Competitive Enterprise Institute
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Advancing Liberty – From the Economy to Ecology

August 20, 2009 **No. 159**

The Politicization of the FAA Reauthorization Act

How UPS and the Teamsters are Using Federal Law to Target FedEx

By Russ Brown*

In an economy slowly clawing its way out of the most serious recession in over a half century, it is hard to imagine Congress looking for ways to saddle a key sector with new taxes and restrictions. But that is exactly what Rep. James Oberstar (D-Minn.) is proposing in the FAA Reauthorization Act of 2009. The bill nearly doubles the Passenger Facility Tax. It reduces efficiency by requiring deplaning after every three hours. And then there is Section 806, which singles out a specific company to burden it wit a patchwork of burdensome new work rules. Call it the "union payback" provision.

Section 806, an amendment also proposed by Rep. Oberstar, dramatically changes the rules upon which FedEx, one of America's most successful companies, has built its business. It changes the labor jurisdiction of FedEx workers from the Railway Labor Act (RLA) to the National Labor Relations Act (NLRA).

This bill already passed the House of Representatives. It was read twice in the Senate, where it now awaits action in the Commerce, Science and Transportation Committee. Unless the Senate removes the amendment, Oberstar's proposal could devastate a company that could play a critical role in the recovery of the American economy.[i]

What are the differences between the Railway Labor Act and the National Labor Relations Act?

National Labor Relations Act. The workforces of most private sector businesses are regulated under the National Labor Relations Act (NLRA), which was passed in 1935 and was substantially amended in 1947. This law gives unions the ability to organize workers as their exclusive representative for purposes of collective bargaining. Under the

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NLRA, when a union wants to organize a company, it must show interest from the employees in a designated bargaining unit—a group of employees performing a similar job or who share a "community of interest" with each other. The union can do this by collecting signed authorization cards from at least 30 percent of the employees in the proposed bargaining unit. Under NLRA this can be done on a location-by-location basis—which allows the union to organize specific facilities, rather than on a company-wide basis. Once the union has collected enough authorization cards, it can petition the National Labor Relations Board for an election.

Under the NLRA, a simple majority of votes cast in any election wins. For example: A company has 10 employees in a bargaining unit, and on the day of the representation election four of the 10 employees show up to vote. If three of those four employees vote for the union, then the union would win the election on the basis of the majority of votes cast.

Railway Labor Act. The workforces of some private sector businesses in the transportation sector—mainly railways and airlines—are regulated under the Railway Labor Act (RLA). Congress passed the RLA in 1926 and expanded it to include airlines in 1936. It amounted to a rare collaboration between management and labor designed to avoid disruptions to America's transport network through strikes and other kinds of work stoppages. To this end, the Act imposed mandatory mediation and gave the President the ability to order workers back to work.

Like the NLRA, the RLA allows for unions to organize workers for the purpose of negotiating a collective bargaining agreement as the workers' exclusive representative. However, where the NLRA allows unions to organize on a location-by-location basis, under the RLA, a bargaining unit must include *all* the workers of the same classification throughout the entire company.

This is one of the safeguards to keep commerce moving. Railways and airlines are network industries, whose capital investments can stretch across several states and even across the entire nation. By requiring unions to organize on a company-wide basis, the RLA helps to avoid the creation of a patchwork of work rules that piecemeal unionization at specific facilities would bring. Balkanized work rules detract from the standardization and economies of scale upon which network industries rely.

Another difference between the two statutes is the organization and election process. First, under the RLA, authorization card interest must reflect 35 percent of the employees in a given bargaining unit across the entire organization, rather than the 30 percent required under the NLRA. Second, in an RLA election the union must receive a majority of the votes from *all eligible bargaining unit members*, not just a majority of votes cast. Using the same example as above, the union would lose that election with only three of the 10 possible votes cast in its favor. In an RLA election a union would need at least six votes to win in a unit of 10 workers.

UPS and FedEx fall under two different jurisdictions because of their own individual histories.

UPS. United Parcel Service is more than 100 years old. It began in Seattle as a parcel delivery service under the name American Messenger Company. UPS operated as a common carrier ground transportation company using various airlines for shipping logistics. In 1978, President Carter deregulated the airline industry and as a result many airlines discontinued service to smaller markets, which left a void in UPS' logistic system. To address this, UPS then formed their own airline in the early 1980s.

UPS' workforce has been under the regulatory jurisdiction of the NLRA for the nearly 80 years that the law has been in effect. UPS is the largest and strongest company in the parcel delivery business. It was first organized by the Teamsters in 1916, and some of America's most legendary strikes involve UPS and the Teamsters.

FedEx. FedEx, originally known as Federal Express, on the other hand, began as an Airline and its workforce fell under the RLA. Many in the business world know the story of a Yale student named Frederick W. Smith, who received a "D" on a paper that outlined the FedEx concept "as his professor felt that his idea was not realistic." Smith subsequently got his cargo airline off the ground in Little Rock, Arkansas, in 1971.

FedEx moved to Memphis in 1973 when the Little Rock airport became uncooperative. Through acquisitions FedEx developed a parcel delivery service with most of the FedEx units remaining under the RLA jurisdiction. Only FedEx Ground's workforce falls under the jurisdiction of the NLRA.

UPS and FedEx came from two different directions, though today they compete for the same business. FedEx has remained largely—though not entirely—nonunion. UPS has continued its long relationship with the Teamsters.

Why has Rep. Oberstar added this amendment? Section 806 of the FAA Reauthorization Act appears as an example of a legislator imposing government regulations on a company for political payback to UPS and the Teamsters.

UPS believes that FedEx's workforce being regulated under the RLA gives the latter an advantage in keeping down costs The Teamsters want to organize FedEx employees and know that their best hope is to so so on a location-by-location, piecemeal basis, as allowed by the NLRA. (The proposed Employee Free Choice Act, which would aid the Teamsters's efforts, only applies to companies covered by the NLRA.) Oberstar collected $78,000 in campaign contributions from UPS employees.

This change would add more members to the struggling Teamsters membership rolls. It would do nothing to help consumers. In fact, unionization would likely to reduce service levels and increase shipping costs. This makes no sense in good times; in today's difficult economic environment, it borders on insanity.

Conclusion: There is a better way to level the playing field. Although FedEx and UPS compete for the same business, FedEx continues to use air as its primary method to move four out of five parcels. There is simply no compelling reason to force FedEx under NLRA jurisdiction. There is an orderly process for companies to switch from RLA to NLRA jurisdiction. That is the federal labor law system, backed by the federal courts. If UPS believes its business has become more like FedEx, it can ask to be moved under RLA jurisdiction. Likewise FedEx—or the Teamsters, for that matter—can ask that FedEx be covered by the NLRA.

FedEx and UPS are both true American success stories. They came from two different directions to provide a similar service using different business models. Similar companies should be treated similarly. Yet it is equally true that simple rules are better than complicated ones. Under those criteria, it makes sense for UPS' workforce to be covered by the RLA, rather than seek to FedEx's workforce to NLRA jurisdiction.

In a precarious economic environment, it makes no sense for Congress to make, politically motivated, dramatic, and potentially disruptive changes to a vital sector of the economy, circumventing the agencies to which Congress has delegated the authority to make those decisions.

America's commerce must move, every day. All business depends on goods, supplies, and services making it to market on a constant basis. Economic disaster would result if America's goods and services could not move. In 1926, Congress addressed that possibility by passing the Railway Labor Act, in which it including important provisions to prevent massive disruptions in interstate commerce. The National Labor Relations Act was formed in 1935. In the midst of the Great Depression, Congress had a choice in 1936 over how to regulate airline workers. It chose the Railway Labor Act. There is no compelling reason to change that decision today.

Notes

[i] **SEC. 806. EXPRESS CARRIER EMPLOYEE PROTECTION.**

(a) In General- Section 201 of the Railway Labor Act (45 U.S.C. 181) is amended--

(1) by striking 'All' and inserting '(a) In General- All';

(2) by inserting 'and every express carrier' after 'common carrier by air'; and

(3) by adding at the end the following:

'(b) Special Rules for Express Carriers-

'(1) IN GENERAL- An employee of an express carrier shall be covered by this Act only if that employee is in a position that is eligible for certification under part 61, 63, or 65 of title 14, Code of Federal Regulations, and only if that employee performs duties for the express carrier that are eligible for such certification. All other employees of an express carrier shall be covered by the provisions of the National Labor Relations Act (29 U.S.C. 151 et seq.).

'(2) AIR CARRIER STATUS- Any person that is an express carrier shall be governed by paragraph (1) notwithstanding any finding that the person is also '(3) EXPRESS CARRIER DEFINED- In this section, the term 'express carrier' means any person (or persons affiliated through common control or ownership) whose primary business is the express shipment of freight or packages through an integrated network of air and surface transportation.'.

(b) Conforming Amendment- Section 1 of such Act (45 U.S.C. 151) is amended in the first paragraph by striking ', any express company that would have been subject to subtitle IV of title 49, United States Code, as of December 31, 1995,'.