

Railroaded out of Their Rights

**How a Labor Law Loophole Prevents FedEx Express
Employees from Being Represented by a Union**



Acknowledgements

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This report follows two other efforts by The

Leadership Conference that call attention to the denial of working Americans’ fundamental freedoms. In 2007, we released the report “Let All Voices Be Heard: Restoring the Right of Workers to Form Unions” in support of the Employee Free Choice Act. In that same year, we also produced a report, “Fed Up with FedEx: How FedEx Ground Tramples Workers’ Rights and Civil Rights.” That study documents how another FedEx subsidiary, Fed Ex Ground, misclassifies its truck drivers as “independent contractors” in order to exclude them from coverage under labor and anti-discrimination laws.

With this report, we continue to call for protecting basic American rights in our nation’s workplaces.

The authors and publisher are solely responsible for the accuracy of statements and interpretations contained in this publication.

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Table of Contents

1	Executive Summary
3	Introduction: The FedEx Express Labor Law Loophole
5	The Statutory Framework: The National Labor Relations Act and the Railway Labor Act
7	Union Organizing under the National Labor Relations Act and the Railway Labor Act: Different Rules
9	Why FedEx Express Is Covered by the Railway Labor Act: An “Historical Anomaly”
11	Efforts to Bring FedEx Express’ Ground Transportation Employees under the National Labor Relations Act: The FedEx Corporation’s No-Holds-Barred Campaign in Opposition
15	The FedEx Corporation’s History of Opposing Unionization
17	Conclusion and Recommendation

Executive Summary

Nearly 100,000 ground transportation employees of the package-delivery company FedEx Express are being denied a fair chance to be represented by a union and improve their wages, benefits, and working conditions. Unlike similar employees of other package delivery companies who are covered under the National Labor Relations Act (NLRA) – the nation’s basic federal labor law for most private sector workers – these FedEx Express employees are covered under the Railway Labor Act (RLA). The RLA, a separate federal labor law uniquely designed to regulate the railroad and airline industries, sets extraordinarily high hurdles for workers seeking to organize.

You might say that these working Americans at FedEx Express – drivers, package handlers, dispatchers, and others – are being “railroaded” out of their rights.

For the civil and human rights community, what is at stake is not simply the technicalities of federal labor law or competition between FedEx Express and other package-delivery companies. The issue is about equity – the right of almost 100,000 FedEx Express employees to be treated fairly and to have the same opportunity as similarly situated employees of other package-delivery companies to be represented by a union in seeking better wages, benefits, and working conditions. For that reason, the issue should be dealt with not with hardball political tactics and slick public relations, but on the basis of facts and logic.

Unfortunately, much of the commentary about the FedEx Express issue has served only to obscure the facts and divert attention away from what is essentially a special exception that is unfair to the FedEx Express employees involved. A thorough review of the law and history of the issue demonstrates that:

The coverage of FedEx Express’ ground transportation employees under the RLA is an historical anomaly. Because its parent company was essentially an air carrier when it began operations in 1971, FedEx Express was initially subject to airline regulations, including the RLA. That continues to be the case, even though the ground transportation workforce of FedEx Express has grown to almost 100,000 employees who far outnumber the company’s pilots and other airline-related workers.

It is far more difficult for employees covered under the RLA to organize than it is for employees covered under the NLRA. Under the NLRA, employees can be organized on a location-by-location basis – which means a union can organize the employees at a particular facility of a nationwide company. The RLA, in contrast, requires the union to organize all the employees who do similar work throughout an entire company – which means a union must organize the employees at all of a company’s facilities.

For two decades, FedEx has used every tactic at its disposal in litigation and in Congress to deny FedEx Express ground transportation employees a fair opportunity to organize by allowing them to be covered under the NLRA. FedEx's effort to keep these FedEx Express ground transportation employees under the coverage of the RLA is not – as FedEx's campaign attempts to portray it – a battle between rival package-delivery companies. It is rather a battle between FedEx Express and its own employees who seek the same opportunity to be represented by a union as similarly situated employees of other package and delivery companies.

Congress should correct this inequity by enacting the pending FAA Reauthorization Act with the language proposed by Representative Oberstar that would bring FedEx Express ground transportation employees under the NLRA. Companies that provide a similar service and that are structured and operated in a similar way should be treated similarly under the law. The Leadership Conference believes that this basic principle should apply to the regulation of labor relations in the package-delivery industry, and it recommends that the Oberstar amendment be included in the final version of the FAA Reauthorization Act.

Introduction: The FedEx Express Labor Law Loophole

Almost 100,000 employees of the package-delivery company FedEx Express do not have the same right to be represented by a union as employees who have similar jobs at other package-delivery companies.¹ This is because FedEx Express – unlike those other companies – is not covered by the National Labor Relations Act (“NLRA”),² the basic federal labor law that covers most of the nation’s private sector workforce, and that protects the right of employees to form, join, and be represented by a union in dealing with their employer in regard to wages, benefits, and working conditions.

FedEx Express – which is the largest division of the FedEx Corporation, and delivers packages to destinations in the United States and around the world³ – is covered instead by the Railway Labor Act⁴ (“RLA”), a separate federal labor law that is uniquely designed to regulate the railroad and airline industries. Although the RLA – like the NLRA – protects the right of employees to form, join, and be represented by a union, it is far more difficult for employees to organize under the RLA than it is under the NLRA. As a result, only a small segment of the FedEx Express workforce – some 4,500–5,000 pilots – is unionized; almost 100,000 truck drivers, package handlers, dispatchers, and other FedEx Express ground transportation employees are not. This is in marked contrast to the overall situation in the package-delivery industry. By way of example, the ground transportation employees of United Parcel Service (“UPS”) – which is FedEx Express’ leading competitor, and is covered by the NLRA – are represented by the Teamsters Union.⁵

Because FedEx Express’ RLA coverage is, as one observer has characterized it, an “historical anomaly”⁶ that is unfair to the FedEx Express employees involved and gives FedEx Express an unwarranted competitive

advantage, efforts have been made in recent years to level the playing field by bringing FedEx Express’ ground transportation employees under the NLRA. FedEx Corporation, the parent company of FedEx Express, has used its considerable resources and political influence to oppose these corrective efforts, and to date has been successful in doing so. The issue is now before Congress, and FedEx Corporation is once again engaged in an all-out campaign to retain FedEx Express’ special exception, this time using even more aggressive tactics than it has in the past.

What is at stake here is not simply the technicalities of federal labor law or competition between FedEx Express and other package-delivery companies. The issue is about equity – the right of almost 100,000 FedEx Express employees to be treated fairly and to have the same opportunity as similarly situated employees with other package-delivery companies to be represented by a union in seeking better wages, benefits, and working conditions. For that reason, the issue should be dealt with not with hardball political tactics and slick public relations, but on the basis of facts and logic. It is in an effort to frame the debate on those terms that The Leadership Conference on Civil and Human Rights has prepared this report.

Before turning to specifics, it is appropriate to explain why The Leadership Conference – the nation’s premier civil and human rights coalition – has chosen to speak out on an issue that some might characterize as “just a labor dispute”? We have done so because this issue implicates the mission of The Leadership Conference. That mission is to protect and promote the civil and human rights of all persons in the United States, and the workplace rights of employees – including their right to be represented by a union in seeking better wages, benefits, and working

conditions – are civil and human rights. The core purpose of union representation is to bring equity and opportunity to the workplace – by removing barriers to economic advancement, providing workplace dignity and respect, and making the American dream more accessible to workers. The Rev. Martin Luther King, Jr., recognized this intrinsic connection between civil and human rights and workers’ rights in 1961, when he declared:

“Our needs are identical with labor’s needs: decent wages, fair working conditions, livable housing, old age security, health and welfare measures, conditions in which families can grow, have education for their children, and respect in their community.”⁷⁷

The Statutory Framework: The National Labor Relations Act and The Railway Labor Act

Two federal labor laws are at issue in the dispute involving FedEx Express: the NLRA and the RLA. These two laws are designed to serve very different purposes.

Passed in 1926, the RLA originally covered the nation's railroads and "express companies."⁸ Coverage for express companies was included in the RLA because Congress recognized the important role that the Railway Express Agency ("REA") – which was the only express company in existence at that time – played in the nation's transportation system.⁹ The REA ceased operations in 1970.

The primary purpose of the RLA was not to facilitate union organizing – indeed, many railroad workers already were represented by craft unions that had existed since the late 19th century. Its purpose was rather to avoid strikes in the nation's crucial cross-country transportation system, by encouraging collective bargaining, mediation, and arbitration as means for resolving labor-management disputes. As stated in the 1926 Congressional debate leading to enactment of the RLA:

[T]he railroads are the arteries through which flow the lifeblood of our nation. It is vital to the country that the operation of its railroads be uninterrupted.¹⁰

A new federal agency – the National Mediation Board ("NMB") – was established by Congress to administer the RLA.

In 1936, the RLA was amended to apply to the airline industry.¹¹ Recognizing the vital role that burgeoning industry was destined to play in our nation's commerce, Congress' purpose once again was to avoid strikes.

In contrast, the NLRA – which became law in 1935 – was intended to facilitate organizing in basic industries, such as automobiles, steel, electronics, clothing, and textiles. Hailed as "Labor's Magna Carta," the NLRA led to the growth of the great industrial unions, and promoted the process of collective bargaining as the primary mechanism of industrial governance in the private sector.¹² As was the case with the RLA, a new federal agency – the National Labor Relations Board ("NLRB") – was established and charged with responsibility for administering the statute.

In order to put the dispute over the statutory coverage of FedEx Express' ground transportation employees in context, it is important to understand the interplay between the RLA and the NLRA with regard to coverage of the airline industry. The RLA provides that the Act

shall cover every common carrier by air engaged in interstate and 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.¹³

In accordance with this provision, anyone employed by an air carrier engaged in interstate or foreign commerce – regardless of the specific nature of the work that he or she does for the carrier – is covered by the RLA.

In order to mesh RLA and NLRA coverage, the NLRA specifically excludes from coverage any employer that is "subject to the Railway Labor Act."¹⁴ And, the NLRA's definition of "employee" excludes "any individual employed by an employer subject to the Railway Labor

Act.”¹⁵ In sum, all employees of a company that is covered by the RLA – including those who have no direct involvement in the company’s airline operations – are expressly excluded from the coverage of the NLRA.

The NLRB traditionally has taken the position that questions concerning RLA coverage should be resolved by the NMB. As explained by the NLRB General Counsel, where issues concerning RLA coverage arise in an NLRA representation proceeding, the NLRB will defer to the NMB:

[B]ecause of the nature of this type of jurisdictional question, it has been the Board’s practice to request the National Mediation Board, which has primary authority to determine its own jurisdiction, to study the record in these cases and determine the applicability of the Railway Labor Act to the employer in question. Where the National Mediation Board finds that the employer meets the definition of common carrier under the Act administered by it, the NLRB declines to assert jurisdiction.¹⁶

Union Organizing under The National Labor Relations Act and The Railway Labor Act: Different Rules

Why is it so important to FedEx Express to have its ground transportation employees covered by the RLA rather than the NLRA? The answer lies in the different approach taken by the two statutes with regard to union organizing – specifically, those provisions that regulate the right of employees to choose whether or not to be represented by a union.

To be sure, after decades of weakening amendments and lax enforcement, the road to unionization under the NLRA is by no means an easy one. This is why The Leadership Conference supports passage of the Employee Free Choice Act (“EFCA”), which would, among other things, grant union representation if a majority of the employees that a union seeks to represent present signed authorization cards indicating their desire for such representation, thereby preventing exposure to the employer’s anti-union campaign pending an election. Passage of EFCA, improved enforcement of existing law by the NLRB, and other types of labor law reform remain a top priority for labor and employee rights advocates. But even under a weakened NLRA, the ability of employees to organize is far greater than it is under the RLA.

Under the NLRA, when a union wants to organize a company, it must as a first step show a specified level of interest from the employees in a designated “bargaining unit” – a group of employees performing similar jobs or who share a “community of interest” with each other in regard to wages, benefits, and working conditions. The union can make such a showing by collecting signed authorization cards from at least 30 percent of the employees in the proposed bargaining unit. The NLRA allows this to be done on a location-by-location basis,

which means the union can organize specific company facilities – the production workers at a particular plant of a nationwide manufacturing company, or the clerical employees at a particular office of a nationwide insurance company – rather than on a company-wide basis.¹⁷

This is not the case under the RLA. The RLA requires the NMB to determine which union, if any, represents a “craft or class” of employees,¹⁸ a requirement that the NMB has construed to mean that a bargaining unit must include all the employees of a particular craft or class throughout an entire company.¹⁹ Thus, if the FedEx Express ground transportation employees at a company facility in one state want to organize, they would have to do so for a bargaining unit that includes the FedEx Express ground transportation employees at all of the company’s facilities in every state.

There was until recently another distinction between the NLRA and the RLA that placed employees seeking to unionize under the RLA at a further disadvantage. In a representation election under the NLRA, a union wins if it receives a majority of the actual votes – specifically, of the valid ballots cast.²⁰ In an RLA representation election, a union historically has been required to receive a majority of the votes from all employees in the bargaining unit who are eligible to vote, including both those who voted as well as those who chose not to vote. Phrased otherwise, in an RLA representation election, the failure of a bargaining unit employee to vote – for whatever reason – was counted as a vote against union representation. This no longer is the case. The NMB has amended the RLA election rules, and – as of June 10, 2010 – the NLRA standard of a majority of the valid ballots cast will be used in RLA representation elections.²¹

On May 17, 2010, the Air Transport Association of America, Inc. (“ATA”), which is the trade association that represents most major airlines in the United States, filed a lawsuit against the NMB in federal district court seeking to prevent implementation of the new rule,²² so there is at least some uncertainty as to the rule change.²³ But even if the rule change is treated as a *fait accompli*, it removes only one of the reasons why it historically has been more difficult to unionize under the RLA than under the NLRA, and by no means levels the playing field between the two statutes. Because of the local bargaining unit/nationwide bargaining unit distinction, the FedEx Express’ ground transportation employees still are required to clear a significantly higher hurdle than their counterparts who work for other package-delivery companies in order to have a union represent them in bargaining for better wages, benefits, and working conditions. Moreover, to the extent that ongoing efforts to enact EFCA and otherwise strengthen employee organizing rights under the NLRA are successful, this unfairness will be even greater.

The recent action by the NMB serves to highlight a more basic point. The very fact that the NLRA and the RLA are separate statutes that can be interpreted and/or amended independently of each other means that there will be the potential for unfair treatment as long as employees who have the same jobs at different package-delivery companies are covered by different labor relations statutes.

Why FedEx Express Is Covered by The Railway Labor Act: An “Historical Anomaly”

When FedEx Corporation (“FedEx”), the parent company of FedEx Express, began operations in 1971, it was essentially an air carrier, with ground transportation as only a minor appendage. Thus, in a 1978 opinion, the NMB described FedEx as follows:

The Federal Express Corporation is an air freight carrier principally engaged in operating an interstate air express service.²⁴

Consistent with this description, FedEx was from the outset subject to airline regulations, including the RLA. For labor relations purposes, this meant that the company’s employees –including its relatively small contingent of ground transportation employees – were covered by the RLA rather than the NLRA.

Over the years, the ground transportation workforce of FedEx Express has grown to almost 100,000 truck drivers, package handlers, dispatchers, and other employees.²⁵ Notwithstanding this change in the composition of its workforce, FedEx Express’ ground transportation employees have – because of administrative agency decisions and Congressional action discussed below – remained under the coverage of the RLA. Meanwhile, the ground transportation component of UPS and other package-delivery companies with integrated air and ground transportation have been covered by the NLRA.

This difference in statutory coverage persists notwithstanding the fact that FedEx Express and these other package-delivery companies are now structured and operate similarly. By way of comparison, UPS, which originated as a ground shipping service, now provides

overnight air deliveries. FedEx Express, founded as an airline, now delivers packages by truck. The two companies’ air and ground fleets are of comparable size: FedEx Express utilizes about 650 airplanes, while the UPS air fleet numbers about 550; FedEx Express has about 45,000 package-delivery trucks, while UPS has about 60,000.²⁶

From the employees’ vantage point, there is no difference between being a truck driver or package handler for FedEx Express or UPS. Yet, FedEx Express’ ground transportation employees face much more formidable obstacles to union representation than counterpart employees at UPS, most of whom are unionized. The difference in their rights and representation helps to explain why UPS’ ground transportation employees, on average, earn \$5 more an hour than similar FedEx Express’ employees, and, when employer health care coverage and pension contributions are considered, make at least \$8 an hour more.²⁷

This reliance on the difference in the origins of FedEx Express and UPS – rather than on the similarity of their current structure and operation – in determining the applicable labor law has prompted one of the nation’s pre-eminent labor law experts to characterize FedEx Express’ RLA coverage as an “historical anomaly,” noting that “[f]rom the workers’ point of view, it seems unfair.”²⁸

Not only is this difference in statutory coverage unfair to the employees involved, but it also gives FedEx Express an unwarranted competitive edge in the package-delivery industry. Because it has been shown that union representation can substantially improve the wages, benefits, and working conditions of employees,²⁹ the fact

that it is more difficult for FedEx Express' ground transportation employees to unionize under the RLA than it would be under the NLRA is a cost-saving measure for FedEx Express. As one commentator has put it, the ability of FedEx Express to avoid unionization of its employees is "a key element of Federal Express' market strategy."³⁰ Market competition among firms within the same industry that provide the same service should not be skewed by differential costs imposed by different labor relations regimes.

Efforts to Bring FedEx Express’ Ground Transportation Employees Under The National Labor Relations Act: The FedEx Corporation’s No-Holds-Barred Campaign in Opposition

Because RLA coverage of FedEx Express’ ground transportation employees is unfair to the employees involved and gives FedEx Express an unwarranted competitive edge in the package-delivery industry, efforts have been made to level the playing field by bringing these FedEx Express employees under the NLRA.

Such efforts have proceeded on two fronts: litigation before the relevant federal administrative agencies (the NMB and the NLRB) and action by Congress.

Litigation

In 1991, the United Automobile Workers union (“UAW”) filed a petition with the NLRB seeking to represent under the NLRA a bargaining unit of FedEx Express employees in one of the company’s geographic districts – the “Liberty District” – which included portions of Pennsylvania, New Jersey, and Delaware.³¹ This bargaining unit would not have been appropriate under the RLA because it was not company-wide.

In its representation petition, the UAW acknowledged that pilots, aircraft mechanics, and other FedEx Express employees who performed airline work should remain subject to the RLA. The UAW contended, however, that the employees it sought to represent in the Liberty District – truck drivers, package handlers, and other ground transportation employees – did not perform airline work, and were not “integral to Federal Express’ air transportation functions.”³²

Consistent with the “deferral” process described above, the NLRB asked the NMB to determine the applicability of the RLA to the employees covered by the UAW petition.³³ On November 22, 1995, the NMB issued an opinion, in which it concluded that “Federal Express and

all of its employees [including the ground transportation employees sought by the UAW’s petition] are subject to the Railway Labor Act.”³⁴ In reaching this conclusion, the NMB began with the fact – which was not disputed by the UAW – that Federal Express is “a common carrier by air” within the meaning of the RLA,³⁵ and it ruled that by virtue of such coverage, all of the employees sought by the UAW’s petition before the NLRB were subject to the RLA.³⁶ The Act’s definition of an employee of an air carrier, the NMB noted,

includes 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.³⁷

That definition, the NMB stated, does not limit RLA coverage to air carrier employees who fly or maintain aircraft. Rather,

its coverage extends to virtually all employees engaged in performing a service for the carrier so that the carrier may transport passengers or freight.³⁸

The NLRB agreed with the NMB that the FedEx Express ground transportation employees sought by the UAW petition were covered by the RLA, and in turn not subject to the NLRA. Accordingly, in an opinion dated May 30, 1997, the NLRB dismissed the UAW petition, bringing to a close six years of administrative agency litigation.³⁹ The analysis that was used by the NMB and the NLRB in reaching this conclusion suggests that RLA coverage of FedEx Express’ ground transportation employees is dictated by the language of the RLA itself,

and that it would be necessary for Congress to amend the statute in order to change coverage.

Congressional Action

While the administrative agency litigation was pending, activity related to the labor law coverage of FedEx Express also was taking place in Congress. On December 29, 1995, the Interstate Commerce Commission Termination Act, which abolished the 108-year-old Interstate Commerce Commission (“ICC”), was signed into law.⁴⁰ This Act contained a number of conforming amendments, one of which removed the term “express company” from the coverage provision of the RLA.⁴¹ Although it has been suggested that removal of the term was a technical error, it was more likely intentional, reflecting the fact that the Railway Express Agency (“REA”) – the express company that prompted inclusion of the term in the original 1926 enactment – had gone out of business more than two decades earlier.⁴² The Congressional Research Service agreed. After analyzing the history of the deletion, it stated “[s]ince the [RLA] coverage had been triggered by federal regulation of express companies, it appears logical and necessary to . . . preclude ostensible coverage of nonexistent express companies [referring to the REA].”⁴³

FedEx Express had relied on the RLA’s specific reference to an express company to argue that all of its operations, not just its airline operations, were subject to the RLA. Although, as indicated in the litigation discussed above, FedEx Express also relied on the language in the RLA that extended the act’s coverage to all of the employees of “every common carrier by air,” the litigation was at the time still pending and the outcome uncertain. The 1995 removal of the “express company” classification at the very least created an ambiguity in FedEx Express’ status, and FedEx sought to reinstate the language.

Despite opposition from unions, other package-delivery companies, and members of Congress sympathetic to labor – as well as charges of special interest legislation – FedEx and its political allies persevered in their efforts. Indeed, FedEx’s political allies tried to attach riders to some six separate bills without getting the reinstatement provision adopted. Eventually, Senator Ernest Hollings, D. S.C., reintroduced the provision as a rider to the Federal Aviation Administration (“FAA”) reauthorization bill in conference committee.⁴⁴ The FAA reauthorization bill, which enjoyed extensive support apart from the FedEx provision, was to reauthorize the FAA and approve various airport security measures. Despite the fact that neither the Senate nor House versions of the bill

contained the reinstatement provision, the conference committee approved it.⁴⁵ The conference bill then went back to the House, where it was passed, substantially along party lines.⁴⁶

When the measure was before the Senate for final passage, Senator Edward M. Kennedy, D. Mass., led an effort to block the legislation through a filibuster. During the debate, Sen. Kennedy declared:

Federal Express is notorious for its anti-union ideology, but there is no justification for Congress becoming an accomplice in its union-busting tactic.⁴⁷

Sen. Russ Feingold, D. Wis., was equally pointed in his comments, stating that:

This provision is designed exclusively for this single company, Federal Express, to allow it to impose special barriers to block unionization efforts among employees who transport cargo by truck . . . Federal Express, and my colleagues who support their provision, understand how much more difficult it would be for Federal Express’s truck drivers to unionize if they have to organize all of their employees nationwide as opposed to being able to form local unions.⁴⁸

After four days of debate, FedEx was able to obtain enough votes to end the filibuster. The bill then passed, definitively establishing that FedEx Express was an “express company,” and that its ground transportation employees were for that reason alone subject to the RLA. FedEx pulled out all the stops in its effort to obtain this legislative change, and, after it succeeded, observers noted the company’s extraordinary legislative access and political power. “I was stunned by the breadth and depth of their clout up here,” declared Sen. Feingold.⁴⁹ “The sky’s the limit for Federal Express when it wants to get its own customized regulatory protection made into law,” said Joan Claybrook, President of Public Citizen.⁵⁰ In a report on FedEx’s victory, *The New York Times* concluded that the company “has become one of the most formidable and successful corporate lobbies in the capital.”⁵¹

It is hard to quarrel with these assessments, inasmuch as the reinstatement provision was impossible to defend as anything other than special interest legislation. And, indeed, FedEx’s congressional supporters made little

attempt to defend the provision on its merits. Thus, Sen. Hollings – who introduced the provision as a rider to the FAA reauthorization bill in conference committee – openly acknowledged that he did so based largely on his gratitude to FedEx for using its aircraft to fly him to his home state during the droughts a decade earlier.⁵² Rep. Bud Shuster, R. Pa., who in 1996 was chairman of the House Transportation and Infrastructure Committee and a member of the conference committee who voted to approve the provision, was quoted by the media as saying “I have been instructed by my leadership to accept this.”⁵³

In sum, by 1997 it had been established that the ground transportation employees of FedEx Express were covered by the RLA on two separate grounds – as employees of an “express company” by virtue of the rider to the FAA Reauthorization Act adopted by Congress on October 3, 1996, and as employees of a “common carrier by air” by virtue of the decision issued by the NLRB on May 30, 1997.

After reinserting the term “express company” into the RLA in 1996, Congress did not deal with the labor law coverage of FedEx Express for more than a decade. In 2007, Rep. James Oberstar, D. Minn., introduced a rider to the FAA Reauthorization Act of 2007. This rider – which was titled the “Express Carrier Employee Protection” Amendment – sought to amend the RLA to remove FedEx Express ground transportation employees from the coverage of the RLA and make them subject to the NLRA.⁵⁴ Unlike the action that was taken by Congress in 1995, the Oberstar amendment did not simply remove the “express company” classification from the RLA, because that would not have achieved the desired result: in light of the May 30, 1997, NLRB decision (and the November 22, 1995, NMB opinion on which it was based), the FedEx Express ground transportation employees would remain subject to the RLA as employees of a “common carrier by air.” Accordingly, Rep. Oberstar’s 2007 amendment took a more refined approach.

The Oberstar amendment retained RLA coverage for an “express carrier,” which was defined to mean any company “whose primary business is the express shipment of freight or packages through an integrated network of air and surface transportation,”⁵⁵ a definition that would include FedEx Express, UPS, and most other major package-delivery companies. But under the amendment, not all employees of an express carrier would be covered by the RLA.

Paragraph one of the Oberstar amendment limited RLA coverage to an express carrier’s employees in positions that are eligible for FAA certification, such as pilots, aircraft mechanics, and others who perform functions that are directly related to the company’s airline service. The paragraph provided that “[a]ll other employees of an express carrier shall be covered by the provisions of the National Labor Relations Act.”⁵⁶ To deal with the alternate basis for RLA coverage of FedEx Express’ ground transportation employees that was relied on by the NMB and the NLRB, the second paragraph of the Oberstar amendment provided that “an express carrier shall be governed by paragraph (1) notwithstanding any finding that the [company] is also a common carrier by air.”⁵⁷

The House approved the FAA Reauthorization Act of 2007 – with the Oberstar amendment to the RLA. But the amendment was not included in the Senate version of the bill,⁵⁸ and efforts to reconcile the two bills were unsuccessful. The FAA Act was not reauthorized, and it has received temporary extensions since its expiration in 2007.⁵⁹

In 2009, Rep. Oberstar, then chairman of the House Transportation and Infrastructure Committee, reintroduced his RLA amendment as a rider to the FAA Reauthorization Act of 2009. On May 21, 2009, the House approved the FAA Reauthorization Act – again with the Oberstar amendment to the RLA.⁶⁰

Following House passage of the FAA Reauthorization Act of 2009, the matter moved to the Senate, where FedEx once again mobilized its considerable resources in an effort to keep FedEx Express’ ground transportation employees under the coverage of the RLA. In this effort, FedEx used even more aggressive tactics than it had in the past.

In June 2009, FedEx began an intensive advertising and public relations campaign, contending that the effort to cover FedEx Express’ ground transportation employees under the NLRA amounted to a government “bailout” of UPS. As part of this campaign, FedEx launched a website – BrownBailout.com (referring to the fact that “Brown” is UPS’ nickname, as well as the color of the company’s trucks and its employees’ uniforms). In an effort to capitalize on public antipathy toward the recent bailouts of leading firms in the financial sector, as well as two of the “big three” U.S. auto companies, the website claims that UPS is “quietly seeking a congressional bailout designed to limit competition for overnight deliveries.”⁶¹

But this is clearly not a “bailout” as that term is commonly understood. UPS is not seeking any federal funds or loans, and the provision in question does not offer UPS any special competitive advantage. To the contrary, it would do precisely the opposite, and create a level playing field by covering the ground transportation employees of FedEx Express, UPS, and other package-delivery companies under the same labor law – the NLRA.

Using another unorthodox tactic, FedEx, in March 2009, warned that if Congress covers the FedEx Express’ ground transportation employees under the NLRA, the company might cancel a \$10 billion contract with Boeing to purchase 30 freighter planes.⁶² This threatened cancellation would impact not only Boeing, but also General Electric, which manufactures Boeing’s engines. Neither company had been involved in the debate about whether the NLRA should apply to FedEx Express.

After the House passed the FAA Reauthorization Act of 2009, with the Oberstar RLA amendment, and the matter was under consideration in the Senate, Fred Smith, FedEx’s founder and CEO, repeated and expanded on these threats. In a March 2010 interview, Smith warned that if the House language is included in the final version of the bill, FedEx would be forced to cut capital spending, slash the \$2 billion it invests each year in FedEx Express, cancel the planned purchase of extra aircraft, and redeploy cash.⁶³

FedEx’s assertion that these cost-cutting measures would be necessary if FedEx Express’ ground transportation employees were brought under the coverage of the same labor law that applies to similarly situated employees of other package-delivery companies reflects a line of reasoning that is clearly specious. To begin with, the scenario posed by FedEx assumes that if FedEx Express’ ground transportation employees are covered by the NLRA, they will choose to be represented by a union. To be sure, such coverage may make it easier for those employees to unionize, but it is by no means a given that they will do so. As noted in the next section of this report, FedEx has a well-established policy of union avoidance, and it can be expected to adhere to that policy regardless of the labor law that covers its employees.

FedEx’s reasoning is flawed in another respect as well. It is one thing to assume that, as a result of NLRA coverage, FedEx Express’ ground transportation employees will choose to be represented by a union, and that the union will succeed in negotiating improved wages, benefits, and

working conditions. But it is quite another thing to assume – as is implicit in the scenario posited by FedEx – that a company such as FedEx Express, with its management savvy and business acumen, will simply accede to union demands that would so significantly worsen its financial condition as to impair its ability to remain competitive. This is hardly a credible scenario, and FedEx’s threats should be taken for what they are – an attempt to enlist the support of Boeing, General Electric, and other “neutral” companies as allies in the Congressional debate.

On March 22, 2010, the Senate passed its version of the FAA Reauthorization Act. The Senate bill does not include a counterpart to the provision in the House version that would bring the ground transportation employees of FedEx Express under the coverage of the NLRA.⁶⁴ The existing FAA Act, which has received temporary extensions since it expired in 2007, was scheduled to expire on March 31, 2010, but a further 90-day extension has been granted, and the House and Senate now have until June 30 to reconcile the two bills.⁶⁵ It is unclear at this time what procedure will be followed in an effort to reconcile the differences in the two bills – primarily, the dispute over the Oberstar amendment in the House bill. The traditional way for the House and Senate to resolve their differences once they have each passed differing versions of the same bill is to appoint members to a House/Senate conference committee. There is some question whether that procedure will be followed in this case, or whether a less formal procedure will be used.

The FedEx Corporation's History of Opposing Unionization

FedEx's effort to keep FedEx Express' ground transportation employees under the RLA is not—as the FedEx website would have it—a battle between rival package-delivery companies, specifically, FedEx Express and UPS. It is rather a battle between FedEx Express and its own employees, who seek the same opportunity to be represented by a union as counterpart employees at other package-delivery companies. In this regard, the actions taken by FedEx are just the latest in a long history of vigorous resistance to efforts by its employees to unionize:

- As early as 1983, a FedEx booklet titled “Managers Labor Law Book” credits the company's success in large part to being “union free.”⁶⁶ On the second page, the booklet declares that the corporate goal is to remain “union free;”
- In 1989, shortly before acquiring Tiger International Airline, many of whose pilots were union members, FedEx's founder and chief executive officer, Fred Smith, declared: “I don't intend to recognize any unions at Federal Express;”⁶⁷
- In 1993, FedEx distributed to its managers a booklet produced by the company's legal department titled “Keeping the People Philosophy Alive: Making Unions Unnecessary.” The cover letter said, “Enclosed you will find a new guide designed to provide Federal Express managers with basic information about union avoidance and union organizing;”⁶⁸ and
- As recently as 2006, FedEx's Human Resource Services and Diversity Organization published a paper calling on human resources staff to “co-develop strategy with Labor Relations team on union avoidance,” and listing five “union avoidance strategies.”⁶⁹

The Leadership Conference recognizes the right of an employer, including FedEx, to resist unionization by its employees—provided that in doing so, the employer respects the rights of the employees and complies with its own legal obligations. But that has not always been the case with FedEx.

In 1991, for example, the National Mediation Board found that FedEx Express illegally interfered with the representation election for the company's pilots.⁷⁰ In another election, the pilots voted for union representation, becoming the only group of FedEx Express' employees to unionize.⁷¹

In 2007, The Leadership Conference issued a report titled “Fed Up with FedEx: How FedEx Ground Tramples Workers Rights and Civil Rights,” which documents how another division of FedEx, FedEx Ground—a shipping company that relies entirely on trucks rather than airplanes, and whose employees are covered by the NLRA—misclassifies approximately 15,000 of its truck drivers as “independent contractors.”⁷² This misclassification excludes these employees from the coverage of labor, employment, and civil rights laws, including the NLRA, and among other things, denies them the right to form and join unions. Although several courts, federal agencies, and state officials have ruled that these FedEx Ground truck drivers are employees—as one court put it, FedEx Ground's agreement with its drivers is “a brilliantly drafted contract creating the constraints of an employment relationship . . . in the guise of an independent contractor model”⁷³—FedEx Ground continues to adhere to this policy in most of the nation.

The tactics used by FedEx in its campaign to keep FedEx Express' ground transportation employees under the RLA – while aggressive and disingenuous – have not to date been unlawful. But the statement made by Sen. Kennedy in the 1996 Congressional debate to restore the special exception for FedEx Express is as apt today as it was then:

Federal Express is notorious for its anti-union ideology, but there is no justification for Congress becoming an accomplice in its union-busting tactic.⁷⁴

Conclusion and Recommendation

A basic equitable principle informs this report: companies that provide a similar service and that are structured and operate in a similar way should be treated similarly under the law. This principle should apply to the regulation of labor relations in the package-delivery industry, and in turn should guide Congress in determining the appropriate labor law coverage for FedEx Express' ground transportation employees.

Because RLA coverage of these employees is an “historical anomaly” that is unfair to the FedEx Express employees involved and gives FedEx Express an unwarranted competitive edge, Congress should close the FedEx Express labor law loophole. The Leadership Conference urges Congress to level the playing field by bringing these employees under the coverage of the NLRA and providing them with the same right to be represented by a union as similarly situated employees at other package-delivery companies. Toward that end, we recommend that the Oberstar amendment be included in the final version of the FAA Reauthorization Act.

Endnotes

¹ More precisely, FedEx Express and these other companies are known as “express package delivery companies.” This term refers to companies that use an integrated network of air and ground transportation to deliver time-sensitive shipments within one or two business days.

² National Labor Relations Act, 29 U.S.C. §§ 151, et seq.

³ FedEx Facts, http://about.fedex.designcdt.com/our_company/company_information/fedex_express (last visited June 8, 2010).

⁴ The Railway Labor Act, 45 U.S.C. §§ 151, et seq.

⁵ UPS/ Teamsters Master Agreement, available at <http://www.teamster.org/content/ups-master-agreement-2008-2013>.

⁶ Clifford, Stephanie. “Campaign Against Rival Could Haunt FedEx.” *The New York Times*. June 10, 2009, quoting Professor James Brudney, Moritz College of Law at Ohio State University.

⁷ King, Jr., Martin Luther. Address before the Constitutional Convention. AFL-CIO, Bal Harbour, Fla., Dec. 11, 1961.

⁸ 45 U.S.C. § 151.

⁹ O’Keefe, Jr., M. Rush. “RLA Jurisdiction for Express Companies.” *Airline and Railroad Labor and Employment Law*, Vol. 1. Oct. 23-25, 1997.

¹⁰ 67 CONG. REC. 4509 (1926); reprinted in *The Railway Labor Act of 1926, A Legislative History*, at 171 (1988).

¹¹ 45 U.S.C. §§ 181-88.

¹² NLRB: The First Sixty Years, available at http://www.nlr.gov/nlr/shared_files/brochures/60yrs_15-20.pdf.

¹³ 45 U.S.C. § 181.

¹⁴ 29 U.S.C. §§ 152 para. 2.

¹⁵ 29 U.S.C. §§ 152 para. 3.

¹⁶ An Outline and Procedure in Representation Cases, Office of the General Counsel, National Labor Relations Board, at 18 (June 1974, ed.) quoting Northwest Airlines, 47 NLRB 498, 501-02 (1943).

¹⁷ NLRA, 29 U.S.C. § 151(a).

¹⁸ RLA, 45 U.S.C. § 152 para. 9.

¹⁹ Eischen, Dana. Representation Disputes and Their Resolution in the Railroad and Airline Industries, in *The Railway Labor Act at Fifty 1*, at 58-68. (Charles Rehmus ed., 1977) (discussing the NMB placing all employees of the same “craft or class” in the same bargaining unit).

²⁰ 29 U.S.C. § 159 (b).

²¹ Hananel, Sam. “New Rule Makes Union Organizing Easier at Airline, Railroad Companies” Associated Press Newswires, May 10, 2010.

²² http://www.airlines.org/PublicPolicy/Judicial/Documents/court_5-17-10.pdf (last visited June 8, 2010)

²³ FedEx Corporation is a member of the ATA, and it is among the ATA members that have joined in the lawsuit.

²⁴ In re: Application of the Int’l B’hood of Teamsters, 6 NMB 442, 444 (March 22, 1978).

²⁵ FedEx Corporation – Investor Relations – Railway Labor Act, <http://ir.fedex.com/releasedetail.cfm?releaseid=388559> (last visited June 8, 2010).

²⁶ Nyden, Paul. “FedEx Battles Over Unions” *Charleston Gazette*, Aug. 2 2009.

²⁷ *Ibid.*

²⁸ Clifford, Stephanie. “Campaign Against Rival Could Haunt FedEx,” *The New York Times*, June 10, 2009, quoting Professor James Brudney, Moritz College of Law at Ohio State University.

²⁹ See *Collective Bargaining Raises Wages — Especially For Women and People of Color*, <http://www.aflcio.org/joinaunion/why/uniondifference/uniondiff4.cfm> (last visited June 8, 2010). Unionized employees earn 28 percent more than their nonunionized counterparts. The union wage benefit is greatest for people of color and women. With union representation, African-Americans earn 29 percent more, Latinos earn 50 percent more, Asian-Americans earn 4 percent more, and women from every background earn 34 percent more than their nonunion counterparts.

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- ³⁴ *Ibid.* at 41.
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- ⁴³ Federal Express Anti-Labor Rider to FAA Reauthorization Bill Hearing, Sept. 30, 1996, 104th Congress, 2nd Session, 142 Cong. Rec. S. 11854 at *11855.
- ⁴⁴ William Roberts, "Organized Labor set to Fight GOP on FedEx Rider," *J. Com.*, May 20, 1996, at 1A.
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- ⁵¹ *Ibid.*
- ⁵² *Ibid.*
- ⁵³ Roberts, William. "Organized Labor Set to Fight GOP on FedEx Rider," *J. Com.*, Sept. 27, 1996, at 1A.
- ⁵⁴ FAA Reauthorization Act of 2007, H.R. 2881, Sec. 806, addressing express carrier employee protection.
- ⁵⁵ *Ibid.*
- ⁵⁶ *Ibid.*
- ⁵⁷ *Ibid.*
- ⁵⁸ Sullivan, Bartholomev. "Senate Expected to Strip Amendment to Labor Law" Memphis Commercial Appeal, Sept. 21, 2007; FAA Reauthorization Act of 2007, 110th Congress, 1st Session, 153 Cong. Rec. H. 10637 at *10687.
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- ⁶⁰ FAA Reauthorization Act of 2009, May 21, 2009, 155 Cong. Rec. H. 5913, 111th Congress, 1st Session.
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