

## RLA or NLRA? FedEx and UPS Follow the Money Trail

By Frank N. Wilner

FedEx Express and UPS compete furiously in the market for expedited pickup and delivery service. Labor costs are a significant component of total costs for both competitors, but they compete on different playing fields: UPS ground-service employees are covered by the National Labor Relations Act (NLRA), which permits union organizing at individual terminal locations, while FedEx Express ground-service employees are subject to the Railway Labor Act (RLA), which requires union organizing on a systemwide basis—making it much more difficult to call a strike.

UPS has failed on numerous occasions to shift its ground-service employees to RLA coverage and now is aligned with the Teamsters to bring FedEx employees under the NLRA. FedEx Express wants its nonunionized ground-service employees to remain under the RLA; however, legislation has passed the House to bring them under the ambit of the NLRA, and Senate action is expected in early 2010.

*"We are a freight service with 550-mile per hour delivery trucks"*  
— FedEx founder, Fred Smith<sup>1</sup>

The Railway Labor Act (RLA) of 1926<sup>2</sup> is an 83-year-old statute that is distinctly different, in crucial respects, from the National Labor Relations Act (NLRA) of 1935.<sup>3</sup> The RLA was the nation's first law guaranteeing workers the right to organize and choose their own bargaining representatives. The RLA governs the labor-management relations of railroads and airlines (the latter added in 1936), whereas the NLRA governs other private-sector industries. Federal agencies—the National Mediation Board (NMB) and the National Labor Relations Board (NLRB)—not the affected employer or employees, determine which of the two labor laws govern an employer's labor relations.

This article focuses on the RLA's application to ground-service employees of FedEx Express (an overnight delivery system for time-sensitive goods that need to be transported on aircraft) as opposed to its sister company FedEx Ground (a trucking company that delivers small packages). The FedEx Corporation owns numerous operating companies, which include FedEx Express and FedEx Ground.

FedEx Express faces substantial competition for expedited pickup and delivery service. All competitors in the market use a combination of air and ground transportation. UPS, which is major competitor, is also discussed in this article.



### A Brief Introduction to the Players

FedEx Express inaugurated operations in 1973, offering the first expedited pickup and delivery service in the United States. In 1978, the NMB defined FedEx Express as "an air freight carrier principally engaged in operating an interstate air express service [providing] door-to-door parcel express services utilizing FedEx employees and aircraft throughout the route from the point the materials are picked up for transport to their subsequent delivery to the designated recipient."<sup>4</sup>

FedEx Ground is a separate operation from FedEx Express; the two companies have different headquarters, different management, and a different workforce. FedEx Ground originated as Roadway Package System (RPS), a ground package delivery operation run by former Roadway Services, which also operated a trucking company, Roadway Express (now part of YRC Worldwide). RPS was

created to compete with United Parcel Service, commonly known as UPS. In 1998, RPS was sold to FedEx, and its name was changed to FedEx Ground in 2000. From its inception, FedEx Ground has been subject to NLRA regulations. FedEx Ground drivers are currently a target of an organizing campaign by the Teamsters Union, but FedEx Ground is not the subject of this article. A separate section at the end of this article briefly summarizes the situation that FedEx Ground is facing.

UPS, the world's largest package delivery company, was largely on the sidelines in 1973, when FedEx Express inaugurated its overnight delivery system for time-sensitive goods dependent on aircraft. But in 1982, after airlines were deregulated, UPS entered the market as a determined FedEx Express competitor. By 1985, UPS Next Day Air service was available in the lower 48 states and Puerto Rico, with service to Alaska and Hawaii added later. In 1988, UPS acquired authorization from the Federal Aviation Administration to operate its own aircraft as UPS Airlines.<sup>5</sup>

### Scrambling to Gain an Advantage

There is no question that the RLA applies to flight crews and aircraft mechanics. Thus, labor relations affecting pilots and aircraft mechanics employed by FedEx Express and UPS are governed by the RLA. Questions have arisen as to whether the two companies' ground-service employees, such as package sorters and truck drivers, are under the jurisdiction of the RLA or the NLRA. Repeatedly, in the case of FedEx Express, but not UPS, that question has been answered in favor of the RLA. Thus, FedEx Express and UPS compete head-to-head using ground-service employees, who are covered under separate labor laws. Moreover, some 100,000 ground-service employees of FedEx Express have yet to be organized by a labor union; whereas about 230,000 ground-service employees of UPS are represented by the Teamsters Union.

Understandably, for more than a dozen years the separate treatment of ground-service employees of FedEx Express and UPS—one company subject to the RLA, the other to NLRA—has been severely criticized. In 1995, UPS unsuccessfully sought to shift jurisdiction of its ground-service employees, such as package sorters and truck drivers, to the RLA. Perhaps UPS thought that, under the RLA, the company might be able to get rid of the Teamsters Union. There are valid reasons for accepting such thinking. The NLRB and a federal court slammed the lid shut on UPS' attempt to have its ground-service employees covered under the RLA. Now UPS has reversed course and is collaborating with the Teamsters Union, which represents the company's package sorters and truck drivers, in efforts to get Congress to pass legislation that would shift jurisdiction of FedEx Express' ground-service employees to the NLRA. As for FedEx Express, it historically has opposed attempts to shift jurisdiction of its ground-service employees to the NLRA, and the company continues to do so today—perhaps operating under the assumption that FedEx Express has a better chance of avoiding unionization if its employee relations are regulated by the RLA.

UPS' flip-flop—in 1995 wanting itself to be under the

RLA; now wanting FedEx Express to be governed by the NLRA—has everything to do with leveling the labor-economics playing field. If UPS can't have its ground-service employees subject to the RLA (under which, arguably, UPS might be able to oust the Teamsters Union), as does FedEx Express, then UPS would benefit from having FedEx Express' currently nonunionized ground-service employees subject to the NLRA, under which FedEx Express' ground-service employees could presumably be organized by the Teamsters or another labor union. Indeed, it is likely that the assumptions made above regarding labor unions are correct.

There are definite economic benefits of having employees subject to the RLA rather than the NLRA—not the least of which is the difficulty of organizing workers under the RLA and the RLA's built-in statutory delays of work stoppages. As Watergate's Deep Throat, W. Mark Felt, continually reminded Bob Woodward, "Follow the money"—a phrase that has been chiseled into American history.

### The Role of the National Mediation Board's Role in the Conflict

The NMB, which administers and interprets the Railway Labor Act, generally makes decisions regarding the application of the act. When the question is first brought before the National Labor Relations Board, that agency usually refers the matter to the NMB for determination. However, on occasion—and one of those occasions slammed the door shut on UPS—the NLRB has made the decision on its own as to which law covers the workers involved in the particular case.<sup>6</sup>

With regard to FedEx Express, the NMB repeatedly has exercised jurisdiction over such decisions.<sup>7</sup> In ruling that the RLA governs FedEx Express' ground-service employees, such as package sorters and truck drivers, the NMB historically has looked to FedEx Express' status as an air carrier. For example, in the mid-1990s, when the United Auto Workers (UAW) sought to use the protections provided by the NLRA in its efforts to organize FedEx Express' ground-service employees in the historically union-friendly Northeast (specifically, FedEx Express' Liberty District, which then extended from northern New Jersey to the District of Columbia), the NLRB asked the NMB to determine if those employees were subject to the RLA.<sup>8</sup> Under the NLRA, the UAW could organize on a facility-by-facility basis, but under the RLA, the UAW would have to organize nationally.

The UAW argued that the FedEx Express employees it was seeking to represent did not perform work on aircraft and were not "integral" to FedEx Express' air transportation functions, as were FedEx pilots and aircraft mechanics. Therefore, according to the UAW, the RLA should not govern the company's ground-service employees. FedEx Express responded that, as an air carrier, all of its employees are subject to the RLA, because FedEx Express is a "unified operation with fully integrated air and ground services."<sup>9</sup> Allowing some employees to be covered by the NLRA and others to be subject to the RLA, said FedEx Express, would result in employees being covered by different labor

relations statutes as they are promoted up the career ladder.

The NMB responded that “there [was] no dispute” that FedEx Express is a carrier subject to the RLA with respect to its pilots and aircraft mechanics. As for its ground-service employees, the NMB ruled there was “no clear and convincing evidence to support” a decision other than affirming that those FedEx Express ground-service employees, such as package sorters and truck drivers, were subject to the jurisdiction of the RLA, not to that of the NLRA.

The NMB justified its decision in favor of FedEx Express by pointing to § 181 of the 1936 statute that extended RLA coverage to airlines,<sup>10</sup> which provides that “[E]very air pilot or other person who performs any work as an employee or subordinate official of such [air] carrier or carriers” is subject to RLA coverage. According to the ruling made by the NMB:

The RLA does not limit its coverage to air carrier employees who fly or maintain aircraft. Rather, its coverage extends to virtually all employees engaged in performing a service for the carrier so that the carrier may transport passengers or freight. ... The limit [on coverage] is that the carrier must have continuing authority to supervise and direct [its employees]. ... The couriers, tractor-trailer drivers, operations agents and other employees sought by the UAW are employed by FedEx directly. As the record amply demonstrates, these employees, as part of FedEx’s air express delivery system, are supervised by FedEx employees. The Board need not look further to find that all of the FedEx [Express] employees are subject to the RLA. ...

It has been the Board’s consistent position that the fact of employment by a “carrier” under the Act is determinative of the status of *all* that carrier’s employees as subject to the Act. The effort to carve out or to separate the so-called over-the-road drivers would be contrary to and do violence to a long line of decisions by this Board which would embrace the policy of refraining from setting up a multiplicity of crafts or classes.<sup>11</sup>

Although the NMB said that it “need not look further” to find that all the FedEx Express employees are subject to the RLA, the NMB chose to address another issue raised by the UAW: whether those FedEx Express ground-service employees are “integrally related” to FedEx Express’ air carrier functions.

The NMB took note of prior federal court decisions, holding that FedEx Express’ trucking operations are integrally related to its air operations.<sup>12</sup> Shutting the door more tightly on the UAW, the NMB observed:

Where, as here, the company at issue is a common carrier by air, the Act’s jurisdiction does not depend upon whether there is an integral relationship between its air carrier activities and the functions performed by the carrier’s employees in question. The

Board need not consider the relationship between the work performed by employees of a common carrier and the air carrier’s mission, because [the RLA] encompasses every pilot or other person who performs *any* work as an employee or subordinate official of such carrier or carriers. ...

Even if the Board were to assume, *arguendo* that the “integrally related” test applies to the facts in this case, the Board would hold in concurrence with the [*FedEx v. California PUC* decision] that the trucking operations of FedEx [Express] are integral to its operations as an air carrier. ...

[W]ithout the functions performed by the employees at issue, FedEx [Express] could not provide the on-time express delivery required of an air express delivery service.<sup>13</sup>

It is interesting to note that, at the tail end of its decision that went against the UAW, the NMB volunteered the following, which should be kept in mind as one considers UPS’ and the Teamsters Union’s current effort to bring FedEx Express’ ground-service employees under the jurisdiction of the RLA: “[T]he Board has found that virtually all of the work performed by employees sought by the UAW’s petition is work traditionally performed by employees in the airline industry (citing *Air Cargo Transport Inc.*, 15 NMB 202 (1988); *Crew Transit Inc.*, 10 NMB 64 (1982); *Florida Express Inc.*, 16 NMB 407 (1989); and *Trans-World International Airlines Inc.*, 6 NMB 703 (1979)).”<sup>14</sup>

## UPS Reacts

After reading the NMB decision that summarily sent the UAW on its way, it was reasonable for UPS to assume that if it looked, walked, and quacked like the FedEx Express duck, then UPS ground-service employees, like those of FedEx Express, should be under the ambit of the RLA rather than the NLRA. So UPS requested the NLRB to decide, fully expecting the board to toss the question to the NMB, which, surely, would rule in favor of RLA coverage for UPS ground-service employees. But the decision did not go the way UPS hoped it would.

The NLRB declined to ask the NMB to decide the issue, as the NLRB had done in response to the UAW’s petition. Instead, the NLRB chose to rule on the issue itself, and the board did so quickly and firmly, deciding against UPS’ request. The NLRB ruled that, since 1974, UPS had historically and repeatedly acknowledged that it was subject to the NLRA and also that there had been no “material change” in the corporation’s operations since UPS had last acknowledged its coverage under the NLRA; therefore, UPS and its ground-service employees should remain under the ambit of the NLRA.<sup>15</sup> Moreover, the NLRB noted that UPS did not principally serve its affiliate, UPS Airlines (which is governed by the RLA) as is required by NMB precedent. In fact, according to the NLRB, the vast majority of packages sorted and delivered by UPS ground-service employees neither originated nor terminated on aircraft. The Team-



sters Union, which opposed UPS' petition, presented evidence that, of the 11.5 million packages and letters UPS delivers daily, fewer than 875,000 had to be transported by air either before or after handling by ground-service crews.<sup>16</sup>

Calling the NLRB's decision "illegally arbitrary or otherwise contrary to the law," UPS took the case to the U.S. Court of Appeals for the D.C. Circuit, which upheld the NLRB's decision in August 1996.<sup>17</sup> First, the court defended the NLRB's decision not to pass the question of RLA jurisdiction to the NMB, saying: "Only in the few cases in which a trucking company has essentially existed only to serve a rail or air carrier with which it was common owned and operated has the NLRB not exercised jurisdiction."<sup>18</sup>

The court also cited the so-called *Chevron* deference to an expert federal agency, such as the NLRB: "A federal court, whose power is strictly judicial, is properly reluctant to preclude any federal agency's deliberations of policy because a federal agency, which is controlled by the political branches of the federal government, is constitutionally better suited than a federal court to render policy decisions."<sup>19</sup> In addition, the court cited the so-called *Bayside* deference precedent, in which the U.S. Supreme Court had encouraged courts to defer to "any reasonable interpretation" of the jurisdictional provisions of the NLRA by the NLRB.<sup>20</sup>

The D.C. Circuit went on to note that United Parcel Services of America (UPS) has two primary corporate components. The larger company, UPS Inc., performs the traditional truck-delivery service that had been governed by the NLRA since 1947. A smaller component, United Parcel Services Co. (known as UPS Airlines) is an FAA-authorized airline under the ambit of the RLA. However, according to the court, UPS Airlines does not yet "rival its more established affiliate in the amount of freight carried. ... UPS Inc. still carries more than 90 percent of all UPSA packages exclusively on the ground."<sup>21</sup> Thus, the court came to the same conclusion that the NLRB had reached: The RLA does not govern UPS ground-service employees, who handle only a minority of packages that are transported by air. In distinguishing in the number of packages that are transported by air before or after being handled by UPS ground-service crews, the court noted a three-part test that the NMB had administered in the past:<sup>22</sup>

- Does the trucker perform services principally for an RLA carrier with which it is affiliated?
- Is the trucker an integral part of that affiliate?
- Does the trucker provide services "essential" to the RLA carrier's operations?

According to the court, "[i]n the two leading cases," the trucker worked "almost exclusively" for its RLA carrier, "or it received at least 80 percent of its business from that carrier."<sup>23</sup> By contrast, said the court,

[UPS Inc.] does not receive even a tenth of its business from its RLA associate [UPS Airlines], never mind receiving eight-tenths. ... Faced with this gross disparity between the facts of this case and the standard sketched by relevant NMB precedent, we must con-

clude that UPS, Inc., as it presently operates, does not 'principally' serve UPS Co. [UPS Airlines]. ...

In light of petitioner's failure to meet the "principally serving" standard, and petitioner's long-established status as an NLRA carrier, which is a factor that both the NLRB and the NMB have agreed to be of some importance in these matters, we must conclude that the NLRB properly determined that UPS Inc. remained an NLRA carrier.<sup>24</sup>

The court saw a bright-line distinction—"the complete dependence of FedEx [Express]' trucking services on its air freight services," yet "superficial similarities" in the nature of the services provided by UPS and FedEx Express.<sup>25</sup> The court ruled that "Fed Ex [Express]' trucking services, unlike UPS, *do* principally serve FedEx's air delivery services ... they are part and parcel of the air delivery system. Every truck carries packages that are in interstate commerce by air. Because UPS has not even approached a showing of similar dependence on its affiliated RLA carrier, we cannot disturb the NLRB's conclusion that it maintains jurisdiction over UPS as it has for the last 47 years."<sup>26</sup>

### UPS' Turnabout

It is a basic premise of economics that competitors prefer to limit the areas of competition. Labor costs are significant in the transportation industry, and the entity with lower labor costs (often enjoyed by a nonunionized or largely nonunionized entity) can have a meaningful competitive advantage. FedEx Express' 100,000 ground-service employees do not belong to a union, whereas UPS' 238,000 ground-service employees are represented by the Teamsters Union. Understandably, having failed to place its Teamsters-represented ground-service employees under RLA jurisdiction (under which UPS might have been able to oust the union), UPS would prefer to see FedEx Express' ground-service employees subject to NLRA jurisdiction (so that the Teamsters might organize FedEx Express' employees and, perhaps, level the labor-cost playing field).

As for the Teamsters, non-union FedEx Express presents an obstacle in the Teamsters' contract bargaining with UPS: higher UPS labor costs can translate into lost business and/or reduced profits that threaten job security and invite employer demands for labor to give back something in order for UPS to be more competitive with FedEx Express.

The Teamsters Union sees having FedEx Express' ground-service employees under NLRA jurisdiction as something that would enable the union to organize those workers at a lower cost and with a better likelihood of success. The Teamsters Union is especially desperate for new members, because the union is in distress as a result of a complete and bitter defeat of its attempt to organize the workers at Overnite Transportation, a company that is now owned by UPS and remains nonunionized.<sup>27</sup> Indeed, the Teamsters Union has not organized employees of a major trucking company since the trucking industry was deregulated in 1980. Moreover, the union has lost 500,000 members employed by trucking companies since deregulation.

In addition, the Teamsters Union's finances are rocky and it continues to operate under court supervision because of past involvement with organized crime. UPS—with its 238,000 drivers represented by the Teamsters—constitutes the Teamsters' largest membership base. Whereas all of the top-10 trucking companies were represented by the union in 1980, today, among the top 10 companies, the Teamsters Union represents only UPS workers and the approximately 35,000 workers who are employed by the newly merged Yellow-Roadway.<sup>28</sup> For these reasons, lobbyists for UPS and the Teamsters Union are supporting a legislative provision—and one currently is before Congress (as discussed below)—that could bring FedEx Express' ground-service employees under the ambit of the RLA. Supporting the Teamsters Union also allows UPS to have good labor relations.<sup>29</sup>

### The Times They Are A-Changin'

Even though the NMB has repeatedly ruled in favor of RLA jurisdiction for FedEx Express' ground-service employees because RLA coverage extends to virtually all employees engaged in performing a service for the carrier so that the carrier may transport passengers or freight, significant changes have occurred that could alter the status quo. And despite court rulings that cited the *Chevron* and *Bayside* deference, which suggest that courts are likely to validate those NMB decisions if they are challenged by UPS or the Teamsters, FedEx Express could still face a decision that would place its ground-service crews under the jurisdiction of the NLRA.

However, it is important to recall that the NMB found that most of the work done by FedEx Express ground-service employees referred to in UAW's petition is traditionally the kind of work done by employees in the airline industry. In addition, in the past, the NLRB has paid attention to material change in a carrier's operations, and the NMB could express a similar concern in the future.<sup>30</sup> Indeed, in 1995, the NMB made the following observations about FedEx Express:

After the trucking industry was deregulated in 1980, FedEx began moving away from its single Memphis hub. As FedEx expanded, it incorporated a "bypass and bleed off" (BABO) concept. The "bypass" concept involved sorting freight at the origin ramp by destination rather than sorting the freight in Memphis. Using the bypass concept, freight could move through Memphis without sorting. The "bleed off" concept allowed freight to be moved by air or ground transportation without going through Memphis. ...

FedEx began acquiring tractor-trailers in 1978 when it began using Boeing 727s. FedEx operates trucks called "containerized transport vehicles" (CTVs) designed to carry the same freight containers that are flown on its aircraft. ...

The decision to send a package by truck or by plane is based on short-term load factors. ... For example,

depending upon where space is available, a package from Fort Lauderdale, Fla., destined for Philadelphia, Pa., would probably go by aircraft through Memphis. From Memphis it might go by aircraft ... to Newark. If the package goes to Newark, it is then driven to Philadelphia. If that package were traveling from Atlanta to Philadelphia ... it could be flown directly from Atlanta to Newark and driven to Philadelphia. ...

Using the Newark hub as an example, approximately 50 percent of [packages destined for cities radiating from Newark] moves exclusively by ground through Newark. ...

If a package were scheduled to travel by air, but was delayed and would miss on-time delivery anyway, it might be sent by truck. ... Trucks and planes are used interchangeably.<sup>31</sup>

Clearly, FedEx Express has been increasing its use of trucks, and its business plan has been revised from the one that was developed when the company began operations in 1973. As the Commission on the Future of Worker-Management Relations observed in 1994, "Today, due to the complexities of corporate structuring and the combinations of services provided, the line between a RLA-covered and non-covered firm has become sometimes ambiguous. ... The growth of intermodal transportation further complicates the separation."<sup>32</sup> Indeed, one could argue that FedEx Express has experienced a material change in its operations since its start-up 37 years ago, and it no longer is a company in which, in the NMB's words, "virtually all of the work performed by employees ... [is work that is] traditionally performed by employees in the airline industry."<sup>33</sup>

### The "Express Carrier" Provision

FedEx Express would have a fallback position if there were to be an attempt to have its expanding trucking operations treated separately from its air operations. Section 1 of the RLA provides that "the term 'carrier' includes any express company. ..."<sup>34</sup> The origin of the term "express carrier" is the Interstate Commerce Act,<sup>35</sup> which predates the RLA and referred to such now defunct railroad-related express companies as the Railway Express Agency (shut down in 1975), the Adams Express (now a mutual fund company), American Express (now a credit card and travel services company), and Wells Fargo (now a banking and real estate conglomerate).

When Congress amended the Interstate Commerce Act with the passage of the Interstate Commerce Commission Termination Act (ICCTA) of 1995,<sup>36</sup> the term "express carrier" was deleted.<sup>37</sup> Susan Molinari (R-N.Y.), chair of the House Subcommittee on Railroads, Pipelines, and Hazardous Materials at the time, said the term was removed at the suggestion of the Interstate Commerce Commission, which assumed that the term no longer had any meaning. An article in *Traffic World* quoted Rep. Molinari as follows: "The assumption was true for ICC purposes. ... What no one realized at the time is that the term does have meaning

for NMB purposes in determining who is and who is not covered by the RLA.”<sup>38</sup> Conforming amendments to other laws required that the “express carrier” provision also be removed also from RLA § 1. Lobbyists for FedEx apparently did not notice the deletion when it was done, because, once the ICCTA was signed into law, they worked furiously to have the term re-inserted into the statute, signaling to the Teamsters Union and UPS that the term had value to FedEx Express as a bar to union organizing of its ground-service employees.

Indeed, Sen. Frank Lautenberg (D-N.J.) said on the Senate floor that restoring the term “would hurt attempts by FedEx truck drivers to organize.”<sup>39</sup> Rep. William Lipinski (D-Ill.), the senior Democrat on the subcommittee studying railroads, stated that FedEx intended to use trucks to deliver all packages within 400 miles of its regional hubs. According to Lipinski, “FedEx is pushing this provision so it will be prepared in the future to meet its corporate goal, to remain union free.”<sup>40</sup>

Rep. Jim Oberstar (D-Minn.) asked why FedEx wanted the “express carrier” provision restored, because the company was already covered under the RLA as an air carrier. As reported in an article in *Traffic World*, Oberstar wondered “if the company plans to change its operating methods or plans to acquire new trucking subsidiaries that would not be covered by the RLA.”<sup>41</sup> The same article stated that FedEx “declined to comment on the congressional speculation,” and quoted a spokesperson, who said, “It’s confusing to the issue. The issue at hand is that Congress made an inadvertent technical error that needs to be corrected.”

In October 1996, Congress re-inserted the term “express carrier” after Sen. Ted Kennedy (D-Mass.) led a three-day filibuster against it in the Senate.<sup>42</sup> FedEx Express never explained why it considered the “express carrier” provision so important. However, organized labor saw FedEx Express’ position as a belt-and-suspenders approach to preventing the company’s ground-service employees from unionizing.

### **Cannon on the Left, Cannon on the Right**

In recent years, the Teamsters Union, in collaboration with UPS, has launched a full-scale attack on RLA jurisdiction over FedEx Express’ ground-service employees. In June 2007, the Democratically controlled House Transportation and Infrastructure Committee approved a transportation funding bill that included an amendment authored by Oberstar that would strip RLA coverage from FedEx Express ground-service employees (but the amendment did not survive). The amendment would have limited RLA coverage to pilots and aircraft mechanics who are certified by the FAA and specified that ground-service employees, such as package sorters and truck drivers, are subject to the NLRA.<sup>43</sup>

A similar attempt is contained in H.R. 915, which was passed by the House in this session of Congress. The Senate version of FAA reauthorization is stalled and not expected to reach the Senate floor until early 2010, according to the Nov. 24, 2009, edition of *Aviation News Today*, accessible

at [www.aviationnews.net](http://www.aviationnews.net). FedEx, understandably, is lobbying furiously against the provision for several reasons:<sup>44</sup>

- Under the RLA, to get the right to hold an election, a union must obtain authorization cards from 35 percent of eligible employees, by craft and systemwide, and receive 50 percent plus one vote of all union-eligible voters (not just those voting) systemwide to become certified as the bargaining representative. The systemwide threshold is problematic for a union seeking to represent workers dispersed over a nationwide grid.<sup>45</sup>
- Under the NLRA, by contrast, to become certified, a union may organize workers on a facility-by-facility basis (rather than systemwide), and the union needs to receive only a majority of the votes of those actually voting at each facility.
- If FedEx Express’ ground-service employees were to be put under the jurisdiction of the NLRA, the Teamsters Union would be able to organize FedEx Express’ employees facility-by-facility as a way to pressure FedEx Express into signing a systemwide agreement with the union, and this would wreak havoc within the company’s system.

In addition, FedEx views the RLA as a statute that offers greater limitations against work stoppages than the NLRA does.

- Under the RLA, disputes over contract interpretation (so-called minor disputes) must be submitted to binding arbitration, but the NLRA, where localized strikes over grievances involving contract interpretation can and do occur, does not include this requirement. A localized strike could seriously impair or shut down FedEx Express’ nationwide network—much the same as a severe storm at a single airport ripples through the operation of a scheduled passenger airline.
- Disputes over wages, benefits, and work rules (so-called major disputes) must progress through a lengthy mediation process before a strike may commence. Under the RLA, the term of collective bargaining agreements is not of a fixed duration; thus, contracts do not expire and remain in force until they are changed. Moreover, only the NMB, which controls the schedule of negotiations, may release the parties from mediation. By contrast, contracts negotiated by employees covered by the NLRA may reach an impasse, and workers may strike upon expiration of a contract.
- In addition, although neither statute provides for congressional intervention in strikes, there is a history of Congress’ imposition of settlements on industries that are governed by the RLA, although such intervention has been more frequent in the case of the rail industry than the airline industry. In the railroad industry, for example, since World War II, fewer than 30 workdays have been lost to national strikes. Although Congress has declined to become involved in airline strikes over the past few decades, the threat of congressional intervention is a potent deterrent against strikes.

It is not surprising, then, that FedEx Express desperately wants its nonunionized ground-service employees to remain under the ambit of the Railway Labor Act. RLA regulations make it more difficult for employees to organize and more difficult for a union to call a strike. In addition, even though the RLA doesn't provide for it, the threat of congressional intervention in a labor dispute often creates an incentive to settle disputes between management and labor voluntarily. As Fred Smith, the founder and chairman of FedEx, told a Senate subcommittee on July 19, 2007, "The correct resolution of this matter in the public interest would be for UPS to be put under the Railway Labor Act."<sup>46</sup> **TFL**

*Frank N. Wilner is an economist and director of public relations for the United Transportation Union. He is author of five books, including Understanding the Railway Labor Act and Railroad Mergers: History, Analysis, Insight. Wilner earned undergraduate and graduate degrees in economics and labor relations from Virginia Tech. The views expressed are his, entirely.*

## Endnotes

<sup>1</sup>Bernard Reichert, *A Review of Overnight Success: Federal Express and Its Renegade Creator* by Vance Tremble, J. OF BUS. LEADERSHIP 33, 44 (2000–2001).

<sup>2</sup>44 Stat. 577 (1926). In spite of its name, the RLA was expanded in 1936 to cover airlines. 49 Stat. 1189 (1936).

<sup>3</sup>49 Stat. 449 (1935).

<sup>4</sup>23 NMB No. 13, at 36.

<sup>5</sup>Actually, UPS, which was formed in 1907, offered package delivery service to major West Coast cities via airplane for a brief period in 1929. In 1953, UPS inaugurated Blue Label Air on the East and West Coasts, using regularly scheduled airlines.

<sup>6</sup>The NLRB has no statutory requirement to submit questions of RLA coverage to the NMB. See *Dobbs Houses Inc.*, 443 F.2d 1066, 1072 (6th Cir. 1971). The NLRB typically does not refer a party to the NMB once the NMB has already determined that the party is not an RLA carrier, or once the party has already acknowledged the NLRB's jurisdiction, unless the party demonstrates some material change in its circumstances. See *Teamsters Local No. 287*, 304 NLRB at 120; and *Teamsters*, 255 NLRB 1091, 1092 (1981); and *Hot Shoppes Inc.*, 143 NLRB 578, 581 (1963).

<sup>7</sup>See, e.g., 22 NMB 279 (1995); 22 NMB 257 (1995); 22 NMB 215 (1995); 20 NMB 404 (1993); 20 NMB 394 (1993); 20 NMB 360 (1993); 20 NMB 91 (1992); 20 NMB 7 (1992); 17 NMB 24 (1989); 16 NMB 433 (1989); and 6 NMB 442 (1978). Eight of those determinations involved ground-service employees of FedEx Express, and, in each case, the NMB ruled that they were subject to coverage under the RLA.

<sup>8</sup>*Federal Express Corporation*, NMB File No. CJ-6463, NLRB Case 4-RC-17698, 23 NMB No. 13 (Nov. 22, 1995). The UAW sought to organize and represent couriers, tractor-trailer drivers, customer service agents, service agents, dispatchers, and checker/sorters.

<sup>9</sup>*Id.*

<sup>10</sup>49 Stat. 1189 (1936).

<sup>11</sup>*Federal Express Corporation*, NMB File No. CJ-6463,

NLRB Case 4-RC-17698, 23 NMB No. 13, at 71–73 (Nov. 22, 1995) (emphasis in the original). Two exceptions were cited: See *Pan American World Airways v. Carpenters*, 324 F.2d 2487, 2488 (9th Cir. 1963), cert. denied, 375 U.S. 964 (1964); and *Jackson v. Northwest Airlines Inc.*, 185 F.2d 74, 77 (8th Cir. 1950). See also *Biswanger v. Boyd*, 40 LRRM 2267 (D.D.C. 1957); and *REA Express Inc.*, 4 NMB 253, 269 (1965).

<sup>12</sup>*Federal Express Corporation v. California Public Utilities Commission*, 936 F.2d 1075, 1078 (9th Cir. 1991); and *Chicago Truck Drivers v. NLRB*, 99 LRRM 2967 (N.D. Ill. 1978); aff'd 599 F.2d 816, 101 (7th Cir. 1979).

<sup>13</sup>*Federal Express Corporation*, NMB File No. CJ-6463, NLRB Case 4-RC-17698, 23 NMB No. 13, at 73–74 (Nov. 22, 1995) (emphasis added).

<sup>14</sup>*Id.* at 76.

<sup>15</sup>*United Parcel Service Inc.* 318 NLRB No. 97, at 1 (Aug. 25, 1995); and *United Parcel Service of New York Inc.*, 74 NLRB 888, 888–89 (1947).

<sup>16</sup>*Teamsters Dismiss UPS' Exploration of NMB Regulation as Bargaining Ploy*, TRAFFIC WORLD (June 21, 1993).

<sup>17</sup>*United Parcel Service Inc. v. NLRB*, 92 F.3d 1221 (D.C. Cir. 1996).

<sup>18</sup>*Id.*, citing *Chicago Truck Drivers, Helpers and Warehouse Workers Union v. NLRB*, 599 F.2d 816, 819–20 (7th Cir. 1979); and *Florida Express Carrier Inc.*, 16 NMB 407, 410–11 (1989).

<sup>19</sup>*Id.*, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 865–66 (1984).

<sup>20</sup>See *Bayside Enterprise Inc. v. NLRB*, 429 U.S. 298, 300–04 (1977).

<sup>21</sup>*United Parcel Service Inc. v. NLRB*, 92 F.3d 1221 (D.C. Cir. 1996).

<sup>22</sup>*Id.*, citing *United Parcel Service Inc.*, 318 NLRB at 4; *Florida Express Carrier Inc.*, 16 NMB 407, 410 (1989); and *O/O Truck Sales*, 21 NMB 258, 272 (1994).

<sup>23</sup>*United Parcel Service Inc. v. NLRB*, 92 F.3d 1221 (D.C. Cir. 1996).

<sup>24</sup>*Id.*

<sup>25</sup>*Id.*

<sup>26</sup>*Id.* (emphasis added).

<sup>27</sup>See, e.g., John D. Schulz, *Teamsters' Financing: Image Hurting Organizing Attempts in Trucking; Analysts Question Future*, TRAFFIC WORLD (Oct. 27, 2003). When the Teamsters gave up and accepted defeat, an Overnite spokesman said, "Three years ago Jimmy Hoffa came in as George Patton. Now he's being carried out as George Custer." John D. Schulz, *Teamsters End Overnite Strike*, TRAFFIC WORLD (Nov. 4, 2002).

<sup>28</sup>*Id.*

<sup>29</sup>As J.P. Morgan analyst Thomas R. Wadewitz wrote in a research update issued Aug. 6, 2007, UPS "has consistently targeted" a new contract with the Teamsters by the end of 2007. Historically, UPS has had a contentious relationship with the Teamsters, including a devastating 15-day strike in August 1997. Efforts are being made to improve that relationship. See, e.g., *UPS Makes Progress with Central States*, TRAFFIC WORLD (Aug. 3, 2007).

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it easier for health plans and insurers to implement the provisions of this act.

### Impact of the New Laws on Employers

GINA, the HITECH Act, Michelle's Law, and the Mental Health Parity and Addiction Equity Act made significant changes to the laws governing group health plans. Employers who sponsor group health plans must review their plans and governing policies and procedures and implement the necessary changes to ensure compliance. **TFL**

Karleen J. Green is a partner in the Labor and Employment Group in the Baton Rouge office of Phelps Dunbar LLP. Her practice consists of employee benefits and employment matters, which includes advising employers on ERISA, HIPAA, and other aspects of plan administration. Green currently serves as secretary of the Labor & Employment Section of the FBA and is a member of the Baton Rouge Chapter of the FBA. The contributions of Brandi Cole and Jess Coco to this article are gratefully acknowledged.



### Endnotes

<sup>1</sup>Pub. L. No. 110-233 (May 21, 2008).

<sup>2</sup>GINA contains two titles. Title I governs health plans and insurers. Title II applies to employers with at least 15 employees and prohibits discrimination with respect to compensation, terms, conditions, or privileges of employment. Employers became subject to the provisions of Title II on Nov. 21, 2009.

<sup>3</sup>A genetic test is any analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes. Tests to evaluate cholesterol levels, blood count, liver function, or blood alcohol levels are not genetic tests. However, a test to determine whether an individual has a genetic variant associated with a medical condition is a genetic test. 26 C.F.R. § 54.9802-3T(a)(5)(i).

<sup>4</sup>74 Fed. Reg. 51664 (Oct. 7, 2009). The regulations become effective for plan years beginning on or after Dec. 7, 2009.

<sup>5</sup>The EEOC issued informal letters warning employers that disability-related questions contained in health risk assessments may violate the Americans with Disabilities Act. See EEOC Informal Letters, Jan. 6, 2009, and March 6, 2009.

<sup>6</sup>See 74 Fed. Reg. 51698 (Oct. 7, 2009).

<sup>7</sup>Pub. L. No. 111-5 (Feb. 17, 2009).

<sup>8</sup>74 Fed. Reg. 427470 (Aug. 24, 2009).

<sup>9</sup>74 Fed. Reg. 19006 (April 27, 2009).

<sup>10</sup>Pub. L. No. 110-381 (Oct. 9, 2008).

<sup>11</sup>Pub. L. No. 110-343 (Oct. 3, 2008).

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<sup>30</sup>With regard to "material change," see *Teamsters Local No. 287*, 304 NLRB at 120; *Teamsters*, 255 NLRB 1091, 1092 (1981); and *Hot Shoppes Inc.*, 143 NLRB 578, 581 (1963).

<sup>31</sup>See *Air Cargo Transport Inc.*, 15 NMB 202 (1988); *Crew Transit Inc.*, 10 NMB 64 (1982); *Florida Express Inc.*, 16 NMB 407 (1989); and *Trans-World International Airlines Inc.*, 6 NMB 703 (1979).

<sup>32</sup>Dunlop Commission, *Fact Finding Report Issued by the Commission on the Future of Worker-Management Relations*, available at [www.nathannewman.org/EDIN/.labor/.files/.archive/.dunlop/DunlopPreliminaryReport.html](http://www.nathannewman.org/EDIN/.labor/.files/.archive/.dunlop/DunlopPreliminaryReport.html).

<sup>33</sup>*Supra* note 31.

<sup>34</sup>45 U.S.C. 151. Note that the RLA explicitly exempts from its regulatory ambit even those "trucking services" performed by a company commonly owned and operated with an RLA carrier. Thus, the "express carrier" provision is absolutely essential to FedEx Express if its growing trucking operations threaten previous NMB rulings.

<sup>35</sup>49 U.S.C. 10501 *et seq.*

<sup>36</sup>109 Stat. 803 (1995).

<sup>37</sup>109 Stat. 803, 950 (1995); see also David Barnes, *Express Carrier Battle Heats Up on Capitol Hill*, *TRAFFIC WORLD* (July 29, 1996).

<sup>38</sup>David Barnes, *Down to the Wire: Airport Groups Fed Up with FedEx as Labor Provision Holds up FAA Bill*, *TRAFFIC WORLD* (Oct. 7, 1996).

<sup>39</sup>*Id.*

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

<sup>42</sup>David Barnes, *Victory for FedEx: Senate Breaks Filibuster Against FedEx Language*, *TRAFFIC WORLD* (Oct. 14, 1996).

<sup>43</sup>Oberstar amendment to H.R. 2881, amending § 201 of the RLA.

<sup>44</sup>See, e.g., Bartholomew Sullivan, *Smith Defends Labor Act Jurisdiction*, *MEMPHIS COMMERCIAL APPEAL*, July 20, 2007. FedEx has a history of opposing union organizing. Its pilots did not organize under the RLA until 1993. That occurred only after FedEx acquired Flying Tiger in 1989 and inherited that carrier's 970 pilots, who already belonged to the Air Line Pilots Association, see Algis Salpukas, *Labor's Showdown at Federal Express*, *NEW YORK TIMES*, Feb. 7, 1993.

<sup>45</sup>If the union does not receive 50 percent of the votes plus one systemwide, it is not certified. That is what seemed so enticing to UPS in 1995. Had the NLRB permitted UPS ground-service employees to be covered by the RLA and had a new vote for representation been engineered, UPS could have ousted the Teamsters Union as representatives of its ground-service employees if the Teamsters had not been able to meet the threshold established for the vote.

<sup>46</sup>Bartholomew Sullivan, *Smith Defends Labor Act Jurisdiction*, *MEMPHIS COMMERCIAL APPEAL*, July 20, 2007.