Chapter 11

PILOTING THROUGH THE MERGER

I. Seniority Integration Issues in Airline Mergers

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The National Mediation Board (NMB) administers portions of the Railway Labor Act (RLA),[2] which governs labor relations in the railroad and airline industries. The NMB plays a key role in determining the representation consequences of a merger, but plays no *substantive* role in airline seniority integration.

Background to the McCaskill-Bond Amendment

Since 2008, seniority integration in the airline industry has been subject to the McCaskill-Bond Amendment to the 2008 Federal Aviation Act.[3] From 1950 to 1984, the process of seniority integration in airline mergers was governed by Labor Protective Provisions (LPPs) issued by the Civil Aeronautics Board (CAB) as a condition of its approval of mergers. The most well-known framework, *Allegheny-Mohawk*[4] was adopted by the CAB in 1972 and was imposed consistently in LPP decisions until the CAB ceased to exist as the result of the 1978 Airline Deregulation Act.[5]

Sections 3 and 13 of *Allegheny-Mohawk* dealt with seniority integration. Section 3 provided, in part, that "provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining…" Section 13 provided that any dispute with regard to LPPs may be referred to an arbitrator selected from a panel of seven names furnished by the NMB. Once the parties selected an

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[2]45 U.S.C. §151 *et seq.*
[3]49 U.S.C. §42112.
[4]59 C.A.B. 45 (1972).
[5]49 U.S.C. §1301.

arbitrator from the panel, the arbitrator's decision was final and binding.

From 1984 to 2008, the process of seniority integration was conducted on an ad hoc basis. McCaskill-Bond essentially codified Sections 3 and 13 of *Allegheny-Mohawk*.[6] Because the statute was enacted as a last-minute amendment to an unrelated bill and was never considered in committee, there is very little legislative history behind the McCaskill-Bond Amendment.

Judicial Interpretation of McCaskill-Bond

Since its enactment in 2008, McCaskill-Bond has been interpreted in three major cases. Each of these cases deals with very distinct circumstances with regard to McCaskill-Bond, and the specific wording of the statute seems to have been directly analyzed in only one.

Association of Flight Attendants-CWA v. Delta Airlines, Inc.

The first case interpreting McCaskill-Bond arose out of the merger of Delta Air Lines and Northwest Air Lines in 2008. *Association of Flight Attendants-CWA v. Delta Air Lines, Inc.*[7] At the time of the merger, Northwest flight attendants were represented by AFA, and Delta flight attendants were not organized. Following the merger, Delta notified AFA of its intention to initiate a seniority integration process that would merge various groups of com-

[6](a) Labor Integration.—With respect to any covered transaction involving two or more covered air carriers that results in combination of crafts or classes that are subject to the Railway Labor Act, sections 3 and 13 of the labor protective provisions imposed by the Civil Aeronautics Board in the Allegheny-Mohawk merger shall apply to the integration of covered employees of the covered air carriers; except that—(1) if the same collective bargaining agent represents the combining crafts or classes at each of the covered air carriers, that collective bargaining agent's internal policies regarding integration, if any, will not be affected by and will supersede the requirements of this section; and (2) the requirements of any collective bargaining agreement that may be applicable to the terms of integration involving covered employees of a covered air carrier shall not be affected by the requirements of this section as to the employees covered by that agreement, so long as those provisions allow for the protections afforded by section 3 and 13 of the Allegheny-Mohawk provisions.—(b) Definitions—(1) the term "air carrier" means an air carrier that holds a certificate issued under chapter 411 of title 49, United States Code. (2) the term "covered air carrier" means an air carrier that is involved in a covered transaction… (3) The term "covered employee" means an employee who (A) is not a temporary employee; and (B) is a member of a craft or class subject to the Railway Labor Act. (4) the term "covered transaction" means—(A) a transaction for the combination of multiple air carriers into a single air carrier; and which (B) involves the transfer of ownership or control of—(i) 50 percent or more of the equity securities (as defined in section 101 of title 11, United States Code) of an air carrier; or (ii) 50 percent or more (by value) of the assets of the carrier. 49 U.S.C. §42112.

[7]CIV.A. 08-2009 RWR, 2010 WL 5300534, at *1 (D.D.C. Dec. 21, 2010).

parable pre-merger Delta and Northwest employees. Plaintiff AFA then alleged that Delta's efforts to initiate a seniority integration process unlawfully interfered with the employees' rights under the RLA to choose their own representatives and to organize and bargain collectively. Delta moved to dismiss the plaintiff's actions for lack of subject matter jurisdiction, claiming that the matter was a representation dispute over which the NMB had exclusive jurisdiction.

In denying Delta's motion to dismiss, the court held that there was no dispute as to the representation of relevant employees. The court further explained that there was no representation dispute because "the question of which representative was certified was distinct and settled."[8]

Delta also asserted in pleadings that McCaskill-Bond created no private cause of action, and the claim must therefore fail. According to the court, "plaintiffs point to no authority reflecting that this statute creates a private right of action or any language or legislative history from which a private remedy may be inferred."[9] But because Delta brought its motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure (lack of subject matter jurisdiction) and not Rule 12(b)(6) (failure to state a claim), the court held that Delta's jurisdictional challenge failed and its motion was still denied.

Committee of Concerned Midwest Flight Attendants for Fair and Equitable Seniority Integration v. International Brotherhood of Teamsters

This next important case, *Committee of Concerned Midwest Flight Attendants for Fair and Equitable Seniority Integration v. International Brotherhood of Teamsters*,[10] involved a dispute arising out of the purchase of Midwest Air Group by Republic Airways Holding in July 2009. The seniority lists for mechanics, baggage handlers, and administrative personnel had been integrated under McCaskill-Bond. Republic, however, furloughed the former Midwest flight attendants and required them to reapply for jobs at the merged Republic. If the former Republic flight attendants were "rehired," the International Brotherhood of Teamsters (IBT) placed them at the bottom of its seniority roster. They continued to maintain this

[8] *Id.* at *4.
[9] *Id.* at *1.
[10] 662 F.3d 954, 955 (7th Cir. 2011).

position even though the NMB concluded that the flight attendants had become part of a single bargaining unit when Republic had acquired Midwest. Three Midwest flight attendants, joined by a committee purporting to speak for all Midwest flight attendants, filed this suit.

In reversing the District Court holding that McCaskill-Bond was never meant to protect employees of an air carrier that simply goes out of business, the Court of Appeals clarified and interpreted the requirements of subsections (a) and (b) of McCaskill-Bond. "Merging seniority lists, rather than putting employees of the acquired carrier at the bottom of the acquiring carrier's list, was a condition of the Allegheny-Mohawk merger and therefore is required in every covered transaction 'involving' covered air carriers."[11] The court explained that an "air carrier" was any firm that holds a certificate issued under 49 U.S.C. Chapter 411. It held that Midwest held such a certificate on the date of the merger, and was therefore a carrier for terms of the amendment. Further, Midwest was also "involved in" a transaction even though it was a subsidiary in a holding company structure since "the McCaskill-Bond Amendment does not require that the operating company be acquired, only that it be 'involved.'"[12]

The court then turned to whether or not Midwest and Republic were engaged in a "covered transaction." It found that subparagraph B was satisfied because Republic acquired 100 percent of Midwest, and subparagraph A was satisfied because Midwest became part of a "single air carrier" with Republic by taking over routine operations for both airlines.. The Teamsters Union argued that because Midwest was on the verge of bankruptcy, its acquisition by Republic must not be covered by the requirements of McCaskill-Bond. The court held, however, that this acquisition was indeed covered because the drafters of the McCaskill-Bond amendment (Senators Kit Bond and Claire McCaskill from Missouri) were acting to protect and maintain a peaceful acquisition of TWA by American Airlines when TWA was going through bankruptcy. "One cannot remove bankrupt and soon-to-disappear carriers from the statute's coverage, as the Teamsters propose, without simultaneously circumventing the statutory text and frustrating the design behind it."[13]

[11] *Id.* at 957.
[12] *Id.*
[13] *Id.* at 958.

Thomas v. Republic Airways Holdings

The most recent interpretation of McCaskill-Bond was in March of 2012. The court dismissed a complaint by the Frontier Pilots Merger Committee seeking review of an arbitration decision issued under McCaskill-Bond involving the acquisitions of Republic Holdings: Midwest Airlines, Frontier Airlines, and Lynx Aviation.[14] The unions representing pilots of these airlines entered into an agreement to negotiate seniority integration in accordance with Sections 3 and 13 of the labor protective provisions enacted by McCaskill-Bond.

As a result of these negotiations, the parties agreed to arbitration pursuant to Section 13(b) of the *Allegheny-Mohawk* LPPs. The parties also agreed that the airline pilots would be represented by a single organization designated by the NMB, and that organization authorized the continuation of committees formed by other unions for the *sole purpose* (emphasis added) of adjusting any disputes that might arise as to the interpretation or application of the award.[15] The arbitrator issued a ruling creating an integrated seniority list that would become effective if and when the NMB issued a decision finding that the separate airlines constituted a single carrier under the RLA. In April of 2011, the NMB found that the airlines operated as a single transportation system for the craft or class of pilots for representation purposes under the RLA. In June of the same year, the NMB conducted an election among the pilots of these airlines, which resulted in designating and certifying the IBT as the exclusive representative of the pilots.[16]

In May of 2011, members of the Frontier Pilots Merger Committee filed a civil action to vacate the award of the arbitrator, alleging jurisdiction under McCaskill-Bond. IBT immediately demanded that the Frontier Pilots Merger Committee dismiss the action on the basis that they had no authority to represent the Frontier pilots. According to the court, the agreement signed and agreed to by the parties did not include any authority to seek vacation of the award, and the Frontier Pilots Merger Committee had no authority to represent the pilots under basic principles of agency law. The court also refused to overturn the arbitrator's award due to the limitations of judicial review of an arbitrator's award under

[14]Thomas v. Republic Airways Holdings, Inc., No. 11-CV-01313-RPM, 2012 WL 683525, at *1 (D. Colo. Mar. 2, 2012).
[15]*Id.,* 2012 WL 683525, at *2.
[16]*Id.* at *3.

McCaskill-Bond. The scope of judicial review under McCaskill-Bond and the RLA were held to be identical. This standard may be explained as follows, "As long as the arbitrator is even arguably construing the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."[17]

The NMB's Role in Mergers

As stated above, the only role the NMB has in seniority integration is to provide a list of arbitrators upon request. The Board has a much greater role in determining employee representation choice as a consequence of a merger.

In the approximately 10 years after the passage of the Airline Deregulation Act, the NMB became increasingly concerned about maintaining its ability to ensure employee free choice of representative as required by the RLA. Therefore, in 1987, the Board set forth "merger procedures" in the context of the merger between Trans World Airlines and Ozark Airlines.[18] *TWA/Ozark* established the test that the Board still uses, with some modifications, to determine whether a single transportation system exists for purposes of representation under the RLA.[19] An NMB merger case is initiated by the filing of an application by a labor organization or individual.[20] Where the craft or class covered by the application is represented on two or more parts of the system, the applicant is usually the organization which represents the larger percentage of the employees on the combined system. The application must be supported by a showing of interest. The current minimum showing of interest required is 50 percent.[21]

In determining whether there is a single transportation system for representation purposes, the NMB takes a number of factors into consideration, including whether there is combined or com-

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[17] *Id.* at *5. *See also* Addington v. U.S. Airline Pilots Ass'n, 2014 WL 321349 (D. Ariz. 2014) (holding that if there are previously certified bargaining representatives, an independent group of employees will not be allowed to participate in the seniority integration process under McCaskill-Bond).

[18] TWA/Ozark, 14 NMB 218 (1987); TWA/Ozark, 14 NMB 236 (1987).

[19] *See also* United Airlines/Continental Airlines, 38 NMB 124 (2011); Republic Airlines, et al./Frontier, 37 NMB 148 (2010); Northwest Airlines/Delta Airlines, 36 NMB 36 (2009); US Airways/America W. Airlines, 33 NMB 49 (2006).

[20] Section 19 of the NMB Representation Manual outlines the NMB's procedures for determining the representation consequences of mergers. *See* National Mediation Board, Representation Manual, Revised Text (effective Mar. 25, 2013), *available at* http://www.nmb.gov/representation/representation-manual.pdf, pp. 26–28.

[21] 29 C.F.R. §1206.2.

mon management and a combined work force. Other factors the Board examines are whether there are combined schedules or routes, common marketing, markings, or insignia, and whether there are standardized uniforms. Once the NMB determines that there is a single system, applicants, incumbents, and intervenors have 30 days to supplement their showing of interest. Incumbents may submit collective bargaining agreements, seniority lists, or dues check-off lists. Non-incumbents must submit authorization cards signed by the employees in the combined craft or class. Board certifications which exist prior to mergers remain in effect until the Board issues a new certification or dismissal.

Generally, if the showing of interest is met, the Board will conduct an election, but in certain circumstances the Board will extend the certification of the organization that represents a significant percentage of the combined craft or class.[22]

United Air Lines/Continental Airlines represents an example of the NMB's representation procedures in a recent merger case.[23] The NMB found that United and Continental were wholly-owned subsidiaries of United Continental Holdings, Inc., which has a single board of directors and a common senior management group in place. In addition, the Board found that a single group of officers was responsible for labor relations and that the carriers had received a single operating certificate from the Federal Aviation Administration.

Conclusion

Seniority integration can be a contentious matter. The continuing consolidation in the airline industry may present a greater possibility of the application of McCaskill-Bond to seniority integration. But it is also possible that we will see labor organizations and carriers agree to other methods of resolving seniority integration without resort to McCaskill-Bond. Seniority integration, while noted in NMB merger decisions, is not the determinative factor in the Board's decisions as to whether a single transportation exists for RLA purposes. The NMB will resolve the representation consequences of the recent merger between American Airlines and US Airways, whether through elections or through other methods.

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[22] *Id.*
[23] 40 NMB 205 (2013).