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By Stanley B. Rosenfield*

Introduction

Conditions of employment, wages and other benefits have been steadily improving for employees of private industry. Conditions for employees in the public sector have not kept pace. The gains of the employee of private industry are based on his ability to enforce his demands through strikes. The public employee has not had the coercive power to enforce his demands because a strike in a public service or industry would affect the general public. It is not in the public interest to allow public services to be discontinued or curtailed. The public interest would suffer if policemen, firemen, teachers or other public employees were allowed to disrupt basic services.

Today, however, there is great upheaval in the public sector. More and more the right of a public employee to receive the same terms, conditions and benefits as an employee in private industry is being recognized. More and more the right of any employee, whether public or private, to enforce his demands through strikes, is being recognized. More and more the public employee is viewed as having the same rights and privileges as an employee in private industry. There are many recent examples of the expanded privilege of the public employee. The most common current example is the public school teacher.

In addition to the labor force in private industry and the labor force in public industry, there is a third labor force, one that may be characterized as quasi-public—quasi-public because it has aspects of both private and public industry. It is private because the source of capital and management is private industry. It is, at the same time, public because it is subject to public

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regulation. This quasi-public labor force is found in the area of public utility. The specific segment of public utility to which this study is devoted is commercial aviation. Each commercial air carrier is a private company, whose stock is handled in the same manner as any other private corporation. The management is private and is chosen by the stockholders as in the case of any private corporation. The employees are technically working for a private company and are a part of private industry. However, like all utilities, the airlines are subject to public regulation. This regulation is provided by the Civil Aeronautics Board [hereinafter referred to as Board or CAB] and encompasses almost all basic areas of management decision. The Board must approve: entry into the field of commercial aviation; all routes including expansion and abandonment of existing routes; all rates and fares, including new rates and fares as well as increases or decreases in existing rates and fares; all service to the public, including new services or expansion or removal of existing services; and finally, even withdrawal from the field itself. The Board literally exercises absolute control over commercial operations of air carriers. Since the commercial air carriers are private, but subject to public regulation in regard to all operations, the characterization of "quasi-public" is appropriate.

How does the labor force of a quasi-public industry fit the mold of labor in other industries? Do airline employees have the rights of private industry? Are they subject to the problems confronted by public employees? It might be expected that the rights of quasi-public employees would be similar to the rights of public employees.

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7 49 U.S.C. § 1373 (1970); while this section only provides for merger and consolidation, this is the only method by which a commercial air carrier has been allowed to withdraw from commercial aviation. R. Caves, AIR TRANSPORT AND ITS REGULATIONS 176 (1962).
8 This regulation even extends to the private area of ownership in certain instances. Board approval is required: for an individual or company who is an air carrier, or engaged in some phase of aeronautics, to acquire control in any manner of any other air carrier or company engaged in some phase of aeronautics (49 U.S.C. § 1378 (1970)); for an officer or director of one air carrier or company engaged in some phase of aeronautics, to obtain a controlling interest in another air carrier or company engaged in some phase of aeronautics (49 U.S.C. § 1379 (1970)); for any pooling or other contract or agreement between air carriers (49 U.S.C. § 1382 (1970)).
employees since the same concern with public interest exists in public utility as in public industry. However, there is one area in which airline employees enjoy labor rights superior to the rights of public employees—an area, in fact, in which the rights of airline employees are superior to the rights enjoyed by almost all other employees, regardless of the industry or service performed, and regardless of the employment classification as private, public or quasi-public. This is the area of labor protective conditions imposed upon a surviving air carrier in the event of an airline merger.\(^9\)

If Brick Company \(B\) is merged into Brick Company \(A\), apart from private agreement, there is no obligation on the part of Brick Company \(A\) to retain the employees of Brick Company \(B\). Neither is there any obligation on Company \(A\) to make any provision for those employees of either Company \(A\) or Company \(B\) who may be terminated as a consequence of the merger. This is true although it is recognized that a saving of personnel through elimination of jobs and facilities is often a major objective of merger. The same is not true, however, in the case of commercial air carriers. If we substitute air carriers for brick companies, it will be necessary for the Board to approve the proposed merger before it can be effected.\(^{10}\) One of the requirements for approval of the merger will be satisfactory protective conditions to insure that any employee put in a worse position by the merger will be compensated for the loss he has sustained.

The disaccommodation caused by a strike in commercial aviation would adversely affect the aviation segment of public transportation. This adverse effect on the public interest is the basis for labor protective provisions in an airline merger. It is an attempt to avoid strikes by insuring employee protection. But is there a greater public interest in preventing airline strikes than in preventing strikes by firemen, policemen, or public school teachers? Why do airline employees have protection which is not available to employees in other areas of public or private industry? What unique category provides such special rights? Is it in the

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\(^9\) 49 U.S.C. § 1378(b) (1970). This section refers to merger, consolidation, purchase, lease, operating contract or acquisition of control. The reference throughout this paper will be merger or merger transaction. Either of these terms is intended to cover all of the items above.

\(^{10}\) Id.
public interest to provide protective conditions not available in private industry? Is it in the public interest to provide conditions which will simply be added to the cost of the merger transaction to be paid eventually by the public using the airlines? Are there any public benefits to these labor protective conditions, or are they simply provisions for the benefit of a relatively small group at the expense of the general public?

At least a part of the reason for labor protective provisions is provided by an historical analogy to the railroad industry. It is the purpose of this work to look at the historical background to determine if there ever was a valid basis for such analogy. Assuming the analogy was valid when first adopted, is it still valid today? Finally, is there a public interest which justifies labor protective provisions in airline mergers, and if there is, what is this public interest? The conclusion of this author is that airline labor protective provisions were based on the railroad analogy; however, this analogy was not valid when first adopted, and it is not valid today. In addition, it is the conclusion of this writer that there is a public interest in uninterrupted air service, but such public interest is no greater than the public interest in any uninterrupted service, whether such is provided by private, public, or quasi-public industry. If such protection is justifiable in airline mergers it is likewise valid in any merger whether such involves private, public or quasi-public companies.

I. LABOR PROTECTIVE PROVISIONS

A. United-Capital Provisions

In 1961, the largest airline merger in United States history was approved by the Civil Aeronautics Board. This transaction merged Capital Airlines, at the time the fifth largest domestic carrier but on the verge of bankruptcy, into United Airlines, the healthy, vigorous, second largest domestic airline. This merger produced what was in 1961, and is still today, the largest domestic air carrier in the United States. In order to secure approval of the merger the surviving carrier was required to accept thirteen conditions for the protection of the employees of both carriers. These conditions have become the standard labor protective

\(12\) Id. at 342.
conditions which have been uniformly imposed in subsequent airline mergers.

There are two basic purposes of labor protective conditions: (1) to insure the integration of all employees of the newly merged company as rapidly and efficiently as possible;\textsuperscript{13} and (2) to make compensatory allowances to all adversely affected employees, \textit{i.e.}, to provide allowances for a "displaced employee," one placed in a worse position in regard to compensation than the position occupied immediately preceding the merger, or a "dismissed employee," one deprived of his employment as a result of the merger.\textsuperscript{14} An adversely affected employee must show that any change in his position was due solely to the merger. If any part of the change in his position is due to any cause other than the merger, for example, general economic conditions, the employee is not entitled to the protection of these conditions.\textsuperscript{15} The term "employee" is defined to include all but temporary or part time employees.\textsuperscript{16}

One requirement of the labor protective conditions is fair and equitable integration of seniority lists. The protective provisions require this to be done through collective bargaining between the carrier and representatives of the employees.\textsuperscript{17} Upon failure to agree through the collective bargaining process, the matter may be submitted to arbitration.\textsuperscript{18} The complexity and difficulty of integration of seniority lists can best be illustrated by example. Company B with 125 pilots is merged into Company A with 400 pilots. The merged company anticipates a force of 500 pilots and will have 25 surplus pilots. How, and by whom, will it be determined which 25 pilots are to be dismissed? Will all dismissed pilots be from Company B, even though some have substantially more experience than some pilots from Company A? If such determination is made based on seniority, it may be further complicated if Company A pilots have company wide seniority, while Company B pilots have a separate seniority roster at each base. Of equal importance is the method by which seniority will be determined among the 500 pilots to be retained.

\textsuperscript{13} Id. at 323.
\textsuperscript{14} Id.
\textsuperscript{15} Id. at 342 (APPENDIX A, Labor protective provisions).
\textsuperscript{16} Id. (§ 2(d)).
\textsuperscript{17} Id. (§ 3).
\textsuperscript{18} Id. at 346 (§ 13).
A complicating factor may be a difference in job description. Suppose Company B has flight engineers while all Company A cockpit personnel are required to be qualified pilots. The complexity and scope of potential problems is limitless. In each case it is necessary to combine each individual belonging to craft or class of Carrier A in a fair and equitable manner with the individuals belonging to the corresponding craft or class of Carrier B into one new integrated seniority list.

Other major provisions for labor protection include a requirement that the company resulting from the merger pay an allowance to any employee displaced by the merger, i.e., any employee who, though retained by the merged company, through seniority of another employee or through phasing out of a position, is placed in a worse position in regard to compensation than the position occupied immediately prior to the merger.\(^\text{19}\) This allowance is the difference between the displaced employee’s new pay and his average pay based on the average number of hours worked per month, during the twelve months preceding the merger transaction.\(^\text{20}\) Eligibility for a displacement allowance requires displacement within three years of the effective date of the merger. After three years, a displacement cannot be considered to have been occasioned by the merger transaction.\(^\text{21}\) The displacement allowance shall continue for a period not to exceed four years from the date of displacement.\(^\text{22}\)

If any employee is deprived of his employment as a result of the merger, rather than being retained as a displaced employee, he shall be entitled to a monthly allowance equal to 60% of his average pay immediately preceding the merger. This dismissal allowance extends for a period ranging from six months to five years, depending on his length of service with the carrier.\(^\text{23}\) The dismissed employee has the option of taking a lump-sum separation allowance in lieu of the monthly dismissal allowance. This allowance, like the monthly dismissal allowance, is based on the length of service to the carrier. If an employee elects to take the lump-sum separation allowance, he must resign and take such

\(^{19}\) Id. at 343 (§ 4(a)).  
^{20}\) Id. (§ 4(c)).  
^{21}\) Id.  
^{22}\) Id. (§ 4(d)).  
^{23}\) Id. at 343-44 (§ 5).
settlement in lieu of all other rights and protection thereunder.\textsuperscript{24} While an employee may be offered an alternate position by the carrier, no employee is required to accept employment that is not within the craft, class or field of endeavor in which he was previously employed in order to be eligible for the protection of these conditions.\textsuperscript{25} However, an employee may be required to relocate his residence to retain his position with the surviving company. If the move is required within three years of the merger, the company is required to provide moving and travel expenses.\textsuperscript{26} Provision is also made to protect the employee from loss in the sale of his home or disposal of an unexpired lease on a dwelling.\textsuperscript{27}

Finally, in case the parties are unable to agree on any provision under any of the protective conditions, either party may submit the dispute to arbitration as agreed upon between the parties.\textsuperscript{28}

\textbf{B. Amendments to United-Capital Protective Conditions}

While the standard labor protective conditions were finally established in the \textit{United-Capital} case, labor protective conditions were not originated in this case. The first case considering labor protection was in 1947.\textsuperscript{29} This case was followed by eleven additional cases in the thirteen intervening years during which the standard United-Capital provisions evolved.\textsuperscript{30} Neither the unions nor the carriers were satisfied with the provisions of \textit{United-Capital}. In the cases through 1971, a continuing effort to amend these conditions has been made. Some of the areas in which change has been most urgently requested would include:

\begin{itemize}
\item \textsuperscript{24} \textit{Id.} at 345 (§ 7).
\item \textsuperscript{25} \textit{Id.} at 346 (§ 12).
\item \textsuperscript{26} \textit{Id.} at 345 (§ 8(a)).
\item \textsuperscript{27} \textit{Id.} (§ 9).
\item \textsuperscript{28} \textit{Id.} at 346-47 (§ 13).
\item \textsuperscript{29} \textit{United-Western}, Acquisition of Air Carrier Property, 8 C.A.B. 298 (1947).
\item \textsuperscript{30} Mackay-Midiet Acquisition Case, 24 C.A.B. 51 (1950); Colonial-Eastern Acquisition Case, 23 C.A.B. 500 (1950); Wien-Alaska Air Acquisition of Byers, 23 C.A.B. 428 (1950); Continental-Pioneer Acquisition Case, 20 C.A.B. 323 (1955); Flying Tiger-Slick Merger Case, 18 C.A.B. 326 (1954); Delta-Chicago & Southern Merger Case, 16 C.A.B. 647 (1952); West Coast-Empire Merger Case, 15 C.A.B. 971 (1952); Braniff-Mid-Continent Merger Case, 15 C.A.B. 708 (1952); North Atlantic Route Transfer Case, 12 C.A.B. 124 (1950); \textit{United-Western}, Acquisition of Carrier Property, 11 C.A.B. 701 (1950); Monarch-Challenger Merger Case, 11 C.A.B. 33 (1949).
\end{itemize}
Instead of requiring the employee to prove the merger was the cause of his displacement, simply allowing the employee to show the merger, and then shifting the burden of proof to require the carrier to prove that such displacement or dismissal was not caused by the merger. The basis for this change is that the information required for proof is solely in the possession of the carrier. In addition, even if the employee could get such information, the cost would prevent him from doing so.31

(2) Requiring the merger of seniority lists as a pre-condition to approval of the merger. Under such a provision, approval by the Civil Aeronautics Board of the merger itself would be required to be delayed until all merger of seniority list matters had been settled between the carriers involved in the merger and the affected unions.32

(3) Redefining “displaced employee” from one who is placed in a worse position in regard to compensation by the merger, to an employee placed in a worse position in regard to compensation or in regard to rules and regulations and working conditions. In addition, it is argued that the average wage on which displacement compensation is based, should be adjusted by increases granted to employees not further affected by the merger. Further, the period during which an employee may become displaced should be increased from three to five years because of the possibility that all changes brought about by the merger transaction will not be effected within three years. Finally it is requested that the period during which the displacement allowance is paid be increased from four to five years.33

(4) Raising the dismissal allowance to 100% of the dismissed employee’s average income, the same as the displacement


allowance. The *United-Capital* provision called for 60% of average income in case of displacement. The basis of this argument is that an employee should not be further penalized if he is dismissed rather than if he is only displaced. The employee who has been terminated because of the merger should be entitled to an allowance at least as large as that provided the employee who is only displaced.34

The four points above represent a summary of the major changes which have been requested, but no attempt has been made to note every change which may have been requested from time to time. The requested changes have been resisted by the carriers, and their position has been sustained by the Board on the basis that the provisions, as set out in the *United-Capital* case, have generally worked well. Before any changes will be allowed there must be an affirmative showing of some mitigating circumstances requiring a change. Until such is shown, it is in the best interest of all to provide conditions which have proven successful and which can be relied upon. “The Board’s standard procedures have proven ‘singularly successful’ in accomplishing the objectives; proponents of change must demonstrate clearly that their alternative offers genuine advantages.”35

C. *Airline Basis for Labor Protective Provisions*

There is no specific requirement in the Federal Aviation Act36 requiring labor protection. The only provision in the Act relating to merger transactions requires the Board to approve of proposed merger, unless it finds that such merger transaction will not be consistent with the public interest.37 This section goes on to provide that such approval may be: “Upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe.”38

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38 Id.
A merger transaction may include benefits to the stockholders of the companies involved. It will also ordinarily involve benefits to the general public through new or improved services and/or equipment. These benefits to the public and the stockholders may be at the expense of some of the employees involved through loss of jobs or seniority. It is, however, reasonable to consider labor a part of the public and entitled to protection as part of the public interest. If labor, as part of the public, is damaged, at least to this extent, the merger transaction will not be in the public interest.  

Essentially, the solution involves balancing the public interest and the protection of labor. It is in the public interest to allow business to operate as free of restriction and condition as possible. The interest in giving the successor carrier complete discretion in the consolidation of its operation without regard to the effect on its employees must be balanced against the interest in providing protection for any employee injured by a merger transaction. The result has been a compromise. The surviving carrier is allowed discretion on retention, transfer and dismissal of its labor forces, but at the same time conditions are imposed to assure some protection to the adversely affected employees.  

The difficulty with balancing public interests is not in the weight given to each, but rather in defining what are public interests. The Federal Aviation Act refers to public interest, but does not define the term. The airline cases have not considered a definition of the public interest. It is assumed. The Board has only made determinations of which of the assumed public interests carry the greatest weight.  

In adopting labor protective conditions, the Board was not charting a new path. It was following the path explored by the Interstate Commerce Commission in regard to the railroads, a path which the I.C.C. began charting long in advance of the airlines. It is not surprising that the Interstate Commerce Commission was looked to for guidance. The Civil Aeronautics Act itself was patterned on the Interstate Commerce Act, and the Civil Aeronautics Board has looked to the Interstate Commerce Commission for guidance in those areas virgin to airline regulation.

89 United-Western, Acquisition of Air Carrier Property, 11 C.A.B. 701 (1950).
41 United-Western, Acquisition of Air Carrier Property, 11 C.A.B. 701 (1950).
In addition, the Interstate Commerce Commission was established to regulate the railroad industry in 1887, while similar regulation of the airlines was not adopted until more than fifty years later. To determine the validity of the airline adoption of railroad provisions, it is necessary to look to the railroad history of labor protective provisions.

D. Historical Basis for Airline Labor Protective Provisions: The Railroads

Today we look at the plight of the railroads, particularly with reference to passenger service, and the tendency is to consider this difficulty as a post World War II problem. The railroads, however, were in serious financial trouble long before World War II. There was Congressional recognition of the problem shortly after World War I, in the Transportation Act of 1920, in which the established national policy was declared to be consolidation of the railroads in the interest of economy and efficiency. In the preparation of a plan to implement this Congressional mandate, the Interstate Commerce Commission found that any great savings resulting from consolidations would be effected at the expense of two groups: the railroad security holders and the employees. The Commission estimated that 75% of the savings would be at the expense of the employees. Such harsh consequences could so seriously affect employee morale, however, as to require mitigation both in the interest of successful prosecution of the Congressional policy and in the efficient operation of the industry itself. The hardship created by this policy, therefore, had to be alleviated. Congress had previously established a pattern of protection for employees in the railroad industry upon which it was now in a position to build further. The Interstate Commerce Act, 24 Stat. 379 (1887), as amended, 49 U.S.C. § 1 et seq. (1984).


41 Stat. 491 (1920).

28 MONTHLY LABOR REVIEW 1191 (1929); 43 MONTHLY LABOR REVIEW 867 (1936).

Commerce Commission early recognized the interest of the railroads in employee relations. In 1892, in its annual report, the Commission declared that “relations existing between railway corporations and their employees are always in their public interest.”

In 1933, the Emergency Railroad Transportation Act was adopted. The purpose of this bill was to encourage and promote or require action on the part of the carriers to avoid unnecessary duplication of services and facilities. This Act provided, in part, that no railroad employee in service in May, 1933, could be deprived of his employment or be placed in a worse position with respect to his compensation by reason of any action taken under the Act. The Federal Coordinator of Railroads, appointed under the above-mentioned Act, recommended a comprehensive system of dismissal compensation in order to “. . . enhance the safety or efficiency of railroad service.” It was urged that management and employees negotiate this agreement rather than having it provided by legislation. A negotiated agreement between the parties involved would prove superior to any legislation. Three months of face-to-face bargaining followed. The result was the Washington Agreement entered into May 31, 1936. This agreement was signed by 219 (the vast majority) of the nation's railroads and by 21 labor organizations. The agreement went into effect June 18, 1936, for a period of five years.

The major provisions of this agreement called for an allowance for any employee affected by a railroad coordination providing the effect was caused solely by the coordination. The provisions of this agreement did not apply if the changes to an affected employee were brought about solely by other causes. A coordi-
nation was defined as any joint action of two or more carriers to unify their facilities or operations, either in whole or in part.\textsuperscript{55}

All parties agreed to apply the provisions to any coordination while the agreement was in force. If any party to a coordination was a party to the agreement, such party agreed the coordination would be made only on the basis of the agreement. Thus, the only coordination to which these conditions would not be applicable would be a coordination between carriers, none of whom was a party to the agreement.\textsuperscript{56}

A carrier was required to give employees 90 days' notice of an intended coordination and to include a statement of proposed changes and an estimate of the number of employees thereby affected. A conference was to be held within 30 days for the purpose of reaching agreement on the application of the agreement.\textsuperscript{57} Where employees would be displaced by the coordination, selection of those would be from all involved carriers on a basis appropriate to the occasion. If this was not possible, the question would be submitted to binding arbitration.\textsuperscript{58} The heart of the protective provisions provided that no employee because of a coordination would be placed in a worse position in respect to compensation or rules governing working conditions for a period of five years.\textsuperscript{59}

If an employee was displaced because of the coordination, he was entitled to a displacement allowance equal to 60% of his average monthly compensation based on his income over the preceding year. The length of the period during which the displacement allowance was to be paid would depend on the length of service with the railroad.\textsuperscript{60} An employee had the option of taking a lump sum settlement in lieu of the coordination allowance and resigning from the company without further rights. The amount of the lump sum settlement depended on length of service.\textsuperscript{61}

If an employee was required to move his place of residence as a result of, and within three years of, the coordination, the

\textsuperscript{55} Id. (§ 2(a)).
\textsuperscript{56} Id. (§ 3(a)).
\textsuperscript{57} Id. (§ 4).
\textsuperscript{58} Id. at 232-33 (§ 5).
\textsuperscript{59} Id. at 233 (§ 6(a)).
\textsuperscript{60} Id. at 233-34 (§ 7).
\textsuperscript{61} Id. at 235 (§ 9).
company paid the cost of moving the employee and his family. Further, if moved and then furloughed within three years of the date of coordination, the employee had the option of being moved back to his first residence at company expense. Where an employee was required to move his place of residence because of the coordination, provision was made to prevent loss by forced disposition of the residence, whether the employee owned the premises or was renting. Finally, in case of disagreement between the parties under the agreement, any dispute was to be submitted to binding arbitration.

A comparison of the Washington Agreement with the terms provided in the United-Capital merger make it readily apparent that while the airline agreement was narrower, its basis was the Washington Agreement. In fact, the Washington Agreement has provided the basis for all subsequent protective provisions in both the railroad and airline industries.

While the Washington Agreement was a basis for labor protection in railroad mergers, labor considered it no more than a beginning point. At the time of this agreement, the terms were considered the best that could be obtained. It is not surprising, in the light of the above history, that in the cases subsequent to the adoption of the Washington Agreement, railroad employee groups devoted considerable time to securing broader provisions. An early result was a decision of the United States Supreme Court that the Interstate Commerce Commission had the power, even without the Washington Agreement, to prescribe labor protective conditions. This power was later codified in the Transportation Act of 1940 by a requirement that protection be provided employees affected by a railroad coordination. Under this statute, the Commission was required, as a condition of its approval of

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62 Id. at 235 (§ 10(b)).
63 Id. at 235-36 (§ 11).
64 Id. at 236 (§ 13).
65 The employee groups believed they were entitled to more liberal provisions and would continue to strive for such. Statement of Geo. Harrison, Chairman, Railway Labor Executives' Association, the Organization representing the organized employees, made before the H. of Rep., Comm. on Interstate and Foreign Commerce, Feb. 3, 1939.
any coordination, to insure a fair and equitable arrangement to protect the railroad employees affected.\textsuperscript{68}

E. \textit{Amtrak and the Airlines}

In 1970, the Rail Passenger Service Act became law.\textsuperscript{69} This Act created the National Railroad Passenger Corporation (Railpax), designed to take over and operate intercity passenger rail service, the system popularly known as Amtrak. The Act requires fair and equitable arrangements to protect the interests of employees affected by discontinuance of intercity rail service.\textsuperscript{70} The railroads and unions were given an opportunity to agree to a plan of protection through the collective bargaining process. They were unable to agree to the provisions to be adopted, however, and it was left to Secretary of Labor Hodgson to provide the labor protective conditions. These conditions will be part of any agreement by which the National Railroad Passenger Corporation takes over the intercity passenger service of a railroad. This plan went into effect May 1, 1971, "... to protect the interests of employees who are displaced or dismissed as a result of the new route system created by the National Railroad Passenger Corp."\textsuperscript{71}

These provisions are based upon the Washington Agreement of 1936, although they are expanded and broadened. Their major purpose is the protection of employees affected by discontinuance of intercity rail passenger service. However, instead of requiring the employee to show that displacement was caused by the merger transaction, the railroad must show that the effect on the employee was caused by something other than the merger transaction. The burden of proof has been shifted from the employee to the carrier.\textsuperscript{72}

The period of protection is extended from four years to six years and extends from the date of displacement, rather than from the date of the merger transaction.\textsuperscript{73} The exact maximum

\footnotesize
\begin{itemize}
\item \textsuperscript{70} These provisions are designed as Appendices C-1, C-2 and C-3, under § 405 of Pub. L. No. 91-518.
\item \textsuperscript{71} U.S. DEP'T OF LABOR, PRESS RELEASE 71-217, April 16, 1971.
\item \textsuperscript{72} Id. (Appendix C-1, preamble).
\item \textsuperscript{73} Id. at 2 (Art. 1(1)(d)).
\end{itemize}
protective period will depend on the length of employment in accordance with the formula in Section 7(b) of the Washington Agreement. A dismissed employee has the option to take a dismissal allowance and to continue to participate in all fringe benefits to which he would otherwise be entitled, or he may take a lump sum settlement in lieu of all other benefits. If the employee selects the dismissal allowance, it is based on 100% of the average monthly income, the same as the displacement allowance.

Any worker who has to move his place of residence due to a job site change brought about by a discontinuation of rail service will receive moving expenses for himself and his family. Further, if such an employee is furloughed within three years after transferring to another job site and chooses to move back where he was previously employed, the railroad will pay moving expenses. If an employee so requests, he may be granted priority to fill a position in a different class or craft for which he is, or by retraining can become, qualified for. Retraining is to be provided at carrier expense. Such, however, may not contravene any collective bargaining agreement.

Benefits are applicable, not only to railroad employees, but also have been expanded to include workers in other railroad related enterprises owned, used by, or which use the railroads, including such operations as railway express and rail ferry companies.

This recitation is not an exhaustive list of the changes brought about by Amtrak labor provisions. It is intended merely to illustrate the reliance on the Washington Agreement as a foundation, together with the expansion, improvements and increased labor benefits provided by this 1971 development.

At the time of the Amtrak legislation, the airlines were in a period of greater merger activity than had ever been experienced in commercial aviation history. This period has seen the filing of

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74 Id.
75 Id. at 10 (Art. I(8)).
76 Id. (Art. I(7)).
77 Id. (Art. I(8)).
78 Id. at 10-12 (Art. I(9)).
79 Id. at 17 (Art. II(1)).
80 Id. at 18 (Art. III).
nine major merger applications before the Board. In addition, others are in the negotiation or shopping stage. Of the 12 trunk airlines, only United is free of at least rumor that it is looking for a merger partner, and this is because, as the largest domestic air carrier, United is considered to have reached the maximum acceptable size.

This activity in the commercial aviation field has brought with it increased pressure to expand the United-Capital labor provisions at least to the level of the Amtrak provisions. The Board declared that the standard labor protective provisions, that is, those adopted in the United-Capital merger, were singularly successful and that no changes would be made therein until there was a positive demonstration of the advantage offered by a proposed alternative. This was further supplemented by standards for determining acceptability of domestic merger agreements, which were adopted by the Department of Transportation in consultation with the Department of Justice. These rules were issued August 31, 1971, and provided that protection afforded labor in the merging firm should be in accordance with the present policies of the Board, specifically noting that changes in the United-Capital provisions were rejected in the Northwest-Northeast Merger, the last airline merger decided prior to adop-

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82 For just two of many examples that could be given: Trans-World Airlines and Braniff Airlines have agreed in principle to merge. AVIATION WEEK & SPACE TECHNOLOGY, Oct. 11, 1971, at 23. Pan-American Airways and Eastern Airlines have discussed merger. AVIATION WEEK & SPACE TECHNOLOGY, Feb. 15, 1971, at 36.

83 United Airlines, Eastern Air Lines, Trans-World Airlines, American Airlines, Pan-American World Airways, Northwest Airlines, Northeast Airlines, Braniff Airways, Delta Airlines, National Airlines, Continental Air Lines, Western Airlines. This list has now been reduced to 11, with the approval of the merger of Northeast into Delta Airlines. (No. 23315, Order Nos. 72-5-73, 72-5-74 (C.A.B., April 24, 1972).


86 UNITED STATES DEPT OF TRANSPORTATION, EXECUTIVE BRANCH CRITERIA FOR DOMESTIC AIRLINE MERGER PROPOSALS, Aug. 31, 1971.

tion of these standards. This policy was reaffirmed, and the expanded provisions of Amtrak rejected, in the latest Board decision considering labor protective provisions, decided in March, 1972.

II. PUBLIC INTEREST IN LABOR PROTECTIVE PROVISIONS

A. Defining Public Interest

To determine whether labor protective provisions in airline mergers are in the public interest, it is necessary to consider the term "public interest" itself. The term is used often, but seldom defined. What does the term "public interest" mean? The unabridged dictionary does not define the term, but it does define "public" as "relating to, or affecting the people as an organized community"; "devoted to the general or national welfare"; "the people as a whole." "Interest" is defined as "to concern, be of importance"; "to involve the interest or welfare of."

Public interest is defined by a legal dictionary as something in which the public has some interest by which their legal rights or liabilities are affected. It cannot cover an area so narrow as to be mere curiosity, or the interests of particular localities which may be affected by the matter in question. It refers to the community at large.

Public interest concerns the community as a whole, rather than any individual or group of individuals. In concept this is clear. In application a problem may arise where a substantial group is involved. How is a determination made whether such group is individual or the public in general? The airline unions represent a large number of individual employees. Is the collective membership of these unions sufficient to be considered a public interest? What number of individuals is adequate to change a group from individuals to the community as a whole? There is no precise line dividing that which concerns only a group of individuals and that which falls within the public interest.

88 Supra note 86, at 8.
91 Id. at 1178.
The Federal Aviation Act\textsuperscript{93} speaks of public interest in various instances: in the policy section, consideration of enumerated items is required in the public interest;\textsuperscript{94} no route may be abandoned unless such abandonment is found to be in the public interest;\textsuperscript{95} no foreign carrier may engage in foreign air transportation unless such transportation is in the public interest;\textsuperscript{96} the Civil Aeronautics Board may waive the 30 day notice required of a change in rates when such is in the public interest;\textsuperscript{97} the Civil Aeronautics Board shall approve a consolidation or merger unless it finds that such is not consistent with the public interest;\textsuperscript{98} finally, the rule of ratemaking shall consider the public interest.\textsuperscript{99}

These varied references in the Federal Aviation Act indicate that Congress considered public interest of prime importance. Nowhere, however, did Congress define public interest nor did it spell out the factors to be considered in a determination of the public interest. Rather than a failure on the part of Congress, this omission expressed an intention to refrain from a definition which might limit the scope of the Act. The concept of public interest is not subject to a static, universal definition. What is in the public interest may depend upon the circumstances, the time, and the parties involved, as well as upon various other factors.

The section referring to abandonment of routes is a good example.\textsuperscript{100} Is it in the public interest to abandon a route that five members of the public are using a day? At least to those five members of the public it is against their interest. If the general public means the public in general, speaking of a broad spectrum of the public, then five individuals would not constitute the public. This may be so, but where is the point at which reference is to the general public rather than individual members of the public? If this route to be abandoned is multiplied by 100, 500 or 1,000, is it still referring to individual members of the public or have they now become the general public? Would it

\begin{footnotesize}
\begin{enumerate}
\item Supra note 1.
\item 49 U.S.C. § 1372(b) (1970).
\item Supra note 95.
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\end{footnotesize}
make a difference if the number on each route was ten or 50 instead of five?

Assuming a public interest, it will be necessary to determine if other public interests are involved. If so, appropriate action will be determined by a balance of interests. An example is economic feasibility of air service. An airline will provide service to a city large enough to provide a profitable operation, but will it provide service to a town too small to economically support air transportation? It could not be said there is no public interest in small towns, or that the needs of the population of a small town does not constitute public interest. The public interest in providing service to a small town would have to be weighed against economic viability of the airline, the public interest in keeping the means of public transportation solvent.

Public interest may vary according to the interest of the group involved. Barely 50% of the United States population has ever flown. To the half that has never flown, any government money devoted to aviation, such as the cost of operating the Board itself, will be only a cost without benefit. The only advantage is to the portion of the public who, by use, benefit from aviation. Who comprises this group differs from time to time, as does the size of the group.

What is in the public interest today may not be in the public interest tomorrow. One group constituting a unit with public interest today may have none tomorrow. One public interest not sufficient to outweigh other factors today may be ample tomorrow. The term public interest is not capable of precise definition because it is never static. The prevailing public interest can be determined only by application of general principles to a particular situation.

B. Airlines v. Railroads

Labor protective provisions in the railroad industry were based on a Congressional policy specifically expressed in 1920,101 which encouraged railroad mergers because of the oversupply of railroads and because of the weak financial position of the rail carriers. This policy became more important in the 1930's when

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101 Supra note 44.
the United States was in a period of depression with widespread unemployment.\footnote{For example, in 1936, at the depth of the depression, 37 of 139 Class I railroads were in receivership or trusteeship. H.R. Doc. No. 593, 75th Cong., 3d Sess., vol. 16, at 25 (1938).} The policy of encouraging mergers could only lead to further unemployment, even though it would have the advantage of consolidating and strengthening rail transportation. What would provide the greatest benefit for the country as a whole, \textit{i.e.}, what would be the best policy for the benefit of the public interest? Unquestionably, a policy which expanded unemployment during a depression would not be in line with the public interest in improvement of the economy. A balance of the cost to the railroads, \textit{vis-à-vis} the benefit of extending employment, or at least providing compensation for any extension of unemployment would be required.

The public had a two-fold involvement. First, there was an interest in the cost of passenger transportation. This was of primary concern to those members of the general public using railroad transportation. The second involvement was broader in scope—the interest in encouragement of the economy and discouragement of extended unemployment. There is little difficulty in determining where the greater public interest lay, and which involvement had the greater effect. This was an extreme situation, and it put a relatively small group, that portion traveling by railroad, against an infinitely larger group, the whole population of the United States. Because the situation was urgent, Congress was able to take action which might otherwise have been considered extreme in its scope. This action was the specific legislative provision requiring that employee protection be provided in carrying out the expressed Congressional policy of railroad merger.\footnote{Supra note 48.}

Today conditions in the railroad industry are, again, at a low ebb. Consideration must be given to the cost to the general public, as well as to the cost to one industry, the railroads, which has been on the verge of bankruptcy. In the introduction of Railpax, Congress has again specifically declared a policy that it is in the public interest to make provision for dismissed or displaced employees.\footnote{48 U.S.C. § 565 (1970).} Certainly it is not unreasonable to con-
clude that Congress has recognized an extreme situation and provided a radical remedy.

When the airline mergers were first considered it was reasonable to look to the railroad industry for guidance because regulation in the aviation industry was patterned on regulation in the railroad industry.\textsuperscript{105} It was not reasonable, however, to simply accept railroad regulation as automatically applicable to airlines without independent consideration given to the differences and times faced by the railroads vis-à-vis the airlines. By the time the question of airline merger and employee protection was first raised,\textsuperscript{106} the railroads had twenty-seven years of explicitly expressed Congressional policy;\textsuperscript{107} eleven years with the industry accepted Washington Agreement;\textsuperscript{108} and, seven years with a specific statutory provision for railroad labor protective conditions.\textsuperscript{109} Yet in the airline industry there was no expressed Congressional policy either in regard to merger or to employee protection. With the importance and consideration given the question in the railroad industry it is difficult to comprehend that this matter was simply "overlooked" when it came to considering aviation. This is particularly true because railroad and aviation legislation were both considered by the same men and the same Committees in Congress.\textsuperscript{110}

A more realistic assumption is that any omission in the aviation field was intentional. In support of this argument is the fact that economic regulation of commercial aviation was first adopted by Congress in 1938,\textsuperscript{111} at a time when aviation was struggling to get a start and to compete with other forms of transportation. The struggle was to get a start, not to reduce the competitors to a small number who could economically compete. By railroad standards the number of commercial air carriers has never been large.

In the late 1940's and early 1950's, when airline mergers were first receiving serious consideration, loss of employee jobs was

\textsuperscript{105} C. Rhine, The Civil Aeronautics Act Annotated (1939).
\textsuperscript{106} United-Western, Acquisition of Air Carrier Property, 8 C.A.B. 298 (1947).
\textsuperscript{107} The Transportation Act of 1920, 41 Stat. 491 (1920).
\textsuperscript{108} The Washington Agreement was adopted June 18, 1936.
\textsuperscript{109} \textsuperscript{Supra} note 67.
\textsuperscript{110} The Senate Committee on Interstate Commerce and the House of Representatives Committee on Interstate and Foreign Commerce.
\textsuperscript{111} The Civil Aeronautics Act, 52 Stat. 973 (1938).
not a major problem. The airlines were in the post World War II era of tremendous expansion. Employment with another carrier in the industry, or in some other industry, was easily obtainable.

Both the railroads and the airlines are forms of public transportation. As such both are public utilities and subject to public regulation. The experience of the railroads is sufficient to provide a basis for airline regulation in general. Because of the difference in background and conditions between railroads and airlines, however, there is no railroad background which is applicable as a justification for labor protective conditions in airline mergers. The Board has not attempted to find justification for its merger labor policy in the railroads. It has rather based it upon the general concept of public interest as a policy statement.

We have said on numerous occasions, and we repeat here, that some realignment of the air transport map by mergers route transfers would be in the public interest.112

There is hardly an analogy between a Congressional policy declared in legislation, and a statement by the Board of an administrative policy. Nevertheless, this is the only justification for adopting protective provisions for the airline employees.

The Board further noted that the railroad formula was worked out in the railroad industry not by administrative order but by the collective bargaining process:

It would be an act of statesmanship for airline managements and airline labor organizations to work out by voluntary negotiation a general program to mitigate the hardships to employees incident to such transactions.113

In the absence of any negotiated agreement in the airlines, the Board did not hesitate to provide conditions itself. The railroads' Washington Agreement was used as the basis for the airline labor protective conditions.114 The public interest which the Board found was the benefit which would ordinarily accrue to the general public through new or improved service or equipment. This public benefit would be at the expense of employees who were displaced or dismissed because of the merger. Labor, as a

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112 Supra note 39, at 710.
113 Id.
114 Id.
part of the general public, is entitled to protection in the public interest.\textsuperscript{115}

Where the main purpose of the merger is economy, efficiency in operation or retrenchment for survival, one of the results of the merger may be a loss of jobs to some members of the labor force. However, in the case of an expanding industry this result does not necessarily follow. Rather than retrenchment, the purpose of merger may be expansion. Particularly in a regulated industry merger may be the easiest method of obtaining coveted new routes or territories.\textsuperscript{116} When intended expansion is combined with a technical and highly skilled labor force, the result on labor may be expansion rather than contraction.\textsuperscript{117}

In its ordinary connotation public interest is a broad term referring to the community at large, or the people, or at least a multitude of people. It ordinarily does not apply to private rights.\textsuperscript{118} Labor is a part of the general public and entitled to protection in the public interest. This is undoubtedly correct if labor is being used in the broad sense as referring to the general group of persons employed by industry. It would probably not be too confining to limit the term to those employees belonging to all labor unions or even to all employees of a particular industry, particularly if this concept is in reference to this group's relationship with the balance of society, \textit{i.e.}, the effect on society of the balance of the general public vis-à-vis the action of, or to, this group. This is the frame of reference for the term "labor" when used in the railroad industry. The problem was not that the effect of a particular merger might be to displace some employees, but rather that a necessary concomitant of the policy of encouragement of merger would be loss of jobs and an effect on the economy of the locality or the whole country.

The reference by the Board, however, is to none of these definitions of the term "labor." Instead, the reference is to a

\textsuperscript{115}Id.\textsuperscript{116} E.g., the case of Northeast Airlines. Both the proposed merger with Northwest Airlines, which was finally aborted, No. 21819 (C.A.B., 1970), and the Delta merger, which was finally consummated, No. 23315 (C.A.B., 1971), considered Northeast's Miami-Los Angeles Southern Tier route as the pium. Denial of this route was the reason the Northwest merger was aborted.\textsuperscript{117} The United-Capital merger is such an example.\textsuperscript{118} Royal Milling Co. v. FTC, 58 F.2d 581 (6th Cir. 1932); State v. North Dakota Hosp. Serv. Ass'n, 106 N.W.2d 545 (N.D. 1960).
relatively small and private group, those employees of a specific air carrier involved in a particular merger. These employees are part of the general term "labor," but it is difficult to find a part of a particular labor force, concerned only with their private rights, as being the representative of the general term "labor," a valid consideration to include within the public interest. An attempt to include this narrow concept of "labor" within the public interest is made more difficult because this is not action in furtherance of a Congressional policy but only in furtherance of a statement of administrative policy.\textsuperscript{119}

The case against including employees of the airlines in the public interest is strengthened by the fact that Congress has shown that it is able to act where necessary. In the case of the railroads, it has acted several times, the last time in 1970.\textsuperscript{120} Yet, in the case of the airlines, it has failed to act. At the time the first Civil Aeronautics Act was passed in 1938,\textsuperscript{121} labor protective provisions were already being required in the railroads.\textsuperscript{122} The public interest was a prime consideration in this legislation and yet Congress was silent on labor protective provisions in case of merger. Since this beginning in 1938, Congress has had the opportunity to act during the periods of airline difficulty, yet it has failed to do so. That Congress can act, and act dynamically, is evidenced by the railroad legislation of 1970.\textsuperscript{123} Yet in the case of airlines, Congress has remained silent.

We have already noted the time and atmosphere during which the Washington railroad agreement was being considered. We have also noted that the periods of airline mergers were completely different. Post World War II years were years of an expanding economy. In spite of short periods of arrested growth, or even loss, the airlines were enlarging and air traffic was growing. Would it be in the public interest to insure the job or protective conditions for an airline employee in 1950? Certainly,

\textsuperscript{119} United-Western, Acquisition of Air Carrier Property, 11 C.A.B. 701 (1950).
\textsuperscript{121} 52 Stat. 973 (1938).
\textsuperscript{122} The Washington Agreement, signed in 1936, was a result of the provisions of The Emergency Railroad Transportation Act, 48 Stat. 217 (1933).
\textsuperscript{123} Pub. L. No. 91-518, the legislation providing for Amtrak.
the situation was considerably different from the 1930's. In 1950, other considerations had to be recognized. The flying public would eventually pay the bill for extra labor protection. Was such a burden justified in a rising economy when jobs, not only in aviation but in all industries, were relatively easily obtainable? It is desirable for the airline employee to have the peace of mind that protective conditions can provide. The question is, however, whether such can be justified in light of the cost to the general public; whether such can be justified as part of the public interest.

Today's airline merger decisions must be considered in the light of present conditions in aviation. The airlines have been emerging from a period of substantial red ink. In addition, the whole economy of 1970-1972 has been depressed. Should this temporary economic decline in one industry be the responsibility of the general public? What conceivable public interest is involved which would require the total economy to support losses to this particular segment of the economy? When the term public interest is again considered it is difficult to see how the benefit to individual employees of individual airlines, or for that matter the cost to the airlines, or even the benefit to the flying public, could balance the scales vis-à-vis the economy of the nation.\textsuperscript{124}

If the interests involved were analyzed, we would not have statements such as "it is clear that airline and rail employees have a need for similar protection."\textsuperscript{125} This statement was supported by no evidence, and it is far from clear why an industry that is bankrupt and requires a governmental corporation to continue providing passenger service is comparable to a highly viable expanding industry, which, while it may have had some bad years, is generally healthy and expanding. Today, in the light of our present overall economic situation, the strongest arguments of the public interest would require only such agreements as would expand the economy. Any agreement of an

\textsuperscript{124} Whether such is sufficiently desirable to provide employee protection as an added cost of air transportation, to be paid by the flying public, is a question we are not considering. The only question for consideration is whether such is of sufficient public interest to be required as a matter of law in all cases.

inflationary nature would be contrary to the public interest. Guaranteeing unneeded employment or payments where work was not performed would be counter-productive in relation to the public interest in the general economy. Rather than strengthening the economy, such policy would lead to further deterioration of the public interest through broadened inflation.

An additional justification advanced for labor protective provisions in airline mergers is the public interest in continued transportation service. If such provisions were not made some labor strife would follow. Strikes in commercial aviation would be detrimental to the maintenance of public transportation and therefore it is in the public interest to provide employee protection which would avoid labor strife. Airline employees, and particularly pilots, are in a unique position. Their jobs require a high degree of proficiency and a vast amount of training. In the event of a pilot strike, an airline will be shut down, or at the very most, the airline may have enough qualified management personnel to operate token service. This will have an effect on transportation which is adverse to the general public.

If public interest in avoidance of labor strife justifies protective provisions in merger matters, then it is even more essential that labor strife be avoided in other matters, such as contract negotiation. It is not sufficient to provide protection in one area only. This is particularly true because this one area, merger, is an area of relatively rare occurrence to the individual airline. Yet, provision to avoid labor strife has been made in no area other than merger. Strikes are not prohibited, nor has any legislation been enacted requiring employee protection to prevent strikes.

Strikes are not uncommon. The latest major airline strike crippled Northwest Airlines for 95 days. When settlement finally came it was based upon agreement between the parties involved. No effort was made to interpose legislation to prevent or terminate this strike, nor has legislation been proposed as a solution to airline strikes which are based on contract negotiations.

Labor peace is always desirable and is a goal of both labor and management. An argument for public interest in settlement of any strike can be made, regardless of the industry, and regardless

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of whether such industry is public, private or regulated. Yet, in an area of genuine public concern, that of treatment of public employees, the direction is toward more employee rights to enforce contract demands, rather than more regulation, and less labor right to negotiate and strike if necessary. Today one need only look at the daily newspaper to see that public school teachers, policemen, firemen, and other public employees enforce contract demands through strikes. The direction is toward less control and more labor freedom. If there is a public policy which justifies a contrary direction, such public policy must be clearly enunciated. Undoubtedly, Congress could determine that the public interest required labor protection to avoid labor strife, but such would have to be clearly stated and uniformly applied. In the field of commercial aviation, Congress has not spoken at all. The Board has spoken, but only in the case of merger. That labor peace is a specious argument for labor protective provisions is clearly shown by the fact that it is applied only in the narrow merger situation, and not to the much more common and potentially disruptive problem of contract negotiation.

C. Private Employees v. Public Employees v. Quasi-Public Employees

There is little, if any, justification for labor protective provisions based on the public interest. Nevertheless, such provisions do exist. Further they have become an established requirement of all airline merger transactions. Accepting the fact that such labor protection is in the public interest, a second issue is presented: whether such labor protection should be limited to airline employees, or whether protection should be available to all employees, whether in public, private or quasi-public industry. Is there any justification for airline employees that cannot, and should not, be applied also to employees in a private or public area? Is the term public interest as applied to the airlines herein, also applicable to private or public industry?

The difficulty in defining public interest has been previously discussed. Just as nebulous and just as difficult is the application of the concept of public interest. An example is the public interest which demands reasonable rates from a utility whether it furnishes

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127 See text accompanying footnotes 90-100 supra.
transportation or energy, such as gas or electricity. The same public interest is not found in rates charged by private industry. General Motors is not required to set a reasonable price on its automobiles, because an automobile is not considered such a basic necessity that its availability must be guaranteed by the government. At the same time, there are provisions in the form of anti-trust laws to insure that the price will be set by competition. The fear of losing sales to a competitor will keep the price reasonable.

To say that the public has no interest in the price of automobiles is not correct. What is actually meant is that under our competitive system the price of a Ford will keep the price of a Chevrolet reasonable. To insure that competition and cost set the price, anti-trust laws prevent Ford and Chevrolet from agreeing to an artificial price. Because of these factors, government supervision, apart from enforcement of anti-trust laws, is not necessary. It is justified in a public or quasi-public industry because of limited, or non-existent, competition. Public regulation is a substitute for private competition to insure the rights of the consumer. There is a definite public interest, an interest on the part of members of the general public, in prices of all consumer goods.

There is a public interest in maintaining public services without interruption, and this has been the basis for refusing to allow public employees to strike. In the area of quasi-public industry, the government has invoked Congressional sanction to force railroad employees back to work because of the adverse public interest caused by a shutdown of the nation’s railroads. Yet, is there any less interest in General Motors remaining in operation? Not only can an extended strike at General Motors affect the individual’s ability to buy a new car, and the price he pays for that new car, but because of the size of General Motors, and because of the wide variety of items necessary to manufacture an automobile, a strike will have an impact on many other industries from glass to basic steel to rubber to gasoline. Certainly this impact would have an effect on, and could be detrimental to, a very large segment of the general public.

This same reasoning applies to other private industries. The whole population is affected if the steel mills close down because
of the many dependent industries. Are we any less affected if all the flour millers, or all the bread bakers or all the frozen food manufacturers were to be closed? As an individual, any one person may be more affected by one particular strike than another. One person may not use frozen food, while another may rely on frozen food almost completely. This will be true whether the industry is public, private or quasi-public. A school strike is not of immediate concern to one who does not have children in that school; an airline strike is not of immediate concern to one who is not going to the area serviced by the struck airline.

If we speak in terms of any particular private, consumer industry the answer may be that it is not a basic, public service and therefore there is no particular public interest therein. If we speak of the result of a strike in a private, consumer industry on the basic economy the answer will be different. The result will have the same public interest as has been found in public or quasi-public industry. The public interest is the need to maintain a strong, profitable and viable company. For proof that private business, when it affects such, will be a matter of public interest we need look no further than the present wage and price controls.\[128\] There is no pretense of a limitation to the area ordinarily subject to government regulation. These controls were set up to require that private business would be operated in such a manner as to enhance the general welfare of the whole country; that all business, whether public, private or quasi-public, would be operated, at least in regard to wages and prices, for the benefit of the public interest.

In terms of the general economy of the nation, the public interest will be concerned with all industry. The concern with industry is not whether it is private, public or quasi-public. The public interest concern is with reference to the economic effect on the community. No reason is apparent that would require a different rule in relation to our basic question, labor protective conditions in mergers. There may be particular reasons for applying special rules where special considerations make it necessary. Such an instance is the Congressional mandate in the case of the railroad employees. Another might be particular produc-

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tion requirements in the event of a national emergency. Under ordinary circumstances, if labor protection is in the public interest, then it should be applicable to all industry with sufficient scope to affect the public interest, without regard to whether such industry is, in nature, private, public or quasi-public.

CONCLUSION

The evidence indicates that the basis for labor protective provisions in aviation is not its peculiar status as a quasi-public industry. It appears instead that the basis for airline protection is blindly following the terms provided for the railroad industry, terms which were provided under circumstances foreign to the airlines and peculiar to the status of the railroads. The provisions in the railroad industry were based on the expressed policy enunciated by Congress, that such provisions in the railroad industry were in the public interest. This policy has never been enunciated in Congressional consideration of the airline industry.

The factors which are to be considered in making up the general term "public interest" should be subjected to continual scrutiny by the appropriate authority, the Interstate Commerce Commission, the Civil Aeronautics Board or some other agency. Such agency has a duty to insure that the public interest is continually considered so that the statutory standard will be met, although some of the criteria going into public interest may change from time to time. However, the right to redefine public interest in terms of a narrow, particular interest rests solely in Congress. Until such time as Congress acts, the Board has the duty, not to follow another industry, but to examine the term public interest as intended by Congress for the airline industry. As Congress has not seen fit to narrow the definition of public interest in the Federal Aviation Act, but rather used it in its broad, general sense, the Board's duty is to determine the public interest within this framework. Such factors as benefit to employees, benefit to the flying public, relation of each of these to the general economy of the nation, as well as other items which may be determined important from time to time, must be examined before a valid determination of the public interest involved in employee protective provisions in airline mergers may be made.
In determination of the public interest, it is also necessary to consider the transportation industry, a quasi-public industry, in its relationship to public industry and private industry. In an earlier era there was a special relationship to public employees and government, based upon the sovereignty of the state. This might have been a basis for special consideration in a public industry, but certainly it cannot be the basis for special consideration not available either to public industry or to private industry. In fact, certain portions of this whole concept upon which this doctrine was based are dissolving, so that while we still have a doctrine of sovereign immunity, nevertheless the rights of employees of public industry are growing closer and closer to the rights of employees in private industry. While the state is a sovereign, in terms of employee relations, less and less distinction is being made between public and private industry.

It is the conclusion of the author that labor protective provisions in the airlines cannot be justified by the provisions in the railroad industry. Labor protection is an established part of airline mergers. After twelve years of standard application there is no question of reversal of this policy. Consideration of the tenuous ground of such provisions should, however, restrain further expansion of such provisions until there is clear Congressional mandate.

The necessary conclusion is not that airline employees should not be entitled to protection in case of merger. Rather, the question to be asked today is whether only employees in special situations, such as the railroads, should be entitled to labor protective provisions as a matter of law, or whether all employees, regardless of the industry in which they are employed, should be entitled to some form of protection in the case of merger. I do not pretend to have the answer to this problem. At this time I can only present the problem, and suggest that this is an area for immediate study by all segments of the economy—by labor, by management and by the government. The answer might be that our economy now demands that in mergers in any industry, as a matters of law, employees receive protection against dismissal or displacement.

It does seem evident that if the answer is no, i.e., if any labor protection agreement should be arrived at only through collective
bargaining, without sanction of law, there can be no justification for special consideration to airline employees. There can be no basis for one answer for employees of a quasi-public industry and another answer for employees of private or public industry. There does not seem to have been any justification for past special consideration to airline employees, and it does not seem that there are presently any valid bases for special airline consideration.