Chapter Twenty-Six

THE INTERACTION BETWEEN THE RLA AND OTHER LAWS

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I. COMPARISON BETWEEN THE RAILWAY LABOR ACT (RLA) AND THE NATIONAL LABOR RELATIONS ACT (NLRA)

The RLA governs labor relations at the nation's air and rail carriers that provide services to the public. The NLRA is the primary labor statute governing labor-management relations at all other private employers. Aside from the nature of the industries covered by the NLRA and the RLA, the most fundamental difference between the two statutes is their approach to the continuity of commerce and the ability of the parties to engage in "self-help" – i.e., striking or similar activity by unions and unilaterally implementing changes in rates of pay, rules and working conditions by the carriers.

One of the primary purposes of the RLA is to ensure that rail and airline labor disputes do not interrupt interstate commerce. *See, e.g., Burlington N. R.R. v. Bhd. of Maint. of Way Employees*, 481 U.S. 429, 450 (1987) (overarching purpose of RLA is "[t]o prevent, if possible, wasteful strikes and interruptions of interstate commerce"). The statute itself identifies as one of its purposes "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a. That purpose is made enforceable in § 2, First, which imposes a substantive duty on "all carriers, their officers, agents and employees to exert every reasonable effort … to settle all disputes … in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152, First. This duty is the "heart" of the RLA. *Bhd. of R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969).

To accomplish the goal of minimizing strikes and interruptions to commerce, the RLA contains stringent status quo requirements that, in the context of minor disputes (grievances), foreclose the possibility of strikes altogether. In the context of major disputes (those involving the negotiation or renegotiation of labor contracts), the RLA establishes an intentionally lengthy process that involves extensive and time-consuming negotiation, mediation, and other steps before the union may be released to engage in a strike or other forms of self-help. The union's duty under § 2, First prohibits it from striking even when the carrier is not under a similar obligation to refrain from making unilateral changes, such as during negotiations for an initial collective bargaining agreement (CBA). *Aircraft Mechanics Fraternal Ass'n v. Atlantic Coast Airlines*, 125 F.3d 41, 44 (2d Cir. 1997).

Recent Decision Regarding "Status Quo": In *Int'l Bhd. Of Teamsters, Airline Division v. Allegiant Air, LLC*, 788 F.3d 1080 (9th Cir. 2015), a newly certified union tried to circumvent the case law permitting a carrier to make unilateral changes during first contract negotiations by arguing that previously established work rules constituted the "status quo" that had to be observed during negotiations. Specifically, the union argued that an in-house "advocacy group" with which the airline had dealt on issues involving its pilots had become their collective bargaining representative for purposes of the RLA, and that work rules developed by the airline in coordination with the advocacy group constituted a "status quo" that could not be changed unilaterally during its negotiations with the union. Although the district court agreed with the union and issued a preliminary injunction prohibiting the carrier from making changes to the work rules unilaterally, the Ninth Circuit reversed.

- ***Background:*** In August 2012, the International Brotherhood of Teamsters (IBT) was certified as the collective bargaining representative of the pilots of Allegiant Air. In late 2013, IBT sued Allegiant for violating the RLA's status quo requirements, under the theory that the advocacy group had been the pilots' representative for RLA purposes and that the work rules constituted a CBA. Thus, the IBT claimed that the work rules constituted the "status quo" that had to be observed during the parties' negotiations. In July 2014, a federal district court agreed with IBT and enjoined

Allegiant from making changes that violated the status quo as established by the work rules. Allegiant appealed and the Ninth Circuit reversed the lower court's ruling on both points.

- ***Ninth Circuit Decision.*** The Ninth Circuit started from the premise that "[e]mployees, employers, and federal courts need certainty – prior to the advent of litigation – on whether an advocacy group is an RLA representative." The need for such clarity compelled the court to hold that an entity can become an RLA representative "only when certified by the Board or voluntarily recognized by the employer." The advocacy group unquestionably had never been certified to represent the pilots, leaving voluntary recognition as the only possibility. Not only was there no evidence that the advocacy group ever demanded recognition as the pilots' bargaining agent, its actions and statements demonstrated that it did not consider itself to have such a status. In summary, the Ninth Circuit held, if a "labor organization wants to be an RLA representative, it must demand recognition from a carrier; if the carrier will not give it, the group must seek Board certification. Because [the advocacy group] did neither, it was not an RLA representative."

  Because the advocacy group was not an RLA representative, the Ninth Circuit concluded that the work rules were not a CBA within the meaning of the RLA. Based on prior precedent that there is no status quo obligation during initial contract negotiations, the RLA "did not prevent Allegiant from changing the Work Rules." The Ninth Circuit thus vacated the injunction and remanded the matter "to permit the Teamsters and Allegiant to continue negotiating a collective bargaining agreement in conformity with the RLA and under the Board's guidance."

The NLRA contains far fewer impediments to striking than the RLA. Under the NLRA, unless employees contractually surrender the right to strike, they are not statutorily required to engage in the same sort of mandatory dispute resolution mechanisms required by the RLA. Thus, although courts interpreting the RLA sometimes will look to the NLRA for guidance, they generally draw such comparisons carefully, based on the statutes' different purposes. *See, e.g., Stewart v. Spirit Airlines,* 503 F. App'x 814 (11th Cir. Jan. 10, 2013) (noting that while the NRLA specifically protects employees in efforts to seek improved terms and conditions of employment for "mutual aid or protection," § 152, Fourth of the RLA only protects employees in their efforts to join or organize a union). Under most circumstances, and unless a labor union and management contractually agree to limit the union's ability to strike, the Norris-LaGuardia Act (NLGA) prevents a federal court from issuing an injunction enjoining a strike by a labor union governed by the NLRA. However, the NLGA does not bar injunctive relief where a union's exercise of self-help would violate the RLA. *See, e.g., Pittsburgh & L. E. R. Co. v. Ry. Labor Execs. Ass'n*, 491 U.S. 490, 513 (1989) (NLGA's general limitation on a court's ability to grant injunctions in labor disputes "must be accommodated to the more specific provisions of the RLA"); *Grand Trunk W. R.R. Inc. v. Bhd. of Maint. of Way Employees Div.,* 497 F.3d 568 (6th Cir. 2007) (NLGA did not deprive court of authority to enjoin union from engaging in self-help while the parties were engaged in mediation; employer did not fail to make "every reasonable effort" to resolve its dispute with the union as required by the NLGA and § 2, First of the RLA by refusing to negotiate with the union outside of mediation).

In *PHI, Inc. v. OPEIU*, 2010 WL 2740066 (W.D. La. July 9, 2010) *adopted, clarified,* 2010 WL 2835540 (W.D. La. Sept. 14, 2010), *aff'd,* 440 F. App'x 394 (5th Cir. Sept. 12, 2011), a union that went on strike against a carrier later asserted that the carrier had breached its duty under RLA § 2, First to exert every reasonable effort to reach agreement with the union *prior* to the strike. The carrier moved to dismiss that claim because the union had rejected the National Mediation Board's (NMB's) proffer of arbitration at the conclusion of negotiations, and thus the NLGA barred the union's request for injunctive and other equitable relief. *Id.* at *5. The court found that the union's efforts to restore the status quo after exercising self-help was no longer justiciable, and that the union should have brought such claims prior to engaging in self-help itself. *Id.* at *12 ("any request for injunctive relief to stop changes and preserve the status quo until PHI bargained in good faith should have been made *during the bargaining period* as set up by the RLA, and is wholly misplaced within the period of self-help") (emphasis in original). Because the union had unclean hands by virtue of its rejection of the proffer of arbitration, and because injunctive relief would not stop a violation of the RLA, the court granted the carrier's motion to dismiss the bad faith bargaining claims. *Id.* at *13.

The court also was presented with a claim by the carrier against the union for bad faith bargaining. Unlike the union, which specifically rejected the NMB's proffer of arbitration, the carrier had not responded either way to the NMB's proffer. The court found that, in light of the ambiguity created by carrier's silence, the NLGA applied, reasoning that "to allow a party to deliberately remain silent on the issue of arbitration and then seek injunctive relief from the courts when its silence has not reaped the desired result, would be violative of the policies of both the RLA and NLGA." *Id.* at *21. Given the carrier's own unclean hands, and because it, too, could have sought injunctive relief prior to availing itself of self-help, the court granted the union's motion to dismiss the carrier's request for injunctive and declaratory relief. *Id.* at *24, 26. In a subsequent decision in the same matter, the court granted the carrier's motion to dismiss claims brought by the union under RLA § 2, Third and Fourth relating to the manner in which the carrier had returned employees to work at the conclusion of the strike. *PHI, Inc. v. OPEIU*, 2010 WL 3034712 (W.D. La. July 30, 2010), *adopted by, clarified by, dismissed without prejudice,* 2010 WL 3805913 (W.D. La. Sept. 24, 2010), *aff'd, PHI, Inc. v. Office & Prof'l Employees Int'l Union*, 440 F. App'x 398 (5th Cir. 2011). The court rejected the union's argument that the return to work issues constituted a separate "labor dispute" from the bad faith bargaining, and thus the union had unclean hands under the NLGA "having rejected the NMB's proffer of arbitration, and having chosen self-help, and its subsequent "economic warfare." *Id.* at *9.

The Fifth Circuit affirmed the lower court's decision that PHI did not violate the RLA by making unilateral changes during self-help (but before the strike) to improve pilot pay and making those changes retroactive (by a short time) to a period before self-help. *See PHI, Inc. v. OPEIU,* 440 F. App'x 398, 399 (5th Cir. 2011). The Fifth Circuit agreed with the lower court that such conduct by PHI was permissible unless it struck a "fundamental blow" to the unions, and found that the carrier's actions did not strike such a blow. Accordingly, the Fifth Circuit affirmed the trial court's ruling on this issue and did not reach the issue of whether the union's rejection of the NMB's proffer of arbitration prior to the carrier's self-help would bar the unions from seeking injunctive or other equitable relief for the alleged bad faith bargaining by PHI.

The NLRA permits unrepresented employees to strike and engage in similar self-help under some circumstances. That arguably is not the case under the RLA, though there is not much case law on the issue.

In *Aircraft Serv. Int'l, Inc. v. Int'l Bhd. of Teamsters,* 2012 WL 5194163 at *3 (W.D. Wash., Oct. 18, 2012), the district court enjoined a threatened strike by nonunion employees of an airline service provider subject to the RLA. A divided panel of the Ninth Circuit affirmed that decision in *Aircraft Serv. Int'l v. Int'l Bhd. of Teamsters*, 742 F.3d 1110 (9th Cir. 2014). Thereafter, however, the Ninth Circuit sitting en banc reversed the district court's decision, with the 11 judges splitting 7-4. *See Aircraft Serv. Int'l v. Int'l Bhd. of Teamsters*, 779 F.3d 1069 (9th Cir. 2015) (en banc). The decision did not turn on the ability of courts to enjoin unrepresented employees from striking under the RLA, but on whether the employer had complied with the requirement of Section 8 of the NLGA that it "make every reasonable effort" to settle a dispute through negotiation before seeking injunctive relief in a labor dispute. The majority concluded that the employer had not complied with that obligation and reversed on that ground, declining to reach the issue of whether unrepresented employees could be enjoined from striking. Three of the seven judges in the majority would have held that unrepresented employees could not be enjoined at all. *See id.* at 1079-1085 (Berzon, J., concurring). The four dissenting judges argued that the district court and the three-judge panel "got it right" and that the employees could be enjoined. *See id.* at 1085-1097 (Kleinfeld, J., dissenting).

One way in which the RLA and NLRA interact is with respect to which law applies to companies that are not carriers by rail or air themselves but which contract with carriers to perform services for them. This issue usually arises when a proceeding is initiated with the National Labor Relations Board (NLRB) against a service provider (e.g., a representation petition or an unfair labor practice charge), and the service provider contends that the NLRB lacks jurisdiction over it because it is subject to the RLA. A two-part test is used to determine whether a service provider is subject to the RLA: (1) do the employees perform work that traditionally is performed by carrier employees (the "function" test); and (2) do carriers

own or control, directly or indirectly, the employer and its employees (the "control" test). *See, e.g., Air Serv. Corp.*, 38 NMB 37, 2010 WL 5019553 (2011); *Swissport USA, Inc.*, 35 NMB 190, 194-95 (2008). In most cases, the function test is not at issue, and the jurisdictional determination turns on the level of carrier control. Recently, the NMB has interpreted the "control" test more narrowly than it has in the past, resulting in companies being found to be subject to the NLRA, when in the past they would have been found to be with the RLA's jurisdiction. *See, e.g., Menzies Aviation, Inc.*, 42 NMB 1, 7-9 (2014) (Member Geale, dissenting). One current NMB member has suggested that the two-part test should be jettisoned and replaced with a test that "parallels the common law agency test." *Airway Cleaners, LLC*, 41 NMB 262, 270 (2014) (Member Hoglander, concurring).

Historically, the NLRB typically would create a record relating to the facts relevant to the jurisdictional inquiry and then ask the NMB for an advisory opinion on whether the employer is subject to the RLA. Recently, however, because of a backlog of jurisdictional cases at the NMB, the NLRB has taken it upon itself to resolve the jurisdictional question without seeking the NMB's opinion.

II. INTERSTATE COMMERCE ACT (ICA)

The ICA, 49 U.S.C. § 10101, *et seq.*, was enacted by Congress to ensure an adequate and efficient rail transportation system. One of the ways Congress sought to achieve that goal was to require the Interstate Commerce Commission (ICC) to approve almost every transaction that affects the operation or ownership of the nation's rail lines. Because rail acquisitions and mergers affected the employees of the acquiring and acquired rail lines – in the form of layoffs, terminations, and forced transfers, among other things – the ICA gave the ICC authority to impose labor protective provisions (LPPs) as a condition of such transactions, to address some of those effects.

The ICC was abolished by the ICC Termination Act of 1995, which recodified the ICA at 49 U.S.C. §§ 10101-14914. Some of the functions formerly performed by the ICC were transferred to the newly created Surface Transportation Board (STB). The STB, like the ICC before it, has the "exclusive authority to examine, condition, and approve proposed mergers and consolidations." *CSX Transp., Inc. v. Transp. Communs. Int'l Union*, 480 F.3d 678, 679 (4th Cir. 2007) (quoting *Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 119 (1991)). The STB may impose LPPs in appropriate situations. However, at some point, STB jurisdiction over the interpretation of an implementing agreement ceases and "the parties will be required to resort to the Railway Labor Act to resolve disputes arising under the collective bargaining agreements then in effect." *CSX Transp., Inc. v. Transp. Communs. Int'l Union*, 480 F.3d at 684 (internal citations omitted). In *CSX,* the court held that because the disputed decisions of the National Railroad Adjustment Board (NRAB) regarding work assignments drew their essence from the interpretation and enforcement of the CBA between the parties, and not from the Implementing Agreement that was created as part of a railway consolidation (over which the STB had jurisdiction), the NRAB had jurisdiction to resolve the claims.

The authority to impose LPPs leads to the ICA's principle interaction with the RLA. STB-imposed LPPs may vary in certain respects. For transactions involving Class I carriers (rail carriers with annual operating revenues of $250 million or more), LPPs may provide the following: (A) income protection for up to six years for employees displaced or dismissed from their jobs because of an STB-approved transaction; (B) compulsory expedited negotiations (and arbitration if necessary) of each carrier's selection and assignment of employees; and (C) a bar on unilateral changes in rates of pay, rules, and working conditions (for unrepresented employees) or to CBAs.

Transactions involving only smaller Class II, Class III, and short-line carriers may result in lesser protections. For example, when a Class II carrier acquires a short-line carrier, employees may only receive one year of severance pay (with a set-off against affected employees' earnings with the acquiring or surviving railroad during the 12-month period immediately following the effective date of the transaction) instead of the six years of pay protection for Class I transactions. 49 U.S.C. § 10902.

Varying levels of LPPs also may be ordered in connection with abandonments of rails or railroads, sales

of "feeder lines," directed service to prevent temporary disruptions of service, line acquisitions by noncarriers, and construction of new rail lines.

Rail carriers should keep the scope of STB-imposed LPPs in mind if they agree to include LPP-like provisions in side letters, merger or acquisition agreements, and/or CBAs. First, there is the risk of conflicting obligations. For example, a labor-management agreement might contain obligations that conflict with LPPs that could be imposed by the STB. Second, to the extent a carrier and union agree to LPP-like requirements that are less stringent than those that would be imposed by the STB and the ICA, the STB can impose LPPs as protective as those required by the ICA instead of enforcing the parties' agreement.

Similarly, railroad acquisition and merger transactions also can create situations that potentially run afoul of the RLA's status quo requirements. The RLA forbids carriers from making unilateral changes in rates of pay, rules, and working conditions unless the RLA's major dispute resolution mechanisms have been exhausted. It is possible, however, for an order of the STB in connection with its approval of a covered transaction to adversely affect employee rights as defined in a CBA. In such a situation, the question of which statute pre-empts the other will depend on what section of the ICA is pertinent to the transaction, as well as the precise terms of the STB's order. *See Union R.R. Co. v. United Steelworkers of America*, 242 F.3d 458 (3d Cir. 2001) (the "RLA must yield to the ICA when it impedes the implementation of a STB-approved consolidation" under § 10502).

A court recently addressed the interaction between the ICA, NLGA and the RLA in a case that involved the interpretation of a "contract where a line is included in a CBA between a union and a railroad, the line is sold, the language in the CBA referring to the line is nonetheless carried over into a new CBA between the union and a corporate successor, and the line is then reacquired by the successor railroad." *See Bhd. of Maint. of Way Employes Div./IBT v. BNSF Ry. Co.*, 2013 WL 5670917, at *6 (D. Neb. Oct. 16, 2013). The court noted:

> These statutes do not always coexist easily. While Norris–LaGuardia generally prevents the federal courts from enjoining labor union activity, the prohibition of Norris–LaGuardia must give way when necessary to enforce a duty specifically imposed by another statute. Thus, the ICA may supersede Norris–LaGuardia, such that a court may enjoin a strike threatened in violation of the ICA. A court may also issue injunctions to enforce compliance with the RLA notwithstanding Norris–LaGuardia. And in some instances, the ICA can supersede the RLA.

Id. at *4 (citations omitted). The court also noted, however, that it was not faced with deciding which dispute resolution procedures should be followed by the parties. Instead, the issue before it was whether the union should be enjoined from self-help using economic force. Since the parties in this case agreed that the RLA applied and neither contended that the ICA superseded the RLA, the court had to determine whether the RLA precluded the union from engaging in self-help – that is, whether the issue was a minor dispute or a major dispute. The court held that the issue was a minor dispute because the railroad's reliance on the CBA was reasonably justified, noting that its understanding of how the CBA applied to the unusual circumstances of this case was neither frivolous nor obviously insubstantial. The court held that "[t]he fact that BNSF's contract interpretation may be questionable—and might even be wrong—does not make it frivolous." *Id.* at *7. Accordingly, the court granted the railroad's motion for preliminary injunction prohibiting the union from engaging in self-help pending final judgment in the case.

The source of the other significant effect of the ICA upon the RLA lies within the definitions section of the RLA. Section 1, Fifth of the RLA defines an "employee" as "every person in the service of a carrier … who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board in effect, and as the same may be amended or interpreted by orders hereafter entered by the Board." Because only "employees" are protected by and subject to the RLA, the STB's orders in that regard are important to NMB decisions regarding who can engage in union activities in the railroad industry.

III. THE FEDERAL AVIATION ACT

There is very little in the Federal Aviation Act, 49 U.S.C. §§ 40101, *et seq.*, that directly affects airline labor relations. The Act's real influence is found in the regulations enacted by the Federal Aviation Administration (FAA) addressing various aspects of air carrier operations and administration. The most important of those regulations on a day-to-day basis, from a labor relations standpoint, are pilot and flight attendant duty time and rest requirements, and various drug and alcohol testing requirements that are applicable to employees in "safety sensitive positions." Also of some importance is the requirement that crew members hold certain types of medical certificates to serve in their respective positions. Other significant sources of interaction between the Federal Aviation Act and air carrier labor relations involve the Pilot Records Improvement Act (PRIA) and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) (both discussed below).

Pilots and flight engineers have, for many years, been subject to strict duty time and rest requirements. For example, the Federal Aviation Regulations (FARs) limit pilots of FAR Part 121 air carriers to 30 hours aloft per week, 100 hours aloft per month, and 1,000 hours aloft per year. 14 C.F.R. § 121.471. It also has well-defined limits on daily duty and rest requirements. Duty and rest requirements for flight attendants are found in 14 C.F.R. § 121.467.

Due to concerns over pilot fatigue, in December 2011 the FAA published a final rule – referred to as Part 117, based on where it is found in the FARs – revising the existing pilot flight, duty and rest rules for all Part 121 passenger operations, including traditional scheduled services and large charter operations. Part 117 became effective January 4, 2014. Unlike the proposed rule issued in September 2010, Part 117 does not apply to all-cargo carriers. The new rule no longer distinguishes between domestic, supplemental, and flag passenger operations. Under the new rule:

- A pilot's maximum Flight Duty Period (FDP) is based on the time of day and the number of segments flown during the FDP. The maximum FDP is reduced during nighttime hours; when an FDP period consists of multiple flight segments; and if the flight member is unacclimated to the theater in which he or she is operating.
- Actual time at the controls (flight time) is limited to eight or nine hours, depending on the time of day that the FDP commences. The final rule allows longer duty periods in instances where the carrier provides additional crew and adequate on-board rest facilities.
- Split duty rest must be at least three hours long and be scheduled in advance.
- Pilots on reserve must be given a rest period of at least 10 consecutive hours immediately before beginning a reserve period, measured from the time the pilot is released from his or her previous duty.
- Pilots are subject to cumulative limits for FDP and flight time of 60 FDP hours in any 168 consecutive hours and 190 FDP hours in any 672 consecutive hours, and 100 hours of flight time in any 672 consecutive hours and 1,000 hours of flight time in any 365 consecutive calendar day period.
- Pilots are required to be provided with a 10-hour rest opportunity, eight hours of which must be an uninterrupted sleep opportunity.
- The prior rule's provision for reduced rest has been eliminated.

See Flight and Duty Limitations and Rest Requirements: Flight Crew Members, 14 C.F.R. Part 117, *et seq.*; Flight Attendant Duty Period Limitations and Rest Requirements: Domestic, Flag and Supplemental Operations, 14 C.F.R. § 121.467 (amendments to paragraph c effective January 4, 2014). Additionally, the FAA has adopted a Fatigue Risk Management System (FRMS), also effective January 4, 2014, as an alternative regulatory approach to provide a means of monitoring and mitigating fatigue. Under an FRMS, a certificate holder develops processes that manage and mitigate fatigue and meet an equivalent level of safety. FRMS, 14 C.F.R. § 121.473; FAA AC 120-103A, May 6, 2013, http://www.faa.gov/regulations_policies/advisory_circulars/index.cfm/go/document.information/documentid/1021088.

IV. FAIR TREATMENT FOR EXPERIENCED PILOTS ACT (FTEPA)

The FTEPA, 49 U.S.C. § 44729, increased the mandatory retirement age for pilots from 60 to 65. This law permits pilots of aircraft operating under Part 121 of the federal aviation regulations to work until age 65; however, a 60-year-old pilot may only be pilot-in-command of a flight between the U.S. and another country if there is another pilot in the flight deck crew who is younger than 60. The law provides that the limitation for overseas flights will cease when it is eliminated from the Convention on International Civil Aviation.

The FTEPA is not retroactive. Thus, pilots who turned 60 before its effective date (December 13, 2007) are not entitled to reinstatement. Airlines and unions may agree on any amendments to CBAs or benefit plans required to comply with the new law. Actions taken to comply with the requirements of the FTEPA, or the prior age 60 rule, may not serve as the basis for liability under any employment law or regulation.

The nonretroactivity provision of the FTEPA provides:

> No person who has attained 60 years of age before the date of enactment of this section may serve as a pilot for an air carrier engaged in covered operations unless --
>
> > (A) such person is in the employment of that air carrier in such operations on such date of enactment as a required flight deck crew member; or
> >
> > (B) such person is newly hired by an air carrier as a pilot on or after such date of enactment without credit for prior seniority or prior longevity for benefits or other terms related to length of service prior to the date of rehire under any labor agreement or employment policies of the air carrier.

49 U.S.C. § 44729(e)(1).

In *Emory v. United Air Lines,* 720 F.3d 915 (D.C. Cir. 2013), *cert. denied,* 134 S. Ct. 1520 (2014), the D.C. Circuit affirmed a district court decision that FTEPA did not apply to pilots who turned 60 between December 3 and December 11, 2007 (prior to the effective date of the act). The pilots were removed from active flight status on their 60th birthdays, but retained their seniority numbers and remained employed by the airline until December 31, 2007, when they were involuntarily terminated. This was in accordance with the airline's practice of permitting pilots who reached their 60th birthdates to remain employees until the last day of the month in which each turned 60. None of the pilots requested transfers to other positions; however, in anticipation of the FTEPA's enactment, they requested they be permitted to continue as pilots after December 12, 2007. The airline and the pilots' union interpreted the first exception to the FTEPA's nonretroactivity provision to apply only to flight engineers and denied their requests. Subsequently, the plaintiffs sued for age discrimination. The plaintiffs also challenged the FTEPA as unconstitutional and sued the union for breach of the duty of loyalty and the duty of fair representation. The trial court ruled in favor of the carrier and the D.C. Circuit affirmed.

The D.C. Circuit held that the "in such operations" language of § 44729(e)(1)(A) modifies the phrase "such person." Thus, because persons over the age of 60 were barred from piloting Part 121 flights under the Age 60 Rule, only such persons serving as required flight deck crew members in a secondary, nonpiloting capacity on December 13, 2007, qualified for the exemption. *Id.* at 390. Quoting the district court's decision, the appellate court held, "Since '[t]he plaintiff pilots in this case were not, and could not have been, employed as pilots after their respective birthdates' and 'had not been reassigned to another 'required flight deck crew member' position,' the § 44729 (e)(1)(A) exemption plainly 'does not apply.'" *Id.* (quoting 821 F. Supp. 2d 200, 216 (D.D.C. 2011)). The court also affirmed summary judgment on the plaintiffs' Age Discrimination in Employment Act (ADEA) claims against the carrier and the pilots' union, holding that they did not err in their reading of the FTEPA. Because their interpretations conformed with the Age 60 and 65 Rules, they could not be the basis for liability on the plaintiffs' ADEA claims.

A. Medical Requirements. Pilots age 60 and over must have a first-class medical certificate, which must be renewed every six months. Airlines may not subject pilots to different medical standards or

different, greater or more frequent medical examinations because of their age unless the Secretary of Transportation determines that such standards are necessary to ensure flight safety.

B. Training and Qualification. The law requires airlines to continue to use pilot training and qualification programs approved by the FAA, but requires "specific emphasis" on initial and recurrent training and qualification of pilots age 60 and older "to ensure continued acceptable levels of pilot skill and judgment." The FAA Modernization and Reform Act of 2012 removed the FTEPA's requirement that pilots age 60 and over undergo a line check at six-month intervals. Accordingly, the FAA revised its regulations, removing paragraphs (d)-(f) of 14 C.F.R. § 121.440, effective June 12, 2012. *See* InFO 12017, September 20, 2012, http://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/info/all_infos/media/2012/InFO12017.pdf.

C. FAA Legal Interpretations. The FAA has published an InFo providing Information, Questions and Answers regarding the FTEPA, http://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/info/all_infos/media/age65_qa.pdf. (An InFo is provided by the FAA to airlines to assist them in meeting certain administrative, regulatory or operational requirements "with relatively low urgency or impact on safety.") The FTEPA InFo incorporates information provided in earlier InFos, and supersedes those InFos. The InFo, which is in question and answer format, addresses various issues, including the use of augmented crews on international flights and line checks and first class medical certificates for pilots-in-command (PICs) age 60 and over.

Augmented Crews. The FTEPA provides that a pilot who has reached age 60 may serve as a PIC on a flight between the U.S. and another country only if there is another pilot assigned to the flight deck crew who is younger than 60. The FAA states that if there is an augmented flight deck crew assigned to a flight, the assigned flight deck crew must include one pilot who is licensed, current, qualified, appropriately rated for all phases of flight, and younger than age 60. Although the FAA does not require that a pilot younger than 60 be on the flight deck when a PIC over age 60 is on the flight deck, the International Civil Aviation Organization (ICAO) and FAA "suggest that a pilot younger than 60 be at the controls during critical phases of the flight (such as below 10,000 feet)." Additionally, the FAA expects airlines and PICs to use best scheduling practices and crew management to ensure compliance with this recommendation, noting that "issues such as pilot seniority are not considered valid reasons for noncompliance."

V. MCCASKILL-BOND LABOR INTEGRATION

On December 26, 2007, President George W. Bush signed the Consolidated Appropriations Act 2008 (HR 2764), which contained, among other things, the McCaskill-Bond Labor Integration legislation. This amendment provides that §§ 3 and 13 of the Allegheny-Mohawk LPPs apply to the integration of covered employees in any "covered transaction" between two or more covered air carriers. Section 3 of the LPPs calls for the integration of employee seniority lists "in a fair and equitable manner." Section 13 sets out the time table and the procedures to be used to accomplish the merger of the seniority lists.

The McCaskill-Bond legislation states that the Allegheny-Mohawk LPPs do not apply if the same collective bargaining agent represents the combining crafts or classes at each of the covered air carriers. In that case, the collective bargaining agent's internal policies regarding integration will apply. Additionally, the Allegheny-Mohawk LPPs do not apply if there are provisions in an applicable CBA that provide for terms of integration of seniority lists that are at least as favorable as those in §§ 3 and 13.

The legislation defines a "covered transaction" as the combination of multiple air carriers into a single air carrier that involves the transfer of ownership or control of 50 percent or more of the equity securities of an air carrier or 50 percent or more of the assets of the air carrier.

In *Comm. of Concerned Midwest Flight Attendants for Fair & Equitable Seniority Integration v. Int'l Bhd. of Teamsters Airline Div.*, 662 F.3d 954, 956 (7th Cir. 2011), the Seventh Circuit held that the acquisition of Midwest Airlines by Republic Airways Holdings (RAH), a holding company with other airline subsid-

iaries, was a covered transaction within the meaning of the McCaskill-Bond legislation. The Seventh Circuit held that Midwest was an "air carrier" under McCaskill-Bond because it held a certificate issued under 49 U.S.C. § 411 on the date the merger closed. Further, the court held that a covered transaction occurred because RAH acquired 100 percent of Midwest, and Midwest became part of a "single air carrier" with Republic's other air carrier subsidiaries. The court noted that "operations and schedules were integrated; Republic answered the phones, took reservations, and began to fly Midwest's routes with planes and employees that came from its other subsidiary carriers." 662 F.3d at 957. The court also held that Midwest was not excluded from coverage under McCaskill-Bond because it was bankrupt and about to vanish when the transaction closed. According to the court, "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." *Id.* at 957-58.

Although the McCaskill-Bond legislation was intended to ensure the integration of seniority lists in a "fair and equitable" manner, the integration of these lists continues to create issues in mergers and acquisitions in the airline industry. For example, the pilot seniority dispute in the US Airways/America West merger has continued for approximately ten years, involving litigation, arbitration and administrative proceedings in numerous forums. *See* Tom A. Jerman and Aparna B. Joshi, *Seniority Integration in Airlines Mergers, The Intended and Unintended Consequences of the McCaskill-Bond Act,* http://www.americanbar.org/content/dam/aba/events/labor_law/2012/03/railway_airline_labor_law_committee_midwinter_meeting/mw2012rla_jermanjoshi.authcheckdam.pdf.

Most recently, in June 2015, the Ninth Circuit agreed with a group of US Airways pilots who were originally employed by America West (West Pilots) that their former representative, the US Airline Pilot Association (USAPA), had breached its duty of fair representation (DFR) to them in the seniority integration process. *Addington v. US Airline Pilots Ass'n,* 791 F.3d 967 (9th Cir. 2015).

Addington had its genesis in the seniority dispute between the former US Airways and America West pilot groups, both of which were represented by Air Line Pilots Association, International (ALPA) at the time of that merger. Ultimately, an arbitration panel issued an award integrating the pilot seniority lists (the "Nicolau Award"). The former US Airways pilot (East Pilots) objected to the Nicolau Award. In an effort to prevent it from ever going into effect, the East Pilots forced the decertification of ALPA and formed USAPA, which was certified as the representative of pilots at the combined carrier (the "new" US Airways). Subsequently, when US Airways and American Airlines decided to merge, representatives from the two airlines, as well as representatives from USAPA and American's pilot union (the Allied Pilots Association (APA)), entered into a memorandum of understanding (MOU) regarding the working conditions that would apply to all pilots once the merger was consummated. Among other things, the MOU included a provision in paragraph 10(h) which provided for a seniority integration process that would have ensured that the Nicolau Award would **not** go into effect. The West Pilots sued USAPA claiming it breached its duty of fair representation by including this paragraph in the MOU instead of insisting on application of the Nicolau Award. The group also claimed it should be permitted to participate in the seniority integration process under McCaskill-Bond.

The federal district court rejected the DFR claim – though it held it was a "very close call" – and held that the West Pilots group was not entitled to participate in the seniority integration process.

The Ninth Circuit reversed the lower court's decision. In finding that USAPA breached its duty of fair representation to the West Pilots, the Ninth Circuit held that "USAPA was, for all intents and purposes, a representative of the East Pilots." *Addington*, 791 F.3d at 986. The court further held that USAPA violated its duty of fair representation because it "included Paragraph 10(h) solely to benefit the East Pilots over the West Pilots, to free them from the consequences of the arbitration to which they were bound," which the court found to be "blatantly discriminatory." *Id.* at 989. The court concluded that injunctive relief was appropriate to prevent the East Pilots from continuing to enjoy the benefit of USAPA's breach at the expense of the West Pilots. Thus the court ordered the district court to enter an order enjoining USAPA from participating in the McCaskill-Bond seniority integration proceedings "except to the extent USAPA advocates the Nicolau Award." *Id.* at 991.

The Ninth Circuit vacated as moot the portion of the district court's decision regarding whether the West Pilots should be permitted to participate separately in the integration process. In the period since the district court's ruling, APA – which had been certified as the representative for all pilots at the combined US Airways-American – had designated a West Pilots Merger Committee to participate in the integration process, rendering that issue moot.

VI. THE BANKRUPTCY CODE

One of the ways in which the Bankruptcy Code attempts to prevent or delay the complete financial collapse of failing corporations is by allowing them, with the approval of the bankruptcy court, to reject executory agreements. In 1984 the U.S. Supreme Court held that CBAs are executory agreements that can be rejected by a debtor in bankruptcy proceedings. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). Congress reacted to that decision by passing legislation (the Bankruptcy Amendments and Federal Judgeship Act of 1984) which enacted § 1113 of the Bankruptcy Code, restricting the ability of employers to reject labor agreements.

Section 1113 gives employers subject to the NLRA and air carriers a procedural framework that defines their ability to reject CBAs. Section 1167 of the Bankruptcy Code, however, prohibits rail carriers from assuming or rejecting their CBAs under the Bankruptcy Code; such contracts may only be changed pursuant to the RLA's major dispute procedures.

To apply to the bankruptcy court for permission to reject a CBA under § 1113, a covered employer must: (A) propose a plan to the union that includes the proposed modifications to the agreement that are necessary for reorganization and that assures equitable treatment among all creditors, the debtor, and all affected parties; (B) provide the union with the information it needs to evaluate the proposal; and (C) from the making of the proposal until the bankruptcy court's hearing on the proposal, meet with the union and make good faith attempts to reach mutually acceptable modifications to the parties' CBA. 11 U.S.C. §§ 1113(b)(1)(A), (b)(1)(B), (b)(2).

If those requirements are met, the union unjustifiably refuses to accept the debtor-employer's proposals, and the equities clearly favor rejection, the bankruptcy court should grant the employer's application to reject the agreement. *See, e.g., In re Delta Air Lines, Inc.,* 359 B.R. 468, 476 (Bankr. S.D.N.Y. 2006) (Congress enacted § 1113 "not to eliminate but govern a debtor's power to reject CBAs, and to substitute the elaborate set of subjective requirements in Section 1113(b) and (c) in place of the business judgment rule as the standard for adjudicating an objection to a debtor's motion to reject a CBA"; permitting Comair to reject its pilot CBA), *adversary proceeding, injunction granted,* 359 B.R. 491 (Bankr. S.D.N.Y. 2007).

If the court does not rule within 30 days of its hearing on the employer's application, the employer can terminate or modify the parties' agreement until the court rules on its application. 11 U.S.C. § 1113(d)(2).

Self-Help after Rejection of CBA. *In re Northwest Airlines Corp.*, 483 F.3d 160 (2d Cir. 2007), the Association of Flight Attendants (AFA), the union representing Northwest Airlines' flight attendants, was enjoined from striking or engaging in any other form of work stoppage in response to the rejection of the flight attendants' CBA and implementation of new terms and conditions of employment pursuant to a bankruptcy court § 1113 order. Upholding the injunction, the Court of Appeals held that a carrier which rejects its CBA and imposes new terms and conditions of employment pursuant to a § 1113 order abrogates, but does not breach, its CBA. Accordingly, the status quo provisions of the RLA do not survive this abrogation, and an injunction against a work stoppage cannot be based on violation of the status quo provisions.

The appeals court also held that RLA § 2, First imposes a duty to "exert every reasonable effort to make [agreements] … and to settle all disputes," even when the rules governing the RLA's status quo provisions are not in effect. The court held that a strike by the union would violate this duty. Thus, a § 1113 order absolves both parties of the RLA's status quo duty – that is, the duty to maintain agreements. It does not, however, absolve the parties of their § 2 First obligation to make every reasonable effort to

make agreements – that is, make a new contract that would create a new status quo. *See also In re Delta Air Lines Inc.,* 359 B.R. 491 (Bankr. S.D.N.Y. 2007) (bankrupt regional airline that had lawfully rejected its CBA with pilots' union, in accordance with § 1113, was free to impose new terms and conditions of employment, and neither its rejection of CBA nor its imposition of new terms and conditions of employment violated status quo provisions of the RLA or entitled pilots to strike).

VII. FAMILY AND MEDICAL LEAVE ACT (FMLA)

A. Extension of FMLA to Flight Crew Members. In December 2009, President Obama signed the Airline Flight Crew Technical Corrections Act (AFCTCA), which expands the coverage of the FMLA with respect to flight attendants and pilots. According to the bill's sponsors, the AFCTCA was designed to address the unique concerns of flight crew workers who, because of the way their duty hours are calculated, may not meet the FMLA's eligibility requirement of working 1,250 hours a year.

The U.S. Department of Labor (DOL) has issued a Final Regulation incorporating changes made by the AFCTCA. There are five significant components of these regulations: (1) explanation of the new crewmember eligibility standards; (2) establishment of a uniform FMLA leave bank for crewmembers; (3) implementation of a new manner of calculating crewmember FMLA leave usage; (4) retention of the "physical impossibility exception," which permits extending FMLA leave when crewmembers cannot immediately be returned to service; and (5) establishment of unique record-keeping obligations.

1. Flight Crew Eligibility Standards. The AFCTCA established special hours-of-service FMLA eligibility requirements for airline flight crewmembers: during the previous 12 months a crewmember must have worked or been paid for: (a) 60 percent of his or her monthly guarantee; AND (b) 504 hours (which must not include personal commute time or time spent on vacation, medical, or sick leave) in order to be eligible to take FMLA leave. The AFCTCA provided that the "monthly guarantee" is the minimum number of hours that a carrier has agreed to schedule a line-holder and to pay a reserve.

The regulations clarify that the proper measure of a crewmember's hours "worked" is duty hours, not flight or block hours. Although the regulations do not define "duty hours," DOL commentary suggests that they include pre- and post-flight duties as well as training time.

2. Flight Crew Leave Bank. One of the regulations' most significant provisions is the establishment of a uniform bank of 72 days of FMLA leave for crewmembers to use over the carrier's 12-month FMLA period. The bank is based on the FAR that mandates a maximum six-day duty period for crewmembers. Multiplying this maximum six-day duty period by the universal 12 weeks of FMLA leave yields the 72-day bank.

This is a significant deviation from traditional FMLA methodology, which bases FMLA banks on an average of actual time worked for those employees with fluctuating schedules. This provision may significantly expand FMLA leave benefits for crewmembers and entitle them to more leave than a carrier's other employees.

The regulation also establishes a 156-day crewmember leave bank (within a single 12-month period) for military caregiver leave purposes. This calculation is based on the same FAR six-day duty period, but represents the 26-workweek entitlement afforded for military caregiver leave.

3. Flight Crew Utilization Calculations. Another significant provision of the regulations is the authorization of charging crewmembers in full-day increments for FMLA leave taken on an intermittent or reduced schedule basis. Previously carriers may have been required to charge crewmembers in increments of an hour, or less, depending on the carrier's broader leave practices. This provision relieves what has traditionally been a huge burden in the administration of FMLA leave. It also should be easier for crewmembers to understand and manage.

4. Retention of Physical Impossibility Exception. The final regulations leave intact (after threatening removal of) an exception to the general rule that employee leave banks may not be charged more time than the employee is absent from work for an FMLA-related reason. The "physical impossibility exception" permits employers to charge employees with more FMLA leave than they requested or needed where it is "physically impossible" to restore them to their original job or to assign them to alternate work.

This exception is particularly applicable to crewmembers because of the unique nature of their jobs. Crewmembers usually cannot be rejoined with their original trip at the time they are ready to return from FMLA leave, and sometimes they also cannot be immediately placed on reserve or are not called to work another flight while on reserve. In these instances, the physical impossibility exception may authorize a carrier to charge the crewmember's leave bank for additional FMLA time until the crewmember can be returned to service.

DOL commentary warns, however, that it does not consider contractual or other scheduling restrictions to be lawful reasons to delay a crewmember's return to her trip or to equivalent duty. Thus, seniority restrictions that delay or prevent a crewmember's reinstatement to her original or equivalent duty do not justify the extension of her FMLA leave.

5. Crewmember Recordkeeping Obligations. In addition to the FMLA's existing recordkeeping obligations, which continue to apply to crewmembers, an air carrier must also maintain: (a) documentation of crewmembers' monthly guarantee (which in most instances means copies of applicable CBAs); and (b) records of hours worked and hours paid for purposes of verifying a crewmember's duty hours. Like the existing FMLA recordkeeping obligations, these records need only be maintained and made available to the DOL in the event of an inspection or investigation.

B. FMLA Did Not Justify Unilateral Change in CBA Leave Provisions. In *Bhd. of Maint. of Way Employees v. CSX Transp. Inc.*, 478 F.3d 814 (7th Cir. 2007), the Seventh Circuit held that a group of railroads violated the RLA when they required employees to substitute collectively bargained paid vacation or personal leave for unpaid leave covered by the FMLA. In reaching this decision, the court held that provisions of the FMLA allowing – but not requiring – employers to substitute paid leave for FMLA leave did not permit the carriers to unilaterally change the provisions of their negotiated agreements regarding vacation and personal leave. *See CSX,* 478 F.3d at 818 ("Section 2612 of the FMLA simply tells employers what they may do – require substitution – not what they must do. A reasonable conclusion is that, while substitution is allowed, the carriers cannot require substitution without complying with procedures set out in the RLA.").

C. Arbitrability of FMLA Claim. The Eighth Circuit upheld the arbitrability of a pilot's FMLA and state law disability discrimination claims against his former employer pursuant to a provision in the CBA between his union and the carrier. *See Thompson v. Air Transport Int'l*, 664 F.3d 723 (8th Cir. 2011). The pilot admitted the arbitration clause in the CBA subjected his complaint to mandatory arbitration, but claimed that the arbitration clause was part of an unconscionable and nonseverable waiver of his FMLA claims. The Eighth Circuit rejected this argument, holding that the contract did not purport to waive the pilot's FMLA remedies. The arbitration agreement stated, in part:

> [C]laims of discrimination arising within the employment relationship between the Company and the Crewmembers, whether such claims are made under the CBA or in state or federal court and alleged to be violations of state or federal law. … are to be addressed, resolved and finalized solely under Section V – Grievance and/or [Section] VI – Arbitration of the Agreement as by the terms of the Collective Bargaining [Agreement] each Crewmember waives each and every cause of action and remedies provided under these statutes and common law frameworks.

The pilot argued that the last portion of the agreement, stating "each Crewmember waives each and every cause of action and remedies provided under these statutes and common law frameworks"

was an unlawful waiver of his FMLA claims. The court held, however, that when read in conjunction with the CBA, which expressly retained the FMLA rights of crewmembers, it was clear that the agreement was a "waiver of a judicial forum," not a waiver of the pilot's FMLA claims. The court noted that a waiver of a judicial forum is not a waiver of claims, but is instead a waiver of the right to seek relief from a court. Relying on the U.S. Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), the court held that "[p]arties can waive the judicial forum as an avenue for bringing federal statutory claims and state anti-discrimination claims as part of a mandatory arbitration agreement."

VIII. DRUG AND ALCOHOL TESTING

A. Federal Requirements. The Omnibus Transportation Employee Testing Act of 1991 (the Testing Act) requires drug and alcohol testing of safety-sensitive transportation employees in aviation, trucking, railroads, mass transit, pipelines, and other transportation industries. The Department of Transportation (DOT) has published a DOT-wide regulation, 49 C.F.R. Part 40 (Part 40), that states how to conduct testing and how to return employees to safety-sensitive positions. The DOT's Office of Drug & Alcohol Policy & Compliance (ODAPC) publishes, implements, and provides interpretations of the regulations. Information on the ODAPC and the DOT's drug and alcohol testing requirements is available at http://www.dot.gov/odapc/. An employer's guide to DOT drug and alcohol testing requirements is available at http://www.dot.gov/odapc/employer_handbook.

Individual DOT agency regulations state who is subject to testing, as well as when and in what situations testing is required for a particular transportation industry. A list of the various DOT agencies' drug and alcohol testing related information is available at https://www.transportation.gov/odapc/agencies. Additionally, the random drug and alcohol testing rates for various transportation industries is available on this web site. For the aviation industry, the minimum random drug testing rate will remain at 25 percent of safety-sensitive employees for 2016. The random alcohol testing rate will remain at 10 percent. *See* https://www.transportation.gov/odapc/agencies; Random Drug and Alcohol Testing Percentage Rates of Covered Aviation Employees for the Period of January 1, 2016, through December 31, 2016, 80 Fed. Reg. 69,770 (Nov. 10, 2015).

Pursuant to the Testing Act, the FAA has issued regulations requiring domestic air carriers, and foreign air carriers operating in the U.S., to implement pre-employment, reasonable suspicion, post-accident, and random drug and alcohol testing programs. The FAA's drug testing regulations are located at 14 CFR Part 120. More information is available at http://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/drug_alcohol/.

The FAA regulations require drug and alcohol testing of all covered employees (those in any of eight listed "safety sensitive" functions) of air carriers, including contractors and subcontractors at any tier (including noncertificated repair subcontractors). *See Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161 (D.C. Cir. 2007) (upholding FAA regulations that include covered employees of contractors and subcontractors). In addition to the penalties that an employer might impose on an employee who violates its own or the FAA's drug and alcohol regulations, the FAA can take action against any crew member who violates the FAA's regulations. The FAA's action may vary from suspension or permanent revocation of the employee's certificate(s), to requiring the employer to either discharge the employee or remove him or her from a safety-sensitive position.

As a result of the decision in *American Trucking Ass'ns v. Federal Highway Admin.*, 51 F.3d 405 (4th Cir. 1995), the DOT suspended its requirement for pre-employment alcohol testing. That suspension has flowed down to the FAA and the other administrative agencies under the DOT, and pre-employment alcohol testing is no longer required by federal regulation. Although the FAA does not require carriers to conduct pre-employment alcohol testing, carriers are permitted to do so if the policy complies with the requirements of 14 C.F.R. § 120.217(a).

DOT drug and alcohol tests must be kept completely separate from any non-DOT tests. 49 C.F.R. § 40.13. According to the DOT regulations, DOT tests must take priority over non-DOT tests and must be conducted and completed before any non-DOT test is begun. *Id.* The sample used for the DOT test must not be tested for anything other than what is permitted under the DOT drug and alcohol testing regulations, unless the testing is conducted as part of a physical examination required by DOT regulations. Id

Employers must comply with Part 40 record-keeping requirements as well as applicable specific agency requirements, such as those imposed by the FAA, which are quite detailed.

B. Medical and Recreational Marijuana Laws. The DOT has issued a Medical Marijuana Notice, stating that Part 40 does not authorize "medical marijuana" under a state law to be a valid medical explanation for a transportation employee's positive drug test. "DOT Office of Drug and Alcohol Policy and Compliance Notice," http://www.dot.gov/odapc/medical-marijuana-notice (February 22, 2013). The Notice cites 49 C.F.R. § 40.151, which states that a Medical Review Officer (MRO) must not verify a test negative based on "information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the 'medical marijuana' laws that some states have adopted)." Thus, the Notice states, "It remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation's drug testing regulations to use marijuana." The DOT also has issued a Notice stating that state initiatives authorizing recreational use of marijuana have no bearing on the DOT's regulated drug testing program. *See* "DOT 'Recreational' Marijuana Notice," http://www.dot.gov/odapc/dot-recreational-marijuana-notice (May 27, 2014).

C. Duty to Bargain. In the context of the maze of federal regulations pertaining to who may be tested, when they may be tested, how often they may be tested, the method by which they may be tested, how the results are determined, the appropriate chain of custody, how results are reported, the question remains – what does any of that have to do with the RLA? The answer lies primarily in the presence or absence of a duty to bargain.

In *Conrail v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989), the plaintiff sought to enjoin Conrail from unilaterally instituting a random drug testing policy by claiming that the policy violated the RLA's status quo obligation. Conrail, in turn, sought dismissal of the case asserting that its drug testing policy was justified by the parties' CBA and that the court, therefore, was presented with a minor dispute over which the parties' board of adjustment had exclusive jurisdiction. The U.S. Supreme Court held that it was for an arbitrator to decide whether Conrail had breached the parties' agreement by instituting the new policy, and that the company had not violated the RLA's status quo requirements. Carriers in several other cases obtained similar results. *See e.g., International Brotherhood of Teamsters v. Southwest Airlines*, 875 F.2d 1129 (5th Cir. 1989) (en banc); *Allied Pilots Ass'n v. American Airlines*, 898 F.2d 462 (5th Cir. 1990); *Railway Labor Executives' Ass'n v. Metro-North C.R. Co.*, 759 F. Supp. 1019 (S.D.N.Y. 1990) (vacating status quo injunction in light of *Conrail* decision).

In the above cases, the courts found that the carriers were arguably justified in unilaterally imposing a drug testing policy on employees in safety-sensitive positions because the parties' CBAs could be read as allowing such a policy, even though the arbitrators might not uphold those policies. Ultimately, however, a union can do little about a policy that strictly conforms to the regulations enacted by the FAA or the Federal Railroad Administration (FRA). *See Southwest Airlines*, 875 F.2d at 1137 n.3 (J. Goldberg, dissenting) (carrier must bargain only about elements of its program that exceed the FAA's requirements). Even if a carrier complies with the applicable agency regulations and does not try to enforce some heightened rule, unions will likely seek bargaining about the effects of the rules and regulations on their members. While a carrier may not be required to bargain about its compliance with the FAA's or the FRA's regulations, "effects" bargaining is arguably a mandatory subject of bargaining.

The FAA and FRA regulations provide a base-line about which no negotiations are necessary – they are the federally mandated rules from which carriers cannot deviate. A union might seek to bargain if a carrier intends to use procedures that are more stringent than those in the regulations, test for substances in addition to those required by the regulations, or establish more restrictive thresholds. In most cases an arbitrator, not a federal court, should decide whether such a requirement is proper.

D. Pre-emption of State Law Claims by the Testing Act and FAA Regulations. In *MN Airlines, Inc. d/b/a/ Sun Country Airlines v. Levander,* 2015 WL 5092495 (D. Minn. Aug. 27, 2015), a federal district court held that Minnesota's drug-testing statute, which prohibits discharging an employee the first time the employee fails a drug test, is pre-empted by federal law and the FAA regulations. There, the carrier discharged a flight attendant after she failed a random drug test. The flight attendant threatened to sue the airline under the Minnesota Drug and Alcohol Testing in the Workplace Act (MDATWA), which prohibits employers from discharging an employee the first time the employee fails a drug test unless the employee has been given the opportunity to participate in a rehabilitation program and has refused to do so or failed to successfully complete such a program. The carrier filed a lawsuit seeking a declaration that MDATWA, as applied to airline personnel, is pre-empted by federal law and the FAA's drug testing regulations. The court granted the carrier's motion, noting that the regulations promulgated under the Testing Act pre-empt any "State or local law, rule, regulation, order, or standard covering the subject matter" of those regulations, "including, but not limited to, drug testing of aviation personnel performing safety-sensitive functions." The court held, "Rarely is the intent of a law so clear: states may not regulate the drug testing of aviation personnel performing safety-sensitive functions. The MDATWA purports to do just that, by precluding airlines from terminating the employment of such personnel for an initial positive drug test. As such, it is preempted." *Id.* at * 2.

In *Frank v. Delta Air Lines, Inc.*, 314 F.3d 195 (5th Cir. 2002), the Fifth Circuit held that an employee's state law claims of negligence, intentional infliction of emotional distress, and defamation, filed after Delta discharged him for refusal to test when he submitted an adulterated urine sample after being selected for a random drug test, were pre-empted by the Testing Act and FAA regulations. In finding the claims pre-empted, the court held that if Delta violated any FAA regulations and improperly disseminated the results of the plaintiff's drug test, his proper recourse against the company was through the FAA administrative regime. However, the *Ninth Circuit in Ishikawa v. Delta Air Lines, Inc.*, 343 F.3d 1129 (9th Cir. 2003), opinion amended, 350 F.3d 915 (2003), held that a flight attendant's negligence claim against the laboratory that conducted her work-related drug test was neither expressly nor impliedly pre-empted. The court held that there is no federal pre-emption under the Testing Act or the FAA regulations. The court noted that the law only pre-empts state laws that are inconsistent with the federal law. The court held that the state negligence law requiring the laboratory to test urine and report the results with due care was not inconsistent with federal guidelines. Additionally, the FAA regulations, issued pursuant to the federal law, state that an employee cannot be required to waive liability with respect to negligence claims. The court noted that it made no sense to prohibit waiver of these claims if they were pre-empted by the federal law. The court also held that the express pre-emption provision of the FAA regulations is too narrow to pre-empt state common law negligence claims. *See also Drake v. Lab. Corp. of Am. Holdings*, 458 F.3d 48 (2d Cir. 2006) (although pre-emption applies to a state law claim that "interferes with the FAA's stated desire to regulate such drug testing in a 'consistent and uniform' manner," the plaintiff's state-law causes of action were not pre-empted to the extent they sought remedies for violations of federal regulations); *Chapman v. LabOne*, 390 F.3d 620 (8th Cir. 2004) (state law negligence claims not pre-empted by Testing Act); *Siotkas v. LabOne, Inc.*, 594 F. Supp. 2d 259 (E.D.N.Y. 2009) (the mere fact that common law claims are based upon "events that occur during the course of … drug testing" does not necessarily warrant their pre-emption).

IX. IMMUNITY FOR STATEMENTS MADE TO THE TRANSPORTATION SAFETY AUTHORITY (TSA)

The U.S. Supreme Court held that statements made by an air carrier to the TSA were entitled to immunity under the Aviation and Transportation Security Act (ATSA), overturning a $1.2 million jury verdict on a pilot's defamation claims based on these statements. *Air Wisconsin v. Hoeper*, 134 S. Ct. 852 (January 27, 2014). The Court held that materially truthful statements made by airlines to the TSA regarding potential safety threats are entitled to immunity regardless of whether they were made with reckless disregard as to their truthfulness.

The case involved a pilot who became angry and yelled at an instructor after he failed a proficiency check, which would lead to his termination. The instructor reported the incident to a manager, who booked the pilot a flight home to Denver. After discussing the matter further with other Flight Operations management personnel, and after realizing that the pilot was a Federal Flight Deck Officer (FFDO) and thus permitted to carry a firearm, the carrier officials determined that they should call the TSA to make them aware of the situation. The carrier told the TSA that the pilot "was an FFDO who may be armed," that the airline was "concerned about his mental stability and the whereabouts of his firearm," and that an "[u]nstable pilot in [the] FFDO program was terminated today."

In response to the call, TSA officials ordered the pilot's airplane to return to the gate. TSA officers boarded the plane, removed the pilot, searched him, and questioned him about the gun. The pilot subsequently sued the airline for defamation based on the statements made to the TSA. A state court jury returned a verdict of over $1.2 million in the pilot's favor. After the decision was affirmed by the Colorado Supreme Court, the case went to the U.S. Supreme Court, which found that the carrier's statements were entitled to immunity under the ATSA. The immunity provision in the ATSA provides:

> [a]ny air carrier … or any employee of an air carrier … who makes a voluntary disclosure of any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism, … to any employee or agent of the Department of Transportation, the Department of Justice, any Federal, State, or local law enforcement officer, or any airport or airline security officer shall not be civilly liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, for such disclosure.

The Court held that immunity may not be denied under the ATSA without a determination that the disclosure was materially false. In reaching this conclusion, the U.S. Supreme Court noted that immunity under the ATSA is patterned after the actual malice standard the Court adopted for defamation claims involving public figures in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). The actual malice standard requires a finding of material falsity.

Since the holdings requiring a finding of material falsity to establish actual malice were established when Congress enacted the ATSA, the Court presumed Congress meant to adopt the material falsity requirement when it incorporated the actual malice standard into the ATSA immunity exception. The Court held, "[t]he actual malice standard does not cover materially true statements made recklessly, so we presume that Congress did not mean to deny ATSA immunity to such statements."

The Court held that the material falsity standard serves the purpose of ATSA immunity. The ATSA shifted responsibility for assessing and investigating possible threats to airline security from the airlines to the TSA. The Court found that Congress included the immunity provision in the ATSA to ensure that air carriers and their employees would not hesitate to provide the TSA with the information it needed. According to the Court, it would defeat this purpose to deny immunity for substantially true reports on the theory that the person making the report had not yet gathered enough information to be certain of its truth.

The Court then determined that the statements in this case were not materially false. The Court noted that a materially false statement is generally one that "would have a different effect on the mind of the reader [or listener] from that which the … truth would have produced." In the ATSA context, this standard

suffices as long as the hypothetical reader or listener is a security officer. In determining whether a statement produces a different effect on the mind of a security officer than the truth would have produced, a court must look at the impact of the statement on the TSA's behavior.

Although the pilot did not argue that the manager's statement that he "was an FFDO who may be armed" was false, he claimed that the carrier should have qualified this statement by adding that it had no reason to think he was actually carrying his weapon, especially since he was not permitted to do so under the regulations. The Court rejected this argument, holding that any confusion caused by the failure to make such a qualification was immaterial, since a "reasonable TSA officer, having been told only that [the pilot] was an FFDO and that he was upset about losing his job, would have wanted to investigate whether [the pilot] was carrying his gun." Further, the Court held that to accept the demand for such precise wording "would vitiate the purpose of ATSA immunity: to encourage air carriers and their employees, often in fast-moving situations and with little time to fine-tune their diction, to provide the TSA immediately with information about potential threats. Baggage handlers, flight attendants, gate agents, and other airline employees who report suspicious behavior to the TSA should not face financial ruin if, in the heat of a potential threat, they fail to choose their words with exacting care."

Additionally, the Court was not troubled by the airline's statement that it was concerned about the pilot's mental stability. Although some of the managers testified that they might not have framed their concerns in terms of "mental stability," the Court held that the manager's statements accurately conveyed the "gist" of the situation and that "it is irrelevant whether trained lawyers or judges might with the luxury of time have chosen more precise words." The Court also rejected the partial dissent's argument that the manager's reference to the pilot's "mental instability" was so egregious as to make his report to the TSA the basis of a $1.2 million defamation judgment. A finding that the carrier lost ATSA immunity because its manager failed to be aware of every connotation of the term mental stability "would eviscerate the immunity provision." According to the Court, "if such slips of the tongue could give rise to major financial liability, no airline would contact the TSA (or permit its employees to do so) without running by its lawyers the text of its proposed disclosure - exactly the kind of hesitation that Congress aimed to avoid."

The Court concluded that, by incorporating the actual malice standard into the ATSA's immunity provision, Congress "meant to give air carriers the 'breathing space' to report potential threats to security officials without fear of civil liability for a few inaptly chosen words" and "[t]o hold Air Wisconsin liable for minor misstatements or loose wording would undermine that purpose and disregard the statutory text."

X. OCCUPATIONAL SAFETY AND HEALTH STANDARDS FOR AIRCRAFT CABIN CREWMEMBERS

On August 21, 2013, the FAA issued a Policy Statement describing the extent to which it has ceded to the Occupational Health and Safety Administration (OSHA) its prior exclusive authority to regulate the safety and health aspects of the work environment of aircraft crewmembers. The FAA determined that, for nonflight crew members during "aircraft operations," OSHA can enforce its standards for hazard communications and bloodborne pathogens. OSHA also can enforce its hearing conservation standards for employees working in the aircraft cabin. The policy statement is available at: https://www.osha.gov/faa/faa_osha.html. On August 26, 2014, the FAA and OSHA published a MOU regarding Occupational Safety and Health Standards for Aircraft Cabin Crewmembers, implementing the joint policy. The MOU specifically states that the working conditions addressed by the hazard communication (29 CFR § 1910.1200), bloodborne pathogens exposure (29 CFR § 1910.1030), and occupational noise exposure (29 CFR § 1910.95) standards "are the only working conditions subject to OSHA enforcement. FAA will continue to exercise its statutory authority over all other working conditions of aircraft cabin crewmembers while they are on aircraft in operation, and to fully occupy and exhaust the field of flight deck crew occupational safety and health while they are on aircraft in operation." Additionally, the MOU notes that OSHA already has the authority to enforce its regulations on recordkeeping and access to employee exposure and medical records, which are not pre-empted by section 4(b)(1) of the Occupational Safety

and Health Act of 1970 (OSH Act). The MOU further notes that OSHA has responsibility for investigating employee complaints of discrimination for engaging in protected activity related to safety or health in the workplace as well as whistleblower complaints under AIR21. The MOU is available at: https://www.osha.gov/faa/index.html. For more information on the OSH Act and OSHA's inspection procedures, please see the *OSHA* SourceBook Chapter.

XI. PRE-EMPTION OF OTHER FEDERAL OR STATE LAW CLAIMS

System boards in the air and rail industries have exclusive jurisdiction over minor disputes. Therefore, any lawsuit that involves a minor dispute is pre-empted by the RLA, and state and federal courts do not have jurisdiction over such matters. *See Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972). In *Hawaiian Airlines v. Norris,* 512 U.S. 246 (1994), the Supreme Court clarified the standard to be used in determining whether a claim is a "minor dispute" that is pre-empted by the RLA.

In *Norris,* the Supreme Court adopted for cases arising under the RLA the framework for analyzing pre-emption under the Labor Management Relations Act (LMRA), set forth in *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (1988), under which a state law claim is pre-empted only if its resolution requires the court to interpret a CBA. 512 U.S. at 261-62. The Court found that the plaintiff's state law tort claims "involve[d] rights and obligations that exist[ed] independent of the CBA"; thus the claims were not pre-empted and the plaintiff was not required to pursue his claims through the grievance and arbitration procedure. *Id.* at 260, 266.

The Court's ruling in *Norris* did not change the fundamental tenet that employment-related "minor disputes" – disputes that require interpretation of a CBA – remain subject to the exclusive and mandatory jurisdiction of system boards of adjustment. The determination of whether a particular matter is inextricably intertwined with the interpretation of the CBA remains a fact-specific question.

Courts have held, however, that parties may exclude specific disputes from the mandatory arbitration requirements of the RLA. However, where the text of a CBA is ambiguous regarding the specific dispute, the court may require arbitration. *See NetJets Ass'n of Shared Aircraft Pilots v. NetJets Aviation, Inc.,* 601 F. App'x 408, 409 (6th Cir. 2015) (finding the text of the CBA ambiguous and applying the "statutory presumption" in favor of arbitration to require arbitration of the discharge of a management pilot). In *NetJets*, the Sixth Circuit recognized that if a CBA "unambiguously excludes a minor dispute from the scope of arbitration, that dispute is not subject to arbitration." *Id.* at 411. However, in that case the court held that the CBA did not unambiguously exclude the grievance from arbitration. While the arbitration provision stated that it only applies to crewmembers, and the CBA defined crewmembers as nonmanagement pilots, "several other provisions of the CBA unambiguously treat management pilots as crewmembers, making it plausible that management pilots are crewmembers for purposes of the arbitration provision as well." *Id.* Accordingly, the court found that the arbitration provision could be interpreted to cover the management pilot's grievance and ordered arbitration.

A. Exceptions to Pre-emption of Minor Disputes. Some courts have recognized exceptions to the pre-emption of minor disputes in limited circumstances. *See Martin v. American Airlines, Inc.*, 390 F.3d 601 (8th Cir. 2004) (recognizing exceptions but holding that none applied to plaintiff's claim that his discharge was in violation of the CBA between the employer and the union that represented him).

1. Hybrid Exception. A court has jurisdiction to consider a contract violation claim where there are allegations and facts supporting those allegations indicating collusion or otherwise tying the employer and the union together in allegedly arbitrary, discriminatory, or bad faith conduct amounting to a breach of the duty of fair representation. *Martin,* 390 F.3d at 608 (quoting *Raus v. Brotherhood of Ry. Carmen,* 663 F.2d 791, 798 (8th Cir. 1981)). In *Martin,* the court held that, because it had determined that the union did not breach its duty of fair representation, it was required to hold that the hybrid exception to the pre-emption doctrine did not apply. *Id. See also McCormick v. Aircraft Mechanics Fraternal Ass'n,* 340 F.3d 642 (8th Cir. 2003) (hybrid exception

to RLA pre-emption did not apply to claims against carrier where plaintiffs could not maintain a breach of duty of fair representation claim against their union); *Robertson v. Burlington Northern & Santa Fe Ry. Co.,* 216 F. App'x 724 (10th Cir. 2007) (court lacked jurisdiction over trainmen's claim against railway company because their correlative claim against union for breach of duty of fair representation failed).

2. Contract Repudiation Exception. The contract repudiation exception applies when the employer's conduct amounts to a repudiation of the CBA's contractual procedures. *Martin,* 390 F.3d at 608. In *Martin,* the plaintiff claimed the employer repudiated the arbitration provisions of the CBA when it ignored his individual petition for arbitration of his discharge. The court noted that § 153 First, which permits railroad employees to pursue arbitration individually before the NRAB, does not apply to airline employees. The court held that, even assuming the plaintiff had an individual right to pursue arbitration, his allegation that the employer ignored his request for individual arbitration was not sufficient to establish repudiation. *Id.* at 609. *See also Smith v. American Airlines,* 414 F.3d 949 (8th Cir. 2005) (acquiring carrier's position that transition bargaining agreement did not apply to employee of acquired carrier who was not hired after acquisition was not a repudiation of the transition agreement; it was a classic dispute over arbitrability and must be resolved through arbitration).

3. Futility Exception. The futility exception applies "where the effort to proceed formally with contractual or administrative remedies would be wholly futile." *Martin,* 390 F.3d at 609 (quoting *Glover v. St. Louis-S.F. Ry. Co.,* 393 U.S. 324 (1969)). The plaintiff in *Martin* claimed this exception applied because the employer ignored his individual petition for arbitration and the union withdrew his union-backed petition before the deadline for filing a petition, thus any subsequent attempt to seek arbitration would have been futile. The court held that this exception did not apply because the plaintiff had no individual right to pursue arbitration. *Id.*

4. Childs Exception. In *Childs v. Pennsylvania Federation Brotherhood of Maintenance Way Employees*, 831 F.2d 429 (3d Cir. 1987), the Third Circuit recognized another exception to RLA pre-emption. The court held that "an employee may sue his [employer] in federal court where, because of a union's breach of its duty of fair representation, the employee cannot obtain meaningful relief before the [board of adjustment]." *Id.* at 430. In *Martin*, the plaintiff argued that the *Childs* exception applied based on the union's withdrawal of his union-backed petition for arbitration after the filing deadline, which caused him to lose his right to pursue arbitration on his own. However, the court held that this exception did not apply because the plaintiff did not have an individual right to pursue arbitration.

B. Complete vs. "Ordinary" Pre-emption. In *Geddes v. American Airlines, Inc.*, 321 F.3d 1349 (11th Cir. 2003), the court explained the difference between complete pre-emption, which provides a basis for removing a case from state to federal court, and "ordinary" pre-emption, which is an affirmative defense to the allegations in a plaintiff's complaint but cannot be the basis for removing a case to federal court. The court held that complete pre-emption is rare and courts generally find it only where there is evidence that Congress intended to transform a claim into "purely a creature of federal law." *Id.* at 1353 (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987)). The court noted that it and the Supreme Court had found complete pre-emption only for claims under the LMRA and Employee Retirement Income Security Act (ERISA). 321 F.3d at 1353. The court held that there is no complete pre-emption under the RLA because there is no evidence that Congress intended that minor disputes under the RLA should be litigated in federal court. *Id.* at 1356-57.

Because there was no complete pre-emption in *Geddes*, there was no basis for federal jurisdiction. Accordingly, the case was remanded to state court for it to determine whether the complaint, which asserted claims of defamation, negligence, and negligent supervision and retention, involved a minor dispute that was subject to arbitration under the RLA. That ruling has been followed by several other Circuit courts. *See Hughes v. United Air Lines, Inc.,* 634 F.3d 391 (7th Cir. 2011); *Sullivan v. American Airlines, Inc.*, 424 F.3d 267 (2d Cir. 2005); *Roddy v. Grand Truck Western R.R.,* 395 F.3d 318 (6th Cir. 2005).

C. Pre-emption of Common Law Claims. Prior to *Norris*, a broad variety of state common law claims were held to be pre-empted as "minor disputes" under the RLA. Since *Norris*, however, courts have found pre-emption of such claims on "minor dispute" grounds only when the claims are based on a violation of the CBA itself or require interpretation of the CBA. *Compare Thomas v. Union Pac. R.R. Co.*, 308 F.3d 891 (8th Cir. 2002) (claim of discharge in violation of public policy not pre-empted) *and Ertle v. Continental Airlines, Inc.,* 136 F.3d 690 (10th Cir. 1998) (fraudulent concealment claim not pre-empted) *with Brokate v. Express Jet Airlines, Inc.,* 174 F. App'x 867 (6th Cir. 2006) (claims for breach of contract, intentional infliction of emotional distress, breach of the CBA, and violation of the duty of good faith and fair dealing claims pre-empted), *Rachford v. Air Line Pilots Ass'n, Int'l,* 284 F. App'x 473 (9th Cir. 2008) (claims for intentional and negligent interference with contractual relations pre-empted), *Teamsters v. AmeriJet Int'l, Inc.*, 755 F. Supp. 2d 1243 (S.D. Fla. 2010) (union's claim for breach of contract pre-empted), *Faulkner v. Dominguez*, 2010 WL 342600 (C.D. Cal. Jan. 28, 2010) (claims for breach of contract and intentional infliction of emotional distress pre-empted); *and Martinez-Gonzalez v. AMR Corp.*, 787 F. Supp. 2d 199 (D.P.R. 2011) (wrongful discharge claim under Puerto Rico law pre-empted).

D. Pre-emption or Preclusion of Statutory Claims.

1. Claims Brought Under the RLA. After the Court's decision in *Norris,* a plaintiff's claim of violation of the RLA will not be precluded as a minor dispute if its resolution does not require interpretation of the CBA. *See Konop v. Hawaiian Airlines, Inc.,* 302 F.3d 868 (9th Cir. 2002) (plaintiff's claims that employer violated the RLA by accessing his website under false pretenses, disclosing the website's contents to a rival union faction, and threatening to sue the plaintiff for defamation based on statements contained in his website were not grounded in the CBA and thus were not pre-empted by the RLA); *Fennessy v. Southwest Airlines,* 91 F.3d 1359 (9th Cir. 1996) (plaintiff's claim that employer violated RLA § 2 Fourth by discharging him in retaliation for his efforts to replace the existing union were based on a statutory provision, not the CBA, and were not a minor dispute that must be arbitrated under the RLA). *But see Teamsters v. AmeriJet Int'l, Inc.*, 755 F. Supp. 2d 1243 (S.D. Fla. 2010) (union's claims that the carrier had violated RLA § 2 Fourth by allegedly terminating a pilot because of his support for the union and with respect to how it treated striking pilots were minor disputes subject to the mandatory arbitration process). *See also Int'l Bhd of Teamsters v. Amerijet Int'l, Inc.,* 604 F. App'x 841, 844 (11th Cir. 2015) (recognizing that "as a jurisdictional matter, the RLA prohibits federal courts from reaching the merits of minor disputes" but holding that these courts "maintain jurisdiction to enter orders required to ensure compliance with the procedures prescribed by the RLA for settling such disputes"), *cert. denied,* 2015 WL 4722797 (Nov. 16, 2015). In *Amerijet,* the Eleventh Circuit held that the lower court erred in granting Amerijet's motion to dismiss and in finding it lacked subject matter jurisdiction to compel arbitration. The court held that "IBT's complaint has pled undisputed facts sufficient to show a right to have arbitration of the … deadlocked grievances compelled by the district court as a matter of law, with the procedural issues to be decided by the arbitrator." *Id.* at *849.

2. Claims Brought Under Other Federal Statutes. Courts generally have held that the RLA's provisions for resolution of "minor disputes" do not preclude claims brought for violation of express statutory rights granted by federal law, except where resolution of those claims will require interpretation or application of the CBA.

a. Federal Employers Liability Act (FELA) Claims. In *Atchison, Topeka, & Santa Fe Ry. v. Buell*, 480 U.S. 557 (1987), the Supreme Court held that the RLA does not preclude a claim for an injury that is "otherwise compensable under the [Federal Employers Liability Act]." The Court stated: "It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful completion." *Id.* at 565. *See also Green v. Kan. City S. Ry. Co.*, 464 F. Supp. 2d 610 (E.D. Tex. 2006) (plaintiff's claims he was discharged in retaliation for filing a FELA claim were not precluded by the RLA); *Hanmann v. Metro-North Commuter R.R.*, 368 F. Supp. 2d 285 (S.D.N.Y. 2005) ("the

potential applicability of the RLA to one aspect of a claim does not automatically preclude recovery under FELA if the suit itself is based in negligence and not in labor law."); *Pothul v. CONRAIL*, 94 F. Supp. 2d 269 (N.D.N.Y. 2000) ("Because Plaintiff brings a claim pursuant to FELA to recover future lost wages and benefits related to his personal injuries rather than his termination, that claim is not barred based on the previous disciplinary hearing conducted by Conrail pursuant to the RLA."). In some cases, however, courts have found FELA claims to be pre-empted because their resolution would necessarily require interpretation or application of the applicable CBA. *See, e.g., Thacker v. St. Louis Southwestern Ry.*, 257 F.3d 922 (8th Cir. 2001); *Ellis v. Burlington N. & S.F. Ry.*, 22 F. App'x 592 (6th Cir. Dec. 4, 2001).

b. Federal Employment Discrimination Claims. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court held that a private agreement to arbitrate employment disputes must be enforced against a terminated employee who sued under the ADEA. *Gilmer* did not, however, involve arbitration under a union CBA. The Court subsequently addressed this situation in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). In *14 Penn Plaza,* the Court held that an arbitration provision in a CBA, which clearly and unmistakably required union members to arbitrate ADEA claims, is enforceable as a matter of federal law. The Court's five-to-four decision reiterates its prior holding in *Gilmer*. The Court rejected arguments that *Gilmer* does not apply in the collective bargaining context, holding that nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative. *Id.* at 258. "This Court has required only that an agreement to arbitrate statutory anti-discrimination claims be 'explicitly stated' in the collective-bargaining agreement." *Id.*

The Court in *Gilmer* distinguished *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which established that a discharged employee who lost an arbitration ruling was nevertheless free to pursue a Title VII racial discrimination claim. The plaintiff in *Gardner-Denver* had two separate claims: a contract claim to be arbitrated and a statutory claim to be litigated. If arbitration barred litigation, the plaintiff would lose the statutory claim. In *Gilmer*, however, the employee had only the contract claim and lost nothing by agreeing to arbitrate rather than litigate it. Further, in *14 Penn Plaza,* the Court distinguished *Gardner-Denver* and the line of cases following it because, unlike those cases, the CBA involved in *14 Penn Plaza* expressly covered both statutory and contractual discrimination claims. *See Thompson v. Air Transport Int'l LLC*, 664 F.3d 723 (8th Cir. 2011) (in light of *14 Penn Plaza*, FMLA claim had to be arbitrated based on provision in CBA requiring arbitration of all "claims of discrimination arising within the employment relationship … and alleged to be violations of state or federal law").

Until the Supreme Court's decision in *Norris,* lower courts following *Gilmer* found that the minor dispute resolution process in the RLA was the exclusive method for resolving employment discrimination claims brought under federal anti-discrimination statutes. After *Norris,* however, federal discrimination claims generally will be held not to be minor disputes, unless their resolution is inextricably intertwined with provisions in the CBA. *See, e.g., Saridakis v. United Airlines,* 166 F.3d 1272 (9th Cir. 1999) (plaintiff's Americans with Disabilities Act (ADA) claim (based on his discharge for a positive drug test) was not precluded even if the defendant would be able to introduce and rely on the CBA and last chance agreement as part of its defense in the ADA claim); *Brown v. TransWorld Airlines,* 127 F.3d 337 (4th Cir. 1997) (arbitration provision in a CBA only covered disputes concerning interpretation or application of the CBA; merely because the facts underlying the plaintiff's discrimination claims could also give rise to a breach of the CBA did not mean that the plaintiff's federal discrimination claims were subsumed by the CBA or transformed into breach of contract claims); *Gilmore v. Northwest Airlines Inc.*, 504 F. Supp. 2d 649 (D. Minn. 2007) (FMLA claim not a minor dispute and thus, not precluded by the RLA); *Parker v. Am. Airlines, Inc.*, 516 F. Supp. 2d 632 (N.D. Tex. 2007) (Plaintiff's ADA and state law disability and retaliation claims not precluded by RLA), *summary judgment granted in part, summary judgment denied in part,* 2008 WL 2811320 (N.D. Tex.

July 22, 2008); *Prokopiou v. Long Island R.R. Co.*, 2007 WL 1098696 (S.D.N.Y. Apr. 9, 2007) (ex-employee's Title VII national origin discrimination claim did not "arise out" of his CBA with employer, thus the claim was not precluded by the RLA). *Cf. Everette v. Union Pac. R.R.,* 2006 WL 2587927 (N.D. Ill. Sept. 5, 2006) (plaintiff's Title VII claims were precluded by the RLA because the resolution of his claims depends on interpretation of the CBA); *Crayton v. Long Island R.R.*, 2006 WL 3833114 (E.D.N.Y. Dec. 28, 2006) (plaintiff's Title VII claims precluded by the RLA).

c. ERISA Claims. The Eighth Circuit has held that the RLA's arbitration requirement applies to ERISA claims if the pension plan is: (1) itself a CBA; or (2) maintained pursuant to a CBA. *Hastings v. Wilson,* 516 F.3d 1055, 1059 (8th Cir. 2008). "A court, however, retains jurisdiction over ERISA claims that are 'independent of an interpretation or application of any collective bargaining agreements, even if the pension plan is created or maintained pursuant to a collective bargaining agreement.'" *Id.* at 1059. In *Hastings,* the court held that the plaintiffs' ERISA breach of fiduciary claims required an interpretation and application of the relevant CBAs; thus, they constituted minor disputes within the jurisdiction of the RLA adjustment board. In *Oakey v. U.S. Airways Pilots Disability Income Plan,* 723 F.3d 227, 233 (D.C. Cir. 2013), *cert. denied,* 134 S. Ct. 1513 (2014), the D.C. Circuit Court of Appeals noted that "every circuit that has considered the issued has reached the same conclusion as *Northwest [Air Line Pilots Association, International v. Northwest Airlines, Inc.,* 627 F.2d 272 (D.C.Cir.1980)] that the district court lacks ERISA jurisdiction over a dispute involving the interpretation of a collectively-bargained benefit plan within the exclusive jurisdiction of the appropriate adjustment board pursuant to the RLA." (citing cases). In *Oakey,* the court affirmed the trial court's dismissal of a former pilot's ERISA claim seeking benefits under a collectively-bargained pilot disability plan because the resolution of the claim depended upon an interpretation of the plan. Accordingly, the claim was subject to the mandatory arbitration provisions of the RLA. *See also James v. American General Assurance Co.*, 816 F. Supp. 2d 471 (E.D. Mich. 2011) (ERISA claims based on pension plan were minor disputes because the pension plan was maintained pursuant to the CBA since the CBA expressly adopted the pension plan and the pension plan referenced the CBA; additionally the claims were minor disputes because they required the court to determine whether the plan administrator correctly interpreted the term "disability," as defined in the plan documents); *Pearson v. Northwest Airlines, Inc.,* 659 F. Supp. 2d 1084 (C.D. Cal. 2009) (following *Hastings* and finding that plaintiff's allegations relating to whether her claim for long-term disability (LTD) benefits was wrongfully denied were minor disputes). *Cf. Sturge v. Northwest Airlines, Inc.,* 658 F.3d 832 (8th Cir. 2011) (ERISA claims not inextricably intertwined with CBA and thus not minor dispute precluded by the RLA).

d. Racketeer Influenced and Corrupt Organizations Act (RICO) Claims. In *Int'l Ass'n of Machinists and Aerospace Workers District Local Lodge 1776 v. Jackson,* 2010 WL 597247 (E.D. Pa. Feb. 19, 2010), the court held that civil RICO allegations filed by an International Association of Machinists (IAM) local against the Transportation Workers Union (TWU) and individual defendants claiming the defendants conspired to replace the local during a merger between US Airways and America West were precluded by the RLA. The court held that although the complaint recited RICO claims, the wrong complained of was actually the termination of the individual plaintiffs. Accordingly, the court held that these claims were "'inextricably intertwined' and/or 'substantially dependent upon analysis" of the CBA. *Id.* at *4. The court further held that the wrongs complained of arise from the parties' rights and obligations under the CBA, including suspension and discharge issues, the individual defendants' duty not to discriminate against IAM and the disciplinary process.

3. Claims Brought Under State Statutes. Claims brought under state anti-discrimination laws generally have been found to be pre-empted only in limited circumstances. In *Colorado Anti-Discrimination Comm'n v. Continental Airlines*, 372 U.S. 714 (1963), for example, the Supreme Court held the RLA did not pre-empt claims brought under a state race discrimination law. Gen-

erally, if a claim is based upon a state statute expressly prohibiting retaliatory discharge, jurisdiction over the state law claim has been upheld because the source of the right is statutory, rather than arising from a CBA. *See, e.g., Pan American World Airways, Inc. v. Puchert,* 472 U.S. 1001 (1985); *Selim v. Pan American Airways,* 889 So. 2d 149 (Fla. 4th DCA 2004) (pilot's state law discrimination and whistleblowing claims not pre-empted by the RLA because "preventing discrimination is not one of the purposes of the RLA"). Allegations of discrimination on the basis of disability brought under state handicap discrimination statutes may be found to be pre-empted as "minor disputes" if the resolution of the claim requires an interpretation of a CBA. *See, e.g., Carr v. Northwest Airlines, Inc.,* 2004 WL 1666443 at *5 (W.D. Tenn. 2004) (plaintiff's claims under the Tennessee Handicap Act and the Tennessee Human Rights Act were pre-empted by the RLA because the claims were "inextricably intertwined" with the CBA). *But see Saridakis v. United Airlines,* 166 F.3d 1272 (9th Cir. 1999) (plaintiff's ADA and state FEHA claim (based on his discharge for a positive drug test) not pre-empted even if the defendant would be able to introduce and rely on the CBA and last chance agreement as part of its defense); *Taggart v. Trans World Airlines*, 40 F.3d 269 (8th Cir. 1994) (RLA does not pre-empt handicap discrimination claim based on Missouri Human Rights Act).

Claims arising under state wage and hour laws are more likely to be found to require interpretation of a CBA, and thus to be pre-empted, than discrimination claims. For example, in *McKinley v. Sw. Airlines Co.*, 2015 WL 2431644 (C.D. Cal. May 19, 2015), a federal district court dismissed a former union employee's putative class action claims for overtime pay, finding them to be pre-empted by the RLA. As part of its rationale in dismissing the claims, the district court noted that the very nature of the claims, which sought to attack how the carrier calculated employees' regular rate of pay, would have required the district court to interpret the CBA to identify each form of pay provided by the CBA, determine when that pay was due, and then decide whether the pay was the type of remuneration that should have been included in the overtime calculation. Accordingly, the district court concluded that because the merits of the former employee's claims hinged on an in-depth analysis of the various provisions of the CBA, the RLA deprived the court of subject matter jurisdiction, and thus pre-empted the claims. *See also PHI v. OPEIU*, 440 F. App'x 398 (5th Cir. 2011) (claims under Louisiana law providing a remedy for failure to pay final wages owed pre-empted because they required resort to the CBA); *Evermann v. BNSF Ry.*, 608 F.3d 364 (8th Cir. 2010) (statutory claim for lost "productivity shares" due to serve on grand jury pre-empted); *Adames v. Executive Airlines*, 258 F.3d 7 (1st Cir. 2001) (claims for unpaid wages and leave under Puerto Rican law pre-empted); *Rosado v. American Airlines, Inc.*, 743 F. Supp. 2d 40 (D.P.R. 2010) (statutory claim that plaintiff was terminated without just cause pre-empted); *Fitz-Gerald v. SkyWest Airlines, Inc.*, 155 Cal. App. 4th 411 (Cal. App. 2007), as modified on denial of rehearing October 16, 2007; (flight attendants' claims based on state wage and hour laws were pre-empted); *Blackwell v. SkyWest, Inc.*, 2008 WL 5103195 (S.D. Cal. Dec. 3, 2008) (plaintiff's claims of violations of state law overtime and meal and rest break laws pre-empted by the RLA).

XII. PRIA

A. The Statute. PRIA was signed into law on February 6, 1997. In general, PRIA requires airlines to "request and receive" information about a pilot's training, proficiency, and disciplinary and employment history from previous employers before hiring that individual as a pilot. PRIA was the Congressional response to recommendations from the National Transportation Safety Board (NTSB) arising from a number of air crashes. The NTSB found an inordinately high number of recent accidents had resulted from air carriers not obtaining adequate information about newly-hired pilots. The result was that pilots who were discharged from one air carrier for lack of proficiency were being hired by other air carriers. PRIA was amended to make clarifications and relieve air carriers of unnecessary burdens. These amendments to PRIA are in 49 U.S.C. §§ 44703(h), (i), and (j).

The FAA has issued an InFo stating that it has chartered a Rulemaking Committee to provide

recommendations on the implementation of the Pilot Records Database (PRD), which the FAA is required to create in accordance with the Airline Safety and Federal Aviation Administration Extension Act of 2010. The FAA has not yet issued rulemaking.

The FAA's InFo states that until implementation of the PRD, the PRIA law and Advisory Circular 120-68F (discussed below) remain in effect. When implemented, air carriers will use the PRD to perform a background check on a pilot when deciding whether to hire that individual as a pilot. Upon implementation of the PRD, air carriers and others who employ pilots under parts 91, 121, 125 and 135 will be required to provide the records identified in the Act that are maintained by those employers on August 1, 2010 and five years prior to that date. Covered employers will also be required to submit records identified in the Act that are created in the future. *See* http://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/info/all_infos/media/2011/InFO11014.pdf.

On August 20, 2015, the Office of Inspector General (OIG) published the findings of its audit of the FAA's implementation of a pilot records database. The OIG report states:

> FAA's progress in developing and implementing the PRD remains limited, and its completion remains uncertain. According to FAA's regulatory timeline, the Agency does not expect to issue a PRD rulemaking until 2017, and the database will likely not be fully implemented until more than a decade after Congress mandated its creation in 2010.

OIG Audit Report, FAA Delays in Establishing a Pilot Records Database Limit Air Carriers' Access to Background Information, August 20, 2015, https://www.oig.dot.gov/sites/default/files/FAA%20Pilot%20Records%20Database%20Progress%20Final%20Report%5E8-20-15.pdf. The OIG also found that the FAA has yet to make critical decisions regarding historical records and how carriers will transition to the new database, nor has it ensured carriers are retaining records for inclusion in the database. Additionally, the OIG noted that the FAA has not established a process to ensure records are maintained when air carriers cease operations. *Id.* The OIG concluded by recommending that the FAA complete inspections to ensure pilot records are being retained for inclusion in the PRD. Additionally, the OIG recommended that the FAA:

1. Develop a clearly defined and expedited schedule for the development and implementation of a PRD, including cost estimates and project timelines.
2. As part of the standard PRIA response letter, incorporate a written notification to air carriers that additional records may be available through FOIA and Privacy Act requests.
3. Establish the FAA-records portion of the database and develop a single process for air carriers to request and obtain records currently available through PRIA, notices of disapproval, and summaries of enforcement actions in accordance with the Act.

In response to the report, the FAA stated that it is continually inspecting air carriers and operators for their compliance with Title 49 of the United States Code 44703(i)(4)(B)(ii)(II) (Airmen Certificates, FAA Pilot Records Database), requiring pilot records to be retained from August 1, 2005. Additionally, the FAA stated it is pursuing the automation of PRIA records which will provide air carriers direct access to FAA pilot records and significantly reduce the time it takes to acquire them. It is also developing proposed regulations to address the inconsistent formats with historical and present recordkeeping practices and identifying ways to reduce the data entry burden. *Id.*

The 2010 law requires the FAA to retain certain legal enforcement records until the agency is notified that a pilot has died. Previously, some types of legal enforcement records were expunged after five years. The FAA has suspended this expunction policy while it determines the full scope of the new law's effect on the expunction policy. *See Pilot Records Expunction Policy Changes*, available at: http://www.faa.gov/pilots/lic_cert/pria/guidance/pilotfaq/. PRIA's record retention requirements are discussed below.

1. Records from Prior and Current Employers. PRIA requires a hiring employer (if it is a U.S. air carrier under Part 121 or 135 or a U.S. air operator under Part 125) to request, and the prior and current employers of pilot-applicants (if they are Part 121 or 135 air carriers or Part 125 air operators or other person, or trustee in bankruptcy for an operator that employed the individual as the pilot of a civil or public aircraft at any time during the five-year period before the date of the individual's employment application) to provide:

a. Pilot Performance. Records pertaining to the individual's performance as a pilot, including:

(1) Initial and recurrent training records.

(2) Records concerning qualifications, proficiency, or professional competence of the individual, including comments and evaluations made by a check airman designated under 14 C.F.R. §§ 121.411, 125.295, or 135.337. Such records would include, for example, documents that show the individual's qualifications as instructor/evaluator, check airman, or examiner; and records of the individual's proficiency checks (recurring checks for captain, first officer, or line checks).

(3) Records of any disciplinary action(s) that were not subsequently overturned, *if* these disciplinary actions pertained to the individual's performance as a pilot.

(4) Records relating to any release from employment or resignation, termination, or disqualification of the individual with respect to employment.

b. Disciplinary Actions that Resulted in Termination of Employment. Employers must report any disciplinary actions taken against the pilot that played any role in the individual's termination or release from employment.

c. Disciplinary Actions Involving Pilot's Performance. Employers should only report disciplinary actions unrelated to an individual's termination or release from employment if the actions involved the individual's performance as a pilot and have not been subsequently overturned. Employers should not report other employment-related actions that have nothing to do with the pilot's aeronautical duties that resulted in a disciplinary action short of discharge or termination. In May 2012, the FAA issued a new Advisory Circular interpreting PRIA and providing more information than provided by the previous AC. *See* AC No. 120-68F, Advisory Circular, Pilot Records Improvement Act of 1996, available at: http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/BFBBCC67615379C386257A1A004CDEF9?OpenDocument&Highlight=120-68f.

If an airline agrees as part of a settlement to convert the company's internal personnel records to show that a pilot resigned instead of being terminated, the airline would probably need to disclose the initial termination as well as the resignation in response to a PRIA request. The legislative history of the PRIA indicates that discipline is considered to be "subsequently overturned" if the discipline has been rescinded as a part of a legitimate settlement agreement – for example, if the parties agree that the action that was the subject of the discipline did not occur or was not the pilot's fault. However, it does not include instances where the airline agrees to "wipe the pilot's record clean in order to pass him or her on to another unsuspecting carrier." Additionally, discipline may be considered subsequently overturned if it was reversed by the employer or by a panel or individual given authority to review employment disputes.

2. Records that Must be Furnished by Part 121 Air Carriers. In response to a records request, an entity that is a carrier under 14 C.F.R. Part 121 must furnish records pertaining to the individual (other than those relating to flight time, duty time, or rest time), including:

a. Records that show whether the crewmember complied with the applicable sections of 14 C.F.R. Part 121, § 121.683(a), including:

(1) Proficiency and route checks;

(2) Airplane and route qualifications;

(3) Training; and

(4) Records of each action taken concerning the release from employment or physical or professional disqualification of the flight crewmember that was not subsequently overturned.

b. Records pertaining to the drug testing and alcohol misuse programs described in 14 C.F.R. Part 120, and maintained in accordance with 49 C.F.R. Part 40, § 40.333:

(1) Confirmed alcohol test results indicating an alcohol concentration of 0.04 or greater;

(2) Verified positive drug test results;

(3) Documentation of refusals to take required alcohol and/or drug tests (including substituted or adulterated test results);

(4) Documentation of other violations of DOT agency drug and alcohol testing regulations;

(5) Substance Abuse Professional (SAP) reports;

(6) All follow-up test results and schedules for follow-up tests, including documentation of the return-to-duty test;

(7) Information obtained from previous employers under 49 CFR part 40, § 40.25 concerning drug and/or alcohol violations; and

(8) Records of negative and canceled drug test results, and confirmed alcohol test results with an alcohol concentration of less than 0.039.

3. Records that Must be Furnished by Part 125 Air Operators. In response to a records request, an entity that is an air operator under 14 C.F.R. Part 125 must furnish records pertaining to the individual (other than those relating to flight time, duty time, or rest time), including records that show whether the crewmember complied with the applicable sections of 14 C.F.R. part 125, § 125.401(a). This includes:

a. Proficiency and route checks;

b. Aircraft qualifications; and

c. Records of each action taken concerning the release from employment or physical or professional disqualification of the flight crewmember that was not subsequently overturned.

4. Records that Must be Furnished by Part 135 Air Carriers. In response to a records request, an entity that is an air carrier under 14 C.F.R. Part 135 must furnish records pertaining to the individual (other than those relating to flight time, duty time, or rest time), including:

a. Records that show whether the pilot complied with the applicable sections of 14 C.F.R. Part 135, § 135.63(a)(4), including:

(1) Full name;

(2) Pilot certificate (by type and number) and ratings held;

(3) Aeronautical experience;

(4) Current duties and the date of assignment to those duties;

(5) Date and result of each of the initial and recurrent competency tests and proficiency and route checks required by Part 135 and the type of aircraft flown during that test or check;

(6) Check pilot authorization, if any;

(7) Release from employment for physical or professional disqualification that was not subsequently overturned; and

(8) Date of the completion of the initial phase and each recurrent phase of the training required by Part 135.

b. Per §§ 135.251(b) and 135.255(b), records pertaining to drug and alcohol testing described in 14 C.F.R. Part 120, and maintained in accordance with 49 C.F.R. § 40.333:

(1) Confirmed alcohol test results indicating an alcohol concentration of 0.04 or greater;

(2) Verified positive drug test results;

(3) Documentation of refusals to take required alcohol and/or drug tests (including substituted or adulterated test results);

(4) Documentation of other violations of DOT agency drug and alcohol testing regulations;

(5) SAP reports;

(6) All follow-up test results and schedules for follow up tests, including documentation of the return-to-duty test;

(7) Information obtained from previous employers under 49 C.F.R. § 40.25 concerning drug and/or alcohol violations; and

(8) Records of negative and cancelled drug test results, and confirmed alcohol test results with an alcohol concentration of less than 0.039.

5. Records from Federal Agencies. PRIA also requires hiring carriers to request pilot-applicants' records from the FAA (including airman's certificates, type ratings, any limitations on those certificates or ratings, and any FAA enforcement actions within the preceding five years that were not overturned), and the applicant's motor vehicle driving records from the National Driver Registry (or from the individual states).

B. Records That Must be Maintained. An employer required to maintain PRIA records must do so for the length of the pilot's employment plus an additional five years after that individual's employment ends. PRIA-related records must be filed separately from other company pilot records or must be easily retrievable from the primary system of records. Individuals who are not involved in the hiring process should not view or have access to PRIA-related records.

C. PRIA Release. In order to protect pilot-applicants' employers from legal liability for supplying possibly damaging information to a potential employer, PRIA provides:

(1) Limitation on Liability. No action or proceeding may be brought by or on behalf of an individual who has applied for or is seeking a position with an air carrier as a pilot and who has signed a release from liability, as provided for under subsection (h)(2) or (i)(3), against –

(A) the air carrier requesting the records of that individual under subsection (h)(1) or accessing the records of that individual under subsection (i)(1);

(B) a person who has complied with such request;

(C) a person who has entered information contained in the individual's records; or

(D) an agent or employee of a person described in subparagraph (A) or (B);

in the nature of an action for defamation, invasion of privacy, negligence, interference with contract, or otherwise, or under any Federal or State law with respect to the furnishing or use of such records in accordance with subsection (h) or (i).

(2) Pre-emption. No State or political subdivision thereof may enact, prescribe, issue, continue in effect, or enforce any law (including any regulation, standard, or other provision having the force and effect of law) that prohibits, penalizes, or imposes liability for furnishing or using records in accordance with subsection (h) or (i).

(3) Provision of Knowingly False Information. Paragraphs (1) and (2) shall not apply with respect to a person who furnishes information in response to a request made under subsection (h)(1) or who furnished information to the database established under subsection (i)(2), that–

(A) the person knows is false; and

(B) was maintained in violation of a criminal statute of the United States.

49 U.S.C. § 44703(j).

Because PRIA requires the requesting carrier to obtain from a pilot-applicant "written consent to the release of [required] records," and because there is no obligation to release the required records in the absence of a written release, prior employers are protected from liability if they otherwise comply with PRIA. Employers should be careful to provide only the records required by PRIA, and not summaries of such records, as PRIA provides broad immunity only for "furnishing … records," and not for furnishing a document, not kept in the ordinary course of business, that summarizes the contents of such records.

D. FAA Enforcement Guidance. The FAA has issued enforcement guidelines on the PRIA. The enforcement guidelines are designed to familiarize FAA inspectors with PRIA and provide procedural information that may be used by the air carrier. Among other things, the enforcement guidance:

- outlines what is required and the procedures for completing a PRIA request;
- sets out a recommended procedure for completing a PRIA request;
- discusses the air carrier's obligations to maintain PRIA records;
- states that records pertaining to drug and alcohol testing must be maintained in an area that ensures their confidentiality and cannot be contained in the company's primary system of records;
- recommends that other records required under PRIA be maintained separately from the company's primary system of records;
- identifies forms that have been developed to help air carriers comply with PRIA (the most current version of the official PRIA request forms can be found on the FAA web site at: http://www.faa.gov/forms/ or http://www.faa.gov/pilots/lic_cert/pria/forms_docs/);
- identifies what an air carrier who receives a PRIA request must do to comply with the request;
- clarifies that records of both positive and negative results of the applicant's drug and/or alcohol tests must be provided in response to the PRIA request;
- clarifies that the employer to employee verbal questioning required by DOT-agency testing rules is unrelated to and separate from the employer to employer questions required by PRIA;
- clarifies that PRIA drug and alcohol records are not limited to the document retention requirements under the DOT's regulations, but, like all PRIA records, must be maintained for a period of at least five years;
- discusses violations and penalties for violations;
- includes a PRIA Air Carrier Basic Compliance Checklist; and
- includes a list of PRIA sanctions and suggested penalties.

The guidelines are available on the FAA web site at: http://www.faa.gov/pilots/lic_cert/pria/forms_docs/. (Click on FAA Order 8000.88, PRIA Guidance for FAA Inspectors.)

E. PRIA's Impact on Labor Relations. As with many other laws that affect air carriers, PRIA's record retention and reporting requirements have an impact on labor relations. For example, while a collective bargaining agreement may require a carrier to destroy disciplinary records that are more

than two years old, under PRIA, if a disciplinary record relates to proficiency (such as a demotion to first officer due to check ride failures), that record must be retained for at least five years. If a union contract provides for a different retention period, that conflict should be resolved in favor of the federally mandated retention period.

Similarly, PRIA's reporting requirements create a disincentive to settlement of discipline and termination cases involving proficiency. If a pilot has been demoted or terminated because of a proficiency problem, and if he or she does not want an obstacle to obtaining a pilot job within the next five years, the pilot must either obtain an arbitrator's decision overturning the discipline, or reach a settlement based on the general premise that "the action that was the subject of the discipline did not occur or was not the pilot's fault." H.R. 2626, 105th Cong., 1st Sess., p. 4 (1997). A settlement "where the airline agrees to wipe the pilot's record clean in order to pass him or her on to another unsuspecting carrier" would not qualify as being "subsequently overturned," and would have to be reported. *Id.* PRIA has thus all but eliminated the "resignation in lieu of termination" option for pilot proficiency cases.

F. Case Law Interpreting PRIA. In *Johnson v. Baylor Univ.,* 188 S.W. 3d 296 (Tex. App. 2006), a state court in Texas held that a pilot's state law tort claims filed against his former employer based on its failure to provide his employment records to a subsequent employer were not pre-empted by PRIA. In this case, the plaintiff was a pilot for Baylor University and was discharged for reasons unrelated to his competency as a pilot. He was subsequently hired by Kitty Hawk Air Cargo. Kitty Hawk requested his records from Baylor under PRIA and was erroneously told the school had no records on the plaintiff. Kitty Hawk fired the plaintiff because it had received a report from a background screening company indicating the plaintiff had discharged by Baylor because of misconduct and was not eligible for rehire.

The plaintiff sued Baylor under state law and the court held that the release the plaintiff signed as part of the PRIA request and PRIA's limitation of liability did not preclude the state court action. PRIA's limitation of liability provides that an individual who has applied for or is seeking a position with an air carrier as a pilot and who has signed a release from liability may not bring an action against a person who has complied with such a request.

The court held that because Baylor did not comply with the PRIA request, PRIA's limitation on liability did not apply. The court noted that the PRIA does not "broadly immunize a prior employer's conduct in responding to a request for personnel records. Instead, it contains a quid pro quo: if the prior employer complies with the request for personnel records, its liability is limited." Accordingly, the court permitted the plaintiff to take his tort claims to trial.

XIII. AVIATION SAFETY WHISTLEBLOWER PROTECTION ACT

AIR21 contains a whistleblower protection program for airline and airline subcontractor employees. The statute essentially prohibits a carrier or airline subcontractor from discharging or otherwise discriminating against any employee who has:

- provided information about any violation of Federal law relating to air carrier safety;
- filed a proceeding relating to any violation of Federal law relating to air carrier safety;
- testified in such proceeding; or
- assisted or participated in such a proceeding.

See 49 U.S.C. § 42121(a)(1) to (4). The DOL has delegated enforcement of this statute to the OSHA, which has published rules setting forth procedures for handling whistleblower complaints under AIR21. *See* 29 C.F.R. Part 1979. OSHA has also published a Directive establishing policies and procedures for the early resolution process, which is to be used as a part of a regional Alternative Dispute Resolution (ADR) program, in relation to OSHA's enforcement of whistleblower laws, including AIR21. *See* CPL 02-03-006, https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-006.pdf.

Any person who believes he or she has been subjected to retaliation in violation of AIR21 has 90 days to file a complaint with OSHA. Within 60 days of the filing of the complaint, OSHA will determine whether there is reasonable cause to believe a violation has occurred. (That deadline is not typically met, and it is not unusual for OSHA investigations to take months or even years before a determination is made.) The complaint will be dismissed unless the complainant makes a prima facie showing that the protected activity was a contributing factor in the adverse personnel action alleged in the complaint. Even if the employee presents a prima facie case, OSHA will not conduct an investigation if the employer can demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.

Either party may file objections to OSHA's determination within 30 days and request a hearing on the record before the DOL Office of Administrative Law Judges (ALJ). A party seeking review of an ALJ decision must file a petition for review with the DOL's Administrative Review Board (ARB). A party has 60 days to appeal from an adverse decision by the ARB, which appeal must be filed with the appropriate federal appeals court.

Under AIR21, prevailing employees may be awarded reinstatement, back pay, compensatory damages, and attorney fees. The AIR21 regulations state that, if OSHA concludes that there is reasonable cause to believe the statute has been violated and preliminarily orders reinstatement, the filing of an objection by the employer does not stay the order of reinstatement. The regulations likewise state that an ALJ's decision requiring reinstatement is effective immediately upon receipt of the decision and may not be stayed. It is unclear, however, whether preliminary orders of reinstatement are enforceable in court. *See Solis v. Union Pac. R. Co.*, 2013 WL 440707 (D. Idaho Jan. 11, 2013) (court lacked jurisdiction to enforce preliminary order of reinstatement under Federal Railroad Safety Act, which applies AIR21 rules procedures).

In *Williams v. United Airlines, Inc.*, 500 F.3d 1019 (9th Cir. 2007), the Ninth Circuit concluded that there is no private right of action in federal court under AIR21.

In *Bechtel v. ARB*, 710 F.3d 443 (2d Cir. 2013), the court expressed its view on the relevant burdens of proof under AIR21. (The claim in *Bechtel* arose under the Sarbanes-Oxley Act, which incorporates AIR21's elements and burdens of proof.) In discussing the burdens of proof, the court concluded that, to prevail, the claimant must prove by a preponderance of the evidence that: (A) he or she engaged in protected activity; (B) the employer knew that the claimant engaged in the protected activity; (C) the claimant suffered an unfavorable personnel action; and (D) the protected activity was a contributing factor in the unfavorable action. The court observed that this four-part framework applies both when deciding whether the allegations are legally sufficient to justify further investigation and when an ALJ determines whether the claimant has satisfied his or her evidentiary burden. At the evidentiary stage, however, the fourth element requires that the claimant prove by a preponderance of the evidence that the protected activity contributed to the adverse action, not just that the circumstances were sufficient to raise the inference that the protected activity was a contributing factor. Even if the claimant can establish each of these four elements, the employer still may avoid liability if it can prove, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Bechtel* is just the latest effort by the courts – as well as the ALJs and ARB – to explain how the AIR21 burdens of proof work. These decisions are not always easily harmonized. *Compare Ameristar Airways, Inc. v. ARB*, 650 F.3d 562, 566-67 (5th Cir. 2011) (evaluating AIR21 claim under *McDonnell Douglas* burden-shifting framework; once claimant adduces evidence of pretext, the burden-shifting framework "drops out," and trier of fact must determine whether protected activity contributed to adverse employment action and whether employer can prove it would have taken the same action regardless of protected activity) *with Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152 (3rd Cir. 2013) (Federal Rail Safety Act (FRSA) claim; holds that *McDonnell Douglas* does not apply and that "the AIR-21 burden-shifting framework that is applicable to FRSA cases is much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard").

XIV. AIRLINE DEREGULATION ACT OF 1978 (ADA)

The purpose of the ADA was to encourage, develop, and attain an air transportation system that relied on competitive market forces to determine the quality, variety, and price of air services. 49 U.S.C. § 41713 of the ADA provides that states may not enact any law related to a price, route, or service of an air carrier.

A. State Law Whistleblower Claims. Courts are split on whether the ADA pre-empts a former employee's state-law whistleblower claim against an airline employer. In *Botz v. Omni Air Int'l*, 286 F.3d 488 (8th Cir. 2002), a flight attendant claimed she was fired because she refused a flight assignment that she believed violated federal safety regulations. The Eighth Circuit found her claim to be pre-empted because of the direct relationship between a flight attendant's refusal to serve, federal regulations prohibiting the operation of a flight with less than the required minimum number of flight attendants, and a resulting disruption of air service. Thus, the plaintiff's actions in *Botz* had a direct impact on a particular flight because she refused to accept an assignment to work on a specific flight. The court found further support for its conclusion in the enactment of AIR21, because the protections of AIR21 illustrate the types of claims Congress intended the ADA to pre-empt. "In fashioning a single, uniform standard for dealing with employee complaints of air-safety violations, Congress furthered its goal of ensuring that the price, availability, and efficiency of air transportation rely primarily upon market forces and competition rather than allowing them to be determined by fragmented and inconsistent state regulation." *Botz*, 286 F.3d at 497. The court noted that AIR21 provides a reporting and complaint procedure and a remedy for claims like the ones raised by the plaintiff in *Botz*, which are based on an air-carrier employee's attempts to redress a possible air-safety violation. According to the court, "while the plain language of the ADA's pre-emption provision encompasses *Botz*'s claims, [AIR21] makes it unmistakable that such claims are pre-empted and dispels whatever doubt might possibly linger after a plain-language analysis of the ADA's pre-emption provision." *See also Simonds v. Pan Am*, 2003 WL 22251155 (D.N.H. September 30, 2003) (unpublished decision) (pilot's retaliatory discharge claim pre-empted; like the plaintiff in Botz, pilot's conduct in refusing to fly his airplane and leaving the cockpit put in jeopardy the airline's ability to render service to its passengers, by threatening to ground a plane).

In *Branche v. AirTran Airways, Inc.*, 342 F.3d 1248 (11th Cir. 2003), on the other hand, the Eleventh Circuit found that an aircraft inspector's claim that he was fired after he reported to the FAA that his employer had committed certain violations of FAA safety guidelines was not pre-empted. The court reasoned that safety is not a basis on which airlines compete for passengers and thus is not something for which air travelers bargain; instead it is implicit in every ticket sold by the carrier. Accordingly, the court held that "it does not serve the purposes of the ADA to pre-empt state law employment claims related to safety." The Eleventh Circuit distinguished *Botz* because Branche claimed he was terminated for reporting safety violations after the plane was permitted to take off. The Eleventh Circuit held that the potential connection between Branche's actions and air carrier services is far more attenuated than in *Botz*, since it was unlikely that Branche's actions would result in the grounding of the airplane.

Other federal courts have found no pre-emption where the connection between the law in question and an airline's rates, routes or service is too tenuous. Generally, these decisions can be harmonized with *Botz*, because under the facts involved, the state law claims would not result in an interruption in service. For example, in *Gary v. Air Group, Inc.*, 397 F.3d 183 (3d Cir. 2005), the court addressed whether AIR21 pre-empted an employee's claim that he was discharged in violation of state law after he reported that another pilot might not have the proper qualifications to fly. The court analyzed whether the retaliation claim had a "significant effect" on the Air Group's "service." Distinguishing *Botz*, the court found that Gary never refused a work assignment, and thus his report to the Air Group about the other pilot did not have the potential to interrupt service by grounding a particular flight. Accordingly, the court held that his claim was not pre-empted. *See also Meyer v. United Airlines, Inc.*, 2009 WL 367762 (N.D. Ill. Feb. 15, 2009) (plaintiff's claim that he was discharged in retaliation for complaining that carrier's maintenance procedures violated FAA safety regulations, in

violation of the state whistleblower law, was not pre-empted; "for his employment case to have an impact on the services of United, however, [the plaintiff] would need to assert that the result of his case would have more than a tenuous impact on Defendant."); *Gervasio v. Continental Airlines, Inc.*, 2008 WL 2938047 (D.N.J. July 29, 2008) (plaintiff's complaint that he was discharged in retaliation for reporting safety violations committed by ground crew who did not operate specific flights did not pertain to the prices or routes of an air carrier and was too far removed from affecting the service of an air carrier, thus his claims were not pre-empted by the ADA as amended by AIR21). *See also Ventress v. Japan Airlines*, 603 F.3d 676 (9th Cir. 2010) (plaintiff's state law whistleblower claims not pre-empted by the ADA where pilot reported safety violations six months after they occurred and after completion of the scheduled flights and the record did not indicate that he grounded or had the potential to ground a flight). Subsequently, the Ninth Circuit held that the plaintiff's claims were pre-empted by the FAA. *See Ventress v. Japan Airlines*, 747 F.3d 716 (9th Cir. 2014) (plaintiff's state law claims alleging that his employer retaliated against him for filing safety complaints by sending him for psychiatric evaluations, questioning his mental competency, and constructively terminating him were pre-empted by the FAA because to resolve these claims, the court would be required to determine whether the plaintiff was fit to carry out his duties as a flight engineer, which would intrude into the area of airmen medical standards, which Congress intended to occupy exclusively by the FAA regulations), *cert. denied*, 135 S. Ct. 164 (2014).

B. Local Wage Payment Ordinances. Employers have argued in some cases, generally without success so far, that local wage payment ordinances are pre-empted by the ADA.

For example**,** *Amerijet Int'l, Inc. v. Miami-Dade Cnty,* 2015 WL 5515343 (11th Cir. Sept. 21, 2015), involved a challenge to Miami-Dade County's Living Wage Ordinance (LWO) as it applied to cargo handling services provided by a carrier to other airlines (the LWO does not apply to airlines provided services on their own behalf). The district court ruled that the ADA did not preclude the county from applying the LWO to the carrier under those circumstances, and the Eleventh Circuit affirmed in an unpublished per curiam decision.

The court held that the LWO does not single out or target airlines, and thus resembles a law of "general application" rather than one that was designed to regulate the airline industry. The court further stated that the "service" at issue – providing cargo services to other airlines – was not the type that implicates ADA pre-emption under Eleventh Circuit precedent that the "bargained-for exchange must be between an air carrier and its consumers." The court held that "cargo handling, when performed by one airline for another" fails to satisfy that requirement. Negotiations over such cargo handling occurred between the carrier and other airlines, the court concluded, and thus did not implicate the airline-customer relationship. The court also found that the LWO was not pre-empted by the ADA because of its record-keeping requirements and because the airline would have to segregate its workforce into two groups depending on for whom they performed services, reasoning that the LWO did not have a significant effect on services because it did not dictate the types of services a carrier must provide or prevent a carrier from providing cargo handling services. Finally, the court held that even if the LWO could increase an air carrier's cargo handling costs and thus raise the prices of the carrier's services, such indirect economic influences were insufficient to trigger ADA pre-emption.

Similarly, in *Calop Business Systems, Inc. v. City of Los Angeles*, 984 F. Supp.2d 981 (C.D. Cal. 2013), *aff'd*, 614 F. Appx. 857 (9th Cir. 2015), the courts rejected various challenges to a local LWO brought by an airline service provider, including that the ordinance was pre-empted by the ADA. The district court held that the employer had not proffered evidence that any increased wages it had to pay as a result of the LWO had been passed on to its airline customers, or that its labor costs affected the prices, routes or services of those carriers. Moreover, the court found that any connection that might have been shown was "too tenuous, remote or peripheral" to trigger pre-emption, as there was no showing that the LWO had an "acute impact" on the prices it charged its customers or on the airlines' prices, routes, or services. The Ninth Circuit summarily affirmed the district court's decision in this regard.

In *Filo Foods, LLC v. City of SeaTac*, 183 Wash.2d 770 (Wash. 2015), the Washington State Supreme Court held that an ordinance which increased the minimum wage within the city of SeaTac for employees in the hospitality and transportation industries to $15 an hour was enforceable at the SeaTac Airport, which is located within the city's boundaries. The trial court had held the ordinance unenforceable at the airport because it believed that the city did not have jurisdiction to regulate wages at the airport under state law. The Washington Supreme Court reversed that ruling, and further held that the ordinance was not pre-empted by the ADA because it regulated the employer-employee relationship and its effect on airline prices and services was only indirect and tenuous.