George Washington University

From the SelectedWorks of Ashton S. Phillips

October 31, 2008

If They Could Only Eat Efficiency: How Airline Deregulation and the Bankruptcy Code Joined Forces to Undermine Airline Workers and What Can Be Done About It

Ashton S. Phillips, George Washington University

Available at: https://works.bepress.com/ashton_phillips/1/
If They Could Only Eat Efficiency – How Airline Deregulation and the Bankruptcy Code Joined Forces to Undermine Airline Workers and What Can Be Done About It

Ashton S. Phillips*

Table of Contents

I. Introduction ......................................................................................................................... 1

II. Part I: Background of Airline Law and History of the Airline Industry .............................. 2
   A. Regulation ......................................................................................................................... 2
   B. Deregulation .................................................................................................................... 4

III. PART II: Current Airline Law ......................................................................................... 5
   A. The Railway Labor Act ................................................................................................... 5
      1. Mechanisms of the RLA: Disputes Resolution ............................................................... 5
      2. Mergers and Modification of Collective Bargaining Agreements ............................. 6

   B. Bankruptcy Code ............................................................................................................ 7
      1. Railway Worker CBA’s in Bankruptcy: 11 U.S.C. §1167 ............................................. 7

IV. PART III: The problems with this legal framework ............................................................. 10
   A. Bankruptcies .................................................................................................................... 10
      1. Pension Defaults .......................................................................................................... 11
      2. Layoffs ........................................................................................................................ 11
      3. Profitability Problem ................................................................................................... 12

V. Part IV: Suggestions for Reform ........................................................................................ 13
   A. Profitability problem ....................................................................................................... 13
      1. Free Market Approach: Eliminate or Restrict Access to Chapter 11 ......................... 13
      2. Regulatory Approach: Re-regulate the Airlines ........................................................... 15

   B. Distribution Problem ..................................................................................................... 19
      1. Bankruptcy reform: §§ 1113 and 1110 ..................................................................... 19

I. Introduction

You don’t have to be a news junky or the son of a furloughed flight attendant to recognize the economic crisis gripping the American airline industry and that tens of thousands of airline workers are paying for it with their pensions and jobs. It takes a little more digging, however, to uncover the sources of this crisis and its full impact on airline workers.

The government’s failure to restrict airlines’ access to Chapter 11 and its 1978 revocation of price and supply controls have fostered a long-standing profitability problem in the airline industry, which, like passenger rail service, is arguably incapable of profit in a Chapter 11 and subsidy-bloated quasi-free market. This profitability problem guarantees losses to some airline constituencies and comprises the main source of the economic crisis in the airline industry. Today, airline workers are that losing constituency. To address this problem, Congress should investigate the role of Chapter 11 bankruptcy on the airline market and carefully weigh/examine the pros and cons of re-regulating the airlines.

Unfortunately, addressing the economic crisis in the airline industry will not be enough to protect airline workers’ rights. The laws governing airlines’ relationships with their workers have developed in the context of the industry’s gross economic failings. These laws accordingly grant airlines remarkable leniency to disregard their workers’ rights and interests. Therefore, regardless of the cause of the economic crisis in the airline industry, Congress must reform the specific aspects of the labor and bankruptcy laws that allow airlines to legally and easily evade their collective bargaining agreements in bankruptcy proceedings and in mergers. In addition, Congress should remove special protections for aircraft lessors in airline bankruptcies and condition government approval of airline mergers on satisfaction of Allegheny-Mohawk-style labor protective provisions.
This paper begins in Part I by outlining the background of airline law, including the history, purpose, and substance of airline regulation and deregulation. Part II reviews and analyzes the law governing airline labor relations, bankruptcies, and mergers, including the provisions of the Railway Labor Act and the Bankruptcy Code that govern rejections of collective bargaining agreements. Part III discusses the breadth and depth of the airline industry’s economic crisis and reviews some theories of its cause. Part IV proposes reforms to the Airline Deregulation Act and to the laws governing airline bankruptcies and mergers based on the analysis in Parts I, II, and III.

II. Part I: Background of Airline Law and History of the Airline Industry

The airline industry has a short history. From the beginning, the government feared that the costs of entering and maintaining an airline were so high compared to its unstable returns that the industry could not survive without direct government intervention and support. Therefore, in 1917, the government began subsidizing the industry by awarding lucrative airmail contracts to a limited number of startup airlines. These contracts allowed the nascent industry to grow and predated the 1926 beginning of commercial passenger air service. By 1938, the continued financial instability of the airline industry prompted increased intervention from the government. That year, Franklin D. Roosevelt’s New Deal government signed into law the Civil Aeronautics Act (“CAA”), authorizing a comprehensive regulatory scheme intended to protect the industry and its workers from “unnecessary and unsustainable competition.”

A. Regulation

Modeled after 1887 legislation regulating the railroad industry, the CAA created an independent regulatory commission, the Civil Aeronautics Board, (“CAB”), with authority to limit competitive entry into the commercial airline industry, set fare prices, and reject or authorize airline mergers and route transfers. Congress directed the Board to award routes, approve mergers, certify airlines, and set prices in accordance with the public interest. To ensure the public interest in universal air service was met, the CAB expected financially fit airlines to serve unprofitable routes. In exchange, the CAB limited competition and set fares at a rate that ensured certified airlines could sustain a profit. The CAB certified and awarded major routes to ten “trunk” airlines, including all those airlines that had been awarded airmail contracts before regulation, and certified several smaller regional airlines to fly feeder routes for the trunks. After these initial certifications, the CAB certified no additional trunk airlines throughout the remaining 40 year period of regulation. Under this system, airline bankruptcies and layoffs were extremely rare.

2 Id. The airline industry garnered most of its profits from shipping services before the inception of commercial passenger service in 1926.
3 Id.
4 Richard D. Cudahy, The Airlines: Destined To Fail?, 71 J. Air L. & Com. 3, 18 (2006) (“Regulation was introduced in 1938 in the belief that, without it, excessive and destructive competition would destroy the potential for successful operations.”) (citing E.g., John R. Meyer & Thomas R. Menzies, Airline Deregulation: Time to Complete the Job, 16 Issues in Sci. & Tech. 24, 24 (1999)"The airline industry was originally regulated out of concern that carriers, left to their own devices, would compete so intensely that they would set fares too low to generate the profits to reinvest in new equipment and other capital.")
5 Id.
7 Id., See Cudahy, supra note 4, at 8-9.
8 Cudahy, supra note 4 at 8.
9 Id.
10 Id.
In 1950, under its authority to approve airline mergers and acquisitions, the CAB began conditioning its approval of these transactions on airlines’ satisfaction of a series of labor-protective provisions. To justify its adoption of these standards, the CAB cited the sections of the Civil Aeronautics Act requiring it to only approve mergers and route transfers consistent with the public interest. In its first opinion applying these provisions, the CAB stated:

A route transfer or a merger or a similar transaction presumably involves benefits to the stockholders of the companies who are parties to it. On balance, it must also benefit the public as a whole; otherwise we would disapprove it. Very often, these benefits to the stockholders and to the public will be at the expense of some of the employees of the companies involved. We think it only equitable that in such circumstances the hardships borne by adversely affected employees should be mitigated by provisions for their benefit.

In the ten years following its first application of Labor-Protective Provisions (LPP), the CAB drafted and applied protective conditions on a case by case basis. In 1961, the CAB began applying a standardized set of Labor-Protective Provisions to all airline merger and route transfer cases. In 1972, the CAB reviewed and formally sanctioned the substance and use of a standardized set of labor protection provisions in the Allegheny-Mohawk merger case. The CAB applied these provisions in every subsequent merger approval proceeding with only a few minor modifications.

For a merger to receive CAB approval, these “Allegheny-Mohawk Provisions” required a surviving carrier to:

1. Provide for the fair and equitable integration of seniority lists;
2. In regard to any employee who continues on in the employment of the carrier, pay a "displacement allowance" to that employee for up to 4 years, to the extent that the employee is "placed in a worse position with respect to compensation" as a result of the merger;
3. Pay a "dismissal allowance" to any employee who loses his job as a result of the merger. For dismissed employees with 15 years of service with either of the merger partners, payments continue for 5 years after the discharge; employees with less seniority receive payments for a commensurately shorter period. At the employee's option, a lesser amount can be taken in a lump sum;
4. Continue, for a stated period, fringe benefits, such as hospitalization insurance, to employees affected by the merger;
5. Compensate employees who as a result of the merger have to change their place of residence;
6. Arbitrate disputes with employees arising under the labor protective provisions.

To airline employees working in the post-regulation airline economy, the degree of protection these now abandoned provisions afforded regulation-era employees must sound nearly inconceivably utopian. As Part III discusses, airline employees enjoy virtually no job, seniority, or retirement security in the post-regulation legal environment, despite the language of their collective bargaining agreements or the startling level of taxpayer subsidization of the airline industry.

---

13 United-Western, Acquisition of Air Carrier Property, 11 C.A.B. 701 (1950), aff’d sub nom. In re Western Air Lines, 194 F.2d 211 (9th Cir. 1952).
14 Paul Stephen Dempsey, Antitrust Law and Policy in Transportation: Monopoly Is the Name of the Game, 21 Ga. L. Rev. 505, 529 (1987). ("Sections 401(i) and 408(b) of the Ch. 601, §§ 401, 408, 52 Stat. 973, 987, 1001 (49 U.S.C. app. § 1301 (1982)). §401(i) provided: ‘No certificate may be transferred unless such transfer is approved by the [Board] as being consistent with the public interest.’ Section 408(b) expressly authorized approval of the acquisition ‘upon such terms and conditions as [the Board] shall find just and reasonable and with such modifications as it may prescribe.’")
15 See, United-Western, 11 C.A.B. at 708.
16 Id.
17 Dempsey, supra note 14, at 529.
18 Id.
20 Dempsey, supra note 14 at 531.
B. Deregulation

The 1960’s and early 1970’s marked the rise of the Chicago School of economic theory in academia. One of the central tenets of this school is that markets are universally better at regulating the economy than the government. Proponents of this school, principally Alfred E. Kahn, took their criticisms to the policymakers with the airlines as their prime target. This criticism aided, if not triggered, the eventual push for deregulation in Washington. By the late 1970’s, politicians across branches and parties of the federal government supported deregulation, particularly after a series of investigations and a well-publicized suicide exposed corruption within the CAB. Still, not all observers were so optimistic about deregulation. Many feared it would lead to mass layoffs and bankruptcy, while threatening the safety of the air traveling public.

Nonetheless, Congress passed the Airline Deregulation Act of 1978 by sweeping margins, with 83 votes in the Senate and 356 votes in the House. Instead of just limiting the CAB’s authority, the Act completely eliminated the agency while retaining the right to disapprove airline mergers for the Department of Transportation (“DOT”).

After de-regulation, new carriers flooded the market, significantly reducing fares. Major airlines watched their profit margins narrow with the added competition. Unemployment in the aviation industry increased, and mergers and bankruptcies became commonplace.

Still, even after de-regulation, the future of labor protection provisions like the Allegheny-Mohawk provisions was uncertain. Because the DOT would still have the authority to reject proposed airline mergers and acquisitions and because the Airline Deregulation Act of 1978 required the DOT to consider the “need to encourage fair wages and equitable working conditions” in the process, reasonable observers could have expected these provisions to survive deregulation. Nonetheless, the DOT opted not to condition its approval of airline mergers on satisfaction of the Allegheny-Mohawk provisions, construing the law’s commands as discretionary and determining that LPP’s should only be applied “where necessary to prevent labor strife that...
would disrupt the nation’s air transport system [as a whole].” 33 In 1989, Congress shifted responsibility for approving airline mergers to the Department of Justice (“DOJ”). 34 Today, the DOJ still has the authority to disapprove proposed mergers and acquisitions for failure to ensure fair wages and equitable working conditions; despite this authority, the DOJ has elected to only review proposed transactions for potential violations of antitrust statutes. 35

Since the 1980’s, Congress has considered requiring the DOJ to reject all airline mergers that fail to satisfy the Allegheny-Mohawk provisions. 36 Indeed, as recently as 2003, Senator Kit Bond of Missouri introduced a bill that would mandate the DOJ condition its approval of airline mergers on satisfaction of some of the Allegheny-Mohawk provisions. 37 To date, however, all such efforts have failed.

III. PART II: Current Airline Law

A. The Railway Labor Act

Congress passed the Railway Labor Act (“RLA”) in 1926. 38 Its purposes were:

1. to avoid any interruption to commerce or to the operation of any carrier engaged therein;
2. to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization;
3. to provide for the complete independence of carriers and of employees in the matter of self-organization;
4. to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;
5. to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. 39

As its name suggests, the RLA was originally only applicable to the railroad industry, but in 1936, after a pilots’ union petitioned Congress for labor protection legislation, Congress amended the RLA to cover airline workers. 40 At that time, two systems of federal labor law existed to which Congress could have subjected the airline industry: the RLA and National Labor Relations Act (“NLRA”). 41 Congress chose to subject the airline industry to the RLA, instead of the NLRA, because of the commonalities between the airlines and railroads as transportation industries upon which the stability and vitality of interstate commerce heavily depends. 42 The RLA differs from the NLRA in creating more burdensome, mandatory dispute-resolution mechanisms designed to bring the parties to agreement without resorting to economic weapons. 43

1. Mechanisms of the RLA: Disputes Resolution

The RLA seeks to promote stability and the status quo within the airline and railroad industries by prescribing a burdensome, mandatory dispute resolution process for all parties attempting to change the status quo. 44 This process must be satisfied before either side can resort to economic weapons, such as strikes or lockouts. 45

---

33 Dempsey, supra note 14 at 532-35 (quoting Braniff South American Route-Transfer, 102 C.A.B. at 125-3 ).
34 Id. at 544.
35 Tulk, supra note 31 at 642.
36 Dempsey, supra note 14 at 534-35.
37 See Airline Workers Fairness Act, infra note 168.
41 Id.
42 Id. at 618.
43 Id.
44 Id.
45 Id.
If a dispute arises out of an employer or a union’s attempt to change a policy secured by a substantive term of a Collective Bargaining Agreement (“CBA”), the RLA categorizes this as a “major dispute.” In a “major dispute,” the party seeking to change the policy secured by a substantive term of a CBA must give the other side 30 days written notice of their intent to do so. This notice is followed by a mandatory bargaining period. If this bargaining fails to resolve the dispute, either party may summon to the National Mediation Board (“NMB”) to resolve the dispute, or the NMB can step in sua sponte. If the NMB cannot resolve the dispute, it recommends binding arbitration. If either party rejects this option, a thirty day “cooling off” period begins. After these thirty days, either side can begin economic war, including strikes, boycotts, and unilateral implementation of the airline’s changes to the terms of the CBA. Like the RLA as a whole, this mechanism is designed to promote stability and the status quo in the airline industry.

2. Mergers and Modification of Collective Bargaining Agreements

Despite the clear purposes of the RLA to promote stability in the airline industry by promoting the status quo in the relationship between airline workers and airline management, when airline workers’ rights are threatened by mergers, the RLA as interpreted does not require airlines to satisfy its strict dispute resolution mechanisms, unless “merger rights” are secured by a CBA. Even if the airline workers do have certain merger rights secured by a CBA, the RLA provides them only illusory protections.

For airline workers to be protected under the RLA, they must be represented by an NMB recognized union. However, the NMB “decertifies” an acquired airline’s unions on the effective date of that airline’s merger with an acquiring airline. When the NMB decertifies a union, any “permanent” CBA’s that union secured for its members are also terminated in the eyes of the NMB. Therefore, upon the effective date of merger, an acquired airline’s workers’ merger rights lose all legal force. If the rights are not enforced before the effective merger they are lost.

Even before the effective merger date, if an acquired airline’s union files a complaint with the NMB alleging the airline violated the merger rights of its members, the burdensome dispute resolution mechanisms of the RLA will only slow down the acquired airline’s union’s right to engage in economic war, they will not help the union enforce its rights. Thus, to avoid liability for any of its merger related obligations, the acquired airline need only take advantage of the slowing mechanisms of the RLA to stall the resolution of the dispute until the effective merger date, when any of the workers’ merger rights become obsolete. This is a perverse result.

47 Id.
48 Id.
49 Id.
50 Id.
51 Id.
52 The Supreme Court articulated its reading of the policy rationale behind the RLA’s burdensome dispute resolution mechanisms: “Since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.” Detroit & T. Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 150 (1969).
53 Railway Labor Executives' Ass'n v. City of Galveston, Tex., 897 F.2d 164 (5th Cir. 1990) (holding that in the absence of an express or implied labor-management agreement that ensures certain rights during merger, the RLA creates no independent duty for the airlines to bargain over a proposed merger or to provide notice of a merger to their unions. Even if an employer knows that a merger will negatively affect its workers, the RLA creates no independent duty on an employer to bargain over the effects of that merger, if doing so could “jeopardize the merger”).
54 Tulk, supra note 31 at 630-31.
55 Id.
56 Id.
57 Id.
The NMB has no authority to disapprove airline mergers or to stall merger dates on account of an acquired airline’s failure to complete the dispute resolution mechanisms required under the RLA. This authority rests in the hands of the DOJ, which only rejects mergers for anti-trust violations.

Therefore, under this system, airlines can evade CBA terms (even those explicitly referencing mergers) and the RLA’s dispute resolution mechanisms by simply merging with another airline. Arguably, this makes mergers easier, which can be expected to result in more buyouts for airline shareholders, but it renders airline workers’ rights unnecessarily and inexcusably vulnerable. This system also makes an airline worth more if acquired (because it will have less liabilities to labor) than if it is not acquired (where its labor costs can only be evaded in bankruptcy or through the burdensome dispute resolution mechanisms of the RLA). This disparity in de facto labor costs creates a potentially perverse incentive for airlines to merge, inhibiting competition.

Because the federal government no longer requires acquiring airlines to satisfy the Allegheny-Mohawk provisions before approving airline mergers, and because the RLA does not require the satisfaction of any specific labor protective provisions before airlines can legally merge, the RLA’s failure to protect even those merger rights which an acquired airline’s workers have secured through CBA’s amounts to a gaping loophole in the federal labor law.

B. Bankruptcy Code

Congress first adopted Chapter 11-like bankruptcy protections in 1898, in response to concerns over the ramifications of railroad company bankruptcies. Focusing on the difference in value to creditors and the public between a railroad company as a “going concern” and the value of the sum of the liquidated, individual parts of a railroad company, Congress passed the Bankruptcy Act of 1898 to provide railroad companies with a legal means to maximize their value as a going concern, even when faced with insolvency.

Chapter 11 of the modern Bankruptcy Code allows airlines, like other businesses, access to Bankruptcy Courts where they can “restructure” their finances while continuing to operate and pursue profits. Labor costs are often the prime target of these “restructurings” because the specific provisions of the bankruptcy code as interpreted by the courts make labor costs easy to “shed” in Chapter 11.

Strangely, although railways and airlines are subject to the same labor laws, they are subject to different provisions of the bankruptcy code regarding their ability, while in bankruptcy, to assume or reject their collective bargaining agreements.

1. Railway Worker CBA’s in Bankruptcy: 11 U.S.C. §1167

11 U.S.C. § 1167 states that neither the court nor the trustee may change the wages or working conditions of employees of a debtor subject to Subchapter 4 of Chapter 11, and established by a collective bargaining agreement.

---

58 Id.
59 See supra note 34.
60 See discussion on the dispute resolution mechanisms of the RLA, supra section III.A.1, and collective bargaining agreements in bankruptcy, infra section III.B.2.
61 See case cited supra note 19.
64 Id. at 69-74; see Harvey R. Miller & Shai Y. Whismah, Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?, 78 Am. Bankr. L.J. 153, 154 (2004).
agreement subject to the Railway Labor Act, except in accordance with section 6 of that act (45 U.S.C. § 156).68 45 USC § 156 prescribes the cumbersome dispute resolution procedures for employers and unions subject to the Railway Labor Act wishing to change rates of pay, rules, or working conditions.69 As interpreted today, this provision precludes trustees in cases covered by Subchapter IV of the Bankruptcy Code, 11 USC §§ 1161 et seq. and by Title I of the Railway Labor Act, 45 USCA §§ 151 et seq. (railroads) from accessing the less CBA-protective mechanisms of 11 U.S.C. section 365 or 1113 to reject CBA’s in bankruptcy proceedings.70 Via 11 USC §1165, Congress also instructed trustees in reorganizations subject to § 1167 to consider the public interest in addition to the interests of the debtor, creditors, and equity security holders when construing §1167.71

The legislative history shows that concerns about the volatility of labor relations in the railway industry and the preservation of reliable railway service motivated Congress’ enactment of the §1167’s strict restrictions on the rejection of railway workers’ collective bargaining agreements in bankruptcy proceedings.72 Despite the arguments behind subjecting airlines to the RLA, including that interstate commerce heavily relies upon both industries as forms of mass transportation and shipping and that both industries are especially vulnerable to wide-scale disruption during labor disputes,73 Bankruptcy Courts held that §1167 applies only to railroad reorganizations and not to airlines.74 Congress subsequently codified this reading.75


Despite the plain terms of the RLA and the then ambiguously phrased §1167, Courts held that airline’s CBA’s were subject to rejection in Chapter 11 proceedings pursuant first to §365 and then to §1113 of the Bankruptcy Code. In the first major bankruptcy proceeding following airline deregulation, In re Braniff Airways, Inc., a Bankruptcy Court held that CBA’s in the airline industry are subject to rejection in bankruptcy proceedings as executory contracts under §365, unlike collective bargaining agreements in the railroad industry.76 Another Bankruptcy Court followed Braniff’s lead in 1983 invoking §365 of the Bankruptcy Code to reject Continental Airlines’ labor contracts.77 Continental subsequently legally terminated roughly 60% of all unionized employees, despite a CBA guaranteeing these workers’ collective job security.78 Continental’s unions filed challenges to these actions, arguing that Continental filed Chapter 11 in bad faith, but these challenges failed to attract judicial support.79

In 1984 in NLRB v. Bildisco & Bildisco, the Supreme Court implicitly sanctioned these Courts’ application of §365 to reject CBA’s in Chapter 11 proceedings, holding in a non-airline context that a collective bargaining agreement was an executory contract subject to rejection in Bankruptcy Court pursuant to §365 of the

70 See, discussion infra section 2.
71 11 U.S.C. § 1165. The Senate Report accompanying this provision and subsequent courts have interpreted its “public interest” commandment narrowly, as requiring court’s to only consider the public interest in the preservation of the debtor’s rail service. S. Rep. No. 989; 95th Cong., 2d Sess.; S. 2266 (1978). (Noting, “the preservation of the debtor's rail service … is an important factor in railroad reorganization, which distinguishes them from other business reorganizations. Hence, this section modifies the provisions in sections 303 and 305 that govern generally when the business of a debtor may continue to operate, when relief under the Act sought should be granted, and when the petition should be dismissed.”); New Haven Inclusion Cases, 399 U.S. 392 (1970).
72 H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) (explaining the House passed § 1167 “because of concerns that the subject of railway labor is too delicate and has too long a history for the bankruptcy code to upset established relationships.”).
73 See, discussion supra.
77 Id.
78 See, Mathiesan supra note 12 at 1029.
79 Id.
Bankruptcy Code.  

The Court ruled that therefore the debtor need only show “that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract,” to legally reject a CBA.

Immediately following Bildisco, Congress amended the Bankruptcy Code by adding 11 U.S.C. §1113 governing the rejection of CBA’s. As construed by the courts, Congress added §1113 to establish a means for debtors and trustees to successfully reject CBA’s in bankruptcy while precluding their unilateral termination or alteration. Section 1113 covers all labor contracts, except for railway workers. It requires that a) the employer make a proposal to the union before seeking rejection of the agreement by the court, b) provide relevant information to the union, and c) negotiate in good faith. It also requires that the Bankruptcy Court only approve applications for rejection of a collective bargaining agreement if a) the debtor made the proposal, b) the union refused to accept it without good cause, and c) the balance of the equities “clearly favor rejection of the agreement.”

These limited and vague protections stand in stark contrast to the prescriptions of §1167 which require railroad debtors to abide by the RLA’s provisions for resolving “major disputes” when rejecting CBA’s even when the railroad is in bankruptcy. The contrast is even clearer in light of courts’ often half-hearted application of the protective elements of §1113. Courts regularly reject airline CBAs, even when employers arguably fail to satisfy its provisions, including when the equities arguably do not favor rejection of the agreement. Some observers attribute the contrast to the “subtle preferences afforded to airlines by bankruptcy judges.” They note that even after §1113 afforded some protections to CBA’s in airline bankruptcies, airlines in Chapter 11 have continued to successfully seek concessions from unions in a “take-it-or-leave-it fashion.”


Section 1110 is another provision of the Bankruptcy Code that facilitates the disproportionate impact of the airline industry’s economic crisis on its workers and needlessly treats airline workers differently from railway workers despite the policy rationales behind subjecting them to the same labor laws. Section 1110 provides unparalleled protections for aircraft lessors, at the expense of all other creditors to the airline, including airline workers, by requiring that within sixty days of filing for Chapter 11 protection, an airline must decide whether to assume or reject any lease or purchase obligations for its aircraft. If the carrier retains the aircraft, it must cure all defaults and agree to honor all future payment requirements. Failure to do so enables owners or financiers to

---

81 Id. at 526.
83 In re Continental Airlines, 125 F.3d 120 (3d Cir. 1997); and Mathiesen, supra note 12 at 1030-31.
84 §1113(a).
85 §1113(c) (emphasis added); see also, Mathiesen, supra note 12 at 1031-32.
87 See e.g., In re National Forge Co., 289 B.R. 803 (Bankr. W.D. Pa. 2003), where the court allowed rejection of a CBA over a challenge that all parties would not be treated fairly if the court did so, while approving large severance payments to top executives, arguing that without these payments the executives might not remain with the Debtor through bankruptcy. For further examples, see Mathiesen at 1030-31.
90 Id. (citing Gregory P. Ripple, Special Protection in the Airline Industry: The Historical Development of Section 1110 of the Bankruptcy Code, 78 Notre Dame L. Rev. 281, 282 (2002)).
92 §1110
immediately assert their interests and take possession of the equipment.\textsuperscript{94}

This provision is unique within the Bankruptcy Code. \textsuperscript{95} Similar accommodations for other capital-intensive industries, such as automotive or steel manufacturing, do not exist within the Code. \textsuperscript{96} Congress enacted this unprecedented provision at the behest of the aircraft manufacturing industry on the theory that the provision was necessary to ensure that airlines in a financially precarious industry could secure the requisite financing to operate. \textsuperscript{97}

IV. PART III: The problems with this legal framework

A. Bankruptcies

Since airline deregulation in 1978, over 166 airlines have declared bankruptcy. \textsuperscript{98} In the spring of 2008 alone, four airlines filed for bankruptcy. \textsuperscript{99} Of the “legacy carriers,” airlines authorized by the government to fly major passenger routes during regulation, all except American Airlines have filed for bankruptcy since 1978. \textsuperscript{100} Several

\textsuperscript{94} Id.
\textsuperscript{95} Ripple, supra note 91 at 290-292.
\textsuperscript{96} Id. Although, the Bankruptcy Code does have special provisions for railroads, in general, see 11 U.S.C. 11, subchapter IV, on Railroad Reorganizations (2006), it does not contain any preferential provisions for the lessors of trains or railroad equipment. Id. Instead, as discussed, infra Part III.B.1, it provides special protections for railroad employees in §1167 by prohibiting the rejection of railroad CBA’s in bankruptcy unless they could have been legally revoked outside of bankruptcy.
\textsuperscript{97} Id. at 281-82.
\textsuperscript{99} Aloha, ATA, and Skybus Airlines have all ceased operations since the beginning of 2008. Each has filed for Chapter 7 bankruptcy and is in the process of liquidating their remaining assets. Frontier Airlines filed for Chapter 11 bankruptcy in April 2008. It is maintaining service while attempting to reorganize. Fischer, Bart Elias, & Robert S. Kirk, Congressional Research Service, \textit{U.S. Airline Industry: Issues and Role of Congress at 4} (July 29, 2008).
\textsuperscript{100} \textit{What if... American hadn't avoided bankruptcy in 2003?} THE DALLAS MORNING NEWS Nov. 18, 2007 Sunday. The ten “trunk” legacy carriers were: American Airlines, Braniff Airlines, Continental Airlines, Delta Air Lines, Eastern Airlines, Northwest Airlines, PanAm, United Airlines, US Airways, and TWA. Terry Sanders, \textit{NOTE: The Runway to Settlement: Rejection of Collective Bargaining Agreements in Airline Bankruptcies}, 72 Brooklyn L. Rev. 1401, 1403 (2007). For more details on these bankruptcies, see Cudahy at 6-7 citing:


11 of these, including three that eventually liquidated, have entered bankruptcy more than once (including US Airways, Continental, Eastern, PanAm, and TWA).101

1. Pension Defaults

The degree of economic crisis in the airline industry and its effect on airline workers is especially evident in the unprecedented levels of pension defaults since deregulation. During its reorganization in 2003, U.S. Airways defaulted on over $600 million in promised pension benefits to its pilots, passing the liability for these promises onto the government-created Pension Benefit Guaranty Corporation (“PBGC”).102 In July of 2004, United Airlines ceased making payments to its pension plans, which were underfunded by at least $6.4 billion.103 In May 2005, United terminated these plans, passing off $6.6 billion of liability to the PBGC.104 These defaults affect not only the PBGC and therefore potentially all other beneficiaries insured by the PBGC and the American taxpayer; they hurt airline workers too, because even when the PBGC assumes responsibility for administering a plan, it imposes limits on the benefits it will pay.105 These limits impose an absolute cap on the value of benefits a participant can receive from a retirement plan, regardless of the retirement benefits a company has promised its workers.106 United’s dump of its pension obligations cost PBGC $6.6 billion, but it also cost the workers $3.2 billion in lost benefits.107

2. Layoffs

Some airline workers have suffered even worse, losing not only their pensions but also their jobs. Since 2000, over 135,000 airline employees have met this fate.108 And mass layoffs are not just a 21st century phenomenon for the airline industry; many more tens of thousands of airline workers lost their jobs in the years directly following deregulation and preceding the turn of the century.109 Many of these workers lost their jobs despite


101 Id. Eastern Airlines, Pan Am and TWA, all former United States legacy carriers, also filed for Chapter 11 more than once before finally liquidating. In fact, Continental almost filed for Chapter 11 three times, nearly earning the title of a “Chapter 33” carrier. Terry Maxon, Lessons From Past Airline Bankruptcies, DALLAS MORNING NEWS, Sept. 15, 2005, at 8D.

102 Nicholas J. Brannick, At the Crossroads of Three Codes: How Employers Are Using ERISA, the Tax Code, and Bankruptcy to Evade Their Pension Obligations, 65 Ohio St. L.J. 1577, 1580-81 (2004).

103 Id.


106 Id.


109 One child of a fired Braniff Airlines mechanics claims. 10,652 employees of Braniff Airlines lost their jobs in 1992; 37,277 employees of Eastern; 29,639 employees Pan American; 9,362 employees and Western lost their
CBA’s guaranteeing their collective job security.\footnote{Id.}

3. Profitability Problem

Underlying these specific losses to workers is a more fundamental problem: the airline industry has never, since deregulation, posted a cumulative net profit.\footnote{Id.} Even when including the $5.4 billion cumulative net profits the industry enjoyed at the time of deregulation as post-deregulation profits, airlines have still lost more money than they have earned since 1978.\footnote{Id.}

The frequency of bankruptcies, pension defaults, and layoffs in the airline industry are plainly related to this profitability problem. Referencing these statistics, some scholars have suggested that, as a species of mass transit, the airline industry is incapable of sustained profitability.\footnote{Id.} Indeed, these theories are not new. A similar assessment fueled the original push to regulate the airline industry in 1938.\footnote{Id.}

Other scholars and industry experts disagree that airlines are incapable of long-term profitability, citing the profitability of Southwest Airlines.\footnote{Id.} These observers note that Southwest has maintained cumulative profits since its inception (in 1973), while all other airlines have failed.\footnote{Id.} They argue that Southwest’s unique business model enables its success.\footnote{Id.} However, most of these observers fail to note several other important and unique aspects of Southwest’s business plan. First, Southwest, unlike all other American airlines, is immune to increases in fuel costs because, with admitted business savvy, it hedged its fuel bids.\footnote{Id.} Second, Southwest provides only selected service to limited parts of the country.\footnote{Id.}

Southwest’s success, then, only proves that airlines providing limited-service and supplementing their income with independent and lucrative investment returns can sustain profitability in today’s legal and economic environment. To the extent that policymakers are concerned with ensuring reliable universal air service as a predicate of a thriving economy, the peculiarities of Southwest’s business model prevent its responsible use as jobs after deregulation. \textit{See}, Commanding Heights, Deregulation. Available at: \url{http://www.pbs.org/wgbh/commandingheights/shared/minitextlo/ufd_deregulation_full.html#judithhamill}.

\footnote{Id.} Air Transport Ass’n of Am., Inc.’s Statement for the Record of the Subcommittee on Aviation Transportation and Infrastructure Committee of the U.S. House of Representatives Concerning the Financial Condition of the US Airline Industry (June 3, 2004), available at \url{http://www.house.gov/transportation aviation06-03-04/bethuneanderson.pdf}.

\footnote{Cudahy, supra note 4 at 35 (“Since price competition was unleashed by deregulation, the industry has lost all of the $5.4 billion in cumulative profits it had made prior to 1978 and then some,” citing Daniel P. Rollman, \textit{Flying Low: Chapter 11’s Contribution to the Self-Destructive Nature of Airline Industry Economics}, 21 Emory Bankr. Dev. J. 381, 383 n.16 (2004)).

\footnote{For a thorough discussion, see \textit{Id.}}

\footnote{Bubb, supra note 1 at 656 (quoting John Frederick, a professor of business and economics: by the summer of 1938, “the ‘entire [airline] industry was in a chaotic state, with several major carriers facing bankruptcy, half the original investment in the airlines lost forever, and new capital so backward as to be practically unobtainable.’”). \textit{See also}, Cudahy, supra note 4.}

\footnote{See, Cudahy, supra note 4 at 35, citing Edward Wong, \textit{Airline Economics: Fasten Your Seat Belt}, N.Y. TIMES, Dec. 9, 2003, at G6, as supporting the position that Southwest is “a shining example of what a successful airline ought to be.”}


\footnote{Id.}

\footnote{Id. (“Hedging is a practice used to lock in prices, and in this case, Southwest ‘was 87 percent hedged at oil prices equivalent to below $24 a barrel, well under the spot price today of about $35.’”) If all airlines had this foresight, the cost of hedging would necessarily be more, and the returns on the investment less. Further, once the price of oil rises, the capacity to hedge for profit decreases, because only if the price of oil continues to rise will the airline make a return. Therefore, Southwest’s success with this investment cannot be replicated universally.

\footnote{Id.}}
proof that a private airline system providing universal air service can be profitable over time.

V. Part IV: Suggestions for Reform

Two dependant but distinct phenomena enable this ongoing exploitation of airline workers. The first is an apparent profitability problem in the airline industry generally: if airlines make no profit, they will be unable to fulfill promises to their workers, including those secured by CBA’s. The second is a distributive justice problem: under the current legal and economic regime, airline workers absorb a disproportionate share of the industry’s losses as compared to airline executives, other creditors, and airline customers.

Unless the airline profitability problem is solved, any reform to ensure a more equitable distribution of the industry’s losses among the parties will provide only temporary relief to workers. Still, although solving the profitability problem would free airlines to respond to market-based incentives to treat their workers well, additional legal reform would be necessary to ensure the equitable treatment of airline workers even in a profitable industry. Courts and legislatures have so drastically whittled away airline workers’ legal protections since deregulation, that this additional reform would be necessary to enable labor to protect itself.

A. Profitability problem

Like debates about most economic problems, there are two core positions on how to solve the profitability problem in the airline industry: the first is a radically free market approach, and the second is a radically regulatory approach.

1. Free Market Approach: Eliminate or Restrict Access to Chapter 11

Some argue that in the absence of government subsidies, regulation, and Chapter 11 Bankruptcy, the airline industry could achieve profitability. This assertion is premised on the idea that unrestricted access to Chapter 11 facilitates a bloated supply of air service in the market and subsequent air fare pricing at unsustainably low levels. The argument is that as long as airlines with unsuccessful business strategies can take advantage of Chapter 11 to shed their debts, other airlines will be forced to compete with the artificially low prices at which these airlines can sell fares after emerging from bankruptcy. The inability of airlines that have not taken advantage of Chapter 11 to compete with the artificially low pricing of those that have filed for Chapter 11 encourages even financially healthy airlines to enter the Chapter 11 process. In other words, some airlines’ use of Chapter 11 to shed obligations to unsecured creditors and workers creates a perverse incentive for other airlines to enter Chapter 11 to invalidate their CBA’s and executory contracts just to remain competitive in the subsequently flooded market.

These concerns are not merely speculative: when Northwest filed for bankruptcy protection in 2005, it had $1 billion of cash and available credit at its disposal. The filing even surprised brokers at prominent Wall Street firms like Merrill Lynch, Morgan Stanley, Prudential, JP Morgan, and Fulcrum Securities who recommended Northwest as a “buy” the morning the airline filed for Chapter 11 protection. When discussing his motives for filing for bankruptcy protection, Northwest CEO Doug Steenland explained,

120 See infra note 153 detailing consumers’ growing dissatisfaction with airlines’ customer service.
123 Id.
124 Id.
125 Id.
126 Dowdell supra note 89 at 685.
127 Id.
Northwest must significantly lower its costs to compete with other carriers. Many of these are legacy carriers that have already used the bankruptcy process to achieve changes in their cost structures or newer, low-cost carriers which have much lower labor and operating costs than legacy carriers.\textsuperscript{128} This apparent race to Chapter 11 has led some observers to suggest that Congress should completely eliminate Chapter 11.\textsuperscript{129}

In this scenario, no airline would be able to use the bankruptcy system to lower costs and then lower fares. Obviously, if airlines were prohibited from restructuring, financially unfit airlines would be forced to liquidate or sell to a bidder more able to efficiently and/or profitably run the business. Accordingly, it can also be reasonably expected that without Chapter 11, the supply of air services in the market would diminish. Proponents of this solution buttress their position by arguing that Chapter 11 is unnecessary to preserve the value of airlines as going concerns, i.e. to fulfill the original purpose of bankruptcy.\textsuperscript{130} They suggest the market will ensure that an airline worth more as a going concern will continue to operate as such because savvy investors will anticipate the disparity in the worth of the airline as a going concern and its liquidated value and offer to buy the collapsing airline as a whole for slightly more than its liquidated value.\textsuperscript{131}

Eliminating Chapter 11, even only for airlines, is a radical approach that may be unable to garner the political support necessary to become law. But, some of the goals of this approach could be served with a few less drastic reforms to the bankruptcy system. If we allow financially failing airlines to use Chapter 11, the market may remain bloated, but we can prevent financially fit airlines from accessing Chapter 11 and at least stop the ongoing race to Chapter 11 in the airline industry.

Currently, insolvency is not a prerequisite for corporations seeking Chapter 11 protection.\textsuperscript{132} Congress has apparently adopted the position that restrictions on access to Chapter 11 are unnecessary because the social stigma of entering bankruptcy sufficiently deters financially fit airlines and businesses from filing for Chapter 11 protection unnecessarily.\textsuperscript{133} Testimonial evidence of airlines’ motives in filing for bankruptcy\textsuperscript{134} suggests that such reliance is, at best, misguided. Congress amended the bankruptcy code in 2005 to apply a “means test” to individuals filing for bankruptcy out of concern that individuals social stigma was no longer sufficient to prevent individuals from abusing the bankruptcy system to secure discharges on debts they could repay.\textsuperscript{135} Why would Congress restrict access to bankruptcy for individuals, but not for corporations? It is foolish to believe that shame will deter socially irresponsible corporate action more effectively than it will deter socially irresponsible individual action.

There are multiple ways Congress could restrict access to Chapter 11 to prevent its abuse. Congress could apply a “means test” similar to that which it applied to individuals via the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Alternatively, Congress could limit the number of Chapter 11 filings a company is eligible to undertake in a certain period of time. For example, corporations could be granted unrestricted access to Chapter 11 twice a decade. If after 2 filings in 10 years a company has not corrected its losses, that company may be irreparably destined for failure. Keeping a company destined for failure artificially alive facilitates over-supply in the market, so it may be better to force those companies to file Chapter 7 liquidations. More important, by firmly restricting the number of reorganizations a company can undertake, Congress could make Chapter 11

\textsuperscript{129} Dowdell \textit{supra} note 89 at 685 (citing Christopher W. Frost, \textit{Bankruptcy Redistributive Policies and the Limits of the Judicial Process}, 74 N.C. L. Rev. 75, 78-79 (1995).)
\textsuperscript{131} Id.
\textsuperscript{134} See e.g., Northwest CEO’s statements, \textit{supra} note 128.
\textsuperscript{135} 11 U.S.C. section 707(b); and \textit{supra} note 62 at 36.
less attractive to corporations analyzing the costs and benefits of unnecessary bankruptcies.

On top of these two direct means of restricting access, the most effective reform to prevent unnecessary Chapter 11 filings may be less direct. If airlines can enter bankruptcy and shed all of their labor costs, they will. If Congress corrected the bankruptcy system to better protect workers’ CBA’s, they could minimize airlines’ incentive to needlessly file bankruptcies. In a practical sense, manipulating the incentives of actors is often the most effective means of controlling behavior.

If Congress restricted access to Chapter 11, some airlines would fail faster, but their failures would decrease supply in a flooded market. We could reasonably expect that surviving airlines would therefore be able to command higher fares from the market. We might further venture that in this market a sufficient number of airlines could sustain profitability to collectively provide universal and reliable air service without regulation. If the airlines are thus capable of running a profit in a true free market while providing sufficiently universal service to meet the public interest in a reliable and thorough transportation infrastructure, Congress should make changes to facilitate a true free market, i.e. eliminate or restrict access to Chapter 11.

The economic failure of passenger service in the railroads (another species of mass transportation) in a free market and the near universal failure of airlines throughout the 30 years of deregulation, however, suggest that the elimination of Chapter 11 for airlines would not necessarily usher in profitable and affordable, universal air service. Economic theory supports this reservation. Because the airline industry is a classic example of an industry struggling under marginal cost pricing, it is very unlikely that it will ever maintain profitability without substantial direct and indirect subsidization and/or direct regulation, unless it evolves into a private monopoly.

Marginal cost pricing exists when operating a business requires high fixed costs and low marginal costs. Running an airline requires high fixed costs, including the cost of aircraft, fuel, scheduling and labor. It has low marginal costs because the additional cost of flying an additional passenger on a flight that is already set to fly is virtually nothing. The airlines have not and will not develop into a private monopoly as many predicted because direct and indirect public and private subsidization keep otherwise doomed competitors afloat. Clearly, a private monopoly is not good for consumers or workers because it enables monopoly pricing and disables market incentives to protect labor. Accordingly, if the marginal pricing cost model is correct, airlines must be reregulated as a public monopoly to ensure profitability and prevent the negative consequences of a private monopoly.

2. Regulatory Approach: Re-regulate the Airlines

Because, as just discussed, it is unclear that the airline industry can ever both sustain profitability in a true free market and provide universal air service, Congress should consider re-regulating the airlines. As noted above, the only airline post deregulation to consistently post profits is Southwest. But, Southwest’s profits include

---

136 See infra Part IV.B.1 arguing that Congress should make airline workers’ CBA’s subject to the more protective §1167 of the Bankruptcy Code and repeal preferential treatment for aircraft lessors in bankruptcy.
137 This reform would have the happy coincidence of better protecting workers rights secured by CBA’s.
138 For a review of the financial turmoil in passenger rail service triggering its 1970 government takeover and recreation as Amtrak, see: John C. Spychalski, Transport At The Millennium: Rail Transport: Retreat And Resurgence, 553 Annals 42, 49 (1997) (“The imminence of the disappearance of most remaining intercity passenger trains, coupled with the growing destitution of Penn Central and its relative prominence as a passenger service provider, forced congressional action [re-regulating passenger rail service]... [Spychalski then notes] viewed as a total system, no extensive network in any mode of passenger transport breaks even, let alone operates at a profit. [And] public funding of road and air transport infrastructure is significant in magnitude and indispensable to the public benefits that those modes provide.”)
139 See Cudahy, supra note 4 at 29-30; Dempsey, Airline Deregulation and Laissez-Faire Mythology 345-7 (noting “the inherent tendency of airlines to engage in destructive competition (because of the instantly perishable nature of the product sold and the extremely low short-term marginal costs of production” as a “legitimate rationale for economic regulation.”)
140 Id.
141 See supra notes 114-15.
income from fuel hedging contracts, and Southwest provides only limited service.\textsuperscript{142}  If airlines as a form of mass transportation are incapable of profit in the long run, as history and the marginal cost pricing model suggest,\textsuperscript{143} reforming the bankruptcy system to facilitate a true free market will only cause airlines to fail faster.\textsuperscript{144}  This grim future seems increasingly likely as the costs of oil, security, and credit increase.

Assuming that airlines are incapable of sustaining profits while providing universal air service over time and that the economy and society as we know it depend on universal air-service, the economic crisis in the airline industry presents an urgent and weighty policy question for lawmakers: which constituency should pay for the difference between the costs of providing universal air service and the low prices airlines are able to command from the market?

The unregulated status quo, replete with its illusory protections for airline worker CBA’s in bankruptcy and merger contexts, demands that airline workers subsidize the airline industry with their livelihoods. But Congress could place this burden on other, more appropriate parties by re-regulating the industry. There are pros and cons of re-regulation and multiple models of it. This section addresses two models of re-regulation: the first would ask consumers to pay for the disparity between the cost of providing air service and the market price of air fare, the second would ask both the consumer and the government to pay for the cost disparity. The pros of re-regulation are common to the two models, so they are discussed jointly in Section a. The cons of the first model are discussed in Section b, while the lesser cons of the second model are discussed in Section c.

\textbf{a) Pros of Re-Regulating: Enabling Profitability and Stability}

History has shown that chronic airline insolvency is avoidable.\textsuperscript{145}  The widespread layoffs and bankruptcy filings in the airline industry occurred only after the deregulation of the airlines.\textsuperscript{146}  Braniff, PanAm, Eastern Airlines and many other airlines first declared bankruptcy in the years immediately following deregulation, after decades of successful operation.\textsuperscript{147}

Under regulation, prices were fixed and competition artificially limited to ensure airline profitability. If operating costs increased, due to higher fuel costs or more expensive labor contracts, prices, in most instances, were correspondingly raised.\textsuperscript{148}  Supply of air service was limited to prevent wasted costs of operating empty flights.\textsuperscript{149}  The CAB limited supply by refusing to recognize new airlines and by only authorizing new routes when it found a demonstrated need for more service.\textsuperscript{150}

With airlines making profits, airline workers were able to negotiate good compensation packages, including stable and increasing wages, secure employment, good working conditions, and reliable pensions.\textsuperscript{151}  Moreover, there was greater stability in the airline industry with less strikes, bankruptcies, mergers and acquisitions, and less firings.\textsuperscript{152}

\textsuperscript{142} Id.
\textsuperscript{143} See supra notes 139-141; for a historical exposition of this idea as applied to railroads, see also, Adams, The Relation of the State to Industrial Action, 1 Publications of the Am. Econ. Ass’n 7, 61, 64 (1887)(concluding, “[For the railroads], the only question at issue is, whether society shall support an irresponsible, extra-legal monopoly, or a monopoly established by law and managed in the interest of the public.”).
\textsuperscript{145} See supra note 12.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{152} Id.
b) Cons of Re-regulating: The CAA model

Although many positives could result from re-regulating the airlines in a fashion similar to that practiced prior to 1978, there are also many potential negatives.

First, it would be naïve to suggest that a return to regulation would necessarily be in the interest of all current airline workers. If one of the major causes of the economic crisis in the airline industry is over-supply and if one of the main mechanisms by which the CAB ensured airline profitability during regulation was limiting the number of airlines and routes which could be flown, re-regulation would almost certainly spell termination for many thousands of airline workers as the government decertified many airlines or severely limited their rights to fly various routes. To be sure, the working conditions, or at least the bargaining power, for those airline employees who retained jobs after re-regulation would be preferable to those under the current system. But, sacrificing the many to save the few hardly seems like an equitable solution to the current policy predicament.

Second, it would also be naïve to ignore one of the major motivators behind the original push for de-regulation and one of the biggest differences between pre and post de-regulation for the consumer: fare prices. During regulation, most Americans could not afford to fly to other areas of the country. In 1974, the cheapest roundtrip coast-to-coast flight, adjusted for inflation, cost $1,400. These prices would not necessarily return under a new regulatory regime because they resulted from the CAB’s discretionary decision to charge more for longer flights even though the price differential between a regional flight and a coast-to-coast flight were comparatively minimal. Nonetheless, the cost of air travel in general would almost certainly increase if the industry were re-regulated (especially in light of the recent and dramatic increases in fuel costs) as the purpose of regulation is to limit competition and set prices at a level sufficiently high for the industry to sustain profits.

Increased air fare prices could have sweeping consequences beyond the obvious limitations on mobility for the middle and working classes. Sudden, dramatic increases in air fare prices could have a powerful chilling effect on commerce. In this sense, although asking the consumer to pay for the difference between the cost of operating an airline and the currently below-cost price of air fare may seem to be the most equitable solution to the economic crisis in the airline industry, the costs of this solution may outweigh its benefits.

Despite these concerns, it is possible that a reregulated industry could rationally support current staff levels. Airlines have cut so many jobs since deregulation that airlines are arguably running with less than optimal staffing. The security and safety of passengers and the reliability of service are ill-served by these bare bones staffs. Correcting airline staffing to maximize safety, security, and efficiency may support jobs for the majority of those wishing to stay in the industry after reregulation. Also, a new regulatory agency could institute a hiring freeze could to preserve jobs for the majority of airline workers in the short term without radically affecting the profitability of the industry as a whole. This could work because, like almost all American industries, the airline labor force is heavily populated by baby boomers nearing retirement. If reregulation occurred before the majority of these retirements take place and regulators determined that fewer staff were needed under the new regime, regulators could simply institute a hiring freeze until a sufficient number of the workforce retired to accommodate desired staff levels.

Although consumers benefited from decreased prices after deregulation, the benefits of deregulation for consumers may be more complicated than they first appear. J.D. Power & Associates reports that customer satisfaction with the airline industry is at a three year low. It attributes this dissatisfaction to “battered employee morale” resulting from “layoffs, shut downs and industry consolidation.” The report clarifies, “Deteriorating levels of customer service provided by airline staff—rather than high fares and additional charges for amenities—have led to a significant decline in customer satisfaction with airline carriers.”
c) Lesser Cons of Re-regulating under a Modified Model: The CAA model Plus Direct Subsidization

Still, there is a modified model for regulating the airline industry that takes account of the potential faults of the CAA regulation model. Although certainly not without its critics, the regulatory model for passenger train travel in the U.S. prevents some of the more extreme costs of the CAA regulatory model while ensuring that railway workers are not forced to subsidize the costs of running an inherently unprofitable universal train service with their livelihoods.158

This model succeeds where the CAA model fails because it couples regulation of supply in the passenger railway service and price controls with government subsidies.159 Regulation of fares and supply is insufficient to solve the economic crisis in the airline industry because the fare prices necessary to sustain the costs of providing universal air service are so high that many consumers will be unlikely to pay them. Even if passengers did pay the increased prices, the costs to the economy in chilled trade could be dramatic.

On the other hand, increasing government subsidies to the airline industry is not sufficient by itself to correct the market. Over-supply in the market coupled with strict price transparency and the ease of shedding liabilities in bankruptcy court enable the current system in which airlines are willing to sell their fares for less than the cost necessary to maintain a profit.160 If government subsidies are increased without resolving the ease of abusing the bankruptcy system, over-supply will continue in the market and airlines’ willingness to sell their fares below cost will remain. Accordingly, it is irrational to expect that, without regulation, government subsidies will do anything but facilitate even lower market fares – they will not alone promote airline profitability.161

complaints. On top of deteriorating satisfaction with airlines’ customer service, consumers are also ill-served by the effect of deregulation’s economic hardships on passenger safety. The New York Times recently reported

Airlines’ long-running problems have put them in a fix that many car owners can appreciate: the carriers have been too financially squeezed to buy new planes, so they hold onto old ones. And now the repair bills are mounting… To cut costs and reduce payrolls, airlines have increasingly sent maintenance work out to contractors in recent years. Roughly two-thirds of maintenance was outsourced as of 2006… That was up from a decade earlier, when about one third of the maintenance work was outsourced… The F.A.A., however, has not moved as swiftly to shift its inspectors to monitor these hundreds of contractors, causing concern that the agency is not scrutinizing some of the highest-risk work on planes. Much of the work is sent overseas. But… just 103 of the F.A.A.’s 3,865 inspectors were devoted to international field offices. Jeff Bailey, Aging Jet Fleets An Added Strain on U.S. Airlines, N.Y. Times, April 12, 2008, at C1.

Airlines are outsourcing maintenance work to cut costs. Surely, the market can correct, to some degree, for airlines’ willingness to risk the safety of passengers. A plane crash is the fastest way for an airline to go out of business. But an airline destined for failure if it doesn’t cut maintenance costs, has nothing to lose, at least on its balance sheet, if it cuts those maintenance costs. Either it protects passenger safety and goes out of business immediately, or it risks passenger safety by outsourcing its maintenance work to cheaper unregulated offshore contractors and continues operating. Reregulating the airlines to ensure collective profitability would protect airlines from the financial desperation that undergirds this unenviable choice.

159 Id.
160 For discussion on the mechanics and destructive nature of competitive pricing in the deregulated airline industry, see: Rollman at 392-8. 21
161 Put in formal Economics terms: to subsidize the airline industry without imposing direct supply restraints or price caps and floors will only “shift the aggregate supply curve to the right” resulting in lower market prices for fares. The suppliers will be willing to sell the same quantity of fares for a lesser price, proportionate to their subsidy. The problem in the airline market is that suppliers are willing to sell their fares for less than the cost of providing the service. Richard Cudahy suggests this may be because of the virtually nonexistent marginal cost of providing transportation to additional passengers after the first passenger and the perishable nature of unsold
However, by coupling increased subsidies with limits on supply and fixed fare pricing, the government may be able to create a system where universal air service can be provided profitably and fare prices are not so high that they excessively chill commerce or destroy demand for air service. This solution would appropriately ask consumers and taxpayers, who benefit from the economic stimulus of artificially affordable universal air service, to pay for the cost of air travel, instead of dumping the financial burden of an expensive commodity, air travel, onto airline workers and unsecured airline creditors.

B. Distribution Problem

The second problem with the legal regime that enables the abuse of airline workers’ rights is a distributional problem: airline workers are absorbing a grossly disproportionate share of the cost of the industry’s losses vis a vis other airline constituencies. Regardless of whether Congress finds a way to correct the airline industry’s profitability problem, additional reforms to prevent airlines’ easy abdication of CBA’s in bankruptcy proceedings and mergers will be necessary to protect airline workers from this inequitable burden.

If the profitability problem is not solved, these reforms may exacerbate some airlines’ financial demise by making it more difficult for them to shed labor costs, but they will ensure a more equitable distribution of the industry’s losses over its constituencies than the current system provides. On the other hand, if the profitability problem is solved, these reforms will still be necessary to ensure that the airlines respect their duties under their CBA’s, to discourage bankruptcy for profit, and to ensure equitable integration of labor after mergers.

1. Bankruptcy reform: §§ 1113 and 1110

Most obvious and urgent among the needed reforms to the Bankruptcy Code is the need to replace §1113 with another provision, like §1167, which provides stronger protections for airline workers’ CBA’s. The current law makes it more difficult for airline and railroad workers to strike than it is for workers in other industries. As discussed previously, airline workers must comply with a cumbersome and slow series of mandatory negotiation and cooling off periods before they may legally strike. Because it wanted to promote stability in the airline industry, upon which commerce relies. Congress applied the more restrictive labor provisions to airlines (the RLA) instead of the more lax NLRA provisions. However, Congress chose to decouple the airline industry from the railroad industry when prescribing bankruptcy law, granting railroad workers the strong protections of §1167 and relegating airline workers to the illusory protections of §1113. The same policy reason for treating airline and railroad workers alike in labor law, the importance of stable transportation service, should persuade Congress to treat airline and railroad workers alike in bankruptcy law. Indeed, Congress justified applying the more protective §1167 to railroad workers for the same reason it justified applying the RLA to railroad workers and airline workers – out of concern for preserving reliable railway service, as a fulcrum of interstate commerce. Interstate commerce also relies on reliable air service, or so Congress would have us believe, so why not ensure stability in the industry by granting airline workers the same stability in their CBA’s that the law grants railroad workers?

The application of §1113 to airline worker’s CBAs is inconsistent with Congress’ decision to apply the RLA to labor relations in the airline industry. Worse, this inconsistent application unjustifiably subjects airline workers

fares. Once a plane takes off, the opportunity to recoup any return on empty seats perishes. These qualities create a peculiar situation in which airlines are willing to sell many fares for virtually any return. When other airlines are competing on the flooded market with these under-cost priced fares, those who are not willing to price their fares at these desperation prices simply don’t find any willing buyers. Cudahy at 29-30. Subsidies alone, which will simply shift the supply curve to the right, will do nothing to correct the suppliers’ collective willingness to sell at below-cost rates. Therefore, subsidies without price and supply regulation will indirectly benefit consumers by ensuring even cheaper fares, but they will do nothing to help the airline industry achieve profitability or increase or secure airline workers’ compensation and job security.

162 See supra, section III.A.1.
163 Id.
164 See supra, section III.A.
165 See supra, section III.B.1, n 75.
166 H.R. REP. No. 595; 95th Cong., 1st Sess.; H.R. 8200.
to the less desirable option of both the labor and bankruptcy laws. The policy reasons behind subjecting airlines to the RLA and subjecting railroad workers CBA’s to §1167 justify subjecting airline workers’ CBA’s to §1167.

In addition to this change, Congress should revoke §1110 of the Bankruptcy Code. More than any other provision of the Code, this section smacks of gross inequity. With the high costs of air craft leases, a company forced to either return its planes or pay all its outstanding debts on its aircraft leases, will likely burn through any money left in its Estate satisfying this provision. This section creates an automatic preference for Boeing, Airbus, and the like, over airline workers in bankruptcy proceedings. By revoking this provision, it may be more difficult for financially strapped airlines to secure leases for aircraft or leases at manageable rates. But to support this historically unprecedented provision, is to again ask airline workers to subsidize a financially broken industry with their livelihoods. More directly than anything else, this section betrays how the law has failed airline workers, and why it needs to be changed.

2. **Merger Reform: Reinstate Allegheny-Mohawk Provisions**

Because of the RLA’s functional impotence in merger contexts, reforms to the bankruptcy code alone will be insufficient to fully protect airline workers. Congress should reinstate the Labor Protective Provisions that the CAB required satisfied before approving mergers during regulation as mandatory conditions of government approval of airline mergers today. No price setting or competition limiting is necessary for these provisions to operate with the full force they once did. And the rationale behind applying these provisions is at least as strong now as it has ever been.\(^\text{167}\)

To prevent the kind of willful neglect of the law embodied by the DOJ’s ongoing refusal to disapprove airline mergers except for antitrust violations, Congress should attach a private right of action to its Labor-Protective Provisions. Thereby, those negatively affected by the airlines’ failure to satisfy the new Labor-Protective Provisions or the government’s failure to enforce them can protect themselves.

This suggestion is not as farfetched as it may seem. In 2001, Republican Senator Kit Bond introduced the Airline Workers Fairness Act in the Senate.\(^\text{168}\) The following day, Representative Jo Ann Emerson introduced the Bill in the House.\(^\text{169}\) The bill had 4 co-sponsors in the Senate and 31 in the House.\(^\text{170}\) The Act would have required the fair and equitable integration of acquired airline workers into an acquiring airlines workforce before the government would grant approval of an airline merger.\(^\text{171}\) Senator Bond said this bill was needed to “reinstate the concept of ‘fair and equitable’” into the law governing airline mergers.\(^\text{172}\) These protections, although not as broad as the Allegheny-Mohawk provisions, would at least prevent some of the worst abuses experienced by airline workers in the current system.

### VI. Conclusion

The schools of thought supporting the airline industry’s current legal environment rely on two fundamental assumptions: 1) that the airline industry is capable, without direct regulation, of earning a profit while providing sufficient service to meet the public interest in efficient and reliable transportation, and 2) that while the market adjusts to its deregulated equilibrium, enabling airlines to continue as going concerns benefits society, even if those airlines’ continued vitality relies on routine pension defaults, layoffs, and CBA repudiation. These assumptions are questionable at best, and it will be impossible to secure meaningful reforms to protect airline workers from the abuses that have become common since deregulation until these assumptions are thoughtfully examined.

There is no reason to believe that without direct regulation the airline industry is capable of earning a profit and

---

\(^{167}\) See supra note 16.


\(^{170}\) Id.

\(^{171}\) H. R. 2989; S. 1479

\(^{172}\) Available at: [http://bond.senate.gov/atwork/recordtopic.cfm?id=205019](http://bond.senate.gov/atwork/recordtopic.cfm?id=205019).
providing universal air service. Indeed, experience indicates that as a species of mass transportation, it is not. If the airline industry is incapable of maintaining a profit and meeting the public interest in universal air service without regulation, lawmakers must choose which constituency will absorb the industry’s losses. Congress can refuse to act and thereby choose to allow the airlines to dump their necessary losses onto their weakest constituency, their workers, or Congress can re-regulate the industry and place the burden of universal air service on the consumers and taxpayers who benefit most from the service.

If Congress chooses to do nothing about the profitability problem in the airlines, it should at least act to protect workers from the inequitable distribution of industry losses that has become the status quo. The easiest way to do this is to amend the bankruptcy code to 1) grant airline worker’s CBA’s the greater protection of §1167, and 2) revoke §1110’s special rights for aircraft lessors. Congress should also act to implement Labor-Protective Provisions similar to the CAB’s Allegheny-Mohawk provisions to prevent airlines from manipulating the merger process to evade obligations to their workers.

If Congress chooses to re-regulate the airlines, it must also subsidize the airlines in order to prevent a dramatic, economy-shocking increase in air fare and to diminish the need to immediately fire a substantial portion of the airline industry’s workforce. Congress must also remember that subsidies alone cannot fix the economic crisis in the industry - the airlines are apparently willing to habitually sell fares at below-cost prices, therefore government subsidies without price and supply regulations will only decrease the market price of airfare leaving the underlying profitability problem in the industry intact.

Even if Congress does re-regulate the airlines and subsidize the industry to the extent necessary to ensure the continuation of reasonably affordable air fare prices, it must also pass the amendments to the Bankruptcy Code and Labor-Protective Provisions discussed above. A profitable industry cannot be expected to share its profits with its workers, even those its CBA’s require it to share, if the law allows the industry to easily and legally evade those obligations through elective bankruptcy and mergers.

As the increasingly global economic crisis continues to chip away at the credibility of the neo-liberal economic theories that once spurred the efforts to deregulate the airline, telecommunications, and energy industries, responsible scholars and citizens need to start looking for alternate explanations for our troubles. To ignore the problem and embrace the oversimplified and demonstrably false mantra of a previous era of economic ideologues is to condone the foreseeable results of political inaction. Here, the foreseeable results of inaction include the continued, unnecessary, and unjustifiable torment of tens of thousands of airline workers.