

## LABOR POLICY AND THE AIRLINES' MUTUAL AID PACT

### *Air Line Pilots Association v. CAB, 502 F.2d 453 (D.C. Cir. 1974)*

In 1958, six airline carriers<sup>1</sup> formed a Mutual Aid Pact<sup>2</sup> that compensated members for operating losses incurred during strikes.<sup>3</sup> Petition-

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1. American Airlines, Inc.; Capital Airlines, Inc.; Eastern Airlines, Inc.; Pan American World Airways, Inc.; Trans World Airlines, Inc.; and United Air Lines, Inc.

2. Six Carrier Mutual Aid Pact, 29 C.A.B. 168 (1959). See generally Kahn, *Mutual Strike Aid in the Airlines*, 11 LAB. L.J. 595 (1960); Note, *Strike Insurance: An Analysis of the Legality of Interemployer Economic Aid Under Present Federal Regulation*, 38 N.Y.U.L. REV. 126 (1963); 60 COLUM. L. REV. 205 (1960); 35 IND. L.J. 491 (1960).

3. The original Pact provided financial assistance to members affected by strikes that were called prior to the exhaustion of Railway Labor Act (RLA) procedures, that sought settlement on terms contrary to or in excess of presidential Emergency Board recommendations, or that were otherwise unlawful. The RLA establishes procedures that route minor disputes to the National Air Transport Adjustment Board and major disputes to the National Mediation Board. See Railway Labor Act §§ 4, 5, 205, 45 U.S.C. §§ 154, 155, 185 (1970). If the National Mediation Board believes that an unsettled dispute threatens to interrupt interstate commerce so that transportation service will be denied to any part of the country, it may so notify the President, who in turn may appoint a board to investigate the dispute and issue a report. See Railway Labor Act § 10, 45 U.S.C. § 160 (1970).

Further, under the original Pact, only windfall payments representing the net profits realized by operating Pact members from strike-diverted traffic were within the scope of the agreement. Through a series of amendments, the carriers broadened the Pact to include all strikes except those in which Pact members acted illegally or refused to settle on terms equal to or less than Emergency Board recommendations. Supplemental payments of twenty-five percent of a struck carrier's normal operating expenses for strike-closed operations were added to the Pact's benefits. Under the evolving agreement, the liability of a member for supplemental payments was limited to one-half of one percent of that member's previous year's income. In 1969 the Pact was amended again; supplemental payments were increased to fifty percent for the initial stages of a strike, and the limit on individual carrier liability for these payments was raised to one percent. The administrative law judge disapproved the 1969 amendments, but was subsequently overruled by the Civil Aeronautics Board (CAB) in its 1973 order. *Airlines Mutual Aid Agreement*, — C.A.B. —, Order 73-2-110 (1973). For a history of the Pact, see *Airlines Mutual Aid Pact*, — C.A.B. —, Order 70-11-110 (1970) (order granting reconsideration in part and remanding for further hearing); *Airlines Mutual Aid Agreement*, — C.A.B. —, Order 70-7-114 (1970) (renewal); *Mutual Aid Pact*, — C.A.B. —, Order E-26000 (1967) (order directing hearing); *Mutual Aid Agreement*, 45 C.A.B. 209 (1966) (agreement between American Airlines, Inc., and Mohawk Airlines, Inc.); *Mutual Aid Pact Investigation*, 40 C.A.B. 559 (1964); *Mutual Aid Pact*, 31 C.A.B. 977 (1960) (order instituting investigation); *Six Carrier Mutual Aid Pact*, 29 C.A.B. 168, *reconsideration denied*, 30 C.A.B. 90 (1959).

ers<sup>4</sup> filed suit to review an order of the Civil Aeronautics Board<sup>5</sup> (CAB) approving increased Pact benefits and nonstruck-carrier liability for payments. The unions alleged<sup>6</sup> that the amended Pact<sup>7</sup> violated the national labor policy<sup>8</sup> and the Railway Labor Act<sup>9</sup> (RLA), and that there was no substantial evidence to support the CAB finding that the amended Pact was not adverse to the public interest.<sup>10</sup> The United States Court of Appeals for the District of Columbia Circuit affirmed the order and *held*: The Airlines' Mutual Aid Pact does not violate the national labor policy or the Railway Labor Act and the CAB finding about the public interest is not without substantial support.<sup>11</sup>

The goal of American labor legislation<sup>12</sup> is the maintenance of industrial peace.<sup>13</sup> The RLA, like other labor laws, seeks to achieve this goal

4. The Air Line Pilots Association International; the Air Line Dispatchers' Association; the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees; the Communication Workers of America; the Flight Engineers' International Association; the International Association of Machinists and Aerospace Workers; and the Transport Workers Union of America. The Allied Pilots Association and the Aircraft Mechanics Fraternal Association intervened.

5. Airlines Mutual Aid Agreement, — C.A.B. —, Order 73-2-110 (1973).

6. Air Line Pilots Ass'n v. CAB, 502 F.2d 453, 455 (D.C. Cir. 1974). The petitioners also contested a 1971 Pact amendment allowing participation by local service carriers in the Pact. The court refused to consider alleged antitrust violations because the unions had not previously raised them before the CAB, *id.* at 457, and certain rate-making objections that were in the wrong procedural context, *id.* at 460.

7. Airlines Mutual Aid Agreement, — C.A.B. —, Order 73-2-110 (1973).

8. The national labor policy is found in the history of the administration of the National Labor Relations Act §§ 1-18, 29 U.S.C. §§ 151-68 (1970).

9. Railway Labor Act §§ 1-14, 201-08, 45 U.S.C. §§ 151-88 (1970).

10. Federal Aviation Act of 1958 §§ 102, 412, 49 U.S.C. §§ 1302, 1382 (1970), requires and defines the public interest analysis to be made by the CAB when it considers agreements between carriers. Federal Aviation Act of 1958 § 401(k)(4), 49 U.S.C. § 1371(k)(4) (1970), makes the Railway Labor Act §§ 201-08, 45 U.S.C. §§ 181-88 (1970), applicable to air carriers, and those sections of the RLA in turn make the Railway Labor Act §§ 1-2, 4-14, 45 U.S.C. §§ 151-52, 154-63 (1970), applicable to air carriers.

11. Air Line Pilots Ass'n v. CAB, 502 F.2d 453, 457, 460 (D.C. Cir. 1974).

12. For statement of the goals of the applicable labor statutes, see Labor Management Relations Act of 1947 § 1, 29 U.S.C. § 141 (1970); Railway Labor Act § 2, 45 U.S.C. § 151a (1970); Federal Aviation Act of 1958 § 102, 49 U.S.C. § 1302 (1970). Though not directly applicable to RLA industries, the Labor Management Relations Act (LMRA) and the National Labor Relations Act (NLRA) may be used to draw guidelines by analogy where the RLA is silent. *See, e.g.*, Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383-84 (1969); International Ass'n of Machinists v. National Ry. Labor Conference, 310 F. Supp. 905, 913 (D.D.C. 1970); Pan Am. World Airways, Inc. v. Teamsters Union, 275 F. Supp. 986, 997-98 (S.D.N.Y. 1967), *aff'd per curiam*, 404 F.2d 938 (2d Cir. 1969).

13. *See, e.g.*, Allied Chem. Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S.

through voluntary conciliation of major disputes,<sup>14</sup> good faith bargaining,<sup>15</sup> and postponement of economic self-help until collective bargaining has failed.<sup>16</sup> In addition, the RLA seeks to avoid any interruption of

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157 (1971) (LMRA); Brotherhood of R.R. Trainmen v. Chicago River & I.R.R., 353 U.S. 30, 40 (1957) (RLA); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 409 (1952) (LMRA); F.W. Means & Co. v. NLRB, 377 F.2d 683, 686 (7th Cir. 1967) (NLRA); Armco Steel Corp. v. NLRB, 344 F.2d 621, 624 (6th Cir. 1965) (NLRA); NLRB v. R.C. Can Co., 328 F.2d 974, 978 (5th Cir. 1964) (NLRA); Roberts v. Lehigh & N.E. Ry., 323 F.2d 219 (3d Cir. 1963) (RLA); Servette, Inc. v. NLRB, 310 F.2d 659, 666 (9th Cir. 1962), *rev'd on other grounds*, 377 U.S. 46 (1964) (LMRA); NLRB v. Holly-General Co., 305 F.2d 670 (9th Cir. 1962) (LMRA); Brotherhood of R.R. Trainmen v. Denver & R.G.W.R.R., 290 F.2d 266, 268 (10th Cir.), *cert. denied*, 366 U.S. 966 (1961) (RLA); Plasti-Line v. NLRB, 278 F.2d 482, 486 (6th Cir. 1960) (LMRA); NLRB v. Deutsch Co., 265 F.2d 473, 478 (9th Cir. 1959) (LMRA), *quoting* Brooks v. NLRB, 348 U.S. 96, 103 (1954); Oliphant v. Brotherhood of Locomotive Firemen, 262 F.2d 359, 361 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959) (RLA).

The Federal Aviation Act of 1958 § 401(k)(4), 49 U.S.C. § 1371(k)(4) (1970), makes compliance with the RLA, including the Act's purpose section, a condition for holding a certificate. *See* International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682, 685 (1963); Air Line Stewards Ass'n v. Northwest Airlines, Inc., 267 F.2d 170, 173 (8th Cir.), *cert. denied*, 361 U.S. 901 (1959).

14. *See* Detroit & T.S.L.R.R. v. United Transp. Union, 396 U.S. 142, 148-49 (1969); Brotherhood of Locomotive Firemen v. Southern Pac. Co., 447 F.2d 1127, 1131-32 (5th Cir. 1971); Itasca Lodge 2029, Ry. Clerks v. Railway Express Agency, Inc., 391 F.2d 657, 662 (8th Cir. 1968); Railroad Carmen, Local 429 v. Chicago & N.W. Ry., 354 F.2d 786, 791-92 (8th Cir. 1965), *quoting* International Ass'n of Machinists v. Northwest Airlines, Inc., 304 F.2d 206, 209-10 (8th Cir. 1962); Florida E.C. Ry. v. Brotherhood of R.R. Trainmen, 336 F.2d 172, 180-81 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965); Rutland Ry. v. Brotherhood of Locomotive Eng'rs, 307 F.2d 21, 31-32 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); Norfolk & P.B.L.R.R. v. Railroad Trainmen, Lodge 514, 248 F.2d 34, 39-40 (4th Cir. 1957), *cert. denied*, 355 U.S. 914 (1958); Pan Am. World Airways, Inc. v. Teamsters Union, 275 F. Supp. 986, 999-1000 (S.D.N.Y. 1967), *aff'd per curiam*, 404 F.2d 938 (2d Cir. 1969); Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 185 F. Supp. 77, 79 (D. Minn. 1960), *quoting* American Airlines, Inc. v. Air Line Pilots Ass'n, 169 F. Supp. 777, 783 (S.D.N.Y. 1958).

15. *See* Detroit & T.S.L.R.R. v. United Transp. Union, 396 U.S. 142, 149 (1969); Atlanta & W.P.R.R. v. United Transp. Union, 439 F.2d 73, 77-78 (5th Cir.), *cert. denied*, 404 U.S. 825 (1971); Pyzynski v. New York Cent. R.R., 421 F.2d 854, 858-59 (2d Cir. 1970), *citing* Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515, 548 (1937); Long Island R.R. v. System Fed'n No. 156, 289 F. Supp. 119, 125 (E.D.N.Y. 1968); Chicago, R.I. & Pac. R.R. v. Switchmen's Union, 187 F. Supp. 581, 584 (W.D.N.Y. 1960), *rev'd on other grounds*, 292 F.2d 61 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962).

16. *See* Detroit & T.S.L.R.R. v. United Transp. Union, 396 U.S. 142 (1969); Delaware & H. Ry. v. United Transp. Union, 450 F.2d 603, 608-10 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971); Brotherhood of Locomotive Firemen v. Southern Pac. Co., 447 F.2d 1127 (5th Cir. 1971); National Airlines, Inc. v. International Ass'n of Machinists, 416 F.2d 998, 1001-02 (5th Cir. 1969); Piedmont Aviation, Inc. v. Air Line Pilots Ass'n, 416 F.2d 633 (4th Cir. 1969), *cert. denied*, 397 U.S. 926 (1970); Florida E.C.

commerce by establishing elaborate bargaining procedures for railroads and airlines.<sup>17</sup> In recognition of the potentially devastating effect of transportation strikes, these procedures more zealously protect the bargaining equilibrium than do the procedures established by labor statutes applicable to other industries.<sup>18</sup> For example, the RLA acknowledges

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Ry. v. Brotherhood of R.R. Trainmen, 336 F.2d 172, 180-81 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965); Pan Am. World Airways, Inc. v. Flight Eng'rs Int'l Ass'n, 306 F.2d 840, 846 (2d Cir. 1962); Chicago, B. & Q.R.R. v. Railway Employes' Dep't, 301 F. Supp. 603, 608 (D.D.C. 1969); Railway Carmen, Lodge 886 v. Long Island R.R., 267 F. Supp. 320, 326 (S.D.N.Y. 1967); Spokane, P. & S. Ry. v. Order of Ry. Conductors, 265 F. Supp. 892, 894 (D.D.C. 1967).

17. *See, e.g.*, Railway Labor Act §§ 2-10, 202-05, 45 U.S.C. §§ 151a-60, 182-85 (1970). *See also* California v. Taylor, 353 U.S. 553, 558 (1957); Williams v. Jacksonville Terminal Co., 315 U.S. 386, 399 (1942); Virginia Ry. v. System Fed'n No. 40, 300 U.S. 515, 553 (1937); Baker v. United Transp. Union, 455 F.2d 149, 153-54 (3d Cir. 1971); Pan Am. World Airways, Inc. v. United Bhd. of Carpenters, 324 F.2d 217, 220 (9th Cir. 1963), *cert. denied*, 376 U.S. 964 (1964); National Airlines, Inc. v. International Ass'n of Machinists, 308 F. Supp. 179, 180 (S.D. Fla.), *rev'd on other grounds*, 430 F.2d 957 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971).

18. For the procedures and restrictions of the RLA see statute cited note 17 *supra*. *See also* Chicago & N.W. Ry. v. United Transp. Union, 402 U.S. 570, 571 (1971) (requirement to make every reasonable effort to reach agreement is legal obligation); Brotherhood of Ry. Clerks v. Association for Benefit of Non-Contract Employees, 380 U.S. 650, 658 (1965) (RLA requires preliminary steps without which agreement cannot be reached); International Ass'n of Machinists v. National Mediation Bd., 425 F.2d 527, 536 (D.C. Cir. 1970) (right of self-help preserved until RLA procedures exhausted); National Airlines, Inc. v. International Ass'n of Machinists, 416 F.2d 998, 1001-02 (5th Cir. 1969) (proscription on self-help while major dispute is running); Illinois Cent. R.R. v. Brotherhood of R.R. Trainmen, 398 F.2d 973, 976 (7th Cir. 1968) (minor disputes are subject to negotiation and binding arbitration); Itasca Lodge 2029, Ry. Clerks v. Railway Express Agency, Inc., 391 F.2d 657, 662 (8th Cir. 1968) (strike action must be delayed until statutory procedures exhausted); Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 383 F.2d 225, 229 (D.C. Cir. 1967) (procedures are lengthy to afford maximum inducement to make peaceful settlement); Switchmen's Union v. Central of Ga. Ry., 341 F.2d 213, 217 (5th Cir.), *cert. denied*, 382 U.S. 841 (1965) (union cannot file suit for damages or injunction until in compliance with RLA procedures); Rutland Ry. v. Brotherhood of Locomotive Eng'rs, 307 F.2d 21, 37 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963) (railroad seeking injunction must comply with all legal obligations); Prettner v. Aston, 339 F. Supp. 273, 285 (D. Del. 1972) (requirement to make every reasonable effort to reach and maintain agreement is legal obligation); Atlanta & W.P.R.R. v. United Transp. Union, 307 F. Supp. 1205, 1210 (N.D. Ga. 1970), *aff'd*, 439 F.2d 73 (5th Cir.), *cert. denied*, 404 U.S. 825 (1971) (good faith negotiations are required prior to self-help; refusal to negotiate will not suffice); Chicago, B. & Q.R.R. v. Railway Employes' Dep't, 301 F. Supp. 603, 608 (D.D.C. 1969) (procedures of RLA must be exhausted before resorting to self-help); Southern Pac. Co. v. Leidenheimer, 296 F. Supp. 1377, 1379 (E.D. La. 1969) (RLA procedures are mandatory, exclusive, and comprehensive for grievance procedures); Pan Am. World Airways, Inc. v. Teamsters Union, 275 F. Supp. 986, 1000 (S.D.N.Y. 1967), *aff'd per curiam*, 404 F.2d 938 (2d Cir. 1969) (steps required by RLA are compulsory, though agreement

the right of employers and employees to use economic weapons to obtain favorable settlements,<sup>19</sup> but seeks to stall unilateral self-help until a

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is not); *Railway Carmen, Lodge 886 v. Long Island R.R.*, 267 F. Supp. 320, 326 (S.D. N.Y. 1967) (initial conference provision must be met before resort to National Mediation Board); *Atlantic Coast Line R.R. v. Brotherhood of R.R. Trainmen*, 262 F. Supp. 177, 183 (D.D.C. 1967) (parties are to negotiate with aim of reaching agreement); *Hudie v. Aliquippa & S.R.R.*, 249 F. Supp. 210, 212 (W.D. Pa.), *aff'd per curiam*, 360 F.2d 213 (3d Cir. 1966) (RLA requires compulsory arbitration of minor disputes); *Northwest Airlines, Inc. v. Transport Workers Union*, 190 F. Supp. 495, 497 (W.D. Wash. 1961) (orderly arbitration procedures must precede economic coercion); *Long Island R.R. v. Brotherhood of R.R. Trainmen*, 185 F. Supp. 356, 358 (E.D.N.Y. 1960) (requirement to make reasonable effort to reach and maintain agreement is legal obligation); *Switchmen's Union v. Louisville & N.R.R.*, 130 F. Supp. 220, 225 (W.D. Ky. 1955) (provisions of LMRA and RLA differ in respect of method of hearing individual grievances).

For the purposes and procedures of the LMRA and the NLRA, see *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 288 (1972) (congressional policy is to allow negotiation for any protection parties deem appropriate); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348-49 (1958) (parties are under no compulsion to reach agreement); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 402 (1952) (same); *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 390-92 (1945) (Board has authority to prevent unfair labor practices); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-11, 13 (1940) (subchapter does not carry a penal program of fines and penalties); *National Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940) (Board has authority to prevent unfair labor practices); *NLRB v. Newport News Shipbldg. & Dry Dock Co.*, 308 U.S. 241, 250 (1939) (Board is not allowed to take punitive action); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938) (same); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) (Board is without power to compel agreement); *Sign & Pictorial Local 1175 v. NLRB*, 419 F.2d 726, 731 (D.C. Cir. 1969) (parties are under no compulsion to reach agreement); *NLRB v. Texas Coca-Cola Bottling Co.*, 365 F.2d 321, 322 (5th Cir. 1966) (same); *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 215 (8th Cir. 1965) (same); *Parks v. International Bhd. of Elec. Workers*, 314 F.2d 886, 910 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963) (it is not purpose of NLRB to constrict format of collective bargaining); *NLRB v. Clegg*, 304 F.2d 168, 176 (8th Cir. 1962) (parties are under no compulsion to reach agreement); *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231-32 (5th Cir. 1960) (same); *Textile Workers Union v. NLRB*, 227 F.2d 409, 410-11 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 864 (1956) (NLRB does not forbid strikes or limit use of economic pressure in support of lawful demands); *NLRB v. Thompson Prods., Inc.*, 162 F.2d 287, 293 (6th Cir. 1947) (purpose of NLRA is to leave employees with free choice as to their best interests); *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 683-84 (9th Cir. 1943) (NLRA does not compel agreement); *NLRB v. Thompson Prods., Inc.*, 130 F.2d 363, 368 (6th Cir. 1942) (NLRB does not have power to punish or exact retribution for past wrongs); *Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1939) (NLRA does not compel agreement); *NLRB v. Bell Oil & Gas Co.*, 91 F.2d 509, 513 (5th Cir. 1937) (same); *Foster Bros. Mfg. Co. v. NLRB*, 85 F.2d 984, 986 (4th Cir. 1936) (purpose of NLRA is to prevent unfair labor practices).

19. See, e.g., *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969); *Delaware & H. Ry. v. United Transp. Union*, 450 F.2d 603 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971); *Brotherhood of Locomotive Firemen v. Southern Pac.*

strike is inevitable.<sup>20</sup>

In *Air Line Pilots Association v. CAB*,<sup>21</sup> the court rested its labor policy holdings on the right of economic self-help. At the outset, the court recognized that the CAB is bound by the congressional mandate to make decisions consistent with national labor policy.<sup>22</sup> The court reasoned that since it is largely within the discretion of the bargaining parties to decide upon their economic weapons after the exhaustion of RLA procedures, the Pact was within the limits of appropriate employer self-help.<sup>23</sup> The opinion also relied extensively upon *Kennedy v. Long Island Railroad*,<sup>24</sup> a case approving a strike insurance plan for another industry subject to the RLA. Having implicitly accepted the Board's jurisdiction, the court affirmed three findings central to the public interest analysis required of the CAB:<sup>25</sup> the airlines are particularly vulnerable to strikes; the Pact, in all likelihood, will have no serious effect on carrier ability or

Co., 447 F.2d 1127 (5th Cir. 1971); *Piedmont Aviation, Inc. v. Air Line Pilots Ass'n*, 416 F.2d 633 (4th Cir. 1969), *cert. denied*, 397 U.S. 926 (1970); *Detroit & T.S.L.R.R. v. Brotherhood of Locomotive Firemen*, 267 F. Supp. 572 (N.D. Ohio 1967), *aff'd*, 401 F.2d 368 (6th Cir. 1968), *aff'd sub nom. Detroit & T.S.L.R.R. v. United Transp. Union*, 396 U.S. 142 (1969).

20. See Railway Labor Act § 2, 45 U.S.C. §§ 151a, 152 First (1970). See also *Baker v. United Transp. Union*, 455 F.2d 149 (3d Cir. 1971); *Delaware & H. Ry. v. United Transp. Union*, 450 F.2d 603 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971); *International Ass'n of Machinists v. National Mediation Bd.*, 425 F.2d 527 (D.C. Cir. 1970); *Piedmont Aviation, Inc. v. Air Line Pilots Ass'n*, 416 F.2d 633 (4th Cir. 1969), *cert. denied*, 397 U.S. 926 (1970); *National Airlines, Inc. v. International Ass'n of Machinists*, 416 F.2d 998 (5th Cir. 1969); *Itasca Lodge 2029, Ry. Clerks v. Railway Express Agency, Inc.*, 391 F.2d 657 (8th Cir. 1968); *Hilpert v. Pennsylvania R.R.*, 290 F.2d 881 (7th Cir.), *cert. denied*, 368 U.S. 900 (1961); *Washington Terminal Co. v. Boswell*, 124 F.2d 235 (D.C. Cir. 1941); *Northern Pac. Ry. v. Brotherhood of Locomotive Eng'rs*, 308 F. Supp. 995 (D. Minn. 1970); *Chicago, B. & Q.R.R. v. Railway Employes' Dep't*, 301 F. Supp. 603 (D.D.C. 1969); *Detroit & T.S.L.R.R. v. Brotherhood of Locomotive Firemen*, 267 F. Supp. 572 (N.D. Ohio 1967), *aff'd*, 401 F.2d 368 (6th Cir. 1968), *aff'd sub nom. Detroit & T.S.L.R.R. v. United Transp. Union*, 396 U.S. 142 (1969); *Northwest Airlines, Inc. v. Transport Workers Union*, 190 F. Supp. 495 (W.D. Wash. 1961).

21. 502 F.2d 453 (D.C. Cir. 1974).

22. *Id.* at 456, *citing Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173 (1962). The court, however, did not take into account that the CAB's labor jurisdiction extends to matters generally ancillary to the promotion of a safe, efficient, and economically sound air transportation industry. See Federal Aviation Act of 1958 § 401, 49 U.S.C. § 1371 (1970).

23. 502 F.2d at 456.

24. 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963), *aff'g* 211 F. Supp. 478 (S.D.N.Y. 1962).

25. See Federal Aviation Act of 1958 §§ 102, 412, 49 U.S.C. §§ 1302, 1382 (1970); note 10 *supra*.

willingness to promote or prolong strikes; and the burden of Pact payments does not presently, and is not likely to, affect the viability of economically marginal airlines.<sup>26</sup>

The finding that the Pact is within the scope of permissible employer self-help<sup>27</sup> does not comport with the dominant labor policy: the promotion of industrial peace.<sup>28</sup> The Pact threatens the underpinnings of that policy<sup>29</sup> by mitigating the losses of struck carriers, thereby encouraging them to resist early strike settlements. Narrowing the scope of the labor policy inquiry to the right of economic self-help enabled the court to reach an easy conclusion, but only at the expense of the goals of national labor policy and of the RLA.

Moreover, *Kennedy* does not justify the heavy reliance placed on it by the court to establish the legality of an RLA employer strike fund, because the facts that supported the rail industry's strike insurance plan do not exist in the airline industry. First, the railroad plan was in response to a labor-management power imbalance peculiar to that industry.<sup>30</sup> Secondly, the Railroad Unemployment Insurance Act<sup>31</sup> required railroads to contribute to a fund that provided benefits to striking employees. Thirdly, benefits accruing to the struck carrier in *Kennedy* were more limited than those given by the Pact. The *Kennedy* benefits were available only for strikes violating the RLA or attempts at enforcing demands contrary to presidential Emergency Board recommendations,<sup>32</sup> and even then the benefits covered only fixed costs.<sup>33</sup>

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26. Airlines Mutual Aid Agreement, — C.A.B. —, Order 73-2-110 (1973). The CAB finding that Pact payments do not and will not affect the viability of economically marginal airlines does not present any consideration relevant to the labor policy discussion of the Pact.

27. 502 F.2d at 456-57.

28. See cases cited note 13 *supra*.

29. See cases and statutes cited notes 13-17 *supra*; text accompanying notes 13-17 *supra*.

30. Indicative of that imbalance was the unions' use of the "whipsaw" strike, a technique by which a union can concentrate its strength by striking one member of a multi-employer association. See *Kennedy v. Long Island R.R.*, 211 F. Supp. 478, 482 n.5, 488 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963). Whipsaw strikes and multi-employer bargaining had been customary tactics in the rail industry for at least thirteen years before *Kennedy*. *Id.* at 482.

31. 45 U.S.C. §§ 351-67 (1970).

32. 211 F. Supp. at 487.

33. *Id.* at 484. Furthermore, all benefits were to cease if fifty percent of the member railroads experienced strikes at the same time. See Note, *Strike Insurance: An Analysis of the Legality of Interemployer Economic Aid Under Present Federal Legislation*, 38 N.Y.U.L. REV. 126, 131 (1963), citing Service Interruption Policy art. VI(a),

Part of the problem with the court's labor analysis is caused by its ready acceptance of the CAB's findings. There may be substantial factual support for these findings, but their relevance to labor policy is assailable. Although the Board has had much experience in dealing with the economic structure of the airline industry and has dealt with the Pact for over a decade,<sup>34</sup> it has no special labor-management relations skills. For example, the CAB found that the airlines' inability to stockpile cargo makes them more vulnerable to strikes than nonservice industries and other transportation industries carrying a higher percentage of freight.<sup>35</sup> It is difficult to see how the ability to store cargo would protect a carrier from the effects of a strike, since it is reasonable to assume that a shipper would be reluctant to send his cargo to a struck carrier regardless of the carrier's ability to store cargo. Further, although air carriers may be particularly vulnerable to strikes, Congress has chosen to regulate the area through the bargaining scheme of the RLA,<sup>36</sup> not through extrastatutory employer measures.

The court's affirmance of the CAB's finding that the Pact would have no serious effect on carrier willingness to prolong strikes ignored the practical effect of paying profits to Pact members. The unions' ability to use the strike as an effective and protected self-help technique<sup>37</sup> is obviously hampered by such payments. The court attempted to minimize this factor by pointing out that the Pact payments were lower than normal operating profits.<sup>38</sup> Profits, however, were still being made.<sup>39</sup>

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Joint Record vol. I, at 282, *Kennedy v. Long Island R.R.*, 211 F. Supp. 478 (S.D.N.Y. 1962). The *Kennedy* plan was supported by 189 railroads, whereas the airlines' fund was started by six carriers. See Note, *supra*, at 129 n.13.

34. See note 3 *supra*.

35. 502 F.2d at 458.

36. See cases and statutes cited notes 17 & 20 *supra*. See also *Detroit & T.S.L.R.R. v. United Transp. Union*, 396 U.S. 142, 148 (1969); *Slocum v. Delaware, L. & W.R.R.*, 339 U.S. 239, 242-43 (1950); *Brotherhood of R.R. Trainmen v. Denver & R.G.W.R.R.*, 290 F.2d 266, 268 (10th Cir.), *cert. denied*, 366 U.S. 966 (1961); *Estes v. Union Terminal Co.*, 89 F.2d 768, 770 (5th Cir. 1937); *Railroad Shop Crafts, Lodge 3 v. Lowden*, 86 F.2d 458, 460 (10th Cir. 1936), *cert. denied*, 300 U.S. 659 (1937).

37. See, e.g., *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-80 (1969); *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 685 (1963); *Piedmont Aviation, Inc. v. Air Line Pilots Ass'n*, 416 F.2d 633, 637 (4th Cir. 1969), *cert. denied*, 397 U.S. 926 (1970).

38. 502 F.2d at 459. The figures for normal operating profits and poststrike losses were submitted by the airlines as interested parties and accepted by the CAB without any investigation into the reliability of the figures. Since they are peculiarly within the knowledge of the airlines and therefore less likely to be subject to a successful adversary attack, it seems inadvisable for the Board to take these figures at face value.

39. Since the 1969 amendments, National experienced a four-month strike, during



Although the Pact by its terms does not interfere with the right to call a strike, its provisions for profits during a strike remove the impetus to call one.

Traditionally, great weight is given to administrative board findings.<sup>40</sup> This deference, however, should be limited to those findings within the administrative board's expertise. The legality of the Pact is questionable in view of the dominant goals of the RLA and national labor policy. Moreover, its legality should not be decided by an administrative agency whose expertise is in economic affairs, whose public interest analysis centers on economic matters, not labor policy, whose jurisdiction over labor-management matters is open to challenge, and whose findings are based upon economic grounds that undercut the operation

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which it conducted no operations but had a net income of \$810,000 after deducting \$8.4 million for depreciation and amortization. Northwest, while operating twenty-nine percent of its activities during a five-month strike, had a profit of \$17.9 million before taxes after deducting \$32.8 million for depreciation and amortization. TWA, operating twenty-five percent of its activities, had a net loss of \$879,000 during a two-day strike after deducting \$621,000 for depreciation and amortization. TWA estimated that, had it not suffered a strike, its losses would have been \$1,687,000. Mohawk, experiencing a three-month strike that closed all of its operations, realized a \$29,000 profit after deducting \$1.8 million for depreciation and amortization and \$1.4 million for nonoperating expenses. See Brief for Petitioner Air Line Pilots Ass'n at 31-32, quoting Initial Decision of Examiner Arthur S. Present, at 17-18 (1972).

There is also the remaining question of the Pact's effect on economically marginal airlines. As of December 31, 1968, United, the Pact's highest contributor, had a working capital of \$45,994,000. United's working capital as of December 31, 1970, was \$17,520,000. By United's own estimate, had there been no Pact its working capital as of December 31, 1970, would have been \$47,225,000. See Brief for Petitioner Air Line Pilot Ass'n at 41, quoting Initial Decision of Examiner Arthur S. Present, at 29-30 (1972).

40. See, e.g., *NLRB v. Coca-Cola Bottling Co.*, 350 U.S. 264 (1956); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *Gray v. Powell*, 314 U.S. 402 (1941); *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939); *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177 (1938); *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282 (1934); *ICC v. Union Pac. R.R.*, 222 U.S. 541 (1912); *Federal Broadcasting Sys. v. FCC*, 239 F.2d 941 (D.C. Cir. 1956); *Brotherhood of Ry. Clerks v. Railroad Retirement Bd.*, 239 F.2d 37 (D.C. Cir. 1956); *Ferenz v. Folsom*, 237 F.2d 46 (3d Cir. 1956), cert. denied, 352 U.S. 1006 (1957); *American Airlines, Inc. v. CAB*, 231 F.2d 483 (D.C. Cir. 1956); *United Air Lines, Inc. v. CAB*, 228 F.2d 13 (D.C. Cir. 1955); *Director, United States Bureau of Mines v. Princess Elkhorn Coal Co.*, 226 F.2d 570 (6th Cir. 1955); *Namekagon Hydro Co. v. FPC*, 216 F.2d 509 (7th Cir. 1954); *NLRB v. Pinkerton's Nat'l Detective Agency*, 202 F.2d 230 (9th Cir. 1953); *American Airlines, Inc. v. CAB*, 178 F.2d 903 (7th Cir. 1949); *Apgar Travel Agency, Inc. v. International Air Transp. Ass'n*, 107 F. Supp. 706 (S.D.N.Y. 1952); 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 30.05, 30.06 (1958).

of national labor policy and deny the labor issue the primacy it deserves. Alternatives to this situation might be to enlarge the CAB's mandate to include an affirmative investigation into the labor ramifications of issues presented to it, to restrict the CAB's mandate and present such issues initially to the district courts, or to empower an existing board to adjudicate such controversies. The present state of affairs is not helpful in obtaining a full and fair resolution of the issues.