumstances exist that require protective provisions to encourage fair and equitable working conditions. "That approach reflects our conviction that labor management issues are best resolved by the parties themselves."

However, current law does not require the acquiring airline in an international route transfer to negotiate or even meet with labor to discuss employee protections. There is no contractual device by which employee groups can secure direct assurance of job protection from an acquiring airline. Nor, historically, have acquiring airlines reached out to negotiate with labor. Therefore, the current law does not facilitate any meaningful discussion on what will happen to the original employees on an airline route when route authority is

97. *See Don Phillips, Delta Was Ready - But Government Wasn't*, WASH. POST, Aug. 31, 1992, at A17. Article chronicles the bureaucracy Delta Airlines faced when trying to get the DOT to approve a change in flights pattern from Frankfurt, Germany to New Delhi, India.
98. 14 CFR § 121.385(c)(1) (1992), states that "No person may serve as a pilot of an airplane engaged in operations under this part if that person has reached his 60th birthday." *See e.g.*, Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985).
100. *Id.*
102. *Id.*
103. *Id.* at 884, n.233. "In 1933, Century Airlines announced a cut in pilot’s pay of $200 a month. Pilots were ordered to resign and reapply for employment at the new rate." *Id.* In September 1983, Continental filed a voluntary Chapter 11 petition in bankruptcy and then "announced the termination of two-thirds of its unionized employees, unilaterally abrogated its union contracts, and implemented wage and benefit cuts of 50 percent, eradicated seniority, and established work rules never before so much as reported to the union." *Joint Hearing Before the Subcomm. on Labor-Management Relations and Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 6 (1983); *Walls, supra note 21, at 883."
transferred to a new carrier. 104

At the Senate hearing, airline industry representatives argued that governmental intervention on behalf of employees affected by the transfer of international route authority will unnecessarily impose substantial costs on airlines and their employees. 105 "Adding to the deliberations of a potential acquiring carrier a reckoning of the costs of statutory labor protecting requirements will not make such transactions more attractive," testified James E. Landry, Sr. Vice President of the Air Transport Association of America. 106 "If the carrier seeking to dispose of the route is in financial distress, a potential acquiring carrier that views the labor protection requirement as making the acquisition too expensive will simply forgo purchasing the route." 107

If the acquiring carrier refuses to take employees when it acquires a route, the "costs" Mr. Landry refers to are simply transferred to the public purse. In the absence of job protection legislation, the U.S. taxpayers are left paying the costs of unemployment and retraining expenses while the acquiring carriers profit from new, valuable assets. For example, as previously mentioned, between June of 1990 and June of 1992, the Department of Labor spent $22.8 million retraining dislocated airline employees. 108

In testimony supporting the legislation, Victoria L. Frankovich of the Independent Federation of Flight Attendants wisely suggested that the proposed job protection provisions in S. 1565 should be considered as a kind of "user fee." 109 "Private firms are now profiting from the sale of government created assets and, at the same time, imposing enormous costs on federal and state governments. It would be more efficient to reallocate responsibilities so that the airline industry takes reasonable steps to avoid some of these costs by hiring experienced airline workers." 110

106. Id.
107. Id.
108. See supra note 1.
110. Id.
A study by the Congressional Research Service indicates that most developed countries have laws providing some level of protection to employees when ownership of a business changes hands.\textsuperscript{111} For example, the European Economic Community Code requires that the transfer of an undertaking, business, or part of a business, shall not in itself constitute grounds for dismissal by the transferor or the transferee.\textsuperscript{112} French law provides that in the case of a sale or merger of a business, all employment agreements between employees and the new employer remain in effect as they were previously.\textsuperscript{113} The United Kingdom prohibits dismissals of employees for a reason connected with the transfer.\textsuperscript{114}

\section*{V. CONCLUSION}

S. 1565 is predicated on the long-established Congressional dictate that transactions in the airline industry should be based on what is in the best public interest. Uninterrupted flow of goods and a safe transportation system are certainly high public interest priorities. Maintaining an economically viable airline industry is also a high public interest priority. However, as the late Senator Zorinsky recognized, ensuring job opportunities for experienced airline workers, rather than unemployment benefits, is also a high public interest priority.\textsuperscript{115}

\section*{VI. EPILOGUE}

During consideration of the Department of Transportation funding bill for fiscal year 1993, Senator Christopher Bond (D-Mo) and I offered an amendment to the bill, the provisions of which were identical to S. 1565.\textsuperscript{116} After consultation with several interested Senators, the amendment was modified by Senator John Danforth.\textsuperscript{117} The new proposal eliminated the mandate that jobs be transferred on an
availability basis in international route transactions and instead mandated that the DOT give priority consideration to carriers proposing to acquire an international route which offered to make reasonable efforts to hire the employees with the routes.\textsuperscript{118} The amendment was adopted by voice vote.\textsuperscript{119}

In a September 22, 1992 letter to Senator Robert Dole (D-KS), the Director of the Office of Management and Budget highlighted the Danforth amendment as being an item which, if included in the final funding bill, could be grounds for a presidential veto.\textsuperscript{120} Eager to complete work on the funding bill without antagonizing the President, the House and Senate conferees appointed by Congressional leadership to prepare the final bill for the President’s approval dropped the airline employee provision.\textsuperscript{121}

\begin{footnotes}
\item[118] Id.
\end{footnotes}
APPENDIX A

102d CONGRESS
1ST SESSION

S. 1565

To amend the Federal Aviation Act of 1958 to ensure fair treatment of airline employees in connection with route transfers.

IN THE SENATE OF THE UNITED STATES

JULY 26 (legislative day, JULY 8), 1991

Mr. GRAHAM (for himself and Mr. D'AMATO) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To amend the Federal Aviation Act of 1958 to ensure fair treatment of airline employees in connection with route transfers.

1 Be it enacted by the Senate and House of Representa-
2 tives of the United States of America in Congress assembled,
3 SECTION 1. EMPLOYEE CONSIDERATIONS IN AIRLINE
4 ROUTE TRANSFERS.
5 (a) IN GENERAL.—
6 (1) Title IV of the Federal Aviation Act of
7 1958 is amended by adding at the end of section
8 401(h) the following new paragraph:
“(4) EMPLOYEE CONSIDERATIONS.—(i) If a certificate transfer is approved, the air carrier to which the route authority is being transferred shall hire in each class or craft, no less than the number of employees from the air carrier transferring the certificate, in order of seniority, which the Secretary determines in the order approving the transfer are required to appropriately operate the certificate authority being transferred. The hired employees shall be afforded the seniority integration protections specified in Tiger International Seaboard Acquisition Case, CAB Docket 33712.

“(ii) On complaint by any employee or by the representative of any group of the employees affected by a transaction specified in subparagraph (i), the United States District Court for the district in which the complainant resides or has its principal place of business or for the District of Columbia, shall order the air carrier or carriers acquiring the route authority, or other persons, to provide the seniority integration protections specified in that paragraph. The pendency of a representation dispute before the National Mediation Board shall not deprive the court of jurisdiction. The court may assess against the surviving air carrier or carriers, reasonable attorneys’ fees and other litigation costs reasonably incurred
in any case under the section in which the complainant has substantially prevailed.”.

(b) DUTY TO HIRE PROTECTED EMPLOYEES.—Section 43 of the Airline Deregulation Act of 1978 is amended by deleting in subsection (d)(1) thereof the number “10” and inserting in place thereof the number “17”.

c) EFFECTIVE DATE.—The amendments made by subsections (a) shall apply with respect to any application filed with the Secretary of Transportation requesting approval of a transfer in whole or in part of any certificate on or after July 26, 1991.