COMPETITIVE ENTERPRISE INSTITUTE

WEBmemo

June 21, 2017 **No. 40**

Dispelling Six Myths on Air Traffic Control Reform and Labor Relations

By Marc Scribner[*]

In 2016, when House Transportation and Infrastructure Committee Chairman Bill Shuster (R-Pa.) introduced legislation to reform the U.S. air traffic control (ATC) system along the lines of what the rest of the industrialized world has done over the last 30 years, a small number of conservative critics claimed corporatizing air traffic control amounted to a "union giveaway." These claims are based on fundamental misunderstandings of federal labor law and the proposed legislation.

Rep. Shuster has reintroduced air traffic control reform legislation with the 21st Century Aviation Innovation, Reform, and Reauthorization (21st Century AIRR) Act (H.R. 2997).[1] The bill would charter a new nonprofit, called the American Air Navigation Services Corporation, to replace the Federal Aviation Administration's (FAA) Air Traffic Organization (ATO) as the nation's air navigation service provider. This corporation would be customer-focused and governed by aviation stakeholders from airlines, recreational general aviation, aviation unions, and the Department of Transportation.

This policy brief aims to dispel six of the most common labor-management relations myths about air traffic control reform.

Myth 1: The reforms would grant air traffic controllers the power to strike.[2]

The proposal to spin off the Federal Aviation Administration's Air Traffic Organization into an independent nonprofit does not eliminate the existing prohibition on air traffic controller strikes.

Section 91109 contains an explicit, clearly worded prohibition on individual controllers striking. Specifically, it provides that employees are prohibited from "participating in a strike, work stoppage, or lowdown against the Corporation" or "picketing the Corporation in a labor-management dispute if such picketing interferes with the Corporation's operations" and that any employee who participates in these activities "shall be terminated from employment with the Corporation." This provision is redundant in that 5 U.S.C. Chapter 71 (see below), which applies to the American Air Navigation Services Corporation's workforce, already bans controller strikes, but it was added to more clearly highlight the strike prohibition.

[*] *Marc Scribner is a Senior Fellow at the Competitive Enterprise Institute.*

In addition, the union representing unlawfully striking controllers would be held accountable under this proposal. Section 91103 of the bill extends 5 U.S.C. Chapter 71 to cover the ATC Corporation's controller workforce. This includes 5 U.S.C. § 7116(b)(7), which makes it an unfair labor practice for a union covered by the statute "to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or ... to condone any activity ... by failing to take action to prevent or stop such activity."

Striking or failing to prevent a strike would constitute an unfair labor practice enforceable by the Federal Labor Relations Authority. Management can obtain an order from the Authority stopping the strike under 5 U.S.C. § 7118(a)(7), which can then be enforced in the federal district courts under 5 U.S.C. § 7123(d).

Further, in the event of a strike, work stoppage, slowdown, or failure to prevent a prohibited strike, 5 U.S.C. § 7120(f) strips the "exclusive recognition status of the labor organization, which shall then immediately cease to be legally entitled and obligated to represent employees in the unit." In other words, the union would likely be put out of business if it engages in any of the above prohibited conduct.

Myth 2: The reforms would reduce penalties for illegally striking controllers.[3]

While the current bill includes the express strike termination provision noted above, some critics of the 2016 bill's labor relations provisions claimed that the length of time required to adjudicate unfair labor practices gave the controllers' union an opportunity to force management concessions by threatening to shut down the nation's airspace. This was also a misreading of federal labor law.

Under the 2016 bill, the corporation's emergency management powers granted it the ability to take swift action against those who violate the law, up to and including terminating the offending employees.

In the current bill as in the previous one, Section 91103 extends 5 U.S.C. Chapter 71 to the American Air Navigation Services Corporation. In the 2016 bill, this also included 5 U.S.C. § 7106(a)(2)(D), which makes clear that federal law does not limit the corporation's ability "to take whatever actions may be necessary to carry out the agency mission during emergencies."

A potential shutdown of the National Airspace System would constitute such an emergency. In evaluating Section 7106 management actions, courts have upheld agency management rights to:

- Compel employees to return to work regardless of leave status during an emergency;[4]
- Discipline employees;[5]
- Demote disciplined employees;[6] and
- Terminate employees without consulting a labor organization.[7]

Myth 3: Unions would hold seats on the ATC Corporation's board of directors.[8]

The proposed governance structure expressly forbids controllers' and pilots' union officials from holding positions on the ATC Corporation board.[9] Instead, stakeholders, including controllers' and pilots' unions, will be able to nominate individuals to represent them on the board, but nominees may not have any direct ties to the stakeholder groups.

Myth 4: Unions would have an outsized influence on the ATC Corporation's board of directors.[10]

The proposal calls for a 13-seat board, on which union representation would be limited to just two seats. The board is to be governed by directors with a fiduciary duty to the ATC Corporation. Directors may not be directly affiliated with any stakeholder they represent. The controllers' union is granted just one seat, as are the commercial pilots' unions collectively. Airlines, both passenger and cargo, are granted a total of three. The Secretary of Transportation is granted two. And noncommercial general aviation, business aviation, airports, and the CEO of the ATC Corporation each have one seat. These 11 members then select two additional at-large members. This is similar to the composition of Nav Canada's board of directors, where it has not presented any governance problems.[11]

Myth 5: Potential union shenanigans will put taxpayers on the hook for ATC Corporation bailouts.[12]

Some have compared the proposed ATC Corporation to Amtrak and the United States Postal Service, warning that inefficient union practices risk driving the corporation into a similar situation requiring annual congressional appropriations or bailouts to keep it afloat. This is inapt. The nonprofit congressionally chartered ATC Corporation would be much more like a utility co-op than Amtrak (of which the federal government owns all preferred shares) or the Postal Service (an independent federal agency). But Section 90304 of the bill specifically provides:

> (a) Non-Federal Entity.—The Corporation is not a department, agency, or instrumentality of the United States Government, and is not subject to title 31.
> (b) Liability.—The United States Government shall not be liable for the actions or inactions of the Corporation.
> (c) Not-For-Profit Corporation.—The Corporation shall maintain its status as a not-for-profit corporation exempt from taxation under the Internal Revenue Code of 1986.
> (d) No Federal Guarantee.—Any debt assumed by the Corporation shall not have an implied or explicit Federal guarantee.

In fact, a primary purpose of these reforms is to take air traffic control out of the congressional appropriations process. Bailout fears are unwarranted and comparisons to Amtrak and the Postal Service are off the mark.

Myth 6: Controllers' union binding arbitration constitutes a radical departure from the status quo.[13]

It is true that controllers would have binding arbitration under the proposal, just as they do in Canada.[14] However, this is already the status quo at the FAA. The main difference claimed by critics is that the FAA can now impose a contract if negotiations with the union hit an impasse.[15] This is incorrect, as the 2012 FAA reauthorization eliminated that power.[16] Prior to 2012, the last time the power was exercised was under the George W. Bush administration, and it was reversed less than three years later by the Obama administration.[17] The politicized nature of this tool is what made it so ineffective when it actually existed.

Furthermore, arbitration board selection is hardly dominated by union interests. Under the 21st Century AIRR Act, the union and management would each select one arbitrator, and those two would then select a third arbitrator from a preselected list of candidates recommended by both management and the union.[18] As noted, the bill would keep in place a current prohibition on strikes—a prohibition not found anywhere else in the private sector.

* * *

Myths about the effects of the 21st Century AIRR Act on labor-management relations should not stand in the way of reforms that offer dramatic improvements to the air traffic control system, U.S. air travel, and the economic and social benefits that a healthy air transportation system promises.

Notes

[1] 21st Century Aviation Innovation, Reform, and Reauthorization Act, H.R. 2997, 115th Congress (2017).
[2] Diana Furchtgott-Roth, "Privatize Air-Traffic Control? Not if It's a Union Giveaway," *National Review*, February 17, 2016, http://www.nationalreview.com/article/431458/air-traffic-control-union-giveaway.
[3] James Sherk, "Union Giveaways in Air Traffic Control Bill Set a Bad Precedent," Daily Signal, May 13, 2016, http://dailysignal.com/2016/05/13/union-giveaways-in-air-traffic-control-act-set-a-bad-precedent/.
[4] *Bangerter v. Department of Transportation, Federal Aviation Administration*, 16 M.S.P.R. 670 (1983).
[5] *Patent Office Professional Association v. Federal Labor Relations Authority*, 26 F.3d 1148 (D.C. Cir. 1994).
[6] *Patent Office Professional Association v. Federal Labor Relations Authority*, 873 F.2d 1485 (D.C. Cir. 1989).
[7] *Bross v. Department of Commerce*, 94 M.S.P.R. 662 (2003), aff'd, 389 F.3d 1212 (Fed. Cir. 2004).
[8] National Right to Work Committee, "Out of the ATC Frying Pan, Into the Fire?" *National Right to Work Newsletter*, June/July 2016, p. 5, https://nrtwc.org/nl/nl201606.pdf.
[9] To be codified at 49 U.S.C. § 90307(b).
[10] Andrew Langer, "Air traffic control 'privatization' is anything but," *The Hill*, February 6, 2017, http://thehill.com/blogs/congress-blog/politics/318019-air-traffic-control-privatization-is-anything-but.
[11] Nav Canada, "Corporate Governance," Nav Canada website, last accessed June 20, 2017, http://www.navcanada.ca/EN/about-us/Pages/governance.aspx.
[12] Furchtgott-Roth, "Don't let air-traffic control become another Amtrak," MarketWatch, June 14, 2016, http://www.marketwatch.com/story/dont-let-air-traffic-control-become-another-amtrak-2016-06-14.
[13] Sherk.
[14] R.S.C., 1985, c. L-2, § 57, *available at* http://laws-lois.justice.gc.ca/eng/acts/L-2/page-11.html.
[15] Sherk.
[16] FAA Modernization and Reform Act of 2012, Pub. L. 112–95, 126 Stat. 109, § 601.
[17] Eric Yoder, "FAA, controllers extend contract for 4 years," *The Washington Post*, March 15, 2012, https://www.washingtonpost.com/blogs/federal-eye/post/faa-controllers-extend-contract-for-4-years/2012/03/15/gIQAw7gcES_blog.html.
[18] To be codified at 49 U.S.C. § 91107(b).