Comment

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL v. UAL CORP.: ANTITAKEOVER DEFENSE MECHANISMS IN THE CONTEXT OF LABOR AGREEMENTS

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I. Introduction

The 1980s saw a flood of mergers and takeovers in the corporate world which resulted in the proliferation of numerous tactics designed

to impede an unwanted acquisition. The means of adopting these devices has traditionally been to include the device in either the title of incorporation or within the company's bylaws. However, a case decided recently in the United States District Court for the Northern District of Illinois, on remand from the Seventh Circuit Court of Appeals, addressed an issue of first impression in the United States. In *Air Line Pilots Association, International v. UAL Corp.* (*UAL Corp. III*),[1] the court addressed the issue of whether management's[2] implementation of antitakeover defense mechanisms included within a labor agreement was a valid exercise of corporate authority. The court held that under Delaware corporate law, provisions incorporated in a labor agreement between United Air Lines, Inc. (United) and the International Association of Machinists and Aerospace Workers (IAM) which functioned as an antitakeover device were in violation of the fiduciary duties of United's Board of Directors.

Courts have determined that management is vested with the exclusive authority to decide whether to acquiesce in or oppose a prospective acquisition.[3] However, employees are not without tools to influence corporate transactions. This comment will discuss the implications of this recent decision and will consider alternative methods labor may utilize to influence corporate transactions in the context of Delaware law, the nation's most important corporation law.

II. BACKGROUND

A. *Statutory Background*

The airline industry, as well as all modes of major commercial transportation, is governed by the Railway Labor Act (RLA),[4] which

1. 717 F. Supp. 575 (N.D. Ill. 1989), *aff'd*, 897 F.2d 1394 (7th Cir. 1990).

2. As used herein, the term "management" refers not only to corporate officers but also to corporate directors.

3. *See infra* note 156.

4. 45 U.S.C. §§ 151-188 (West 1986). According to one commentator, Theodore Kheel, the enactment of the RLA in 1926 was not a result of any injustice or hardship on those in the railway industry. Mr. Kheel asserts that the RLA is a reflection of the political and economic power held by the railroad industry and an attempt to stabilize the relationship of management and labor to the benefit of the developing nation. Ten years after the enactment of the RLA, it was extended to the airline industry. 9 T. KHEEL, LABOR LAW § 50.02, at 50-4, 50-5 (1987).

See generally Pennsylvania Ry. Co. v. Day, 360 U.S. 548 (1959) (presenting a historical and legislative overview of RLA).

provides a "comprehensive statutory plan for resolving disputes" in the transportation industry.[5] The RLA covers employees[6] and subordinate officials who work with the various carriers and requires employers to (1) refrain from interfering with organizational activities, (2) bargain in good faith,[7] and (3) work for dispute resolution.[8] It is the controlling statute for both the railway and airline industries. Pursuant to the RLA, the National Mediation Board (NMB) is the primary agency responsible for the administration of the statute.[9]

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5. Firemen & Enginemen v. Louisville & Nashville R.R., 400 F.2d 572, 574 (6th Cir.), *cert. denied*, 393 U.S. 1050 (1969). 45 U.S.C. § 151a (West 1986) outlines the general purpose of the RLA:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Id.

6. 45 U.S.C. § 151, Fifth (West 1986), states in pertinent part:

> The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders.

7. The union and employer have a duty to bargain in good faith; however, the parties are not required to come to an agreement. They must only show that they have made every reasonable effort to come to an agreement. 3 Lab. L. Rep. (CCH) ¶ 7140, at 15,513 (Jan. 27, 1989).

8. *Id.* ¶ 7101, at 15,434. Specific areas covered by the RLA are representation of employees, collective bargaining, interference with employee rights, discrimination by carriers or unions, union security and enforcement of the statute. *Id. See* 45 U.S.C. § 152, First (West 1986). *See also* Williams v. Jacksonville Terminal Co., 315 U.S. 386 (1942) (reviewing scope of the RLA); Nelson v. Piedmont Aviation, Inc., 750 F.2d 1234 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985) (stating RLA places no restrictions on rights of employers in hiring).

9. KHEEL, *supra* note 4, § 50.04[1], at 50-9. *See* 45 U.S.C. §§ 154-155 (West 1986). The NMB is to be composed of three members appointed by the president. The NMB has been given the power to appoint experts, employees and officers necessary for the function of the board. *Id.* § 154. The NMB has no adjudicatory authority regarding major disputes, nor does it have the power to issue regulations construing the RLA generally. Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 158-59 (1969).

The NMB has two principal functions: administration and determination of representation controversies and mediation of collective bargaining disputes.[10]

The RLA has extensive influence over the collective bargaining process. Collective bargaining disputes fall within two categories: (1) "major" disputes, such as negotiations of new or amended collective bargaining agreements, and (2) "minor" disputes, which call only for the interpretation or application of an existing agreement.[11] Before any changes may be made to a collective bargaining agreement, the RLA mandates that the parties meet certain notice and procedural requirements.[12] The purpose of these requirements is to prevent any unilateral action, upon the expiration of a collective bargaining agree-

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10. KHEEL, *supra* note 4, § 50.04[1]. "The most important function of the Board, in its own view, is the mediation of differences between carriers and their employees . . . ." 3 Lab. L. Rep. (CCH) ¶ 7,106, at 15,439 (Jan. 27, 1989). Other responsibilities include determining representation of employees, contract interpretation, and arbitration guidance. *Id.*

11. Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711 (1945), *aff'd*, 327 U.S. 661 (1946) (action brought for alleged violation of starting time provision within the collective bargaining agreement in which Supreme Court affirmed denial of summary judgment for defendant). Major disputes arise when there is no agreement or

> where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past. The second class [minor disputes], however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one.

Id. at 723. *See* KHEEL, *supra* note 4, § 50.05[1], at 50-23; 10 Empl. Coordinator (Research Inst. Am.), ¶¶ LR13,003-LR13,011 (Oct. 15, 1985).

12. The requirements for § 156 of the RLA are:

> (1) Carriers and/or representatives of the employees must give at least thirty days written notice of an intended change in agreements affecting rates of pay, rules and working conditions. This is the so-called "Section 6 notice."
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> (2) The time and place for the beginning of conferences must be set within ten days of the receipt of the Section 6 notice.
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> (3) The parties are to enter into negotiations in good faith.
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> (4) The statute presumes that the parties will continue negotiations on a regular basis. If the meetings are terminated for a period of ten days without an application to the Mediation Board for its services, the parties are free to take unilateral action with respect to those issues covered by the Section 6 notice.

KHEEL, *supra* note 4, § 50.05[1], at 50-24. *See also* Iberia Air Lines v. National Mediation Bd., 472 F. Supp. 104 (S.D.N.Y. 1979) (addressing § 6 notice dispute), *aff'd*, 636 F.2d 1201 (2d Cir. 1980), *cert. denied*, 450 U.S. 999 (1981).

ment, by either the employer or employees to change the conditions of their agreement while the RLA procedures are in progress.[13]

The RLA states, for example, that "[n]o carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."[14] Section 156 provides that carriers and representatives must give a minimum of thirty days notice, often referred to as a section 6 notice, before any changes may be made within the agreement.[15] Moreover, the parties have a mandatory duty to bargain over subjects which are determined to involve rates of pay, rules, and working conditions.[16] Negotiations must address "all subjects which specify labor standards for employees within [a certain] craft or class."[17] Those areas which are not certified do not require mandatory bargaining.[18] Given the parameters for collective bargaining, the parties are permitted to bring in any proposals which will fall into one of the specified subjects.

The National Labor Relations Act (NLRA) is the statutory body of law that addresses labor relations in industry and commerce.[19] It is a separate and much more extensive law than the RLA, and consequently, because the NLRA is supported by extensive case

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13. KHEEL, *supra* note 4, § 50.05[1], at 50-24.

14. 45 U.S.C. § 152, Seventh (West 1986).

15. 45 U.S.C. § 156 (West 1986).

16. 45 U.S.C. § 152, First (West 1986). "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions . . . ." *Id.*

The scope of mandatory bargaining under the RLA has been adopted from the National Labor Relations Act (NLRA). *See* Japan Air Lines v. International Ass'n of Machinists & Aerospace Workers, 538 F.2d 46 (1st Cir. 1976). *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (duty under the NLRA to bargain over wages, hours and other terms and conditions of employment). *See* KHEEL, *supra* note 4, § 50.05[2], at 50-32.

17. KHEEL, *supra* note 4, § 50.05[2], at 50-32.

18. KHEEL, *supra* note 4, § 50.05[2], at 50-33. There is no duty to bargain over non-mandatory subjects. This has been interpreted as including certain job classifications which are a part of the certified craft or class. However, there is nothing unlawful about including a non-mandatory subject among those bargaining issues in a § 6 proposal. *Id. See* Brotherhood of Ry. & S.S. Clerks v. Atlantic Coast Line R.R., 201 F.2d 36 (4th Cir.), *cert. denied*, 345 U.S. 992 (1953); Transport Workers Union of Am. v. Argentine Airlines, 479 F. Supp. 625 (S.D.N.Y. 1979).

19. 29 U.S.C. § 151 (West 1973). The National Labor Relations Board is the governing body for the administration of the National Labor Relations Act. 29 U.S.C. § 153 (West 1973).

history, it is often looked to for guidance in interpreting the RLA.[20] However, because both laws regulate similar subjects, some aspects of the NLRA have been adopted wholesale into the RLA. For example, distinctions between mandatory and permissive subjects of collective bargaining under the NLRA apply with equal force under the RLA.[21] Although this comment specifically involves the RLA, references occasionally will be made to cases under the NLRA which are beneficial in interpreting or lending support to this topic.

B. Facts

The plaintiff, Air Line Pilots Association (ALPA), was an unincorporated labor organization. ALPA was a duly certified collective bargaining representative under the RLA for airline pilots, including first and second officers employed by United,[22] an air carrier engaged in interstate and foreign commerce.[23] The defendants were United and its parent, UAL Corporation (UAL),[24] both Delaware corpo-

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20. *See* Trans Int'l Airlines, Inc. v. International Bhd. of Teamsters, 650 F.2d 949, 959 (9th Cir. 1980) ("[I]n cases which present difficult questions under the RLA but do not require statutory interpretations that are unique to the mechanisms of that Act, the doctrines developed by Congress and the courts from their experience in questions of labor law policy generally are instructive."), *cert. denied*, 449 U.S. 1110 (1981). *See* Balzeit v. Southern Pac. Transp. Co., 569 F. Supp. 986 (N.D. Cal. 1983); Adams v. Federal Express Corp., 470 F. Supp. 1356 (W.D. Tenn.), *aff'd*, 654 F.2d 452 (6th Cir. 1981); Pan Am World Airways, Inc. v. International Bhd. of Teamsters, 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd*, 404 F.2d 938 (2d Cir. 1969).

21. Norfolk & W. Ry. Co. v. Brotherhood of Locomotive Eng'rs, 459 F. Supp. 136, 142 (W.D. Va. 1978).

22. Air Line Pilots Ass'n, Int'l v. UAL Corp., 699 F. Supp. 1309, 1312 (N.D. Ill.) (*UAL Corp. I*), *rev'd in part, aff'd in part*, 874 F.2d 439 (7th Cir. 1989) (*UAL Corp. II*). Jeffrey Buckley Cockrell, a United pilot and a member of ALPA, was also a plaintiff in the action. Cockrell had been a shareholder of United or of its parent company since 1970. *Id.* at 1313.

23. 45 U.S.C. § 181 (West 1986) states in part:

> All of the provisions of subchapter I of this chapter . . . are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, . . . and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Id.

24. Prior to 1987, UAL Corporation was known as UAL, Inc. At that time the company was operating mainly as an airline company. In 1987 UAL, Inc. changed its name to Allegis. The then chairman and chief executive officer, Richard J. Ferris, sought to convert the company into an "integrated travel services"

rations with their principal place of business in Elk Grove Township, Illinois, former and current members of the UAL Board of Directors, and the IAM.[25] IAM was also an unincorporated labor organization and was the certified collective bargaining representative under RLA for all fleet service employees, stock clerks, mechanics and mechanics' helpers, mechanic apprentices, utility employees and ground communication technicians employed by United.[26]

In March 1987, ALPA retained the services of Lazard Freres and Company and Salomon Brothers, Inc., both New York investment banking firms, to assist the pilots in their attempt to take over United.[27] On April 5, 1987, the United pilots submitted a written proposal to Mr. Ferris, president and chief executive officer (CEO) of UAL, proposing an acquisition of United for $4.5 billion.[28] The purchase price included all of United's assets relating to the airline business. The pilots proposed to accomplish this through a heavily leveraged Employee Stock Ownership Plan (ESOP)[29] in which the pilots would not initially own the stock, but would keep it in a trust until its distribution.

UAL's response was less than enthusiastic. The senior management of UAL viewed ALPA's proposal "as a direct threat to its

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company. Over the next two years, Allegis purchased the Hertz Corporation, whose primary business was car rentals and the Hilton International Company, a hotel chain. The intent of the purchases was to combine the airline with a hotel and rental car service in order to make the traveling experience easier. The strategy, however, was unsuccessful. Capital was diverted away from the airline to support changes; the stock decreased, and shareholder discontent grew. In May 1988, Allegis changed its name to UAL Corporation as it abandoned its travel service plan. United is a wholly-owned subsidiary of UAL Corporation. *UAL Corp. I*, 699 F. Supp. at 1313-14. For convenience, this comment will identify the predecessor companies as UAL.

25. *Id.* at 1313.

26. *Id.*

27. *Id.* at 1314.

28. *Id.* According to the terms of the proposal, United was to be purchased for the pilots and other employees. The management of the airline was to be "run partly by managers recruited from 'current management,'" with the pilots having some power to retain some of the current directors. *Id.* "The purchase was to be financed by wage, pension and 'productivity' savings contributed by the pilots." *Id.* It was the pilots' opinion that the airline could be operated more efficiently and profitably if it was separated from the newly acquired rental car and hotel services. *Id.*

Salomon Brothers issued a "highly confident letter" stating that it was satisfied that the necessary capital could be raised. It felt that $1.5 billion could be raised publicly or placed privately in the form of junior debt securities. *Id.*

29. *Id. See infra* notes 225-29 and accompanying text.

strategy" of building the corporation into a travel service conglomerate.[30] The directors decided that United was not for sale to the pilots or to any other party.[31] On April 21, 1987, UAL announced that it was granting special employment contracts[32] to Ferris and other top officers of the corporation as a defensive measure against the takeover.[33]

In addition to the opposition expressed by the senior management of UAL, IAM also expressed dissatisfaction with the proposal. IAM believed the pilots' offer would result in financial difficulties because of the large debt financing that would be necessary and so would jeopardize the security of its members.[34] Although IAM was involved in ongoing negotiations with United for a new bargaining agreement prior to the announcement of the pilots' proposal, negotiations immediately terminated upon ALPA's announcement.[35] Additionally, IAM determined to use whatever measures were necessary to stop the takeover.[36]

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30. *UAL Corp. I*, 699 F. Supp. at 1315. *See supra* note 23. "The pilots' proposal had the effect, in Wall Street parlance, of putting Allegis [UAL] 'in play'—i.e., subject to acquisition attempts by unwanted suitors." *UAL Corp. I*, 699 F. Supp. at 1315.

31. *UAL Corp. I*, 699 F. Supp. at 1315.

32. *Id.* The special employment contracts, often referred to as "golden parachutes," were offered to over 37 senior officials. These "golden parachutes" provided for generous severance pay and bonuses in the event that there was a change of control. *Id.*

Prior to the announcement regarding employment contracts, UAL met with its financial advisor, Morgan Stanley & Company, and its counsel, Skadden, Arps, Slate, Meagher & Flom. During these meetings the takeover threat was discussed, and the obligations and responsibilities of the directors in considering the acquisition proposal were reviewed. The offer was officially rejected by UAL on April 24, 1987. UAL claimed the offer was "grossly inadequate." *Id.*

33. *Id.*

34. *Id.* ("The pilots' proposal ran counter to IAM's philosophy that employees should seek ownership only where necessary to save jobs at a financially troubled company, which IAM did not believe United to be.").

35. *Id.* at 1316. IAM was disturbed at the impact the ALPA announcement had on its negotiations for a new contract with United. Prior to the acquisition bid, negotiations had been entered into in order to determine whether an agreement could be reached without mediation. The talks ended when ALPA "dropped their atomic warhead." *Id.*

36. *Id.* Because both IAM and the senior management of UAL wanted to prevent a takeover, Mr. Pringle, senior vice president of Human Resources at UAL, told Ferris that IAM might be interested in fending off the pilot "raiders."

IAM was not unconditionally committed to supporting UAL's position. In a letter to UAL, IAM expressed its opposition to the pilots' proposal. However, IAM, in a move to retain its potential leverage over the company, stated that it was "not

On April 22 and 23, 1987, representatives of IAM and United met to discuss methods of defeating the pilots' actions. United proposed "locking in" IAM by offering IAM members three-year employment contracts.[37] United felt that by locking in the union, the company would appear less attractive to potential acquirors.[38] IAM rejected the airline's proposal but answered on April 23 with its own suggestions.

The union asked for a 5% annual wage increase over three years and a "Wage Investment Program" under which the machinist union would give up wage increases in exchange for common and preferred stock rights.[39] The IAM counter-offer also included sections called "Labor Contract Protective Provisions" and "Protection of Viability and Service" which included several poison pill provisions.[40] The plan included a "snapback" provision which required the wage increases to snap back to 5% in the event of a "Fundamental Corporate Transaction," including an acquisition, and for all stock option rights to remain in place.[41] Finally, IAM left a number of blanks in the labor contract in order to insert protective measures.[42]

UAL initially rejected the IAM offer and instead sought to deter ALPA's attempted acquisition by negotiating a highly leveraged purchase of aircraft from Boeing Company and developing a recapitalization plan which would cause United to incur over $3 billion

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closing the door entirely" to working with the pilots. Further, IAM began its own investigation into the possibility of buying UAL. Thus, IAM played both sides of the deal. *Id.*

Brian M. Freeman, an independent advisor for IAM, sent the union several options for dealing with the pilots' proposal. The first alternative called for IAM to join UAL in a "voluntary transaction" that would keep the company together. The plan included a proposal for union members to give wage and benefit cuts in return for stock. Additionally, Freeman suggested putting "poison pills" within the collective bargaining agreement which were designed to prevent a hostile takeover. *Id.*

37. *Id.* at 1317.

38. *Id.* The "lock-up" would "'send [the] raiders away', and '[a]llow [the integrated travel] strategy' to continue" according to Ferris. United felt that negotiating contracts with its other unions could help defeat the pilots' attempted takeover. *Id.*

39. *Id.*

40. *Id. See infra* text accompanying notes 183-86 (defining the poison pill antitakeover mechanism).

41. *Id.* Under the snapback provision, IAM would have a right to 5% wage increases and to all the stock contemplated by the wage investment program without having to give up any wages. In the presentation, Freeman referred to the snapback provision as a "poison pill." *Id.*

42. *Id.* at 1317-18.

in debt.[43] On June 9, 1987, the UAL Board met and decided to abandon its plan to develop the corporation into an integrated travel service and dispose of all non-airline assets.[44] Ferris resigned as CEO and was replaced by Frank A. Olson. Olson subsequently announced a series of conditions that would need to be met in order for the company to consider acquisition offers.[45] Despite these conditions, the pilots persisted with their initial bid. IAM, upon learning of UAL's proposal to sell off the non-airline assets and the potential increased debt that would be created by recapitalization, threatened to join the pilots' bid.[46]

Mr. Peterpaul, IAM's general vice president of transportation, and Mr. Dubinsky, a member of ALPA and chairman of ALPA's Master Executive Council, met to discuss IAM's potential participation in the pilots' ESOP.[47] The pilots' proposal for allocating the stock held in the ESOP required distribution according to a "pro-rata" basis predicated on economic contributions made by each group

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43. *Id.* at 1318. Upon the advice of its financial advisor, Morgan Stanley, United was told to transact an airplane purchase with Boeing or to develop a recapitalization plan. On May 12, 1987, UAL announced that United would purchase Boeing aircraft for $2.1 billion in return for $700 million in convertible notes from UAL. The notes could be converted into preferred stock at Boeing's option. In addition, Boeing had the right to convert the notes and preferred stock into common stock equal to approximately 15% to 19% of UAL's outstanding common stock. Finally, the notes' interest rates were to go up automatically if a third party purchased more than 40% of the UAL stock. This transaction was attacked by shareholders as a breach of fiduciary duty. Consequently, UAL prepaid the notes and suffered a $50 million prepayment penalty. *Id.*

On May 28, 1987, a recapitalization plan was proposed which would require UAL to borrow $3 billion and pay a special dividend to the stockholders. Through the recapitalization plan, United hoped to burden the airline with debt, thereby making it less attractive to potential acquirors. The recapitalization plan was rejected. *Id.* at 1318-19.

44. *Id.* at 1319.

45. *Id.* at 1320. These requirements were:

> (1) that the proposal be all cash and leave the company adequately financed; (2) that the proposal be agreed to by all unions representing United employees; (3) that the proposal provide for fair participation by non-represented employees; and (4) that the proposal contain a satisfactory plan for the management of the company after the change in ownership.

Id.

46. *Id.*

47. *Id.* at 1321. Dubinsky expressed the pilots' wish to have IAM participate in the acquisition. As an incentive, Dubinsky stated that the pilots were willing to share control of the company with IAM although the pilots would control more stock. The settlement of the control issue allowed the parties to concentrate on the financial aspects of taking over UAL. *Id.*

in the form of wage and benefit concessions.[48] IAM rejected the pilots' plan, claiming that the pilots were already overpaid and thus they would be impacted less by "give-ups," while its members were already underpaid and any concessions made would be more difficult.[49] IAM decided that before it would participate in an ESOP, it would negotiate a new wage increase through its collective bargaining contract in order to create a higher wage base for making concessions.[50] IAM later agreed to give consideration to the pilots' proposal if the allocation of stock was made according to a "market test."[51] Under this theory, wages would be determined by similar jobs in the marketplace. Distribution of stock would then be determined by concessions from this market test.[52] No agreement was reached.[53]

Negotiations between IAM and United began, and on November 15, 1987, Peterpaul and Tallent, the United contract negotiator, agreed on the final form of the protective covenants for the new contract.[54] *UAL Corp. III* focused on two of those covenants in particular:

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48. *Id.* ("[F]or every dollar an employee group would give up in the form of wage or benefit concessions, it would receive a proportionate amount of stock in return.").

49. *Id.* at 1321-22.

50. *Id.* The IAM members not only believed that they were underpaid, but also that the pilots were overpaid. Negotiating a new contract with United was seen as the only plan which would eliminate this discrepancy. *Id.*

51. IAM and United were involved in collective bargaining under the NMB from June to September 1987. However, the labor protective provisions were not seriously discussed during the bargaining. Later, Mr. Freeman sent a copy of the protective provisions to Mr. Tallent, United negotiator, at his request, and sent a revised proposal to Mr. Peterpaul on October 2. The cover memorandum stated, "[T]he revised 'poison pill' type proposal that you requested." *Id.* at 1322. Discussions between the parties continued, and the subject of poison pills became a central issue. During the next several weeks, Freeman drafted and redrafted the protective provisions in an attempt to gain approval from Tallent. *Id.* at 1322-23. It was the intention of IAM and UAL to use the labor agreement as a tool against the pilots. Rather than a normal adversarial contest, which most contract negotiations are, the two sides cooperated in refining the protective provisions. It was no secret that the parties wanted the poison pills in order to prevent any acquisition. UAL and IAM were not naive to the potential effects of the pills. *Id.*

52. *Id.* at 1324. The market test contemplated that each employee group would have its wages and benefits brought up or down according to the existing market average for comparable services. From this market base, concessions would be made and stock allocated according to the wages. *Id.*

53. *Id.* at 1327. On October 15, 1987, the NMB granted binding arbitration. This was rejected by IAM. As a result, the parties were released from mediation under the RLA. A 30-day cooling-off period was triggered. If no agreement was reached by November 15, 1987, a strike would begin at midnight. *Id.* at 1323.

54. *Id.* at 1326. The airline industry was in a competitive period when the

Section B. Upon an acquisition of control or a change in control of the Company or of substantial part (50% or more) of its assets and/or operations (except in the ordinary course of business) by a third-party or by or on behalf of one or more employee groups (alone or with other investors) or the entering of an agreement that will have those effects:

1. The IAM shall have the unilateral option in its sole discretion upon written notice to the Company within 90 days of written notice of such change in control to elect the following options in lieu of maintaining the labor agreement pursuant to its then existing terms: (a) Extend the expiration date of its labor agreement to October 31, 1992 with additional automatic wage increases of 3% on November 1, 1989, 3% on November 1, 1990 and 5% on November 1, 1991 and additional pension benefit increases to $40 on November 1, 1990 and $42 on November 1, 1991. (b) To serve a Section 6 notice immediately.

Section C. In the event the Company or any other party provides or agrees to provide any union-represented labor group with a common stock, preferred stock, stock option, warrant, Employee Stock Ownership Program, or employee equity/participatory ownership of any type ("employee stock plan"), or profit-sharing, such plan shall be offered and allocated to each union-represented labor group on the same basis by reference to "market" wages, benefits and work rules relative to those in effect upon implementation of such plan.

In the first instance, the determination of "market" levels of wages, benefit levels and work rules for the purposes of this agreement shall be by the carrier for all employee groups. A joint arbitration procedure including all parties will be established for the settlement of any dispute over market wages, benefit levels and work rules for all employee

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UAL/IAM contract was negotiated. Most airlines had been seeking concessions in order to compete in the market. However, the IAM package was considered generous. It provided nearly $94 million to IAM. *Id.* at 1328.

groups. Such arbitration procedures and standards shall be detailed in a stipulation agreement entered as soon as practicable.[55]

In a letter to Dubinsky dated April 6, 1988, Peterpaul reiterated IAM's position against the pilots' attempted takeover. Peterpaul stated that provisions had been adopted in its new labor agreement which were "intended to stabilize and protect the position of our members against the disruption potentially produced by a takeover and certain forms of employee ownership."[56]

UAL's Board of Directors had been informed of the protective covenants but never considered or approved them, nor did the board seek any investment banking advice regarding the covenants.[57]

Because of the protective covenants in the labor contract, ChemBank, the pilots' leading lender, stated that it was not prepared to proceed with the transaction because section B(1)(b) could possibly trigger a strike by IAM.[58] Further, section C prohibited the pilots from acquiring United without the participation of the other employees of the company.[59] Consequently, the pilots' attempted acquisition was stopped cold.

The pilots could not reasonably proceed with their transaction because of sections B(1)(b) and C. As a result, suit was brought against UAL and IAM to invalidate those provisions of the contract. The pilots' suit contained the following allegations: (1) sections B(1)(b) and C damaged the UAL shareholders by depriving them of the opportunity to receive premiums above the market price; (2) UAL and IAM adopted the provisions knowing that they would defeat the attempted takeover; (3) the individual directors did not approve

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55. *Id.* at 1326.

56. *Id.* at 1327 ("We intend to exercise those rights as we deem appropriate to all cases, including an ALPA transaction. [B]ased on the current facts, we cannot provide any assurance that may be required by lenders who are considering financing your proposed buyout.").

57. Tallent provided Olson with a broad outline of the terms United was willing to accept in the contract negotiations, but Olson did not take an active role in the discussions, nor did he see a final copy of the agreement until after negotiations were completed. "In accordance with United's long-standing practice, United delegated the responsibility to negotiate and enter into the IAM labor contract to Tallent and Olson, who had authority to bind the corporation without formal approval by the Board of Directors." *Id.* at 1328.

58. Section B(1)(b) made it possible that ChemBank would trigger the strike by financing the transaction. *Id.* at 1329.

59. *Id.*

or consider the protective covenants before they were adopted in violation of Delaware corporate law; and (4) the UAL Board lost the power to approve certain types of takeovers because of their inability to nullify the covenants.[60]

III. ANALYSIS

The case originally came before the United States District Court for the Northern District of Illinois. The court held that section C was illegal under the RLA and that sections B(1)(b) and C were not controlled by Delaware law because they were preempted by federal labor law.[61] The decision was appealed to the United States Court of Appeals for the Seventh Circuit, where Judge Posner affirmed the lower court's finding that section C was in violation of the RLA but reversed the ruling that Delaware corporate law was preempted by federal law.[62] The case was remanded, whereupon the district court, applying Delaware corporate law, found that both sections of the contract violated Delaware law.[63]

A. *Section C—Mandatory Allocation of Stock*

The first substantive issue determined by the court of appeals was whether the district court was correct in finding that section C affected the pilots' right to bargain collectively over the terms of their employment in violation of RLA section 152, First and Ninth.[64] The defendants argued that no violation existed because section C only affected the pilots' rights as investors, an area in which United was not required to negotiate with the pilots; it did not affect terms

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60. *Id.* at 1329-30.
61. *Id.* at 1331-34.
62. *UAL Corp. I*, 874 F.2d 439 (7th Cir. 1989).
63. *UAL Corp. III*, 717 F. Supp. 575 (N.D. Ill. 1989).
64. *UAL Corp. II*, 874 F.2d at 445. 45 U.S.C. § 152, First provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Id.

45 U.S.C. § 152, Ninth, mandates that the NMB shall be responsible for determining the representative organization or individual for a union. *Id.*

of employment which required mandatory bargaining.[65] However, section C referred to any "employee" stock plan.[66] The pilots' proposal required that the stock purchased under the ESOP be distributed according to the "give-ups" made by the airline employees. The interest that each employee received in the airline would be a substitute for wages and other benefits.

The court determined that the allocation of the shares was among the terms and conditions of employment over which an employer subject to RLA was required to negotiate:[67] "Section C will affect the value of this wage substitute, and will therefore affect the terms of the pilots' employment without giving their union a chance to bargain collectively over the change."[68] Consequently, the section was invalidated.

B. Preemption of Delaware Law

1. The Original District Court Decision

The district court (*UAL Corp. I*) originally held that the plaintiffs' claims, alleging that the United Board of Directors violated Delaware corporate law through the embodiment of protective measures in a collective bargaining agreement, were preempted by federal law.[69] In arriving at this conclusion, the court cited *Lingle v. Norge Division of Magic Chef, Inc.*[70] where the United States Supreme Court stated that "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law . . . is pre-empted and federal labor-law principles—necessarily uniform

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65. *UAL Corp. II*, 874 F.2d at 445.
66. *Id.*
67. *Id.*
68. *Id.*
69. *UAL Corp. I*, 699 F. Supp. at 1334.
70. 486 U.S. 399 (1988). In *Lingle*, plaintiff, who was injured on the job, was discharged for allegedly filing a false workman's compensation claim. The union, representing the plaintiff, filed a grievance under the collective bargaining agreement, which prohibited employee discharge except for "just" cause. Plaintiff also filed a retaliatory discharge claim action. The district court dismissed the retaliatory claim, stating that it was preempted by the Labor Management Relations Act § 301, which governed the collective bargaining agreement. The court of appeals affirmed, and the United States Supreme Court reversed. The Court held that the petitioner's state tort remedy was not preempted under § 301 as it did not require any interpretation of the collective bargaining agreement. *Id.* at 409-10.

throughout the nation—must be employed to resolve the dispute."[71] The district court stated that, because it would be necessary for the Delaware courts to interpret the protective sections within the labor contract to determine if there was a violation of Delaware law, state law was preempted.[72]

The district court noted that the RLA was enacted to avoid the interruption of commerce and that to subject labor contracts to Delaware corporate law would impede that purpose. "It seems clear that requiring parties to conduct collective bargaining negotiations with one eye on state corporate law and the other on federal labor law will impair the collective bargaining process."[73] The judge further stated that Delaware corporate principles had nothing to do with employment; rather, they only governed the internal affairs of the corporation.[74] The court also cited *Teamsters Local v. Lucas Flour Co.*,[75] stating that stability and

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71. *Id.* at 405-06, *cited in UAL Corp. I*, 699 F. Supp. at 1332.

> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.

Teamsters Local v. Lucas Flour Co., 369 U.S. 95, 104 (1962), *cited in Lingle*, 486 U.S. at 404 n.3.

72. *UAL Corp. I*, 699 F. Supp. at 1332-33.

73. *Id.* at 1333 (emphasis omitted). Judge Zagel stated that requiring parties to follow state corporate statutes would create obstacles to reaching agreements by requiring parties to balance both state and federal law. Zagel agreed with the plaintiff that Delaware corporate law did not conflict with the RLA and that both could be followed. The problem was that collective bargaining agreements generally have deadlines. If parties must spend precious time determining state law adherence, the RLA's objective of setting matters and avoiding conflict would be thwarted. *Id.*

74. *Id.* at 1334.

75. 369 U.S. 95 (1962). In *Lucas Flour*, the employer brought an action against a union to recover business losses which were caused by a strike. The collective bargaining agreement provided for all differences to be settled through arbitration. The Supreme Court found that actions under § 301 of the Labor Management Relations Act are paramount to any incompatible state law. "The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute." *Id.* at 103.

See also Dragone v. M.J. Raynes, Inc., 695 F. Supp. 720 (S.D.N.Y. 1988) (former employee's claims against employer for tortious interference with a contract, slander, libel and wrongful discharge preempted by the Labor Management Relations Act); Alameda Room, Inc. v. Pitta, 538 F. Supp. 1072 (S.D.N.Y. 1982) (state contract law preempted by federal labor law).

uniformity of meaning are of such importance that "actual inconsistencies between state and federal law are unnecessary for preemption to occur; rather, it is the mere possibility that the different bodies of substantive law might give rise to different meanings in a collective bargaining agreement that justifies preemption."[76]

The court concluded that application of Delaware law would only create greater problems for labor negotiations. To promote the RLA objectives, it was necessary that state law be preempted to ensure uniformity within the federal system. "Forcing carriers to comply with state law duties in addition to those imposed by the RLA may make the difference between striking an agreement and just plain striking."[77]

2. The Seventh Circuit Opinion

Judge Posner, writing for the Seventh Circuit (*UAL Corp. II*), held that Delaware corporate law was applicable when issues of corporate law arise in a labor contract. The court acknowledged the power of the supremacy clause of the United States Constitution and the necessity for federal preemption of state law when there is a conflict or when the enforcement of the state law would lead to a substantial and unwarranted obstacle to obtaining the objectives of the federal statute.[78] However, it found neither of these conditions present in the original *UAL Corp.* decision.[79]

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76. *UAL Corp. I*, 699 F. Supp. at 1332 (emphasis omitted).

77. *Id.* at 1333.

78. *UAL Corp. II*, 874 F.2d at 445. The supremacy clause, found in article VI, clause 2 of the United States Constitution, states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judge in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Chief Justice John Marshall is responsible for defining the scope of the supremacy clause through his opinions in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) and McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). When Congress creates legislation as permitted under its delegated powers, conflicting state law must give way. *See* Perez v. Campbell, 402 U.S. 637 (1971); Nash v. Florida Indus. Comm'n, 389 U.S. 235 (1967); Hill v. Florida *ex rel.* Watson, 325 U.S. 538 (1945).

If the state statute creates only an obstacle to the enforcement of federal law, the federal law is interpreted by the courts as outlawing obstacles. As a result of this backward interpretation, these state laws are preempted under the supremacy clause. *See* Brown v. Hotel & Restaurant Employees, 468 U.S. 491, 501 (1984); Massachusetts Medical Society v. Dukakis, 815 F.2d 790, 791 (1st Cir.), *cert. denied*, 484 U.S. 896 (1987).

79. *UAL Corp. II*, 874 F.2d at 445.

As to whether Delaware corporate law was preempted by federal labor law because of potential conflicts, the court stated that there was a possibility of conflict between the United directors' duty under Delaware law to "proceed with all due deliberation in deciding whether to adopt defensive measures against a takeover," including a management-sponsored ESOP, and United's duty under federal law to bargain collectively.[80] "But this is theory, not practice, at least as far as the present case is concerned. And even as theory it is suspect because any illegal proposal could be made at the last minute, and it cannot be right that this bare possibility preempts all state laws . . . ."[81]

On the second issue, whether Delaware corporation law frustrated the objectives of the RLA, the court again held that such concerns were not relevant in the case. The defendants contended that applying Delaware law would prevent antitakeover devices from being placed in all labor contracts. However, the court stated that:

> this is not a persuasive argument for federal preemption, unless it can be shown that allowing poison pills or other anti-takeover devices to be written into such contracts regardless of whether the devices violate state law is necessary in order to reduce the number or severity of transportation strikes or otherwise to attain the essential objectives of the Railway Labor Act.[82]

The court pointed out that the preemption of state law would severely restrict a state's ability to govern its corporations. "[I]t could have a catastrophic effect on the efforts of states to regulate takeovers, and this consideration is germane since, realistically, a judgment

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80. *Id.* at 445-46.

81. *Id.* at 446. The court gave an example of when a conflict may develop. If labor negotiations are continuing into the eleventh hour, the employer may find itself obligated under state law to present the board of directors with the proposed agreements for approval. In order to make a fair and objective determination of these proposals, the board may be required to submit these to financial advisors. At the same time, the employer may be obligated to obey federal law, which requires him to respond immediately to union demands. The court concluded that there was a theoretical possibility of conflict, but it was an insufficient reason to preempt state law in every case. *Id.*

82. *Id.*

about preemption requires a weighing of federal and state interests."[83] Permitting preemption could result in work forces' adopting antitakeover measures within the collective bargaining agreements in order to avoid invalidation under state law.[84] The court expressed its concern thus: "For us to create in the name of preemption so enormous a loophole in state regulation, without any evidence that the loophole is necessary to protect the objectives of federal labor law, would be reckless."[85] Hence, the case was then remanded to the district court for a proper application of Delaware law.

3. The Case on Remand to the District Court

On remand (*UAL Corp. III*), the district court held that Delaware law had been violated by the antitakeover mechanisms placed within the collective bargaining agreement. The court pointed out that the board of directors has "[t]he ultimate responsibility for managing the business and affairs of the corporation."[86] But this responsibility has limits.[87] Thus, the business judgment rule protects the board only when its business decisions are founded on some "rational business purpose."[88]

The court found that the United Board's implementation of protective measures in the IAM contract occurred in the context of United's response to a legitimate acquisition proposal by the pilots.[89] Consequently, it was necessary to apply the *Unocal* standard[90] to the board's conduct: It was necessary for the board to show (1) that it

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83. *Id.* at 447. *Cf.* Local 926, Int'l Union of Operating Eng'rs v. Jones, 460 U.S. 669, 676 (1983) (employee tort action against employer for depriving him of employment preempted because it was within the jurisdiction of the NLRA).

84. The court pointed out that it is common for unions to fear that a buyer of the company would take steps detrimental to the union, including renegotiating the collective bargaining agreements or selling off portions of the company. In such a case, a union might agree to the adoption of antitakeover measures in the agreement. *UAL Corp. II*, 874 F.2d at 447.

85. *Id.*

86. *UAL Corp. III*, 717 F. Supp. at 581.

87. *Id.* The court pointed out that the board's authority is limited by its duty to protect the corporation from any "reasonably perceived" harm. *Id.*

88. *Id.* at 582 (quoting Sinclair Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)). *See infra* notes 128-35 and accompanying text (stating the business judgment rule).

89. *Id.* at 583.

90. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985). *See infra* note 125.

had "reasonable grounds for supposing that there was a danger to corporate policy or effectiveness," and (2) that the actions taken were "reasonable in relation to the threat posed."[91]

In addressing the first prong of the *Unocal* test, United maintained that the actions taken by it and IAM were reasonable given the threat presented by the pilots. United based the threat on three theories: (1) the pilots' actions put the company "in play," subjecting it to possible acquisition by unwanted buyers; (2) the proposal frustrated the long-term policies of the company; and (3) it was an inadequate offer.[92] The court, referring to *Robert M. Bass Group, Inc. v. Evans*,[93] found that although United was "in play," there was no showing that the shareholders were coerced to sell. Therefore, the fact that the company was "in play" did not, by itself, constitute actionable harm.[94] Regarding the frustration of United's long-term objectives, the court stated that this argument was ill-founded for two reasons: (1) United's plan to develop a travel service conglomerate was the subject of widespread employee/shareholder dissatisfation and was ultimately abandoned; and (2) at the time of the litigation, United was unstable, as evidenced by its third CEO in five years, and its failure to show any adverse effect of the pilots' proposal on stated company policy.[95] These two facts established that there was little long-term planning that remained. Finally, the board's claim that the offer was inadequate ignored the pilots' willingness to negotiate any term within the proposed takeover.[96]

The court also found that the United Board did not adopt the defensive measures in good faith and on an informed basis. "The Directors approved those provisions with little or no consideration and upon the misinformation that they were in compliance with federal law."[97] United alleged that it had no duty to examine the collective bargaining agreement since it had delegated that duty to a labor specialist who negotiated directly with the unions. The court rejected this argument, noting that, while a board may delegate its duties, it may not avoid its responsibilities.[98]

Regarding the second prong of the *Unocal* analysis, the court found that, even if there was a reasonably perceived threat to cor-

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91. *UAL Corp. III*, 717 F. Supp. at 583.
92. *Id.* at 586.
93. 552 A.2d 1227 (Del. Ch. 1988). *See infra* note 136.
94. *UAL Corp. III*, 717 F. Supp. at 586.
95. *Id.*
96. *Id.* at 586-87.
97. *Id.* at 587.
98. *Id.*

porate policy, United had failed to respond in a reasonable manner in respect to the threat posed. Because the protective clauses were incorporated in a labor contract, the directors no longer had a unilateral power of revocation. "[A] defense measure which is irredeemable, regardless of the offer tendered, is manifestly unfair to shareholders and inconsistent with the United Board's duty of care."[99]

The court found that the United Board had failed to properly implement the antitakeover measures. Consequently, the two provisions, sections B(1)(b) and C, were invalidated under Delaware law.

IV. EVALUATION

A. *The Effect of State Law on Directors in Respect to Labor Contracts*

In *UAL Corp. II*, Judge Posner found that the RLA did not preempt Delaware corporate law. This conclusion was arrived at on the basis that Delaware law is neither inconsistent with the RLA nor does it hinder the RLA's objectives.[100] In referring to the role of the state in corporation law, the United States Supreme Court has stated:

> It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.[101]

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99. *Id.* at 588.

100. *UAL Corp. II*, 874 F.2d at 446.

> [U]nless it can be shown that allowing poison pills or other anti-takeover devices to be written into such contracts regardless of whether the devices violate state law is necessary in order to reduce the number or severity of transportation strikes or otherwise to attain the essential objectives of the Railway Labor Act[,] state corporate law will not be preempted.

Id.

101. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 91 (1987). *CTS* involved a suit by a tender offeror who attempted to enjoin enforcement of an Indiana statute regulating takeovers. The company counterclaimed, seeking an injunction against the offeror. The United States District Court for the Northern District of Illinois, Eastern Division, granted a preliminary injunction. Dynamics Corp. of Am. v. CTS, 637 F. Supp. 389 (N.D. Ill. 1986). Judge Posner of the

The governance of corporations has long been within the province of the individual states.[102] Only when state law is contrary to a federal statute or when it contravenes the "full purposes and objectives"[103] of the congressional enactment will it be preempted by the supremacy clause.[104]

The Williams Act[105] is the federal statute which governs the area of tender offers. The Act imposes requirements in two basic areas:

Seventh Circuit Court of Appeals affirmed the decision, stating that the statute was in conflict with the Williams Act and was, therefore, a violation of the commerce clause. Dynamics Corp. of Am. v. CTS, 794 F.2d 250 (7th Cir. 1986). The Supreme Court held that the Indiana statute was consistent with the Williams Act and did not violate the commerce clause. *CTS*, 481 U.S. at 94.

See also Fleet Aerospace Corp. v. Holderman, 848 F.2d 720 (6th Cir. 1988) (overturning lower court decision which had found Ohio's Control Share Acquisition Act unconstitutional); Hyde Park Partners, Ltd. Partnership v. Connolly, 839 F.2d 837 (1st Cir. 1988) (affirming lower court decision that provisions within Massachusetts takeover statute were preempted by the Williams Act); Amanda Acquisition Corp. v. Universal Food Corp., 708 F. Supp. 984 (E.D. Wis. 1989) (Wisconsin Business Combination Statute found not violative of the Williams Act or commerce clause). *Cf.* Holylake Inv. Ltd. v. Bell, 723 F. Supp. 576 (D. Kan. 1989) (challenge of constitutionality of Kansas Insurance Holding Companies Act. Court found no violation of commerce clause or due process).

102. Joint stock companies, the forerunners of the modern corporation, existed in North America prior to the formation of the Union. Corp. L. Guide (CCH) §§ 100-01 (1987). In the early days of the country, corporate charters were only granted to business enterprises by special acts of the state legislatures. Gradually states began to adopt general corporation statutes which replaced the cumbersome method of incorporation by legislative acts. *Id.*

103. *CTS*, 481 U.S. at 79 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). *See* Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978); Florida Lime & Avocado Growers, Inc., v. Paul, 373 U.S. 132, 142-43, *reh'g denied*, 374 U.S. 358 (1963).

104. *CTS*, 481 U.S. at 79.

105. Securities Exchange Act of 1934 §§ 13(d,e), 14(d-f), *as amended by* 15 U.S.C. §§ 78m, 78n (1983). "[T]he Williams Act was passed to ensure that tender offerees be afforded sufficient information to allow them to make an intelligent business decision whether or not to tender their shares." RP Acquisition Corp v. Staley Continental, Inc., 686 F. Supp. 476, 479 (D. Del. 1988).

The development of the Securities Exchange Act of 1934 was a result of the fraud and corruption which existed within the trading of securities. States had attempted to regulate corporate securities through "blue sky" laws. However, individual state attempts to control securities proved ineffective: (1) each state law varied, thus uniformity was nonexistent; and (2) as corporations grew, state borders diminished in importance. Through the Securities Exchange Act of 1934, Congress sought to compel corporations to disclose information about corporate affairs to shareholders and potential buyers. The Act regulates security exchanges and brokers, tender offers, proxy solicitation, and insider trading. 11A-Pt. 1 BUSINESS ORGANIZATIONS § 1.01[1], at 1-4 (1990).

(1) it requires the offeror to file a statement disclosing information about the offer, the offer's background, identity and source and amount of funds to be used in the acquisition; and (2) it establishes procedural rules to govern tender offers.[106] Yet its scope does not usurp a state's right to govern corporations. "The longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly."[107] It follows that Posner's opinion that the RLA does not preempt Delaware's right to regulate an apparent antitakeover maneuver is consistent with the Supreme Court's ruling in *CTS Corp.*

Recently, the United States District Court for the District of Delaware held that section 203 of the Delaware Code,[108] Delaware's business combinations statute, was not violative of the Williams Act.[109] The court, in enunciating the parameters of state power in regulating tender offers, stated that state statutes that protect the shareholder but which also have "substantial deterrent effects on tender offers do not circumvent Williams Act goals, so long as hostile offers [that] are beneficial to target shareholders have a meaningful opportunity for success."[110]

The Williams Act and companion state tender offer statutes in most instances complement one another because of their similarities of purpose. Generally, if a corporation adheres to the state statute, there will be conformity with the federal statute. Nonconformity would result in preemption. In contrast, the RLA's purpose shares little relationship to the goals of state corporation laws. State corporation law seeks to govern the formation and functions of corporate activities, whereas the RLA seeks to govern bargaining under labor contracts.[111] Thus, certain activities could be found permissible under

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106. *CTS*, 481 U.S. at 79.

107. *Id.* at 86.

108. DEL. CODE ANN. tit. 8, § 203(a) (Supp. 1988). *See infra* note 231 (providing language of the statute).

109. BNS Inc. v. Koppers Co., 683 F. Supp. 458 (D. Del. 1988). A tender offeror involved in a takeover of a Delaware corporation sought an order declaring the Delaware combinations statute unconstitutional. *Id.*

110. *Id.* at 469. A second challenge to the Delaware business combinations statute was launched immediately following the holding in *BNS*. In *RP Acquisition Corp.*, a corporation seeking a hostile takeover of another company moved for a preliminary injunction on the grounds that the Delaware statute was unconstitutional. The court, relying upon *BNS*, denied the motion. RP Acquisition Corp. v. Staley Continental, Inc., 686 F. Supp. 476 (D. Del. 1988).

111. *See supra* note 5.

one statute while they violated the other. For example, the "snapback" provision implemented in *UAL Corp.*, which provided that in the event of a "fundamental corporate transaction"[112] wage increases would move to a predetermined level and IAM would have the option of serving a section 6 notice,[113] was not found violative of the RLA.[114] Judge Posner stated that section B(1)(b), which contained the "snapback" and section 6 provisions, was merely a declaration of the "machinists' statutory rights."[115] However, Posner noted that the effect of section B(1)(b) was to deter potential lenders.[116] If IAM were to serve a section 6 notice, it would be giving warning of a potential strike. Consequently, ALPA's lenders retracted offers to loan money in fear it would trigger an IAM strike. The airline business would have suffered, and losses would have mounted in the face of a strike, thus diminishing the company's value.

Under Delaware corporate law, however, section B(1)(b) was anything but legal. It may have been a declaration of statutory rights under federal labor law, but it was also an antitakeover device which severely restricted the ALPA acquisition when viewed in light of Delaware corporate law. Judge Zagel, in *UAL Corp. III*, acknowledged that section B(1)(b) stated the machinists' statutory rights, but he also looked at the intent of IAM and United in incorporating the provision into the labor contract. "The provision was adopted with the intent to deter the pilots' efforts and Chemical Bank refused to provide financing because of the increased potential for a strike caused by the provision."[117] The court proceeded to apply Delaware corporate law and ultimately found section B(1)(b) in violation because the board of directors had "neither made an informed decision nor engaged in any deliberative process" before approving the provisions.[118]

However, there was no need to preempt state law because of the different objectives of the RLA and Delaware corporate law.

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112. *UAL Corp. I*, 699 F. Supp. at 1317 (included in the definition of a fundamental transaction was an acquisition).

113. *See supra* note 12.

114. *UAL Corp. II*, 874 F.2d at 442.

115. *Id.*

116. *Id.* Testimony had been given that the lenders were unwilling to commit themselves to loaning money when it could potentially lead to a strike. However, the same lenders in later testimony stated that they would have taken the risk had § B(1)(b) been stricken. *Id.*

117. *UAL Corp. III*, 717 F. Supp. at 581.

118. *Id.* at 589.

The court's decision to nullify the provisions did not actually impede the objectives pursued by the RLA.

B. The Role of Directors in Monitoring Collective Bargaining Agreements

Although the trilogy of *UAL Corp.* decisions addressed an issue of first impression,[119] its implications require corporate directors to pursue a more active role when labor negotiations are underway. United had appointed Stephen E. Tallent[120] as its labor negotiator and, to a large extent, had relinquished much of its responsibilities to him.[121] Chairman Olson stated that he never recognized the relationship between IAM's contract and the pilots' proposal.[122] But the court, citing to *Mills Acquisition Corp. v. Macmillian, Inc.*,[123] stated

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119. *UAL Corp. II*, 874 F.2d at 446-47.

> This is the first case that has come to our attention where anti-takeover devices have been planted in a collective bargaining agreement, and this makes it hard for us to believe, in the absence of evidence, that freedom to negotiate for their inclusion unhampered by state law is necessary to the system of collective bargaining established by the [Railway Labor] Act.

Id.

120. Tallent was a labor specialist with the law firm of Gibson, Dunn and Crutcher. He was hired by Frank Olson, then president and CEO of United, specifically for the purpose of negotiating labor agreements. *UAL Corp. III*, 717 F. Supp. at 587.

121. *Id. See supra* note 57 and accompanying text.

122. *UAL Corp. III*, 717 F. Supp. at 587. Three to four weeks before the final agreement was settled, Tallent advised the UAL board of the protective provisions that IAM was supporting. Olson never discussed the provisions and what impact they might have on the sale of UAL. On the few occasions that Olson and Tallent did speak about the negotiations, Olson stated that nothing should be done which would interfere with the salability of the company. No discussions about the poison pills were discussed with First Boston, UAL's investment banker. *UAL Corp. I*, 699 F. Supp. at 1327-28.

Zagel pointed out in *UAL Corp. I* that at no time did Tallent "vigorously resist" the protective provisions demanded by IAM. *Id.* at 1325.

It is apparent that UAL and IAM were working to derail the pilots' bid. The legal implications of placing poison pills inside a collective bargaining agreement must have been recognized by the parties. Tallent is one of the premier labor negotiators in the country, and it would appear that he had some knowledge of the potential effects of the poison pills. However, no known attempt had been made prior to this case to place protective provisions within a labor contract. The parties had everything to gain if the agreement was left untouched, and nothing to lose. Given the threat posed by the pilots, the management and IAM had every reason to test the "labor pill" waters.

123. 559 A.2d 1261 (Del. 1989). An unsuccessful bidder sued to preliminarily enjoin a lockup agreement between the corporate directors and a second bidder. The chancery court denied the plaintiff's motion, and plaintiff appealed. The Supreme Court of Delaware reversed and remanded the case. In an opinion issued at a later date, the supreme court held that the lockup, as part of a merger agreement, was invalid and unenforceable. *Id.*

that although a board may delegate its duties, it cannot relieve itself of its responsibilities.[124] The court found that the board could not rely on misinformation, nor on the fact that they did not consider themselves to be defending against a takeover in ignoring a *Unocal*[125] analysis.[126]

In the vast majority of cases, labor contracts will not conflict with state corporate law. But directors will not be relieved of the duty of assuring conformity in those instances where inconsistencies arise. The directors have an unyielding fiduciary duty to the corporation and shareholders to protect them from harm reasonably perceived, irrespective of its source.[127]

Under most conditions, directors may invoke the business judgment rule's protection, which is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[128] When the decision can

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124. *UAL Corp. III*, 717 F. Supp. at 587.

125. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985). In *Unocal* the court set down a two-prong test which is to be applied when there is a threat of a takeover. In order for the corporation's directors to receive the benefit of the business judgment rule, they must show that there was a reasonably perceived threat to corporate policy and effectiveness and that the action taken in response was reasonable. *Id.* at 955.

See also Bass, 552 A.2d at 1227 (attempt to enjoin restructuring plan of corporation); City Capital Assocs. Ltd. Partnership v. Interco, Inc., 551 A.2d 787 (Del. Ch. 1988) (entities seeking to acquire corporation sought preliminary injunction requiring board to redeem poison pill); Ivanhoe Partners v. Newmont Mining Corp., 533 A.2d 585 (Del. Ch. 1987) (motion brought for preliminary injunction to prevent stock trades).

126. *UAL Corp. III*, 717 F. Supp. at 587.

127. *Unocal*, 493 A.2d at 954.

128. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). *Aronson* involved a derivative action filed by a shareholder against the corporation. The chancery court denied the defendant's motion to dismiss the action. The Delaware Supreme Court reversed and remanded the decision. *Id. See also* 2 E. BRODSKY & M. ADAMSKI, LAW OF CORPORATE OFFICERS AND DIRECTORS, DUTIES OF CARE § 2:06 (1989); Fischel & Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis*, 71 CORNELL L. REV. 261, 283-84 (1986).

> The elements of the business judgment rule have been summarized as follows: (a) it applies to the making of a decision (whether that decision is to act or not to act); (b) directors must act in good faith; (c) they must act in the honest belief that their action is in the best interests of the corporation; (d) they must be informed and act with due care in the process of their decision-making; and (e) the substantive decision will be sustained if it can be attributed to a rational business purpose.

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be attributed to a rational business purpose, a reviewing court will honor the board's decision. This doctrine purports to keep courts from second guessing the board's decision in hindsight, because the directors are presumably better qualified in the operations of a business.[129] It is not required that the board guarantee a successful outcome for all of its actions; rather, they are only expected to exercise reasonable care in making corporate decisions.[130] This requires the board, prior to making a business decision, to inform itself of all material information reasonably available to it.[131] Only in a showing of gross negligence may the board be held liable for its actions.[132] The business judgment rule only operates in the context of director action.[133] When the directors either abdicate their functions or, by refraining from a conscious decision, fail to act, it appears that no protection will be offered by the business judgment rule.[134] However, if the board makes a conscious decision to refrain from acting, the business judgment rule may apply.[135]

The highest standard of scrutiny arises when there is self-dealing on the part of the directors. This occurs when the board stands on both sides of the transaction and approves its terms.[136] In this context,

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ORGANIZATIONS § 4.6 (1989) (footnotes omitted).

See also Kumpf v. Steinhaus, 779 F.2d 1323 (7th Cir. 1985) (managing officer exercised business judgment and did not violate fiduciary duty in merger); Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257 (Del. Ch. 1989) (directors' decision to develop an ESOP was within the purview of the business judgment rule).

129. Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971). In this action a derivative suit was filed by a stockholder of subsidiary against the parent corporation to account for damages incurred by subsidiary when parent corporation declared large dividends for the subsidiary. The Supreme Court of Delaware held that, in the absence of a showing of fraud or gross overreaching, the parent's decision would be protected by the business judgment rule. *Id.*

"The business judgment rule encourages competent individuals to become directors who otherwise might decline for fear of personal liability. More importantly, the rule encourages directors to engage in ventures which have potential for great profit but which may entail some risk." *UAL Corp. III*, 717 F. Supp. at 582. *See* Note, *Fortifying the Directorial Stronghold: Delaware Limits Director Liability*, 29 B.C.L. REV. 481, 492 (1982).

130. *Aronson*, 473 A.2d at 813.

131. *Id.* at 812.

132. *Id.*

133. *Id.* at 813.

134. *Id.*

135. *Id.*

136. Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983). *See also Bass*, 552 A.2d at 1227. In *Bass*, the plaintiffs moved for preliminary relief to enjoin corporation from instituting a restructuring plan which had been developed to defeat

because the board has a fiduciary duty towards protecting the shareholders, they have a conflict of interest. In order to protect themselves, the board must show the "entire fairness" of the transaction to the satisfaction of the court.[137] In *Weinberger v. UOP, Inc.*,[138] the Supreme Court of Delaware set down guidelines for entire fairness. In order to receive protection, the board must show: (1) fair dealing, which requires a showing that the transaction was fairly initiated, structured, negotiated, and disclosed; and (2) fair price, which requires a showing that a proper method of valuation was employed.[139]

In the rare cases, such as *UAL Corp.*, when there is a takeover threat, the duties of the directors are enhanced. This is because there is an "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders . . . ."[140] Before the protections of the business judgment rule apply, the directors must meet a threshold examination that establishes reasonable grounds for believing that there is a danger

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a takeover attempt. The chancery court ordered the injunction, concluding that the defendants had not shown a danger to corporate policy and effectiveness and the restructuring was reasonable. *Id.*

> A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be *no conflict between duty and self-interest.*

Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) (emphasis added).

137. *Bass*, 552 A.2d at 1239.

138. 457 A.2d 701 (Del. 1983). Corporation which was a majority shareholder in subsidiary sought to buy out minority shareholders. Minority shareholders attacked the validity of the merger transaction and sought to either enjoin the merger or recover monetary damages. The chancery court entered judgment for the defendants. The supreme court reversed and remanded, holding that the merger failed to meet the entire fairness test. *Id.*

139. *Id.* at 711. The concept of fair dealing involves several factors: "when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and stockholders were obtained." *Id.* Fair price addresses the economic considerations of the transaction such as assets, market value, earnings, future prospects, and any other factor which might influence the value. *Id. See* Moore, *The "Interested" Director or Officer Transaction*, 4 DEL. J. CORP. L. 674, 676 (1979).

140. *Unocal*, 493 A.2d at 954.

to corporate policy and effectiveness. Additionally, the defensive action taken must be reasonable in relation to the threat posed.[141] Thus, in the atmosphere of a potential acquisition, the duty of the directors is heightened. It was under the *Unocal* standard that the *UAL Corp.* transaction was analyzed.

The court in *UAL Corp. III* found that the United Directors had failed both requirements of *Unocal.* United argued that the provisions of the agreement were necessary concessions to IAM. Therefore, according to United, it was a legitimate business decision and deserved the protection of the business judgment rule, and *Unocal* should not apply.[142] However, the court found that there were no reasonable grounds for finding a threat to corporate policy and effectiveness because there was no offer based on fixed terms.[143]

Even assuming the United Board had satisfied the first prong of the *Unocal* analysis, the court found that United had failed to show that its response was reasonable in relation to the threat posed.[144] The provisions within the labor contract were irredeemable and were "fatal to any transaction to which they may apply, regardless of how attractive an offer may be."[145] Thus, the measures adopted were found to be "far more potent" than reasonable responses.[146]

Finally, Judge Zagel found that the United Board approved the IAM contract without any consideration of its terms. Thus, the United Board violated its duty of care in assessing and responding to potential acquirors and denied the shareholders the right to de-

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141. *Id.* at 954-55. The court stated that the obligation of the board when addressing a takeover bid is no different from any other decision the board is asked to make. In each case, the board must act in the best interest of the corporation and shareholder. The court, however, stated that because the board may be acting in its own self-interest when deciding how to face a takeover bid, its duties are enhanced, calling for a judicial examination at the threshold before the court will honor the board's business judgment. *Id.* This standard will hereinafter be referred to as the *Unocal* standard.

142. *UAL Corp. III*, 717 F. Supp. at 584. The UAL Board arrived at this conclusion from its interpretation of Doskocil Cos. v. Wilson Food Corp., No. 10,095 (Del. Ch. Oct. 7, 1988), *reprinted in* 14 DEL. J. CORP. L. 682 (1989). The board's reading of *Doskocil* was that whenever there was a legitimate business purpose, the *Unocal* standard did not apply. The board felt that the action taken was necessary in order to avert a strike and maintain profitability. *UAL Corp. III*, 717 F. Supp. at 584.

143. *UAL Corp. III*, 717 F. Supp. at 587. *See Bass*, 552 A.2d at 1241.

144. *UAL Corp. III*, 717 F. Supp. at 588.

145. *Id.*

146. *Id.*

termine whether to tender their shares.[147] IAM, through its labor contract provisions, found itself in the driver's seat; to a large extent it controlled whether the company would be sold.

Following the *UAL Corp.* trilogy, it appears settled that any labor contract that contains irredeemable provisions related to whether the company may be sold is illegal under Delaware law. However, there is no case history to measure to what extent other protective provisions within a labor contract may be valid. Section (B)(1)(b) of the IAM contract contained both a "snapback" provision and a section 6 notice provision. "Snapback" provisions are a common tool in labor contracts and, under normal conditions, are probably acceptable under state corporation law.[148] Similarly, section 6 notices, provided within the RLA,[149] are rights granted to employees. Judge Zagel stated that "[w]hile avoiding a strike may have been a concern when sections B(1)(b) and C were adopted, we found that these provisions [the "snapback" and section 6 notice clauses] were principally defensive measures, adopted in response to the pilots' proposal and for the purpose of defeating it."[150] A potential conflict exists in this arena: the board of directors duties may not agree with the employees' right to a section 6 notice. The express language of section 6 states that notice may be given only when "changes in agreements affecting rates of pay, rules, or working conditions" are proposed.[151] However, in the IAM contract the language stated that "[t]he IAM shall have the unilateral option in its sole discretion . . . of written notice of such change in control to elect the following options [including serving] a Section 6 notice immediately."[152] According to section B(1)(b), IAM would be permitted to trigger a section 6 notice when there was a potential change in control of the company and not just for changes with respect to rates of pay, rules, and working conditions. IAM would effectively have the unilateral power to halt any takeover attempt. Consequently, section B(1)(b) usurps the directors' fiduciary obligation to determine when to trigger

147. "[E]ven if directors propose a reasonable alternative they may not 'force shareholders to accept an economically inferior transaction . . . under *Unocal* the directors are obligated to give shareholders a choice.'" *Id.* at 585 (citing *Bass*, 552 A.2d at 1243).

148. *See infra* notes 222-24 and accompanying text.

149. 45 U.S.C.A. § 156 (West 1986). *See supra* note 12.

150. *UAL Corp. III*, 717 F. Supp. at 584.

151. 45 U.S.C.A. § 156 (West 1983).

152. *UAL Corp. I*, 699 F. Supp. at 1326.

defensive mechanisms. The only way to avoid a breach of their duty is for the directors to ensure that a section 6 notice is only served to further a legitimate negotiation purpose and not to hinder corporate transactions.

Boards of directors will no longer be able to idly sit by when there is a probability that a labor contract will contain terms or conditions offensive to state law. Directors will be required to balance the potential effect of a contract clause with its purpose. As long as the contract clause is legitimate under federal law and is intended for the sole purpose of furthering labor rights in negotiations, the board will not find it contrary to state corporate law.

The *UAL Corp.* fallout appears to require the board to look beyond the shell, and look into the intent of the labor clause. Judge Zagel recognized this requirement when he noted the purpose of the antitakeover devices in the IAM contract.[153] If the intent is other than a legitimate labor contract interest, the board will have to establish its good faith and informed consent in adopting provisions which may affect salability. If the clause was adopted in an atmosphere of a proposed merger or self-dealing, the board will be held to the enhanced duty standard. In any event, nonredeemable clauses which act as antitakeover devices have been found categorically illegal under Delaware corporate law because the board is unable to make an informed determination before they are implemented.[154]

C. The Use of Labor Tools to Influence Corporate Transactions

The decision to change the scope and direction of a business enterprise has been viewed by the courts as a non-bargainable management decision.[155] In *First National Maintenance Corp. v. NLRB*, the United States Supreme Court held that a company's decision to shut down part of its operations was outside the scope of mandatory bargaining.[156] The Court acknowledged the seriousness of both union

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153. *UAL Corp. III*, 717 F. Supp. at 581.

154. *Id.* at 587. *See Bass*, 552 A.2d at 1239.

155. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

156. *Id.* Petitioner was engaged in providing housekeeping services to commercial customers. After a dispute with a customer over the fee, petitioner terminated the contract. The union that represented the employees who would be laid off attempted to bargain with petitioner. However, petitioner refused. The Court held that the petitioner had a duty to negotiate over the effects of the decision to terminate, but had no duty to negotiate over the decision itself to terminate the

and management in determining whether a shutdown should be allowed absent bargaining. While the Court found that the purpose of the NLRA was to maintain industrial peace and promote the continuous free flow of interstate commerce, it noted that decisions which require an analysis into all aspects of the corporate entity and whose scope extends beyond employee issues are within the domain of the management.[157] Congress has limited the duty to bargain to matters of "wages, hours, and other terms and conditions of employment."[158] "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."[159]

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contract. *Id.*

Fibreboard Paper Prods. Co. v. NLRB, 379 U.S. 203 (1964), is the first major case which addressed the scope of mandatory bargaining subjects as it affected subcontracting and plant closings. The case dealt specifically with Fibreboard's attempt to eliminate jobs and to instead subcontract the work in order to cut costs. The Court concluded that the management had an obligation to negotiate with the employees. The Court's decision was based on the fact that the work to be contracted out did not change the basic operations of the plant. The same work was being performed under the same conditions and in the same location.

Justice Stewart's concurring opinion in *Fibreboard* has been the springboard for subsequent decisions. Justice Stewart stated that *Fibreboard* raised broader questions regarding the line between subjects of mandatory bargaining and purely managerial decisions which lie at the core of the entrepreneurial control. Justice Stewart also opined that subcontracting work was a subject of bargaining, but decisions whether to merge, completely close down or to acquire another business were strictly within the confines of managerial prerogative. *Id.* at 223.

157. *First Nat'l Maintenance*, 452 U.S. at 682-83. The Court noted that, although the unions do not have a voice in decisions which are at the core of entrepreneurial control, the NLRA protects their interest in fair dealing. NLRA § 8(a)(3) prohibits partial closings when they are motivated by antiunion animus. Under the statute, the NLRB may inquire into the motives of the employer for closing part of a business. If the board determines that the employer's motive was to harm the union and no substantial economic reason existed, the employer may be punished. *See also* Textile Workers v. Darlington Co., 380 U.S. 263 (1965).

158. 29 U.S.C. §§ 158(a)(5), (d) (West 1973). *See also* 45 U.S.C. § 156 (West 1986).

159. *First Nat'l Maintenance*, 452 U.S. at 676. *First National Maintenance* set forth a two-part test to determine whether a subject requires mandatory bargaining. The first question is whether the subject at issue is amenable to bargaining. *Id.* at 679. In other words, is there anything the employees could do which would change the decision? If this question is answered in the negative, the analysis ends. Obviously, decisions made to shut-down the business or merge cannot be changed by union negotiation. Essentially, management decisions which change the scope and direction of the business do not require bargaining.

If the issue is amenable to bargaining, the second part of the test requires a balancing of the benefits of bargaining with the union weighed against the burden

The Court recognized that the union's interest in participating in a decision to close a specific facility is based on the preservation of job security. If negotiations were required, the union's purpose would "be largely uniform: it [would] seek to delay or halt the closing."[160]

> Management's interest in whether it should discuss a decision of this kind is much more complex and varies with the particular circumstances. If labor costs are an important factor in a failing operation and the decision to close, management will have an incentive to confer voluntarily with the union to seek concessions that may make continuing the business profitable . . . . At other times, management may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies. It may face significant tax or securities consequences that hinge on confidentiality, the timing of a plant closing, or a reorganization of the corporate structure.[161]

The Court further asserted that labeling a traditional management prerogative as a mandatory bargaining subject "could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose."[162] In conclusion, the Supreme Court reversed the case, stating that the NLRA does not make negotiations mandatory when management decides to close a

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of bargaining on the employer. Some factors to be considered in determining whether bargaining is a burden on the employer are: (1) the need to make a speedy decision, (2) costs of delaying the business decision, (3) the need for improvement, (4) the need for secrecy, and (5) the need for flexibility. If the burden is greater for the employer, no bargaining is required. *Id.* at 682-87.

See generally Fenton, *Partial Closing After* First National Maintenance: *Legal Refusals to Bargain Collectively*, 1981 ARIZ. ST. L.J. 865 (examining issues raised in *First National Maintenance* and assessing impact on duty to bargain versus management prerogative); Harper, *Leveling the Road from* Borg-Warner *to* First National Maintenance: *The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982) (criticizing *First National Maintenance* decision and arguing that Congress did not intend for union representives to have no voice in determining partial closings).

160. *First Nat'l Maintenance*, 452 U.S. at 682. "No doubt [the union] will be impelled . . . to offer concessions, information, and alternatives that might be helpful to management or forestall or prevent the termination of jobs." *Id.*

161. *First Nat'l Maintenance*, 452 U.S. at 683-84 (citations omitted).

162. *Id.* at 684. *See* Comment, *Partial Terminations—A Choice Between Bargaining Equality and Economic Efficiency*, 14 U.C.L.A. L. REV. 1089 (1967).

facility or reorganize. Although this case involved the NLRA, courts have applied its principles regarding bargainable matters to non-NLRA cases.

The Court of Appeals for the First Circuit, in a case that dealt with the RLA, held that a labor union has no statutory right to negotiate with the employer regarding a proposed merger.[163] The court stated that the merger of a corporation is initially a change in ownership. "The impact of such a decision on jobs is not nearly so direct or immediate as the decision to subcontract work."[164] In holding that a merger is central to entrepreneurial control, the court cited to *Fibreboard Paper Products Corp.*,[165] where in his concurring opinion, Justice Stewart stated that decisions regarding the investment of capital and the basic scope of the enterprise were not directly related to employment.[166]

> Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect

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163. International Ass'n of Machinists & Aerospace Workers v. Northeast Airlines, Inc., 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972). In this action, the labor union sought to compel Northeast Airlines to negotiate concerning a proposed merger agreement. The United States District Court for the District of Massachusetts denied relief and the court of appeals affirmed. *Id.*

Cf. IBTCHWA Local Union No. 2707 v. Western Airlines, Inc., 813 F.2d 1359 (9th Cir. 1987) (merging airlines required to be bound by outcome of arbitration in order to prevent injunction barring merger); Air Line Pilots Ass'n, Int'l v. Eastern Airlines, Inc., 701 F. Supp. 865 (D.D.C. 1988) (airline's proposed sale of shuttle service held to be minor dispute not subject to injunction).

164. *Northeast Airlines*, 473 F.2d at 556. The court went on to state that "[w]hile the change may eventually affect job security, such an effect is not an inevitable one, and could be bargained about separately from the merger itself." *Id.* at 556-57.

165. 379 U.S. 203 (1964). Courts have refused to interpret *Fibreboard* as affecting all managerial decisions. Decisions regarding closings, mergers and sales are more central to management's autonomous control over the direction of the company. *See Northeast Airlines*, 473 F.2d at 556.

166. *Fibreboard*, 379 U.S. at 223 (Stevens, J., concurring). The aim of labeling a matter a mandatory subject of bargaining is to promote the objectives of the RLA and NLRA, including the peaceful resolution of industrial disputes. Mandatory bargaining is required for subjects which are based on employment conditions which can reasonably be resolved by the parties. *Id.* at 211. On the other hand, management must be free from the constraints of mandatory bargaining when making decisions regarding the profitability and direction of the business. The Court has also stated that a business "must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice." *First Nat'l Maintenance*, 452 U.S. at 679.

> of the decision may be necessarily to terminate employment. [T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area [subject to collective bargaining].[167]

It would be an infringement on the control of the directors and the rights of shareholders to give labor the power to influence decisions regarding matters solely within management's realm.[168] The court in *Northeast Airlines* stated that merger negotiations require a minimum amount of "secrecy, flexibility and quickness antithetical to collective bargaining."[169] Additionally, the court noted that employees are not qualified to evaluate the financial matters surrounding a merger.[170]

The view that mergers and acquisitions are not subjects of mandatory bargaining has been further strengthened by recent court decisions.[171] In *Otis Elevator Co.*,[172] the National Labor Relations Board attempted to articulate the scope of management prerogative. United Technologies had purchased Otis Elevator Company and, in order to enhance research and development and avoid duplication of projects, the company consolidated research and development into one location. The union argued that there was a mandatory duty to bargain over the closing of the two New Jersey facilities.[173] However, the board found in favor of Otis based on the *First National Maintenance* decision. "[W]e hold that excluded from Section 8(d)[174] of the Act

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167. *Fibreboard*, 379 U.S. at 223.

168. *Id.* Justice Stewart stated further:

> [T]here are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control.

Id.

169. *Northeast Airlines*, 473 F.2d at 557.

170. *Id.*

171. *See* Arrow Automotive Indus., Inc. v. NLRB, 853 F.2d 223 (4th Cir. 1988). The court in *Arrow* held that even where labor costs are a major reason for closing or relocating, it still remains a nonmandatory subject of bargaining. *Id.* at 228.

172. 269 N.L.R.B. 891 (1984).

173. *Id.* at 891-92.

174. 29 U.S.C. § 158(d) (West 1973). Section 8(d) defines bargaining collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." *Id.*

[NLRA] are decisions which affect the scope, direction or nature of the business."[175]

Although there is no duty for a corporation to bargain with the union in decisions regarding core entrepreneurial control, there is a duty upon the corporation to bargain over the effects of the fundamental corporate activity.[176] "There is no dispute that the union must be given a significant opportunity to bargain about . . . matters of job security as part of the 'effects' bargaining mandated by §8(a)(5)[177] [of the NLRA]."[178] Bargaining over effects must be done in a constructive manner and in a reasonable time in relation to the business decision.[179] Failure on the part of the corporation to acknowledge the union's right to bargain may result in sanctions.[180] Thus, the union does retain some control over concessions which may be negotiated prior to the activation of the business decision.

Management decisions which lie at the core of entrepreneurial control and which reflect a change in the focus and direction of the business are not subject to mandatory bargaining. Rather, it is within the discretion of management to make these decisions. As a result, unions have very little statutory or judicial clout to frustrate such decisions. However, this does not leave unions without other means to affect management decisions.

D. *Alternative Methods for Labor to Influence Corporate Transactions*

Although it has been established by the courts that decisions regarding mergers or acquisitions are nonnegotiable management

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175. *Otis Elevator Co.*, 269 N.L.R.B. at 893 (footnote omitted). Topics which affect the scope and direction "include, *inter alia*, decisions to sell a business or a part thereof, to dispose of its assets, to restructure or to consolidate operations, to subcontract, to invest in labor-saving machinery, to change the methods of finance or of sales, advertising, product design, and all other decisions akin to the foregoing." *Id.* at 893 n.5. The NLRB also cited to the decision in *Northeast Airlines*, which established that mergers were not negotiable. *Id.*

The NLRB's position in *Otis Elevator Co.* essentially characterized some topics as nonmandatory business decisions. The Supreme Court had previously refused to state an opinion about those same topics. *See First National Maintenance*, 452 U.S. at 687 n.22.

176. *First Nat'l Maintenance*, 452 U.S. at 682.

177. 29 U.S.C. § 158(a)(5) (West 1973). It is an unfair labor practice by the employer "to refuse to bargain collectively with the representatives of his employees . . . ." *Id.*

178. *First Nat'l Maintenance*, 452 U.S. at 682.

179. *Id.* at 682-83.

180. *Id.*

decisions, employees have not been without means to influence such transactions. These methods do not usurp shareholder rights, but they are not always effective. Nevertheless, they have served to impact these corporate decisions.

1. The Labor Pill

UAL Corp. has brought attention to an area of corporate law that has not traditionally been considered a breeding ground for protective measures from takeovers—labor contracts. But variations of protective measures have been in use by employees for a number of years. ALPA dubbed the IAM/United provisions as a "labor contract poison pill."[181] The court of appeals did not accept this definition, but did state that the two provisions were "[i]n at least one respect . . . more lethal than poison pills."[182] Since the *UAL Corp.* decision, the legal community has adopted the term "labor pill" to identify antitakeover provisions within labor contracts.[183]

The common shareholder rights plan, or poison pill, is a device "which grant[s] stockholders of the target corporation special rights to purchase or sell securities under favorable or preferential conditions in the midst or as the result of a hostile takeover."[184] The effect of

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181. *UAL Corp. II*, 874 F.2d at 441.

182. *Id.* This "one respect" was the irrevocability of the provisions by the board of directors.

183. 1 A. FLEISCHER, TENDER OFFERS: DEFENSES, RESPONSES AND PLANNING 184.113 (Supp. 1989). "The term 'labor pill' was coined to describe two sections that were included in a new collective bargaining agreement between United Air Lines and the machinists' union . . . ." *Id.*

184. BALOTTI & FINKELSTEIN, *supra* note 128, § 6.30, at 318. *See, e.g.*, CRTF Corp. v. Federated Dept. Stores, Inc., 683 F. Supp. 422 (S.D.N.Y. 1988); BNS Inc. v. Koppers Co., 683 F. Supp. 458 (D. Del. 1988); Dynamics Corp. of Am. v. CTS Corp., 638 F. Supp. 802 (N.D. Ill.), *aff'd in part & rev'd in part*, 805 F.2d 705 (7th Cir. 1986); Revlon, Inc. v. MacAndrews & Forbes Holding, Inc., 506 A.2d 173 (Del. 1986); MAI Basic Four, Inc. v. Prime Computer, Inc., No. 10,428 (Del. Ch. Dec. 20, 1988), *reprinted in* 14 DEL. J. CORP. L. 1086 (1989); TW Servs., Inc. v. SWT Acquisition Corp., Nos. 10,427 & 10,298 (consolidated) (Del. Ch. Mar. 2, 1988), *reprinted in* 14 DEL. J. CORP. L. 1169 (1989); Amalgamated Sugar Co. v. NL Indus., [1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,857 (S.D.N.Y. Aug. 5, 1986); Moran v. Household Int'l, Inc., 490 A.2d 1059 (Del. Ch.), *aff'd*, 500 A.2d 1346 (Del. 1985); Huffington v. ENSTAR Corp., No. 7543 (Del. Ch. Apr. 25, 1984), *reprinted in* 9 DEL. J. CORP. L. 185 (1984); Brown-Forman Distillers Corp. v. Lenox, Inc., 83 Civ. 2116 (D.N.J. June 20, 1983).

Cases enjoining or ordering redemption of the shareholder rights: Grand Metro. Pub. Ltd. v. Pillsbury Co., 558 A.2d 1049 (Del. Ch. 1988); City Capital Assocs., Ltd. Partnership v. Interco, Inc., 551 A.2d 787 (Del. Ch.), *appeal dismissed*, 556 A.2d 1070 (Del. 1988).

this entitlement to receive money or property by the shareholders deters potential raiders if the cost of triggering the pill nullifies any gain to be received.[185] An additional element of a poison pill is that it can be adopted by a board of directors without a shareholder vote and only the board may redeem it.[186] Further, the poison pill's acceptance has been enhanced by the fact that it does not impair the value structure of the corporation, does not dilute earnings, requires no significant outlay of corporate assets, affects no changes in the company's capital structure, and does not result in negative tax implications.[187]

The labor pill has few similarities to the poison pill. Once the labor pill has been implemented it cannot be redeemed by the board of directors.[188] It is also a permanent deterrent to potential acquirors. In order for a board of directors to fulfill its fiduciary obligation to the shareholders, it must follow a *Unocal* analysis to determine whether a defensive measure is reasonable in relation to a reasonably perceived threat. If a labor pill is placed within a collective bargaining agreement, however, the board has, in effect, relinquished its duty to the shareholders: the labor pill becomes a permanent part of the contract and is irredeemable. Thus, since the *Unocal* test cannot be satisfied, the future of the labor pill at this point is limited. However, if a provision can be worked out which allows for the pill's redemption, thus permitting the board to fulfill its fiduciary obligations, it may serve as a useful defensive measure.

2. Concessions and "Give-Ups"

Aside from the labor pill, employees have exercised a limited ability to influence the destiny of the company through concessions

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185. FLEISHER, *supra* note 183, at 184.2-4. According to Fleischer, as of August 31, 1989, well over one thousand companies had adopted poison pills. The author noted that the litigation involving poison pills has shifted away from attacks on its adoption, but rather to challenges regarding how it is subsequently used. *Id.* at 184.2.

186. *Id.* at 184.4.

187. *Id.* at 184.9. *See also Moran*, 500 A.2d at 1346-57 (affirming the corporate authority of a Delaware corporation's board to adopt a poison pill as a planned defense and the applicability of the business judgment rule to insulate the board from attack).

It must be noted, though, that the board of directors, when adopting a poison pill, must still adhere to the business judgment rule and the *Unocal* standard in order to receive protection.

188. *See* FLEISCHER, *supra* note 183, at 184.115-16.

and give-ups. Although the employees, in many of these cases, are unionized and do not hold large blocks of the employee stock, their influence in many cases rivals that of the shareholders, and to some extent allows them to become a major factor in determining whether a merger will go through. However, the actual decision to merge or acquire another company is generally a nonbargainable management prerogative.[189]

The most recent case on point relates to efforts made on two separate occasions by Peter Ueberroth, the former baseball commissioner, and Joseph Ritchie, a Chicago options trader, to acquire Eastern Airlines. In the beginning of April 1989, Mr. Ueberroth made a $464 million proposal to purchase the embattled bankrupt airline, whose unions had been on strike.[190] In an effort to entice Ueberroth to acquire the airline, the unions agreed to wage concessions amounting to $200 million in return for a 30% ownership share in the airline.[191] Texas Air Chairman Frank Lorenzo acknowledged that the acquisition was dependent on the union's willingness to work with Ueberroth.[192] Ueberroth received that backing. How-

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189. *See supra* notes 155-59 and accompanying text.

190. O'Brian & Dahl, *Ueberroth Group Plans to Acquire Eastern From Texas Air Under $464 Million Pact*, Wall St. J., Apr. 7, 1989, at A3, col. 1. Peter Ueberroth led a group of investors in an attempt to purchase Eastern Airlines. Ueberroth's proposal of $464 million consisted of only $200 million in actual cash. The remaining amount was to be made up by the forgiveness of notes owed by Texas Air to Eastern and the transfer of some assets to Texas Air. Frank Lorenzo, the current owner, had purchased Eastern for $615 million in 1986. *Id. See also Now Eastern Air Faces the Hard Part*, Wall St. J., Apr. 7, 1989 at B1, col. 4 (addressing the problems involved with resuming Eastern flights and making it competitive again).

Under the Ueberroth proposal, Texas Air was to be paid $200 million in cash and $185 million in notes. Eastern was also to give Texas Air one New York-Montreal route and eight slots and one gate at LaGuardia Airport in New York. McKenna & Kolcum, *Ueberroth Woos Unions in Bid to Take Over Eastern, Resume Flight Operations*, Aviation & Space Technology Week, Apr. 10, 1989, at 89. Ueberroth would receive 230 aircraft, Eastern's routes and facilities, a Miami-London route, and a 19.1% share in the SystemOne computer reservation system. *Id.*

191. *Eastern Unions Agree to Concessions in Contract with Ueberroth Group*, Washington Post, Apr. 11, 1989, at E1, col. 5. Of the $212 million in wage cuts, 70% was to have come from the striking machinist union. *Id.* The pilots were to provide $50 million in concessions, and cabin crew members were going to offer $10 million in concessions. McKenna & Kolcum, *supra* note 190. Thirty percent ownership would be held by the unions, another 30% would be controlled by non-union employees and the final 40% would be controlled by the public. *Id. See also* Reibstein, Friday & Barrett, *The Ueberroth Touch*, Newsweek, Apr. 17, 1989, at 44.

192. O'Brian & Dahl, *supra* note 190. No plan to sell Eastern could proceed without approval from Bankruptcy Judge Burton R. Lifland. The bankruptcy court

ever, the Ueberroth plan failed several days later, on April 13, as a result of the union's insistence that a trustee be appointed to run the airline until Ueberroth's investment group took over Eastern.[193] "The unions were adamant that they would never again work for Lorenzo. And to assure they wouldn't have to, the unions insisted that their agreement was only good if a trustee was appointed to run the carrier . . . ."[194] Ueberroth's attempted takeover was quashed.

In a separate attempt by Ritchie to acquire Eastern, the unions agreed to an even more generous offer than that extended to Ueberroth. Under the proposal, the unions agreed to pay cuts between $175 million to $200 million during the first six months that it would take to get the airline functioning again and $75 million in financing.[195] These concessions came on top of an existing pledge of $210 million in annual wage and benefit cuts.[196] However, no agreement could be reached by the parties and again the planned takeover fell through.

In the *Eastern Airlines* case, the employees controlled the destiny of the acquisition. Success was dependent on their willingness to negotiate with the potential acquiror. *Eastern* was unique in the sense that it was bankrupt and any alternative to working under Lorenzo, even if it required large concessions, was appealing. Nevertheless, the negotiations revealed the strength of the unions to promote an acquisition.

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had jurisdiction over transfers of the Eastern assets. *Id.* In addition, creditors who held approximately $2.3 billion in debt, $1 billion more than the value of the Eastern assets, would have had to be willing to go with the plan. Fowler & McCarroll, *The Designated Hero*, Time, Apr. 17, 1989, at 46.

193. *Eastern Sale Foundered Over Issue of Control*, Washington Post, Apr. 14, 1989, at F10, col. 3 [hereinafter *Eastern Sale*]. Frank Carlucci, the former Secretary of Defense, had flown to New York and was to be appointed the interim trustee for Eastern Airlines. However, Lorenzo had not yet given up control and the plan fell through. *Where's My Escape Hatch?*, Time, Apr. 24, 1989, at 51. *See* Amster, *EAL Unions Accept Wage Concessions*, Travel Weekly, Apr. 17, 1989, at 73, col. 3.

194. *Eastern Sale*, *supra* note 193. *See* Amster, *Carrier's Future Now Uncertain in Wake of Failed Ueberroth Bid*, Travel Weekly, Apr. 20, 1989, at 1.

195. Hamilton, *Eastern Unions Add Concessions to Entice Ritchie Investor Group*, Washington Post, June 3, 1989, at D13, col. 5.

196. *Eastern Airlines Again Trims Pay of Management; Reduction is Set as Strikers Offer to Take Wage Cuts to Support Ritchie Bid*, Wall St. J., June 5, 1989, at A4, col. 1. Because of the generous concessions proposed by the union, Judge Lifland, Chief Judge of the United States Bankruptcy Court for the Southern District of Manhattan, extended the proposal deadline. Under the plan, the unions would make up any losses during the first six months. *Id. See* Salpukas, *Eastern Unions are Given New Extension to Draft Bid*, New York Times, June 3, 1989, at 37, col. 1; Salpukas, *Eastern Unions Get Extension*, New York Times, June 2, 1989, at D3, col. 5.

3. Successor Clauses

Successor clauses are often found within labor contracts. A successor clause is a provision within the labor contract which binds the successor, administrators, executors, and assigns to the current labor contract. In essence, if a company sells, leases, or transfers an entire operation, the new owner will be bound by the then existing agreement. Several states have adopted statutes that require successor employers who do not fall under the NLRA to adhere to pre-existing contracts regardless of whether there is such language within the contract. In Delaware, for example, a labor contract continues in existence until its termination date or until otherwise agreed to by the parties, regardless of whether there has been a merger, consolidation, sale of assets, or business combination.[197] Other states have variations of successor clauses.[198] Although successor clauses are not intended as antitakeover devices, their existence in a contract may impede a takeover or at least force a buyer who intends a highly leveraged buyout to consider whether it can maintain its debt payment level while adhering to the contract provisions.

In *Local Lodge No. 1266 v. Panoramic Corp.*,[199] the Seventh Circuit upheld a preliminary injunction that restrained the employer from completing the sale of corporate assets pending a determination by an arbitrator that a successor clause within the collective bargaining agreement had been violated.[200] The clause bound the "successors and assigns" of the Panoramic Corporation to the agreement.[201] Sintered Specialties, Inc. (SSI), the proposed buyer of Panoramic,

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197. The Code states in part:

> (a) Notwithstanding any other provisions of this Code, no merger, consolidation, sale of assets or business combination shall result in the termination or impairment of the provisions of any labor contract covering persons engaged in employment in this State and negotiated by a labor organization or by a collective bargaining agent or other representative.

DEL. CODE ANN. tit. 19, § 706(a) (Michie Supp. 1988).

198. 12 Empl. Coordinator (Research Inst. Am.) ¶ LR-35,045 (Apr. 16, 1989). *See, e.g.*, CAL. LAB. CODE § 1127 (West 1989); MASS. GEN. LAWS ANN. ch. 149, § 179C (West 1982); OHIO REV. CODE ANN. § 4113.30(B) (Page's 1980). The language in these statutes is similar. Each provides that a successor employer is bound by the collective bargaining agreement until its expiration but not longer than three years after the successor employer takes over.

199. 668 F.2d 276 (7th Cir. 1981) (Union sought a preliminary injunction restraining employer from completing sale of assets without first requiring the transferee to assume the labor agreement that existed).

200. *Id.* at 277.

201. *Id.* at 278.

posted a sign at the Panoramic plant informing the employees that they would be terminated and would have to reapply with SSI if they wanted to continue employment at the plant.[202] The union sued Panoramic, claiming the successor clause required the retention of the existing contract. The court concluded "that the Union's claim that the proposed sale of the Sintered Specialties Division violates the 'successors' clause of the collective bargaining agreement raises a sufficiently 'genuine' dispute to support a status quo injunction."[203]

In addition to successor clauses in contracts and state statutes which protect existing contracts, it has been held that a successor employer, following a merger, is bound to the collective bargaining agreement negotiated by the prior union when there is union representation under the new entity.[204]

> With respect to successor unions and their rights under collective bargaining agreements negotiated by a prior union, the National Mediation Board has taken the position that "a change in representation does not alter or cancel any existing agreement made in behalf of the employees by their previous representative."[205]

When there has been a disruption of union representation because of a merger, it is the exclusive responsibility of the NMB to investigate the dispute and determine the properly designated collective bargaining representative.[206] The NMB has ruled that, under such con-

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202. *Id.* Contemporaneous with the notice to the Panoramic employees were advertisements in the local paper soliciting applicants for positions with SSI. SSI interviewed a large number of non-Panoramic employees for positions. *Id.* at 278 n.4.

203. *Id.* at 285.

204. International Ass'n of Machinists v. Northwest Airlines, 843 F.2d 1119, 1123 n.5 (8th Cir. 1988) (citing *The First Annual Report of the National Mediation Board* 23-24 (1935) (II Joint Appendix at 312-13)).

205. *Id.*

206. 45 U.S.C. § 152, Ninth (West 1986) states in part:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board . . . to investigate . . . and to certify to both parties . . . the name or names of the individuals or organizations that have been designated and authorized to represent the employees . . . .

Whether a union survives a merger is within the exclusive jurisdiction of the NMB. Association of Flight Attendants, AFL-CIO v. Delta Airlines, Inc., 879 F.2d 906, 912 (D.C. Cir. 1989). "Congress [clearly] entrusted the NMB with exclusive power to resolve representation disputes between unions because of the inherent

ditions, the certificate of representation of the minority union will be extinguished, and the board alone will determine the new representative, generally the majority union.[207] A carrier cannot unilaterally abrogate valid collective bargaining agreements or change existing working conditions without first following the mandatory dispute resolution procedures.[208] The collective bargaining agreement may only be altered when there is a board certified union representative. Until the representation issue is resolved by the NMB, the federal district courts have no jurisdiction to enforce any provisions within the contract.[209]

In cases where there is no union representation after a merger, the federal courts have held that a preexisting collective bargaining agreement cannot survive.[210] In *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, Texas International Airlines had wed its company with Western Airlines. Continental Airlines, a subsidiary

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divisiveness of such disputes . . . ." *Id.* at 913.

Federal courts may not review the NMB's certification of a representative for the employees. Switchmen's Union of N. Am. v. National Mediation Bd., 320 U.S. 297 (1943). The Supreme Court stated that the purposes of the RLA prevent judicial review of NMB actions. "[T]he intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law." *Id.* at 305. Judicial review is limited to issues of whether there was conformance by the NMB to the requirements of the statute. No review is allowed of its discretionary decisions. International In-Flight Catering Co. v. National Mediation Bd., 555 F.2d 712, 717-18 (9th Cir. 1977). *See* Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines, Inc., 656 F.2d 16 (2d Cir. 1981).

207. Republic Airlines, Inc. & Hughes Aircraft Corp., 8 N.M.B. 49, 54-55 (1980). The court noted that permitting a union to survive would lead to duplication, confusion, uneven representation, and make integration of the two entities difficult. *Id.* at 54.

208. International Bhd. of Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157, 160 (5th Cir. 1983).

209. *Machinists*, 843 F.2d at 1124. *See* Chicago & N.W. Ry. v. United Transp. Union, 402 U.S. 570 (1971). Under the 1920 Transportation Act, the predecessor to the RLA, the administrative agency had both the power to mediate and enforce the provisions of the act. However, employers and unions did not look favorably on this dual function. Parties had little confidence in an agency that could mediate and then turn around and enforce its own decisions. Consequently, under the RLA, administrative duties were retained exclusively by the NMB and adjudicatory authority to enforce the contracts was given to the federal courts. Congress intended enforcement to be overseen "by appropriate judicial means" rather than the NMB. *Id.* at 580-81. *See also* Air Line Pilots Ass'n, Int'l v. TransAmerica Airlines, Inc., 817 F.2d 511, 513 (9th Cir. 1987) (involving scope of subject matter jurisdiction under RLA).

210. *International Bhd. of Teamsters*, 717 F.2d at 163-64.

of Texas International, had no union. Two issues arose: the designation of the appropriate bargaining representative for the former Western union members and whether the pre-existing labor contract would be effective. Normally, when there is a merger, both entities are represented by unions and the surviving union provides representation under both contracts.[211] "The agreement cannot survive, however, without some bargaining agent."[212] Enforcement of a contract cannot proceed without union representation. If a majority of employees are unrepresented, the collective bargaining agreement of the minority becomes unenforceable.[213]

The NLRA also provides for the adherence to pre-existing contracts in other situations where there has been a change in a company's business. In a case before the United States Court of Appeals for the District of Columbia, the court found that the closing of a plant and transfer of stock to a new owner was not sufficient to avoid the prior labor contracts.[214] The contract did not contain a successor clause, and the NLRA concluded that the new owner had no obligation to negotiate with the employees.[215] However, the court of appeals reversed. The legal principle applied in this case requires a successor to recognize and bargain with a union that has previously been certified as the bargaining representative of the employees if there remains a "substantial continuity of the employing industry."[216]

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211. *See supra* note 207 and accompanying text.

212. *International Bhd. of Teamsters*, 717 F.2d at 163-64.

213. [I]n the context of a merger between a unionized airline and a non-union airline, post-merger judicial enforcement of any provision of a pre-merger CBA [collective bargaining agreement] would undermine the NMB's rule, because it would necessarily entail the union's continued representation of its former constituents, regardless of whether they constitute a majority of their class in the merged enterprise; as a result, some employees could be represented while others in the same class would not be.

Delta Airlines, 879 F.2d at 913.

The NMB has the authority to determine union representation for the minority employees of a pre-merger union. However, in a practical sense, appointing a representative to ensure adherence to the pre-merger collective bargaining agreement when the majority is non-union, creates a two-tier system. The same problems which were articulated in *Republic Airlines*, 8 N.M.B. at 49, would arise in this situation. *Delta Airlines*, 879 F.2d at 913.

214. United Food & Commercial Workers Int'l Union, Local 152 v. NLRB, 768 F.2d 1463 (D.C. Cir. 1985) (closing of plant and transfer of stock to new owner insufficient to release new owner from obligations under preexisting labor contract).

215. *Id.* at 1469.

216. *Id.* at 1470. *See* NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. 272,

This test requires an analysis of such factors as whether operation, location, work force, work conditions, supervision, machinery, and equipment are the same as existed prior to the transaction.[217] Under this standard, the court found that the successor was required to deal with the union.[218] Thus it can be seen that, even when the employees do not control a large block of the stock, they are able to apply pressure on the acquirors because of their positions as employees.

Congress has not stood idly by as the acquisition war has raged. Two bills had been proposed which would have put in place labor protective provisions (LPPs).[219] The purpose of the proposed legislation was to ensure the fair treatment of airline employees when mergers occur.[220] In cases of lost jobs or reduced wages, the airlines would be required to compensate the employees for the losses. As of this time, no legislation has actually been passed. However, the proposed bills do establish Congress' willingness to step into the merger and acquisition arena in order to protect parties who may be adversely affected.[221] Under the right circumstances, Congress may be less hesitant to protect the employees.

278-79 (1972) ("It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification . . . ."). *See also* NLRB v. Zayre Corp., 424 F.2d 1159 (5th Cir. 1982).

217. *United Food*, 768 F.2d at 1470. *See also* NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 464 (9th Cir. 1985) ("[T]he touchstone remains whether there was an 'essential change in the business that would have affected employee attitudes toward representation.'") (quoting Premium Foods Inc. v. NLRB, 709 F.2d 623, 627 (9th Cir. 1983)).

218. *United Food*, 768 F.2d at 1470-74.

219. *Airline Passengers Protection Act of 1987: Hearings on H.R. 3501 Before the Committee on Public Works and Transportation*, 100th Cong., 1st Sess. 1 (1987) [hereinafter Airline Passenger Protection Act]; *Airline Merger Transfer Act of 1987: Hearings on S. 724 Before the Committee on Commerce Science and Transportation*, 100th Cong., 1st Sess. 1 (1987) [hereinafter Airline Merger Transfer Act].

220. Airline Merger Transfer Act, *supra* note 219, at 1.

221. LPPs were regularly imposed prior to the deregulation of the airline industry but were modified thereafter. Under the Civil Aeronautics Board, which has since been discontinued, LPPs ensured that seniority lists were maintained through mergers, that displaced workers would receive adequate compensation and that employees who received lower wages would be compensated with other benefits. Those members of Congress supporting the bill argued that it was only a continuation of rights which had been exercised earlier. However, efforts to pass the LPP bills have failed. Airline Passenger Protection Act, *supra* note 219, at 12-13.

The Airline Deregulation Act, 49 U.S.C. § 1552 (West Supp. 1990), created a new set of LPPs designed to ease the transition from a regulated to a deregulated

4. "Snapback" Provisions

The use of "snapback" provisions within labor contracts has been a common tool used in negotiations. The clauses are most often used when employees of a financially troubled corporation agree to temporary concessions or give-ups which the employees regain when the company becomes stable again. This was the case in *Airline Pilots Association, International v. Pan American World*,[222] where the employees' union accepted wage cuts and extended work hours. After two years under this duration clause, the contract was to snap back to a pre-concession level. The union's acceptance of the concessions was based on Pan Am's agreement to terminate the concessions on January 1, 1985. However, when January 1 arrived, Pan Am refused to return to the higher wage scales, arguing that because it was entering collective bargaining, it was only required to maintain status quo under section 6. The union argued that status quo according to the contract required Pan Am to return to the higher levels. The court agreed with the union.[223]

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industry. The LPPs were designed to provide (1) monthly assistance payments, (2) assistance with relocation, and (3) a duty by carriers to hire former airline employees. *Id.* Protected employees are defined as individuals who were employed for at least four years prior to October 28, 1978, the date of enactment. Additionally, the statute's effective date terminated on October 28, 1988. *Id.* Thus, the statute's scope is narrow and presently only benefits those individuals who brought claims prior to the deadline. Additionally, no money was ever allocated in the appropriation bills for the benefit of the program. Green, *Labor Protective Provisions in the Airline Industry*, 1 Airline Labor & Empl. Law (ALI/ABA) 521, 540 (1990). Congress' recent attempts to establish LPPs is partially in response to the deficiencies of this statute.

222. 765 F.2d 377 (2d Cir. 1985).

223. *Id.* at 381. The court relied on Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142 (1969), in reaching its decision. The Supreme Court, in *Shore Line*, held that the status quo under a section 6 notice may be altered. *Id.* The purpose of a section 6 notice is to prevent the union or management from doing anything which might lead to a strike. In *Shore Line*, the Court stated "that the status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement." *Id.* at 153. However, the court of appeals noted that the Supreme Court's interpretation of the RLA allowed the parties to "alter the status quo by agreement." *Pam Am*, 765 F.2d at 381. Additionally, some agreements or snapback provisions are not part of the "actual, objective working condition." Consequently, courts have since held that agreements may be entered into which are not part of the status quo. International Ass'n of Machinists v. Aloha Airlines, 776 F.2d 812, 816-17 (9th Cir. 1985); Railway Labor Executives' Ass'n v. Boston & Maine Corp., 664 F. Supp. 605, 611 (D. Me. 1987) ("It has long been established that parties governed by the RLA may, by express agreement, extend, modify, or waive certain statutory requirements.").

The snapback provisions used in *Pan Am* were conciliatory in nature. The unions accepted the lower wages in hopes of helping the corporation. In *UAL Corp.*, the snapback provision was used as a sword. United was not in financial difficulty. Instead of the union's snapback provision helping the company, it was self-serving. The union would receive stock in return for lower wages, but if a "major corporate transaction" was to occur, the union could unilaterally trigger the snapback provision and take the higher wages. Its purpose was to deter potential acquirors by forcing them to pay higher wages if they were to succeed in their takeover bid. The triggering mechanism was controlled by the unions, whereas most snapback provisions are triggered by a specified date which is set in advance by both parties.[224]

Snapback provisions are a useful tool when the purpose is narrowly tailored to providing the company with greater flexibility to combat financial instability. However, once the snapback provision crosses over to a defensive measure, its retention will be determined by the board of directors; they will have to determine whether its inclusion adversely affects the rights of the shareholders and hinders the financial standing of the company. If the snapback provision is intended to prevent unwanted raiders from bidding on the corporation, the board will again be called on to weigh the defensive action taken against the perceived threat.

5. Employee Stock Ownership Plans

An ESOP is defined as a contribution plan that is either a stock bonus plan or a combination stock bonus and money purchase plan that invests primarily in employer securities and is qualified under section 401(a)[225] of the Internal Revenue Code.[226] Its central purpose

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224. *Pan Am*, 765 F.2d at 379.

225. 26 U.S.C. § 401(a) (1988); I.R.C. § 401(a) (West 1988). Section 401(a) states in pertinent part: "[A] trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section . . . ." *Id.*

226. I.R.C. § 4975(e)(7) (Supp. 1988). The Code states:

> "[E]mployee stock ownership plan" means a defined contribution plan—(A) which is a stock bonus plan which is qualified, or a stock bonus and a money purchase plan both of which are qualified under section 401(a), and which are designed to invest primarily in qualifying employer securities; and (B) which is otherwise defined in regulations prescribed by

is for the exclusive benefit of the employees. Over a period of time, employees receive shares of company stock. Upon the allocation of employer securities to the accounts of the participants, the ESOP must permit the employees to direct the voting of those shares they control.[227] ESOPs have grown in popularity in the eighties. In the 1970s, Congress opened the door for ESOPs and since that time over 10,000 companies, representing over 10 million workers have been created.[228] According to the National Center for Employee Ownership, in the first three months of 1989, $4.3 billion of stock had been purchased by ESOPs.[229]

The ESOP has grown in popularity today partially as a result of the protection it provides in the face of a takeover. In *Shamrock Holdings, Inc. v. Polaroid Corp.*,[230] Polaroid Corporation had planned to establish an ESOP which controlled 5% of the company stock. However, after Shamrock initiated talks in regards to taking control of Polaroid, the board of directors voted to establish an ESOP which controlled 14% of the stock. Under Delaware corporate law,[231] this

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> the Secretary. A plan shall not be treated as an employee stock ownership plan unless it meets the requirements of section 409(h) . . . and, if the employer has a registration-type class of securities (as defined in section 409(e)(4)), it meets the requirements of section 409(e).

Id.

227. I.R.C. § 409(e) (1988) states:

> (2) Requirements where employer has a Registration-Type Class of Securities.—If the employer has a registration-type class of securities, the plan meets the requirements of this paragraph only if each participant or beneficiary in the plan is entitled to direct the plan as to the manner in which securities of the employer which are entitled to vote and are allocated to the account of such participant or beneficiary are to be voted.

Id.

228. Schwartz, *Giving Workers a Piece of the Action*, Newsweek, Apr. 17, 1989, at 45.

229. *Id.* According to the National Center for Employee Ownership, in 1988 $6.5 billion in stock had been purchased by ESOPs. *Id.*

230. 559 A.2d 257 (Del. Ch. 1989).

231. The Delaware Code provides that a potential acquirer may not "engage in any business combination" with the potential stockholder/acquiree for a period of three years unless:

> (2) Upon consummation of the transaction which resulted in the stockholder becoming an interested stockholder, the interested stockholder owned at least 85% of the voting stock of the corporation outstanding at the time the transaction commenced, excluding for purposes of determination the number of shares outstanding those shares owned (i) by persons who are directors and also officers and (ii) employee stock plans in which employee participants do not have the right to determine confidentially whether shares held subject to the plan will be tendered in a tender or

action effectively killed Shamrock's offer when the 14% was added to the stock owned by officers and directors.[232] Thus, ESOPs can serve as a beneficial tool in protecting the corporation from unwanted solicitations.

However, the stock controlled by the employees through the ESOP may also be used by labor to frustrate corporate policy or initiatives which require a shareholder vote. Recently, Lockheed Corporation held its annual shareholders meeting.[233] In the meeting, a number of shareholder initiatives proposed by Harold Simmons, a Dallas investor whose company controls almost 19% of Lockheed stock, were adopted. Simmons commented about the potential influence of the Lockheed ESOP which controlled close to 19% of the stock.[234] Given the right conditions, the employees, with the help of additional minority stockholders, might be in a position to dictate new directors and policies. This is enhanced by the fact that 45% of Lockheed stock is owned by institutional investors who are not always management friendly. The *Wall Street Journal* article stated, "[B]y raising the shibboleth of shareholder rights, large portfolio managers in particular have made it clear that they want more of a say in how such a turnaround might be achieved."[235]

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exchange offer.

DEL. CODE ANN. tit. 8, § 203(a) (Supp. 1988).

232. *Shamrock Holdings*, 559 A.2d at 273. In this action, Polaroid's directors had approved an ESOP, but never considered funding a $300 million plan. The directors did not ask questions regarding the ESOP size, nor was there much discussion regarding the fact that it would be partially funded through employee cuts. However, the court stated that, although the plan was to be funded by the employees, there was no evidence that it would do anything but improve productivity. The court was "satisfied that the ESOP does not impose a hidden cost in the form of decreased productivity that would make it less than fair to Polaroid and its stockholders." *Id.* at 272. Therefore, the plan was held to be valid.

233. *Lockheed Wins Proxy Battle with Simmons; But Shareholders Approve Initiatives Supported by the Dallas Investor*, Wall St. J., Apr. 11, 1990, at A3, col. 2. Lockheed Corporation is the sixth largest defense contractor in the United States. Prior to the shareholder meeting, intense pressure had been applied by Harold Simmons, a Lockheed stockholder, to push his proposals. Ultimately, Lockheed's existing management was able to prevail on all important issues. *Id.*

234. *Id.* Simmons contended that the ESOP was a major factor in defeating his takeover attempt. "If management can, with the stroke of a pen, create 20% of the vote and put it in their pocket, it makes a mockery of corporate democracy." *Id.*

235. *Id.* It seems that the employees, through an ESOP, may become, in effect, large portfolio managers capable of using the "shibboleth" of rights in their advantage.

Through an ESOP, labor may exert control over the corporation in the same manner that has been available to shareholders. This permits labor to not only negotiate through labor contracts, but to use the power available as part owners of the corporation. Companies, in developing ESOPs for protection, have given up partial control to the employees. Generally labor and management objectives coincide, but when differences of opinions do arise, an ESOP offers employees an opportunity to actively pursue their interests.

E. The Future Ability of Labor to Influence Corporate Transactions

Labor currently has several avenues to influence corporate transactions: successor clauses, snapback provisions, ESOPs, concessions, give-ups and labor pills. Societal shifts in how labor and corporations are viewed may also play an influential role in the future. The large number of mergers and acquisitions in the last ten years have brought greater attention to the plight of those constituencies who are adversely affected by corporate transactions. Many of these activities have resulted in lost jobs, plant closings, and economic instability to communities. Consequently, society has questioned whether these mergers and acquisitions are beneficial when many parties are often harmed and when the only winners are the shareholders, investment bankers, and attorneys. Greater concern has developed over the costs which are borne in these transactions.

A.A. Sommer, Jr., former Commissioner of the Securities and Exchange Commission, has spoken on the role of corporations and the problems brought about by mergers.[236] Sommer noted that traditionally, social responsibility to the community has taken a back seat to the shareholder.[237] However, the 1980s have seen approximately half the states develop constituency statutes which permit a corporation to consider other factors besides shareholder interest in

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236. Sommer, *Whom Should the Corporation Serve? The Berle-Dodds Debate Revisited Sixty Years Later*, 16 DEL. J. CORP. L. 33 (1991) (address presented at Annual Francis G. Pileggi Distinguished Lecture in Law).

237. *Id.* In the past, statutes have been designed to permit the free flow of assets and capital through sales, mergers and acquisitions. The board of directors has had little duty to parties other than the shareholders. If a merger resulted in a plant closing, the effects on the community and employees would not be considered a factor in the decision. Maximizing shareholder return has been the central focus. *Id.*

determining whether to engage in a transaction.[238] The Supreme Court of Delaware has held that corporations may consider constituencies other than the shareholders, but limited the application of the rule by stating that there must be a rational relationship to the shareholder.[239]

Connecticut's statute goes even further, *requiring* a corporation to look at other constituencies before approving a transaction.[240] This statute apparently requires Connecticut corporations to consider effects on labor and the community. The problem with such a statute is that the attention of the corporation is diverted from the shareholder. In serving the shareholder, the corporation is interested in maximizing profits. In order to accomplish this objective, the corporation must focus on efficiency and using resources where they

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238. The following states have adopted such laws: CONN. GEN. STAT. ANN. § 33-313 (West Supp. 1990); FLA. STAT. ANN. § 607.111 (amended 1988) (West Supp. 1990); IDAHO CODE § 30-1602 (amended 1989) (Michie Supp. 1990); IND. CODE ANN. §§ 23-1-35-1 (Burns 1989); KY. REV. STAT. ANN. §§ 271B.12-210 (amended 1988) (Baldwin Supp. 1989); LA. REV. STAT. ANN. § 12:92 (amended 1988) (West Supp. 1990); ME. REV. STAT. tit. 13-A, § 716 (West Supp. 1990); MASS. GEN. LAWS ANN. ch. 65 (West 1989); MINN. STAT. ANN. § 302A.251 (West Supp. 1990); MO. ANN. STAT. § 351.347 (Vernon Supp. 1990); NEB. REV. STAT. § 21-2035 (amended 1988) (Supp. 1990); N.Y. BUS. CORP. LAW § 912 (amended 1988) (McKinney Supp. 1990); OHIO REV. CODE ANN. tit. 17, § 1701.59 (amended 1988) (Page's Supp. 1989); OR. REV. STAT. § 85(5) (1989); PA. STAT. ANN. tit. 15, § 1721 (Purdon Supp. 1990); TENN. CODE ANN. § 48-235-301 (Supp. 1989); WIS. STAT. ANN. § 180.305 (West Supp. 1990), *cited in* 3 R. WINTER, R. ROSENBAUM, M. STUMPF & L. PARKER, SHARK REPELLANTS & GOLDEN PARACHUTES 7 (Supp. 1989).

239. *Unocal*, 493 A.2d at 955.

240. CONN. GEN. STAT. ANN. § 33-313 (Supp. 1990) (emphasis added). The Connecticut corporation statute states in part:

> [A] director of a corporation which has a class of voting stock registered pursuant to Section 12 of the Securities Exchange Act of 1934, as the same has been or hereafter may be amended from time to time, in addition to complying with the provisions of subsection (d) of this section, shall consider, in determining what he reasonably believes to be in the best interests of the corporation, (1) the long-term as well as the short-term interests of the corporation, (2) the interests of the shareholders, long-term as well as short-term, including the possibility that those interests may be best served by the continued independence of the corporation, (3) the interests of the corporation's employees, customers, creditors and suppliers, and (4) community and societal considerations including those of any community in which any office or other facility of the corporation is located. A director may also in his discretion consider any other factors he reasonably considers appropriate in determining what he reasonably believes to be in the best interests of the corporation.

Id.

have their greatest value. A corporate decision to close a plant or to lay off employees would seem permissible so long as the decision results in a better use of capital. However, Connecticut's statute may limit this ability.

Pennsylvania recently instituted its latest takeover statute,[241] which went into effect on April 27, 1990. The purpose of the Pennsylvania statute is to provide greater protection to its own corporations. It attempts to accomplish this in three ways: (1) it requires the disgorgement by certain controlling shareholders of any profits they receive through the sale of stock within a specified period of time;[242] (2) it requires a person who wishes to acquire more than a specified percentage of stock in a Pennsylvania corporation to get shareholder approval (control share acquisition);[243] and (3) it addresses employee interests.[244] The statute also allows the board of directors to consider other interests besides those of the shareholder without facing liability for breach of its fiduciary duty.[245] Although the Pennsylvania statute is deemed to be a takeover statute designed to protect the shareholder, its content suggests otherwise.[246]

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241. PA. STAT. ANN. tit. 25, §§ 2561-2567, 2571-2575 (Purdon 1990).

242. *Id.* § 2574.

243. *Id.* §§ 2561-2567.

244. *Id.* §§ 2581-2587. "Section 2582 provides that an eligible employee is entitled to a one time lump-sum payment of severance compensation if the employee is terminated within 24 months of a 'control share approval,' or within ninety days of a 'control share approval.'" The definition of control share approval arises in three situations: (1) when there is an acquisition of at least 20% of a corporation's voting shares in which the acquiror has shareholder approval; (2) and (3) when there is an acquisition of at least 20% of a corporation's voting shares according to the statute but no shareholder approval is obtained. *Id.* § 2581.

Additionally, section 2587 provides that collective bargaining agreements may not be invalidated by any business combination transaction until it terminates pursuant to the contract or an agreement is reached between the parties to the contract and the successor employer. *Id.* § 2587.

245. PA. STAT. ANN. tit. 15, § 1721 (Purdon 1990), states:

> Consideration of factors.—In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors may, in considering the best interests of the corporation, consider the effects of any action upon employees, upon suppliers and customers of the corporation and upon communities in which offices or other establishments of the corporation are located, and all other pertinent factors.

Id.

246. *See* Demick, *Study Links Loss of Pa. Stocks to the Takeover Law*, Philadelphia Inquirer, Oct. 14, 1990, D1, col. 5. Since the enactment of the Pennsylvania Takeover statute, shareholders of Pennsylvania corporations have lost over $4 billion.

To some extent, constituency statutes serve as an entrenchment tool for current management as they may be able to hide behind the statute and claim they have exercised their fiduciary duty.[247] Further, these statutes serve the state legislature interest in protecting local constituents from interstate commerce.[248] Labor receives additional protection through legislative action which encourages boards of corporations to consider additional factors besides shareholder interests in considering major transactions. However, at this time only Connecticut has a mandatory statute.[249] And as Sommer stated, it would be detrimental to corporate autonomy and the best interests of American business to develop mandatory constituency statutes.[250]

Id.

> In particular, one provision of the Pennsylvania law allows boards of directors to consider the interests of employees, customers, suppliers and the surrounding community when considering a takeover. That seemingly innocuous provision has been assailed by economists and shareholder activists alike as undermining the fiduciary duties of directors. "It redefined the definition of a corporation. Historically, the corporation was designed to promote shareholder interest. The shareholders no longer control the firm," said Samuel Szewczyk, [a Professor at Drexel University involved in a study of the Pennsylvania statute].

Id.

247. *See* Garfield, *State Competence to Regulate Corporate Takeovers: Lessons from State Takeover Statutes*, 13 HOFSTRA L. REV. 535 (1989).

248. *Id.* Garfield argues that state takeover statutes are not intended to solely protect the shareholder, but rather are protectionist statutes which are intended to shelter communities and businesses from the effects of takeovers. *Id.* at 559. Garfield outlines several evidentiary indications which support this point: (1) legislation has arisen in many states when one of its local employers has been threatened by a takeover; (2) open admissions by legislatures that the motive of the legislation is to protect local business; and (3) jurisdictional reach of takeover statutes. *Id.* at 561-64.

249. *See supra* text accompanying note 240.

250. Sommer, *supra* note 236. Directing corporations to make decisions based on local impact instead of looking towards what is best for the corporation will result in inefficiency and loss of competitiveness on the international market. In order for the economy to function, corporations need autonomy to make the often difficult decisions to ensure growth. *Id.*

A secondary issue raised by state takeover statutes is their constitutionality under the commerce clause. A number of statutes have been found constitutional. However, when takeover statutes are viewed as protectionist legislation that is intended to protect local communities and businesses, and not solely developed to protect the interests of the shareholders, a reasonable argument can be made for their unconstitutionality. In the case of takeover statutes, the motive is shielded behind a valid motive of shareholder protection. Garfield, *supra* note 247, at 565. Justice White's dissent in *CTS Corp.* expressed the view that the Indiana takeover statute was in violation of the commerce clause. "A state law which permits a

Labor will continue to have limited influence over corporate transactions. Protective statutes will influence whether such transactions will occur, but will not provide labor with the upper hand in negotiations.

V. CONCLUSION

Air Lines Pilot Association v. UAL Corp. has brought greater attention to labor's ability to influence corporate transactions. Within labor contracts, state law will not be preempted unless there is a direct conflict with the federal governing statutes or the state law frustrates federal law. As evidenced by the finding that the "poison pills" placed within the collective bargaining agreement between United and IAM were invalid under Delaware corporate law, the board of directors of corporations will have an enhanced duty to actively review labor contracts for violations of state law. This duty would seem to extend beyond the situation in *UAL Corp.* Outside of the "labor pills" devised in this case, labor is not without means to influence corporate transactions. Labor may promote its interests through concessions and give-ups, ESOPs, successor clauses and snapback provisions. These tools expand labor's ability to control its agenda. Additionally, constituency statutes protecting corporations from takeovers may serve indirectly to protect labor from being victimized by such transactions.

The struggle between the corporation and its employees has existed for ages and will certainly continue. As this area evolves and societal values shift, new areas may open while others will close in determining the rights of management and labor.

Christopher D. Curzon

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majority of an Indiana corporation's stockholders to prevent individual investors, including out-of-state stockholders, from selling their stock to an out-of-state tender offeror and thereby frustrate any transfer of corporate control, is the archetype of the kind of state law that the commerce clause forbids." *CTS Corp.*, 481 U.S. at 101.