Golden Gate University Law Review

Volume 18
Issue 1 *Ninth Circuit Survey*

Article 11

January 1988

Labor Law

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LABOR LAW

AIRLINE MERGER AND THE IMPACT OF A MINORITY UNION'S LABOR CONTRACT: *THE DELTA-WESTERN AIR LINES MERGER*

I. INTRODUCTION

At 5:00 PM on March 31, 1987 the Ninth Circuit Court of Appeals in *IBTCWHA, Local Union No. 2707 v. Western Air Lines, Inc.*,[1] enjoined the merger of Delta Airlines and Western Air Lines which was scheduled for the following day. The injunction was to remain in place pending a decision in arbitration between Western and one of its labor unions.[2] Western Air Lines immediately petitioned U.S. Supreme Court Justice Sandra Day O'Connor to stay the Ninth Circuit injunction.[3] In a harshly worded decision, Justice O'Connor stayed the Ninth Circuit Court's injunction. Her ruling supports the principle that labor contracts of a constituent corporation that is covered by the Railway Labor Act (RLA) die with the birth of the merger.[4]

II. FACTS

From late 1985 through 1986 there were twenty-five airline mergers[5] that changed the makeup of the airline industry.[6] The

1. 813 F.2d 1359 (9th Cir. 1987)(*per curiam*; the panel members were Goodwin, J., Schroeder, J., and Poole, J.), *petition for cert. filed* April 1, 1987, *injunction stayed*, 107 S.Ct. 1515 (1987) (O'Connor, J., in chambers) (hereinafter *Western*).

2. *Id.* at 1364.

3. Western Air Lines, Inc. v. International Brotherhood of Teamsters, 107 S.Ct. 1515 (1987) (decision on application for stay)(O'Connor, J., in chambers) (hereinafter *Western II*).

4. *Id.*

5. L.A. Times, Jan. 26, 1987, § IV, at 13, col. 3.

top five airlines increased their market share from 55% in 1985 to 73% in 1987.[7] These mergers in the highly unionized airline industry[8] had an adverse impact on employees and their unions.[9] In the last twenty-five years, four of the five top airlines have litigated labor cases before the United States Courts of Appeals arising out of mergers. These cases created the major body of law involving representation rights of unions following a merger.[10]

A. THE GRIEVANCES AT WESTERN

In the present case, the International Brotherhood of Teamsters (Teamsters) represented three separate "classes or crafts"[11]

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6. This rash of mergers in the airline industry have occurred following the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978). *See* Comment, *Deregulation in the Airline Industry: Toward A New Judicial Interpretation of the Railway Labor Act*, 80 NW. U.L. REV. 1003 (1986). The article suggests that the Airline Deregulation Act has led to new strategies, including mergers with non-union airlines, the creation of non-union subsidiaries, permanent layoffs of employees, Chapter 11 bankruptcies and disavowal of collective bargaining agreements in the airline industries. *Id.* at 1009. The author suggests that case law indicates new legislative protections are necessary to correct a management bias favoring the financial health of the airlines to the detriment of organized labor. *Id.* at 1004, 1035. *See also* LEVINE AND LEVENGOOD, *Productivity and Wage Concessions: Current Bargaining Issues for U.S. Airlines*, 9 EMP. REL. L.J. 308 (1982).

7. Travel Weekly, Feb. 2, 1987, Vol. 46, No. 9, at 18, col. 3. The top five airlines were Texas Air, United, American, Delta and Northwest. *Id.* The top ten airlines controlled 96% of the market. *Id.*

8. LEVINE AND LEVENGOOD, *Productivity and Wage Concessions: Current Bargaining Issues for U.S. Airlines*, 9 EMP. REL. L.J. 308 (1982) (hereinafter LEVINE & LEVENGOOD). The authors give a curtailed history of the comfortable relationship between management and organized labor prior to deregulation. *Id.* at 312-15. The authors suggest that the Airline Deregulation Act, high energy costs, inflation, low-cost competition, the air traffic controllers' strike and the economic recession have resulted in financial losses which have occasioned a new management strategy in labor negotiations which includes cost cutting and wage concessions. *Id.* at 309.

9. Travel Weekly, Feb. 2, 1987, Vol. 46, No. 9, at 18, col. 3. The author, Michael Derchin, an airline analyst, states that the toughest job in mergers is the meshing of labor forces. *Id.* at 18.

10. *See infra* note 59 (United merger with Capital Airlines), notes 67, 81 (Northeast merger with Delta), note 88 (Continental merger with Texas International), and note 99 (Northwest merger with Republic).

11. T.KHEEL, LABOR LAW § 50.04 at 50-11 to 50-21 (rev. ed. 1984). The Railway Labor Act at 45 U.S.C. § 152, Fourth, states that "the majority of any craft or class of employees shall have the right to determine who shall be representative of the craft or class. . . ." The craft or class extends to all of the employees in that class or craft on a company-wide or system-wide basis. *Id.* at 50-12. Most employees fall within one of the generally recognized crafts or classes which have evolved. *Id.* at 50-15. These include pilots, flight engineers, flight attendants, dispatchers, mechanics and related employees,

of employees at Western Air Lines (Western).[12] The Teamster labor contract with Western contained a provision that prohibited Western's agreement to a corporate merger unless certain conditions were met.[13] Similar understandings were incorporated in Western's agreements with the Airline Transport Employees (ATE), whose appeal was consolidated with the Teamster case.[14]

Delta acquired all of Western's stock shortly after the merger was approved by shareholders on December 16, 1986.[15] From December until April, Western was to operate as a wholly owned subsidiary of Delta[16] with the legal and operational

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stock clerks, office clerical employees, passenger service employees and fleet service employees. *Id.* at 50-15, n.23.

12. *Western*, 813 F.2d at 1360. The Teamsters were certified for three crafts or classes employed by Western: mechanics and related employees, stock clerks, and flight instructors. *Id.*

13. *Id.* at 1361. The conditions obligated Western to obtain the acquiring corporation's agreement that Western's maintenance facilities would be operated separately post-merger, that post-merger work performed by Western's employees would be recognized as being within Teamster work jurisdiction, and that the post-merger work and employees would be covered by the existing collective bargaining agreements. *Id.* The merger provisions in the labor contracts were part of extensive negotiations in 1984 that included wage concessions by employees exceeding ten percent. *Id.* The earlier wage concessions had aided Western's financial recovery and both Delta and Western were financially viable prior to the merger. *See* L.A. Times, Mar. 29, 1987, § IV, at 1, col. 3. The article states that Delta has never experienced a work stoppage. *Id.* at 2. During the economically difficult times following deregulation, Delta gave its employees wage increases while other airlines were laying off employees. The article stated that Delta was rated number ten in the book *The 100 Best Companies to Work for in America. Id.* The average pay of a Delta employee was $51,200 per year and the average pay of a Western employee was $36,500 per year. *Id.* Because of this, employee turnover at Delta was an extremely low three-tenths of one percent. *Id.* at 5. Western was also financially viable, recovering from the brink of bankruptcy a few years earlier. *Id.* at 1. Western merged because they "did not have the economic or technical wherewithal to succeed." *Id.* For example, the airline needed a computerized reservation system and a 300 airplane fleet, which it could not afford. *Id. See also* LEVINE AND LEVENGOOD, *supra*, note 8, at 1, where the authors state that in 1981 only four of the top twelve airlines reported profits: Delta, Northwest, American and U.S. Air.

14. *Western*, 813 F.2d at 1361. ATE was the representative of Western's clerical, office, fleet, and passenger service employees.

15. *Western II*, 107 S.Ct. 1515 (1987). *See also* L.A. Times, Mar. 29, 1987, § IV, at 1, col. 3. The merger produced a surviving corporation worth 900 million dollars with 48,000 employees and over 360 jets. *Id.* at 2. Revenue increases are anticipated to reach 1.5 billion dollars in the 1987 calendar year. *Id.* at 1.

16. Brief for Defendants/Appellees at 3, IBTCWHA, Local Union No. 2707 v. Western Air Lines, Inc., 813 F.2d 1359 (9th Cir. 1987)(*per curiam*; the panel members were Goodwin, J., Schroeder, J., and Poole, J.), *petition for cert. filed* April 1, 1987, *injunction stayed*, 107 S.Ct. 1515 (1987) (O'Connor, J., in chambers).

merger scheduled for April 1, 1987.[17] Thereafter Western would cease to exist.[18] The merger agreement did not provide that Delta would be bound by the conditions of Western's labor contracts.[19] The omission probably resulted from the fact that Delta was non-union and had approximately three times as many employees doing the same kind of work as the "classes or crafts"[20] represented by the Teamsters at Western.[21]

The unions filed grievances[22] which alleged that the labor contracts with Western were breached by Western's unconditioned agreement to merge.[23] Western refused to arbitrate the grievances[24] and argued that the issue involved the union's representational status in the post-merger operation and thus was subject to the exclusive jurisdiction of the National Mediation Board (NMB).[25]

B. Procedural history of the case

The Teamsters brought the initial action against Western in district court to compel arbitration of the grievances.[26] The district court dismissed the Union's complaint for lack of subject matter jurisdiction and held that the issues involved employee representation matters within the exclusive jurisdiction of the NMB.[27] The Ninth Circuit reversed, agreeing with the Teamsters that the issues were subject to arbitration and enjoined the merger. On the same day Western filed a Writ of Certiorari

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17. *Id.*

18. *Id.*

19. *Western*, 813 F.2d at 1361.

20. Association of Flight Attendants, AFL-CIO v. Western Air Lines, Inc., 662 F. Supp. 1, 2 (D.D.C. 1987) *aff'd*, Association of Flight Attendants, AFL-CIO v. Western Air Lines, Inc., slip op. No. 87-7040 (D.C. Cir. March 31, 1987). This case involves the same merger as *Western* with a similar issue, but with a different labor union.

21. Brief for Defendants/Appellees at 3, IBTCWHA, Local Union No. 2707 v. Western Air Lines, Inc., 813 F.2d 1359 (9th Cir. 1987)(*per curiam*; the panel members were Goodwin, J., Schroeder, J., and Poole, J.), *petition for cert. filed* April 1, 1987, *injunction stayed*, 107 S.Ct. 1515 (1987) (O'Connor, J., in chambers).

22. *Western*, 813 F.2d at 1361.

23. *Id.*

24. *Id.*

25. *Id.* The issue between the parties in the line of cases presented in this article revolves around which forum has jurisdiction, the federal courts or the National Mediation Board.

26. *Id.*

27. *Id.*

before the U.S. Supreme Court. On April 2, 1987, Associate Justice Sandra Day O'Connor granted a stay of the Ninth Circuit injunction.[28]

III. BACKGROUND

The Railway Labor Act (RLA)[29] was originally enacted in 1926, almost a decade before the National Labor Relations Act (NLRA).[30] These first federal efforts were directed toward the systems that were the primary carriers of goods and passengers in interstate commerce. The RLA of 1926 was an agreement worked out between management and labor[31] converted into legislation, and then ratified by the Congress and the President.[32] The RLA, as originally enacted, set forth the rights and duties of carriers and their employees, including the employees' right to organize into unions and bargain with their employers.[33] The

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28. *Western II*, 107 S.Ct. 1515 (1987).

29. The Railway Labor Act is codified at 45 U.S.C. §§ 151-88 (1936).

30. The National Labor Relations Act is codified at 29 U.S.C. §§ 151-68 (1947).

31. Elgin, J. & E. R. Co. v. Burley, 325 U.S. 711, (1944), *aff'd on rehearing*, 327 U.S. 661 (1946) (contains a clear legislative history of the RLA and is a good starting point for a complete analysis of the Act).

32. *Id.*

33. 45 U.S.C. § 152 (1934), Ninth states in part:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion excercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the elec-

Act created procedures and federal administrative machinery to facilitate the selection of bargaining representatives and the reaching of agreements.[34]

The intent of the RLA was the peaceful settlement of labor disputes.[35] To that end, the RLA provides procedural machinery for the settlement of three classes of labor disputes: (1) major disputes (2) representation disputes and (3) minor disputes.[36]

A. "MAJOR DISPUTES"

"Major" disputes involve disagreements over the formation of collective bargaining agreements.[37] The negotiation of agreements follows a long and drawn out procedure.[38] If negotiations fail, the NMB will mediate.[39] If mediation fails, the President of the United States has the power to halt any economic action by the Union for a "cooling off period."[40] The federal courts are, by implication, authorized to issue injunctions maintaining the status quo pending the exhaustion of these procedures.[41] Following the exhaustion of the procedures the parties are free to resort to self-help: the union may strike and the carrier may unilaterally change the terms and conditions of employment.[42]

> tion. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

34. 45 U.S.C. §§ 151-64 (1934).

35. *Elgin*, 325 U.S. 711.

36. 45 U.S.C. §§ 151-64 (1934). *See also Elgin*, 325 U.S. 711 (1944). The terms "major" and "minor" do not appear in the statute. *Elgin* used these classifications in the text of the decision. *Id.* at 723. *Elgin* recognized the classifications as terms that had been traditional in the railway labor world. *Id.* The terms "major" and "minor" have been used consistently in subsequent decisions. Comment, *Deregulation in the Airline Industry: Toward, A New Judicial Interpretation of the Railway Labor Act*, 80 NW. U.L. REV. 1003, 1005 n.20 (1986). The Comment reviews the history of the RLA and suggests that courts institute labor-protective standards to insure against deregulation's erosion of labor's bargaining power.

37. *Elgin*, 325 U.S. 711 at 723.

38. 45 U.S.C. §§ 151-64 (1934).

39. *Id.*

40. International Brotherhood of Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157 (5th Cir. 1983) (hereinafter *Texas Int'l*). *See also* note 92 and accompanying text.

41. *Western*, 813 F.2d 1359 at 1363, *citing* Federal Express Corp. v. Teamsters Union, 617 F.2d 524, 526 (9th Cir. 1980).

42. *Texas Int'l*, 717 F.2d at 159.

B. "Representation Disputes"

"Representation" disputes are governed by 45 U.S.C. section 152, Ninth,[43] which provides that it is the duty of the National Mediation Board (NMB) to investigate any dispute concerning the identity of the collective bargaining representative of employees and then to certify the organization which has been properly designated as the exclusive employee representative.[44]

All issues concerning the proper representative of employees of a carrier are resolved by the NMB.[45] The Supreme Court has held that the NMB has exclusive jurisdiction over representation issues and its determinations are not reviewable by state or federal courts.[46] The Second Circuit Court of Appeals in *Ruby v. American Airlines, Inc.*,[47] held that as soon as the action reveals a representation dispute, the court is required to dismiss the complaint.[48] The Second Circuit ruled in *Summit Airlines v Teamsters, Local Union No. 295*,[49] that a union could not use

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43. *See supra* note 33, where pertinent portions are quoted.

44. 45 U.S.C. § 152, Ninth (1934).

45. *Id.*

46. Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943). The Brotherhood of Railroad Trainmen and the Switchmen's Union filed with the NMB to be designated the representative of the class or craft of "yardmen" of the New York Central and Michigan Central Railroads. *Id.* at 299. The Brotherhood sought to be the representative for all the yardmen of the rail lines operated by the New York Central System. *Id.* The Switchmen contended that yardmen of certain designated parts of the system should be permitted to vote for separate representatives instead of being compelled to take part in a system-wide election. *Id.* The NMB designated all yardmen of the carriers as participants in the election. *Id.* The Brotherhood was certified after the election and the suit for cancellation of the certification was brought in the district court by the Switchmen. *Id.* The U.S. Supreme Court never reached the merits of the dispute; instead it ruled that the district court did not have the power to review the action of the National Mediation Board in issuing the certificate. *Id.* at 300. The Court stated the dispute was to reach its termination when the administrative finding was made. "There was to be no dragging out of the controversy into other tribunals." *Id.* at 305. The Court explained: "Where Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain." *Id.* at 303.

47. 323 F.2d 248, 256 (2nd Cir. 1963), *cert. denied*, 376 U.S. 913 (1964). The court dismissed the motion of the union to compel the employer to bargain since another union also claimed to represent the same group of employees. *Id.*

48. *Id.*

49. 628 F.2d 787 (2nd Cir. 1980). The Teamsters picketed the employer at JFK Airport, attempting to force the employer to recognize them as the representative for cargo-handlers without a representation election conducted by the NMB. *Id.* at 789. The court

economic coercion to circumvent the NMB.[50] Thus, a union can be enjoined from representing employees when accomplished through economic coercion such as picketing.[51]

C. "Minor Disputes"

By 1934, turmoil appeared in disputes between carriers and their unions over the interpretation and enforcement of existing contracts.[52] Problems developed when varying interpretations of the provisions in a labor contract concerning wages, hours and working conditions were so polarized that they led to strikes, lockouts, and other disruptions of a magnitude equaling those resulting from failure to reach agreements in contract negotiations.[53]

Congress, in the amended Act of 1934, adopted a different device to resolve such disputes expeditiously.[54] Parties were encouraged to set up one or more industry "adjustment boards" to hear and determine labor disputes over intepretation of contract terms.[55] Arbitration of unresolved disputes was encouraged. Unresolved disputes were to be referred to the newly created National Railroad Adjustment Board that had the power to make a binding award, subject to review and enforcement by the courts.[56]

In 1936 the RLA was made applicable to the airline industry[57] and a similar "Systems Adjustment Board" procedure was adopted.[58] The disputes handled by the National Railroad Adjustment Board or the Systems Adjustment Board were labled

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enjoined the picketing as a violation of the RLA. *Id.* at 795.

50. *Id.* at 789.

51. *Id.*

52. *Elgin*, 325 U.S. 711 at 726.

53. *Id.* at 726 n.22.

54. 45 U.S.C. § 153 (1934) contains a lengthy dispute resolution procedure for the disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. *Id.*

55. *Id.*

56. *Id.*

57. 45 U.S.C. § 181 (1936) applies all the provisions of the Act (with certain exceptions not involved here) to "every common carrier by air * * * and * * * person who performs any work as an employee * * * of such carrier." *Id.*

58. 45 U.S.C. § 184 (1936).

"minor."

Federal courts have the power to issue injunctions where there are labor disputes concerning issues that are properly before the Systems Adjustment Board.[59] Each court balances competing claims of irreparable hardship, the traditional function of a court of equity.[60] The exercise of this power is reviewable only for abuse of discretion.[61]

Since the procedures for each type of dispute are different, when a dispute arises between a carrier and its employee representative, it is imperative to define at the outset whether it is a major, minor or representation dispute.

IV. A HISTORY OF AIRLINE MERGERS THROUGH COURT DECISIONS

The continuing merger of airlines has led to questions concerning the identity of an employee representative after a merger where at least one of the constituent corporations has employees represented by a labor union. A major problem has been placing the issues arising out of a merger under the proper procedure. The line of cases over the last twenty years leading to the Ninth Circuit decision in Western has narrowed and clarified decisional law on the issue.

A. THE MERGER OF CAPITAL AIRLINES AND UNITED AIRLINES, 1963.[62]

Capital Airlines, Inc. (Capital) was party to a labor contract

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59. Brotherhood of Locomotive Eng'rs v. Missouri-K.-T. R.R., 363 U.S. 528 (1960). The Supreme Court upheld the district court's injunction order to end a strike over a "minor" dispute pending a decision by the Adjustment Board. *Id.* at 530. The district court did so upon certain conditions that were the subject of the controversy before the court. *Id.* These conditions required that the Railroads either (1) restore the situation which existed prior to the General Orders, or (2) pay the employees adversely affected by the orders the wages they would have received had the orders not been issued. *Id.* The conditions imposed on the employer by the court were the price of injunction sought by the employer. *Id.* at 535.

60. *See* Note, *Developments In The Law - Injunctions*, 78 HARV. L. REV. 994, 1005-8 (1965).

61. *Brotherhood of Locomotive Eng'rs*, 363 U.S. at 535.

62. Brotherhood of Ry. and Steamship Clerks v. United Air Lines, Inc., 325 F.2d 576

with the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (Clerks).[63] The labor contract provided that Capital would negotiate labor protective devices in the event of merger.[64] Capital was merged into United Airlines, Inc. (United). The Clerks sought a declaration that United was bound by the terms of Capital's labor contract.[65] The Clerks were attempting to place the issue within the jurisdiction of the Systems Adjustment Board by claiming that the dispute was between the exclusive union representative of Capital employees and United Airlines.[66] The district court stated that in spite of the artful pleading, the underlying dispute concerned representation and held that it lacked jurisdiction.[67] Three prior decisions of the Supreme Court in the railroad industry made it clear that the federal courts have no jurisdiction over the resolution of representation disputes under the RLA.[68] The Sixth Circuit Court of Appeals affirmed the district court's dismissal.[69]

(6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964).

63. *Id.* at 577.

64. *Id.* The court's opinion quoted Article 1(b) of the collective bargaining agreement between Capital and the Clerks which provided:

> All provisions of this agreement shall be binding upon the successors or assigns of the Company (i.e. Capital) and in case of a consolidation or merger, the Company (i.e. Capital) will notify the Brotherhood at least 90 days prior to such consolidation, or merger, and representatives of the Company (i.e. Capital) and the Brotherhood will meet and negotiate for the procedure to be followed and the protection to be afforded the employees involved.

65. *Brotherhood of Ry. and Steamship Clerks*, 325 F.2d 576 (6th Cir. 1963).

66. *Id.* United had three times the employees of Capital and probably reasoned that they could not win representation rights before the NMB with the support of only 30% of the employees. *Id.* at 578. It seems that by skillful pleading and by framing the issue as a contract violation the union was trying to invoke the "minor" disputes procedures and bring the issue before an arbitrator. The Clerks must have had the idea the National Mediation Board would not certify them since they could not show that they represented a majority of the employees in the craft or class. The Clerks had a better chance of post merger survival by either arguing a contract adoption theory before an impartial arbitrator, or gaining "status" or "recognition" if it could force United to talk with them in some manner as a representative of employee interests.

67. *Brotherhood of Ry. and Steamship Clerks*, 325 F.2d at 579-80 (6th Cir. 1963).

68. *Id.* at 578, *citing* Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943); General Comm. v. Missouri-K.-T. R.R., 320 U.S. 323 (1943); General Comm. v. Southern Pacific Co., 320 U.S. 338 (1943).

69. *Brotherhood of Ry. and Steamship Clerks*, 325 F.2d at 580 (6th Cir. 1963).

B. The Merger of Northeast Airlines and Delta Airlines, 1972.[70]

Northeast Airlines, Inc., party to a labor contract with the International Association of Machinists (IAM),[71] agreed to a merger with Delta Air Lines, Inc.[72] The IAM proposed in negotiations for a contract to succeed the recently expired labor contract several "post-merger protective devices" for union members.[73] Northeast refused to consider them.[74] The IAM sought an injunction to the merger and an order compelling Northeast to negotiate on the post-merger seniority and employment rights of Northeast employees.[75]

The court reasoned that the decision to merge was at the core of entrepreneurial control[76] and held that Northeast was not required to consult or negotiate with the IAM concerning that class of decision, or the merger's impact on employees.[77] Further, the post-merger entity would be a different legal entity entitled to make its own management decisions over which Northeast had no control.[78] The First Circuit noted that the Civil Aeronautics Board (CAB) had jurisdiction over post-merger protective devices for employees,[79] and it was not in the public interest to have mergers approved by the CAB, only to be obstructed by labor disputes.[80]

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70. International Ass'n of Machinists and Aerospace Workers v. Northeast Airlines, Inc., 473 F.2d 549 (1st Cir. 1972), *cert. denied*, 409 U.S. 845 (1972) (hereinafter *IAM v. Northeast*).

71. *Id.* at 551. The labor contract expired December 31, 1971, and the merger was scheduled for June 12, 1972. *Id.* at 552.

72. *IAM v. Northeast*, 473 F.2d 549, 552.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 557, *citing* Fiberboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964).

77. *IAM v. Northeast*, 473 F.2d at 560 (1st Cir. 1972). The court stated: "We conclude, therefore, that NE cannot be required to bargain about the protection to be accorded its employees in the event of particular postmerger operating changes to be mandated by the CAB or to be made by Delta, nor about the employment rights of NE employees vis-a-vis Delta employees." *Id.*

78. *Id.* at 558.

79. *Id.* at 559, *citing* 49 USC § 1378 (1938).

80. *IAM v. Northeast*, 473 F.2d at 559 (1st Cir. 1972). The court stated: "One of the policies behind this grant of authority to the CAB is to prevent mergers adjudged by the Board to be in the public interest from being obstructed by labor disputes." *Id.*

The First Circuit also applied a balancing of hardship analysis, noting that a court of equity was obliged to choose the course likely to cause the least injury.[81] Granting an injunction threatened damage to Northeast out of proportion to the potential damage faced by the IAM.[82] Therefore, the First Circuit affirmed the district court's denial of relief in the context of a "major dispute."[83]

C. The Merger of Northeast Airlines and Delta Airlines, Revisited, 1976.[84]

Having lost the right to negotiate post-merger conditions at Northeast prior to the merger with Delta, the IAM attempted to police the administration of CAB labor protective devices and any post-merger rights it might have at Delta Airlines.[85] The IAM demanded that Delta bargain with the IAM over these issues.[86] Delta refused.

The First Circuit ruled that the CAB had exclusive authority to control the application of its mandated labor protective devices.[87] Thus, the district court had no jurisdiction.[88]

The court held there was no duty on the part of Delta to talk to the IAM concerning any other post-merger issues not related to holdover grievances or the survival of any Northeast

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81. *Id.* at 553.

82. *Id.* at 544. The CAB had consistently applied a package of labor protective devices as a condition for approval of mergers since 1961. *Id.* Also, post-merger labor contract conditions may operate to the detriment of Delta's employees since they had no opportunity to participate in the negotiations. *Id.* at 559. The court concluded that the employees would fare far better if the merger went through without the desired negotiations. *Id.* at 554. The district court rested its decision upon a finding that the right of Northeast's management to decide the company's future outweigh whatever interest the union had in protecting its members. *Id.* at 552.

83. *Id.* at 555.

84. International Ass'n of Machinists and Aerospace Workers v. Northeast Airlines, Inc., 536 F.2d 975 (1st Cir. 1976), *cert. denied*, 429 U.S. 961 (1976) (hereinafter *IAM v. Northeast II*).

85. It seems the IAM was attempting to create "status" by forcing Delta to talk to them even though the IAM represented only a minority of the employees of the merged entity. It was a backdoor attempt to be "recognized" as a legitimate representative without going through the procedures for certification under the Act.

86. *IAM v. Northeast II*, 536 F.2d at 976.

87. *Id.* at 977.

88. *Id.*

contract rights.[89] It concluded that, absent certification in the merged unit, the post-merger entity did not have to negotiate with a union of a constituent corporation.[90]

D. The Merger of Continental Airlines and Texas International, 1983.[91]

The issues in this case arose out of the merger of Texas International (TXI) and Continental Airlines.[92] Continental had approximately twice the number of employees in the class or craft of employees represented by the Teamsters at TXI.[93] After the merger, the former TXI employees worked under the Continental employment policies without substantial employee hardships.[94]

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89. *Id.* at 979. Surviving rights from the contract between the IAM and Northeast were treated differently. *Id.* The court stated there were no pending grievances at Northeast that the IAM was seeking to remedy through Delta, nor had Delta refused to submit to a System Adjustment Board (SAB) resolution of particular disputes concerning the survival of rights under the Northeast collective bargaining agreement. *Id.*

90. *IAM v. Northeast II*, 536 F.2d at 978. The court said:

> At the very least, the merger created real doubts about whether plaintiffs represent the majority of any Delta craft or class of employees, and where there is such doubt, federal courts leave resolution of the dispute to the National Mediation Board. (footnotes omitted) In the absence of National Mediation Board certification, 45 U.S.C. § 152 Ninth, there is no basis for finding a duty on the part of Delta to negotiate with plaintiffs.

Id. The First Circuit thereby joined with the Sixth Circuit's earlier decision. *See supra* note 59.

91. International Brotherhood of Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157 (5th Cir. 1983) (hereinafter *Texas Int'l*).

92. *Id.* at 160. Through a series of stock acquisitions and corporation reorganizations, Texas Air Corporation acquired control of Continental Air Corporation which in turn acquired all of the stock of two airlines, Texas Int'l (TXI) and Continental Airlines (Continental). *Id.*

93. *Id.* TXI had over 3,000 employees with approximately 1,800 represented by the Teamsters. *Id.* Continental had over 10,000 employees of whom 4,000 were non-union in the same crafts that were represented by the Teamsters at TXI. *Id.* The labor contract between TXI and the Teamsters expired January 31, 1983. *Id.*

94. *Id.* at 160. Sixty-eight of the 1,800 employees of TXI were adversely affected by the merger. *Id.* Each was offerred employment after relocation, but declined. *Id.* at 160. The court stated:

> As a condition of its approval, the CAB required TXI to agree to labor protective provisions. These provisions require TXI to pay a displacement allowance to all employees placed in lower paying jobs as a result of the merger, a dismissal allowance to employees whose jobs were eliminated, moving expenses to

The Teamsters sought a declaratory judgment that its contract remained valid despite its minority status.[95] Although ostensibly a contract enforcement action, the underlying issue was the identity of the representative of the former TXI employees after the merger.[96] The court ruled that it may not grant injunctive relief if the underlying dispute is representational in nature, even if the dispute arose in the context of an otherwise justiciable claim.[97]

The Fifth Circuit noted that a judgment for the union would require that Continental employees be represented by a minority union.[98] The court held that so long as the operating unit is not dramatically altered by a merger so that the union's majority status was not destroyed, the company must adhere to its labor agreements.[99] However, where the employee group that had previously been represented by the union becomes a minority craft in the merged corporation, the majority is destroyed, and the question of employee representation arises.[100] When this happens, resolution of that question is the function of the NMB.[101]

In other words, the Fifth Circuit held that when a merger

> employees required to relocate, and to integrate seniority lists in a 'fair and equitable manner.' They require also that arbitration be available at the instance of any employee or group of employees to resolve any dispute relating to seniority integration or any other dispute about the application of the labor protective provisions.

Id. The merged company harbored no union animosity and voluntarily recognized unions where classes or crafts of employees at TXI and Continental were represented by the same union. *Id. See also infra* note 151.

95. *Id.* at 160.

96. *Id.* at 161.

97. *Id.* The pleadings for contract enforcement were justiciable claims similar to those in *Brotherhood of Ry. and Steamship Clerks. See supra* note 52, and accompanying text.

98. *Texas Int'l*, 717 F.2d 157. The court stated that if the Teamsters were to represent the former TXI employees as they requested, then "One clerk would have a union representative; two of his neighbors would be unrepresented. One employee's working conditions and grievance procedures would be governed by a collective bargaining agreement; two of his neighbors would not." *Id.* at 163. The court referred to the NMB rule that, upon a merger of two airlines, "all certifications. . .were extinguished by operation of law." *Id.* Not to do so would lead to "uneven representation, duplication of effort, and confusion." *Id.*

99. *Id.* at 164.

100. *Id.*

101. *Id.* The Fifth Circuit thus joined the Sixth Circuit.

takes place and a constituent corporation dies, the constituent's obligations to its workers, and its contracts with its labor unions may also die.[102]

E. The Merger of Northwest Airlines and Republic Airlines, 1986.[103]

Northwest Airlines, Inc. (Northwest) and Republic Airlines, Inc., (Republic) were scheduled to merge, with Northwest becoming the survivor.[104] Northwest had 6435 ground employees represented by the Brotherhood of Railway and Airline Clerks (BRAC) and the International Association of Machinists (IAM). Republic, on the other hand, had 6624 ground employees represented by the Air Line Employees Association, International (ALEA).[105] In anticipation of the merger, Northwest entered into a "transition" agreement with their own unions, BRAC and the IAM, to voluntarily recognize them exclusively as the representatives of ground employees in the post-merger entity.[106]

The ALEA moved to preserve the status quo pending (1) the outcome of a National Mediation Board representation proceeding and (2) the arbitration of a grievance with Republic.[107] The district court dismissed the action without a hearing, holding that the complaint was a representation dispute over which the federal courts do not have jurisdiction.[108]

The Seventh Circuit agreed with the district court's decision as it was in conformity with the overwhelming and well devel-

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102. *Brotherhood of Ry. and Steamship Clerks*, 325 F.2d 576 (6th Cir. 1963).

103. Air Line Employees Ass'n., Int'l. v. Republic Airlines, Inc., 798 F.2d 967 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 458 (1986)(hereinafter *Republic*).

104. *Id.*

105. *Id.*

106. *Id.* Republic had followed a similar course of action in its 1980 merger with Hughes Airwest Airlines. *See* Association of Flight Attendants v. Republic Airlines, Inc., 534 F. Supp. 783 (D. Minn. 1982). The Association of Flight Attendants (AFA) was a party to labor contracts at Republic and at Hughes. *Id.* at 784. Republic, the surviving corporation, had entered into a "fence" agreement with AFA wherein Republic voluntarily recognized the union for the merged corporation. *Id.* In this case the district court balanced the equities and ruled against a requested injunction. *Id.* at 790.

107. *Republic*, 798 F.2d at 967.

108. *AEA v. Republic*, No. 86 C 5239 (N.D. Ill. July 28, 1986) (order dismissing). This unpublished decision was cited by the court at 798 F.2d 968.

oped case law in other circuits.[109] The court held that even though the complaint was couched in terms of enforcing the labor contract, the dispute concerned representation.[110]

F. The Merger of Delta Airlines and Western As Viewed By the D.C. Court of Appeals, 1987.[111]

The Association of Flight Attendants (AFA) was a party to a labor contract with Western Air Lines.[112] Section 1(c) of the labor contract required Western to bind any successor to that contract.[113]

The AFA sought an order from the district court directing Western to submit the issue to the Systems Adjustment Board (SAB) and asked the court to retain jurisdiction to enforce compliance with any award the SAB made against Western.[114] The AFA requested the court to preserve the status quo by preventing the merger pending completion of proceedings before the SAB.[115]

The district court held that the issue of post-merger representation was presented in the dispute,[116] and any attempt to divide jurisdiction between the SAB and the NMB would defeat the purposes of the RLA.[117] The complaint was dismissed with prejudice by the district court.[118] The Court of Appeals for the

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109. *Republic*, 798 F.2d at 968. The same observation of the "overwhelming and well-developed case law" is quoted by Justice Sandra Day O'Connor. *See Western II*, 107 S.Ct. at 1517.

110. *Republic*, 798 F.2d at 968.

111. Association of Flight Attendants, AFL-CIO v. Western Air Lines, Inc., 662 F. Supp. 1 (D.D.C. 1987), *aff'd*, Association of Flight Attendants, AFL-CIO v. Western Air Lines, Inc., slip op. No. 87-7040 (D.C. Cir. March 31, 1987).

112. *Id.* at 2.

113. *Id.*

114. *Id.*

115. *Id.* The Association of Flight Attendants took a position parallel to the Teamsters in *Western*. The dismissal by the district court and the dismissal on appeal, however, did not seem to influence the Ninth Circuit.

116. *Ass'n of Flight Attendants*, 662 F. Supp. 1 (D.D.C. 1987).

117. *Id.* at n.7, *citing Texas Int'l*, 717 F.2d at 164. The court in *Texas Int'l* stated, "Given the [National] Mediation Board's undeniable sole jurisdiction over representation matters, we infer from the practical problems of divided jurisdiction a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Texas Int'l*, 717 F.2d at 164.

118. *Ass'n of Flight Attendants*, 662 F. Supp. at 4 (D.D.C. 1987).

District of Columbia Circuit affirmed.[119]

V. THE COURT'S ANALYSIS

In *Western*, the district court had dismissed the Teamster action as a representation issue within the exclusive jurisdiction of the NMB.[120] The Teamsters sought to enjoin the merger, claiming that the issue involved a "minor" dispute over contract interpretation.[121] The Ninth Circuit agreed with the Teamsters and reversed the district court, holding that the dispute was "minor."[122]

The Ninth Circuit stated that the constituent or target corporation, Western, was still in existence.[123] Therefore, there was no representation question at Western since the union already represented Western employees.[124] The dispute was between existing parties over the application and interpretation of a collective bargaining agreement between them and subject to court jurisdiction as a "minor" dispute.[125] The court distinguished the precedents cited by Western as "post-merger" disputes whereas this case was "pre-merger."[126]

In halting the transfer, the Ninth Circuit cited the Seventh Circuit's decision in *Local Lodge No 1266, International Association of Machinists and Aerospace Workers, AFL-CIO v. Panoramic Corporation*,[127] as "more instructive."[128] In that case, the

119. Association of Flight Attendants, AFL-CIO v. Western Air Lines, Inc., slip op. No. 87-7040 (D.C. Cir. March 31, 1987).

120. IBTCWHA, Local Union No. 2707 v. Western Air Lines, Inc., 813 F.2d 1359 at 1360 (9th Cir. 1987) (*per curiam*; the panel members were Goodwin, J., Schroeder, J., and Poole, J.), *petition for cert. filed* April 1, 1987, *injunction stayed*, 107 S.Ct. 1515 (1987) (O'Connor, J., in chambers).

121. *Id.*

122. *Id.*

123. *Id.* at 1362. Western was scheduled to go out of existence in 12 hours. *Id.*

124. *Id.*

125. *Id.* at 1360.

126. *Id.* at 1362. The court said the cited cases generally involved an attempt by a union after a merger has taken effect to force a successor employer to be bound by a labor contract entered into by the union and the predecessor employer. *Id.*

127. 668 F.2d 276 (7th Cir. 1981). Panoramic Corporation announced a sale of a portion of its business. *Id.* at 278. The labor contract between the parties in *Panoramic*

Seventh Circuit had affirmed an order under the National Labor Relations Act (NLRA)[129] enjoining the sale of corporate assets until the completion of arbitration over the selling corporation's failure to bind the successor corporation to its labor contracts.[130]

In a per curiam opinion, the Ninth Circuit accordingly, reversed and remanded.[131] The court, however, provided an alternative to Western: if Delta and Western stipulated that the result of the arbitration would bind the surviving corporation, the injunction would terminate and the constituent corporations could complete the scheduled merger.[132]

VI. APPEAL TO THE SUPREME COURT

Justice O'Connor first noted that a Circuit Justice may vacate a stay where the rights of a party may be seriously and irreparably injured and when he or she is of the opinion that the

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contained a provision which purported to bind "successors" to the agreement. *Id.* The union moved to enjoin the sale of assets pending an arbitration to determine the applicability of the labor contract provision. *Id.* at 279. The district court granted the motion and Panoramic appealed. *Id.* The Seventh Circuit affirmed the district court injunction, but only after a careful balancing of the equities. *Id.* at 288. The court cautioned against the use of the injunction to compel arbitration since the risk was particularly great in situations involving contracts that contain a "management prerogatives" clause that could cause encroachment on management powers. *Id.* at 284. The court urged a searching analysis of the facts and law in carefully applying the balancing of hardships prerequisite. *Id.* at 289.

The Norris-LaGuardia Act provides that courts are *without* jurisdiction to grant injunctive relief in a labor dispute unless a hearing is conducted and specific findings of fact are made by the court. 29 U.S.C. § 107 (1976). The findings require an unlawful act, irreparable injury, no adequate remedy at law, an inability of public officers to protect property, and that as to each item of relief granted, greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief. *Id.* In *Panoramic*, the injunction could result in the loss of the sale of a profitable department of the company, but the court found, on balance, that the loss of one hundred and thirteen jobs required the court's protection. *Panoramic*, 668 F.2d at 278.

128. *Western*, 813 F.2d at 1363. *See* Chicago & North Western Ry. v. United Transportation Union, 402 U.S. 570 at 579 n.11 (1971) where the U.S. Supreme Court issued the caveat that parallels between the NLRA and the Railway Labor Act should be drawn with the utmost care and with full awareness of the differences between the statutory schemes.

129. The National Labor Relations Act is codified at 29 U.S.C. § 151-68 (1982).

130. *Western*, 813 F.2d at 1363.

131. *Id.* at 1364.

132. *Id.*

appeals court was demonstrably wrong in its application of accepted standards for issuing a stay.[133] She then stayed the injunction stating that the balancing of equities weighed against the injunction, and that the ruling was directly contrary to other circuits.[134]

Justice O'Connor noted that prior rulings in the First, Second, Fifth, Sixth, Seventh and D.C. Circuits cast grave doubts on the validity of the Ninth Circuit's action.[135] She further stated that four Justices would vote for Certiorari and thereupon ruled for Western.[136]

Justice O'Connor analyzed the "alternatives" offered to Western and Delta by the Ninth Circuit for lifting of the injunction.[137] The first alternative, or the basic decision of the Ninth Circuit, prohibited the merger until the completion of the arbitration process.[138] If the arbitrator's decision was adverse to the company or contrary to decisional rules, the company would have had full judicial review available to it on jurisdictional as well as other issues.[139] The parties would then be in the same position before and after the arbitrator's decision, except the dispute would be over the court's jurisdiction to enforce an arbitrator's decision after the hearing, as opposed to the pre-hearing issue of the company's obligation even to submit the issue to an arbitrator.[140] In reality, the Ninth Circuit was not making a decision at all but merely postponing final resolution.[141]

The second alternative required that Western, literally moments before the effective time of the merger, concede to the union's position to abide by an arbitrator's decision in order to effectuate the merger.[142] Justice O'Connor considered the conditions and alternatives put to Western and Delta as unnecessary

133. Western Air Lines, Inc., v. International Brotherhood of Teamsters, 107 S.Ct. 1515, 1517 (1987) (decision on application for stay) (O'Connor, J., in chambers).
134. *Id.* at 1517.
135. *Id.* at 1518.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*

or inequitable.[143]

Justice O'Connor reviewed and balanced the equities involved.[144] The merger included the transfer, modification and cancellation of hundreds of Western's contracts; approval by the Federal Aviation Administration of Western's operating certificates;[145] maintenance and flight schedule changes; transfer of Western's international routes to Delta; and changes in wages, hours and working conditions of employees.[146] She stated that to assume that enjoining the merger would do no more than preserve the "status quo" would be to "blink at reality."[147]

Justice O'Connor then contrasted the resulting injury to Western employees.[148] She noted that employees were protected by the typical labor protective devices obtained in previous airline mergers.[149] Justice O'Connor held for Western because the balance tipped in its favor and stayed the injunction.[150]

VII. CRITIQUE

Delta simply did not want to adopt the labor contract that the Teamsters' had with Western. Voluntary adoption of a labor contract by a successor is not uncommon, however. The Fifth Circuit noted in *International Brotherhood of Teamsters v. Texas International*,[151] that so long as the operating unit was not dramatically altered by a merger that clearly erased the union's majority, the employer must adhere to its labor contracts.[152]

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143. *Id.* at 1519.

144. *Id.* at 1518. Balancing of the equities did not expressly appear in the written Ninth Circuit opinion.

145. *Id.* The lack of FAA approval cast doubts upon Western's ability to operate independently after April 1. *Id.*

146. *Id.*

147. *Id.* at 1519.

148. *Id.*

149. *Id.* The devices included continuation of certain fringe benefits, displacement and dismissal allowances for several years, moving and related costs, and integration of seniority lists.

150. *Id.*

151. 717 F.2d 157 (5th Cir. 1983).

152. *Id.* at 164.

For a brief period between December 1986 until April, 1987, Western remained a wholly owned subsidiary of Delta with separate operations. The operating unit was not dramatically altered by the merger.[153] No Delta employees were combined with Western employees. There was no representation dispute since the same union represented the same employees working for the same corporation.[154] Western adhered to the labor contracts. The dispute would emerge only when the work forces were combined in an operational merger.

Circumstances other than separate operations can lead to voluntary adoption of a labor agreement. For example, voluntary adoption occurred in the TXI-Continental Airlines merger.[155] At TXI and Continental the same unions represented the pilots, dispatchers and mechanics.[156] Where both constituent corporations have "crafts or classes" of employees represented by the same union, there is no issue as to the proper employee representative since the same union continued to represent both groups after operational merger.

Voluntary adoption of a labor agreement occurred in the Hughes-Airwest and Republic Airlines merger.[157] The surviving corporation, Republic, adopted the labor contracts of the unions that represented employees at Republic.[158]

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153. IBTCWHA, Local Union No. 2707 v. Western Air Lines, Inc., 813 F.2d 1359 at 1361 (9th Cir. 1987) (*per curiam*; the panel members were Goodwin, J., Schroeder, J., and Poole, J.), *petition for cert. filed* April 1, 1987, *injunction stayed*, 107 S.Ct. 1515 (1987) (O'Connor, J., in chambers). The merger agreement was signed September 9, 1986 and Western's stock was acquired on December 16, 1986 with operational merger to take place on April 1. 107 S.Ct at 1516.

154. Brief for Defendants/Appellees at 3, IBTCWHA, Local Union No. 2707 v. Western Air Lines, Inc., 813 F.2d 1359 (9th Cir. 1987)(*per curiam*; the panel members were Goodwin, J., Schroeder, J., and Poole, J.), *petition for cert. filed* April 1, 1987, *injunction stayed*, 107 S.Ct. 1515 (1987) (O'Connor, J., in chambers). This was the structure prior to the operational merger scheduled for April 1, 1987.

155. *Texas Int'l*, 717 F.2d 157 at 160. The surviving corporation in the TXI-Continental merger recognized collective bargaining agreements with those other employee groups working in the merged operation that had previously been separately represented by the same unions; these unions represent pilots, dispatchers and mechanics. *Id.* Flight attendants had been represented by different unions, and the company notified these two unions that it would honor the terms of both agreements. *Id.*

156. *Id.*

157. Association of Flight Attendants v. Republic Airlines, Inc., 534 F. Supp. 783 (D. Minn. 1982). *See supra* note 102 and accompanying text.

158. *Id.*

However, in *Western*, where the non-union acquiring corporation had the *majority* of employees in the "craft or class," there is an issue of representation. Representation by a union selected by a minority of employees is counter to the policy that union representation is decided by the majority of employees.[159]

Western refused to voluntarily recognize the labor contract or concede to the union's position and, based on prior case law,[160] intended to maintain that position all the way up to March 31—the day before the scheduled operational merger. The Ninth Circuit decision crashed head on with the company's expectations.

The practical effect of the ruling by the Ninth Circuit was to put tremendous, sudden, and unexpected pressure on Delta and Western to bind themselves to an arbitrator's post-merger decision if they wished to complete the scheduled merger. The risks to Western and Delta were that the decision of the arbitrator could include: (1) an order for Delta to recognize the union, (2) an order for Delta to adopt the labor contract from Western, (3) an order for Western to bargain with the union over post-merger protective devices, (4) an order for Delta to accept the post-merger protective devices negotiated by Western, or (5) a decision prohibiting the merger without the union's consent.

The Ninth Circuit gave to the Teamsters a possible result that all the circuits that had dealt with cases on similar facts had refused to give.

In the context of business combinations, a purchasing entity under the National Labor Relations Act is not obligated to accept a predecessor's employees, labor contracts or unions except under narrowly defined circumstances.[161] The policy is based on

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159. 45 U.S.C. § 152, Ninth (1934). *See supra* note 33.

160. Summit Airlines, Inc. v. Teamsters Local Union No. 295, 628 F.2d 787 (2nd Cir. 1980). The court stated: "The scheme of the Act contemplates carrier-wide organization, see section 2, Fourth, and the NMB usually has required organization to be carrier-wide . . . . Moreover, the NMB deems the dispute requirement of section 2, Ninth, satisfied even though only one union seeks representation if some employees are indifferent or hostile to being represented by that union or by any other union." *Id.* at 793 n.3.

161. NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. 272, *motion to recall judgment denied*, 409 U.S. 818 (1972). The Supreme Court held that a successor employer may set the initial terms of employment. *Id.* at 295. A successor is not required to adopt the

the theory that troubled businesses, by selling, have the opportunity to start fresh and unencumbered by the burden of an expensive labor contract.[162]

The *Panoramic* decision in which the Seventh Circuit enjoined a sale under the NLRA was an exception. In that case, the predecessor employer had agreed that the labor contract would be part of the corporate sale.[163]

The Ninth Circuit relied on this exception as precedent for the ruling in *Western*. Western and the Teamsters had freely agreed, in the face of economic pressures, to protect the corporation from financial distress through wage reductions.[164] In return, Western had agreed that in the event of a sale or merger the labor contract would be binding on the surviving corporation.[165] Western unilaterally abrogated that agreement by not eliciting Delta's agreements to the labor contracts.[166] This abrogation of its agreement and the refusal to arbitrate was what the Ninth Circuit ruled was unfair and illegal.[167]

However, other courts of appeals instruct us that in the face of corporate combinations, agreements with labor unions can be abrogated.[168] This is the practical effect of Justice Sandra Day O'Connor's stay of the injunction.

In truth, the Teamsters' labor contract with Western may

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labor contract of the predecessor employer. *Id.* at 281-82. A successor is not required to bargain with the predecessor's union unless the successor hires a majority of the predecessor's employees in the same collective bargaining unit. *Id.* at 277, 279. The holding in *Burns* seems to have some interesting practical twists. If the labor market is tight or the work requires a particular skill or qualification, the successor will have to hire the predecessor's employees purely for market reasons. However, if the labor contract has artifically pushed the costs of labor beyond market levels, the successor will be able to hire new employees from other sources at terms of employment that it sets unilaterally.

162. *Burns*, 406 U.S. 272. *Burns* emphasized that "[A] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force . . . and nature of supervision." *Id.* at 287-88.

163. *See supra* note 123, and accompanying text.

164. *Western*, 813 F.2d at 1361. *See infra* note 13.

165. *Western*, 813 F.2d at 1361.

166. *Id.*

167. *Id.* at 1364.

168. *Brotherhood of Ry. and Steamship Clerks*, 325 F.2d 576 (6th Cir. 1963). *See supra* note 62; *IAM v. Northeast*, 473 F.2d 549 (1st Cir. 1972). *See supra* note 70; *IAM v. Northeast II*, 536 F.2d 975 (1st Cir. 1976). *See supra* note 84; *Texas Int'l*, 717 F.2d 157 (5th Cir. 1983). *See supra* note 91; *Republic*, 798 F.2d 967 (7th Cir. 1986).

be unnecessary to protect employee interests. The employees were protected by the labor protective devices advocated by the Civil Aeronautics Board.[169] The working conditions and benefits at Delta were as good as, and wages were generally better, than at Western.[170] The Western employees merely lost union representation. But union representation had not afforded them better wages, hours and working conditions than what was available at non-union Delta. It appears that the Ninth Circuit injunction resulted in a situation where everyone, Western, Delta, the employees, and possibly the shareholders came up losers. Only the union's continued existence would qualify the union as coming up a winner.

The balance of equities analysis by Justice O'Connor seems to concur with this analysis.[171] Her opinion lacks any mention of the union's financial loss of dues paying members or recognition that airline mergers have resulted in the erosion of the union's member base, its income and its effectiveness. Against the momentum of judicial opinion, the union in *Western* was fighting for its life. The Ninth Circuit tried to give them a last breath of hope, but failed.

VIII. CONCLUSION

The present case suggests it may be correct policy to permit abrogation of labor contracts when a merger occurs. Corporate efficiency, freedom from unreasonable restraints on alienation, and government mandated protection of employees seem to far outweigh any social value found in the preservation of a union's status, financial base, and income. It is true by definition that an efficient capitalistic system requires corporations be freely transferrable. The result, however, is that the labor contract provisions, negotiated in good faith, that provide employee protections in the event of a merger, become worthless when they may be most needed. Bankruptcy,[172] and now merger, are the death

169. *Western II*, 107 S.Ct. at 1518.

170. *See supra* note 13.

171. *Western II*, 107 S.Ct. at 1518.

172. NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984). The U.S. Supreme Court ruled that the employer, after declaring bankruptcy, may immediately abrogate its labor

knell of the labor contract. The result of this case is the most recent manifestation of a clear policy trend.

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contract. *See also*, Comment, *supra* note 6, at 1015-20. The author suggests that *Bildisco*, a National Labor Relations Act case, has impact under the RLA in the event of bankruptcy, allowing the abrogation of a labor contract in the event of bankruptcy. *Id.*

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