Comments

CHAOS IN THE AIRLINE INDUSTRY: PICKING UP WHERE ASSOCIATION OF FLIGHT ATTENDANTS V. ALASKA AIRLINES LEFT OFF

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I. INTRODUCTION

The landscape of labor relations in the airline industry changed dramatically in 1993 when flight attendants at Alaska Airlines embarked upon a series of random, timed strikes to get the attention of Alaska's management at the bargaining table. Alaska's flight attendants, backed by their union, the Association of Flight Attendants ("AFA"), used their unprecedented and innovative CHAOS ("Create Havoc Around Our System") campaign as a vehicle for securing a new contract that was at least on par with those in the industry. The campaign revolved around a standing threat to strike anywhere, anytime, and without notice. In the end, a total of twenty-four flight attendants struck on seven flights that the AFA specifically targeted. The strikes were very brief, usually lasting between twenty and thirty minutes, and also unannounced, which made it virtually impossible for the airline to defend against them.

The basic premise of the CHAOS strikes was that Alaska flight attendants reported to work as scheduled, but then within an hour of the scheduled departure time for their assigned flight, they made an announcement to their supervisors that they were engaging in a strike.

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2. Id.
3. Id.
The AFA also simultaneously notified the airline of the strikes. The flight attendants waited for roughly an hour before offering to return to work. At that point, however, the airline refused to allow it despite the flight attendants' announcement of a willingness to do so.

Not only was Alaska Airlines unsuccessful in seeking an injunction against the AFA regarding further CHAOS activity, but the trial judge also required the airline to reinstate, with full back pay, the flight attendants who were on suspension for their role in the strikes. This decision sent a major shockwave throughout the airline industry because at least one court was willing to construe the Railway Labor Act ("RLA") as allowing partial, intermittent strikes like the CHAOS campaign. This holding was in stark contrast to the National Labor Relations Board's ("NLRB") longstanding policy of disfavoring these types of activities. According to Maureen F. Moore, "[t]he import of [the Alaska decision]... on intermittent strikes is foreboding for [air] carriers." To be sure, Alaska represents a significant setback for airline management because employees have a new and powerful economic weapon available in their arsenal for use during contract negotiations. On the other hand, Alaska is responsible for leveling the playing field between powerful airline management and an entire industry of underpaid flight attendants.

The trial judge in Alaska specifically refrained from deciding the precise issue of whether the CHAOS campaign, as a distinct form of a partial, intermittent strike, deserved protected status under the RLA, thus

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5. Id.
6. Id.
7. Id. at 838.
8. 45 U.S.C. §§ 151-164, 181-188 (1994). Although the RLA was originally drafted as an agreement between labor unions and the railroad companies as a means of correcting problems in the railroad industry, Congress amended it in 1936 to cover the airline industry as well. 45 U.S.C. §§ 181-87. Aside from "differences in the method of the adjustment of grievances, the same procedures for negotiating agreements and the same desire to avoid interruption of service apply to the airline industry." Maureen F. Moore, Hit and Run Strikes—Protected Activity or Suicidal Actions Under the Railway Labor Act?, 59 J. AIR L. & COM. 867, 871-72 (1994).
9. A partial strike is one in which "employees remain at work but slow down production or refuse to perform certain tasks or to work overtime." David Westfall & Gregor Thüsing, Strikes and Lockouts in Germany and Under Federal Legislation in the United States: A Comparative Analysis, 22 B.C. INT’L & COMP. L. REV. 29, 55 (1999). Intermittent strikes are ones in which "employees are seeking the benefits of employment but are ignoring the employer’s directions as to how the job is to be done." Id. at 55-56. In short, when employees attempt to combine work with strike activity, the result is often that the employees willfully neglect to perform particular tasks or adhere to the employer’s rules of conduct.
10. See infra note 89.
11. Moore, supra note 8, at 902.
12. The Supreme Court has recognized that “[i]n the context of labor relations law [the
leaving the question ripe for final resolution by another court or Congress.\(^1^\)

However, since the *Alaska* decision, there have been no legal challenges to
the AFA's CHAOS campaign despite its usage at various other airlines.\(^4^\)

Furthermore, Congress has not resolved the issue through an amendment to
the RLA or the enactment of a statute.\(^5^\)

Despite running afoul of established NLRB and Supreme Court
doctrine regarding employers who are subject to the NLRA, CHAOS
campaigns are consistent with the RLA and should be granted legal
protection through congressional or judicial rulemaking. Such a rule would
make explicit what was implicit in the trial judge's denial of the airline's
injunction and reinstatement of striking employees in *Alaska*.

Part II of this Comment will analyze the RLA and highlight the salient
differences between the RLA and the NLRA. Specifically, this section will
illustrate the fact that Congress' intention to promote cooperation in the
railroad industry by means of the RLA differs from the legislative intent
behind the NLRA. The contrast between these two statutes will serve as
the underlying framework for the rest of this Comment.

Part III analyzes the limitations on the right to strike under the NLRA
and the RLA. In particular, the Supreme Court's clear disapproval of
partial, intermittent strikes as a legitimate use of a union's resources is
contrasted with competing doctrines applicable only to the RLA. This
discussion will show that CHAOS strikes, as a factually distinct form of
partial, intermittent strikes, should be analyzed under a different framework
than would be applicable under the NLRA.

Although Part III establishes that labor disputes arising under the RLA
are to be analyzed under a different rubric than similar disputes arising
under the NLRA, Part IV takes that analysis one step further and advances

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\(^1^\) Id.

\(^2^\) Id.

\(^3^\) Id.

\(^4^\) For example, in the past several years, flight attendants at America West Airlines
and US Airways employed the threat of CHAOS during contract negotiations, with
management ultimately averting a strike at the last minute. *See supra* notes 165-66 and
accompanying text.

\(^5^\) Similar to the absence of judicial and legislative evaluation of the CHAOS
campaigns used in post-*Alaska* labor disputes, Moore's article is the only academic
literature to address the issue of whether CHAOS campaigns should be given protected
status and be accorded different legal treatment than identical activities by labor unions
several reasons why CHAOS strikes should be given "protected" status under the RLA.

II. THE RAILWAY LABOR ACT

In reaching the conclusion that CHAOS campaigns deserve protected status under the RLA, it is prudent to review the RLA for several reasons. First, the legislative and interpretive histories of the RLA contain very telling information about the congressional intent in enacting this arcane statute. Second, it is necessary to show how the RLA is specifically different from the NLRA in operation, given that the Supreme Court condones looking to the NLRA as a helpful guide in interpreting the broad language of the RLA. As will be shown, the RLA has as its underlying framework a wholly separate and distinct set of goals for the industries within its coverage.

A. Legislative History

During the late nineteenth and early twentieth century, "the railroads performed a critical function in this country and it was essential that uninterrupted service be provided. One of the most common interruptions about which the country was concerned were [sic] strikes by one or more railroad unions." For almost thirty-five years, both Congress and several presidents could not draft legislation that adequately dealt with the problem.

The Railway Labor Act originally came about as an agreement between labor unions and railroad companies. Unlike the NLRA, which would not be adopted until after the RLA was in effect, the RLA was not

16. Jacksonville Terminal, 394 U.S. at 383 (stating that it is acceptable to turn to the NLRA "for assistance in construing" the RLA). However, in Jacksonville Terminal, the Court went on to say that the NLRA "cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." Id. (citations omitted).

17. Moore, supra note 8, at 868.

18. Id. at 868-69. In 1922, President Harding declared that "the law creating the Railroad Labor Board is inadequate . . . . It cannot halt a strike . . . ." Id. at 869 (citation omitted).

19. Id. at 869 ("After many frustrating attempts to pass a law to prevent strikes more effectively in the [railroad] industry, the representatives of labor and management met and drafted legislation to which they could both agree.").

20. The NLRA was originally passed in 1935. Archibald Cox et al., Labor Law Cases and Materials 77 (12th ed. 1996). Although the official name of the statute is the National Labor Relations Act, the original NLRA is often referred to by its colloquial name, the Wagner Act, "to distinguish . . . [it] in its original form from the present National Labor Relations Act which contains provisions derived from the original act and others added by
specifically adopted to protect the rights of workers to unionize.\textsuperscript{21} Rather, the RLA was designed to facilitate the "peaceful settlement of labor disputes [in the railroad industry], thus reflecting the strategic importance of the transportation industry in the national economy."\textsuperscript{22} The debate on the floor of Congress in 1926 prior to enacting the RLA reinforces the fact that the statute was drafted not to guarantee an employee's right to unionize, but rather to ensure that an industry of the utmost importance to this country operated efficiently and trouble-free:

The purpose of this act is to ratify and put the stamp of approval of Congress on the agreement entered into between the railroads and their workers to insure peace in this great industry and uninterrupted operation of the railroads. It simply provides for kindly, friendly cooperation between the railroads and the railroad workers.\textsuperscript{23}

Conversely, while the bill that became the Wagner Act was before the Senate Committee on Education and Labor, Senator Walsh, the Chairman of the Committee, commented on the goals of the bill:

When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.\textsuperscript{24}

The legislative history of the RLA and the NLRA (formerly referred to as the Wagner Act) reveal that the two acts embody substantially different statutory schemes that are used to accomplish substantially different goals.

\textbf{B. Operative Differences}

The call for cooperation in the railroad and airline industries is captured by the RLA in its extensive framework of rules and guidelines designed to avoid strikes.\textsuperscript{25} The RLA imposes a duty upon both

\textsuperscript{21}Id. at 77 n.b.

\textsuperscript{22}Id. at 77 ("The Wagner Act of 1935 established... the legally protected right of employees to organize and bargain collectively through representatives of their own choosing.") (citation omitted).

\textsuperscript{23}67 CONG. REC. 4,702 (1926) (statement of Congressman Robsion of Kentucky).

\textsuperscript{24}79 CONG. REC. 7,660 (1935).

\textsuperscript{25}Moore, supra note 8, at 869-70. Ironically, the RLA does not mention the word "strike" at all. As Moore points out, "[w]hile the RLA implies that a union will have the
management and employees to:

exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, 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.\textsuperscript{26}

Unlike the NLRA, which only achieves a reduction in labor disputes as a by-product of its protection of the right to engage in strike activities and the right to self-organization,\textsuperscript{27} the RLA specifically has the primary goal of reducing labor disputes through cooperation. In \textit{Eastern Air Lines, Inc. v. Air Line Pilots Ass'n International},\textsuperscript{28} the Eleventh Circuit noted that "one of the RLA's central goals . . . [is] the preservation of the employer-employee relationship both during and after a strike."\textsuperscript{29}

In \textit{Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.},\textsuperscript{30} the United States Supreme Court succinctly summarized the detailed framework that the drafters of the RLA designed to facilitate the voluntary settlement of labor disputes:

The parties must confer, . . . and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services \textit{sua sponte} if it finds a labor emergency to exist. . . . If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. . . . If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President," who may create an emergency board right to strike after exhausting all of the procedures contained in the RLA designed to have the parties reach agreement, it never specifically grants labor organizations the right to strike." \textit{Id.} (citation omitted). In contrast, the NLRA specifically recognizes and protects the right to strike. 29 U.S.C. § 163 (1994).

\textsuperscript{26} 45 U.S.C. § 152 (1994).

\textsuperscript{27} Cox \textit{et al.}, supra note 20, at 79. The sponsors of the NLRA "urged that enforcement of the guarantees of the rights to organize and bargain collectively would be the best method of achieving industrial peace without undue sacrifice of personal and economic freedom." \textit{Id.} Professor Cox recognizes that the NLRA has indeed prevented strikes for a number of reasons: (1) "the prohibition of employer unfair labor practices . . . will tend to eliminate strikes," and (2) "collective bargaining itself tends to reduce the number of strikes and lockouts." \textit{Id.} These observations reinforce the notion that the NLRA achieves as a secondary purpose what the RLA has as its primary and sole purpose, namely the prevention of strikes.

\textsuperscript{28} 920 F.2d 722 (1990).

\textsuperscript{29} \textit{Id.} at 730.

to investigate and report on the dispute. . . . While the dispute is working its way through these stages, neither party may unilaterally alter the status quo. 31

If the dispute cannot be resolved by exhausting the procedures required in the RLA, the parties may resort to self-help32 after a thirty-day "cooling off period." 33 Although proposals have been advanced "[b]oth before and after enactment of the . . . [RLA], as well as during congressional debates on the bill itself, . . . for replacing this final resort to economic warfare with compulsory arbitration and antistrike laws . . . , no such general provisions have ever been enacted." 34 In short, once the thirty-day cooling off period has expired for a "major dispute," 35 both the employer and the employees are free to engage in any lawful means of persuading the other party that their position should prevail. 36

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31. Id. at 378 (citations omitted).
32. The Supreme Court correctly recognized in Jacksonville Terminal that "[n]owhere does the text of the . . . [RLA] specify what is to take place once these procedures have been exhausted without yielding resolution of the dispute." Id. However, the Court qualifies that by noting that "[i]mplicit in the statutory scheme . . . is the ultimate right of the disputants to resort to self-help—'the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.'" Id. (quoting Fla. E. Coast Ry. Co. v. Bhd. of R.R. Trainmen, 336 F.2d 172, 181 (5th Cir. 1964)).
34. Jacksonville Terminal, 394 U.S. at 379 (citations omitted).
35. The RLA distinguishes between minor and major disputes.

If the disagreement is over wages, rules or working conditions, an elaborate procedure of negotiation and mediation is set up. If the dispute involves a grievance or a disagreement arising out of the interpretation or application of the collective bargaining agreement, resolution is achieved ultimately by an arbitral decision binding on both parties. The purpose of these provisions is to completely preclude a union from initiating a strike over grievances and disputes arising out of contract interpretation ("minor disputes") and in those situations where the dispute is over wages, hours and working conditions ("major disputes"), to require utilization of almost every conceivable method by which mutual agreement can be reached, before resorting to self-help.

The "Minor Dispute" provision of the Railway Labor Act manifestly presumes the existence of some underlying disagreement which has to be resolved and sets forth procedures for doing so without resort to a strike.


36. In Elgin, J. & E.R. Co. v. Burley, 325 U.S. 711 (1945), the Supreme Court recognized the reality that although the RLA has an extensive list of mandatory procedural
The parties to a labor dispute may exercise the right to self-help under the NLRA more quickly than would be possible under the RLA. As Maureen F. Moore points out, "the right to exercise self-help under the RLA does not ripen as quickly as under the NLRA."37 Under the NLRA, if the parties are at an impasse at the bargaining table, they are free to engage in self-help as soon as the current collective bargaining agreement expires.38 Conversely, under the RLA, "the parties are required to exhaust procedures that are 'long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute.'"39 As mentioned earlier, these exhaustive procedures are in place primarily because the objective of the RLA is "to prevent, if possible, wasteful strikes and interruptions of interstate commerce."40

The right to engage in strikes may be inherent in both the NLRA and the RLA, but there are subtle differences that exemplify the different intentions of the two statutes. For example, courts have recognized that wildcat strikes, which generally involve a handful of employees engaging in a strike without the backing of full union membership, are inconsistent with the aims of both the NLRA and the RLA.41 It is also well established that under both statutes employers generally have a right to self-help once their employees have committed an unlawful act.42 However, as will be shown below, situations exist in which an employer subject to the NLRA would be permitted to discharge employees whereas an employer subject to the RLA might overstep the boundaries of self-help if it discharged workers who had participated in an unlawful activity such as a wildcat strike.

requirements that must be satisfied by both parties to a labor dispute, the ultimate decision to resolve the dispute rests with the parties. Id. at 725. For the settlement of major disputes, the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. . . . But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration.

Id. (citations omitted).

37. Moore, supra note 8, at 890.
38. Id. at 890-91.
39. Id. at 891 (quoting Bhd. of Ry. & S.S. Clerks v. Fla. E. Coast Ry. Co., 384 U.S. 238, 246 (1966)).
42. See supra notes 37-38 and accompanying text.
In *National Airlines, Inc. v. International Ass'n of Machinists & Aerospace Workers*, the Fifth Circuit held that the airline "exceeded the permissible bounds of employer self-help" by discharging employees who had engaged in a wildcat strike. Although the strike was unlawful, the court held that because of the RLA's concern for "continuance of the employer's operations and the employer-employee relationship," the discharge of the strikers was inappropriate.

Unlike a case where the NLRA is controlling and the court must simply decide if the employees engaged in an unlawful strike that warranted employer self-help such as discharge and discipline, a court deciding a case involving an employer subject to the RLA must perform a judicial balancing test to determine the legitimacy of the employer's response to the employees' activities. The Eleventh Circuit summarized the careful analysis a reviewing court must make in determining whether an employer subject to the RLA was legally entitled to discharge its employees:

The central concern of a court must be to weigh the policy of the Act, which is to keep the employer-employee relationship intact, against the policy of the carrier's being able to continue to furnish transportation service by replacing employees to the extent necessary.

With this basic understanding of the RLA and the salient differences between it and the NLRA, a more detailed analysis of the two statutes as they pertain to strike activities, both in general and in particular for partial, intermittent strikes such as the CHAOS campaign, is useful.

### III. The Right To Strike

The right to engage in peaceful strike activity is considered by many to be the most powerful tool available to employees during periods of labor unrest. The right to strike "is the quid pro quo for the employer's ability to implement new terms and conditions of employment when negotiations prove unsuccessful." The Fifth Circuit recognized this principle as well,

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43. 416 F.2d 998 (5th Cir. 1969).
44. Id. at 1007.
45. Id. at 1006 (citation omitted). Furthermore, in *Assoc. of Flight Attendants v. Alaska Airlines*, 847 F. Supp. 832 (W.D. Wash. 1993), the district court pointed out that the "duty to maintain the employer-employee relationship... as well as serve the public... is considered maintained even when permanent replacements are used." Id. at 836 (quoting Air Line Pilots Ass'n v. United Air Lines, Inc., 802 F.2d 886, 897 (7th Cir. 1986)).
46. See *Nat'1 Airlines*, 416 F.2d at 1007.
47. Empresa Ecuatoriana de Aviacion, S.A. v. Dist. Lodge No. 100, 690 F.2d 838, 845 (11th Cir. 1982).
concluding that "when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each [party]. On the side of labor, it is the cherished right to strike."\textsuperscript{49} The Supreme Court clarified this concept by stating that in the past it "has indicated, without reference to the National Labor Relations Act, that employees subject to the Railway Labor Act enjoy the right to engage in primary strikes over major disputes."\textsuperscript{50} The Court went on to point out that "[w]hether the source of this right [to strike] be found in a particular provision of the Railway Labor Act or in the scheme as a whole, it is integral to the Act."\textsuperscript{51}

In \textit{Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway Co.},\textsuperscript{52} railroad employees made a demand on their employer "for a 25-cent-per-hour wage increase and for six months' advance notice of impending layoffs."\textsuperscript{53} This "was a major dispute . . . and it had proceeded through all the major dispute procedures required by the Act without settlement."\textsuperscript{54} The Supreme Court held that "[t]he unions, having made their demands and having exhausted all the procedures provided by Congress, were therefore warranted in striking. For the strike has been the ultimate sanction of the union, compulsory arbitration not being provided."\textsuperscript{55}

Of course, such a broad generalization about the availability of particular economic weapons such as the right to strike does not come without its limitations. The right to strike is not absolute. As will be shown below, judicial decisions from the past century relating to both the NLRA and the RLA are fairly consistent in their findings of what constitutes an illegitimate use of the economic weapon of concerted activity. There has also been no shortage of these decisions.

\textbf{A. Limitations on the Right to Strike Under the National Labor Relations Act}

In the context of the NLRA, there are two distinct categories of activities that, although they are concerted action by employees, do not gain the sweeping protection that strikes are normally afforded.

\begin{itemize}
  \item \textsuperscript{49} Fla. E. Coast Ry. Co. v. Bhd. of R.R. Trainmen, 336 F.2d 172, 181 (5th Cir. 1964).
  \item \textsuperscript{51} \textit{ld.} at 384-85 (citation omitted).
  \item \textsuperscript{52} 384 U.S. 238 (1966).
  \item \textsuperscript{53} \textit{ld.} at 243.
  \item \textsuperscript{54} \textit{ld.} at 243-44 (citations omitted).
  \item \textsuperscript{55} \textit{ld.} at 244.
\end{itemize}
1. Unfair Labor Practices

First, the NLRA identifies a certain number of unfair labor practices that are per se violations of the Act.\textsuperscript{56} Section 158(a) of Title 29 of the United States Code, which is often referred to colloquially as section 8(a) of the NLRA, provides a list of five specific \textit{employer} unfair labor practices.\textsuperscript{57} However, section 8(b)\textsuperscript{58} is the relevant portion of the NLRA for this discussion because it outlines in great detail the specific unfair labor practices committed by unions that constitute a violation of the Act. Of particular relevance to this analysis are the provisions making it an unfair labor practice by a union to strike with illicit motivations.\textsuperscript{59} For example, a union may not “engage in, or... induce or encourage any individual... to engage in[,] a strike” where the object of that strike is “forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees” or “forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade... rather than to employees in another labor organization or in another trade.”\textsuperscript{60}

2. “Unprotected” Concerted Activity

The second category is inherently different from the unfair labor practices covered by section 8 of the NLRA. Unlike an unfair labor practice, which is a per se violation of the NLRA, section 7 provides that “[e]mployees shall have the right to... engage in... concerted activities for... mutual aid or protection.”\textsuperscript{61} In other words, the general rule is that so long as any individual unionized employee acts for the betterment of the remaining employees, that employee will be afforded a “protected” status

\textsuperscript{57} 29 U.S.C. § 158(a). Section 8(a) provides:

\hspace{1em} It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; (2) to... interfere with the formation... of any labor organization or contribute financial or other support to it...; (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;... (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter; (5) to refuse to bargain collectively with the representatives of his employees.

\textsuperscript{58} 29 U.S.C. § 158(b).
\textsuperscript{59} 29 U.S.C. § 158(b)(4).
\textsuperscript{60} 29 U.S.C. § 158(b)(4)(i)(C), (D).
under section 7 that makes them immune from unilateral, arbitrary employer retaliation. However, as Professor Cox points out, "[w]ith no legislative guidelines thus to distinguish between 'protected' and 'unprotected' concerted activity, the Board and courts have assumed the task of drawing that distinction." This is based on the fact that "[t]he broad language of Section 7 has never been read without qualification." Cox points out that even if we assume "that employees are engaged in 'concerted' activity for 'mutual aid or protection' it does not necessarily follow that such activity is immune from discipline." Fortunately, as will be shown below, an ample amount of judicial decisions exists that construe particular instances of concerted activity to be protected or unprotected.

Strike activities that are violations of state criminal and tort laws are not valid exercises of the right to engage in concerted activity. For obvious reasons, the NLRA does not validate a violent or harmful strike in which the employees harm other people or cause damage to another person's property. The offending employees receive no protection from the NLRA, and they might also be individually liable under state law.

The NLRA also makes clear than an employee engaging in concerted activity may still be disciplined or even discharged for "cause." For example, in NLRB v. Local 1229, International Brotherhood of Electric Workers, several employees distributed slanderous handbills in "a vitriolic attack on the quality of the company's television broadcasts."

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62. Section 7 also contemplates the possibility of non-unionized employees receiving protection. Cox et al., supra note 20, at 496. If no union or collective bargaining agreement exists, the "concert" requirement can only be met if two or more employees act. NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830 (1984). Additionally, section 7 does not afford protection to unionized employees whose actions are unrelated to the mutual aid or protection of the remaining employees. Finally, section 7 does not protect employees who refuse to adhere to the collective bargaining agreement by acting in concert for the betterment of a minority group of individuals. The Supreme Court has held that the exclusive representation provisions of section 9(a), 29 U.S.C. § 159(a) (1994), trump the individual right to elect a bargaining representative. See J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944) (declaring that employees who had signed individual contracts with an employer still retain NLRA rights to choose a collective bargaining representative); see also Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 70 (1975) (holding that the NLRA does not protect concerted activity by minority employees).

63. Cox et al., supra note 20, at 516.
64. Id.
65. Id.
66. Id. at 519.
67. See NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 252 (1939) (upholding the discharge of strikers who engaged in a forcible seizure of the plant and destroyed the employer's property).
70. Id. at 468.
These handbills "made no reference to the union, to a labor controversy or to collective bargaining." The Court held that the employees could lawfully be discharged under the NLRA "for cause" because their tactics "were hardly less 'indefensible' than acts of physical sabotage." A strike in breach of a no-strike clause in a collective bargaining agreement "is not prohibited by the... [NLRA, but] it is unprotected and may be met with employer discipline."

Often, concerted activity "is held to fall without Section 7 [protection] because of the method of protest utilized by the employees." A secondary boycott in violation of section 8(b)(4) of the NLRA or a mutiny at sea in possible violation of the mutiny provisions of the federal Criminal Code are sufficient grounds for an employer to discharge employees.

The preceding examples show that concerted activity, even when done for the mutual aid or protection of workers, will not gain the protection of section 7 if its objective "is contrary to the terms or spirit" of the NLRA. For example, if striking employees seek to induce an employer to discharge workers who have voiced opposition to the strike, the employees involved will not be protected against discharge or discipline. Also, if a union uses economic pressure in support of demands that are not within the scope of "mandatory bargaining," its actions will be deemed a refusal to bargain in

71. Id.
72. Id. at 477 (quoting Jefferson Standard Broad. Co., 94 N.L.R.B. 1507, 1511 (1951)).
73. Cox et al., supra note 19, at 518. But see Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 286 (1956) (holding that a strike in violation of a no-strike clause in the collective bargaining agreement was protected because the clause did not waive the "right to strike over employer attempts to oust the employees' bargaining representative"); see also Dow Chem. Co. v. NLRB, 636 F.2d 1352, 1363 (3d Cir. 1980) (holding that a general no-strike clause does waive the right to strike over "non-serious" employer unfair labor practices which can also be redressed as contract breaches through the grievance and arbitration procedures).
74. Cox et al., supra note 20, at 517.
75. Id.; see also S. S. S. Co. v. NLRB, 316 U.S. 31, 47 (1942) (holding that the NLRB abused its discretion by reinstating mutineers, the Court stated that "[i]t is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the [National] Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.").
76. Cox et al., supra note 20, at 516.
77. Id.; see also Am. News Co., 55 N.L.R.B. 1302, 1309 (1944) (holding that an employer may lawfully discharge workers who have engaged in a work stoppage that was designed to pressure the employer into granting an immediate wage increase during a time when federal regulations prohibited such an increase without the prior approval of a wage-stabilization agency).
78. As defined by the NLRA, mandatory subjects of bargaining are "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1994). The employer and the union have a "mutual obligation... to meet at reasonable times and confer in good faith," but the NLRA is careful to point out that this "obligation does not compel either party to agree to a proposal or require the making of a concession." Id.
good faith and will earn no protection under the NLRA. Again, a strike with such an objective is contrary to the terms and spirit of the NLRA since the Act clearly requires parties to bargain about certain statutorily enumerated subjects, but does not require, or allow unilateral insistence on, bargaining on any other subject.

A logical corollary to this point is that strikes employing methods deemed contrary to the “terms and spirit of the NLRA” also receive no protection. The Supreme Court in *Emporium Capwell Co. v. Western Addition Community Organization* made this point abundantly clear. In a monumental decision, the Court held that two employees who had engaged in a “wildcat strike” without the backing of the union were lawfully discharged. As Professor Cox states, “[e]ven the laudable objective of eliminating race discrimination in employment was held not to supersede the exclusive-representation principles of the National Labor Relations Act, and the peaceful concerted activity was held unprotected against discharge.” In another landmark decision, the Court in *NLRB v. Insurance Agents’ International Union* held that partial, intermittent work stoppages do not give rise to an unfair labor practice, thus effectively barring employers from seeking injunctive relief. Despite an assumption that the underlying conduct of the employees was not protected by the NLRA, the Court refrained from passing on the issue.

A broad interpretation of *Insurance Agents’* is that a union is free to use economic pressure on the employer when bargaining on mandatory subjects, and the NLRB may not act as an “arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.” As Mr. Justice Brennan eloquently stated for the Court:

*The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic*

employer, either for refusing to discuss a mandatory subject or for insisting that the union bargain about a non-mandatory, or permissive, subject, is an unfair labor practice under section 8(a)(5) of the NLRA. 29 U.S.C. § 158(a)(5). Conversely, a violation by the union is an unfair labor practice under section 8(b)(3) of the NLRA. 29 U.S.C. § 158(b)(3).

79. 29 U.S.C. § 158(b)(3); Douds v. Int’l Longshoremen’s Ass’n, 241 F.2d 278, 285 (2d Cir. 1957) (holding that the union’s insistence on including a non-mandatory subject of bargaining in the collective bargaining agreement was an unfair labor practice under section 8(b)(3) of the NLRA).
80. COX ET AL., supra note 20, at 516.
82. Id. at 72.
83. COX ET AL., supra note 20, at 517.
84. 361 U.S. 477 (1960).
85. Id. at 490.
86. Id. at 497.
weapons in reserve, and their actual exercise on occasion by the
parties, is part and parcel of the system that the Wagner and Taft-
Hartley Acts have recognized. Thus, the Court left open
the possibility for both the NLRB and subsequent reviewing courts to
classify partial, intermittent strikes as inconsistent with the NLRA as being
an illegitimate method of engaging in concerted activity. This is precisely
what has been done. As Maureen F. Moore points out, the rationale for
such a rule is that “partial or intermittent strikes are not consistent with the
philosophy of putting economic pressure on an employer through
withholding the economic benefits of work performed.”

The distinction between illegitimate objectives and methods also has
relevance when analyzing the recent proliferation of CHAOS campaigns in
the airline industry. Unlike a strike where the employees engage in an
acceptable method of concerted activity with a questionable objective,
CHAOS campaigns typically employ an acceptable objective with a
questionable method (engaging in a partial and intermittent work
stoppage). However, simply because this analysis works well for NLRA-
related cases does not warrant the conclusion that it can be “imported
wholesale” into RLA-related cases.10

The underlying premise of the argument for finding some concerted
activity to be contrary to the “terms and spirit of the NLRA”2 is the fact
that the NLRA contains its own set of rules and prohibitions related to the
right of employees to engage in “concerted activities for . . . mutual aid or

87. Id. at 488-89.
88. Id. at 491 (citations omitted).
89. See Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers v. Wis. Employment
Relations Comm’n, 427 U.S. 132, 147 (1976) (holding that employers are free to respond to
partial, intermittent work stoppages by disciplining the employees or using economic
measures such as lockout or permanent replacement); see also Roseville Dodge, Inc. v.
NLRB, 882 F.2d 1355, 1359 (8th Cir. 1989) (“Harassing techniques, such as intermittent or
recurrent strikes, have been held unprotected because they produce a situation that is
‘neither strike nor work.’”) (quoting NLRB v. Robertson Indus., 560 F.2d 396, 398 (9th Cir.
1976)); Shelly & Anderson Furniture Mfg. v. NLRB, 497 F.2d 1200, 1203 (9th Cir. 1974)
(recognizing that courts have consistently held that employees are not entitled to the
protection of section 7 of the NLRA when they engage in partial or intermittent work
stoppages); Westfall & Thüising, supra note 9, at 55 (“Partial, intermittent, and sit-down
strikes are not protected concerted activity under the NLRA . . . ”) (citations omitted).
90. Moore, supra note 8, at 889.
92. COX ET AL., supra note 20, at 516.
protection," or in other words, to unionize and then engage in a strike without fear of employer retaliation. On the other hand, the RLA encompasses a different realm of labor relations than that under the NLRA. The drafters of the RLA made it abundantly clear that the paramount goal of the statute was to provide a "framework for peaceful settlement of labor disputes." Put simply, what may be contrary to the terms of either the RLA or the NLRA is not necessarily contrary to the other. It can generally be said that what the NLRA seeks to guarantee and protect (the right to strike), the RLA strenuously seeks to avoid, but not prohibit, by requiring that a plethora of cooperative measures be exhausted before any self-help may be considered, and even then the dispute must be over wages, hours and working conditions for self-help to be allowable.

Therefore, even if the same objective/method distinction is to be drawn with respect to RLA-related concerted activity, it must be done subject to the following caveat: Some concerted action by employees may very well be contrary to the "terms and spirit of the NLRA", yet perfectly acceptable, or at least not subject to the same penalties, under the RLA.

A review of the general limitations on the right to strike under the RLA is useful at this point not only to show the divergence from the commonalities with the NLRA, but also to set up a framework for analyzing why CHAOS campaigns deserve protected status under the RLA.

B. Limitations on the Right to Strike Under the Railway Labor Act

When analyzing limitations on self-help under the RLA, an entirely different set of principles emerge than those applicable to the NLRA. To be sure, the concept of giving "unprotected" status to some concerted activity by employees still carries some meaning, but, unlike an analysis

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94. See supra note 27 and accompanying text.
96. See Nat'l Airlines, Inc. v. Int'l Ass'n of Machinists & Aerospace Workers, 416 F.2d 998, 1006-07 (1969) (holding that the discharge of employees who had engaged in an unlawful wildcat strike was outside the permissible bounds of self-help allowed by the RLA).
98. COX ET AL., supra note 20, at 516.
under the NLRA, that is not the end of the inquiry under the RLA. As
mentioned earlier, a court deciding a case under the authority of the RLA
must perform a judicial balancing test, weighing the policy of the RLA,
which is to maintain the employer-employee relationship against a
company’s right to continue serving the public by permanently replacing
striking employees.99 Courts, however, have traditionally had little
guidance on how to approach a situation under the RLA and how to
distinguish it from the NLRA.100 Consequently, many analyses performed
by judges often resemble an analysis that would be done under the NLRA,
with the court searching for ways to find the employees’ use of self-help to
be unlawful and “unprotected.”

Maureen F. Moore describes the RLA as “one of the more arcane
statutes governing labor relations,” and asserts “[b]ecause of the limited
number of employers subject to the RLA, few practitioners, and even fewer
judges, understand its purpose and properly interpret its provisions.”101
Moore also correctly observes that “[a]lthough decisions under the NLRA
are not automatically applicable to the RLA . . . the courts frequently rely
upon previous NLRA decisions to guide them in the interpretation of the
RLA.”102 This is certainly not to say, however, that all judicial opinions
relating to the RLA are based upon NLRA analysis. Some courts over the
past seventy-five years have worked harder than others to find acceptable
results under the RLA without consulting the NLRA for the easy answer.

1. Step One: Is the employees’ concerted activity “protected”?

It is important to recognize that many courts, likely unable to
understand the RLA’s purpose,103 still only look to see if a particular
instance of concerted activity is unprotected by the RLA. These courts fail
to take the necessary next step, which is to determine the legitimacy of the
employer’s response and decide if, on balance, the employer may be
allowed to retaliate against the employees’ use of self-help.104 While
making the initial determination about whether the activity is protected or
not is a big initial step for a court in weaning itself from its dependence on
the NLRA, it does not completely solve the problem. The following cases
exemplify instances where courts have relied solely on the RLA’s

(11th Cir. 1982).
Court has in the past referred to the NLRA for assistance in construing the Railway Labor
Act.”).
101. Moore, supra note 8, at 867.
102. Id. at 868.
103. Id. at 867.
104. Id.
provisions to declare strike activity unlawful, yet have failed to complete the latter part of the two-step analysis required by the RLA—namely "to weigh the policy of the Act, which is to keep the employer-employee relationship intact, against the policy of the carrier's being able to continue to furnish transportation service by [using self-help]."

In *Louisville & Nashville Railroad Co. v. Bass* ("L&N"), the court held a wildcat strike to be unprotected under the RLA, thus allowing the employer to obtain a permanent injunction prohibiting the employees from engaging in the activity. As the court stated, “[t]he pressing of demands by individual employees through a wildcat strike is wholly contrary and repugnant to the statutory scheme [prescribed by the RLA].”

The *L&N* court identified several compelling justifications for finding wildcat strikes inconsistent with the RLA. The court first addressed minor disputes, but summarily dismissed any notion that wildcat strikes would still comport with the framework of the RLA when minor disputes are involved. In short, “[t]he Congressional purpose [of foreclosing strikes over minor disputes] is completely truncated if wildcat strikes are held not to come within . . . [the] statutory ban on self-help with respect to minor disputes.”

The *L&N* court found an equally compelling reason for why wildcat strikes violate the procedures dealing with major disputes. The court stated that “[t]he language of the Railway Labor Act makes it clear that the prescribed procedures which may lead up to the right to strike over a major dispute must be followed by the employees through their authorized representatives.” The court concluded:

The language of the . . . [RLA] thus reveals a bargaining scheme under which the carrier must negotiate only with the duly designated representative of the employees, and, conversely, the employees must present their demands only through their

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109. *Id.* at 744 (noting that a complete statutory scheme is provided “for the orderly settlement” of strikes over minor disputes).
110. *Id.*
111. *Id.* To support this proposition, the court cites, inter alia, 45 U.S.C. § 152 (1994), which states that “[a]ll disputes between a carrier . . . and its . . . employees shall be considered, and, if possible, decided . . . in conference between representatives designated and authorized so to confer, respectively, by the carrier . . . and by the employees . . . .” (emphasis added).
designated representative. This is the interpretation of the [RLA] given by the Supreme Court in Virginian Railway v. System Federation.\textsuperscript{112}

Other courts have found other types of strike activity to be unprotected against unilateral employer action under the RLA. For example, in Long Island Railroad Co. v. System Federation No. 156,\textsuperscript{113} the court held that the employees' refusal to work overtime and inspect the required number of trains waiting to be serviced constituted an unlawful work slowdown and should be enjoined.\textsuperscript{114} In effect, the court said that the activity was unprotected against whatever recourse suited the employer's needs.

While the preceding examples show that it is possible for courts to perform analyses by simply looking at the legality of employees' actions to determine whether they are protected by the RLA, a strong argument exists that these analyses are not complete. If a court is not able to separate itself from the traditional notion of finding employee activity to be protected or unprotected, which is often seen in the context of decisions that interpret the provisions of the NLRA,\textsuperscript{115} the unique statutory plan created by the RLA is rendered meaningless. As will be discussed in the following section, when looking at the framework of the RLA as a whole, some courts have held that although the employees' concerted action was clearly unlawful when viewed independently, it could not be subject to discharge/discipline or an injunction because the goals of the RLA would not be advanced by allowing the employer to put an end to the activity.

2. Step Two: Even if the employees' concerted activity is "unprotected," is the employer's response permissible?

Taking the "protected/unprotected" analysis one step further, several courts have "enunciated some limit to permissible employer self-help."\textsuperscript{116} This means that even if the employees' concerted activity is not protected by the RLA, the employer may still not be legally allowed to

\textsuperscript{113} 289 F. Supp. 119 (E.D.N.Y. 1968).
\textsuperscript{114} Id. at 126.
\textsuperscript{115} See generally Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n, 427 U.S. 132, 152-53 (1976) (stating that an employer subject to the NLRA is free to discipline or discharge workers for engaging in unprotected concerted activity); see also Shelly & Anderson Furniture Mfg. v. NLRB, 497 F.2d 1200, 1203 (9th Cir. 1974) ("[C]oncerted activities that unreasonably interfere with the employer without placing any commensurate economic burden on the employees are not protected....") (citation omitted).
discharge/discipline the employees or obtain a permanent injunction. This represents a major departure from the traditional analysis performed in many labor disputes under the NLRA; however, it is critical to perform this extra step to remain faithful to the cooperative framework of the RLA.

In Air Line Pilots Association International v. United Air Lines, Inc.\(^{117}\) ("United"), the Seventh Circuit held that United Airlines "was free within certain bounds to take the steps necessary to continue flying; the airline's right to employ self-help measures during the strike stopped, however, where its duties under the RLA and other laws began."\(^{118}\) The court also determined that in order for the employer's self-help to be lawful under the RLA, it "must be shown to be reasonably necessary to keep the operation of the carrier ongoing."\(^{119}\) In short, there must be "some showing of a reasonable business justification . . . before a court will allow an employer to implement self-help measures which, whether intentional or not on their face, undercut the union's ability protected by the RLA to function as an effective representative for its members."\(^{120}\)

The Eleventh Circuit later addressed this in Eastern Air Lines, Inc. v. Air Line Pilots Association International\(^{121}\) ("Eastern"). In recognizing the RLA's limitation on discharge of an employee during a strike, the court stated that "under the RLA, airline employees remain statutory employees of the carrier during a strike unless they secure other work."\(^{122}\) The court based its reasoning on the fact that "one of the RLA's central goals . . . [is] the preservation of the employer-employee relationship both during and after a strike."\(^{123}\) However, the employer could lawfully permanently replace the striking workers.\(^{124}\) Thus, the following question arises: In the context of CHAOS campaigns (as a factually distinct form of partial, intermittent strikes), what mechanisms of self-help may an employer not lawfully exercise, even after the parties have exhausted the mandatory bargaining procedures under the RLA and self-help has become lawful?

\(^{117}\) 802 F.2d 886 (7th Cir. 1986).
\(^{118}\) Id. at 897.
\(^{119}\) Id. at 898.
\(^{120}\) Id. at 899.
\(^{121}\) 920 F.2d 722 (11th Cir. 1990).
\(^{122}\) Id. at 725 (citing Indep. Fed'n of Flight Attendants v. Trans World Airlines, Inc., 819 F.2d 839, 842 (8th Cir. 1987)).
\(^{123}\) Id. at 730.
\(^{124}\) Ass'n of Flight Attendants v. Alaska Airlines, 847 F. Supp. 832, 836 (W.D. Wash. 1993) (holding that the employer's duty to "maintain the employer-employee relationship" is considered maintained when striking employees are permanently replaced) (quoting Eastern, 920 F.2d at 730). As the Alaska court noted, the parties disputed "the requirement of showing some business necessity in order to permanently replace strikers." Id. at 837. However, the court did not have to decide the issue because it concluded that the airline, because of its obligation to maintain operations, had made such a showing. Id.
3. Legality of Employer Response to Partial, Intermittent Strikes under the RLA

Although it is well settled that under the NLRA an employer may lawfully respond to a partial, intermittent strike with various methods of self-help,125 the cases interpreting the RLA suggest contrary results.126 In stark contrast to the vast array of cases under the NLRA,127 there are only two major cases under the RLA dealing with partial, intermittent strikes once self-help becomes lawful.128

a. Injunctions

In Pan Am, employees engaged in “a series of intermittent job actions at various Pan Am facilities consisting primarily of hour-long work stoppages for union employee meetings and assemblies.”129 The Second Circuit, in a controversial opinion, “refused to import the NLRA principles on intermittent and partial strikes”130 and denied the airline’s request for an injunction.131 The court rejected both the airline’s claim that the union had lost its right to engage in self-help,132 and also the argument that intermittent strikes were impermissible as self-help.133

In finding that the airline could not enjoin the employees’ actions, the court relied on the fact that the Norris-LaGuardia Act134 “deprives federal courts generally of jurisdiction to issue injunctions in labor disputes.”135

125. See, e.g., Lodge 76, Int’l Machinist & Aerospace Workers v. Wisc. Employment Relations Comm’n, 427 U.S. 132 (1976) (holding that employers are free to respond to unprotected activity with employee discipline, a lockout, or permanent replacement); NLRB v. Mackay Radio & Tele. Co., 304 U.S. 333 (1938) (holding that employers can lawfully replace striking workers); Westfall & Thüsing, supra note 9, at 55 (stating that partial, intermittent strikes are not protected under the NLRA).
126. Moore, supra note 8, at 896 (“One would assume that intermittent or partial strikes would be unprotected under the RLA... [but] at least two courts have held that intermittent activity is permissible under the RLA.”).
127. Id. (“Unlike the NLRA, there have been very few instances under the RLA in which employees have attempted to engage in partial or intermittent strikes.”).
128. See Pan Am. World Airways, Inc. v. Int’l Bhd. of Teamsters (“Pan Am”), 894 F.2d 36 (2d Cir. 1990) (dealing with the availability of an injunction against the employees participating in a partial, intermittent strike); Alaska, 847 F. Supp. at 832 (addressing the discharge and replacement of employees who participated in a CHAOS campaign).
129. Pan Am, 894 F.2d at 38.
130. Moore, supra note 8, at 898.
131. Pan Am, 894 F.2d at 40.
132. Although the resolution of this issue was extremely important in Pan Am, it is not particularly relevant to this inquiry.
133. Id. at 38.
135. Pan Am, 894 F.2d at 40.
The Pan Am court relied on the Supreme Court’s decision in Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees\textsuperscript{136} ("Burlington Northern") to draw support for this proposition.\textsuperscript{137} In Burlington Northern, a railroad company sought to enjoin a union’s secondary boycott activities.\textsuperscript{138} After a district court granted the injunction, the Supreme Court reviewed the case to determine "whether a federal court has jurisdiction to issue such an injunction,"\textsuperscript{139} ultimately holding that the injunction was improper.\textsuperscript{140}

Admittedly, since the precise issue in Burlington Northern revolved around the availability of an injunction for secondary picketing, one could argue that the Second Circuit erred by relying on that case. Maureen F. Moore asserts that

\textit{[t]here is no prohibition against secondary activity in the RLA, nor is there any hint that the statute is intended to apply to relations concerning other employers. Application of that NLRA principle was therefore not warranted. Thus, the Second Circuit’s reliance upon Burlington Northern to support the argument that Norris-LaGuardia prohibits the issuance of an injunction is misplaced.}\textsuperscript{141}

However, a broad reading of Burlington Northern suggests that Moore’s position is not consistent with the Court’s interpretation of the interplay between the RLA and the Norris-LaGuardia Act. In addressing the fact that the RLA does not specifically prohibit secondary picketing or authorize injunctions against such activity, the Court eloquently stated:

The RLA’s silence could... easily signify an intent to allow the parties to resort to whatever self-help is legally available at the time a dispute arises. Faced with a choice between the ambiguity in the RLA and the unambiguous mandate of the Norris-LaGuardia Act, we choose the latter.\textsuperscript{142}

Perhaps an even more lucid explanation comes from the circuit court’s explanation in Burlington Northern Railroad Co. v. Brotherhood of

\textsuperscript{137} Pan Am, 894 F.2d at 40 ("The Supreme Court has declined to approve the use of injunctions to limit self-help under the RLA in light of the Norris-LaGuardia Act except where a violation of a specific mandate of the RLA has been shown.").
\textsuperscript{138} Burlington Northern, 481 U.S. at 431 ("What began as a dispute over renewal of a collective-bargaining agreement... expanded to picketing and threats of strike activity at railroad facilities around the country.").
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 453.
\textsuperscript{141} Moore, supra note 8, at 899 (recognizing that the NLRA “makes it an unfair labor practice, in certain circumstances, to engage in secondary picketing”).
\textsuperscript{142} Burlington Northern, 481 U.S. at 447 (footnote omitted).
Maintenance of Way Employees.\textsuperscript{143} The Seventh Circuit held:

While the Railway Labor Act’s processes continue, no one may use economic self-help. Those who violate this rule may be enjoined. . . . Once these processes are over, and a strike has lawfully begun, the Norris-LaGuardia Act forbids resort to injunctions.\textsuperscript{144}

Both the Seventh Circuit’s opinion in Burlington Northern, and the Supreme Court’s affirmation of it, make clear that the ban on injunctions under the RLA is not simply limited to secondary picketing. It follows that the Pan Am court, although it did not develop its analysis as completely as it could have,\textsuperscript{145} did not erroneously conclude that an injunction should be forbidden when employees engage in partial, intermittent strike activity after the provisions of the RLA have been exhausted during a major dispute.

\textit{b. Discharge, Discipline and Permanent Replacement}

The leading, albeit hotly contested, case on this subject is Ass’n of Flight Attendants v. Alaska Airlines.\textsuperscript{146} In Alaska, “the court recognized that an employer’s response depends upon whether the activity is protected or unprotected. The court, however, refused to decide that issue.”\textsuperscript{147} Nonetheless, the court held that the airline could not lawfully discharge (or threaten to discharge) or discipline (through indefinite suspensions) the employees who had participated in the CHAOS campaigns, but it could permanently replace them.\textsuperscript{148} In order to allow the airline to “counter the somewhat unorthodox methods employed by the union in the CHAOS campaign,” the airline was only allowed to permanently replace workers if the replacements performed equivalent services before the strikers offered to return to work.\textsuperscript{149}

The court was not sure whether to require a showing of a “reasonable business justification” before allowing the employer to “implement self-help measures which, whether intentional or not on their face, undercut the union’s ability protected by the RLA to function as an effective representative for its members.”\textsuperscript{150} Refraining from deciding that issue, the

\begin{itemize}
\item \textsuperscript{143} 793 F.2d 795 (7th Cir. 1986), aff’d, 481 U.S. 429 (1987).
\item \textsuperscript{144} Id. (citation omitted).
\item \textsuperscript{145} Moore, \textit{supra} note 8, at 896 (stating the Pan Am court “only analyzed whether such activity was protected, not whether it was intermittent”).
\item \textsuperscript{146} 847 F. Supp. 832 (W.D. Wash. 1993).
\item \textsuperscript{147} Moore, \textit{supra} note 8, at 901-02.
\item \textsuperscript{148} Alaska, 847 F. Supp. at 838.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} Id. at 836 (quoting Air Line Pilots Ass’n v. United Air Lines, Inc., 802 F.2d 886, 899 (7th Cir. 1986)).
\end{itemize}
court simply stated that Alaska had nonetheless made a showing of business necessity to permanently replace the strikers. However, the court found that since the airline made no attempt to permanently replace some of the strikers, and there was no business justification to suspend them, those strikers who were suspended must receive immediate reinstatement.

The court further held that “[p]ermanently replaced CHAOS participants... [were] not... eligible for vacancies created by later CHAOS participants, but [were]... eligible for other vacancies.” This limitation on the right of the striking workers to return to work was justified by the court as follows: “To calcify the response of one side in the self-help period while allowing the other side to utilize innovative means would be to upset the balance during this period and render Alaska unable to meet its obligation to maintain service to the public.”

As Maureen F. Moore is quick to point out, “it is difficult to understand how the [Alaska] court was able to determine the legality of the carrier’s actions, particularly since it held that employees could not be discharged for engaging in CHAOS activity.” To be sure, when analyzing this case solely under the NLRA’s rubric of “protected or unprotected,” it is difficult to see how the court could decide whether the employer’s conduct was unlawful, given that it specifically refrained from passing on the question of whether the employees’ conduct was protected.

One would expect a case arising under the NLRA to turn on the question of whether the employees’ activity was protected or not, simply because that determines whether the employer is allowed to use its full arsenal of economic weapons or is limited to the more draconian option, which is the permanent discharge of all striking employees. However, as previously discussed, a labor dispute arising under the RLA should not turn only on the lawfulness of the employees’ conduct; rather, the RLA requires the court to independently analyze the employer’s countervailing use of self-help against its employees as well. The Alaska court recognized this critical difference and correctly resolved the case by inquiring into the legality of the employer’s response to the CHAOS campaign, ultimately holding that the employer’s self-help (discipline/discharge) was unlawful.

151. Id. at 837.
152. Id.
153. Id. at 838.
154. Id.
155. Moore, supra note 8, at 902.
157. Id. at 838. The court based its reasoning on the fact that the airline had a duty to maintain “the employer-employee relationship,” and that could not be achieved when
Critics of this approach may argue that Alaska and Pan Am ultimately destroy the necessity to determine whether the employees’ conduct is protected or unprotected. This argument is simply without merit. One must remember that under the RLA, if the court finds the employees’ conduct is protected, that should be the end of the court’s analysis; the employer will be limited to permanently discharging the employees. If the court can determine that the employer’s response is inconsistent with the RLA, and therefore unlawful, it does not have to decide whether the employees’ activity is protected.

Conversely, if the court is able to determine that the employer satisfied its legal obligations and engaged in lawful economic retaliation, the “protected or unprotected” distinction for the employees’ conduct then has paramount importance. Therefore, while at first glance it seems that Alaska vitiates the need to determine whether the employees’ activity is protected by the RLA, a more careful reading of the decision leads one to the conclusion that the “protected/unprotected” distinction still carries great significance. Thus, it is not implausible that certain types of employee self-help can and should be recognized from the outset as immune from the employers’ threats of discipline and discharge.

IV. GRANTING PROTECTED STATUS TO CHAOS CAMPAIGNS

With the preceding principles in mind, it is not difficult to see why CHAOS campaigns deserve protected status. Unlike general categories of strikes, such as sit-down strikes or work slowdowns, CHAOS campaigns are a factually unique subset of partial, intermittent strikes and are not susceptible to changes in form and nature. In order for CHAOS campaigns to work properly, they must involve the same set of factual underpinnings in every situation.

The court’s holding in Alaska makes clear that in a situation where CHAOS has been employed, the employer will be limited to permanently replacing the employees. Since Pan Am teaches us that an airline may

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158. See infra section III.B.1.
159. This scenario exactly matches the fact pattern in Alaska.
160. The key factor in the success of CHAOS campaigns is the element of surprise. Alaska, 847 F. Supp. at 833-34. Therefore, it is highly unlikely that any union would deviate from the chain of events seen in Alaska. In other words, in order for the campaign to work, it must always involve only a handful of employees who briefly strike without notice, targeting specific flights for maximum disruption, and then offering to return to work shortly thereafter. Ass’n of Flight Attendants, supra note 1.
not obtain an injunction against the union in a CHAOS-like situation,\textsuperscript{162} and Alaska enunciates that “the threat of discharge is unlawful self-help” in those situations,\textsuperscript{163} CHAOS campaigns are already receiving \textit{de facto} protected status. Given the unchanging nature of the underlying facts of CHAOS campaigns, their \textit{de facto} protected status under the RLA should formally be recognized. This conclusion is amply supported by sound policy considerations.

\textbf{A. Public Policy Considerations}

Granting protected status to CHAOS campaigns is fully consistent with the RLA’s mandate of settling disputes peacefully.\textsuperscript{164} Although at first glance it appears that the opposite is true, the following evidence about CHAOS usage in post-Alaska disputes, albeit limited because of the infrequent nature of major labor disputes at newsworthy airlines, suggests that when a union threatens during the bargaining phase to use CHAOS if negotiations break down, a strike is typically averted.

Recently, flight attendants at America West Airlines\textsuperscript{165} and US Airways\textsuperscript{166} informed management at their respective airlines that they would employ a CHAOS campaign if their contract negotiations proved fruitless; in both situations the union and management reached an agreement before either party needed to resort to self-help.\textsuperscript{167} Flight attendants at other airlines, such as United Airlines and Northwest Airlines (using a version of CHAOS called HAVOC), have also successfully used the threat of CHAOS to achieve a more equilibrated balance of power at the bargaining table.\textsuperscript{168} Although it took one instance of CHAOS to send a message to the airline industry, the threat of it is more than enough to prevent actual strikes from ever coming about.

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\textsuperscript{162} Pan Am. World Airways v. Int’l Bhd. of Teamsters, 894 F.2d 36, 40 (2d Cir. 1990).
\textsuperscript{163} Alaska, 847 F. Supp. at 837.
\textsuperscript{164} Moore, supra note 8, at 901 (“The RLA was designed specifically to avoid strikes . . . .”).
\textsuperscript{165} Strike Averted at America West, CNN.com (Mar. 20, 1999), available at http://europe.cnn.com/TRAVER/NEWS/9903/20/america.west.01/.
\textsuperscript{167} Association of Flight Attendants, US Airways, supra note 166; CNN.com, supra note 165.
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1. Minimizing Disruptions to the National Transportation Sector

The RLA also seeks to avoid any disruptions to commerce. Maureen F. Moore argues that “to allow a labor organization to disrupt commerce frequently and intermittently [by using a CHAOS campaign] is in direct contravention of the stated statutory goals [of the RLA].” The goals of the RLA include settling disputes peacefully and without interruptions to commerce, but the RLA does not prohibit the right to strike once self-help has become lawful. It is hard to see how a CHAOS campaign, which only affects a handful of flights and passengers, albeit with no advance warning, is more disruptive to the economy than a full cessation of operations by the airline. Not only are more passengers affected, but the national economy suffers more when an entire airline is crippled as opposed to just a few flights. Given that nobody is clamoring for an abolition of the right to strike under the RLA, one must conclude that CHAOS campaigns are far less devastating to the nation’s transportation industry than strikes by the full union membership. With the goals of the RLA in mind, CHAOS strikes are preferable to traditional strikes, and should be encouraged during periods of labor unrest, since they minimize the potential disruption to both the transportation industry and the national economy.

2. Minimizing Disruptions to Passengers

It could be argued that CHAOS strikes are more devastating to the actual passengers as is no advance warning of a disruption in flight operations; a more conventional strike would likely be highly publicized and passengers can make alternative travel arrangements before showing up to the airport. Indeed, many passengers would prefer to know well in advance, as opposed to several minutes before departure, that their travel plans have been compromised. However, this argument overlooks one fundamental aspect of CHAOS strikes—the strikes are specifically designed to affect a small number of flights so as to preserve the element of surprise. In fact, the Alaska Airlines flight attendants only targeted seven flights in total, over the course of several days. Furthermore, the targeted

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169. See Moore, supra note 8, at 901.
170. Id.
171. See supra note 32 and accompanying text.
172. COX ET AL., supra note 20, at 74.
173. The focus on the disruption to the national economy rather than the individual airline is appropriate given that the RLA recognizes “the strategic importance of the transportation industry in the national economy.” Id.
Alaska Airlines flights actually did depart for their destinations, albeit with reserve flight attendants and not quite at the originally scheduled time.\footnote{175}{Id.}

Although many air travelers have become increasingly used to being greeted with unexplained delays and cancellations upon arriving at the airport, a passenger who shows up to the airport only to find that his or her flight has been cancelled can usually expect to find alternate transportation then and there either on that airline or another one. As for delayed flights, any seasoned air traveler understands that a flight can be delayed for a variety of much less interesting reasons, including a delayed inbound aircraft, FAA “sleep requirements” for the pilots, a sudden failure of the onboard air conditioning unit, and a faulty video screen in an empty First Class cabin.\footnote{176}{Much to his chagrin, the author has patiently dealt with all of these ridiculous excuses, and many more, while traveling.}

CHAOS strikes subject air travelers to no greater risk of disruption to travel than they are already being exposed to every time they step foot into an airport. On the other hand, full-blown strikes by the entire union membership inconvenience thousands upon thousands of air travelers each day the strike continues, and this is definitely not a risk that is assumed by the everyday air traveler. What makes a traditional strike much more disruptive to passengers is the fact that the airline, likely having hundreds of flights per day with many thousands of passengers, generally must either refund every ticket, forcing travelers to deal with the price-gouging tactics of other airlines by searching for fares at the last minute, or attempt to re-accommodate every single passenger. The problem with mass re-accommodation is that other airlines are already likely filled close to capacity, and the number of displaced travelers is likely to far exceed the number of available seats on other airlines, especially when the airline affected by the strike is the sole or dominant operator on a particular route.\footnote{177}{This is the case with many of the routes served by Alaska, US Airways, United, Northwest and America West, all previously mentioned as having been subjected to threats of CHAOS strikes. See infra section IV.A.}

Thus, public policy dictates that it is desirable to favor CHAOS strikes over traditional strikes as CHAOS strikes minimize the potential harm to passengers.

3. Minimizing Disruptions to the Airlines

It is less costly for an airline to fight back against CHAOS campaigns.\footnote{178}{As opposed to a strike by an entire union membership, CHAOS strikes involve only a handful of employees.} The airline is also
free to engage in self-help and permanently replace these employees.180 Once the airline knows CHAOS is imminent, and the airline does not plan on implementing a lockout, it can have trained employees on hand who are ready to permanently assume the positions of any participant in the CHAOS strikes.181 This is certainly less expensive than permanently replacing all, or a substantial portion of, the employees when a traditional strike occurs.

Furthermore, the cost to the airline of a traditional strike is much larger as it generally entails a significant reduction in the number of flights. On the other hand, CHAOS campaigns affect only the particular flights targeted. Thus, if anything, the airline only loses the revenue associated with those flights as opposed to losing a major portion, if not its entire daily revenue.182

The foregoing policy considerations show why CHAOS campaigns should receive protected status under the RLA and be encouraged during times of labor unrest.

IV. CONCLUSION

As more courts become familiar with the heightened requirements for resolving labor disputes subject to the RLA, we should expect to see more judicial decisions that are contrary to typical outcomes under the NLRA. It is no surprise that management and other pro-employer entities argue that the same result should be reached under the RLA as under the NLRA. However, it is imprudent to summarily dismiss the glaring differences between the two acts as these differences ultimately compel affording protection to partial, intermittent strikes such as the CHAOS campaigns under the RLA.

Although a lay person may have difficulty embracing the notion that some labor disputes should be treated differently than others, those who have an understanding of the legal system should bear in mind that labor disputes which fall under the RLA deserve special treatment because of the "strategic importance of the transportation industry in the national economy."183 However, since CHAOS campaigns have not been exercised subsequent to a thirty-day cooling-off period at any airline since being employed at Alaska Airlines in 1993, it is unlikely that the Supreme Court

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181. Id. at 838 (holding that workers are considered permanently replaced after the replacement workers perform equivalent work).
182. This, however, ignores the lost revenue associated with future passengers (i.e., lost business) since airlines expect to gain and lose customers (sometimes the same customer) on a daily basis for a variety of reasons much more common and mundane than labor disputes.
183. COX ET AL., supra note 20, at 74.
will be given the opportunity to bring closure to this issue any time soon. Thus, it is important that Congress takes action and puts its stamp of approval on this unique and highly important weapon in the arsenal of labor organizations under the purview of the RLA. A congressional pronouncement to that effect would make explicit what was implicit in the trial judge’s decision in Alaska, namely that CHAOS campaigns should be protected under the RLA.

The onset of this new and creative method of striking has sent a powerful message to all employers subject to the Railway Labor Act: unless collective bargaining is entered into with an honest desire to work out the problem and bring about a contract that is fair to both sides, CHAOS can and will be used to wreak havoc. It is doubtful many airlines will decide to take their chances with that in the future. Isn’t that what the RLA has been striving to attain all along?