Determining What Rules Apply When the Union-Employer Relationship Extends Beyond the United States: "Extraterritoriality" -- Useful Guidepost or Convenient Buzzword Used to Avoid Meaningful Analysis?

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Globalization necessarily impacts the employer-employee relationship. As U.S. and foreign companies forge or deepen their relationships, and as they redistribute their services and work across borders, it no longer is sufficient to look to a single nation's domestic laws, practices and cultures to determine the rules that will attach to the employment relationship or to the relative rights and obligations of employers and unions. Instead, a host of complex issues are presented in deciding which laws and rules will govern, how disagreements regarding coverage will be resolved, and, more broadly, how interested parties will be able to enforce their alleged rights.

In the airline industry, expanded globalization is reflected in, among other things, the following:

- The forging of relationships or "alliances," including more deep-routed "joint ventures," through which U.S.-certificated carriers and foreign carriers have coordinated frequent flyer programs; airport lounges; marketing of flights; pricing; scheduling; revenues and/or maintenance.

- Code-sharing of international flights that permit a single flight to be marketed as if it was the flight of several different carriers of different nations.

- Acquisition by carriers of ownership interests in carriers headquartered in other nations.[1]

As a result of these and other globalization developments, it is increasingly difficult to classify flight operations or activities as "belonging" to individual nations. This blurring of the significance of national boundaries predictably injects a whole host of complex issues that one does not encounter in dealing with domestic disputes.

This paper first addresses legal doctrines that have been applied in determining whether U.S. law (and most importantly U.S. labor laws) apply when the matters in dispute involve, in whole or in part, conduct that occurs outside the United States and/or foreign individuals or entities, including the arguable impact of recent decisions. This is followed by a review of situations in which U.S. labor and employment laws have been applied in contexts where

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[1] Globalization also has led to the developments of cross-border alliances among unions representing common employee groupings.

foreign activities or foreign players are present. We next discuss other issues that arise in applying collective bargaining agreements in a transnational context. We also explore some currently pending contentious and potentially significant cross-border issues. We then suggest possible approaches for dealing more realistically with labor and employment issues generated by increasing globalization.[2] Finally, we offer some practical suggestions for U.S. lawyers if and when they are confronted with international issues.

I. LEGAL DOCTRINES THAT HAVE BEEN APPLIED IN DETERMINING WHETHER U.S. LAW GOVERNS WHEN CROSS-BORDER CONDUCT OR MULTI-NATIONAL PLAYERS ARE PRESENT

In evaluating disputes between U.S. companies and their employees in an "extraterritorial" context, a critical threshold issue is determining which nation's laws govern. A variety of legal doctrines have been applied in making such determinations.

Some courts, when required to determine which nation's laws apply to the relations of U.S. employers, unions and employees involved in activities outside the U.S., have taken as their starting analytical point the so-called "non-extraterritorial presumption." This presumption recognizes that: (1) while United States statutes can be enforced beyond the territorial boundaries of the United States; (2) they will not be presumed to apply outside the U.S. in the absence of some indication that Congress so intended ("long-standing principle of American law ... that Congress legislates against the backdrop of the presumption against extraterritoriality"). *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991).[3] *See Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869 (2010), discussed further below.

Other courts have applied a different analytical approach, focusing on the "effects" of the extraterritorial conduct in question within the United States (the "effects test") or on the extent to which the conduct occurs within the U.S. as well as extraterritorially (the "conduct test"). As we review below, the continued applicability of such tests has been undermined if not eliminated by the Supreme Court's 2010 *Morrison* decision.

Other doctrines that have been considered in determining whether U.S. laws apply are the Act of State of doctrine and the foreign compulsion defense.

A. The Non-Extraterritorial Presumption

Long before the Supreme Court's decision in *Arabian American*, courts applied the non-extraterritorial presumption to find that activities abroad of employees of U.S. companies were

[2] While the focus of this discussion is primarily on developments in the airline industry, related issues also have arisen in the context of the railroad industry. *See infra* at 4-5 n.9.

[3] *Arabian American* held that Title VII of the Civil Rights Act of 1964, as amended, did not apply extraterritorially to regulate the employment practices of United States employers as they applied to U.S. citizens working abroad. To directly override this Supreme Court decision, Congress amended Title VII to include within its protections U.S. citizens who work overseas for U.S. businesses. Section 109(a) of the Civil Rights Act of 1991, 42 U.S.C. §2000e(f) (1991).

not governed by the National Labor Relations Act ("NLRA"),[4] the Labor Management Relations Acts ("LMRA"),[5] or the Eight Hour Law.[6]

Shortly before the *Arabian American* decision, the presumption against extraterritoriality was applied in an RLA setting in *Independent Union of Flight Attendants v. Pan Am World Airways, Inc.*, 923 F.2d 678 (9th Cir. 1991) (referred to hereafter as the "*Berlin Express*" case) to deny statutory coverage to a dispute between a U.S. carrier and the union representing its flight attendants involving flying wholly outside the United States.[7]

In *Berlin Express*, the collective bargaining agreement ("CBA") between Pan American World Airways ("Pan Am") and the Independent Union of Flight Attendants ("IUFA") contained a scope clause that required Pan Am to use flight attendants on the Pan Am flight attendants' system seniority list for all present and future flying. By a letter agreement, this scope clause was explicitly applicable to Pan Am Corp., the parent of Pan Am. Similar scope clauses had been included previously in CBAs with IUFA's predecessor, the Transport Workers Union ("TWU"), and with the Air Line Pilots Association ("ALPA"), the union representing Pan Am's pilots.

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[4]*McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12-13 (1963) (petition by U.S. union seeking to represent seaman of Honduran subsidiary of U.S. corporation dismissed because NLRA does not extend to maritime operations of foreign flagships employing alien seamen). *See Asplundh Tree Export Co. v. NLRB*, 365 U.S. 168 (3d Cir. 2004) (refusing, on the basis of the non-extraterritorial presumption, to enforce NLRB determination that employer engaged in unfair labor practice in terminating employees of an American company working temporarily in Canada for protesting against their terms and conditions of employment).

[5]*Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) (LMRA inapplicable to picketing by U.S. union of foreign ship operated by foreign seamen, even though the ship was temporarily in an American port when the picketing took place). *See Labor Union of Pico Korea v. Pico Products*, 968 F.2d 191 (2d Cir.), *cert. denied*, 506 U.S. 985 (1992) (LMRA does not provide jurisdiction over alleged violations of labor contracts between Korean labor union and Korean corporation regarding work of Korean citizens in Korea; fact that actions of American parent of Korean corporation allegedly caused the contractual violations was an insufficient basis for holding U.S. law applicable).

[6]*Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (Eight Hour Law inapplicable to contract between the United States and a private contractor for construction work in Iraq and Iran).

[7]The Ninth Circuit's *Berlin Express* decision subsequently was withdrawn as moot and remanded to the District Court, 966 F.2d 457, 460 (9th Cir. 1992), but the lower court declined to vacate its original decision that had refused to enforce the collective bargaining agreement on the basis of the non-extraterritoriality presumption. 810 F.Supp. 263 (N.D. Cal. 1992).

Despite these agreements and the long-established practice of using seniority list flight attendants on intra-European flights,[8] Pan Am suddenly shifted flights within Europe to another Pan Am Corp. subsidiary, Pan Am Express, marketed the flights as the "Berlin Express," and staffed the flights with foreign national flight attendants represented by a German union rather than with Pan Am seniority list flight attendants represented by IUFA. IUFA filed a grievance which Pan Am refused to arbitrate because it claimed that the dispute raised extraterritorial issues beyond the jurisdiction of the system board. The union's action to compel arbitration was dismissed for lack of subject matter jurisdiction on the ground that the RLA does not apply extraterritorially, and the Ninth Circuit affirmed, by a 2-1 vote.

The majority and dissenting opinions of the Ninth Circuit in *Berlin Express* are of interest because they reflect differing approaches that jurists may follow in determining whether U.S. law should or should not apply to a labor law dispute involving a U.S. employer's operations in an international context.

The *Berlin Express* majority reasoned that because it could find no clear expression of congressional intent to apply the RLA or the Interstate Commerce Act ("ICA") to "purely foreign flying," 923 F.2d at 683, the non-extraterritorial presumption was applicable and the court therefore lacked jurisdiction to entertain IUFA's suit:

> [t]he presumption against extraterritoriality, in conjunction with Congress' careful and thorough definitions of commerce, compels the conclusion that the RLA does not prescribe substantive law with respect to flights which are not within its definitions of commerce.

923 F.2d at 683.[9] The majority considered this result required even though, as it recognized, RLA contracts are governed and enforceable by federal law and the RLA mandates precisely the arbitral resolution of contractual disputes that IUFA was seeking through its lawsuit:

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[8]Consistent with this past practice at Pan Am, U.S. carriers began to base flight crews overseas virtually with the inception of the airline industry. In most instances where carriers have based flight crews outside the U.S., they have treated their foreign-based flight crews as covered under the same collective bargaining agreements, negotiated under the RLA, and subject to the same union representation as applied to U.S.-based employees performing the same job functions.

[9]The *Berlin Express* majority noted that "virtually every court to consider the question has concluded that Congress did not intend the RLA to govern labor disputes in other countries." 923 F.2d at 682. However, all the prior decisions, in addition to arising many years earlier when the industry overwhelmingly was domestic in scope, involved employees based outside the U.S. who worked exclusively outside the U.S., and who, in almost all instances, were "foreign nationals." *See Air Line Stewards Ass'n v. Northwest Air Lines, Inc.*, 267 F.2d 170, 172-73 (8th Cir.), *cert. denied*, 361 U.S. 901 (1959); *Air Line Stewards Ass'n Int'l v. Trans World Airlines*, 273 F.2d 69, 71 (2d Cir.), *cert. denied*, 362 U.S. 988 (1960); *Air Line Dispatchers Ass'n v. National Mediation Bd.*, 189 F.2d 685, 690 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951). *See also Allen v. CSX Corp.*, 22 F.3d 1180 (D.C. Cir. 1994) (Canadian employees who worked exclusively outside the U.S. not covered by RLA); *cf. Van Blaricom v. Burlington Northern R.R.*, 17 F.3d 1224 (9th Cir.

> [c]oncern for compliance with the statutory mandate need not and should not extend beyond the scope of that mandate itself. Since, as we have seen, the RLA does not apply to purely foreign flying, no substantial question of federal law appears to be raised by an action to enforce an arbitration agreement with respect to such flying.

923 F.2d at 683-84. Moreover, the majority noted that the parties could not, by voluntary agreement, confer jurisdiction over what amounted to purely foreign flying. *Id.*[10]

The dissenting judge in *Berlin Express* believed that the court should never have reached the extraterritoriality issue, as what was at issue was simply an action to compel arbitration over a "domestic agreement" – a "routine agreement between a union and a carrier" – which explicitly covered intra-European flying and thus provided a "domestic 'hook' on which to hang the controversy that neither party could unilaterally modify by virtue of the RLA." *Id.* at 685 (Nelson, J., dissenting). As Judge Nelson further explained,

> it is not the RLA that must be stretched beyond our boundaries; it is the agreement that brings us there. .... The RLA may have no operation in another country; that does not mean, however, that the

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1994) (labor protective benefits awarded by Interstate Commerce Commission inapplicable because applicant was a Canadian citizen who had worked solely in Canada and the Interstate Commerce Act does not apply extraterritorially). The *Berlin Express* majority did not purport to treat any of the prior "extraterritorial" decisions as dispositive, as in none of the cases had courts been called upon to consider the enforceability of an existing contract. 923 F.2d at 682.

In addition, on the issue of whether Congress intended to cover flying outside the U.S. in the RLA, it is perhaps noteworthy that from the outset of the airline industry, and even before the RLA was extended to apply to airlines in 1936, U.S. carriers operated internationally and based employees overseas. This included conducting flights from one foreign location to another, as well as the carriage of U.S. mail overseas. Nothing in the RLA's legislative history indicates that Congress intended to exclude from RLA coverage the significant segment of the U.S. airline industry that, at the time, was operating internationally or the employees who were working on such flights.

[10]The *Berlin Express* majority suggested that IUFA's breach of contract claim could be heard in state court. *Id.* at 684 n.10. A similar possibility was noted in *Allen v. CSX*. 22 F.3d at 1182-83. Regardless of whether such a claim could be brought in state court, a strong argument could be made that the claim would be federally preempted because the agreement is between parties whose relationship is governed by federal law, the agreement was the product of RLA negotiations, and the introduction of state law – if that is what these courts intended – would raise a variety of significant conflict issues that run counter to a well-established body of case law emphasizing the importance of having these union-carrier relationships determined by federal law. *See, e.g, Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969); *Int'l. Ass'n. of Machinists v. Central Airlines*, 372 U.S. 682 (1963).

> agreements which the RLA purports to guarantee are limited in any way by territorial or national boundaries.

Id.

The dissenting judge additionally would have found the exercise of jurisdiction warranted because: (1) this dispute would have a "substantial, direct, and foreseeable effect upon or in the territory" of the United States, quoting Restatement (Third) of Foreign Relations Law, §403(2)(a), by depriving U.S. citizens of employment opportunities; (2) the German courts were unlikely to seek to assert jurisdiction over the dispute in light of Pan Am's status as an American carrier; and (3) the parties "undeniably anticipated that the collective bargaining agreement would apply to international flights," and hence expected that enforcement would be determined by reference to U.S. law. 923 F.2d at 686. In the dissent's view, "[t]he court has a responsibility to act in the face of an alleged breach that might cause serious injury, for 'collective bargaining agreements are central to American labor law and are the essential threads of its fabric.'" *Id.* (quoting *Air Line Pilots Ass'n v. TACA International Airlines, S.A.*, 748 F.2d 965, 968 (5th Cir. 1984), *cert. denied*, 417 U.S. 1100 (1985), a decision addressed *infra* at 10-13).

Subsequent to the *Berlin Express* decision, several other cases were filed that would have afforded an opportunity for further judicial guidance as to the extent to which the RLA will be applied in dealing with airline industry disputes with cross-border components. The Association of Flight Attendants ("AFA") initiated litigation against Tower Air contending that Tower's foreign-based flight attendants were entitled to the protections of U.S. labor law. ALPA similarly challenged Federal Express' position that the RLA did not apply to a pilot domicile established at Subic Bay and that ALPA's certification as bargaining representative did not extend to such pilots. ALPA also instituted litigation with a similar objective when Atlas Air initiated action to establish an alter ego operation at Stansted Airport in the United Kingdom and took the position that the pilots who would be based there would not be subject to the RLA and that the carrier would not negotiate with ALPA, the bargaining representative of the Atlas pilots, with respect to the terms and conditions of employment applicable to pilots based at Stansted. These cases were settled before the courts determined the significant issues presented. However, *see infra* at 16-18, for a discussion of other airline industry cases in which U.S. labor law was applied or CBAs were enforced in disputes with cross-border aspects or implications.

B. The Effects and Conduct Tests

Outside the labor law context, numerous courts over the course of many years determined whether U.S. laws should be applied not based on application of the non-extraterritorial presumption but rather through use of two other standards: the "effects" test and the "conduct" test. Under the effects test, a U.S. law would be considered applicable to "foreign" conduct (i.e., to conduct occurring outside the U.S.) where that conduct had a "substantial, direct, and foreseeable effect upon or in the territory" of the United States. Restatement (Third) of Foreign Relations Law of the United States, §403(2)(a) (the same Restatement provision cited as a basis for finding jurisdiction in the dissenting opinion in *Berlin Express*).[11] The conduct test focused on whether

[11]The effects test was applied to find conduct outside the United States to be subject to U.S. antitrust laws, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796-97 (1993); *United States v.*

conduct within the United States played a part in the accomplishment of illegal activities occurring outside the United States. Restatement (Third) of Foreign Relations Law of the United States, § 402.[12]

The Impact of the Supreme Court's *Morrison* Decision

The Supreme Court's 2010 decision in *Morrison v. National Australia Bank Ltd.*, calls into question whether and to what extent the effects and conduct tests can or will continue to be used in determining whether U.S. laws will be applied to disputes that have international components, and, if not, how this will impact future determinations regarding statutes that, heretofore, have been held to apply extraterritorially at least in certain circumstances.

Morrison dealt not with labor law, but with alleged violations of the anti-fraud provisions of Section 10(b) of the Securities Exchange Act of 1934. Virtually all significant aspects of the case occurred outside the U.S. and pertained to non-U.S. individuals and entities, and thus presented a so-called "foreign-cubed" action: "'(1) *foreign* plaintiffs suing (2) a *foreign* issuer of securities in an American court for violations of American securities laws based on securities transactions in (3) *foreign* countries.'" *Id.* at 2894 n.11 (Stevens, J. concurring), *quoting* the Second Circuit's decision in *Morrison*, 547 F.3d 167, 172 (2d Cir. 2008). Applying the non-extraterritorial presumption, the Court majority, in an opinion by Justice Scalia, emphasized that, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 2878. The Court criticized lower court decisions that had applied the effects or conduct tests to find U.S. law applicable based on their assessment that this result was consistent with the scheme and intent of the statute, even if the specific language of the statute did not provide for its

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Nippon Paper Industries Co., Ltd., 109 F.3d 1, 3-4 (1st Cir. 1997); *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 443-45 (2d Cir. 1945); *see Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986); the Commodity Exchange Act, *Tamari v. Bache & Co.*, 730 F.2d 1103 (7th Cir.), *cedrt. denied*, 469 U.S. 871 (1984); the Securities and Exchange Act, *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir.), *cert. denied*, 502 U.S. 1005 (1991); the Lanham Act, *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952); and the RICO Act, *Liquidation Com'n of Banco Intercont. v. Renta*, 530 F.3d 1339, 1351-52 (11th Cir. 2008); Alfadda *v. Fenn*; *DOE I v. Unocal Corp.*, 395 F.2d 932, 961 (9th Cir. 2002); *see South African Apartheid Litigation*, 346 F.Supp.2d 538, 555-56 (S.D.N.Y. 2004); *see also DOE I v. State of Israel*, 400 F.Supp.2d 86, 115 (D.D.C. 2005); *United States v. Noreiga*, 746 F.Supp. 1506 (S.D. Fla. 1990).

[12]Examples of cases that applied the conduct test or its principles were *Tamari v. Bache & Co.*, *supra*, 730 F.2d at 1106-09 (Commodities Exchange Act); *Steele v. Bulova Watch Co.*, *supra*, 344 U.S. at 287 (Lanham Act); *Liquidation Com'n of Banco Intercont. v. Renta*, *supra*, 530 F.3d at 1351-52 (RICO); *Alfadda v. Fenn*, *supra* (Securities and Exchange Act and RICO Act); *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983) (federal securities laws); *SEC v. Kasser*, 548 F.2d 109 (3d Cir.) (federal securities laws), *cert. denied sub nom. Churchill Forest Industries (Manitoba), Ltd. v. SEC*, 431 U.S. 938 (1977); *O'Mahony v. Accenture Ltd.*, 537 F.Supp.2d 506, 512-14 (S.D.N.Y. 2008) (Sarbanes-Oxley Act).

extraterritorial application. *Id.* at 2878-83.[13] The majority disparaged the many lower court decisions that had adopted these alternative approaches as "judge-made rules" and "judicial-speculation-made law," *id.* at 2881 – a somewhat ironic basis for criticism when the non-extraterritorial presumption, itself, is a judicially created doctrine. *See id.* at 2889-91 (Stevens, J., concurring). It also rejected the position of the Solicitor General that the "significant and material" conduct test that had been followed by numerous lower courts should be applied because it was "in accord with prevailing notions of international comity." *Id.* at 2887. The Court additionally considered it significant that another provision of the Securities Exchange Act (Section 30(b)), unlike Section 10(b) – the provision at issue in the case – contained language that reflected an intent that it be applied extraterritorially, thus dispelling the notion that Congress intended Section 10(b) to be similarly applied. *Id.* at 2882-83.

Justice Stevens, in a strongly worded concurrence, criticized the majority opinion as "seek[ing] to transform the [non-extraterritorial] presumption from a flexible rule of thumb into something more like a clear statement rule." *Id.* at 2891. Instead, in Justice Stevens' view, "[t]he presumption against extraterritoriality can be useful as a theory of congressional purpose, a tool for managing international conflict, a background norm, a tiebreaker. It does not relieve courts of their duty to give statutes the most faithful reading possible," *id.* at 2892, and that in making that assessment, "evidence [of the meaning of a statutory provision] legitimately encompasses more than the enacted text," *Id.*

Justice Scalia rejected Justice Stevens' charge that the majority had adopted a "clear statement rule" (*i.e.*, a requirement that a statute expressly state that the law applies abroad for it to be held to so apply), noting that "[a]ssuredly context can be consulted" in determining if a statute applies extraterritoriality." *Id.* at 2883.

The full impact of *Morrison* remains to be seen, although subsequent Supreme Court decisions suggest no retreat from the seemingly broad language of *Morrison*.[14] Some courts have held that *Morrison* precludes applying U.S. law when the statute does not specifically provide for extraterritorial application, even if that means reversing prior decisions holding U.S. laws applicable.[15] Other courts have seized on Justice Scalia's "context" qualifier as a basis for finding

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[13]While Judge Scalia directed the thrust of his criticism principally at the Second Circuit, which he viewed to have been the creator of the effects and conduct tests, courts in many other circuits, as noted above, also have applied these tests, *see also id.* at 2889 at n.2 (Stevens, J., concurring), and those tests are woven into the Restatement of The Foreign Relations Law of the United States. *See supra* at 6-7 and *infra* at 10-11.

[14] *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (applying non-extraterritorial presumption to claims under the Alien Tort Statute); *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014) (finding no U.S. jurisdiction over claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the U.S.).

[15]*E.g., Norex Petroleum Ltd. v. Access Industries, Inc.*, 631 F.3d 29, 32-33 (2d Cir. 2010) (*Morrison* establishes a *"bright-line rule"* and because Section 1964(c) of the RICO Act is silent as to any extraterritorial application, it does not apply extraterritorially); *In re Banco Santander Securities-Optimal Litigation*, 732 F.Supp.2d 1305, 1316 (S.D. Fla. 2010) (viewing *Morrison* as

U.S. applicable even where foreign conduct or players were present.[16] These differences of view as to the significance of *Morrison* have extended even to particular statutes.[17]

"retiring the 'effects' and 'conduct' tests adopted by various circuits in determining the extraterritorial reach of federal securities fraud claims"); *Sorota v. Sosa*, 842 F.Supp.2d 1343, 1348-49 (S.D. Fla. 2012) (district court within Eleventh Circuit holding that because *Morrison* effectively overruled *Liquidation Com'n of Banco Intercont. v. Renta* , 530 F.3d 1339 (11th Cir. 2008), *Renta* no longer was binding within the Eleventh Circuit); *United States v. Philip Morris USA, Inc.*, 783 F.Supp.2d 23 (D.D.C. 2011) (granting motion for reconsideration of prior ruling applying RICO extraterritorially, which the D.C. Circuit had affirmed, in light of intervening *Morrison* decision).

[16]*E.g., Love v. Sanctuary Records Group, Ltd.*, 611 F.3d 601, 612 n.6 (9th Cir. 2010) (*Morrison* does not require change in prior law that Lanham Act applies extraterritorially given the statute's "sweeping[]" definition of commerce); *United States v. Weingarten*, 632 F.3d 60, 65 (2d Cir. 2011) (emphasizing the language in the majority decision in *Morrison* that the non-extraterritorial presumption does not create a clear statement requirement that a statute contain language specifically providing for its extraterritorial application and that context and reference to non-textual sources is permitted), *United States v. Finch*, Cr. No. 10-00333 SOM-KSC, 2010 WL 3938176 at *4 (D. Hawaii Sept. 30, 2010) ("*Morrison* does not … hold that all federal statutes lacking express language authorizing extra-territorial application must necessarily apply only to acts occurring entirely in the United States."); *CGC Holding Co., LLC v. Hutchens*, 824 F.Supp.2d 1193, 1208-10 (D.Colo. 2011) (noting that while decisions post-*Morrison* have held that RICO does not apply extraterritorially, RICO can apply where conduct occurred in the U.S. that was not just incidental, because in such circumstances, RICO is being applied domestically and not extraterritorially); *United States v. Chao Fan Xu*, 706 F.3d 965. 977-79 (9th Cir. 2013) (key is whether the racketeering activity was executed and perpetuated in or outside the U.S.). *See also U.S. v. Reumayr*, 530 F.Supp.2d 1210, 1214 (D. N.M. 2008) (pre-*Morrison* decision expressing view that a court is not limited to language of statute in determining whether statute applies extraterritorially; may consider "'all available evidence about the meaning of the statute, e.g., its text, structure, and legislative history'") (internal citations omitted); *Torrico v. International Business Machines Corp.*, 213 F.Supp.2d 390 (S.D.N.Y. 2002) (pre-*Morrison*; Court declining to dismiss Americans with Disabilities Act claim where substantial conduct occurred in U.S. rather than extraterritorially).

[17]*E.g.,* RICO: *compare Sorota v. Sosa, supra*, n.15 *with CGC Holding Co., LLC v. Hutchens*, *supra*, n. 16; *but see European Community v. RJR Nabisco, Inc.*, 2011 WL 843957, at *4-6 (E.D.N.Y. Mar. 8, 2011) (post-*Morrison*, key in RICO case is finding the locus of the RICO "enterprise" and and to make that determination, you need to focus on the "nerve center" of the enterprise, *i.e.*, on its "brains" (where the enterprise's decisions are made) rather than on its "brawn" (the actions of the enterprise); *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 871 F.Supp.2d 933, 937-943 (same, and further noting that courts post-*Morrison* "have yet to settle on a single approach"); *Republic of Iraq v. ABB AG*, 920 F.Supp.2d 517, 543-44 (S.D.N.Y. 2013.

Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A and Dodd-Frank Act: *compare Asadi v. G.E. Energy (USA) LLC*, 2012 WL 2522599 at *4-5 (S.D. Tex. June 28, 2012), 33 IER

C. The Foreign Compulsion Defense and the Act of State Doctrine

In certain instances, defendants have attempted to excuse their non-compliance with U.S. law or collective bargaining agreements based on the "foreign compulsion" defense. Invoking that defense, defendants have argued that their allegedly unlawful conduct was "involuntary" because it was "compelled" by the foreign law of the country in which the defendant was operating.

In deciding whether to permit a "foreign compulsion" defense, a court is to balance the following factors:

(a) vital national interests of each of the states;

(b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person;

Cases (BNA) 1837, 1841-42 (observing that under *Morrison*, a court, in determining whether a statute applies extraterritorially, may consider, in addition to statutory language, the language's context, and concluding that the anti-retaliation provision of the Dodd-Frank Act does not apply extraterritorially, relying in part on fact that the statute applies extraterritorially when enforced by the SEC or the United States, but does not so provide for private party actions); *Meng-Lin Liu v. Siemens A.G.*, 2013 WL 5692504 at *3 (S.D.N.Y. Oct. 21, 2013) (same); *Villaneuva v. Core Labs, NV*, 2011 WL 7021145 *5-8 (U.S. Dept. of Labor Admin. Law Bd. Dec. 22, 2011), 33 IER Cases (BNA) 1818, 1823-26 (same), *aff'd on other grounds*, 2014 WL 550817 (5th Cir. Feb. 12, 3014), with *id.*, 2011 WL at *10-11, 33 IER at 1827-29 (Royce, Admin. Appeal Judge, dissenting) (under *Morrison*, tribunal should examine context, structure and legislative history, which lend support for extraterritorial application); *id.*, 2011 WL at *13, 33 IER at 1830 (Brown, Dep. Chief Admin. Appeal Judge, dissenting) (Sarbanes-Oxley applies extraterritorially). Even pre-*Morrison*, courts differed on whether Sarbanes-Oxley claims could be disposed of based on the non-extraterritorial presumption. *Compare Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir.) (Sarbanes-Oxley Act does not apply extraterritorially to foreign worker employed outside the United States by foreign subsidiary of an American corporation), *cert. denied*, 548 U.S. 906 (2006), *with O'Mahony, supra* (declining to apply non-extraterritorial presumption to a Sarbanes-Oxley claim where employee was paid and compensated by U.S. subsidiary of foreign corporation, conduct alleged related to purported fraud involving employees located in U.S. and occurred in the U.S., and the employee sued the foreign parent and its U.S. subsidiary for alleged misconduct of the U.S. subsidiary in the U.S.).

See also Ofori-Tenkorang v. *American Intern. Group, Inc.*, 460 F.3d 296 (2d Cir. 2006) (pre-*Morrison* decision; 42 U.S.C. §1981 does not apply to acts committed while employee is outside the U.S., but could apply if employee established that he/she was discriminated against in the terms of the formation and modification of an employment contract before the individual left the U.S. to begin foreign assignment and employer took steps to implement this discriminatory conduct while the employee was still in the U.S.).

(c) the extent to which the required conduct is to take place in the territory of the other state;

(d) the nationality of the person; and

(e) the extent to which enforcement by either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

ALPA v. TACA, 748 F.2d at 971-72 (quoting Restatement (Second), The Foreign Relations Law of the United States, §40). *See* Restatement (Third), The Foreign Relations Law of the United States, §§403, 441.

One case in which a carrier attempted to rely upon a foreign compulsion defense was *Local 553, Transport Workers Union v. Eastern Air Lines*, 544 F.Supp. 1315 (E.D.N.Y.), *aff'd as mod.*, 695 F.2d 668 (2d Cir. 1982) (referred to hereafter as the "*Local 553*" case). In that case, Eastern Airlines ("Eastern") purchased the South American routes of Braniff Airlines ("Braniff"). Eastern claimed that it would lose its right to operate in various South American countries unless it used the "foreign nationals" whom Braniff had employed on such routes, and therefore refused to assign the flying to TWU-represented flight attendants. 544 F.Supp. at 1334; *see* 695 F.2d at 670. The Court did not specifically review the factors listed above, but nevertheless rejected the "foreign compulsion" defense advanced by Eastern, because "[e]ven assuming that . . . the laws and political reactions of these [South American] countries to any change in the employment status of the [foreign] Braniff flight attendants" were as Eastern contended, Eastern was bound to follow the terms of the TWU CBA, for it was Eastern, not the Union, that "voluntarily decided to take over" the foreign routes. 544 F.Supp. at 1335. In the court's view, "a carrier should not be able to avoid its RLA obligations based upon foreign law where it has voluntarily put itself in a situation where it knew those laws would be applicable." *Id.* at 1336.[18] *See Steele v. Bulova Watch*, *supra*, 344 U.S. at 288 (defendant that, by its own acts, brought about forbidden results, cannot avoid liability for Lanham Act violation based on foreign government's registration of trademark).[19]

A more explicit discussion of the foreign compulsion defense as well as the "act of state" doctrine is found in *ALPA v. TACA*. At the time the litigation arose, TACA was the national airline of El Salvador. A majority of TACA's pilots were Salvadoran nationals, but all were based in New Orleans, represented by ALPA and covered under a TACA-ALPA collective bargaining agreement.

In the midst of negotiations between TACA and ALPA for a new CBA, the Constitution of El Salvador was amended to require all public service companies to have their work center and base of operations in El Salvador. Immediately thereafter, the Salvadoran government ordered TACA to relocate its pilot base to El Salvador. TACA announced that it would comply, abrogate the TACA-ALPA CBA, and withdraw recognition from ALPA. ALPA sued in Federal Court in New Orleans, contending that TACA's announced course of action was a

[18]The decision of the Second Circuit in *Local 553* did not specifically address either the extraterritorial or foreign compulsion issues.

[19]*See infra* at 16-17, for a further discussion of *Local 553*.

unilateral change prohibited by the RLA.[20] In response, TACA claimed that: as a Salvadoran company, it had to comply with the Constitutional directive or it would lose its operating certificate; its actions were authorized by an Air Transportation Agreement between the U.S. and El Salvador; and, under the act of state doctrine, the United States courts should defer to the requirements of Salvadoran law and not grant injunctive relief. TACA's position was supported by the government of El Salvador, which appeared as an amicus in proceedings before the Fifth Circuit. *Id.*, 748 F.2d at 967.

Under the act of state doctrine, U.S. courts will not question the validity or motivations of actions of foreign governments taken within their own borders,[21] the purpose being to avoid conflicts between nations and judicial interference with the role of the executive branch in international affairs. *ALPA v. TACA*, 748 F.2d at 970. Among the factors to be considered in determining whether the doctrine applies are: the degree of involvement of the foreign state; the effect a judicial decision would have on foreign relations; and whether the decision will involve the adjudication of the laws, conduct or motivation of a foreign government. A critical factor is the location of the interest (or "*res*") to which the attempted action in question would apply; where "the *res* is outside the control or territory of the foreign state, the doctrine need not apply." *Id.*

The court rejected TACA's reliance on the Air Transportation Agreement, holding that it was not intended to replace relevant domestic labor law. Next, the court held that the act of state doctrine was inapplicable because: (1) the court was not adjudicating the validity of Salvador's Constitution, but rather the legality of TACA's response to the Salvadoran governmental directive, which, "[i]nsofar as the relationship between TACA and ALPA . . . must be made in a manner consistent with controlling provisions of United States law, specifically and primarily the Railway Labor Act," *id.* at 971[22]; (2) the TACA-ALPA dispute did not involve sensitive areas of international relations; and (3) "the *res* or interest in this case, whether we deem it the pilot base or the collective bargaining agreement, is clearly located in the United States." *Id.* Thus, the Court concluded:

> We cannot give effect to El Salvador's directive to TACA to extinguish *ex parte* the collective bargaining agreement and relocate the pilot base. Those acts directly affect interests located within the United States and contravene fundamental principals of American labor policy.

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[20] A similar effort by TACA to leave the U.S. in 1969 had been enjoined, *Ruby v. TACA International Airlines, S.A.*, 439 F.2d 1359 (5th Cir. 1969). In that instance, the alleged Salvadoran government directive to TACA was less explicit.

[21] *E.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *see W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l.*, 493 U.S. 400 (1990).

[22] Only if the court must decide the validity of another country's official actions is the act of state doctrine implicated. *DRFP, LLC v. Republica Bolivariana de Venezuela*, 945 F.Supp.2d 890, 913 (S.D. Ohio 2013).

Id. One such "fundamental principle" was that "collective bargaining agreements are a cornerstone of our national labor policy." *Id.* at 972.

In analyzing TACA's attempt to justify its actions as resulting from "foreign compulsion," the Fifth Circuit in *ALPA v. TACA*, like the court in *Local 553*, placed heavy emphasis on the fact that TACA voluntarily had chosen to conduct business in the United States. By doing so, the court reasoned, TACA became "subject to all relevant domestic [U.S.] laws," *ALPA v. TACA*, 748 F.2d at 972, and its actions could not be excused on foreign compulsion grounds. *Id.* at 971-72. The court held that TACA could relocate its base only by following the procedures of the RLA, *i.e.*, by negotiating an agreement with ALPA, or by exhausting the RLA's bargaining procedures, obtaining a "release," and then lawfully implementing "self-help." *See id.*[23]

An attempted use of the foreign compulsion defense also was rejected in *Association of Flight Attendants v. United Airlines*, 797 F.Supp. 1115 (E.D.N.Y.), *rev'd on other grounds*, 976 F.2d 102 (2d Cir. 1992), *unreported decision following trial*, CV-92-2919 (E.D.N.Y. Nov. 19, 1993). That case arose after United had announced the opening of a flight attendant domicile in Paris, France. The applicable CBA required that vacancies in new domiciles be filled through a bidding process by seniority, and precluded the use of new hires unless there were insufficient bids from incumbent flight attendants.

Flight attendants who were not citizens of the European Economic Community purportedly needed visas to be able to work at the Paris base. Although the domicile was slated to open with 225 flight attendants, United made arrangements with the French government for only 75 visas. Many more incumbents bid for the vacancies than there were openings, but United permitted only the 75 most senior non-EEC citizens to transfer, for whom visas were available, and filled the remainder of the positions either with incumbents who held EEC citizenship (almost all of whom, had seniority governed, would not have been awarded the positions), or with new hires who were EEC citizens. United claimed that incumbents without visas were "not qualified" for the Paris positions.[24] The flight attendants' union (AFA) claimed that the insufficiency of visas could

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[23]As previously noted, Congress amended Title VII of the Civil Rights Act in 1991 to provide for extraterritorial application of the statute. The amendment specifically incorporates a foreign compulsion defense, applicable where statutory compliance with respect to an employee in a foreign workplace would "cause" the employer to "violate the law of the foreign country in which such workplace is located." Section 702(b), 42 U.S.C. 2000e-1(b)(1991). The EEOC's Guidelines on the amendment confirm that the burden is on the employer to demonstrate all elements of the defense, including, *inter alia*, a showing that there is an "inevitable" conflict between statutory compliance and foreign law. The Guidelines further emphasize that foreign court decisions do not constitute "foreign law" for purposes of the foreign compulsion defense. EEOC Enforcement Guidance on Application of Title VII and the ADA to Conduct Overseas and to Foreign Employers Discriminating in the U.S., N-915.002 (Oct. 20, 1993), 8 FEP Manual (BNA) 405:6663 at 405:6668-69 and n.10 (1993). *See also* Americans with Disabilities Act, 42 U.S.C. §12112(c) (ADA foreign compulsion defense provision).

[24]In *AFA v. United*, United did not attempt to foreclose the Court's consideration of the dispute based on the non-extraterritorial presumption; if it had, that undoubtedly would have been in direct

not excuse United's filling of vacancies out-of-seniority order and that the CBA obligated United to arrange for the necessary number of visas.

The District Court initially granted a preliminary injunction and barred United from opening the Paris domicile until visas could be obtained for senior incumbents desiring to fill the openings.[25] The Appellate Court reversed, not on the merits, but because it concluded that United's contractual position was "arguably justified" by the CBA and therefore presented a "minor dispute" under the RLA within the exclusive jurisdiction of the arbitration board.[26] After the federal court litigation had concluded, the parties engaged in a lengthy arbitration that resulted in a decision finding that United had violated the CBA by seeking an insufficient number of visas. The System Board formulated a remedy that requires union participation in future situations involving a need to obtain immigration approvals for flight attendants.

United, as part of its legal defense in the federal court litigation, asserted the equivalent of a foreign compulsion defense, arguing that any non-compliance with the CBA could be excused under the "savings clause" of the CBA because United's actions were required by French immigration law. The district court rejected the carrier's position, finding no factual basis for the contention that United's actions were required by French immigration law. 797 F.Supp. at 1123. Additionally, the court considered United's argument to be flawed as a matter of law because United was aware of the impact of French immigration law before it embarked upon its course of conduct:

> Ten years later [after the *Local 553* case, which had been decided by the same Judge] it remains true that 'a carrier should not be able to avoid its RLA obligations based upon foreign law where it knew those laws would be applicable' (*quoting Local 553*, 544 F.Supp. at 1336). Like the common law of coming to a nuisance, this rule prevents the instigator of trouble from calling itself the victim.

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conflict with the position it previously had taken in *Gately*, reviewed *infra*, that the RLA and the United-AFA CBA, not British law, governed United's London operations and the London-based flight attendants, and also with United's publicly expressed position that the United-AFA CBA and the RLA would apply to the Paris domicile.

[25]In the view of the District Court in *AFA v. United*, United had manipulated the visa requirement in a bad faith attempt to avoid the seniority requirements of the CBA and to get around the CBA's limitation on the number of flight attendant positions that United was permitted to set aside for foreign language-speaking flight attendants.

[26]Because the appellate ruling in *AFA v. United* had been based only on a pre-discovery, preliminary injunction record, the District Court, over United's objection, ordered an expedited trial to determine, with benefit of a full record, whether the matter involved a major dispute (as to which the Court would have jurisdiction and could order necessary relief) or a minor dispute within the exclusive province of the system board of adjustment (the arbitration tribunal). The District Court eventually determined that the case presented a minor dispute to be determined on the merits by the system board. CV-92-2919 (E.D.N.Y. Nov. 19, 1993).

Id. at 1123-24.

The Court of Appeals in *AFA v. United* did not address the "foreign compulsion" issue. The District Court, in its subsequent post-trial decision, again rejected United's foreign compulsion defense: "...United's argument that the CBA's savings clause relieves it of its obligations under the seniority provisions of the CBA because those obligations would require it to violate French law remains, in the [District Court's] view, frivolous." Slip Op., p. 14.[27]

United again was rebuffed in its attempt to rely upon inconsistencies in U.S. and foreign law in litigation in the United Kingdom involving the rights of its London-based flight attendants to continue working and to receive income while they were pregnant. *Bannigan, et.al. v. United Airlines*, Case No. 10471/96, 21107/96, 20119/96 (Employment Tribunals 1999).

The United-AFA CBA, consistent with an earlier consent decree entered by a U.S. District Court arising out of litigation between United and AFA, provided that pregnant flight attendants may continue flying through the first 27 weeks of pregnancy (subject to certain medical verifications). London-based United flight attendants argued that, under U.K. law, flight attendants could not be grounded involuntarily after 27 weeks, but must instead be permitted to continue to fly if able, offered alternative employment if no longer able to fly, or, if no alternative jobs were available, placed on a paid leave. United argued that it was subject to U.S. law, with which its conduct was consistent, and was not bound by any inconsistent obligations imposed by British law. The Employment Tribunal disagreed and ordered United to comply with British law. *Id.*

The British Tribunal in *Bannigan*, like the U.S. Courts in *Local 553*, *TACA* and *AFA v. United*, relied heavily on the fact that United had elected to do business in the United Kingdom for its conclusion that United therefore should not be able to insulate itself from the requirements of British law:

> We find that the Respondent [United], in other areas of the globe where they operated, have applied local legislation. There is no reason why employees who are deemed to be employees working in

[27] In *Machinists v. Varig, S.A.*, 499 F.Supp.2d 469 (S.D.N.Y. 2007), *aff'd*, 302 Fed.Appx. 10, 185 LRRM (BNA) 2486 (2d Cir. 2008), the court rejected another carrier's attempt to excuse non-performance of CBA obligations based on a savings clause – in that instance contending that its non-compliance was compelled by the requirements of Brazilian bankruptcy law under which the carrier then was operating. The court further concluded that because all CBA terms at issue were unambiguous, the case did not present an RLA minor dispute that the Court could not adjudicate. 499 F.Supp.2d at 474-75. However, the Court acknowledged that an interesting issue remained for future decision: "whether the Varig CBA applies at all in this action or whether it is trumped by Brazilian bankruptcy law." *Id.* at 475. In affirming, the Second Circuit held that the district court did not abuse its discretion in failing to extend comity to the Brazilian bankruptcy proceedings, particularly because the reorganization plan filed in the Brazilian bankruptcy proceedings did not, by its terms, prevent creditors such as the employees represented by the union-plaintiff, from pursuing claims against their employer in U.S. courts. 302 Fed. Appx. at 12, 185 LRRM at 2487.

> the United Kingdom should not have United Kingdom legislation applied to them.

Decision of The Employment Tribunals, p. 5*. It should further be noted that, in contrast to the situation presented in *Gately*, where the attempted application of British law would have had severe adverse consequences for the rest of the United flight attendants who were based in the U.S., an application of maternity benefits to British-based flight attendants that were more generous than those provided under U.S. law, as required in *Bannigan*, involved only non-competitive employment terms and would not have caused any harm to the U.S.-based flight attendants. *See infra* at 23, for a further discussion of *Bannigan*.[28]

II. APPLYING U.S. LABOR AND EMPLOYMENT LAWS IN CONTEXTS WHERE FOREIGN ACTIVITIES OR FOREIGN PLAYERS ARE PRESENT

In a number of cases arising in a labor law context, courts determined that U.S. labor law was applicable notwithstanding that foreign conduct and/or participants played a prominent role in the matters in controversy.

A. Applications in the Airline Industry

The previously discussed *Local 553* decision provides an example of the application of U.S. labor law to an international dispute. As noted, that case arose in the context of Eastern Airlines' purchase of the South American routes of Braniff Airlines. The "scope" clause of Eastern's CBA with TWU, the bargaining representative for its flight attendants, required that all Eastern flying be assigned to flight attendants on the Eastern seniority list, but, as previously reviewed, Eastern attempted to excuse non-compliance on foreign compulsion grounds. TWU claimed that Eastern was attempting to unilaterally change the CBA in violation of the RLA. Eastern countered that the RLA did not apply outside the U.S., and that the dispute was a "minor" RLA dispute because the scope clause arguably did not apply to the South American operations. 544 F.Supp. at 1317-18, 1322-27.[29]

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[28] For a more detailed discussion of case law addressing the determination of applicable law in the context of international disputes and related issues, *see* Stephen B. Moldof, *The Application of U.S. Labor Law to Activities and Employees Outside the United States*, 17 *Lab. Law* 417 (Winter/Spring 2002); *International Labor and Employment Laws, Vol. 1B, 3d ed.* (BNA 2009, William J. Keller and Timothy J. Darby, eds.), chapter on *Extraterritorial Application of U.S. Law, Part II – Collective Bargaining* at 34-59 and *2013 Supplement, Vols. IA and IB* at 34-58 (Stephen B. Moldof and Joseph Z. Fleming).

[29] Under the RLA, a distinction is drawn between "major disputes," that involve changes in collective bargaining agreements or established terms and conditions of employment, and "minor disputes," that center on questions of contract interpretation or application. *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 723-25 (1945). Federal courts have jurisdiction over major disputes and can issue injunctions requiring the parties to adhere to the mandatory bargaining procedures of the RLA before instituting self-help (*e.g.*, strikes or unilateral changes in employment terms). *Detroit & T. Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142 (1969). Federal courts generally lack

The District Court in *Local 553* found the dispute to be a "major dispute" under the RLA, and therefore enjoinable, because the all-encompassing scope language made any argument that the CBA was implicitly limited to U.S.-based employees "wholly-insubstantial." *Id.* at 1323. More pertinent to the international issues addressed herein, the Court held that the RLA was applicable because, unlike in other prior extraterritorial cases where wholly-foreign flying was at issue, the flying in question was primarily "between foreign points and points within the United States." *Id.* at 1322 n.1. *But see Gantchar v. United Airlines, Inc.*, No. 93 CV 1457, 1995 WL 137053 (N.D. Ill. Mar. 28, 1995) (considering, for purposes of Title VII, airspace over the Atlantic Ocean to be "an extraterritorial workplace"). In language seemingly conflicting with the previously-noted view of the majority in the *Berlin Express* case, the Court concluded that injunctive relief was appropriate even if the RLA did not apply, because "parties to an agreement made pursuant to the RLA may, by agreement, place conditions on the company's hiring of employees that may not be required by the RLA itself." 544 F.Supp. at 1326.

Similar issues were presented and yielded similar results in litigation in the United Kingdom, when a British Court was called upon to determine whether a contractual-based dispute in the context of an acquisition by United Air Lines ("United") of Pan Am's London routes should be governed by U.S. labor law or British labor law principles. *Gately v. United Air Lines*, CH 1991 G No. 2740 (High Court of Justice, Chancery Division). As part of the transaction, United agreed to hire a "reasonable number" of Pan Am pilots and flight attendants, subject to terms agreed upon by the unions for United's pilots (ALPA) and flight attendants (AFA). The Pan Am flight attendants were represented by IUFA, the same union involved in the *Berlin Express* case.

United offered employment to some but not all of the individuals who had been employed as flight attendants at Pan Am's London domicile. United informed those to whom it extended employment offers that the terms of the United-AFA CBA would govern their employment and that, only if AFA consented, would the hired flight attendants receive seniority credit at United for their service at Pan Am.

Both those who were hired and those who were not sued United in London, claiming that, under a British statute known as the Transfer of Undertakings Act, United was obligated to hire all the former Pan Am flight attendants based in London and to grant them terms and conditions, including seniority, no less favorable than they enjoyed at Pan Am, i.e., at minimum, the terms provided under the Pan Am-IUFA CBA.

United and AFA contended that the RLA rather than British law was applicable because of the superior U.S. ties to the litigation – United was a U.S. carrier, both AFA and IUFA were U.S. unions, the United-UFA collective bargaining agreement had been negotiated in the U.S. under U.S. law, and the bulk of the flying was between the United Kingdom and the United States and not "wholly foreign" – and because United would violate the RLA if it unilaterally changed terms and conditions of employment mandated by the United-AFA CBA.

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jurisdiction over minor disputes; they, instead, are adjudicated through the grievance/arbitration machinery. *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n.*, 491 U.S. 299, 302-04 (1989).

IUFA, which funded the plaintiffs' litigation and intervened on their side, took precisely the opposite position in *Gately* from that which it had pursued in the *Berlin Express* case; it argued that the RLA did not apply because it did not extend extraterritorially to United's operations in London or to British-based employees.

The British Court denied the plaintiffs' request for the equivalent of a preliminary injunction, concluding that the plaintiffs had not demonstrated that they were likely to establish that the British statute applied and that the balance of hardships tipped in defendants' favor. Interestingly, the latter conclusion was based upon the British Court's assessment that United was likely to be enjoined in the United States if United, without AFA's concurrence, provided the terms and conditions sought by plaintiffs in response to the British Court's issuance of an injunction. The Court considered this result compelled by *Local 553* (reviewed above), the only case the Court considered to be directly on point.[30] The British Court did not find the fact that the flight attendants in question were based in the United Kingdom to be determinative.[31] The British lawsuit was discontinued shortly after the Court denied the injunction.

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[30] As noted above, the dissenting opinion in the *Berlin Express* case would have found the RLA applicable to the activity at issue conducted outside the U.S. based on application of the effects test. 923 F.2d at 686 (Nelson, J., dissenting).

[31] Section 9.209 of the NMB's Representation Manual (2013) provides that: "Only employees based within the United States and/or its possessions are eligible," referring to eligibility to vote in representation elections. *See Express One International, Inc.*, 25 NMB 383, 387 (1998); *Petroleum Helicopters, Inc.*, 27 NMB 283, 287 (2000), 32 NMB 179 (2005); *Offshore Logistics Aviation Servs.*, 11 NMB 144 (1984). The NMB has determined that employees based in the U.S. are eligible to vote even if much of their work occurs outside the U.S. *Atlas Air, Inc.*, 25 NMB 181, 183 (1998). Interestingly, the language currently in the Representation Manual replaces language in earlier versions of the Manual that stated that only U.S.-based employees are "subject to Railway Labor Act jurisdiction," *see, e.g.*, Section 5.310 of the 2001 Manual. The foundation for the earlier formulation was questionable because it purported to extend beyond the confines of Section 2 Ninth of the RLA, and thus into areas in which the NMB's pronouncements are entitled to no special deference. *See Railway Labor Exec. Ass'n v. NMB*, 29 F.3d 655, 659, 662-63, 671 (D.C. Cir. 1994) (*en banc*), *cert. denied sub. nom National Railway Lab. Conf. v. Railway Labor Exec. Ass'n*, 514 U.S. 1032 (1995); *ILA v. N.C. Port Auth.*, 463 F.2d 1, 3 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); *United States v. Feaster*, 410 F.2d 1354, 1361 (5th Cir.), *cert. denied*, 396 U.S. 962 (1969); *Pan Am World Airways v. United Bhd of Carpenters*, 324 F.2d 217, 222-23 & n.2 (9th Cir. 1963), *cert. denied*, 376 U.S. 964 (1964); *cf. United Transp. Union v. United States*, 987 F.2d 784, 789, 790 n.4 (D.C. Cir. 1993) (explicitly reserving issue of whether deference due NMB exercise of "jurisdiction based on its interpretation of the [RLA]").

It should also be noted that the NMB has not strictly adhered to its own stated policy. Indeed, when the NMB, prior to the *Gately* litigation, conducted a representation election among the Pan Am flight attendants in response to a petition filed by IUFA, the Board permitted the carrier's flight attendants who were based in London to vote.

B. Applications to NLRA-Covered Employers, Unions and Employees

The applicability of the NLRA was at issue in a dispute involving conduct in Japan that was related to a labor dispute in the United States. The International Longshoremen's Association ("ILA") sought to require the exclusive use of union dockworkers to load goods intended for export on ships docked in Florida. The ILA requested its counterpart in Japan to pressure Japanese importers not to import goods from the U.S. that arrived on ships that had been loaded in the U.S. by non-union labor. As a result of the actions of Japanese unions, Japanese importers restricted their imports to goods that had been boarded in the U.S. by union workers. The affected American exporters filed charges with the NLRB claiming that the ILA had engaged in unlawful secondary activity.

While the NLRB and the courts differed on the merits of the underlying issues in this dispute involving conduct in Japan, all tribunals that addressed the issue concluded that NLRA jurisdiction properly extended to the action in question because the conduct, notwithstanding its foreign locale, was intended to and in fact had substantial effects within the U.S. and pertained to other conduct within the U.S. – namely, the ongoing labor dispute between the U.S. unions and employers that lay at the center of the controversy.[32]

Another potential opportunity to determine the reach of U.S. labor law in disputes with foreign components arose in the context of a dispute involving Trico, a U.S. shipper operating in the Gulf of Mexico and also around the globe through worldwide affiliates. The U.S. unions that were trying to organize Trico's U.S.-based employees enlisted the assistance of the unions that represented mariners outside the U.S., including those employed by overseas Trico affiliates. Boycotts were directed at Trico affiliates outside the United States. The U.S. unions filed an unfair labor practice charge with the NLRB against Trico in the U.S. and, together with the International Transport Federation ("ITF"), filed a complaint against Trico with the Organization for Economic Commerce and Development ("OECD"). Litigation was commenced in Norway related to the threatened boycott of Trico by NOPEF, the union that represented Norway's mariners, in support of their American colleagues. A principal issue in this Norwegian litigation was whether U.S. or Norwegian law should govern disposition of the dispute, with Trico arguing that U.S. law controlled and the union taking the position that the dispute was to be resolved under Norwegian

[32] *Dowd v. International Longshoremen's Ass'n*, 975 F.2d 779, 789-91 (11th Cir. 1992) (on NLRB application for injunction), *International Longshoremen's Ass'n*, 313 NLRB 412, 416-18 (1993) (decision on merits), *enforcement denied on other grounds*, *International Longshoremen's Ass'n v. N.L.R.B.*, 56 F.3d 205 (D.C. Cir. 1995 (not addressing jurisdictional issue), *cert. denied sub. nom Canaveral Port Authority v. Int'l Longshoremen's Ass'n*, 516 U.S. 1158 (1996). On remand from the D.C. Circuit, the NLRB dismissed the case. *International Longshoremen's Ass'n*, 323 NLRB 1029 (1997). While the NLRB majority did not address the jurisdictional issue, then Chairman William Gould, in dissent, agreed with the Board's 1993 determination that the foreign conduct in question properly fell within the NLRB's jurisdiction. *Id*. at 1034-36 (Gould, dissenting). *See also Torrico v. International Business Machines Corp.*, 213 F.Supp.2d 390, 399 (S.D.N.Y. 2002) (court noting, with regard to an Americans with Disability Act claim, that the presumption against extraterritoriality ordinarily does not apply where conduct in a foreign setting will result in adverse effects within U.S. or where the conduct occurs within the U.S.).

law. Trico filed its own NLRB charge in the U.S. against the U.S. unions involved in the dispute, and also commenced litigation in the United Kingdom against the ITF in response to the ITF's support for the U.S. unions' campaign against Trico. This situation clearly presented the prospect of interesting choice-of-law issues; however, they were not decided because the Norwegian and U.K. cases were settled, and pending NLRB proceedings in the U.S. consequently became moot.

U.S. labor law also has been held applicable to secondary boycotts by U.S. labor unions motivated by actions taken by foreign governments where the activity in question occurred in the U.S. and was directed against U.S. companies.[33]

C. Applying State Wage and Hour Laws

While, as noted above, cases in which the RLA has been held not to apply have involved situations in which the work was performed wholly in or between foreign countries, that factor has been held to be an insufficient basis for foreclosing application of state wage and hour legislation. In *Truman v. Dewolff, Boberg & Associates, Inc.*, No. 07-01702, 2009 WL 2015126 (W.D. Pa. July 7, 2009), the Court refused to dismiss a claim by a Pennsylvania resident for overtime pay under Pennsylvania state law for work performed in England and Canada because: the state statute, unlike the Fair Labor Standards Act, included no express exemption for work performed outside of the United States; the FLSA does not preempt state law minimum wage protections that exceed those provided under the FLSA; and, having previously determined that the Pennsylvania law applied to work performed in other states within the U.S., saw no principled reason why it should not also apply to work activities outside the U.S. *Id.*, 2009 WL 2015126, at *2–4.

III. OTHER ISSUES THAT ARISE IN ATTEMPTING TO APPLY COLLECTIVE BARGAINING AGREEMENTS IN A TRANSNATIONAL CONTEXT

A host of interesting issues beyond just choice of law issues are presented when cross-border considerations are present. We review a few of those below.

A. Will U.S. Courts Enforce Attempts to Apply Collective Bargaining or Employment Agreements to Work Performed Outside the United States?

An interesting issue is whether collective bargaining agreements or employment agreements are enforceable in U.S. courts with respect to work performed outside the United States? Here, again, the case law arguably can support different positions on this issue. As reviewed above, the majority decision in *Berlin Express* declined to enforce the CBA's scope provision with respect to flying performed wholly outside the United States because it considered that to require an impermissible extraterritorial application of the RLA. In contrast, both the District Court in *Local 553* and the dissent in *Berlin Express* expressed the view that a party can be held to obligations it has contracted to provide even if those obligations arguably extended beyond

[33] *E.g.*, *International Longshoremen's Ass'n v. Allied International, Inc.*, 456 U.S. 212 (1982) (NLRA extends to a refusal by U.S. union, in protest of the Soviet invasion of Afghanistan, to unload ships within the U.S. that were engaged in trade with the Soviet Union); *International Longshoremen's Ass'n v. N.L.R.B.*, 723 F.2d 963, 965 (D.C. Cir. 1983).

the requirements of statutory law, including to work performed outside the borders of the United States. *Local 553*, 544 F.Supp. at 1326; *Berlin Express*, 923 F.2d at 685 (Nelson, J., dissenting).

The reasoning of *Local 553* and the *Berlin Express* dissent with regard to requiring parties to honor their contractual commitments notwithstanding what statutory law itself might require also lies at the heart of the Seventh Circuit's decision in *Rabé v. United Airlines, Inc.*, 636 F.3d 866 (7th Cir. 2011). There, a former flight attendant, who was a French citizen, was initially assigned to the airline's Paris domicile and later transferred to the Hong Kong domicile. She claimed she had been terminated in violation of a variety of federal and Illinois state antidiscrimination statutes. United had treated flight attendants based at its foreign flight attendant bases as subject to the RLA and to the same collective bargaining agreement between United and the Association of Flight Attendants that applied to all of United's domestically based flight attendants. In addition, United and Rabé were parties to an individual employment agreement which, among other things, provided that terms and conditions of employment would "be governed exclusively by applicable U.S. law, including the RLA and the [CBA]," jurisdiction over all employment-related claims would lie exclusively in courts and administrative bodies of the U.S. and Illinois, and the agreement would not be valid "unless Rabé wrote by hand: 'Read and approved, valid for agreement and in particular for acceptance of the choice of U.S. law clause … and of the jurisdiction clause." *Id.* at 868.

The district court in *Rabé* noted that, in determining whether U.S. law was or was not applicable, courts had applied competing theories, with some focusing on the "primary workshop" of the employee and others on a "center-of-gravity" analysis, and, without choosing between the two theories, determined that the plaintiff's claims should be dismissed because she was a foreign national based outside the United States who had not flown to or from the U.S. for years prior to her termination, and thus, under either theory, there was no basis for finding U.S. law applicable. No. 08 C 6012, 2009 WL 2498076 at *5, 7 (N.D. Ill. Aug. 14, 2009). The Court of Appeals reversed, concluding that United was bound by the terms of the individual agreement, which "had the effect of applying the substantive provisions of U.S. and Illinois employment discrimination laws to Rabé as a matter of contract law," 636 F.3d at 868, and United could not escape potential liability by pointing to the fact that Rabé was a non-citizen who worked outside the U.S. *Id.* at 870-71 (even though both the federal and state statutes on which Rabé's claims were grounded precluded recovery for non-citizens who worked outside the U.S.). The Court additionally suggested that even if Rabé could not pursue statutory claims, she could base her claims on breach of contract or promissory estoppel theories (even though neither had been asserted by Rabé's complaint), because, according to the court, those theories were "implicit" in plaintiff's statutory claims. *Id.* at 872.[34]

[34]The court also held that the claims were not preempted by the RLA – defenses the district court had not addressed – because they turned on United's managers' subjective reasons for discharging Rabé, not on an interpretation of the CBA, and did not challenge any policies grounded in the CBA, but only their application to plaintiff. *Id.* at 872-73.

Following remand, the district court granted United's motion for summary judgment, holding Rabé had failed to exhaust her state law administrative remedies, had waived and abandoned her

The alleged extraterritorial nature of the work involved also was held not to excuse an airline's refusal to honor contractual requirements in *United Parcel Service Co. v. Teamsters Local 2727*, 2010 WL 3944731 (W.D. Ky. Oct. 6, 2010). There, the CBA contained a broad scope clause prohibiting shifting of maintenance work to employees not covered by the CBA. UPS assigned non-union personnel in Taiwan to perform maintenance checks on two UPS aircraft in Taiwan, the union grieved, and the system board ruled in the union's favor. In seeking to set the award aside, the airline argued, among other things, that the system board decision could not be enforced because the union's jurisdiction did not extend to work performed outside the U.S. The court rejected this contention and enforced the award "because the work at issue … was previously performed in the United States, one could conclude that UPS has, in effect, transferred work overseas which it had previously assigned to Union workers. To divest the Union of jurisdiction in this manner appears to be contravene a central provision of the Agreement." *Id.*, 2010 WL 3944731 at *3.

B. Visa and Work Permit Issues

When employees are shifted to foreign bases, a host of immigration-related issues are presented, as they need visas or work permits to work out of the foreign bases. Typically, CBAs require positions to be filled strictly in seniority order among those bidding for the assignments. If the number of available visas is insufficient to accommodate the bidders or the duration of the time they can remain at the foreign location is limited, the lack of sufficient visas or limitations on their duration may impede the ability to honor the contractual seniority rights of employees who desire to fill the foreign openings and remain at the foreign base.

A case in which this issue was present was the previously discussed *Association of Flight Attendants v. United Airlines*, 797 F.Supp. 1115 (E.D.N.Y.). As noted, the lawsuit arose after a U.S. global airline had announced the opening of a flight attendant domicile in Paris, France. The applicable CBA required that vacancies in new domiciles be filled through a bidding process by seniority, and precluded the use of new hires unless there were insufficient bids from incumbent flight attendants. Flight attendants who were not citizens of the European Economic Community purportedly needed visas to be able to work at the Paris base. Although the domicile was slated to open with 225 flight attendants, more than that number of incumbent flight attendants bid for the openings, but because the airline had made arrangements with the French government for only 75 visas, a number of those who desired the positions were not awarded them, and they instead were given to more junior flight attendants who held EEC citizenship and with new hires who were EEC citizens. The Court ultimately determined that the issue of whether United could fill the positions out of seniority order because of the visa requirements presented an RLA minor dispute, after which the arbitration board determined that United had violated the CBA by not seeking a sufficient number of visas. *See supra* at 13-15 for a further discussion of this case.

Title VII retaliation claim, and had failed to establish a basis for her other discrimination claims. 2013 WL 5433251 (N.D. Ill. Sept. 30, 2013).

C. "Social Benefits"

Issues related to the enforceability of U.S. CBAs and of policies that U.S. multi-nationals attempt to apply to workers overseas also arise when dealing with what Europeans often refer to as "social benefits." Just as various States in the U.S. have enacted minimum wage and overtime laws that trump efforts by national companies to apply inferior standards to employees based in such states, so, too, have European tribunals refused to permit application of social benefits to individuals working in particular countries ("member states") that are inferior to that member state's minimum standards. An example is in the treatment of maternity benefits.

In the airline industry, it is not unusual for pilot and flight attendant CBAs to prescribe how long a pilot or flight attendant can continue flying while pregnant before having to take maternity leave. As previously reviewed, United had such a policy for its flight attendants that was established pursuant to its CBA and a consent decree, but when it attempted to apply it to flight attendants at is London base, that was challenged as inconsistent with the superior rights provided under British law. The British tribunal agreed with the complainants, *Bannigan, et.al. v. United Airlines*, Case No. 10471/96, 21107/96, 20119/96 (Employment Tribunals 1999), and United was forced to deviate from its U.S. policy and provide the flight attendants with the more generous leave policy required by local law. A similar scenario played itself out after the same airline opened a Frankfurt flight attendant base and sought to apply the U.S. CBA/Consent Decree 27-week policy at that location. It was required to modify the maternity policy for the Frankfurt-based flight attendants to conform with the superior protection afforded under German law.

IV. IS THE CONCEPT OF EXTRATERRITORIALITY STILL MEANINGFUL?

A. Cross-Border Issues in the Context of the Current Airline Industry

The rapid international expansion of flying involving U.S. carriers has transformed commercial aviation. One no longer can realistically describe airline industry or airline employee activities as "wholly foreign" or as confined exclusively to foreign locales. As previously noted, many U.S. air carriers have entered into relationships or alliances with foreign carriers through which the carriers have coordinated significant aspects of their businesses. There also have been a proliferation of code-sharing arrangements between U.S. and foreign carriers. Under the code-share arrangements, international flights, or add-on segments to such flights, are held out to the flying public as flights flown by a single carrier, when they actually are being flown in whole or in part by one or the other of the code-share partners (often depending on the direction of the international flight, *e.g.*, whether it is from the United States to Europe or from Europe to the United States). A number of these relationships between U.S. and foreign carriers have been assisted substantially by government grants of antitrust immunity.[35]

[35] Among the many relationships or alliances that have been established are: the Star Alliance (including United, Lufthansa, US Airways [will be shifting to OneWorld Alliance], Scandanavian, THAI, Air Canada, Air New Zealand, ANA, Singapore, Austrian, Asiana, LOT Polish, TAP Portugal, Spanair, South African, SWISS, Air China, EGYPTAIR, Turkish Airlines, Adria, Blue I, Croatia, Aegean, Brussels Airlines, Avianca, Copa Airlines, Ethiopian, TAM [will be shfting to OneWorld Alliance], EVA, Shenzhen, Garuda International); OneWorld (including American,

As a result of the developments in the airline industry, the lines between U.S. and foreign carriers truly have been blurred. Quite clearly, actions taken in the workplace in one nation can impact substantially the conduct of work in other nations. Legal precepts built on an assumed single-nation workplace no longer can be squared with economic or business reality. *See Torrico v. International Business Machines Corp.*, 213 F.Supp.2d 390, 405-06 n.9 (S.D.N.Y. 2002); *Gomez v. Honeywell Intern., Inc.*, 510 F.Supp.2d 417, 423 (W.D. Tex. 2007) (assumption that an employee *has* a primary work station "may be invalid given the nature of our global economy with its mobile workforce") (emphasis in original); *Rodriguez v. Filtertek, Inc.*, 518 F.Supp.2d 845, 851 (W.D. Tex. 2007) (same); *see General Accounting Office Report*, "Transatlantic Aviation: Effects of Easing Restrictions on U.S.-European Markets," GAO-04-835 at 33 (July 2004) ("in an industry in which the assets and employers are mobile, what constitutes an airline's principal place of business is uncertain"); *cf. Gantchar* (considering, for purposes of Title VII, airspace over the Atlantic Ocean to be "an extraterritorial workplace"); *see also Rabé v. United Airlines, Inc.*, No. 08 C 6012, 2009 WL 2498076 (N.D. Ill. 2009) (noting competing "primary workshop" and "center-of-gravity" tests and, without selecting either, dismissing Title VII and ADEA claims of foreign national flight attendant based outside the U.S. and who had flown to or from the U.S. laws for years prior to her termination), *rev'd on other grounds*, 636 F.3d 866 (7th Cir. 2011) (*see* discussion of *Rabé supra* at 21).

These U.S.-foreign carrier relationships have significant implications for labor-management relations. For example, such arrangements may threaten vital employment protections embodied in scope clauses found in collective bargaining agreements that define which employees have "jurisdiction" over particular work.[36] Issues over the allocation of flights among alliance partners have arisen and can be expected to increase and become more complex. Difficulties are particularly likely to arise where the alliance partners attempt to relocate work within an alliance from one nation to another, and especially where the work is being shifted from a higher-cost to a lower-cost workforce or to a nation that affords fewer social and economic benefits to employees.

Additional significant issues are likely to arise when the employees of one of the alliance parties are involved in a labor dispute, and especially where the dispute escalates into a

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British Airways, Cathay Pacific, Quantas, Finnair, Iberia, LAN, Japan Airlines, Royal Jordanian, S7 Airlines, airberlin); SkyTeam (Delta, Air France, KLM, Alitalia, Czech Airlines, Aeromexico, Korean Air, Aeroflot, China Southern, Air Europa, Kenya Airlines, TAROM, Vietnam Airlines, China Airlines, China Eastern, Middle East Airlines, Saudia, Aerolineas Argentina, XIAMENAir); and many other combinations of carriers through code-sharing and/or other relationships.

[36]Interestingly, significant scope clause issues are not confined to U.S. carriers and unions. For example, a dispute over which European nation's laws governed was at the heart of a dispute between Lufthansa and its pilots, with the "mainline" Lufthansa pilots claiming the right to perform work that Lufthansa was attempting to shift to subsidiary airlines or other carriers located outside Germany that were affiliated with Lufthansa. *See Aviation Daily* (McGraw Hill), Feb. 19, 2010, p. 5; *Aviation Daily* (McGraw Hill), Feb. 23, 2010, pp. 1-2; *Aviation Daily* (McGraw Hill), Feb. 25, p. 5; *Aviation Daily* (McGraw Hill), Aug. 20, 2012, pp. 1-2; *Aviation Daily* (McGraw Hill), Aug. 23, 2012, pp. 1-2.

strike. Management might very well react by shifting "alliance" flights away from the partner whose employees are engaged in the strike to other partners whose employees are not on strike. Were that to occur, the non-striking employees could find themselves assigned work that previously had been performed by the striking employees. In response, and in the exercise of self-interest, the employees of the alliance partners may likewise determine to join forces to resist such carrier efforts to whipsaw one employee group against another. Unsurprisingly, that is, in fact, what unionized employees of airline alliance partners have done, forming their own alliances in an effort to coordinate and protect their mutual interests and to defend against perceived threats posed by the joint activities of their employers.

It was precisely such concerns with resisting carrier efforts to pit employee groups against one another that led the pilots of Northwest Airlines and KLM to undertake mutual support activities, first, in 1997, when KLM was attempting to extract major concessions from the KLM pilots and later during the 1998 Northwest pilot strike. In both instances, the pilot group that was not directly involved in the dispute resolved to support the other pilot group by refusing to fly operations that could be characterized as "struck work" (e.g., extra sections of flights; flights on larger gauge aircraft; flights flown by the other pilot group before the onset of the dispute). Subsequently, the Northwest pilots resolved to lend support to the efforts of the Japan Air System ("JAS") pilots to resist efforts by Northwest partner carrier JAS to undermine labor conditions by creating what essentially was an alter ego operation.

Pilots also have addressed the issue of foreign domiciles at the bargaining table. ALPA successfully incorporated provisions prohibiting the opening of any foreign domiciles without ALPA consent in its contracts with several major carriers, or requiring that flight operations conducted from foreign domiciles be flown by pilots on the U.S. pilots' seniority list pilots under terms governed by ALPA collective bargaining agreements with U.S. carriers. Other provisions have provided that U.S. carriers will remain domestic air carriers subject to the RLA, and will maintain their headquarters, executive offices and base senior flight operations personnel in the U.S. The effort to obtain such prohibitions and protections was motivated, in part, by concerns generated by decisions such as the previously discussed *Berlin Express*. Foreign domiciles also were an important issue in ALPA negotiations with Federal Express and Atlas Air, and in AFA negotiations with the former carrier Tower Air.

B. Some Current Issues

Foreign Ownership

An issue with potentially significant international law implications is the extent to which foreign carriers, entities or individuals can own or control United States carriers. Under existing law, a certificate of public convenience and necessity may only be given to an entity if its president and at least two-thirds of its board of directors and other managing officers are U.S. citizens and at least 75 percent of its voting interest is owned or controlled by U.S. citizens. *See* 49 U.S.C. §§41102 and 40102(a)(15). Not only European carriers but also European political leaders have been pressing for years to relax these limitations and those efforts are continuing. U.S. unions have strenuously and to date successfully opposed such efforts. That opposition has been based, in part, on a concern that foreign control of U.S. carriers will cause a shift in flying from the

U.S. to other nations and their employees, create pressure to reduce U.S. employees' wages and working conditions, and undercut the protections that may be afforded by U.S. law.

Cabotage

Another source of potential controversy has been the longstanding U.S. prohibition on "cabotage," which thereby bars non-U.S. certificated carriers from carrying passengers or cargo between points within the United States. *See* 49 U.S.C. §41703. In anticipation of possible efforts to modify this prohibition, a number of ALPA pilot CBAs incorporated express prohibitions on U.S. carriers having code share or other similar relationships with foreign carriers that engage in cabotage flying, and carrier-union commitments to work together to oppose any change in the law that would permit cabotage. The European Community has pressed to relax cabotage requirements, but to date those efforts have been unsuccessful.

Aviation Emission Standards

Another source of cross-border conflict has emerged over attempts by the European Community to enforce aviation emission standards on airlines using European airspace, with the threat of substantial financial penalties for non-compliance. Many nations have challenged this effort as an extraterritorial overreach (including such strange bedfellows as the U.S., Russia, China, India and Australia) and as seeking to impose substantial costs on an already financially challenged industry, which, if implemented, may lead to further downward pressures on airline employment, wages and working conditions. In accordance with the preferred approach of opponents of proponents of the European initiative, the issue was referred to the International Civil Aviation Organization (ICAO). On September 24, 2013, the ICAO and the European Commission signed a Declaration of Intent providing for collaboration on the issue, with a timeline/goal of reaching an agreement on standards by 2016.[37] This compromise has been opposed as inadequate by the European Regions Airline Association. Further discussions within the European Community (among the European Commission, the European Parliament, and the European Council) are ongoing and there remains considerable uncertainty as to what rules will be applied for flights operating within Europe. Prior EC directives posed the risk of substantial fines and even aircraft seizures for non-payment of fines, but they had been put on hold pursuant to a "stop the clock" agreement. The status of the latter is uncertain as of the time this paper was submitted. *See Aviation Daily* (Penton), Feb. 28, 2014, pp. 1-3. Several EC member nations – most prominently, France, Germany, and the United Kingdom -- have pushed back against the effort to impose stricter requirements.

Norwegian Air Shuttle and Its Affiliates

Basic concepts of extraterritoriality – if such concepts can be said to continue to exist – have been particularly stretched by the rapid expansion of a Norwegian carrier, Norwegian Air Shuttle (NAS), and its new attempted foray in international operations. NAS operates narrow body aircraft on routes within the European Common Aviation Area (ECAA) and between the ECAA and third countries. A few years ago, it established a wholly-owned subsidiary, Norwegian

[37] Accessible at the ICAO website: www.icao.int/Newsroom/News Doc 2013/COM.34.

Long Haul (NLH), to operate wide body aircraft on certain long haul international routes, including to Ft. Lauderdale, New York, and Bangkok from points in Scandinavia. NAS plans to soon begin operations of flights to Oakland and Los Angeles to Scandinavia, probably with Boeing 787 aircraft, as well as from London Gatwick airport to New York Los Angeles and Fort Lauderdale. The 787s have been registered in Ireland. Available information indicates that the non-management pilots who have been used to crew these long haul flights have been employed on individual employment contracts by a hiring entity – Global Crew Asia PTE Limited, a Singaporean company – that purport to be governed by Singapore law. To further complicate matters, the pilots are domiciled in Thailand. Similar arrangements exist for the flight attendants to whom these flights are assigned. Rather than obtain Norwegian work permits for these crews, NAS decided to establish another affiliate, Norwegian Air International Limited (NAI), in Ireland. Ireland has just recently granted NAI an air operator certificate, even though the flying to be performed by NAI will not be within or to or from Ireland and the crews will be based elsewhere. NAI ostensibly was able to pursue this alternative through opportunities made available by the U.S.-European/Norway/Ireland Air Transport Agreement (the "ATA"). However, that Agreement also includes a prohibition on undermining national labor standards. Article 17 bis of the ATA.

NAI is seeking authority from the U.S. DOT to operate the flights to and from the U.S. It has been somewhat cryptic about its plans, but has suggested that it intends to establish pilot and flight attendant bases in the U.S. to crew some of these flights. If they are based in the U.S., that may have implications, under the NMB's Representation Manual, for their being subject to potential representation under the RLA. *See supra* at 18 n.31.

There has been widespread opposition to the NAI application from a broad variety of entities, including some seemingly strange bedfellows. ALPA has protested what it sees as an attempt to avoid legal requirements and to unfairly compete with U.S. airlines by applying substandard wages and working conditions that will, in turn, place downward pressure on U.S. pilot wages and working conditions, and because these consequences are likely, approval of the NAI application would not be in the public interest and should be denied. The Norwegian Air Line Pilots Association (Norsk Flygerforbund) claims that the NAI setup is an attempt to evade the requirements of Norwegian labor law, apply substantially inferior wages and working conditions to those that the Union has negotiated for the NAS pilots, and to bypass the Union. Union opposition also has been voiced by the European Cockpit Association, the Allied Pilots Association, the Southwest Airlines Pilots Association, AFA, and the Transportation Trades Department of the AFL-CIO. In the view of the unions, NAI's planned operations are analogous to the maritime "flag of convenience" approach that has had disastrous consequences for the U.S. shipping industry . Among U.S. carriers, American, United, Delta, and US Airways are also opposing the NAI application, and in doing so, interestingly relying upon ALPA's opposition submissions. A position in opposition also was submitted Airlines for America ("A4A"), the successor to the Air Transport Association. A submission to the DOT by the Association of European Airlines (including on behalf of Air France, Lufthansa and KLM, among others, but not on behalf of certain of its members, including British Airways and DHL) also expresses concerns with the NAI application. On the other side of the ledger, FedEx and some U.S. municipalities to whom the planned NAI flights will operate have submitted statements in support of the NAI

application. As of the time of submission of this paper, the DOT had not yet ruled on the application.[38]

Activities of the Export-Import Bank

Still another recent instance in which carriers and unions has joined forces with regard to international issues has been in litigation challenging the activities of the U.S. Export-Import Bank (the "Bank") in providing loan guarantees to enable foreign carriers to purchase state-of-the art Boeing aircraft on financing terms than are far more favorable than are available to U.S. carriers seeking to purchase identical aircraft. In litigation originally brought by A4A, in which Delta and ALPA intervened in support, the plaintiffs claimed that the Ex Im Bank's financing activities in support of Air India, which greatly disadvantaged the competitive position of U.S. carriers and forced them to abandon international markets, violated the Administrative Procedures Act (the "APA") and the Export-Import Bank Act (the "Bank Act"), 12 U.S.C. §§635(b)(1)(B), 635a-2, because the Bank had finalized its loan guarantee commitments without having first considered the effects of its loan activities on U.S. industries and U.S. jobs, as it was obligated to do. The District Court granted the Bank's motion for summary judgment, *Air Trans. Ass'n of Am. v. Exp.-Imp. Bank of the U.S.*, 878 F.Supp.2d 42 (D.D.C. 2012), but the Court of Appeals reversed, *Delta Air Lines, Inc. v. Export-Import Bank of the U.S.*, 718 F.3d. 974 (D.C. Cir. 2013), because the Bank had failed to provide a reasoned explanation for how its procedures could be squared with the Bank Act or to adequately consider the potential adverse effects of its loan guarantees. *Id.* at 978. In subsequent litigation, Delta, Hawaiian Airlines and ALPA sued jointly to challenge the Bank's revised procedures for implementing its responsibilities under the Bank Act and the APA. *Delta Air Lines, Inc. v. Export-Import Bank of the U.S.*, 13-cv-00192-RC (D.D.C. 2013). In another action, the same three plaintiffs challenged the Bank's provision of loan guarantees to Emirates Airlines, LOT Polish Airlines, Etihad Airways, LATAM Airlines Group, and Korean Air Lines to enable them to purchase Boeing aircraft at below-market financing rates without considering the impact of those transactions on U.S. industry and jobs. *Delta Air Lines, Inc. v. Export-Import Bank of the U.S.*, 13-cv-00424-RC (D.D.C. 2013). Earlier this year, the same three plaintiffs filed a further action challenging, as in further violation of the Bank Act and the APA, the actions the Bank had taken to ostensibly satisfy the remand by the D.C. Circuit of the first action referenced above. *Delta Air Lines, Inc. v. Export-Import Bank of the U.S.*, 14-cv-00042-RC (D.D.C. 2014).

An interesting facet of these cases, as well as of the Norwegian Air International DOT proceedings, is that carriers and unions that ordinarily might be expected to be litigation adversaries have joined forces to combat specific common threats to their international activities. Whether this presages further coordinated rather than confrontational union-carrier activities remains to be seen, but it does speak to the value of occasionally stepping back, assessing the situation presented, and determining who your real friends and enemies are in dealing with specific issues.

[38] Copies of various parties' submissions can be found on the DOT's website, www.dot.gov, at Docket No. OST-2013-0204 (Application of Air International Limited for an Exemption and Foreign Air Carrier Permit).

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The foregoing discussion highlights but a few examples of labor-management issues that may result as U.S. and foreign carriers further integrate their operations and financial fortunes and that, depending on their resolution, may have significant impact within the United States regardless of the geographic location at which the underlying conduct purportedly is based or from which it is allegedly conducted. These pending and future issues compel us, at minimum, to consider whether the rules currently in place are sufficient to address the needs of the modern aviation industry.

C. In Search of a Rational Approach

While rote application of general rules may often be the simplest way to deal with problems, it often produces illogical and inequitable results. This certainly is true if one attempts to apply allegedly fixed extraterritoriality "principles" without consideration of practical implications in particular settings.

Illustrative of such untenable consequences are decisions involving the airline industry (reviewed above) that focus on the geographic points served on particular flights, i.e., whether the flying is "wholly-foreign" or between the U.S. and a foreign point. This approach runs smack into the realities of how flying is conducted and assigned. A few examples may help to illustrate this point.

While flying assigned to United's Paris and London flight attendant domiciles, after their establishment, consisted primarily of flying to and from the United States, it also included wholly intra-European flying. How can one rationally conclude that the RLA should apply when these foreign-based flight attendants are flying to and from the U.S., but not on segments flown between European points?

At most carriers, the assignment of flying and of flight crews to a particular domicile varies as carriers shift flying among domiciles and employees exercise their seniority rights to transfer to fill openings at different domiciles. Does the RLA coverage of these employees shift from month-to-month depending on the schedules their seniority permits them to hold or on their varying domicile locations? What happens if there is an excess of flight personnel at a U.S. domicile and the employees are involuntarily transferred overseas. Are they, as a result, stripped of their RLA protection? How can such consequences be considered rational?

What if the flying that a carrier assigns to a new foreign domicile consists totally or predominately of existing flying that had heretofore been flown by crews based in the United States and that flying is integrally tied to the rest of the carrier's system? Can the carrier, by unilaterally shifting the flying to a foreign domicile, eliminate its obligations under the RLA or remove the statutory protections that the affected employees previously enjoyed?

There are important legal considerations that logically come into play as well. An approach such as that followed in *Berlin Express*, that essentially sanctions a "runaway shop," directly affronts the duty imposed by Section 2 First of the RLA, 45 U.S.C., §152 First, that carriers and unions "exert every reasonable effort to make and maintain agreements." *See Chicago, N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 574, 579 (1971). Permitting such a

result is particularly troublesome when the carrier continues to retain concessions it obtained from the union in exchange for the enhanced job protections that will be eviscerated if the carrier avoids its statutory and contractual obligations. *Cf. Air Line Pilots Ass'n Int'l v. Pan Am World Airways*, 765 F.2d 377, 379, 381-82 (2d Cir. 1985) (carrier required to implement certain wage increases and work rules that were "the quid pro quo for the Union's agreement to accept [certain] concessions"); *Air Line Pilots Ass'n, Int'l v. Aloha Airlines*, 126 L.R.R.M. (BNA) 2822, 2824 (D. Haw. 1987) (same); *Association of Flight Attendants v. United Airlines*, 71 F.3d 915 (D.C. Cir. 1995) (acquiring carrier in a combination of carriers required to arbitrate obligations to acquiring carrier's employees under scope clause, despite alleged representation dispute, where employees made substantial concessions to obtain the scope clause protections). It was precisely such a concern with the sanctity of collective bargaining agreements and with the statutory collective bargaining process that prompted the court in *ALPA v. TACA* to enjoin TACA's unilateral pilot relocation efforts from the U.S. to El Salvador, even though TACA was a foreign carrier and it arguably was "compelled" by a foreign government to relocate. *See also United Parcel Service Co. v Teamsters Local 2727* (arbitration award enforced because, at least in part, the work being transferred to non-union workers outside the U.S. previously had been performed by union workers under the CBA) (*see* discussion of decision *supra* at 22).

Similarly, automatic application of a rule that would bar foreign-based employees from voting in NMB representation elections, without consideration of the circumstances of a particular case, could have the effect of rewarding carriers for their unilateral efforts to escape RLA coverage – a result at odds with Section 2 Third, Fourth and Ninth, 45 U.S.C. §152 Third, Fourth and Ninth, which, like other provisions of the RLA, are designed to strengthen and make more effective the collective bargaining process. *See Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 302 (1943); *Virginian Ry. v. System Fed. No. 40*, 300 U.S. 515, 547-48 (1937).

It also seems abundantly clear that company actions occurring "wholly outside the U.S." have consequences that are not confined to foreign locations.[39] For example, where a U.S. company establishes a foreign domicile and unilaterally purports to establish and apply different terms and conditions of employment to employees based abroad than those that govern U.S.-based employees in the same employment position, that has foreseeable consequences within the United States. Among other things, the employer, by unilaterally establishing such "two-tier" terms and conditions, and treating the union as a "non-entity" in the establishment of such terms, divides the employee group, impacts future negotiations, and undermines the union's status as exclusive representative. So, too, if airline partners were to agree among themselves, without union input, on the allocation of "alliance flying," or to assist one another in the event of labor conflicts at one of the carriers, with the goal or potential consequence of reductions in wages and working conditions at the struck carrier creating pressure for commensurate reductions at the "supporting" airline partner.

[39] The very description of conduct as occurring "wholly outside the U.S." can be questioned. It is highly likely that significant "extraterritorial" action implemented by a U.S. company abroad has been conceived and developed at company headquarters in the United States. *See* discussion *supra* at 1, 23-24, and, regarding the varying "primary workshop," "center of gravity," and "nerve center" approaches, *see supra* at 9 n.17, 21.

To inject an additional practical consideration, disposition of the representational, contractual and legal issues presented by the expanded international activities of U.S. companies may not be solely dependent on determination of rights under U.S. law. Foreign countries in which employees are based or in which operations are being conducted may interpose their own concepts of representation or collective bargaining – particularly as to their own "nationals" who are employed by U.S. carriers at foreign locations. These concepts may conflict with principals embodied in U.S. labor laws, even as fundamental, from a U.S. standpoint, as those that prescribe that there be a single, exclusive bargaining representative for a bargaining unit of employees (or "craft or class" under the RLA), *Elgin, J & E Ry. Co. v. Burley*, 325 U.S. 711, 728 (1945); *Brotherhood of Ry. and Steamship Clerks v. Florida East Coast Ry. Co.*, 384 U.S. 238, 246 (1966), or that employment terms for a given bargaining unit/craft or class be set by a single collective bargaining agreement. *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 343, 347 (1944); *see J.I. Case Co. v. NLRB*, 321 U.S. 332, 375, 337-39 (1944) (same rules under the National Labor Relations Act). Fortunately, such potential conflicts were avoided in the previously-reviewed *Gately v. United Airlines* litigation in the United Kingdom, when the British Court relied upon the competing (and, in that court's view, the more significant) demands of U.S. law to deny the injunctive relief sought by the plaintiffs (which, had it been granted, effectively would have offered continued representational status to the Pan Am flight attendants' union and have applied terms and conditions to a segment of the craft or class of employees that were inconsistent with those contained in United-AFA CBA). *Supra* at 17-18. There is, of course, no guarantee that other foreign courts or governments will be similarly accommodating.[40]

Foreign governments also may impose "solutions" for their nationals that directly impact U.S. carriers and employees. For example, in recognition of the difficulties that may be presented by the application of different national laws to transnational airline operations and relationships, the Association of European Airlines (which includes most of the major European carriers) proposed the adoption of a "Transatlantic Common Aviation Area" with the objective of substituting for the bilateral relationships between nations a common regulatory framework within which European and U.S. carriers will operate. *See Towards a Transatlantic Common Aviation Area AEA Policy Statement* (September 1999 Association of European Airlines). That approach

[40]It should be noted that U.S. tribunals have, at least in certain instances, held U.S. labor law to be applicable to the activities of foreign employers within the United States. Examples of decisions in which the NLRA was applied to individuals employed by foreign entities but working in the U.S. include *State Bank of India v. N.L.R.B.*, 808 F.2d 526 (7th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); *Goethe House, N.Y., German Cultural Center*, 288 NLRB 257 (1988), *election enjoined, Goethe House New York, German Cultural Center v. NLRB*, 685 F.Supp. 427 (S.D.N.Y. 1988), *rev'd*, 869 F.2d 75 (2d Cir.), *cert. denied*, 493 U.S. 810 (1989); *Great Lakes Dredge & Dock Co.*, 240 NLRB 197 (1979); *S.K. Prods. Corp.*, 230 NLRB 1211 (1977). Illustrative of decisions in which the RLA has been applied to employees of foreign carriers who work or are based in the U.S. are *Air Line Pilots Ass'n v. TACA Int'l Airlines*, 748 F.2d 965; *Ruby v. TACA Int'l Airlines*, 439 F.2d 1359 (5th Cir. 1971); *Saudi Arabian Airlines*, 32 NMB 206 (2005); *Aerovias de Mexico*, 20 NMB 584 (1993); *Egypt Air*, 19 NMB 166 (1992); *see also Aer Lingus*, 39 NMB 292 (2012)) (NMB representation proceeding for Aer Lingus flight attendants based in U.S.; dismissal of application based on voting results, not on nationality of carrier or flight attendants or on their employment base).

was adopted in a 2002 decision of the European Court of Justice ("ECJ"), that threatened to invalidate existing bilateral agreements between single European nations and the U.S. and instead to require multilateral agreements between the European Community as a whole and the U.S. *Commission of the European Communities v. Kingdom of Denmark*, Case C-467/98 (2002). While such European initiatives could not be imposed directly upon U.S. carriers without, at minimum, action by the U.S. government,[41] they have significant practical consequences for U.S. carriers and their employees. Moreover, these European activities serve to further demonstrate that issues as to which laws and rules should apply are being actively considered throughout the international aviation community.[42]

While some have suggested that a number of the uncertainties regarding which laws are applicable could be avoided through the inclusion in CBAs of choice-of-law provisions, it is uncertain whether such provisions would be enforceable. This might continue to turn on whether a court views enforcement of such a provision as presenting an issue of contract interpretation or of the extraterritorial application of U.S. law pursuant to which the contract was negotiated. *See* discussion *supra* at 2-9 and n.17, 16-23.

But the legal uncertainties extend even further. It certainly is conceivable, in an increasingly globalized world, that companies based in different countries might enter into transactions that affect terms and conditions of employment and employment opportunities for employees based in different countries and who are represented by different unions. In such a context, one could envision a cross-border CBA being crafted to which companies and unions in two or more nations were parties. It would make sense in such a circumstance for the parties to agree upon which nation's laws would govern the agreement and any disputes arising thereunder, but if they did, this again would present issues as to whether such agreements would be enforceable and, if so, in which countries. The parties to a cross-border CBA might also select an international arbitral or other form of tribunal to hear disputes; if so, this still might present issues as to enforceability if one or more parties were to contest an effort by another to resort to that tribunal when a dispute actually arose, as occurred in the previously discussed *Berlin Express* case. It also is conceivable that one or more of the parties, if it considered a particular nation's laws to be more favorable to its interests, would seek to channel litigation to the courts or other forums in that country. If such tactics were permitted, it is not difficult to imagine a resulting "race-to-the courthouse" approach where parties seek to control forum selection.

Thus, the question of where and how disputes with international components will be resolved is likely to remain both unresolved and troublesome unless clearer internationally-accepted rules are established, which in turn may require agreements at the nation level and not

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[41]The European Commission and the U.S. engaged in discussions following the above-cited 2002 ECJ decision and eventually agreed on principles that would permit and facilitate the expansion of carrier activities across the Atlantic. Since then, discussions have focused on a host of other difficult issues, including requests by the European parties for expanded opportunities for investments by foreign entities in U.S. carriers and the right to fly between points in the U.S. (cabotage flights), discussed *supra* at 25-26.

[42]*See* discussion, *supra*, p. 24 n.36, regarding the recent scope dispute at Lufthansa.

just by private parties. Of course, this probably could be avoided if parties would adhere to the dispute resolution mechanisms laid out in their CBAs, recognizing that the perceived short-term advantages of doing otherwise yield uncertainties that run counter to their long-term interests.

In the absence of negotiation of satisfactory solutions among nations, the best that can be expected is that U.S. employers will recognize that their long-term self-interest is not served by attempting to walk away from contractual understandings, or by creating divergent work rules and splintered bargaining units based on the location of the employment base, or by attempting to play-off affected employees against one another. If not, and confrontation is inevitable, one would hope that the law will be applied in a way that yields rational results rather than being dictated by antiquated, rigid notions developed in an entirely different economic setting.

It would seem logical to apply U.S. labor law when the operations involved are those of an American company, the existing employees' terms and conditions of employment have been governed by a collective bargaining agreement negotiated in the U.S. between U.S. employers and labor unions or by work rules established and applied in the U.S. to U.S.-based employees, the activities abroad have substantial effects within the U.S., and the employer has decided voluntarily to engage in the international activities that have given rise to the particular dispute. Where such circumstances are present, it would appear that the United States has a more vital interest in the controversy than the nation in which the operation or employee base is located, and that application of U.S. labor law would be both sensible and warranted.

V. PRACTICAL SUGGESTIONS WHEN CONFRONTED WITH INTERNATIONAL ISSUES

In the event a U.S. lawyer is faced with a case or issue that involves international components, it often is necessary or, at the very least useful, to become familiar with the laws, the players, litigation alternatives and forums available in other jurisdictions that may be pertinent to the matter. The following are a few pointers that may be seem self-evident, but that can be useful nonetheless.

First, U.S. counsel should retain or consult with someone who has expertise in the pertinent laws, procedures and cultural norms in the other pertinent jurisdictions. This is essential even if the U.S. lawyer has a basic understanding of these other laws, procedures and norms.

Second, it is helpful for the U.S. lawyer also to acquire some basic familiarity with the law and procedure in the countries that may be involved in the particular matter. This increases the likelihood that U.S. counsel will be able to communicate effectively with the foreign law expert with whom the U.S. lawyer will be interacting. It also will enhance U.S. counsel's ability to explain the issues effectively to counsel's U.S. client, which may prefer to continue to discuss these issues with its regular U.S. labor counsel, notwithstanding the fact that a foreign lawyer has been brought into the picture to provide guidance on foreign law issues.

Third, U.S. counsel should take the time to be sure that, when communicating with counsel's foreign counterpart, both counsel share an understanding of the terms they are using. In this regard, it is important to recognize that words or legal terms may have different meanings in

different jurisdictions; one should not simply assume that because common terminology is present in multiple jurisdictions, it has a similar meaning in each place.

Fourth, U.S. counsel should be willing to put aside preconceived notions of how things "must" operate in another country. Some of the concepts that we, in the U.S., consider most basic when operating under the Railway Labor Act or the National Labor Relations Act (e.g., the enforceability of collective bargaining agreements; the principle of exclusivity of bargaining representatives) may be "foreign" concepts in other countries.

Finally, should there be a need to inform a U.S. court regard regarding the requirements of foreign law, Rule 44.1 of the Federal Rules of Civil Procedure must be kept in mind. It requires that, "[a] party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." While some courts have relied on written or oral expert testimony in determining what foreign law provides, *e.g.*, *Ganem v. Heckler*, 746 F.2d 844, 854 (D.C. Cir. 1984), other courts have suggested that is not required, particularly if an English translation of the laws of the country involved is readily available. *See Bodum v. La Cafetiere, Inc.*, 621 F.3d 624, 628-31 (7th Cir. 2010) (Easterbrook, C.J.) (where the content of French law is at issue and is widely available in English, "[i]t is no more necessary to resort to expert declarations about the law of France than about the law of Louisiana, which had its origins in the French civil code, or the law of Puerto Rico, whose origins are in the Spanish civil code. No federal judge would admit 'expert' declarations about the meaning of Louisiana law in a commercial case"); *see id.* at 631-38 (Posner, J., concurring) ("I join the majority opinion, and write separately merely to express emphatic support for, and modestly to amplify the court's criticism" of the "unsound judicial practice .. of trying to establish the meaning of a law of a foreign country by testimony or affidavits of expert witnesses, usually lawyers or law professors, often from the country in question"); *but see id.* at 638-40 (Wood, J., concurring) ("unpersuaded by my colleagues' assertion that expert testimony is categorically inferior to published, English-language materials" for determining the requirements of foreign law). *See also Botvin v. Islamic Republic of Iran*, 873 F.Supp.2d 232, 240 (D.D.C. 2011) (noting the differing standards for determining what foreign law requires and concluding that the court "must at least conduct sufficient independent research to guard against erroneous or exaggerated claims by partisan experts," *id.* at 240 n.8).

SOME CONCLUDING THOUGHTS

Dealing with international issues injects issues for U.S. lawyers that are not part of the RLA lexicon or practice. Case law that purports to address the issues presented was, in many instances, developed at a time when the RLA industries differed significantly from that which we find today, including, most pertinently, with respect to their international scope. This is an area that is ripe for new developments – both in the law and operationally. It necessitates a willingness to address matters that not only carry us beyond our borders, but also outside our current comfort zones. Like anything new and different, this prospect can be both frightening and exciting, and it is one that we need to appreciate and embrace if we are to effectively chart our course in the international arena.