Missouri Law Review

Volume 54
Issue 4 *Fall 1989*

Article 4

Fall 1989

Trans World Airlines, Inc. v. Independent Federation of Flight Attendants: A Fundamental Blow to Collective Bargaining

David Allen Larson

TRANS WORLD AIRLINES, INC. v. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS: A FUNDAMENTAL BLOW TO COLLECTIVE BARGAINING

By: David Allen Larson*

The United States Supreme Court recently allowed Trans World Airlines, Inc. (TWA) to make a promise to striking employees that significantly affects unions' ability to engage in collective action. In *Trans World Airlines Inc. v. Independent Federation of Flight Attendants*,[1] a case arising under the Railway Labor Act (RLA),[2] TWA was permitted to encourage junior strikers to immediately return to work by promising them that they would not be displaced at the end of the strike by more senior full-time strikers. The Supreme Court rejected the argument that this would result in a loss of seniority for the full-time strikers because those strikers retain seniority for purposes of future reductions of force, future vacancies in desirable assignments, and job scheduling. Although these continuing benefits of seniority will not be realized until full-time strikers are actually reinstated, the court justified its decision by explaining that the RLA provides broader avenues for self-help than the National Labor Relations Act.[3] The Court determined that TWA's action was lawful because, after the parties exhaust resolution procedures under the RLA, they may use any peaceful, self-help measure that does not strike a fundamental blow to union or employee activity or the collective bargaining process itself.[4] By allowing an employer to guarantee returning junior employees protection from displacement, however, the Supreme Court is doing nothing less than permitting employers to deliver a fundamental blow to union activity.

---

* Associate Professor, Creighton University School of Law. J.D., University of Illinois College of Law; LL.M., University of Pennsylvania Law School. This article was partially funded by the Creighton Law School Faculty Research Fund.

1. 109 S. Ct. 1225 (1989).
2. 45 U.S.C. §§ 151-188 (1982).
3. 29 U.S.C. §§ 151-169 (1982 & Supp. 1987). The Court thus distinguished this case from those arising under the National Labor Relations Act (NLRA). The RLA regulates the railroad and airline industries and the NLRA covers most other private employers.
4. *TWA*, 109 S. Ct. at 1235.

The prospect of collective action in a nation like the United States, which cultivates individual independence and autonomy rather than interdependence throughout the society, presents an intriguing paradox. In an era in which the emphasis continues to gravitate toward individual rights in the workplace, courts must not overlook the inherent fragility of the collective voice. Not only is the result in this case unfair to the more senior employees, more importantly, it ignores the fact that unions can only survive when the collective voice is strong. This result weakens the collective voice and, thus, strikes a blow against union activity and the collective bargaining process. It sanctions offers to junior employees that encourage them to ignore collective concerns and instead rush back to work, responding to what appears to be in their individual best interest. The problem is, of course, that what may appear to be in an employee's best short-term interest may actually be contrary to his or her long-term interests.

FACTUAL BACKGROUND

In March of 1984, TWA and the Independent Federation of Flight Attendants (IFFA) began negotiating a new collective bargaining agreement to replace the agreement scheduled to expire in July. The existing agreement created a complex bidding system which ensured that the most senior employees would have the best opportunity to obtain preferred job assignments, flight schedules, the most desirable bases of operation as vacancies occur, and the greatest protection from periodic furloughs. Although the parties bargained unsuccessfully for two years over wages and working conditions, the seniority bidding system was not a focus of the dispute. After pursuing the dispute resolution systems required under the RLA (negotiation, mediation, and the final thirty day cooling-off period) the union went out on strike.[5]

TWA advised the flight attendants that it would continue operations by hiring permanent replacements, using those attendants who did not strike, and rehiring any strikers who abandoned the strike and offered to return to available vacancies. TWA stated that it would fill any vacancies created by the strike according to the seniority bidding system. Furthermore, these assignments would remain effective after the strike.[6] This promise gave senior flight attendants an incentive to remain at or return to work in order to retain prior job and domicile assignments. It also gave junior flight attendants an incentive to remain at or return to work to acquire job and domicile assignments previously occupied by more senior strikers.

After 72 days, the union made an unconditional offer to return to work on behalf of approximately 5,000 remaining strikers. TWA accepted

5. *Id.* at 1228.
6. *Id.*

the offer, but initially recalled only 197 of the most senior employees, refusing to displace those employees who had abandoned the strike and returned to work before the union's offer. In an effort to displace the newly hired employees, as well as less senior crossover employees, the union filed suit. It unsuccessfully argued that the full-term strikers were not economic strikers but rather were unfair labor practice strikers and, thus, entitled to reinstatement. The union also argued that, even if the strike was economic, the full term strikers were entitled to reinstatement under either the terms of the prestrike collective bargaining agreement or under the RLA.[7] The District Court held that the full-term strikers could not displace either the junior crossovers or the 1,220 new attendants employed immediately after the strike.[8] The Court of Appeals for the Eighth Circuit reversed in part and held that more senior full-time employees could displace junior crossovers. In reaching its decision, the court relied on its reading of the union security clause as well as judicial interpretations of the National Labor Relations Act.[9]

THE SUPREME COURT

The Supreme Court, by a six to three margin, rejected the Eighth Circuit's conclusion that senior strikers can displace junior crossovers. Writing for the majority, Justice O'Connor looked to cases decided under the NLRA for guidance in determining the rights of returning strikers. She found that in the 1938 case of *NLRB v. Mackay Radio & Telegraph Co.*,[10] the Court held that under section 8 of the NLRA it was not an unfair labor practice to refuse to displace strike replacements to make room for returning strikers. The union argued that *NLRB v. Erie Resistor Corp.*,[11] which denied employers the right to offer twenty years "superseniority" to crossovers, provided a basis for distinguishing junior crossovers from new hires. Justice O'Connor responded by pointing out that an offer similar to the one in *Erie Resistor* would continue to affect every subsequent lay-off and, thus, continually remind all employees of the dangers of union activities. In contrast, the returning flight attendants in *TWA* could use their full seniority to displace junior crossovers during lay-offs and to outbid junior crossovers for job vacancies and job scheduling. Justice O'Conner explained that, consequently, TWA's offer did not have the same continuing impact.

---

7. *Id.* at 1229.

8. A separate issue was whether the 463 new hires not fully trained by the end of the strike could be replaced. Both the District Court and Court of Appeals for the Eighth Circuit agreed that these new hires could be replaced.

9. Independent Fed'n of Flight Attendants v. Trans World Airlines, Inc., 819 F.2d 839, 843-45 (8th Cir. 1987), *rev'd*, 109 S. Ct. 1225 (1989).

10. 304 U.S. 333 (1938).

11. 373 U.S. 221 (1963).

The union maintained that this policy would have lasting effects because it creates competition among strikers to acquire the most desirable assignments. It results in resentful divisions between returning strikers and junior crossovers. Additionally, the competition would undermine the union's ability to take collective action.[12]

Nevertheless, the Supreme Court rejected what it saw as an attempt to expand *Erie Resistor*. It stated that both the RLA and NLRA protect an employee's right not to strike.[13] Furthermore, an employer's right to hire permanent replacements sets up the same kind of competition that TWA's policy creates. This right similarly creates divisions between those employees who remain on strike and those who return for fear of losing their job to a new hire.[14] The court dismissed the impact of TWA's conduct by asserting, "[A]ll that has occurred is that the employer has filled vacancies created by striking employees."[15] The majority could see no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences.

The union then argued that regardless of whether the NLRA outlawed a crossover policy, section 2 (Fourth) of the RLA[16] prohibits this crossover offer. Its contention was that this policy was an attempt to influence or coerce flight attendants to drop membership in the IFFA.[17] Disagreeing with the union's argument, the Court explained that section 2 (Fourth) does not apply in this instance. Courts always have interpreted that section as primarily addressing precertification rights and freedoms of unorganized employees.[18] The effectiveness of the detailed procedural framework of the RLA depends upon the assurance that neither party will be able to enlist the Court to further partisan goals. The Court concluded that it should

---

12. *TWA*, 109 S. Ct. at 1232.
13. *Id.*
14. *Id.*
15. *Id.*
16. Section 152 (Fourth) reads in part:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, or organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor or to influence or to coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . . .

45 U.S.C. § 152 (Fourth) (1982).
17. *TWA*, 109 S. Ct. at 1234.
18. *Id.*

"hesitate to imply limitations on all but those forms of self-help that strike a fundamental blow to union or employer activity and the collective bargaining process itself."[19]

THE DISSENTS

Justices Brennan and Blackmun wrote separate dissents, with Justice Marshall joining Justice Brennan. Justice Brennan began by declaring that a policy of discriminating against full-term strikers by giving preference to junior crossovers is inherently destructive of the right to strike.[20] In support of his position, he cited *Railroad Trainmen v. Jacksonville Terminal Co.*,[21] a case which examined the extent of a state court's power to issue an anti-strike injunction. In *Railroad Trainmen*, the Supreme Court stated that Congress designed section 2 (Fourth) primarily, if not exclusively, to prohibit coercive employer practices. Justice Brennan then observed that whatever may have been the primary purpose of this section, it is too late in the day to suggest it does not prohibit coercion of the right to strike. When, in the name of self-help, an employer retaliates against employees for exercising the right to strike and thus interferes with the statutory mechanism, courts must intervene.[22]

Justice Brennan seized upon the majority's conclusion that there is no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences. Refusing to discriminate in favor of crossovers does not place the result of a failed strike on those who did not take the risk, but rather on those who ranked lowest in seniority-which is precisely the point of seniority. More fundamentally, there is no reason to favor crossovers over full-term strikers unless one is hostile towards strikes. Rather, employers must make decisions based upon a neutral criterion such as seniority, which is what the union requested.[23]

A refusal to displace junior crossovers after a strike is distinguishable from a refusal to displace newly hired replacements. An employer's threat to hire permanent replacements puts pressure on the strikers as a group to abandon the strike. TWA's promise to junior crossovers produces an additional pressure for individual workers to improve their own positions at the expense of their co-workers. As was the employer's promise in *Erie Resistor*, TWA's offer represents a divide and conquer tactic that strikes

19. *Id.* at 1235.

20. Unlike Justice Blackmun, Justice Brennan would hold this policy *per se* illegal regardless of any business purposes an employer might assert. *Id.* at 1239 n.5.

21. 394 U.S. 369 (1969).

22. *TWA*, 109 S. Ct. at 1236.

23. When it was finally time to reinstate the full-term strikers after the strike, it is interesting to note that TWA did so based upon seniority. Independent Fed'n of Flight Attendants v. Trans World Airlines, Inc., 819 F.2d at 841.

a fundamental blow to union activity and the collective bargaining process.

Under the majority's rule, according to Justice Brennan, a six-month employee can displace a twenty-year veteran who remained faithful to a collective decision to strike. There may be a junior employee who does not wish to strike and who cannot convince her co-workers to adopt her view. The Court, however, should favor a rule that Congress provided for and which errs on the side of solidarity and seniority over a rule allowing discrimination based upon union activity. The principle of majority decision is inherent in our system of exclusive bargaining representatives and may impose burdens upon dissenters.

Justice Blackmun wrote a separate dissent because he would uphold only those crossover policies shown to be truly necessary to continued operations. Justice Brennan would prohibit these policies regardless of the employer's purposes. Justice Blackmun believed that the Court should remand to permit TWA to make the required showing.[24] Beyond this distinction, however, these two dissents have much in common.[25]

Justice Blackmun objected to the majority's suggestion that the RLA does not contain any express limits on employer self-help. Section 2 (Fourth) may have a precertification focus, but it does not have a precertification "blind spot."[26] The purpose of the 1934 amendments, which included section 2 (Fourth), was to strengthen labor. Therefore, it is reasonable to interpret this section in the same manner as section 8(a)(3) of the NLRA, which contains similar language.[27]

In response to the majority's suggestion that there was no discrimination because there were no vacancies, Justice Blackmun reminded the Court that merely because a particular employee occupies a job at the end of the strike does not mean he is entitled to retain the job.[28] Additionally, the majority's analysis threatens to vitiate the majority-rule concept of federal labor policy. The right to opt out of collective decisions when the going gets rough is not a normal aspect of the democratic process. The majority elevates crossovers to "free-riders" and forgets that the burdens and benefits of collective action are borne collectively.[29] Justice Blackmun also argued that the majority's recognition that employers and unions can contract to displace crossovers through poststrike back-to-work agreements undercuts the importance of a dissident's right to be free from the economic

---

24. *TWA*, 109 S. Ct. at 1240.
25. Justice Brennan joined Justice Blackmun as to Parts I and II.
26. *TWA*, 109 S. Ct. at 1241.
27. National Labor Relations Act, section 8(a)(3), 29 U.S.C. § 158(a)(3) (1982), "it shall be an unfair labor practice for an employer . . . (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."
28. *TWA*, 109 S. Ct. at 1243.
29. *Id.* at 1244.

consequences of strikes.[30] Justice Blackmun concluded by explaining why these cases should be reviewed on a case-to-case basis and why employers should be required to prove business necessity.[31]

DISCUSSION

Justice O'Connor's majority opinion does not provide an acceptable result. It offends common sense to suggest that TWA's promise to junior crossovers is no more divisive than offers to new permanent hires. The basic concept of a discrete group taking on outside forces is shattered when employers are permitted to make these offers to junior crossovers. Not only can junior strikers now reclaim their old jobs, they can actually improve their assignments by assuming their fellow strikers' positions.

So long as outside applicants fill positions, employees can hold on to tenuous notions of "us against them" and "we are in this together." Suddenly, however, the probability of an employee improving his own assignment is directly proportional to the speed with which he abandons the joint effort. The fact that co-workers have abandoned a collectively approved strike now confronts those who continue striking. The crossovers they once worked alongside and depended upon for support and collective action now have taken their jobs. It is one thing to recognize that outsiders may not support your cause; it is another to realize that it has become even harder to depend upon insiders. This realization significantly impairs any willingness to attempt future collective action. One should not pretend the effect of this policy is not long term. So long as one worker keeps a position previously held by a second worker, a sense of unfair denial will continue to simmer, if not burn.

Permitting an employer to hire new permanent employees during an economic strike does not compel the conclusion reached by the Supreme Court in *TWA*. A practice of hiring employees to replace strikers still respects the principle that a labor relations system structured around collective bargaining requires two distinct participants, labor and management. By hiring new employees, an employer reminds strikers that they are not quite as powerful as they thought they were. By allowing employers to hire new permanent employees, the Court is providing employers with another weapon within the framework of the power struggle. The result in *TWA*, however, allows employers to disregard the structure of the collective bargaining process and make offers to employees that can destroy collective activity from within.

When an approximate balance of power exists between management and labor, employees have the strength to effectively negotiate issues of

30. *Id.*
31. *Id.* at 1247.

compensation and working conditions. Collective bargaining, however, performs another important role that courts must not overlook. It provides the means through which employees can have a real voice regarding the direction of the enterprise. The *TWA* decision decreases the likelihood of a successful strike. Declining union strength and a reduced incentive to engage in collective activity diminish the opportunity to participate in the enterprise, which is a function of the relative strength of the union.

There are several issues that the Supreme Court does not adequately explore. Junior crossovers do not require as much incentive to return to work as new hires need to accept a new job.[32] Junior crossovers have already made an investment with this employer. They have selected a convenient residence and have begun to accumulate seniority. New hires make unique sacrifices that may justify protection from displacement. Giving up their current jobs may be one such sacrifice.

One must also ask whether this result best provides for safe public transportation. Initially, it may appear that safety can be ensured by encouraging junior employees to return to work so the employer will not have to rely upon completely inexperienced new hires. Yet one must question the long term effect of such a policy. To continue operations, TWA hired 2,350 new flight attendants and 1,280 employees who either did not strike or returned to work before the end of the strike. After 72 days, the union made an unconditional offer to return to work on behalf of 5,000 full-term strikers. TWA, however, initially recalled only 197 of the most senior full-term strikers. Thus, immediately after the strike, approximately 5% of the work force consisted of full-term striking employees. Even two years later, TWA had rehired only 1,100 full-term strikers.[33] Given the attractiveness of the employer's guarantee against displacement, one can expect that many crossovers were the least senior and least experienced employees. Thus, it is probable that while this policy allows an employer to quickly attain the necessary minimum of workers and, thereby, more frequently and more effectively avoid agreeing to strikers' demands, employers will also consequently end up more frequently with a less experienced work force.

The particular facts in this case may have made it easier for the Supreme Court to reach its conclusion. Petitioner's Reply Brief suggested

---

32. Compare the district court opinion which stated: "It is surely as difficult psychologically for old employees to abandon their coworkers and cross a picket line as it is for new hires to take such action. If *MacKay Radio* is sound . . . the same principles would seem to apply to protect crossovers." Independent Fed'n of Flight Attendants v. Trans World Airlines, Inc., 643 F. Supp. 470, 474 (W.D. Mo. 1986), *rev'd on other grounds*, 819 F.2d 839 (8th Cir. 1987), *rev'd*, 109 S. Ct. 1225 (1989).

33. *TWA*, 109 S. Ct. at 1229.

that junior crossovers did not rush to the most desirable jobs.[34] The Brief asserted that so few flight attendants bid for the "more desired" service manager positions that TWA had to "draft" the least senior attendants to fill those jobs.[35] Additionally, only about 17% of the early returning strikers were in California,[36] presumably one of the more sought-after domiciles. Although TWA limited its argument to the position of service manager, the scenario of crossovers grabbing the most desirable assignments may not have developed.

Furthermore, employment as a flight attendant is obviously quite different from employment in maintenance or repair. When a full-term striker who is a mechanic returns to a job site where a crossover has assumed her earlier position, she will not be far from her old job. This physical closeness on a daily basis will produce tension and possible disruption between employees. Conversely, with shifting small crews of flight attendants, it is difficult to pinpoint who has "your" job so tensions and disruptions are less likely to occur. The deficiencies of this crossover policy may become much more apparent when the strike involves different workers.

CONCLUSION

The majority opinion underestimates the divisiveness of a crossover policy and rejects the suggestion that permanent new hires require different incentives than junior crossovers. The opinion does not develop long term safety concerns or examine the implication of crossover policies for other types of work. The most objectionable aspect of this decision, however, is that it refuses to recognize the tenuous character of collective action in this country.

Striking junior employees may believe that accepting an employer's offer to return to work, with the assurance that senior employees will not replace junior employees when the strike is over, is truly in his or her best interest. This perception is dangerously short-sighted. Under our present system of labor relations, we cast labor and management as distinct entities with sometimes conflicting interests to pursue, rather than as an integrated, equally participating single unit. If employees are to acquire broad, across-the-board improvements in wages and working conditions, they will need

---

34. Reply Brief for Petitioner at 8 n.7, Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants, 109 S. Ct. 1225 (1989).

35. Id. One may question, however, the alleged desirability of a position for which nobody applied.

36. *Id.* But note that 80% of the crossovers were domiciled in New York and St. Louis.

the strength of an organized collective voice.[37] In fact, just the ever-present threat of forming a union pushes employers into adopting favorable working conditions. It is naive to suggest employers will voluntarily absorb the cost of a favorable work environment when there is no longer genuine potential for effective, concerted action. Even when it is difficult to achieve goals by dealing directly with particular employers, collective action may be effective in encouraging legislative action.

The viability of our labor relations system assumes a balance of power between employee collective action and management authority. Without such a balance, the system will not only fail to provide sufficient protection to employees, it will also fail to provide for industrial peace through permanent conference and negotiation. Furthermore, the only way employees can have significant input into the operation and direction of an enterprise is through collective bargaining. When an employer is allowed to undercut collective bargaining by pandering to individual self-interest, future collective attempts become much less probable and the vehicle for participation in one's own workplace quietly slips away. The majority in *TWA* is deeply concerned that prohibiting TWA's offer will unjustly penalize individual strikers. Yet the Court ignores what all employees, including junior strikers, lose when the Court impairs the potential for collective action.

TWA's offer to junior crossovers represents a fundamental attack on union activity and the collective bargaining process which requires judicial intervention. In a global economy, our notions of balancing power may have become antiquated. It may be time to move to a more ownership integrated, worker participatory model of labor-management relations. Before courts undermine the existing structure, however, the substitute structure must be in place.

---

37. A similar argument was made in Respondent's Brief:

> Labor unions . . . were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them.

Brief for Respondent at 19, Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants, 109 S. Ct. 1225 (1989) (*quoting* American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209 (1921)).