

# NOTES AND COMMENTS

## REIMBURSING AIRLINE STRIKE LOSSES WITH FEDERAL SUBSIDY: THE RAILWAY LABOR ACT ALOFT\*

ADMINISTRATION of the airline subsidy program, difficult in itself, becomes more complex when the program interacts with national labor relations policy. Section 406 of the Civil Aeronautics Act<sup>1</sup> provides for subsidization by authorizing financial aid needed by mail carriers to "maintain and continue the development of air transportation . . . required for the commerce of the United States, the Postal Service, and the national defense."<sup>2</sup> Implementing

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\*American Overseas Airlines, Inc. v. CAB, 254 F.2d 744 (D.C. Cir. 1958).

1. 52 Stat. 998 (1938) (now Federal Aviation Act § 406, 72 Stat. 763 (1958)). In this Note, the Civil Aeronautics Act is referred to as "the act." On August 23, 1958, Congress enacted the Federal Aviation Act. 72 Stat. 731 (1958). Section 1401(b) of the Federal Aviation Act repealed the Civil Aeronautics Act. However, §§ 406(b) and 401(1)(4) of the Civil Aeronautics Act (the only sections involved in this Note) were re-enacted as §§ 406(b) and 401(k)(4) of the new legislation.

The act sought to provide a comprehensive scheme of air transportation regulation. See North Am. Airlines v. CAB, 228 F.2d 432, 437 (D.C. Cir. 1955), *rev'd on other grounds sub nom.* American Airlines, Inc. v. North Am. Airlines, Inc., 351 U.S. 79 (1956) ("Congress was determined to formulate an over-all policy for the regulation of air transportation"); United Air Lines, Inc. v. CAB, 198 F.2d 100, 105 (7th Cir. 1952) (the act sought to remedy the chaotic condition of air transportation by providing a system of regulated competition). See also DEARING & OWEN, NATIONAL TRANSPORTATION POLICY 44-57, 196-225 (1949) (treatment of airlines as one component of federally controlled transportation); RHYNE, THE CIVIL AERONAUTICS ACT ANNOTATED (1939); Ballard, *Federal Regulation of Aviation*, 60 HARV. L. REV. 1235 (1947); Comment, *Public Regulation of Domestic Airlines: A Proposal for Structural and Subsidy Reform*, 60 YALE L.J. 1196 (1951).

2. 52 Stat. 998 (1938) (now Federal Aviation Act § 406(b), 72 Stat. 763 (1958)).

In fixing and determining fair and reasonable rates of compensation under this section, the Board . . . shall take into consideration . . . the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

*Ibid.*

Inclusion of subsidy payments in the carrier's compensation for carrying the mail was strenuously objected to as a form of concealment. See, e.g., Marvin, *Air Mail Subsidy Separation*, 40 GEO. L.J. 161 (1952) ("No one really knows how much of this mail pay is subsidy . . ."). Attempts to meet this objection through the separate reporting of "need pay" (subsidy) and "service pay" (reasonable value of services rendered) were delayed by difficulties in allocating the airline's costs among mail, passenger, and freight service. See GILL & BATES, AIRLINE COMPETITION 483 (1949); Bunke, *The Fetish of Separating*

this statutory mandate, the Civil Aeronautics Board generally fixes each subsidized carrier's mail rate at a level sufficiently high to cover operating expenses and guarantee a return on the airline's investment.<sup>3</sup> The Board utilizes cost estimates to establish a temporary future rate which it revises retrospectively to reflect the carrier's actual expenses.<sup>4</sup> In making this final revision, the CAB may subsidize only those expenditures which resulted from "honest, economical, and efficient management"<sup>5</sup> and which were necessary to the de-

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*Subsidy From Air Mail Payments*, 20 J. AIR L. & COM. 273, 275 (1953); *Hearings on S. 436 Before the House Committee on Interstate and Foreign Commerce*, 82d Cong., 2d Sess. 132-34 (1952). Compare *id.* at 202-04, 259-60 (describing ICC rate-setting, where similar problem seemingly presented no obstacle). But public and congressional pressure eventually forced adoption of a separate reporting procedure in 1951. See Nyrop, *The Question of U.S. Air Mail Subsidy*, 18 J. AIR L. & COM. 409, 415 (1951). Separation was further facilitated by Reorganization Plan No. 10, 67 Stat. 644 (1953), 5 U.S.C. § 133z-15 (Supp. V, 1958), which shifted subsidy disbursements to the CAB's budget, leaving only mail-carrying payments in the Post Office Department's. Separation has been made a part of the new Federal Aviation Act. § 406(c), 72 Stat. 764 (1958). Subsidies thus were made readily susceptible to legislative scrutiny. See Rasenberger, *Legislative and Administrative Control of Air Carrier Subsidy*, 25 GEO. WASH. L. REV. 397, 408 (1957).

The Board distributed \$42,000,000 in subsidies during 1957. 1957 CAB ANN. REP. 10. One commentator has suggested that not all of these funds are used to effectuate the broad national interests which the act seeks to promote. Hellman, *Comment on Air Mail Subsidy*, 25 IND. L.J. 43, 44-45 (1949) ("the Board has dispensed the subsidy primarily to support needy airlines and not to further a maximum transport system"). See generally O'Connell, *Air "Mail Pay" Under the Civil Aeronautics Act*, 25 IND. L.J. 27 (1949). For other forms of government aid to transportation, see BEHLING, SUBSIDIES TO TRANSPORTATION (Public Affairs Bull. No. 86, Library of Cong. Legislative Reference Serv. 1950).

3. O'Connell, *supra* note 2, at 31; 55 COLUM. L. REV. 933 & n.6 (1955) (collecting cases).

4. See, e.g., *Wien Alaska Airlines, Inc.*, 1A AV. L. REP. ¶ 22180 (CAB May 15, 1958); *Mohawk Airlines, Inc.*, 1A AV. L. REP. ¶ 22161 (CAB Jan. 24, 1958); *Transatlantic Final Mail Rate, 1954-1957* AV. L. REP. ¶ 21787 (CAB 1954). The use of a retrospectively revised rate closely resembles a "cost-plus" method of rate-setting. See Gambrell & Smith, *The Separation of Subsidy From Air Mail Payments*, 1 J. PUB. L. 71, 85 (1952). "Cost-plus" rate-setting was originally rejected by both the CAB and the courts as tending to encourage inefficiency. See *Transcontinental & W. Air, Inc. v. CAB*, 336 U.S. 601, 606 (1949) (cost-plus system does not "harmonize with the apparent design of the act"); *Pennsylvania-Central Airlines Corp.*, 8 C.A.B. 685, 696-701 (1947) (rejecting "cost-plus subsidy plans"). But the Board in effect reversed itself when the difficulty of accurately predicting costs "forced" it to utilize retrospective rate setting. See *Hearings on S. 436, supra* note 2, at 106-07. The courts subsequently approved this change in procedure. See *American Overseas Airlines, Inc. v. CAB*, 254 F.2d 744, 749 (D.C. Cir. 1958). *But see Western Air Lines, Inc. v. CAB*, 207 F.2d 200, 205 (D.C. Cir.), *aff'd*, 347 U.S. 67 (1953) (opposing temporary rates and suggesting that rate-setting difficulties would be eliminated if "what is prospective in legal theory will be prospective in actual fact"). See also *Transcontinental & W. Air, Inc. v. CAB, supra* at 612 (dissenting opinion) (basis of subsidy payments should be "experience rather than . . . prophecy"); Hellman, *supra* note 2, at 45-46 (retrospective rates reduce incentive to efficiency).

5. See text of statute quoted note 2 *supra*. The Board has never specifically defined "honest, economical and efficient." Cf. O'Connell, *supra* note 2, at 34-35 (former CAB chairman attempts definition). Nevertheless, the statutory phrase has been used as authori-

velopment of the airline.<sup>6</sup> Expectations of reimbursement by the Board necessarily influence management decisions.<sup>7</sup> In the area of labor relations, this influence can subvert the policies of the Railway Labor Act<sup>8</sup>—which embraces airlines and seeks to prevent labor strife by encouraging union equality in

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zation to disallow a variety of costs. See National Airlines, Inc., 7 C.A.B. 387, 394 (1946) (costs resulting from airline's failure to maintain "operating standards"); National Airlines, Inc., 4 C.A.B. 567, 575 (1944) (excessive executive salaries); Mid-Continent Airlines, Inc., 3 C.A.B. 464, 471-72 (1942) (certain stewardess salaries); 55 COLUM. L. REV. 933, 934 & nn.14 & 15 (1955) (collecting additional cases). *Accord*, Braniff Airways, Inc., 4 C.A.B. 588, 597 (1944) (reviewing advertising expenses).

6. Section 406(b) indicates that expenditures may be disallowed when nondevelopmental. See text of statute quoted note 2 *supra*. Since "need" under § 406(b) refers to funds needed for air transportation development, the Board has freely disallowed costs which make good business sense but do not promote the air transportation system. "[Some] expenses will include . . . those not allowable for rate-making purposes such as entertainment and contributions expense . . . interest expense and other nonoperating expenses which are unrelated or unnecessary to the air transport operation." Western Air Lines, Inc., 14 C.A.B. 201, 227-28 (1950). See also Continental Air Lines, Inc., 8 C.A.B. 825, 839 (1947) (sponsorship of basketball team); National Airlines, Inc., 4 C.A.B. 567, 569 (1944) (certain legal fees); Hawaiian Airlines, Ltd., 4 C.A.B. 463, 469 (1943) (investment in steamship company); Chicago & So. Air Lines, Inc., 3 C.A.B. 161, 181 (1941) (operation of cafeteria "within managerial discretion" but not essential to air-carrier operation).

The statute does not indicate who bears the burden of proof in cases of expense disallowance. In practice, the Board probably has the burden when expenses have already been incurred, while the airline must justify proposed expenditures. See O'Connell, *supra* note 2, at 33.

7. See cases cited notes 5, 6 *supra*; *Hearings on S. 350 Before the Senate Committee on Interstate and Foreign Commerce*, 81st Cong., 1st Sess. 121-22 (1949) (CAB chairman discussing the Board's "potent power" of disallowance). As a result of Board refusal to reimburse certain expenditures, airlines will probably curtail "good-will" gestures, such as the sponsorship of a basketball team or the employment of stewardesses, and avoid certain types of investment, particularly in areas other than air transportation. On the other hand, an airline about to break even and go off subsidy might incur any expense thought likely to increase profits.

Airline fear of nonreimbursement may be lessened by the realization that the Board has never allowed a subsidized carrier to become bankrupt. See DEARING & OWEN, *op. cit. supra* note 1, at 212 (subsidy policy "discards the inexorable and historic test of managerial efficiency—the ability to survive in a competitive market"); Hellman, *supra* note 2, at 49; O'Connell, *supra* note 2, at 37. *But cf.* KAHN, INDUSTRIAL RELATIONS IN THE AIRLINES[:] THE INTERACTION OF UNIONS, MANagements, AND GOVERNMENT IN A REGULATED AND SUBSIDIZED INDUSTRY 48 (unpublished thesis in Harvard University Library 1950) [hereinafter cited as KAHN] (public pressure acts to "increase industry's concern for costs").

Board control over managerial policies is not limited to the subsidy program and can be exerted in other areas. See Mid-Continent Airlines, Inc., 1 C.A.A. 45, 49-50 (1939) (reviewing Board powers); Leonard, *Collective Bargaining in the Regulated Industries—Discussion*, 42 AM. ECON. REV. 702, 703 (Supp. 1952) (comparing the extensive powers of the CAB with those of the ICC).

8. 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-88 (1952). The act was extended to airlines in 1936. 49 Stat. 1189 (1936), 45 U.S.C. §§ 181-88 (1952). See generally Frankel, *Airline Labor Policy, the Stepchild of the Railway Labor Act*, 18 J. AIR L. & COM. 461, 462-66 (1951).

collective bargaining<sup>9</sup>—because anticipated subsidization of such business costs as strike losses may jeopardize the union's bargaining position.<sup>10</sup> When confronted with this possible conflict between the Railway Labor Act and the Civil Aeronautics Act, the Board must first decide whether labor policies are relevant to the administration of the subsidy program,<sup>11</sup> and, if relevant, how best to accommodate the two acts.<sup>12</sup>

These problems were present in the recent case of *American Overseas Airlines, Inc. v. CAB*,<sup>13</sup> in which a carrier sought to recoup through its subsidy all losses suffered as the result of a pilots' strike.<sup>14</sup> At the preliminary hearing

9. See Leiserson, *The Role of Government in Industrial Relations*, in UNIONS, MANAGEMENT, AND THE PUBLIC 865, 866 (Bakke & Kerr ed. 1948) [hereinafter cited as BAKKE & KERR] (federal labor legislation of the 1930's designed to "equalize [union] . . . bargaining strength with . . . management. . ."). The Railway Labor Act increases union bargaining power by protecting the organizational and collective bargaining rights of unions. 48 Stat. 1187 (1934), 45 U.S.C. § 152 Fourth (1952) ("Employees shall have the right to organize and bargain collectively through representatives of their own choosing"). See GAGLIARDO, INTRODUCTION TO COLLECTIVE BARGAINING 473 (1953) ("if workers combine into unions, their bargaining power will be increased"). See also NATIONAL MEDIATION BOARD, THE RAILWAY LABOR ACT AND THE NATIONAL MEDIATION BOARD 1 (1940), quoted in KAHN 133 (the act provides "a model labor relations policy based on equal rights and mutual responsibilities"); Smith, *Recent Developments in Labor Law*, in BAKKE & KERR 849, 856 (one objective of Railway Labor Act was "development of strong, independent unions"). In fact, the Railway Labor Act was extended to airlines as a congressional response to the demands of the Airline Pilots Union. See KAHN 132-34; Frankel, *supra* note 8, at 466 (the act a "product of our union-fostering labor past . . ."). Amendments permitting the check-off and union security agreements have further increased union strength. 64 Stat. 1238-39 (1951), 45 U.S.C. § 152 Eleventh (1952).

10. See note 57 *infra* and accompanying text. Conversely, disallowances may alter the course of labor relations by reducing the airline's "ability to pay" union wage demands. See KAHN 177; PETERSON, SURVEY OF LABOR ECONOMICS 294 (1947) (ability to pay sets outside limit of wage offer). Specific disallowances may also affect labor relations by forcing layoffs or the employment of less expensive personnel. See *Mid-Continent Airlines, Inc.*, 3 C.A.B. 464, 471-72 (1942) (stewardess salaries disallowed); *Chicago & So. Air Lines, Inc.*, 3 C.A.B. 161, 181 (1941) (cafeteria expenses, including salaries, disallowed).

11. The only explicit consideration of Railway Labor Act policies by the Civil Aeronautics Act is found in § 401(1)(4), 52 Stat. 990 (1938) (now Federal Aviation Act § 401(k)(4), 72 Stat. 757 (1958)), which makes airline compliance with the RLA a prerequisite for CAB certification as a carrier.

12. The Board ignored prior opportunity to attempt such an accommodation. See Kahn, *The National Air Lines Strike: A Case Study*, 19 J. AIR L. & COM. 11, 21-22 (1952). The case here noted represents the CAB's first step toward construing the two acts *in pari materia*.

13. 254 F.2d 744 (D.C. Cir. 1958).

14. The strike lasted seventeen days during October 1947. The airline was then on a temporary, prospectively set rate. Estimating the amount of losses "attributable" to the strike proved difficult. See Opinion of the Board, Joint App., pp. 117-20, *American Overseas Airlines, Inc. v. CAB*, *supra* note 13 [hereinafter cited as Joint App.]. The airline claimed that the maximum amount that could be disallowed for reimbursement purposes was the loss of profits during the strike period plus the difference between the subsidy required to break even without any return on capital in the strike year and a similar figure

before a CAB trial examiner, Overseas argued that the strike was precipitated by the bad faith of the union,<sup>15</sup> that nonreimbursement would retard carrier development,<sup>16</sup> and that disallowance of strike costs would induce airline acceptance of all future union wage demands, thereby necessitating increased subsidies.<sup>17</sup> The union intervened and contended that management's first argument was untenable since the question of strike responsibility is not "practically justiciable."<sup>18</sup> In addition, the union opposed federal subsidization of airline strike losses as giving management an unfair advantage in collective bargaining.<sup>19</sup> Representing the CAB, Bureau Counsel also said that strike costs should not be reimbursed. He claimed that they are nonrecurring and therefore had already been sufficiently compensated for when the Board computed that component of the subsidy representing a return on investment.<sup>20</sup> The trial examiner rejected the Counsel's argument by treating strike losses as part of that component of subsidy payments which reimburses airline operating expenses—the component instantly at issue.<sup>21</sup> The examiner then attempted to reconcile union and management interests with a compromise solution designed to ensure good faith bargaining by management without undermining its resistance to unreasonable union demands.<sup>22</sup> Having deemed strike responsibility an inade-

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in a nonstrike year. This sum (less cost savings during the strike) was approximated at \$363,000. The Board, however, computed strike losses on a subsidy-per-mile basis, estimating that the airline would have flown 7,785,000 revenue-miles in 1947 if there had been no strike, and would have required a total of \$5,053,000 for mail pay and subsidy, or \$0.6491 per mile. As a result of the strike, the airline flew only 7,343,000 revenue-miles and required \$5,364,000 for mail pay and subsidy, or \$0.6811 per mile. The \$0.0320 per mile difference was considered the result of the strike, and the Board reduced the airline's mail service and subsidy reimbursement rate by this amount—a total disallowance of \$585,000 of subsidy. Joint App., p. 119. The Board's disallowance included, in effect, operating costs for the period of the strike as well as loss of revenue. This method of "costing" the strike seems preferable to the airline's, since it results in strike losses which most closely resemble the losses which would be suffered by the unsubsidized carrier. See notes 80-83 *infra* and accompanying text.

15. Brief for American Overseas Airlines, Inc. to Examiner A. Vernon Radcliffe, pp. 30-36.

16. See *id.* at 30, 42.

17. *Id.* at 40-41.

18. Joint App., p. 114. Although the union made no appearance, it filed a written statement of its position. *Id.* at 35 & n.33. The union did not formally contest the issue of strike responsibility, but union officials testifying at the hearings denied that union actions had caused the strike. See Testimony of John C. Christie, Air Line Pilots Association Negotiator, *id.* at 776-82.

19. *Id.* at 35-36.

20. *Id.* at 31-34. This approach was consistent with the position tentatively adopted by the Board after the strike had occurred. "The unpredictability of a contingency such as this establishes it as one of the risks of doing business to be reflected as part of the cost of capital rather than as a normal cost of operations." Statement of Tentative Findings and Conclusions, CAB Order No. E-2731 (April 19, 1949), quoted in Kahn, *Regulatory Agencies and Industrial Relations: The Airlines Case*, 42 AM. ECON. REV. 686, 695 (Supp. 1952).

21. Joint App., pp. 38-40.

22. *Id.* at 40.

quate criterion for determining the carrier's right to reimbursement, because fault allocation is "always controversial and usually impossible of accurate proof,"<sup>23</sup> and having responded to the union's claims by disallowing any return on investment or reimbursement of depreciation and amortization for the period of the strike—ten per cent of the total loss—, the examiner sought to satisfy the carrier's need for funds by awarding a subsidy for the remaining ninety per cent of loss sustained during the strike.<sup>24</sup>

The CAB approved both the trial examiner's basic premise that labor policy is an important consideration in computing subsidies and his rejection of strike responsibility as a subsidy determinant,<sup>25</sup> but held that labor policy is best effectuated by automatically denying reimbursement for all strike losses.<sup>26</sup> The Board said that any subsidization of strike costs would violate a governmental policy of neutrality in labor disputes by depriving the union "of its most significant economic weapon."<sup>27</sup> As an alternative justification for complete disallowance, the CAB stated that the subsidized rate of return on investment for non strike periods adequately compensated the risk of strike losses, and that further reimbursement would therefore be gratuitous.<sup>28</sup>

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23. *Id.* at 37-38. The examiner added that "procedures, personalities, and substance may become inextricably interwoven and incapable of separate evaluation."

24. *Id.* at 40-42.

25. *Id.* at 114.

26. *Ibid.* ("It is . . . a basic tenet of fair government policy that there be no partisan intervention in a labor controversy . . .").

27. *Ibid.*

28. *Id.* at 117. This contention is inconsistent with the Board's statement that strike losses should not be compensated in any manner. See notes 26, 27 *supra* and accompanying text.

As another justification for disallowing Overseas' claims, the Board maintained that public utility regulatory bodies do not usually recognize strike losses. *Id.* at 115. While this statement is generally correct, the analogy between the CAB and other regulatory bodies is imperfect, since no other agency directly reimburses expenditures through a subsidy designed to develop the industry. For decisions of other regulatory bodies which refused to recognize strike losses, see *Baltimore Transit Co.*, 94 P.U.R. (n.s.) 129, 132 (Md. Pub. Serv. Comm'n 1952) (strike losses cannot be recouped through increase in rates); *Southwestern Bell Tel. Co.*, 8 Mo. Pub. Serv. Comm'n 487, 495 (1919) (strike expenses must be deducted from net profits); *Southwestern Tel. & Tel. Co.*, 8 Mo. Pub. Serv. Comm'n 433, 470-71 (1915) (plan to amortize strike losses as an operating expense rejected); *cf. Chesapeake & Potomac Tel. Co.*, 73 P.U.R. (n.s.) 12, 20 (D.C. Pub. Util. Comm'n 1947) (strike period disregarded in determining cost basis for future rates); *Buck v. International Ry.*, 1925D P.U.R. 782, 801-02 (N.Y. Pub. Serv. Comm'n) (same). *But cf. Construction and Repair of Ry. Equipment*, New York, N.H. & H.R.R., 107 I.C.C. 721, 728, 733-34 (1926) (expense incurred in sending locomotives to other shops for repair during period of strike held "reasonable").

The difficulty attending comparisons of the CAB with other regulatory agencies has been noted. See *Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 108 (1948) ("[W]e see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensional transit"); *Mid-Continent Airlines, Inc.*, 1 C.A.A. 45, 54-55 (1939) (denying analogy between the Board's

On appeal, the District of Columbia Circuit, reversing and remanding, held that the Board's consideration of federal labor policy was not authorized by the Aeronautics Act.<sup>29</sup> According to the appellate decision, two Supreme Court cases, *Western Air Lines, Inc. v. CAB*,<sup>30</sup> and *Delta Air Lines, Inc. v. Summerfield*,<sup>31</sup> limit the CAB to the specific terms of section 406 when setting mail rates.<sup>32</sup> These rates, the court concluded, must reflect only the amount of funds needed by a particular carrier to perform its predetermined role in the national air transportation system.<sup>33</sup> The court emphasized that the Board had erred in using general grounds of labor policy as a substitute for actual proof that the disallowed amounts were not essential to Overseas' developmental "need."<sup>34</sup> Turning to the Board's alternative ground, the court admitted that strike costs could be disallowed if previously compensated for by the return-on-investment subsidy, but found no evidence indicating that this procedure had been followed.<sup>35</sup>

The court's rejection of this latter argument, while proper, could have been based on grounds more substantial than an insufficiency of evidence. In the light of the conventional subsidy procedures employed in *Overseas*,<sup>36</sup> Board inclusion of the risk of nonrecurring costs such as strike losses in computing the rate of investment return would have violated the statutory standard of "need." To fulfill its function of enabling the carrier to compete for capital funds,<sup>37</sup> the rate of return must reflect the risks borne by the airline investor.<sup>38</sup>

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rate-making authority and that of other regulatory agencies); *Transcontinental & W. Air, Inc. v. CAB*, 336 U.S. 601, 609 (1949) (dissenting opinion) (same). *But see id.* at 604 (Civil Aeronautics Act "need" standard has counterpart in other types of rate setting); *Hemphill Schools, Inc. v. United States*, 133 Ct. Cl. 462, 469, 135 F. Supp. 946, 949 (1955) (comparing CAB and ICC regulation).

29. 254 F.2d at 748.

30. 347 U.S. 67 (1954).

31. 347 U.S. 74 (1954).

32. 254 F.2d at 748 (act "does not permit mail pay to depend upon Government policies in labor disputes").

33. *Id.* at 749.

34. *Ibid.*

35. *Id.* at 750 ("These are matters upon which the Board must make determinations . . . supported by findings of the facts."). This holding is in accord with the usual judicial requirement that findings of administrative agencies must be supported by substantial evidence appearing in the record. *Cf. Washington Gas Light Co. v. Baker*, 188 F.2d 11, 15 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952 (1951) (collecting cases). A judicial decision turning on the failure of the record to contain specific findings also has the effect of obviating judicial appraisal of an unwieldy record whenever counsel are unable to produce evidence of the necessary findings.

36. See Joint App., p. 111. For an explanation of these procedures, see notes 3-6 *supra* and accompanying text.

37. "The important consideration is that the rate . . . shall place [the carrier] . . . in a position whereby it is enabled to enter the private capital market and obtain needed funds for its legitimate purposes at reasonable rates." *Chicago & So. Air Lines, Inc.*, 4 C.A.B. 419, 421 (1943).

38. See CHAMBERLAIN & EDWARDS, *THE PRINCIPLES OF BOND INVESTMENT* 13 (rev. ed. 1927) ("The risk finds its most patent expression in the ratio of current return ex-

When subsidies are set prospectively, the likelihood of nonrecurring, unforeseeable costs makes accurate prediction of airline expenses unfeasible, thus creating the possibility that the expense-reimbursement component of subsidies will be inadequate.<sup>39</sup> To offset this additional investor risk, the Board allows an increased rate of investment return in granting temporary future subsidies.<sup>40</sup> When, however, final subsidies are set retrospectively, as in the principal case,<sup>41</sup> "unforeseeable" expenses have already been incurred, and the rate of return should be lower, since no risk of inaccurate cost estimations remains.<sup>42</sup> By insisting that strike costs were specifically provided for in the airline's retrospective investment return, the Board disregarded the distinction between future and retrospective rate-setting. In fact, increasing the retrospective rate of investment return to cover the risk of "unforeseeable" costs grants the airline a rate which is higher than necessary to enter the capital market and which thus exceeds developmental "need."<sup>43</sup> Even if the *Overseas* Board meant that strike losses should not be reimbursed because the rate of investment return incorporates the risk of unsubsidized losses, the court properly reversed the Board on this ground. When a loss is disallowed in computing a subsidy, the reason is not that the investment rate reflects the risk of disallowance but that the loss was not incurred in furtherance of national air policy.<sup>44</sup>

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pected of the capital"); HARDY, RISK AND RISK-BEARING 5 (1923) (amount of profits demanded depends on risk assumed); KEYNES, THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY 144-45 (1936). *But see* GRAHAM & DODD, SECURITY ANALYSIS 101-02 (2d ed. 1940) (denying that a mathematical relationship exists between yield and risk since security prices depend primarily on stock "popularity" based largely on non-economic considerations). For a review of pre-Keynesian economic "risk" theories, see KNIGHT, RISK, UNCERTAINTY AND PROFIT 22-48 (1921).

39. See note 2 *supra* (discussing necessity of adopting temporary rates).

40. The future rate is generally about 3% higher than the retrospective rate. See Joint App., p. 39 n.34; *cf.* Braniff Airways, Inc., 9 C.A.B. 607, 616 (1948) (unpredictability of certain costs necessitates their inclusion in the cost of capital). See also Hellman, *Comment on Air Mail Subsidy*, 25 IND. L.J. 43, 45-46 (1949).

41. The Board was "finalizing" *Overseas'* rate for the period from Jan. 1, 1946 to Sept. 25, 1950. Joint App., p. 31.

42. The only risk borne by the investor when rates are set retrospectively is the possibility that certain incurred costs will be disallowed as part of the expense reimbursement component, and will therefore have to be compensated for by funds originally allocated to investment return. The Board did not contend that it had foreseen its own action by increasing the investment-return component of the subsidy to cover the specific risk of strike cost disallowance. Nor, in all likelihood, did the fear of strike loss enter into investor expectations, since relatively few strikes had occurred in the airlines industry, and Board policy toward strike losses was unclear. See Joint App., p. 117 n.11 (few strikes in the airlines industry); note 12 *supra* (uncertainty of Board policy).

43. The Board usually attempts to minimize subsidy payments so long as the development of the airline is not retarded. *Cf.* Mid-Continent Airlines, Inc., 1 C.A.A. 45, 50 (1939) (subsidy expenditures should yield "the greatest possible results"); Gellman, *The Regulation of Competition in United States Domestic Air Transportation: A Judicial Survey and Analysis*, 24 J. AIR L. & COM. 410, 417 (1957) (Board attempts to maximize benefits derived from subsidies).

44. See notes 5, 6 *supra* and accompanying text (statutory bases of disallowance). See also note 42 *supra*.



While correctly finding that strike losses were not compensated for by the rate of investment return, the court of appeals failed to demonstrate the insufficiency of the Board's other ground for decision—that federal labor policy can justify the exclusion of strike losses from the expense-reimbursement component of an airline subsidy. The *Western* and *Delta* precedents relied upon by the court in overruling the Board's decision do not prevent the CAB from weighing labor policy in determining whether losses should be subsidized. In those cases, the utilization of industry-wide policies as a basis for setting mail rates was rejected because the CAB did not show the individual needs of the carriers involved.<sup>45</sup> Although the Board in *Overseas* likewise failed to state

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45. In *Western Airlines, Inc. v. CAB*, 347 U.S. 67 (1954), the Board, in computing the carrier's subsidy, ignored profits which *Western* had derived from a route sale. The Board thus sought to provide an incentive for other carriers to make similar transfers. The Supreme Court reversed the Board on the ground that the application of industry-wide policies violates the statutory standard if the CAB fails to consider the "need" of the individual carrier at issue. The Court implied, however, that the Board may implement an industry-wide policy on showing that policy affects the individual carrier concerned.

No finding was made that there was "need" for the additional subsidy, in the sense that otherwise *Western* would not have been willing or able to make the transfer . . . in accordance with the development program which the Board deems advisable. Whether such a finding would have satisfied the statutory requirement is a question we do not reach . . .

*Id.* at 73. This language appears to represent an invitation which the Board declined in *Overseas*. See 54 COLUM. L. REV. 626, 628 (1954) ("[*Western* and *Delta*] may have little significance if . . . [the Board may bring] all considerations relevant to furthering the policy of the Act under the canopy of the individual carrier's 'need.'").

Under one interpretation, the *Delta* decision may have shut the door that *Western* left ajar. In *Delta*, the Board had refused to offset earnings of the carrier's domestic division against losses incurred by its overseas operation in order to protect the competitive position of the domestic division with respect to other, solely domestic, carriers. The court held that "economic policy" did not justify Board exclusion of any revenue, since § 406(b)'s mandate to "consider . . . all revenue," see text of statute quoted at note 2 *supra*, foreclosed Board discretion. In ignoring the Board's contention that *Delta* itself would be injured by the offset, the Court seemingly disregarded the intimation in *Western* that policies affecting the individual carrier may be effectuated.

A more logical and consistent interpretation is that *Delta* was a case in which the Board failed to make its finding sufficiently explicit. Cf. note 35 *supra*. On the basis of its past decisions, the Supreme Court would hardly force the Board to administer the subsidy program in a manner which would impede the development of the subsidy receiver. See *Western Air Lines, Inc. v. CAB*, *supra*; *Transcontinental & W. Air, Inc. v. CAB*, 336 U.S. 601 (1949). Furthermore, a narrow reading of *Delta* would result in a restriction of administrative discretion not required by the statute, for the act's direction to "consider" all revenue is readily interpreted to permit a certain measure of Board discretion. See *Summerfield v. CAB*, 207 F.2d 207, 212 (D.C. Cir. 1953) (dissenting opinion) ("The elastic statutory phrase . . . is sufficiently flexible to permit the omission of domestic earnings . . ."). Cf. *Secretary of Agriculture v. Central Roig Ref. Co.*, 338 U.S. 604 (1950). In *Roig*, the Supreme Court, interpreting a statute requiring the Secretary to take into consideration certain factors, *id.* at 608, said that "Congress did not think it was feasible to bind the Secretary as to the part his 'consideration' of these . . . factors should play in his final judgment . . ." *Id.* at 612. Compare *Baltimore & O.R.R. v. United States*, 298

specifically that its decision was aimed at the "need" of the individual carrier, that failure was irrelevant, for any subsidy determinations which weaken the collective bargaining process will inevitably affect the carrier in question. Poor union-management relations usually precipitate strikes and other forms of industrial strife which obstruct a carrier's performance.<sup>46</sup> In fact, recognition of this danger caused Congress to promote its aviation policy by extending the Railway Labor Act to airlines in order to encourage peaceful collective bargaining.<sup>47</sup> Since strike-loss reimbursement might reduce the effectiveness of this legislatively desired bargaining procedure and thus impede national air transportation,<sup>48</sup> the Board is required by statute to consider federal labor goals in determining carrier "need" under section 406.<sup>49</sup> Instead of rejecting the Board decision for resting on nonstatutory grounds, the court of appeals

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U.S. 349, 358-59 (1936) (statute requiring "consideration" of railroad's financial need calls for an evaluation of various factors which vary from case to case).

A congressional attempt to overturn the *Western* and *Delta* decisions died in committee. See *Hearings on S. 3426 Before the Senate Committee on Interstate and Foreign Commerce*, 83d Cong., 2d Sess. (1954). The bill's demise did not necessarily represent approval of the Court's decisions, but may have reflected congressional reluctance to adopt legislation which would increase a subsidy burden already much-criticized. See note 2 *supra*.

46. See GAGLIARDO, INTRODUCTION TO COLLECTIVE BARGAINING 430 (1953) (to prevent strife each side must "whole-heartedly" accept collective bargaining); Myers, *Basic Employment Relations*, in INDUSTRIAL CONFLICT 319 (Kornhauser, Dubin & Ross ed. 1954) (employer-employee relationship focal point of conflict).

47. "[The purposes of the Railway Labor Act as amended] are (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; . . . (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." 48 Stat. 1186-87 (1934), 45 U.S.C. § 151(a) (1952). These aims are implemented by machinery facilitating collective bargaining. See *California v. Taylor*, 353 U.S. 553, 559 (1957) ("On numerous occasions, this Court has recognized that the Railway Labor Act protects and promotes collective bargaining"); *Virginia Ry. v. System Fed'n No. 40*, 300 U.S. 515, 553 (1937) ("[The act's] provisions are aimed at the settlement of industrial disputes by the promotion of collective bargaining . . ."). See also note 9 *supra*. The Railway Labor Act was extended to cover airlines in 1936. See note 8 *supra*.

48. See notes 57-60 *infra* and accompanying text.

49. Previous Board utilization of labor policy in determining the necessities of carrier development has been judicially approved. When reviewing prospective mergers, the Board often insists that carriers adopt schemes which will protect workers' seniority rights. Such consideration of labor policy has been held within the Board's authority. See *Kent v. CAB*, 204 F.2d 263, 265 (2d Cir. 1953) ("[The] public interest . . . is to obtain the degree of stability in air transportation that freedom from industrial strife will provide"); *Western Air Lines, Inc. v. CAB*, 194 F.2d 211 (9th Cir. 1952) (labor protective provisions justified as preventing interruptions to commerce). See also KAHN 404-05 (enumerating various ways in which Board actions influence labor relations). This commentator—one of the few writing on airline industrial relations—has consistently emphasized the importance of Board consideration of labor policy. See *id.* at 405 ("The CAB . . . cannot afford to be ignorant about the effect on the industrial relations picture of its . . . economic de-

should have examined that decision to determine whether it reasonably implemented the subsidy program's objective of airline development.<sup>50</sup>

To evaluate the Board's solution properly, the court would have had to consider the carrier's financial need, the union's right to free and equal collective bargaining, the public interest in minimizing subsidy payments, and administrative feasibility. The first part of the Board's opinion, which rejected strike responsibility as a subsidy determinant,<sup>51</sup> seems consonant with these considerations, particularly ease of administration. Since strikes often follow a long period of strained labor relations, fault allocation necessitates a detailed historical analysis and is therefore impractical.<sup>52</sup> Furthermore, even if the CAB

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cisions"); Kahn, *Regulatory Agencies and Industrial Relations: The Airlines Case*, 42 AM. ECON. REV. 686, 695-98 (Supp. 1952).

Aside from the "need" standard, Board authority to consider labor policy can also be justified by the fact that, since the Railway Labor Act and the Civil Aeronautics Act are both designed to promote air transportation development, they should be construed *in pari materia*. Cf. Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942) ("Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."); Wilson v. United States, 250 F.2d 312, 320 (9th Cir. 1958) ("statutes dealing with the same general subject matter are to be construed *in pari materia*"); Brotherhood of Ry. Clerks v. Railroad Retirement Bd., 239 F.2d 37, 44 (D.C. Cir. 1956) ("interrelated [acts] must be read together"); Anderson Tully Co. v. Murphree, 153 F.2d 874, 879 (8th Cir. 1946) ("effect must be given to each [statute] in order to effectuate the legislative intent"); A. P. W. Paper Co. v. FTC, 149 F.2d 424, 427 (2d Cir. 1945), *aff'd*, 328 U.S. 193 (1946) ("[These] principles of statutory construction [*in pari materia*], are too elementary to require citation of any authorities"). *But cf.* S. S. W., Inc. v. Air Transp. Ass'n, 191 F.2d 658, 664-65 (1951) (discussing possible conflict between results of air transportation regulation and public interest as expressed in other acts).

50. Any doubts on the adequacy of the decision's implementation of Civil Aeronautics Act objectives should have been resolved in the CAB's favor, for the Board is uniquely qualified to evaluate the interaction of various congressional policies related to airline development. See American Airlines, Inc. v. North Am. Airlines, Inc., 351 U.S. 79, 84 (1956) (CAB is an "administrative agency of special competence that deals only with the problems of the industry"); cf. Board of Trade v. United States, 314 U.S. 534, 546 (1942) ("Congress has . . . delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems"). In order to utilize CAB expertise, courts should allow the Board to exercise its discretion to the full extent which the statute permits. Cf. Ayrshire Collieries Corp. v. United States, 335 U.S. 573, 593 (1949); Cities Serv. Gas Co. v. FPC, 155 F.2d 694, 698-99 (10th Cir. 1946).

51. See note 25 *supra* and accompanying text.

52. To allocate fault, the Board would have not only to look at the negotiations immediately prior to the strike but also to investigate the general background of the carrier's labor relations. See Opinion of the Board, Joint App., p. 115 n.49; Opinion of the Examiner, *id.* at 37-38; REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS 187 (1949) [hereinafter cited as REYNOLDS]. Labor strife may be an emotional response to events which happened years before. See, e.g., Hunt v. Crumboch, 325 U.S. 821 (1945). And even the negotiations prior to the strike may stretch over a long period. See Kahn, *The National*

attempted such an analysis, the only criteria for fixing strike responsibility—violations of the Railway Labor Act—are inadequate, because the practices proscribed by the act are ill-defined and mainly limited to organizational problems.<sup>53</sup> Of course, the Board could implement the act's provisions with its own regulations. But the CAB has described itself as inadequately prepared to use its present authority to enforce carrier compliance with labor legislation; hence, any expansion of labor-policing functions would contradict the Board's evaluation of its own expertise.<sup>54</sup> Moreover, although administrative supervision of

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*Air Lines Strike: A Case Study*, 19 J. AIR L. & COM. 11, 12-14 (1952) (five months before machinists' strike); *id.* at 15-17 (one year before pilots' strike).

Furthermore, the Board's refusal to allocate fault was consistent with the general position taken by other regulatory agencies. See cases cited in note 28 *supra*. Many agencies have a general aversion to interference in labor matters. *Cf.* *Oakland v. Key System Transit Lines*, 1 P.U.R.3d 150, 156 (Cal. Pub. Util. Comm'n 1953) ("In . . . areas of human conduct, government has established a policy of non-regulation"); *Mutual Tel. Co.*, 1921B P.U.R. 209, 212 (Hawaii Pub. Util. Comm'n 1920). *But cf.* *State v. Broad River Power Co.*, 157 S.C. 1, 63, 153 S.E. 537, 558 (1929) (when attempting to abandon service because of a strike, the company must show it exhibited "a reasonable and proper attitude to the employees . . ."); *Capital Transit Co.*, 9 P.U.R.3d 449, 459 (D.C. Pub. Util. Comm'n 1955) (concurring opinion) (labor relations termed the "exclusive prerogative of management"; nevertheless, events surrounding the strike scrutinized to ascertain whether it was "provoked"); *Terre Haute City Lines*, No. 1496-A (Ind. Pub. Serv. Comm'n Dec. 2, 1954), abstracted in 5 P.U.R. Digest 176 (Supp. 1958) (certificate revoked since company exerted no "reasonable" efforts to settle a strike).

53. The proscribed practices are failure to exert reasonable efforts to settle disputes, interference with the designation of bargaining representatives, interference with union organization, and coercing employees to sign yellow-dog contracts. 48 Stat. 1187-88 (1934), 45 U.S.C. § 152 (1952). See Northrup, *Unfair Labor Practice Prevention Under the Railway Labor Act*, 3 IND. & LAB. REL. REV. 323, 328 (1950) (main function of act is elimination of company unions). See also MacIntyre, *The Railway Labor Act—A Misfit for the Airlines*, 19 J. AIR L. & COM. 274, 283 (1952) ("There is no concept of an 'unfair labor practice' under the Railway Labor Act").

Furthermore, the act has not been extended to proscribe any union practices and contains only a few sanctions which could provide a basis for determining union fault. *Cf.* *Western Air Lines, Inc. v. Hollenbeck*, 124 Colo. 130, 131-34, 235 P.2d 792, 793-94 (1951) (describing union refusal to deal with multi-employer bargaining representative; unpunished, although a technical violation of the act); KAHN 385 ("the Railway Labor Act contains no penalties to check improper union activities"); Frankel, *Airline Labor Policy, the Stepchild of the Railway Labor Act*, 18 J. AIR L. & COM. 461, 476-77 (1951). *But see* Northrup, *supra* at 339 (certain union practices can be enjoined).

The most pertinent violation for fault-finding purposes would be refusal by either side to make "reasonable" efforts to settle disputes. But determination of this violation is difficult, since the failure of the two parties to reach an agreement does not by itself indicate lack of a reasonable effort on either side. *Cf.* *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 402 (1952) (NLRA provision requiring good faith bargaining "does not compel any agreement whatsoever between employees and employers").

54. Although airlines are statutorily required to comply with the Railway Labor Act before they can be certified by the CAB, see note 11 *supra*, in twenty years of administering the Civil Aeronautics Act the Board has never utilized this provision to penalize a

labor relations may be desirable, manipulation of subsidy payments is a singularly circuitous way to achieve this objective.<sup>55</sup>

That part of the Board's decision rejecting the examiner's partial reimbursement of strike costs<sup>56</sup> is also consistent with the reconciliation of union, carrier, and public interests. Arguably, if management were compensated for strike losses, the resulting decrease in union bargaining power<sup>57</sup> might diminish labor strife because management dominance in collective bargaining would discourage labor opposition.<sup>58</sup> But equality rather than inequality in bargaining strength is generally recognized as the most effective means of securing indus-

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carrier for improper labor activities. During the National Airlines strike of 1948, a recommendation of decertification was threatened by Bureau Counsel, but settlement of the strike foreclosed the issue. See Kahn, *Regulatory Agencies and Industrial Relations: The Airlines Case*, 42 AM. ECON. REV. 686, 695-96 (Supp. 1952). At that time, the Board indicated that it felt qualified to judge the merits of a labor controversy and enforce the provisions of the Railway Labor Act. *Ibid.* Subsequently, however, the Board became more modest in its contentions and, in *Overseas*, stated that an inquiry into labor relations "is . . . beyond the scope of our expertise." Joint App., p. 115 n.4a.

55. The absence of administrative enforcement provisions similar to those in the Taft-Hartley Act has been decried as the greatest weakness of the Railway Labor Act. The latter is enforceable only in court. See MacIntyre, *supra* note 53, at 285. For a comparison of the two acts, see Byrer, *The Railway Labor Act and the National Labor Relations Act—A Comparison*, 44 W. VA. L.Q. 1 (1937). Enforcement of the RLA is made even more difficult by the complex procedure for invoking the act's criminal sanctions to halt employer practices. See Northrup, *supra* note 53, at 331 (only one case has ever been brought to trial under the penalty provisions of the Railway Labor Act). But this problem can more easily be solved by congressional amendment of the Railway Labor Act than by Board utilization of the subsidy program as a means of punishing the carrier or union for improper labor activities. Cf. Smith, *Government Policy Concerning Airline Subsidy*, 25 J. AIR L. & COM. 79 (1958) ("[subsidy should not be] used as a substitute for timely and effective regulatory action by the government"). But cf. KAHN 176, 406 (supporting more CAB involvement in labor matters).

56. For the decision, see notes 26, 27 *supra* and accompanying text.

57. Since union bargaining power is based largely on the ability to force employers to choose between alternative costs—strikes or higher wages—the elimination of strike costs would substantially diminish that power. See Kahn, *Regulatory Agencies and Industrial Relations: The Airlines Case*, 42 AM. ECON. REV. 686, 695 (Supp. 1952) ("union bargaining power might be crippled if strikes could impose no economic losses on the carriers"). See also CHAMBERLAIN, *COLLECTIVE BARGAINING* 223-24 (1951) [hereinafter cited as CHAMBERLAIN]; GAGLIARDO, *op. cit. supra* note 46, at 512.

Of course, strike loss reimbursement would not completely eliminate union power, since strikes may have long-run detrimental effects which injure employers. See Baltimore Transit Co., 12 P.U.R.3d 453, 457 (Md. Pub. Serv. Comm'n 1956) (permanent loss of revenue due to customers who did not return after the strike); CARPENTER, *CASE STUDIES IN COLLECTIVE BARGAINING* 99 (1953) (union defeats may lower employee morale and productivity). But these effects are only incidental to the direct employer strike losses which constitute the real basis of union power. On strike costs generally, see DANKERT, *CONTEMPORARY UNIONISM* 407-10 (1948).

58. See HARRISS, *THE AMERICAN ECONOMY* 248 (1953) ("Another variety of industrial peace reigns because employees have no real opportunity to combine effectively to oppose their employer; the union is too weak . . .").

trial peace.<sup>59</sup> Indeed, federal subsidization of airline strike losses would probably increase the number and severity of strikes by removing management's strongest incentive to settle disputes—financial injury flowing from a strike.<sup>60</sup> The examiner's solution of subsidizing only a portion of the strike losses might minimize but would not eliminate the possibility of increased strife.<sup>61</sup> Thus, the uninterrupted operation necessary for airline growth can best be achieved by refusing to reimburse any strike losses. This result would be consistent with the Board's practice of disallowing the reimbursement of expenditures which may be in the financial interest of a carrier but which do not add to the development of national air transportation.<sup>62</sup> Furthermore, since the Board by declining to assess strike responsibility assumes good-faith bargaining,<sup>63</sup> complete rejection of strike-loss reimbursement is also required by the Railway Labor Act's policy of governmental neutrality in fairly conducted labor dis-

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59. See *United States v. Lowden*, 308 U.S. 225, 235-36 (1939) (on the Railway Labor Act); National Labor Relations Act § 1, 61 Stat. 136-37 (1947), 29 U.S.C. § 141 (1952). Union "equality" and industrial peace are primarily fostered through collective bargaining. See note 9 *supra* and accompanying text; *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515, 553 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43, 45 (1936); *Texas & N.O.R.R. v. Brotherhood of Ry. Clerks*, 281 U.S. 548, 570 (1930).

60. Without the pressure of possible strike losses, management would have little incentive to reach agreement with a union. See CHAMBERLAIN 215, 221-23 (size of management's offer depends on estimation of strike costs); *cf.* REYNOLDS 184 (without the fear of strike "there is no reason why an employer should make any concession whatever to a union"). See also note 82 *infra*. Although elimination of the pressure of strikes upon employers would reduce union chances of winning disputes, unions probably would still strike. The most violent strikes in labor history occurred during a period of government-supported management resistance. See DANKERT, *op. cit.* *supra* note 57, at 34-35. When a strike occurs, the same reluctance to compromise might prolong the stoppage. See *id.* at 406 (suggesting that if the desire to compromise is absent, strikes can only be settled by outside intervention). See generally Slichter, *The Determinants of Bargaining Power*, in BAKKE & KERR 205-06.

61. The examiner implied that the fear of stockholder disapproval resulting from his, and any future, disallowance of funds intended for dividends would replace the "normal" incentive to settle disputes. Joint App., p. 40. But the relatively small size of his disallowance renders this effect questionable. *Cf.* Chamberlain, *Management in Theory and Practice*, in BAKKE & KERR 255, 264 (discussing management loyalty to stockholders). Furthermore, the examiner's solution would prevent governmental neutrality. See note 64 *infra* and accompanying text.

62. See cases cited note 6 *supra*. The Board is not required to underwrite operations of the carrier if subsidization would conflict with the developmental aims of the act. "The purpose of the Act is not primarily to advance the private interests of carriers, but the public interest in an adequate air transport system. . . . [P]rivate interests . . . should yield to the broader interests of the public." *United Air Lines, Inc. v. CAB*, 198 F.2d 100, 107 (7th Cir. 1952). See also *Capital Airlines, Inc. v. CAB*, 171 F.2d 339, 340 (D.C. Cir. 1948).

63. If the Board did not assume that management had bargained in good faith, it would be violating its statutory duty to punish carriers not complying with the Railway Labor Act. See note 11 *supra*. See also note 54 *supra*.

putes.<sup>64</sup> Any cost subsidization would represent intervention on the side of management.<sup>65</sup>

Refusing to reimburse any strike losses, although the best solution, would require the CAB to pass on the reasonableness of airline wage costs. If an airline were denied strike loss reimbursement, it would tend to avoid labor trouble by accepting all wage demands on the theory that every increase in labor costs would be subsidized as part of regular operating expenses.<sup>66</sup> Unions might thus achieve wage increases unnecessarily larger than those obtainable through ordinary collective bargaining.<sup>67</sup> If these increases were reimbursed, federal subsidies would be forced above the minimum amount required to pro-

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64. "Neutrality," in the sense used here, means that unless the public welfare demands it or one party acts unreasonably, the government will leave the resolution of labor disputes to the collective bargaining process. See *Terminal R.R. Ass'n v. Brotherhood of R.R. Trainmen*, 318 U.S. 1, 6 (1943) (The Railway Labor Act "seeks to provide a means by which agreement must be reached . . . [C]onditions may be as bad as the employees will tolerate or be made as good as they can bargain for."); Railway Labor Act § 10, 44 Stat. 586-87 (1926), 45 U.S.C. § 160 (1952) (presidential emergency board convenes to make recommendations in disputes only when interruption in "essential transportation" is threatened). Of course, to the extent that it supports collective bargaining, the act may be considered as favoring labor. See note 9 *supra*. But collective bargaining is aimed at preventing strife and thereby aids management as well. See note 59 *supra* and accompanying text. For another expression of "neutral" federal labor policy, see the National Labor Relations Act § 1, 61 Stat. 136-37 (1947), 29 U.S.C. § 151 (1952).

Government neutrality in labor disputes is also reflected in state unemployment compensation statutes which bar payments to striking workers. See *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 145 n.2 (1946) (forty-three states have such provisions). In order to provide an incentive for compliance with the Railway Labor Act, however, a federal statute allows railroad workers to receive unemployment benefits while on a legal strike. 52 Stat. 1098 (1938), 45 U.S.C. § 354(a-2) (iii) (1952); *Brotherhood of Ry. Clerks v. Railroad Retirement Bd.*, 239 F.2d 37, 43 (D.C. Cir. 1956). This provision has not been extended to airline employees.

65. See note 57 *supra*.

66. "Had we given in to the union in this instance, we would have increased our operating costs materially. I presume that the Bureau Counsel would not have complained about that, and that whatever the costs were would have been accepted . . ." Joint App., p. 716 (statement by the general manager of American Overseas Airlines, Inc.). See also the decision of the examiner, *id.* at 40 (discussing resistance of carrier to union demands).

67. In collective bargaining, union and management each set an acceptable range of figures within which it hopes to fix the wage rate. When the two ranges do not overlap prolonged disagreement results, and the ultimate wage rate will depend in large part upon the relative bargaining strength of each side. CHAMBERLAIN 213-15. But if wage increases do not present a threat of pecuniary loss, the employer will have an unusually high upper limit to his range. Wage rates will thus be higher than those that unsubsidized carriers pay. Cf. Moulton, *The Resistance To Increasing Money Wages*, in BAKKE & KERR 679 (in the normal market employers seek to reduce wages). See also DEARING & OWEN, NATIONAL TRANSPORTATION POLICY 214 (1949) (presence of subsidy eliminates the usual balancing of costs and revenue). Other theories of wage determination—besides the bargaining power approach—would also be inapplicable, since they are premised on employer opposition to union demands. See GAGLIARDO, *op. cit. supra* note 46, at 466-73 (stating the theories). Wages would be limited only by the fear of adverse public opinion. See note 85 *infra*.

mote air transportation—an amount reflecting the wage costs of a comparable unsubsidized carrier forced to seek the lowest possible wages.<sup>68</sup> The *Overseas* Board recognized this possibility, but insisted that the prospect of financial independence would provide carriers with sufficient incentive to prevent wages from exceeding the rate paid by unsubsidized carriers.<sup>69</sup> This incentive may be inadequate, however, for local-service and overseas carriers—the two principal classes of subsidized airlines.<sup>70</sup> Financial independence is a remote prospect for the local carriers,<sup>71</sup> and the fortunes of an overseas airline depend as much on the subsidies given to competing, government-owned, foreign carriers as on its own cost reductions.<sup>72</sup> Moreover, since strikes could impair the ability of a subsidized carrier to pay dividends, its immediate desire to satisfy investors and attract new capital might outweigh the prospective advantage of financial independence.<sup>73</sup>

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68. Without explicitly defining developmental “need” in terms of the requirements of unsubsidized airlines, the Board has always sought to encourage subsidized carriers to act like free-market firms. See O’Connell, *Air Mail Pay Under the Civil Aeronautics Act*, 25 IND. L.J. 27, 29 (1949) (“basic concern over mail pay is whether or not it leads airline management . . . to make their decisions as businessmen normally do”). Compare Hellman, *supra* note 40, at 44-45 (basic concern should not be whether carriers act like ordinary businessmen but whether they add to the development of air transportation).

Other regulatory agencies have compared the operation of the utilities they regulate with the practices of competitive firms. See, e.g., Rates and Rate Structures, 1 P.U.R. (n.s.) 113, 140 (N.Y. Pub. Serv. Comm’n 1933) (“If [the company] . . . were in a competitive business and followed such ideas [it] . . . would soon be eliminated . . .”).

Requiring airlines to pay free-market wages would not force them to pay the theoretical wages which would be set in a purely competitive market. Rather, subsidized lines would be limited to the wages paid by existing firms which employ cost techniques generally recognized as the most efficient in the existing market for labor. See Slichter, *Wage Policies of Employers*, in BAKKE & KERR 681 (discussing “market” wage).

69. Opinion of the Board, Joint App., pp. 114-15.

70. 1957 CAB ANN. REP. 10. Officially, the overseas carriers “were temporarily taken off the subsidy list in 1957, pending the establishment of final rates.” *Ibid.* But the international carriers have traditionally constituted a major class of subsidy beneficiaries, and one authority indicates that they are still receiving subsidy payments. See Smith, *Government Policy Concerning Airline Subsidy*, 25 J. AIR L. & COM. 79, 80 (1958).

71. See Adams, *Future of the Local Service Carriers[:] Public Service vs. Federal Subsidy*, 23 J. AIR L. & COM. 127-38 (1956); Gellman, *The Regulation of Competition in United States Domestic Air Transportation: A Judicial Survey and Analysis*, 24 J. AIR L. & COM. 410, 423 & n.32 (1957). Subsidization of local carriers has been criticized as not consistent with the purposes of the act. See DEARING & OWEN, *op. cit. supra* note 67, at 218-23 (1949).

72. See Smith, *Government Policy Concerning Airline Subsidy*, 25 J. AIR L. & COM. 79, 80 (1958). Foreign governments are willing to subsidize their carriers for the prestige gained from having a national airline. See *Hearings on Air Mail Subsidies Before the House Committee on Interstate and Foreign Commerce*, 82d Cong., 2d Sess. 246-47 (1952). See also *Hearings on S. 3426 Before the Senate Committee on Interstate and Foreign Commerce*, 83d Cong., 2d Sess. 17-18 (1954).

73. “[I]f the Board should decide to disallow them [strike losses] in full . . . no management would ever feel it could afford to risk its investors’ money and take a strike . . .” Joint App., p. 765 (testimony of Ralph S. Damon, president of Trans-World Airlines).



Consequently, Board utilization of a "reasonable wage" test is indicated. By comparing the labor costs of the airline under consideration with similar costs of unsubsidized carriers—giving weight to any significant differences in working conditions—the Board could determine whether the subsidized airline is avoiding the normal bargaining process and relying on reimbursement of increased labor costs.<sup>74</sup> Any unreasonable excess revealed by this comparison should then be disallowed for reimbursement, since unnecessary for carrier development.<sup>75</sup> As a result, taxpayers would not bear the burden of unproductive subsidy payments. Furthermore, adoption of the proposed test would accord with the practice of other public regulatory agencies, which often adjudge the reasonableness of wages,<sup>76</sup> and with that of the CAB, which has

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Taking a strike in this situation is not analogous to a corporation's skipping dividends in order to finance long-range programs. The airline would be sacrificing an assured subsidy income in anticipation of problematical financial independence; the corporation would be using earnings to gain more income in a project which is more certain to succeed.

74. This test assumes that wage agreements reached by unsubsidized airlines are similar to those which would be reached by a subsidized carrier if it conducted wage negotiations with the normal managerial incentives. See notes 67, 68 *supra*. Only a rough comparison could be expected, since wage agreements are sometimes dependent upon bargaining factors unique to the individual firm or union. See CHAMBERLAIN 222.

75. See note 68 *supra* and accompanying text.

In order to make the disallowance effective, the Board should not allow excessive wage costs to be passed on through higher passenger or freight rates. The existence of relatively close substitutes makes airline demand elastic. See Kahn, *Wage Determination for Airline Pilots*, 6 IND. & LAB. REL. REV. 317, 318 (1953). Therefore, increased rates would lead to a decrease in demand for service. Cf. Clemens, *Collective Bargaining in the Regulated Industries[:]* *The Interdependence of Wage and Price Determination*, 42 AM. ECON. REV. 674, 681 (Supp. 1952) (impact of higher labor costs in transit industry has been decline in demand for service). And under the standard of "need," the Board would be forced to compensate the resulting loss in revenue by increased subsidies.

76. See New England Tel. & Tel. Co., 71 P.U.R. (n.s.) 243, 260 (N.H. Pub. Serv. Comm'n 1947) (commission can review wages when they are "out of balance" with prevailing wage rates); Oakland v. Key System Transit Lines, 1 P.U.R.3d 150, 157-58 (Cal. Pub. Util. Comm'n 1953) (refusing automatically to raise fares to cover wage increases); Western N.Y. & Pa. Traction Co., 1920A P.U.R. 951, 954 (N.Y. Pub. Serv. Comm'n 1919) ("the Commission should see to it that [wages are] . . . reasonably incurred before permitting [them] . . . to be loaded upon the public . . ."); Southern Bell Tel. & Tel. Co., 1933B P.U.R. 181, 187-88 (S.C.R.R. Comm'n) (reviewing and reducing allowable wage expenses); cf. K. L. M. Tel. Co., 13 P.U.R.3d 112, 117-18 (Mo. Pub. Serv. Comm'n 1956) ("[I]t is within our power and duty to determine whether or not the proposed salaries are reasonable for the service performed . . ."). *But see* Madison Ave. Coach Co., 79 P.U.R. (n.s.) 125, 127 (N.Y. Pub. Serv. Comm'n 1949) ("We have no jurisdiction over the rates of pay . . . [W]e must take into consideration whatever wage claims actually and currently exist."); Chicago & N.W.R.R., 26 Wis. R.R. Comm'n Rep. 705 (1921) (accepting current wage rates); cf. Northwestern Bell Tel. Co. v. Spillman, 6 F.2d 663, 665 (D. Neb. 1925) (employee compensation within managerial discretion).

One commentator suggests placing the entire wage problem of public utilities in the hands of utility commissions. Updegraff, *Public Utility Labor Problems*, 33 IOWA L. REV. 609, 614 (1948).

occasionally assumed a similar responsibility.<sup>77</sup> The Board has already gained the expertise to apply the proposed standard through its use of comparisons in determining the reasonableness of other airline costs.<sup>78</sup> Administration would be further facilitated by the industry-wide character of large airline unions and their efforts to establish wage formulas applicable, with minor variations, to all carriers.<sup>79</sup>

If adopted, the reasonable wage test would place the subsidized airline in the same bargaining position as an unsubsidized carrier. Faced with a wage demand which could not be offset by more efficient operations,<sup>80</sup> an airline

77. The CAB's position on its power to disallow unreasonable wages is unclear. *Compare* Bonanza Air Lines, Inc., 16 C.A.B. 322, 325 (1952) (wage increase found unreasonable), and Braniff Airways, Inc., 9 C.A.B. 607, 628 (1948) (various cost increases, including wages, compared with carriers and found reasonable), *with* All Am. Aviation, Inc., 8 C.A.B. 805, 813 (1947) (approving wage increase without any evident consideration of its reasonableness), and Chicago & So. Air Lines, Inc., 3 C.A.B. 161, 179 (1941) (executives' salaries question of managerial discretion ordinarily not calling for Board review). See also KAHN 407 (management anticipates necessity of justifying wage increases to the Board).

In setting future rates, the Board avoids the wage issue by refusing to provide for any prospective wage increases. See Robinson Airlines Corp., 16 C.A.B. 58, 62 (1952) ("[A]nticipated payroll increases . . . are not recognizable for mail-rate purposes, and, if incurred, should be offset by continuing efforts to achieve maximum economy and efficiency in operations."); Trans-Texas Airways, 12 C.A.B. 101, 114 (1950); Southwest Airways Co., 11 C.A.B. 651, 655 (1950); West Coast Airlines, Inc., 11 C.A.B. 662, 665 (1950); Western Air Lines, Inc., 10 C.A.B. 285, 292 (1949). The Board will make allowance, however, for increases already agreed upon but not to take effect until some future date. *Ibid.*

78. See, e.g., Colonial Airlines, Inc., 1951-1954 Av. L. REP. ¶ 21409.06 (CAB 1951) ("the use of cost comparisons to determine the level of reasonable expense is a necessary and proper administrative tool . . ."); Braniff Airways, Inc., 9 C.A.B. 607, 628 (1948) (comparing various cost categories with the "experienced level of other domestic carriers . . ."). See also O'Connell, *supra* note 68, at 33 & n.18. Comparisons have become increasingly more important in recent years. See 55 COLUM. L. REV. 933, 934-35 (1955).

79. Pressure by Congress, the NLRB and the Postmaster General forced all certified carriers to adopt a single wage formula for pilots. Civil Aeronautics Act § 401(1) (1), 52 Stat. 90 (1938) (now Federal Aviation Act § 401(k) (1), 72 Stat. 756-57 (1958)), Laughlin v. Riddle Aviation Co., 205 F.2d 948 (5th Cir. 1953); Northrup, *Collective Bargaining by Airline Pilots*, 61 Q.J. ECON. 533, 535 (1947).

Although present-day bargaining is on an individual-carrier basis, wage agreements reached with the larger airlines have served as precedents for the remainder of the industry. See KAHN 361-63. Nevertheless, the pilots' union has consistently rejected proposals for multi-employer bargaining. See *Western Air Lines, Inc. v. Hollenbeck*, 124 Colo. 130, 131-34, 235 P.2d 792, 793-94 (1951) (describing union refusal to deal with industry-wide committee); KAHN 364-68. Other large airline unions have indicated that they would not oppose industry-wide bargaining. *Id.* at 371.

80. On the ability of more efficient firms to pay higher wages, see Pool, *The Capacity of Industry To Pay Wages*, in BAKKE & KERR 694, 696. Wage increases which cannot be passed on to consumers may force employers to adopt more efficient methods in order to avoid losses. See Clemens, *supra* note 75, at 681 (transit industry absorbed wage increases partly through more intensive utilization of capital); Pool, *The "Economy of High Wages,"* in BAKKE & KERR 752-53; Reynolds 398-400; cf. *Capital Transit Co.*, 9 P.U.R.3d

would have to determine whether the demand was sufficiently in line with other carriers' wage rates to merit CAB subsidization.<sup>81</sup> If the wage increase exceeded a reasonable and hence subsidizable amount, the airline would have to balance the costs of a possible strike against the excessive portion of the increase and choose the alternative minimizing its loss.<sup>82</sup> With management thus forced to view union demands in the perspective of profit maximization, wages would be fixed at or near a free-market level. True, the carrier would be injured—as is every employer—if compelled to bear the costs of a strike or of unreasonable wages. But this burden is consistent with the statutory objective of “economical . . . management.”<sup>83</sup>

Moreover, the techniques employed in airline labor negotiations would minimize any financial injury caused by CAB refusal to subsidize excessive wages or strike losses. The present widespread acceptance of grievance arbitration and the Railway Labor Act's compulsory arbitration provisions would largely eliminate strikes for nonmonetary objectives.<sup>84</sup> Strikes over wages

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449, 456-57 (D.C. Pub. Util. Comm'n 1955) (concurring opinion). The CAB has indicated that carriers absorb wage increases through greater efficiency. *Robinson Airlines Corp.*, 16 C.A.B. 58, 62 (1952).

81. See notes 74, 75 *supra* and accompanying text.

Industry-wide bargaining patterns would simplify carrier determination of the “reasonable wage” which would be reimbursed by the Board. See note 79 *supra*.

82. Employers have “concession schedules” comparing wage changes with strike costs. Up to a certain point, an employer would grant wage increases rather than take a strike; beyond that point, he would accept the strike in preference to higher wages. See CHAMBERLAIN 218; Smith, *Implications for Collective Bargaining in Quasi-Public Work*, 74 MONTHLY LAB. REV. 257, 259-60 (1952).

Fear of commission disapproval provides other regulated industries with an incentive to resist wage demands. See Clemens, *supra* note 75, at 674. Management fear of CAB disapproval would be desirable, for management is actually representing the government and the taxpayer, who ultimately subsidize allowed wage increases. Cf. SLICHTER, *THE CHALLENGE OF INDUSTRIAL RELATIONS* 30 (1947) (in normal bargaining, management represents consumer interests).

83. See text of statute quoted note 2 *supra*; notes 5, 68 *supra* and accompanying text; cf. Note, 97 U. PA. L. REV. 410, 420 (1949) (concerning public utilities):

[T]he public would be more benefited by permitting a few interruptions in service with low rates than by demanding continuous service at rates disproportionately high, the assumption being that with free collective bargaining, the right to strike, and certain limits on the rate of return, the contestants will arrive at a figure *within* the *existing* rate structure after the necessary test of strength.

84. No record of an airline strike over nonmonetary issues other than grievances has been found. And more than 80% of all United States air carriers have arbitration clauses in their union contracts designed to prevent grievance strikes. See KAHN 397.

The protracted 1948 National Airlines grievance strike occurred despite an arbitration clause because the arbitrators were evenly split over a proper solution. See Kahn, *The National Air Lines Strike: A Case Study*, 19 J. AIR L. & COM. 11, 15 (1952). The subsequent addition of an impartial arbitrator should prevent similar breakdowns in the arbitration process. See KAHN 398; Northrup & Kahn, *Railroad Grievance Machinery*[:] *A Critical Analysis—II*, 5 IND. & LAB. REL. REV. 540, 559 (1952).

Compulsory grievance arbitration could be provided through the National Air Transport Adjustment Board, authorized by § 205 of the Railway Labor Act, which if convened

would also be infrequent because the delay and publicity accompanying Railway Labor Act mediation and fact-finding procedures tend to keep union requests at reasonable levels<sup>85</sup> and, under the proposed test, subsidized airlines could accept reasonable wage demands without fear of being denied reimbursement.<sup>86</sup> Even if strikes occur, they would probably not be dangerously prolonged, for the self-interest of airline employees—particularly the pilots and

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would have the same authority as the previously established Railroad Adjustment Board. 49 Stat. 1190 (1936), 45 U.S.C. § 185 (1952). *Cf.* *Farris v. Alaska Airlines, Inc.*, 113 F. Supp. 907, 909 & n.5 (W.D. Wash. 1953); *UAW v. Delta Air Lines, Inc.*, 83 F. Supp. 63 (N.D. Ga. 1949). For a description of compulsory arbitration provided by the Railroad Adjustment Board, see, *e.g.*, *California v. Taylor*, 353 U.S. 553, 558-59 (1957); *Brotherhood of R.R. Trainmen v. Chicago R. & Ind. R.R.*, 353 U.S. 30 (1957). To date, the NATAB has not been convened. See 23 NATIONAL MEDIATION Bd. ANN. REP. 41 (1957) (voluntary acceptance of arbitration has obviated establishing NATAB).

Grievances can be defined as "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee. They may be contrasted with 'major disputes' which result when there is disagreement in the bargaining process for a new contract." *Brotherhood of R.R. Trainmen v. Chicago R. & Ind. R.R.*, *supra* at 33. See also Frankel, *Airline Labor Policy, the Stepchild of the Railway Labor Act*, 18 J. AIR L. & COM. 461, 468 (1951). Actually, grievances are often difficult to distinguish from other union interests. See MacIntyre, *supra* note 53, at 284 & n.45 (collecting cases exemplifying this difficulty).

Some authorities have urged that compulsory arbitration be applied to wage determinations as well as grievances in publicly regulated industries. See Updegraff, *Compulsory Settlement of Public Utility Disputes*, 36 IOWA L. REV. 61 (1950). *But see* Note, 97 U. PA. L. REV. 410, 417-18 (1949) (opposing compulsory arbitration). A congressional attempt to extend compulsory arbitration to cover wages within the framework of the Railway Labor Act died in committee. For the proposal and its implications, see *Hearings on S. 3463 Before the Subcommittee on Railway Labor Act Amendments of the Senate Committee on Labor and Public Welfare*, 81st Cong., 2d Sess. (1950).

85. "[I]n the case of railroads it seems likely that the delays and publicity attending the bargaining procedure exert a restraining influence upon the timing, and possibly the magnitude of wage changes . . ." Harbeson, *Collective Bargaining in the Regulated Industries—Discussion*, 42 AM. ECON. REV. 699 (Supp. 1952). See also REYNOLDS 312 (resistance of employers and unions diminishes through the Railway Labor Act's "process of attrition"). *Cf.* Smith, *Implications for Collective Bargaining in Quasi-Public Work*, 74 MONTHLY LAB. REV. 257, 262 (1952) (public reaction a factor in collective bargaining). Concern with public reaction to wage demands is also reflected in publicity campaigns during disputes. See Bell, *Industrial Conflict and Public Opinion*, in *INDUSTRIAL CONFLICT* 240, 252-53 (Kornhauser, Dubin & Ross ed. 1954) ("The Propaganda War"); CHAMBERLAIN 230. *But see* Northrup, *The Railway Labor Act and Railway Labor Disputes in Wartime*, 36 AM. ECON. REV. 324, 341 (1946) (emergency boards ineffective because unions disregard public opinion).

Excessive union demands may also be deterred by fear that their actions will lead to adoption of undesirable legislation. See Clemens, *supra* note 75, at 676-77.

Although tending to reduce demands, the mediation and fact-finding provisions of the act have not been directly successful in preventing work stoppages. See KAHN 384, 385; *cf.* Northrup, *supra* at 342.

86. See notes 74, 75 *supra* and accompanying text. The proposed solution would also eliminate the possibility that strikes would occur because of worker dissatisfaction which results from comparing wages with those paid by similar carriers. *Cf.* CHAMBERLAIN 246. Airlines would not resist such wages since they would be subsidizable.

other skilled technicians who have few alternate employment opportunities—would ordinarily prevent unions from forcing a carrier into bankruptcy.<sup>87</sup>

By reducing the likelihood of large subsidy disallowances, these bargaining techniques would also serve to maintain the attractiveness of airline investments. Of course, the suggested approach might increase the risk that airlines will incur nonreimbursable strike or wage costs which have to be absorbed from the investment-return component of the subsidy.<sup>88</sup> While some increase in the investment component may therefore be necessary to overcome investor resistance resulting from this additional risk, the expectation that few strikes will occur should minimize the amount of the increase.<sup>89</sup> Indeed, refusing to subsidize strike and excessive wage costs might eventually make airlines a more attractive investment than they would be otherwise. By taking the subsidy program out of collective bargaining, the Board would prepare airlines for the possibility that they will become financially independent of taxpayer support, with their expenditures subject only to the forces of the market.<sup>90</sup>

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87. Whether a union will force an employer out of business through a strike depends on the ability of its members to transfer to other jobs. See REYNOLDS 403. The high degree of specialization decreases the mobility of airline employees. On this specialization, see Kahn, *Regulatory Agencies and Industrial Relations: The Airlines Case*, 42 AM. ECON. REV. 686, 687 (Supp. 1952). Airline employees are therefore hesitant to forfeit their jobs for the sake of winning a dispute. Cf. GAGLIARDO, INTRODUCTION TO COLLECTIVE BARGAINING 253-54 (1953) ("the union understands that the terms of the agreement must be such that the industry or plant can continue to operate at a relatively high level of employment"). But cf. CARPENTER, *supra* note 57, at 420 (1953) (unions implement an "abstract principle" that employers who cannot meet minimum wage demands should not be permitted to remain in business); CHAMBERLAIN 242-43 (ill-informed members may force union officers to make unreasonable demands); Note, 67 YALE L.J. 98, 101 n.16 (1957) (collecting authorities noting the union's demand for more wages at any cost). The fear of unemployment also serves to reduce the union's original wage demands since the likelihood that wage increases will lead to a reduction in the employment force is particularly acute in the airline industry. The volume of decline in employment due to a particular wage increase generally depends on the elasticity of demand for labor. REYNOLDS 406. The high ratio of labor cost to total cost in the airlines industry makes the long-run demand for labor extremely elastic. Kahn, *Wage Determination for Airline Pilots*, 6 IND. & LAB. REL. REV. 317, 319 (1953) (airline labor costs equal one half of total cost). For an additional factor causing elasticity, see KAHN 109 (long-run demand for labor elastic, since this demand is derived from demand for air transportation which is elastic).

88. See notes 37-40 *supra* and accompanying text.

89. See notes 84-87 *supra* and accompanying text.

In *Overseas*, the record suggests that no increase in the investment-return component of the subsidy was necessary after the Board's "tentative" finding that strike losses would be disallowed. See note 20 *supra*.

90. "[I]t is important not only that the industry be rapidly expanded but also that it be brought to a stage of development where it can be weaned from the subsidy and made to stand on its own feet." O'Connell, *supra* note 68, at 27.

Although subsidized airlines would seem to be a good investment, since the subsidy almost guarantees a steady rate of return, investors have more confidence in the unsubsidized carriers. See Smith, *supra* note 70, at 81 (air transportation would be a better credit risk if "governed by the usual rules of good business"); cf. Eastern Air Lines, Inc., 3 C.A.B. 733, 763 (1942) (an unsubsidized carrier is "regarded as of greater financial stability than one whose prosperity depends upon a subsidy").