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THE EMPLOYER'S DUTY TO BARGAIN OVER LAY-OFFS IN THE AIRLINE INDUSTRY: HOW THE COURTS HAVE DISTORTED THE RAILWAY LABOR ACT

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I. INTRODUCTION

SINCE THE enactment of the Airline Deregulation Act of 1978,¹ labor struggles in the airline industry have frequently made front page headlines. These problems have persisted for almost ten years, and there is no sign of imminent resolution.² In fact, the airlines have been hit by many events which strain labor relations, including strikes, bankruptcies,³ and mergers.⁴ One example of this turbulence was an attempt by several carriers to survive fierce competition resulting from deregulation by lower-

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¹ Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended in 49 U.S.C. (1982)).

² The 1989 pilot's strike at Eastern Airlines ("Eastern") is just the most recent example of this persistent phenomenon. See Shribman, *Classic Struggle—Strike at Eastern Tests Ability of Big Labor to Re-Establish Itself*, Wall St. J., March 6, 1989, at 1, col. 1; see also Bradsher, *Eastern's Pilot Union Ends Strike*, N.Y. Times, Nov. 23, 1989, at D1, col. 1 (describing the bitterness of this continuing nine month strike).

³ See Papaioannou, *The Duty to Bargain and Rejection of Collective Agreements by a Bankrupt Airline: Trying to Reconcile the R.L.A. with the Bankruptcy Code*, 18 TRANSP. L.J. — (1990) (page number unavailable at press time).

⁴ See *Eastern Strike Prompting Worry on Deregulation*, N.Y. Times, Mar. 23, 1989, at 26 (discussing how 19 major air carriers operating before the 1978 deregulation merged into eight carriers by 1988, controlling 92.8% of the market).

ing labor costs and reducing labor forces.⁵ Not surprisingly, airline labor unions responded by demanding collective bargaining. Unfortunately, the resulting disputes between airlines and their unions were not settled through collective bargaining, but were "resolved" in the courts.⁶

The primary issue facing the courts in this litigation was whether the Railway Labor Act (RLA or the Act),⁷ governing labor relations in the airline and railroad industries, imposes a duty on employers to bargain over employee lay-offs. While the duty to bargain over lay-offs has been thoroughly discussed by legal scholars in the context of the National Labor Relations Act (NLRA),⁸ a lack of familiarity with the RLA among legal scholars has resulted in a shortage of literature on the subject.⁹ In fact, this lack of familiarity is also apparent in the courts. For example, courts tend to apply NLRA principles in RLA cases without realizing the differences between the two statutes and the problems such a misapplication of principles creates.¹⁰

⁵ See Cassell & Spencer, *Airline Labor Relations Under Deregulations* [sic]: *Oligopoly to Competition—And Return?* (paper published by the Transportation Center of Northwestern University 1986); Cappelli, *Competitive Pressures and Labor Relations in the Airline Industry*, 24 INDUS. REL. 316 (1985).

⁶ Katz, *The American Experience Under the Airline Deregulation Act of 1978—An Airline Perspective*, 6 HOFSTRA LAB. L.J. 87, 97 (1988).

⁷ 45 U.S.C. §§ 151-163 (1982).

⁸ 29 U.S.C. § 151 *et seq.* (1982); see P. MISCIMARRA, *THE NLRB AND MANAGERIAL DISCRETION: PLANT CLOSINGS, RELOCATIONS, SUBCONTRACTING, AND AUTOMATION* (1983); Harper, *Leveling the Road from Borg Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982); Sockell, *The Scope of Mandatory Bargaining: A Critique and a Proposal*, 40 INDUS. & LAB. REL. REV. 19 (1986); Comment, *Major Operational Decisions and Free Collective Bargaining: Eliminating the Mandatory/Permissive Distinction*, 102 HARV. L. REV. 1971 (1989).

⁹ In fact, there seems to be only two articles, both expressing identical views, available for review on the subject: Campbell & Hiers, *Management Decisions to Close or Sell Part or All of the Enterprise Under the Railway Labor Act—The Air Carrier's Dilemma*, 14 EMPL. REL. L.J. 327 (1988); McDonald, *Airline Management Prerogative in the Deregulation Era*, 52 J. AIR L. & COM. 869 (1987). (During publication of this article, the following Comment addressing similar issues was published: Comment, *Merging the RLA and the NLRA for Eastern Air Lines: Can It Fly?* 44 U. MICH. L. REV. 539 (1989)).

¹⁰ See *infra* note 248 and accompanying text.

The purpose of this article is to analyze the air carriers' duty to bargain over lay-offs with their unions under the RLA and to suggest solutions consistent with the statute's purpose and structure. The first part of this article presents relevant provisions of the RLA. The second part discusses applicable case law that developed in the three decades between the two major Supreme Court decisions on the issue of bargaining over lay-offs under the RLA.¹¹ Case law, however, has not provided coherent and clear answers to the interpretational problems the RLA's provisions create. Thus, the final portion of this article will suggest some guidelines for cases likely to arise in the future.

II. RELEVANT PROVISIONS OF THE RAILWAY LABOR ACT

Embodying an agreement reached on a national level by railroad employers and their unions, the RLA was enacted in 1926 by an almost unanimous Congress.¹² This agreement resulted from the desire by both the carriers and the unions to put an end to the labor strife that had occurred in the early 1920's.¹³ In addition, both parties were dissatisfied with the Labor Board, created in 1920, which had the authority to both mediate and arbitrate the railroads' labor disputes.¹⁴ The RLA embodied the belief that both parties should try to reach a solution to their disputes without resorting to economic warfare and without the threat of binding arbitration.¹⁵ The act was

¹¹ See *infra* notes 80-96, 212-246 and accompanying text.

¹² Railway Labor Act, Pub. L. No. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-163 (1982)). For the history of railroad labor relations at the beginning of this century and the steps taken to enact the RLA, see Rehmus, *Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airlines Industries* in NATIONAL MEDIATION BOARD, *THE RAILWAY LABOR ACT AT FIFTY 1* (C. Rehmus ed. 1976) [hereinafter RLA AT FIFTY]; see also Wilner, *The Railway Labor Act: Why, What, and For How Much Longer, Part I*, 55 TRANSP. PRAC. J. 242 (1988).

¹³ See RLA AT FIFTY, *supra* note 12.

¹⁴ *Id.*

¹⁵ *Id.*

amended in 1936 to include the airlines.¹⁶ One of the main concerns of Congress, as reflected in the stated purposes of the RLA, was the maintenance of an undisturbed transportation system. This aim was to be achieved through the peaceful settlement of labor disputes. Thus, the Act was intended to aid in settling "disputes concerning rates of pay, rules, or working conditions"¹⁷ as well as "disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions."¹⁸

Regardless of which type of dispute is involved, the RLA imposes a duty "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 agreements or otherwise."¹⁹ A later amendment to the Act provided that "[u]pon receipt of such certification [that a particular union represents a group of employees] the carrier shall treat the representative so certified as the representative of the craft or class for the purpose of this Act."²⁰ Both parties, therefore, are required not only to bargain when they disagree over a certain issue, but also to "exert every reasonable effort" to reach an agreement. The United States Supreme Court has held this obligation legally enforceable.²¹ Generally, however, courts have abstained from determining whether this duty was fulfilled. This abstention is in deference to the judgment of the mediation agency, the National Mediation Board (NMB), which can

¹⁶ See Comment, *Airline Labor Policy, The Stepchild of the Railway Labor Act*, 18 J. AIR L. & COM. 461 (1951).

¹⁷ 45 U.S.C. § 151(a)(4).

¹⁸ *Id.* § 151(a)(5).

¹⁹ *Id.* § 152(1) (This language is certainly stricter than the "good faith" bargaining requirement of the NLRA. 29 U.S.C. § 151 *et. seq.* (1982). This difference has been, for the most part, unnoticed by courts and commentators.); see also *id.* § 152(2). "All disputes between carrier or carriers and its or their employees shall be considered, and, if possible, with all expedition, in conference" *Id.*

²⁰ *Id.* § 152(9). This certification is issued by the National Mediation Board, a three member agency, with the authority, *inter alia*, to conduct representation elections. *Id.*

²¹ *Chicago & N. W. Ry. v. United Transp. Union*, 402 U.S. 570 (1971).

prolong mediation efforts when it sees that one party is bargaining inappropriately.²²

Before examining the other provisions of the Act, a look at the broad language used in defining the extent of the duty to bargain (a duty called the heart of the RLA by the Supreme Court)²³ is worthwhile. For example, the use of the phrase "all disputes" reflects broad coverage.²⁴ Other indications also strengthen the impression that the duty was to have a broad scope. The Congressional testimony of the unions' counsel indicates that "it is made the duty of the parties . . . to settle all disputes, whether arising out of obligations of such agreements or otherwise in order to avoid any interruption of interstate commerce."²⁵ Identical language is used in the Senate's Interstate Commerce Committee Report which states that one of the objectives of the Act was "[t]hat any and all disputes shall first be considered in conference between the parties directly interested."²⁶

This far reaching language reflected nothing more than the existing railroad industry practice of extensive collective bargaining.²⁷ In fact, as one observer noted, the extent to which collective bargaining was required was not a controversial issue and was one Congress did not conclusively address,²⁸ which is indicative of the broad scope of the duty to bargain. The courts have generally continued

²² For a discussion of the role of the NMB, see *infra* notes 36-39 and accompanying text.

²³ *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969).

²⁴ 45 U.S.C. § 153.

²⁵ *Hearings on Railroad Labor Disputes (H.R. 7180) Before the House Committee on Interstate and Foreign Commerce*, 69th Cong., 1st Sess. 91 (1926) [hereinafter *Hearings*]. In evaluating the weight of this testimony, the Supreme Court noted that, since the RLA was the enactment of an agreement between management and unions, "the statements of the spokesmen for the two parties made in the hearings on the proposed Act are entitled to great weight in the construction of the Act." *Chicago & N. W. Ry.*, 402 U.S. at 576.

²⁶ S. REP. NO. 222, 69th Cong., 1st Sess. 2 (1926), quoted in Weber, *Public Policy and the Scope of Collective Bargaining*, 13 LAB. L.J. 49, 56-57 (1962).

²⁷ See Weber, *supra* note 26, at 52.

²⁸ *Id.* at 56.

this liberal approach toward the duty to bargain collectively. Not until the acute financial problems and deep change in the political climate of the 1970s and 1980s did some courts take a different approach by finding certain disputes non-bargainable, as discussed in detail below. Although stating that both parties are under an obligation to bargain in any kind of dispute arising between them, the statute differentiates between the settlement procedures that the parties are to follow when negotiations fail. This differentiation is made in accordance with the nature of the dispute involved. On the one hand are disputes concerning "changes in rates of pay, rules, or working conditions";²⁹ on the other hand are those disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, and working conditions."³⁰ At first glance, this distinction might appear to correspond to the classical distinction between "disputes of interests" and "disputes of rights;"³¹ the courts, however, have categorized the disputes as "major" and "minor."³² As will become apparent throughout this article, this distinction is not clear-cut. Rather it is vague, wavering, and overlapping.

A. Major Disputes

For major disputes, the Act provides a very comprehensive framework designed to postpone strikes until every opportunity for reaching an agreement has been ex-

²⁹ 45 U.S.C. § 155(1)(a).

³⁰ *Id.* § 153(1)(i).

³¹ See Comment, *supra* note 16, at 468. The problem with this analogy is that although it is correct as far as grievances are concerned, it fails to adequately address the issue of interpretation. As discussed in section II, some courts give such a broad reading to "interpretation of a contract" that they characterize as arbitrable conflicts those disputes which are actually conflicts of interest, not rights, and thus subject to bargaining, not arbitration. See also Note, *Labor Law-Railway Labor Act—Major and Minor Disputes*, 31 J. AIR L. & COM. 371, 373 (1965). "Generally when the courts have been forced to refer to the bargaining agreement in order to reach their decisions, they have classified a controversy 'minor.'" *Id.*

³² See, e.g., *Elgin, Joliet. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945).

hausted. First, the Act imposes upon the parties a duty to give a thirty-day advance notice of any intended changes to existing collective agreements.³³ This thirty-day period is the first of three such periods during which the parties are not allowed to implement any change to existing agreements or resort to self-help.³⁴

Within these thirty days, the two parties must engage in the negotiations discussed above.³⁵ If unable to reach an agreement, either party may invoke the services of the National Mediation Board (NMB), authorized to mediate between disputing parties subject to the RLA.³⁶ The NMB, which may also intervene on its own initiative, will "use its best efforts, by mediation, to bring . . . [the parties] to agreement."³⁷ The second stage during which neither party may change the existing status quo is during the period in which the NMB is trying to achieve a solution through mediation.

The courts have ruled that the NMB has almost absolute discretion to determine how long its mediation services will be offered and whether an impasse has been reached, rendering further mediation meaningless.³⁸ Thus, the process of mediation, combined with the obli-

³³ 45 U.S.C. § 156. The Supreme Court has ruled that these changes may also involve a past practice in the workplace that has been long followed by the employer and accepted by the employees. Thus, if an employer's decision is consistent with the terms of the collective bargaining agreement, but is contrary to the established practice of the company, the employer must follow the "major dispute" procedures established in the RLA. *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 143 (1969). For a discussion of the bargainable issues related to maintaining stable employment conditions, see *infra* notes 85-92 and accompanying text.

³⁴ *Jacksonville*, 394 U.S. at 378. "While the dispute is working its way through these [three] stages, neither party may unilaterally alter the status quo." *Id.*

³⁵ For a discussion of bargaining requirements, see *supra* notes 19-22 and accompanying text.

³⁶ 45 U.S.C. § 154.

³⁷ *Id.* § 155(1).

³⁸ See *Bad Faith Finding Held Necessary for Court Order Ending Mediation*, Daily Lab. Rep. (BNA) No. 219, at A-5 (Nov. 15, 1989) ("Absent a finding that the National Mediation Board acted in 'patent official bad faith' . . . a federal court has no authority to review the board's decision."); see also *International Ass'n of Machinists & Aerospace Workers v. NMB*, 425 F.2d 527 (D.C. Cir. 1970).

gation of both parties to maintain the status quo, may become a strong tool in the hands of the NMB for delaying the outbreak of a strike and the implementation of an employer's decision to alter the collective agreement or past practice.³⁹

Understanding the implications which a prolonged status quo has upon labor relations is important. Although this mechanism seems *prima facie* neutral, in fact it is not. In periods of economic expansion, when the main focus of bargaining is on the percentage of profits potentially going into wage increases, the status quo and prolonged mediation work in favor of the employer, substantially delaying wage increases and preventing strikes at a time when a strike might be quite effective. By contrast, in recession periods, when the focus of bargaining is on possible concessions the employer might gain from employees in order to survive the crisis, the status quo operates in favor of the unions because the employer cannot immediately implement his contemplated cut in wages. Neither does the prohibition of strikes greatly disadvantage the unions because in times of economic recession and losses to the company, the strike weapon is of relatively limited effectiveness.⁴⁰ This latter scenario was prevalent in the airline industry in the 1980s, as bargaining at that time generally involved wage concessions.⁴¹ The NMB's tactic of prolonging negotiations certainly upset the management of several airlines eager to unilaterally implement wage cuts opposed by the unions.⁴²

³⁹ It is estimated that the average length of mediation is seven to eight months. See Burgoon, *Mediation Under the Railway Labor Act*, in RLA AT FIFTY, *supra* note 12, at 79.

⁴⁰ When a company is in poor economic shape, the union that considers going on strike confronts a very difficult problem: its members might not participate, fearing that the firm will collapse. Even if the strike is successful in terms of membership support, the strike may lead the company to a financial disaster to the detriment of both the union and its members. The recent strike at Eastern exemplifies this point. See Bradsher, *supra* note 2; cf. Bellace, *Employment Protection in the EEC*, 20 STAN. J. INT'L L. 413, 415-16 n.13 (1985).

⁴¹ Cassell & Spencer, *supra* note 5, at 4-5.

⁴² The latest and more publicized example is that of Eastern's negotiations with the machinists' union, when the mediation lasted for more than a year.

When the NMB declares that its mediation efforts have failed, the Board will proffer arbitration.⁴³ The parties, however, have no obligation to accept this proposal.⁴⁴ It is curious that while arbitration law is designed to prevent labor unrest, mutual agreement of the parties is required. The RLA was the embodiment of a national collective agreement in the rail industry, in which both parties were concerned with preserving their autonomy against compulsory government intervention.⁴⁵ The parties were willing to accept mediation and impose upon themselves strict status quo requirements, as each feared the historically violent consequences of labor strife. They did not, however, want the very terms of their agreement to be imposed by a governmental body.

If arbitration is not accepted by either party, as is usually the case in the airline industry,⁴⁶ the Board notifies the parties of its mediation failure and imposes a third thirty day status quo period.⁴⁷ During this period no changes are allowed in the "rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."⁴⁸ Only after this period expires can economic warfare begin if an impasse still exists. Practice shows that this thirty day period is crucial, because efforts to reach agreement are generally made until the last moment of the deadline.⁴⁹

⁴³ 45 U.S.C. § 157(1).

⁴⁴ See generally *Jacksonville*, 394 U.S. at 379 (Supreme Court discussion on unsuccessful attempts by Congressional members to impose compulsory arbitration).

⁴⁵ For the testimony of Donald R. Richberg, counsel for the unions, see *Hearings*, *supra* note 25, at 15.

⁴⁶ For a rare and recent exception, see *T.W.U. Flight Attendants Move Toward New Contracts with Pan Am World Airways*, Daily Lab. Rep. (BNA) No. 195, at A-9 (Oct. 7, 1988).

⁴⁷ 45 U.S.C. § 155(1).

⁴⁸ *Id.*

⁴⁹ If, however, the NMB finds that the dispute "threaten[s] substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service" it is required to notify the President. 45 U.S.C. § 160. The President "may . . . in his discretion, create a board to investigate and report respecting such dispute." *Id.*

From the date such an emergency board is created until 30 days after it has submitted its report to the President, the parties are precluded from making uni-

Only after these procedures have been exhausted may a strike begin. Interestingly, the RLA does not explicitly protect the right of employees to resort to strike, but no doubt exists that this right is implied by the statute. For example, the Supreme Court in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*⁵⁰ found an implicit protection of the right to strike:

Nowhere does the text of the Railway Labor Act specify what is to take place once these procedures have been exhausted without yielding resolution of the dispute. Implicit in the statutory scheme, however, is the ultimate right of the disputants to resort to self-help—"the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration."⁵¹

Obviously, this law severely restricts the right to strike, at least as interpreted by the courts.⁵² The unions cannot strike pending resolution of major disputes, which may take several months. This was the price unions had to pay in order to impose on management prolonged status quo requirements during major disputes.⁵³ The RLA seems to

lateral changes "in the conditions out of which the dispute arose." *Id.* The report of the emergency board is not binding upon the parties; its purpose is mainly to inform the public, which in turn may exercise pressure upon the parties to reach an agreement. This intention, however, of the Act's drafters has not been fulfilled and the reports of the emergency board often have been ignored. See Cullen, *Emergency Boards Under the Railway Labor Act*, in RLA AT FIFTY, *supra* note 12, at 158-62.

No such board has been created in the airline industry since 1966. Presumably, this is a reflection of the belief that given the multitude of carriers, a strike affecting only an individual carrier does not create an emergency situation.

⁵⁰ 394 U.S. at 369.

⁵¹ *Id.* at 378 (quoting the court in *Florida E. Coast Ry. v. Brotherhood of R.R. Trainmen*, 336 F.2d 172, 181 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1968)).

⁵² See, e.g., *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952) (ruling that the RLA takes precedence over the Norris-LaGuardia Act, which seriously limited the availability of injunctions against strikes).

⁵³ Under the RLA, however, the unions have the weapon of the sympathy strike, something not available under the NLRA. See *Burlington N. R.R. v. Brotherhood of Maintenance*, 481 U.S. 429 (1987) (wherein the Supreme Court affirmed this right). The public's hostility against sympathy strikes (a hostility more than apparent in Eastern's sympathy strikes) casts strong doubt on the actual availability of this weapon for unions in the airline industry. Additionally, throughout the Eastern Air Lines litigation, lower courts eagerly issued temporary injunctions against Eastern's threatened sympathy strikes, consistent with public, rather than the

have reached a delicate balance by, on the one hand, restricting the right to strike and, on the other hand, limiting the employer's ability to implement its decisions. Whatever one might say about the wisdom of such restrictions, the courts, in their interpretation of the law, should not destroy this delicately balanced scheme by giving preference to management's need for speedy implementation of its decisions, thereby destroying the status quo obligations. The Act does not favor the needs of management; it restricts both parties' freedom of action. This mutuality of obligation should be respected by the courts; unfortunately, however, this is not always the case.

B. *Minor Disputes*

Legislative history indicates that minor disputes were considered to be of lesser importance because they present a smaller threat to industrial peace.⁵⁴ The Act, therefore, provides for different procedures in this context.

The RLA established the National Adjustment Board for the purpose of settling minor disputes.⁵⁵ Alternatively, however, the parties could create their own "system, group, or regional boards of adjustment" for minor dispute settlement.⁵⁶ The alternative has been the choice of the airline industry. For example, although the 1936 RLA amendments provided for the creation of a National Air Transportation Adjustment Board when deemed necessary by the NMB,⁵⁷ this has never been done; settlement

Supreme Court's, opinion. See, e.g., *ALPA v. Eastern Air Lines, Inc.*, 703 F. Supp. 962 (D.D.C.), *rev'd*, 863 F.2d 891 (D.C. Cir. 1988).

⁵⁴ See *Hearings*, *supra* note 25, at 12-13. "The minor disputes are technical disputes," as opposed to major disputes which concern "fundamental economic differences . . . and where serious differences are likely to develop." *Id.*

⁵⁵ 45 U.S.C. § 153(1). The Board consists of "thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title." *Id.* § 152(1)(a).

⁵⁶ 45 U.S.C. § 153(2).

⁵⁷ *Id.* § 183. "The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board" *Id.*

has been left to adjustment boards created by collective agreements at the individual carrier level.

The RLA does not provide the same extensive status quo requirements for minor disputes as it does for major disputes. Minor disputes arise when one party misinterprets provisions of the agreement. Thus, since the issue turns on contract interpretation, each party believes it is complying with the terms of the agreement and neither is aware of any violations. A status quo requirement is only useful if a violation can be detected and therefore enjoined.

Another reason for the lack of status quo obligations in this context is that the drafters of the Act did not consider minor disputes serious enough to give rise to strikes and, therefore, found it unnecessary to provide for "cooling off" periods.

The courts, however, have ruled that, while strikes over minor disputes are prohibited,⁵⁸ management is not prevented from implementing a decision that gives rise to a minor dispute.⁵⁹ Thus, the courts have created an imbalance that was probably not intended by the drafters of the Act. To resolve this inequity, the Supreme Court has ruled that courts have discretion to issue a status quo injunction against the employer when the threat of irreparable harm to employees exists.⁶⁰ Courts, however, have generally been reluctant to do so.⁶¹

III. THE CASE LAW

An examination of recent case law development con-

⁵⁸ See *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 34-36, *reh'g denied*, 353 U.S. 948 (1957) (discussing minor disputes).

⁵⁹ See, e.g., *Railway Labor Executives Ass'n v. Consolidated Rail Corp.*, 845 F.2d 1187 (3d Cir. 1988), *rev'd on other grounds*, 109 S. Ct. 2477 (1989) (court had no jurisdiction under the RLA to handle a minor dispute involving the railroad's unilateral implementation of drug testing).

⁶⁰ *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas R.R. Co.*, 363 U.S. 528 (1960).

⁶¹ For a discussion of courts' reluctance to issue preliminary injunctions in minor disputes, see *infra* text accompanying notes 125-127.

cerning the duty to bargain over lay-offs under the RLA is even more important than analyzing the specific provisions of the statute. The vagueness of the statutory term "working conditions" and the fact that the RLA is over sixty-five years old has left the courts a wide margin for interpretative "ventures" when construing the law. Not by chance have the most recent decisions almost ignored the language and legislative history of the statute and, instead, depended entirely on case law.

There are two basic questions which the courts must address when adjudicating a dispute involving the duty to bargain over lay-off decisions. First, the court must decide whether the managerial decision which caused the dispute is covered, as a matter of law, by the concept of managerial prerogative. If so, there is no duty to bargain over the lay-off decision. This question is not answered by reference to the particular contractual relationship between the parties but rather, depends on the particular labor statute involved and the case law interpreting it.

If a certain managerial decision is not covered by managerial prerogative as a matter of law, the court must address the possibility that, under the particular collective agreement and/or established practice at the moment the dispute arose, the employer had the right to implement his decision without any bargaining with the union. This issue involves an interpretation of the contractual relationship between the parties and falls under the jurisdiction of the arbitration boards. However straightforward this might seem in theory, it is much more complicated in practice. If an employer is allowed to characterize a dispute surrounding a management decision as one involving interpretation of the contract, he will be able to eliminate collective bargaining from a whole range of issues. This development is unwarranted by the RLA and, as discussed below, goes deep into the heart of the problem of distinguishing major and minor disputes.

Crucial to the understanding of case law development in this area is a recognition of the significant conse-

quences of characterizing a dispute as major or minor. If the dispute is major, the employer cannot implement his decision until the lengthy procedures of bargaining and mediation required under the RLA are exhausted.⁶² By contrast, if the dispute is minor, the employer is free to proceed with his plans and the union has no right to strike.⁶³

The employer's obligation to refrain from proceeding with his plans while he bargains with the union is not unique to the RLA. Indeed, it is well settled that under the NLRA employers cannot change existing working conditions during negotiations with the union until an impasse is reached.⁶⁴ What is unique, however, is the great amount of time bargaining may consume under the auspices of the NMB.⁶⁵ Equally important is the broad definition given to employer status quo obligations in major disputes under the RLA.

The Supreme Court addressed the issue of status quo obligations in *Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union*.⁶⁶ Although not addressing a lay-off situation, the case is very important because of its status quo definition. In *Toledo*, a railroad's decision to change "outlying work assignments" threatened to inconvenience employees.⁶⁷ The union protested the railroad's decision by invoking the "major dispute" settlement pro-

⁶² 45 U.S.C. § 155(1)(a) (1982).

⁶³ For a discussion of the employee's options in minor disputes, see *supra* notes 54-57 and accompanying text.

⁶⁴ 29 U.S.C. 158(a)(4) (1982). See also *NLRB v. Katz*, 369 U.S. 736 (1962) (Court held that employer violated the duty to bargain collectively under the NLRA by unilaterally implementing wage changes and sick-leave benefits, as well as other merit awards).

⁶⁵ See *Brotherhood of Ry. & S.S. Clerks v. Florida E. Coast Ry.*, 384 U.S. 238 (1966). The court noted that "the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Id.* at 246, see also *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149 (1969) (Mediation under RLA may become "an almost interminable process").

⁶⁶ 396 U.S. at 142.

⁶⁷ *Id.* at 143-44. The new assignments would result in some employees reporting to work 35 miles from their eventual destination. *Id.* at 144.

cedures of the RLA. After the parties failed to reach an agreement on their own, the case was referred to the NMB, where it was determined that the employer was not prohibited from making such assignments. The union responded with a request for bargaining, attempting to change the collective agreement in such a way that the employer would be prohibited from making such assignments. With the assistance of the NMB, bargaining commenced. While bargaining was in process, however, the employer unilaterally implemented the disputed work assignments.⁶⁸ The dispute was then taken to federal district court where the railroad was enjoined from establishing new work assignments while bargaining was pending.⁶⁹

In an appeal before the Supreme Court, seven justices ruled that, as a matter of law, an employer was not allowed to make unilateral changes before the bargaining process was exhausted. Justice Black, writing for the majority, defined the status quo obligations of the employer as a duty "to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute."⁷⁰ In his reasoning, Justice Black emphasized the Act's purpose of preventing strikes,⁷¹ and found that its status quo provisions "are central to its design."⁷² He explained that the status quo's immediate effect is to prevent strikes and provide time for peaceful and productive resolutions to labor disputes.⁷³ Justice Black further added that the Act is useful in forcing a compromise be-

⁶⁸ *Id.* at 145. The railroad determined that work crews could be taken from site to site by cab. *Id.*

⁶⁹ *Id.* at 146-47.

⁷⁰ *Id.* at 153.

⁷¹ *Id.* at 148. Strikes were considered a wasteful interruption of interstate commerce. *Id.*

⁷² *Id.* at 150. The court concluded that the immediate effect of the Act was to prevent strikes and actions leading to strikes. *Id.*

⁷³ *Id.* In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational

tween two feuding parties.⁷⁴

According to the Supreme Court, by implementing the very decision that was the focus of negotiations, the employer defeated the primary goal of the Act.⁷⁵ Thus, the Court concluded that the employer would be able to make changes only if such changes had occurred for a length of time such that they had become part of accepted working conditions, which was not the case in the *Toledo* dispute.⁷⁶

The importance of the *Toledo* case is difficult to exaggerate. It established the rule that even if the employer is not prevented by a particular agreement to make and implement a certain decision, he is prohibited from doing so once bargaining arises concerning the disputed decision.⁷⁷ Only if, when bargaining begins, it has already become an established practice for the employer to make such decisions without any union reaction,⁷⁸ may the employer freely proceed with his decision.

bargaining can occur, and permits public sentiment to be mobilized in favor of a settlement without a strike or lockout.

⁷⁴ *Id.* "[T]he power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce." *Id.*

⁷⁵ *Id.* at 154. The Court also felt that the resort to self help by one party would make the other party feel justified in similar actions. These events would frustrate the purposes of the Act even more. *Id.* As Justice Black explained,

When the union moves to bring such a previously uncovered condition within the agreement, it is absolutely essential that the status quo provisions of the Act apply to that working condition if the purpose of the Act is to be fulfilled. If the railroad is free at this stage to take advantage of the agreement's silence and resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. Only if both sides are equally restrained can the Act's remedies work effectively.

Id. at 155.

⁷⁶ *Id.* at 154. The Court concluded that unilateral changes by an employer were only possible if those changes "had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions." *Id.*

⁷⁷ In *Toledo* there was an arbitration award which said the agreement did not bar unilateral employer action. *Id.* at 146; see *supra* note 64 and accompanying text for a discussion on employer limitations on bargaining.

⁷⁸ But see Justice Harlan's dissent discussing the unlikelihood that the Act was meant to require two parties to remain at the same historical point merely because one does not wish to change. *Toledo*, 396 U.S. at 159-61 (Harlan, J., dissenting).

The implications of this decision are obvious. If the employer contemplates decisions which lead to lay-offs and the dispute created is characterized as major, *Toledo* dictates that he cannot implement his decision until the bargaining process is exhausted, unless the implementation of such unilateral decisions is a well established and accepted practice. Hence, one may easily understand the eagerness of employers to have courts characterize a dispute over a lay-off decision as minor.

A last point needs to be made before discussing litigation. The distinction between major and minor disputes is not coextensive with the distinction between mandatory and permissive subjects of bargaining found in NLRA case law. The latter distinction refers primarily to the issue of management prerogative and is determined by law. By contrast, the distinction between major and minor disputes takes for granted that a certain issue is, as a matter of law, a mandatory subject of bargaining. The question remaining is whether the issue is bargainable in the context of a particular contractual relationship.

Until recently, courts failed to address the issue of management prerogative under the RLA, focusing primarily on whether a dispute is major or minor. To the extent this approach implied the issue was, as a matter of law, amenable to bargaining, the airline unions were in a better position than their counterparts in industries covered by NLRA. Even if a dispute was found to be minor, nothing prevented the union from requesting bargaining over the issue once the collective bargaining period expired, since the issue was not precluded, by law, from bargaining. Only recently have courts, including the Supreme Court,⁷⁹ found management prerogative to preclude bargaining as a matter of law. The remainder of this section will discuss judicial treatment of these two separate issues

⁷⁹ See *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989) (finding no duty to bargain over management's decision to sell its assets). For a discussion of the case, see *infra* notes 212-261 and accompanying text.

and will draw some conclusions as to where the law regarding lay-off bargaining stands today.

A. Order of Railroad Telegraphers v. Chicago & North Western Railway.

The first Supreme Court cases dealing with other labor law controversies in the United States arose in the railway industry. The controversy concerning the duty to bargain over managerial decisions which reduce a company's labor force is no exception. In *Order of Railroad Telegraphers v. Chicago & North Western Railway*,⁸⁰ a railroad sought an injunction against a strike which was being organized by a union. The union, claiming that the company's plan to change the organization of its operations was outdated and economically wasteful, sought to amend the collective bargaining agreement with the proposal that "[no job] position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization."⁸¹ When management refused to discuss the proposed amendment, the union called for a strike. The company eventually sought a court injunction against the strike, claiming the union's proposal was not a bargainable issue.⁸²

In a five to four decision, the Supreme Court held that the strike was not enjoinable under the Norris-La Guardia Act because it supported a bargainable issue.⁸³ Justice Black, writing for the majority, said that the legislative history and the language of the RLA made it clear that courts should avoid intervening in labor disputes, as Congress, for this purpose, defined very broadly the issues subject to bargaining.⁸⁴ In determining whether the dispute was covered by the Act's definition of bargainable issues, Justice Black focused not on the nature of the managerial de-

⁸⁰ 362 U.S. 330 (1960).

⁸¹ *Id.* at 332.

⁸² *Id.*

⁸³ *Id.* at 340. Also, nothing the union requested would require the railroad to violate any law or the order of any public agency. *Id.*

⁸⁴ *Id.* at 335-36.

cision but rather on the union's demand. He said that the proposed amendment restricting management's power to implement lay-offs "plainly" referred to the "conditions of employment" of the railway employees and was therefore bargainable under the RLA.⁸⁵

More importantly, Justice Black explicitly rejected the lower court's finding that the amendment was an attempt to "usurp legitimate managerial prerogative" concerning the efficiencies of its operations.⁸⁶ Reviewing the RLA and the Interstate Commerce Act (ICA),⁸⁷ the majority found that the trend of legislation affecting employees had been to broaden the scope of mandatory bargaining subjects, and in any event, it was too late to begin saying that employees have no influence on matters affecting not only themselves, but also their employers and the public at large.⁸⁸ Emphasizing that the goal of both the RLA and ICA is not only a well functioning transportation system, but also fair and stable conditions of employment,⁸⁹ the Court found that the union's efforts to negotiate with the railroad were designed to achieve these aims.⁹⁰ The Court stressed that "[t]here is no express provision of law, and certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs."⁹¹

The majority, rejecting the railroad's contention that the dispute was minor, noted that the proposal at issue

⁸⁵ *Id.* at 336; see 45 U.S.C. § 152(1) (1982).

⁸⁶ *Chicago & N.W. Ry. v. Order of R.R. Telegraphers*, 264 F.2d 254, 259 (7th Cir. 1959), *rev'd*, 362 U.S. 330 (1960).

⁸⁷ 49 U.S.C. § 5(2)(f) (1982).

⁸⁸ *Telegraphers*, 362 U.S. at 338.

⁸⁹ *Id.* at 337.

⁹⁰ *Id.* at 339. The union's actions were "far from violating the Railway Labor Act" and rather complied with the "Act's command that employees as well as railroads exert every reasonable effort to settle all disputes 'concerning rates of pay, rules, and working conditions.'" *Id.*

⁹¹ *Id.* at 340. The union merely attempted to negotiate a contractual right. "Nothing the union requested would require the railroad to violate any valid law or the valid order of any public agency." *Id.*

concerned major changes affecting jobs covered by an existing collective bargaining agreement and did not merely involve the interpretation of that agreement.⁹² Justice Black made it clear that the distinction between major and minor disputes is directly related to the actual importance of the dispute; therefore, any dispute that has a significant impact on the employees' working environment can be classified as a major dispute.

The railroad's final argument was that the injunction should be granted to shut down inefficient stations, services and lines because such waste was contrary to the Congressional policy of fostering an efficient national transportation system.⁹³ The Court, in rejecting this argument, pointed out that Congress, by enacting legislation such as the Railway Labor and Norris-LaGuardia Acts, chose to promote collective bargaining with the knowledge that such a process could increase operating expenses.⁹⁴

The minority focused on the fact that the railroad had agreed to negotiate with the union regarding the effects of its decisions, particularly station abandonments, on employees.⁹⁵ In his dissenting opinion, Justice Whittaker noted that the proposed clause would require the employer to obtain the union's consent before laying off any employees and found that such a clause violates Congressional policy against allowing unions veto power over transactions favored by ICA.⁹⁶

The importance of this decision is apparent. It is the only Supreme Court decision addressing both the major/

⁹² *Id.* at 341.

⁹³ *Id.* at 342.

⁹⁴ *Id.* The Court stated that not all employee expenses constitute waste, and if the focus of these two acts is to reduce waste, Congress, not the courts, should enunciate the policy. *Id.*

⁹⁵ *Id.* at 357. The company agreed to discuss the following measures: (1) transferring affected employees to other jobs; (2) limiting the number of lay-offs to a certain number per year; and (3) paying supplemental unemployment benefits to the furloughed employees. *Id.* (Whittaker, J., dissenting).

⁹⁶ *Id.* at 354-55. This is a distinct and separate issue which is beyond the scope of this article since it does not affect the airline industry.

minor distinction dispute and management prerogative issues.⁹⁷ In both, the Supreme Court chose to protect the interests of the employees and require bargaining. The Court used a simple analysis to classify the managerial decisions involved,⁹⁸ and refused to discuss how labor costs affected the employer's decisions, or how close the decision was to the so-called core of managerial prerogative. Neither did the Court invoke the legalistic standards employed later by several courts in their efforts to distinguish between major and minor disputes.⁹⁹ The Court viewed the union's legitimate interest in protecting its members' jobs as sufficient justification to require bargaining under the RLA.¹⁰⁰ Relying on the reality of bargaining expansion, the Court stressed that the judiciary should refrain from intervening in the parties' relationship under the RLA. In acknowledging the trend of bargaining expansion, the Court indicated that the proper subjects of negotiation should not be determined by the courts but rather by the parties themselves and their respective bargaining positions at any given time. Finally, it is important to note that the Court remained unimpressed by the difficult economic conditions facing the company,¹⁰¹ noting that the problems caused by bargaining are a concern for Congress and not for the Court.¹⁰²

In the years following the 1960 *Telegraphers* decision, the

⁹⁷ Later cases dealt only with the management prerogative issue. For a discussion of one such case, *Pittsburgh & Lake Erie*, see *infra* notes 212-261 and accompanying text.

⁹⁸ For an example of the complex analysis utilized in subsequent Supreme Court decisions, see *First Nat'l Maintenance v. NLRB*, 452 U.S. 666 (1981).

⁹⁹ See *infra* notes 122-144.

¹⁰⁰ *Telegraphers*, 362 U.S. at 336 ("We cannot agree with the Court of Appeals that the union's effort to negotiate about the job security of its members 'represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations.'").

¹⁰¹ *Id.* at 346-47. North Western lost \$8,000,000 in the first quarter of 1956. As a result, the company streamlined its operations resulting in several "one-man" stations monitoring seldom-used routes. After studies revealed that most of these agents were receiving a full day's pay for 15-30 minutes of work, North Western moved to discontinue the "one-man" stations. *Id.*

¹⁰² *Id.* at 345.

world's economic, social and political climate changed. From 1970 through the early 1980s almost all nations, especially the United States, experienced a series of severe economic crises characterized by the increasing and persistent problem of unemployment. Labor relations were severely strained as employers' and employees' concerns increasingly diverged. On the one hand, companies were looking for more flexible working conditions and, where necessary, the freedom to reduce labor forces in order to adjust to external economic and technological strains. On the other hand, employees and their unions shifted their focus from wage increases to job security issues.¹⁰³ These conflicting goals led to turbulent labor relations, especially in labor intensive industries such as the airline industry.¹⁰⁴

Unlike the situation in other Western countries,¹⁰⁵ the dominant labor relations policy of the Reagan Administration was that of government abstention, a policy which, in an era of union weakness, actually favored the employers. Union weakness was clearly seen, not only by their rapid decline in membership, but also by their declining public approval, which bottomed out in the early eighties.¹⁰⁶

Not surprisingly, the jurisprudence of the Supreme Court also changed. This change first occurred in NLRA cases. In a 1965 case, *Textile Workers Union v. Darlington Manufacturing Co.*,¹⁰⁷ the Supreme Court unanimously ruled that an employer does not violate his obligations under the NLRA if he closes his entire business, even if he

¹⁰³ See *Waning Union Influence Cited as Factor Contributing to Wage Gain Moderation*, Daily Lab. Rep. (BNA) No. 150, at A-6 (Aug. 4, 1988).

¹⁰⁴ See *supra* note 5 and accompanying text for discussion of the airline industry structure.

¹⁰⁵ See generally Papaioannou, *The Duty to Bargain Over Lay-Offs in Other Western Countries: A View From an American Perspective*, 7 HOFSTRA LAB. L.J. 1 (1990).

¹⁰⁶ See M. GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE U.S.* 35-36 (1987). The public approval of unions during the mid-1980s was the lowest since World War II. *Id.*

¹⁰⁷ 380 U.S. 263 (1965).

acted with an anti-union animus.¹⁰⁸ The Court in *Darlington* held that, with respect to the National Labor Relations Act, an employer has the absolute right to terminate his business for any reason he sees fit.¹⁰⁹ The Court refused to adhere to the proposition that a businessman may not conduct his business operations as he desires, absent an unequivocal legislative intent or judicial precedent.¹¹⁰ The Court adopted the view of the Fourth Circuit Court of Appeals that, just as the Labor Relations Act cannot bind a person to employment, it cannot force a person to remain an employer. So long as the obligations of all employment contracts have been met, freedom of choice prevails.¹¹¹ Although the decision did not involve the duty to bargain but concerned only the anti-union animus of the employer, the court's reasoning is very important because it was used by the Supreme Court in 1989 to limit the duty to bargain under the RLA.¹¹²

The next step in this progression was seen in a 1981 case, *First National Maintenance Corp. v. NLRB*,¹¹³ in which the Court substantially reduced the scope of the duty to bargain over lay-offs. The case involved a partial closure of the employer's business. Justice Blackmun, writing for the majority, held that this type of managerial decision is not a mandatory subject of bargaining because the bal-

¹⁰⁸ *Id.* at 273-74. *Darlington* involved the liquidation of a textile mill in response to a successful union organization campaign. The NLRB deemed the closing illegal because of the anti-union animus of *Darlington*'s majority stockholder. *Id.* at 265-67. The fact that this rather conservative decision dates back to the liberal 1960s does not attenuate the impact of remarks just made regarding the facts that led to the conservative change of the Supreme Court's jurisprudence seen in the 1970s and '80s. Rather, it indicates, apart from social circumstances, that the judicial majority never were ardent advocates of the union movement.

¹⁰⁹ *Id.* at 268.

¹¹⁰ *Id.* at 270. With respect to the legislative intent, neither the Wagner Act nor the Taft-Hartley Act addressed the proposition that an owner may be prevented from terminating his business. The same conclusion holds true with respect to judicial precedent since no decision has addressed the particular issue. *Id.* See 29 U.S.C. § 141 *et seq.* (1982) and 29 U.S.C. § 151 *et seq.* (1982).

¹¹¹ *Id.* at 271.

¹¹² For the application of this reasoning in *Pittsburgh & Lake Erie*, see *infra* notes 231-232 and accompanying text.

¹¹³ 452 U.S. at 666.

ance of interests weighs against bargaining.¹¹⁴

In his reasoning, Justice Blackmun referred to management's need of speedy, secret, and flexible decision making, and he emphasized that the running of a profitable business depended, to an extent, on management's freedom from the constraints of the bargaining process.¹¹⁵ He added that if dialogue between the parties is likely to produce any satisfactory solutions, management will seek collective bargaining on its own initiative.¹¹⁶ If the dialogue is imposed by law, he argued, the union will have an unwarranted tool to delay the implementation of the decision, to the company's ultimate detriment.¹¹⁷ Finally, Justice Blackmun acknowledged that bargaining should take place regarding the effects of management's decisions on employees; he emphasized, however, that this bargaining should "be conducted in a meaningful manner and at a meaningful time."¹¹⁸

An evaluation of the *First National* decision and its impact on the case law of the 1980s concerning the duty to bargain over lay-offs under the NLRA is beyond the scope of this article.¹¹⁹ What must be noted here, however, is that the difference in approach between *Telegraphers* and *First National* is apparent. The Court's focus shifted from the employees' interests to the nature of management's

¹¹⁴ *Id.* at 679. The holding as well as the reasoning are clearly inconsistent with *Telegraphers*. Realizing this, Justice Blackmun distinguished *Telegraphers* by saying in a footnote that "the mandatory scope of bargaining under the Railway Labor Act and the extent of the prohibition against injunctive relief contained in [the] Norris-LaGuardia Act are not coextensive with the National Labor Relations Act and the [NLRB's] jurisdiction over unfair labor practices." *Id.* at 686 n.23.

¹¹⁵ *Id.* at 678-79.

¹¹⁶ *Id.* at 682. "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." *Id.*

¹¹⁷ *Id.* at 683. Mandatory bargaining "could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner nonrelated to any feasible solution the union might propose." *Id.*

¹¹⁸ *Id.* at 682; see Kohler, *Distinctions Without Differences: Effects Bargaining In Light of First National Maintenance*, 5 IND. REL. L.J. 402 (1983) (criticizing the vague distinctions between effects and decision bargaining).

¹¹⁹ For sources discussing the duty to bargain over lay-offs, see *supra* note 8.

decision. While *Telegraphers* opened the window for more active involvement by employees in the affairs of their company, *First National* signaled a return to the common-law era when management decisions were final and employees' only choice was to acquiesce or leave the company. In dicta characteristic of the majority's philosophy, Justice Blackmun said that "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."¹²⁰ As seen in *Pittsburgh & Lake Erie Railroad v. Railway Labor Executives' Association*,¹²¹ the Supreme Court eventually imported this philosophy into labor disputes governed by the RLA. Before examining this eventuality, however, the varied approaches of the lower courts in the period between *Telegraphers* and *Pittsburgh & Lake Erie* will be discussed.

B. *The Duty to Bargain Under the RLA in the Lower Courts:
The Road from Telegraphers to Pittsburgh & Lake Erie*

1. *Major/Minor Disputes*

Having seen the initial stance of the Supreme Court on the issue of the duty to bargain over lay-offs under the RLA, a closer look at the early case law on the subject is appropriate. Until the 1980s, there were few cases that explicitly addressed the limits of the duty to bargain over managerial decisions reducing company jobs. The problem under the RLA turned on the distinction between major and minor disputes.

As explained at the beginning of this article,¹²² the RLA distinguishes between two types of disputes, later characterized by the Supreme Court as "major" and "minor" disputes.¹²³ *Toledo* established that the RLA imposes sta-

¹²⁰ *First National*, 452 U.S. at 676.

¹²¹ 109 S. Ct. 2584 (1989).

¹²² For a discussion of the distinction between major and minor disputes, see *supra* notes 29-61 and accompanying text.

¹²³ *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945). For extensive excerpts from this decision, see *infra* notes 276-279 and accompanying text.

tus quo requirements upon employers while settlement procedures are in process.¹²⁴ To elaborate, courts have consistently held that in major disputes, employers will be enjoined from altering the status quo, and moreover, in cases involving preliminary injunctions, unions need not show irreparable harm.¹²⁵ It is, however, left to the discretion of the court whether or not to issue a status quo injunction, and an injunction will be issue only after the equities of the case have been considered.¹²⁶ Factors considered in determining issuance include the following: irreparable harm to the petitioning party, probability of success on the merits of the case, possible harmful effects to each party in both the event and failure of issuance, and finally, public interest.¹²⁷

Because the stakes are high, lower courts have generally been divided in their approach to the critical issue of distinguishing the two types of disputes. Apparently, however, most courts prefer to characterize a dispute as minor when the employer decision at issue has a significant impact on employees.

¹²⁴ *Toledo*, *supra* note 77 and accompanying text.

¹²⁵ See, e.g., *Southern Ry. v. Brotherhood of Locomotive Firemen*, 337 F.2d 127, 133-34 (D.C. Cir. 1964).

[W]e think that a showing of irreparable injury is not required before the instant status quo injunction may issue, particularly because the question before us is concerned with far more than the private rights and duties of the parties. . . . [T]he public interest in peaceful settlement of labor disputes through utilization of statutory procedures is also involved, and irreparable injury . . . is not an element which bears significantly or relevantly on furthering the public interest.

Id.; see also *Brotherhood of Maintenance v. Burlington N. R.R.*, 802 F.2d 1016, 1021 (8th Cir. 1986), *aff'd* 481 U.S. 429 (1987); *ALPA v. Eastern Air Lines, Inc.*, 703 F. Supp. 962, 981 (D.D.C. 1988).

¹²⁶ See, e.g., *ALPA v. Northwest Airlines*, 570 F.2d 257 (8th Cir. 1978); *International Bhd. of Teamsters v. Braniff Int'l Airways*, 437 F.2d 1272, 1274 (5th Cir. 1971); see also *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 534 (1960) (wherein the Supreme Court established that an injunction may be issued in a minor case if the equities so require).

¹²⁷ See, e.g., *Local 553, Transp. Workers Union v. Eastern Air Lines, Inc.*, 695 F.2d 668, 678 (2d Cir. 1982); *Association of Flight Attendants v. Republic Airlines*, 534 F. Supp. 783, 789 (D. Minn. 1982) (citing *Dataphase Systems, Inc. v. C. L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981)).

At one end of the spectrum, courts rule that a dispute is minor when an employer maintains that his decision is justified by existing agreements and practice, unless the employer's interpretation of the contract was "frivolous" or "obviously insubstantial."¹²⁸ That is, a dispute is minor unless the "contractual justification [for the employer's action] is 'frivolous' or 'obviously insubstantial,'" ¹²⁹ a standard which is admittedly light.¹³⁰ Thus, the courts rule that the issue is a problem of differing contract interpretations, and therefore falls under the arbitrational jurisdiction of the relevant adjustment board. In such cases, the courts typically refuse to preserve the status quo. The underlying rationale was best expressed in *Chicago & North Western Transportation Co. v. Railway Labor Executives Association*¹³¹: "The primary factor underlying this predisposition, in close cases, in favor of a 'minor dispute' finding is the concern for minimizing the occurrence of strikes in the rail transportation industry. . . . Rail unions are not permitted to strike over minor disputes."¹³²

Obviously however, the underlying philosophy of decisions in favor of minor disputes goes far deeper. It reflects the same jurisprudence that, under the NLRA, protects management prerogative against collective bargaining. Since the lower courts, in the partial closure cases, were prevented under *Telegraphers* from ruling that

¹²⁸ See, e.g., *Local 553*, 695 F.2d at 673-75. But see *Local Lodge 2144, Bhd. of Ry. Clerks v. Railway Express Agency*, 409 F.2d 312, 316 (2d Cir. 1969)).

¹²⁹ *National Ry. Labor Conference v. IAM*, 830 F.2d 741, 746 (7th Cir. 1987) (quoting *Atchison, Topeka & Santa Fe Ry. v. United Transp. Union*, 734 F.2d 317, 321 (7th Cir. 1984)). The employer's justification may also lie in the past practice of the company. See, e.g. *International Bhd. of Teamsters v. Southwest Airlines*, 842 F.2d 794, 804 (5th Cir. 1988). "In determining whether a proposal is 'arguably justified' by the contract we must look both to the contract itself and to the practices under the contract." *Id.*

¹³⁰ *Brotherhood of Maintenance*, 802 F.2d at 1022.

¹³¹ 855 F.2d 1277, 1283 (7th Cir. 1988).

¹³² *Id.*; see also *Railway Labor Executives Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700, 705 (7th Cir. 1987). "Because a major dispute can escalate into a strike, if there is any doubt as to whether a dispute is major or minor a court will construe the dispute to be minor." *Id.*

management prerogative precludes bargaining, they confined themselves to the major-minor distinction and selected the solution that best emulates the management prerogative approach. Unfortunately, however, these courts failed to see that their approach to the distinction was inconsistent with the *Telegraphers* approach, which turned on the importance of the dispute, rather than a test favoring minor disputes.

These cases are significant because they ignore the importance of the dispute, that is, whether the dispute is *literally* "major" or "minor" is never addressed. For example, the Fifth Circuit, in *International Brotherhood of Teamsters v. Southwest Airlines*,¹³³ noted that the method for determining whether a dispute is major or minor has absolutely nothing to do with how important a dispute is.¹³⁴

At the other end of the spectrum lie the cases that examine the substance of the dispute and find that a major dispute exists when major changes in the work force result from the employer's decision. The fact that this approach is in the minority is surprising, as the leading case among them is the Supreme Court's *Telegraphers* decision, where the Court explicitly refused to characterize as minor a dispute involving the loss of numerous jobs.¹³⁵

Another leading case adopting the minority approach is *United Industrial Workers v. Board of Trustees of Galveston Wharves*,¹³⁶ decided by the Fifth Circuit in 1965. In that case, involving a total closure, the court, despite the existence of a management prerogative clause in the contract, emphasized the impact of the decision on the employees' jobs:

[t]he very snarl these employees are in . . . shows why an employer subject to the Railway Labor Act may have special obligations in pretermination bargaining. Suddenly from an action which is entirely legitimate and undoubt-

¹³³ 842 F.2d at 794.

¹³⁴ *Id.* at 803.

¹³⁵ See *supra* note 92 and accompanying text.

¹³⁶ 351 F.2d 183 (5th Cir. 1965).

edly sound from an economic standpoint, employees of long standing find themselves with neither job nor representation continuity.¹³⁷

More significantly, the Court said:

When we look at the sharp outlines of this case through ordinary glasses, not major or minor lenses, we can see this case for what it really is: during the term of the contract, the Carrier terminated the contract by going out of business. But it had no right to terminate the contract prior to its expiration Without trespassing on the exclusive domain of the Adjustment Board . . . it is plain that this action was not, and cannot even remotely be justified as a 'lay off' . . . nor as the exercise of managerial prerogative¹³⁸ Broad as is the management prerogative clause there is absolutely nothing about the agreement, or more fundamentally, about the nature of the relationship and the peculiar role of collective bargaining agreements in assuring industrial peace, which contemplates that during the term the employer has the right to bring it all to an end simply by ceasing operations.¹³⁹

Whatever the validity of *Galveston Wharves* after *Darlington* and *Pittsburgh & Lake Erie*, it is important for its approach to the major-minor distinction dispute. The Court refused to make the major/minor distinction on the basis of "artfully contrived formalistic demands or responses,"¹⁴⁰ and, in support of this approach, quoted the *Telegraphers* analysis of minor disputes.¹⁴¹

Recently, the Second Circuit adopted the minority approach in *Local 553, Transportation Workers Union v. Eastern Air Lines, Inc.*,¹⁴² arguing that the difficulties that arise in construing a bargaining agreement support a more pragmatic approach for determining the characteristics of a

¹³⁷ *Id.* at 191.

¹³⁸ [The court here is rebutting the employer's argument that the dispute involves interpretational problems of the contract's lay off and management prerogative provisions and was therefore a minor dispute.]

¹³⁹ *Galveston Wharves*, 351 F.2d at 189.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 191 (citing *Telegraphers*, 362 U.S. at 337-38).

¹⁴² 695 F.2d at 668.

dispute.¹⁴³

In summary, the minority approach was best described by a court which actually disapproved it in *National Railway Labor Conference v. International Association of Machinists and Aerospace Workers*:

Under [the minority] line of analysis, a dispute with a substantial impact would suggest a major dispute while a negligible impact would point to a minor dispute. This theory is based on the supposition that 'major' and 'minor' describe actual pragmatic differences in the scope of the impact of the dispute on the practices of the parties.¹⁴⁴

Since *Telegraphers*, the Supreme Court has not ruled on the distinction between major and minor disputes in the context of managerial decisions involving labor force reductions. However, in a case not directly on point, the Court has given a strong indication of its intentions. In *Consolidated Rail Corp. v. Railway Labor Executives Association*,¹⁴⁵ the Court, by a clear majority, held that the decision of the employer to impose drug testing on employees constituted a minor dispute. There was, thus, no duty to bargain.¹⁴⁶ Justice Blackmun, writing for the majority, stated that:

[T]he formal demarcation between major and minor disputes does not turn on a case-by-case determination of the importance of the issue presented or the likelihood that it would prompt the exercise of economic self-help. . . . Rather it . . . [depends on] whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action. The distinguishing feature of such a case is that the dispute may be conclusively resolved by interpreting the ex-

¹⁴³ *Id.* at 673-75. Other courts have also taken similar approaches, *see, e.g.*, *ALPA v. Wien Air Alaska*, 120 L.R.R.M. (BNA) 3388 (D. Alaska 1984).

¹⁴⁴ 830 F.2d at 747 n.5.

¹⁴⁵ 109 S.Ct. 2477 (1989).

¹⁴⁶ *Id.* at 2479. The Court said in particular that the previous practice of physical examinations of the employees could arguably be interpreted as giving the right to drug testing; therefore, the dispute was over the interpretation of that practice and was to be resolved by an arbitration board. *Id.*

isting agreement.¹⁴⁷

The opinion is a clear repudiation of the minority approach to the major/minor dispute. The scope of the holding, however, is unclear, as *Consolidated Rail* is off point. For a number of reasons, the applicability of such repudiation to a lay-off dispute is questionable.

A decision involving the loss of numerous jobs has an infinitely greater impact on labor relations than a drug testing decision. Further, the two types of decisions are not equally amenable to collective bargaining and arbitration. The drug testing issue can be analyzed by determining whether previous physical examinations involved the same degree of intrusiveness and to what extent such testing discourages employment. These types of issues are frequently determined by legal bodies such as an arbitration board. It seems unwise, however, to analyze an issue involving the abolishment of hundreds or thousands of jobs in terms of legal interpretations of disputes arising from conflicts of social and economic interests. In the absence of any clear and explicit agreement by the parties, these determinations should be left to the process of collective bargaining.

Consolidated Rail's holding may additionally be inapplicable to lay-off disputes because applicability would require overruling *Telegraphers*. The Supreme Court in *Telegraphers*, a case directly involving lay-off disputes, explicitly rejected the idea that a dispute "relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretation of the provisions of that agreement" could be characterized as minor.¹⁴⁸ In *Consolidated Rail*, Justice Blackmun failed to even mention *Telegraphers*; this suggests strongly the irrelevancy of *Consolidated Rail* in the labor dispute arena. The lower courts should still consider themselves bound by *Telegraphers*. The Supreme Court does not over-

¹⁴⁷ *Id.* at 2481.

¹⁴⁸ *Telegraphers*, 362 U.S. at 341.

turn landmark decisions, such as *Telegrapher*, without a thorough discussion of its reasons for doing so.

Thus, the issue has yet to be authoritatively addressed by the Supreme Court. Given the disagreements among the lower courts, however, the issue will likely be addressed soon. At the end of this section, suggestions are made as to the appropriate approach the Supreme Court should adopt to be consistent with the structure and philosophy of the RLA.

2. *Management Prerogative*

The lower court cases are routinely concerned with the distinction between major and minor disputes in the context of a specific collective agreement. None explicitly refer to the concept of management prerogative, which, as defined by labor law, is applicable regardless of the circumstances of a particular labor relationship. The controversy in the NLRA involving the distinction between mandatory and permissive subjects of bargaining, as well as between bargaining the effects or the decision itself, was unknown in RLA cases.

International Association of Machinists and Aerospace Workers v. Northeast Airlines was the first case ever to discuss management prerogative under the RLA.¹⁴⁹ There, the First Circuit held that a dispute over a merger was minor and refused to issue a status quo injunction to prevent the merger. Chief Judge Aldrich, writing for the court, rejected the union's argument that there was a statutory duty to bargain over mergers. He distinguished *Fibreboard Paper Products Corp. v. NLRB*¹⁵⁰ on the basis that a decision to merge has a less direct and immediate impact on jobs than a decision to subcontract work.¹⁵¹ Additionally, "the

¹⁴⁹ 473 F.2d 549 (1st Cir. 1972).

¹⁵⁰ 379 U.S. 203 (1964). In that case, which arose under NLRA, the Supreme Court ruled that an employer has a duty to bargain over his decision to subcontract work and, thus, lay-off employees. The concurring opinion of Justice Stewart was very influential, providing the framework upon which the *First National* decision was based. See *supra* text accompanying note 129.

¹⁵¹ *Northeast*, 473 F.2d at 556.

decision to merge is much nearer the core of entrepreneurial control.”¹⁵² After extensively quoting Justice Stewart’s concurrence in *Fibreboard*, Judge Aldrich determined that requiring an employer to include the union, in some cases possibly many unions, in discussions concerning a possible sale of the business would infringe greatly upon his control over his investment.¹⁵³ Even more interesting was his point that an employee’s perspective renders him incapable of accurately judging the financial complexities often involved in mergers.¹⁵⁴

The court also rejected the union’s argument that, at a minimum, employers should be required to bargain over a transaction’s effect on employees’ jobs. The court opined that, although bargaining over a transaction’s effect should normally be required, a merger is a unique case because a second employer is involved. Specifically, Judge Aldrich stated that:

[S]ince the merger itself is not the proximate cause of job displacement, which will occur only as a result of management decisions subsequently made by the surviving company, any negotiations between the company being absorbed . . . and its union about what protection the employees should have against such displacement would be recklessly speculative, unless that company has knowledge of and control over the acquirer’s plans.¹⁵⁵

The court refused to order the acquired company to renegotiate its merger contract with the purchasing airline in order to include a clause that would make the collective bargaining agreement binding upon the successor company.¹⁵⁶ The court felt that to hold otherwise would rob

¹⁵² *Id.* at 557.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 558.

¹⁵⁶ *Id.* The collective bargaining agreement between I.A.M. and Northeast Airlines—the airline to be purchased—had a clause that made the contract binding upon “the successors or the assigns of the Company.” *Id.* The successorship doctrine has not been analytically discussed under the RLA. See Note, *Airline Merger and the Impact of a Minority Union’s Labor Contract: The Delta-Western Air Lines Merger*, 18 GOLDEN GATE U.L. REV. 195 (1988); see also Papaioannou, *Labor Protec-*

management of the freedom to make the decision in the first place.¹⁵⁷

Finally, Judge Aldrich determined that employees are adequately protected by Labor Protection Provisions (LPPs) imposed by the Civil Aeronautics Board (CAB) upon approval of the merger.¹⁵⁸ This point limits the validity of this case in the 1980s because LPPs are no longer imposed. The protection of by LPPs, however, was offered as justification for the refusal to impose a duty to bargain over a decision's effects. The denial of the duty to bargain over the decision itself was not based on LPPs.

Another case involving the concept of management prerogative was *Japan Air Lines v. International Association of Machinists*.¹⁵⁹ In that case, the union sought to negotiate a clause that would stop the airline's practice of subcontracting maintenance and ground service work to other companies. The case is of limited importance since it did not involve the loss of existing jobs, but was rather an attempt by the union to expand its members' job opportunities.¹⁶⁰ Interestingly, however, the court rejected the union's suggestion that "labor and management must meet and confer over any proposal, advanced by either party, which is neither unlawful nor expressly contravened by a provision of the RLA."¹⁶¹ Thus, the court accepted that management prerogative excluded some issues from bargaining, stating that "[w]hatever incidental benefits may nonetheless accrue to Union members from

tive Provisions and Collective Agreements in Mergers (as part of his unpublished doctoral thesis on airline labor law, available at the University of Pennsylvania Law School Library).

¹⁵⁷ *Northeast*, 473 F.2d at 558.

¹⁵⁸ *Id.* at 559-60. LPPs are conditions that CAB imposed upon approval of a merger between airlines, with the purpose of protecting the employees who would be adversely affected by transaction; see ROSENFELD, LABOR PROTECTIVE PROVISIONS IN AIRLINE MERGERS (1981) (LPPs have not been imposed since the early 1980s); Northrup, *Airline Labor Protective Provisions: An Economic Analysis*, 53 J. AIR L. & COM. 401 (1987).

¹⁵⁹ 538 F.2d 46 (2d Cir. 1976).

¹⁶⁰ *Id.* at 48. The court also distinguished *Telegraphers* because that case involved losses of already existing jobs. *Id.* at 52-53.

¹⁶¹ *Id.* at 51.

implementation of the scope proposal are outweighed by [the airline's] proper interest in retaining basic control over the size and direction of its enterprise."¹⁶²

These two cases, however, were decided before the deregulation of the airline industry in 1978. The cases concerning management prerogative decided after deregulation are more interesting as it is arguable that more deference will be given to management prerogative as a response to the pressures of fierce competition among the airlines.¹⁶³ In addition, following *First National*, the airlines increasingly argued in the courts that their decisions were neither major nor minor, but merely made according to management prerogative.

The following sections analyze three recent cases that have dealt with this issue. The views represented by those cases are characteristic of the choices available to the Supreme Court when it decided *Pittsburgh & Lake Erie*.

a. ALPA v. Transamerica Airlines

*ALPA v. Transamerica Airlines*¹⁶⁴ was the first case to apply *First National* in the RLA context. The air carrier in that case suffered considerable losses in the 1980s as a result of the fierce competition in the airline industry. Its parent company, Transamerica Corporation (TAC), decided to divest itself of the air carrier. After unsuccessfully attempting to sell the carrier, TAC decided to liquidate its subsidiary, Transamerica Airlines (Transamerica), by selling its assets. ALPA and the International Brotherhood of Teamsters (IBT) sought to enjoin Transamerica from implementing the decision to shut down operations before engaging in collective bargaining with the unions, according to the RLA's provisions for the settlement of major disputes.¹⁶⁵

¹⁶² *Id.* at 52.

¹⁶³ For sources presenting such an argument, see *supra* note 9.

¹⁶⁴ 123 L.R.R.M. (BNA) 2682 (E.D.N.Y. 1986).

¹⁶⁵ *Id.* The exact legal basis of the union's suit is unclear from the opinion. The union appeared to claim violations of the duty to bargain and the status quo re-

The court denied a preliminary injunction because it found that the decision to go completely out of business is one so basic to business ownership that an employer has no obligation to bargain with the union over the decision.¹⁶⁶

The court further determined that neither a major nor minor dispute existed. There was no major dispute because the decision to shut down operations did not seek to change the terms of any collective bargaining agreement. Neither was it a minor dispute because no clause in the agreement would be violated by the company going completely out of business.¹⁶⁷

The court cited with approval both *Northeast and Japan Air Lines*, while distinguishing *Telegraphers*, *Galveston Wharves* and *ALPA v. Wien Air Alaska, Inc.*¹⁶⁸ on the ground that they did not involve a decision to go completely out of business.¹⁶⁹

Judge Bramwell, writing for the court, referred to *First National's* emphasis on the need for freedom of action and the danger of strategic behavior on the union's part if delay of the decision were to occur. The court further pointed out that since the duty to bargain is similar under

quirement. There is also an indication, however, that the union claimed anti-union animus on the part of the company. For example, see the court's reference to the union's argument about "lock-out" and "'self-help' related to pending negotiations over new collective agreements." *Id.* at 2687.

¹⁶⁶ *Id.* at 2686.

¹⁶⁷ *Id.* There is an obvious error in the court's reasoning. The standard for determining whether a dispute is minor is not whether it violates a clause of the agreement, but whether it may be argued that it does so. For the standards used by other courts, see *supra* notes 122-132 and accompanying text.

¹⁶⁸ 120 L.R.R.M. (BNA) 3388 (D. Alaska 1984). This case involved a temporary shut down of an air carrier for the purpose of reorganizing operations. The court found that the dispute over management's decision to shut down constituted a major dispute. The court adopted a rather substantive approach to the distinction between major and minor disputes. "[T]he rule [to determine major and minor disputes] must be applied by looking to the substantive nature of the dispute rather than its formalistic appearance or to the manner in which the dispute occurred." *Id.* at 3390. The court refused to hold that the mere existence of a furlough provision in the collective bargaining agreement rendered the dispute "international" and thus, minor. *Id.*

¹⁶⁹ *Transamerica*, 123 L.R.R.M. (BNA) at 2686.

both NLRA and RLA, *First National*, an NLRA case, is applicable to RLA disputes. Unfortunately, the court failed to adequately emphasize *First National's* dictum that the duty to bargain under the two acts is not coextensive.¹⁷⁰ Probably realizing that the RLA's concern with the free flow of commerce is greater than that shown in the NLRA, the court stated that no major problem in the flow of commerce would be created since competitive carriers would acquire the charter services.

Transamerica also cites *Darlington* for support of its holding that no bargaining is required over an employer's decision to permanently shut down his business.¹⁷¹ As noted by the court, "the very suggestion that a carrier would go completely out of business in order to obtain leverage in contract negotiations with its union makes no sense."¹⁷²

After finding that there was no likelihood of success for the union on the merits of the case, the court denied a preliminary injunction.¹⁷³ The court also based this denial on a determination that the employees would not suffer any irreparable harm as a result of the denial, and that the balance of hardships tipped in *Transamerica's* favor.¹⁷⁴

The significance of *Transamerica* is that it was the first case to apply *First National* in an RLA context.¹⁷⁵ The case's actual holding is of reduced significance because

¹⁷⁰ See *supra* notes 113-118 and accompanying text for a discussion of *First National*.

¹⁷¹ *Transamerica*, 123 L.R.R.M. (BNA) at 2687.

¹⁷² *Id.* The same argument was made by the Supreme Court in *Darlington*, 380 U.S. at 263. See *supra* text accompanying notes 107-112. The *Darlington* Court, however, also emphasized that if the company going out of business is owned by someone engaged in other businesses, the court should examine whether the owner is trying to exert pressure on the other businesses' employees. Fortunately the *Transamerica* court did not examine the facts for this type of conduct. See *ALPA v. Transamerica Airlines*, 817 F.2d 510, 512 (9th Cir.), *cert. denied*, 484 U.S. 963 (1987) (*Transamerica* was actually trying to transfer its business to another of its subsidiaries).

¹⁷³ *Transamerica*, 123 L.R.R.M. at 2688.

¹⁷⁴ *Id.*

¹⁷⁵ See McDonald, *supra* note 9, at 907.

Darlington had already affirmed the right of an employer to go completely out of business. Furthermore, complete shut-downs are uncommon in the airline industry.

Other courts did not follow *Transamerica* by applying *First National* in RLA cases until the Supreme Court decided *Pittsburgh & Lake Erie*. Until that case, it was typically acknowledged that the scope of bargainable issues under the RLA was "extremely broad" and "comprehended fields frequently reserved to management in other industrial contexts."¹⁷⁶ Such an approach was adopted recently by the District Court for the District of Columbia in *ALPA v. Eastern Air Lines*,¹⁷⁷ discussed immediately below.

b. ALPA v. Eastern Air Lines

ALPA v. Eastern Air Lines was decided in August 1988. Although the district court's decision was overturned on appeal, it is worth examining because it is the best example of one of two possible approaches a court may take in dealing with the problem under review.

The case involved Eastern Air Lines, an airline with a history of stormy labor relations. Eastern was purchased by Texas Air Corporation, owner of Continental Airlines, a major air carrier with a very low level of unionization. According to the court's findings, Eastern and Continental coordinated their efforts in order to frustrate the collective bargaining representatives of Eastern, a heavily unionized carrier. The labor tensions created led to extensive litigation with rather disappointing results for Eastern.¹⁷⁸ In the summer of 1988, Eastern decided to

¹⁷⁶ *International Ass'n of Machinists v. Eastern Air Lines*, 849 F.2d 1481, 1487 (D.C. Cir. 1988) (quoting *Brotherhood of R.R. Trainmen v. Akron & Barberton Belt R.R.*, 385 F.2d 581, 601 (D.C. Cir. 1967)).

¹⁷⁷ 703 F. Supp. 962 (D.D.C.) [hereinafter, *Eastern I*], *rev'd* 863 F.2d 891 (D.C. Cir. 1988).

¹⁷⁸ This litigation includes the following: *IAM v. Eastern Air Lines*, 849 F.2d 1481 (D.C. Cir. 1988); *ALPA v. Eastern Air Lines*, 683 F. Supp. 845 (D.D.C. 1988); *Eastern Air Lines v. ALPA*, 670 F.Supp. 947 (S.D. Fla. 1987); *IAM v. Eastern Air Lines*, 125 L.R.R.M. 3491 (D.C.C. 1987); *ALPA v. Eastern Air Lines*, No.

reorganize its operations according to a plan which, among other things, included the closure of Eastern's Kansas City hub. This plan would eliminate nearly 4000 jobs.¹⁷⁹ The reorganization was an attempt to ameliorate the company's precarious financial position. After considering the facts, the court found that management was primarily responsible for the carrier's poor economic shape. As proof of this finding, the court listed a series of transactions between Eastern, Continental, and Texas Air Corporation which drained funds from Eastern to the benefit of the other companies.¹⁸⁰ Throughout the opinion the court implies that there was a plan on the part of Texas Air Corporation's management to conduct business in a manner that would strengthen the position of the non-unionized, low-labor-cost Continental, at the expense of Eastern. In support of these findings, the court also noted a series of statements by Eastern's officials showing a strong anti-union animus.¹⁸¹

Addressing the duty to bargain, the court found the furloughing of 4000 employees unprecedented and thus not part of the status quo. The court acknowledged that "[m]anagerial prerogatives may become part of the status quo if established by past practice," but that this was not the case with Eastern.¹⁸² In response to the company's argument that its decision was motivated by business considerations, the court cited *Telegraphers* for the proposition that considerations of economic necessity are insufficient to make a carrier's decision nonbargainable.¹⁸³ Accordingly, the court ruled that "[m]assive lay-offs are not, and shall never be, business as usual. The Railway Labor Act requires Eastern to bargain with its unions before taking unilateral action to eliminate 12 percent of its work

87-2143 (D.D.C. Aug. 13, 1987). Eastern was mostly unsuccessful in this litigation.

¹⁷⁹ *Eastern I*, 703 F. Supp. at 964.

¹⁸⁰ *Id.* at 968-69.

¹⁸¹ *Id.* at 970-72.

¹⁸² *Id.* at 974.

¹⁸³ *Id.* at 973-74.

force."¹⁸⁴ The court stated emphatically in broad and unreserved language that "[e]mployers subject to the RLA must bargain with their unions even over fundamental decisions affecting the very scope and direction of the employer's enterprise."¹⁸⁵ Unimpressed by Eastern's reliance on *First National*, the court noted that the Supreme Court in that case required bargaining over the effects of a decision "in a meaningful manner and at meaningful times."¹⁸⁶

On the issue of major/minor distinction, the court adopted the minority approach, stating that "[t]he distinction . . . must be applied by looking to the substantive nature of the dispute rather than its formalistic appearance or the manner in which the dispute occurred."¹⁸⁷ The court ultimately held that Eastern's severe furlough plan was unsupported by any reasonable interpretation of the existing collective bargaining agreement.¹⁸⁸

The court then summarily accused Eastern of trying to:

circumvent the bargaining process by unilaterally announcing that it will lay off 4000 workers without pursuing the mandatory negotiation procedures. If the company is allowed to furlough this large group of employees without exhausting the bargaining procedures, it will not only alter the status quo, but moot a central issue of the current negotiations.¹⁸⁹

The court further accused the company of terminating jobs which employees believed to be secure, thereby sending a clear message that the unions are powerless to protect their members.¹⁹⁰

Finally the court held that a status quo injunction in a

¹⁸⁴ *Id.* at 974.

¹⁸⁵ *Id.* at 975 (referencing *Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), *rev'd*, 109 S. Ct. 2584 (1989). See *infra* notes 212-261 and accompanying text for a discussion of *Pittsburgh & Lake Erie*).

¹⁸⁶ *Eastern I*, 703 F. Supp. at 980 (quoting *First National*, 452 U.S. at 681-82).

¹⁸⁷ *Id.* at 977.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 979.

¹⁹⁰ *Id.* at 980.

major dispute may be issued without consideration of the equities of the case.¹⁹¹ Even if a balancing test was required, an injunction should issue because denial of such relief would cause irreparable harm to the unions and employees.¹⁹² Clearly, the combination of the loss of 4000 jobs, the undermining of the unions' representation status, and the resulting possible labor unrest would cause irreparable harm to the unionized employees and to the RLA's collective bargaining framework.¹⁹³ The court found that a lawful strike by the unions would cause the airline, its employees, its customers, and the public more economic hardship than the expense of retaining 4000 employees during the negotiations would cause the carrier.¹⁹⁴

This decision is significant, apart from its unusually liberal approach to labor relations, because of its attempt to leave legal formalities behind and make a probing inquiry into management's labor policy. Among disputes involving the duty to bargain, this case is alone in its attempt to determine management's share of responsibility for the company's financial troubles. Regardless of the validity of the court's findings and the analysis of Eastern's managerial policy, the fact that the court made a sincere attempt to discover the truth, without accepting that labor costs are the cause of every financial problem, is an approach that if followed by other courts, will change the shape of labor law in the United States.

¹⁹¹ *Id.* at 981. "[W]here there is a major dispute, plaintiffs are not required to establish the traditional equitable prerequisites of irreparable injury and a favorable balance of harms in order to obtain immediate injunctive relief." *Id.*

¹⁹² *Id.* "Although a balancing . . . is not necessary for a preliminary injunction . . . plaintiffs have satisfied the traditional criteria for such relief." *Id.* The court based its holding on the loss of jobs and resulting harm to the bargaining relationship between Eastern and the unions.

¹⁹³ *Id.* The furlough of 4000 employees "could itself trigger lawful strikes under the RLA and could irreparably damage the RLA's collective bargaining framework" *Id.*

¹⁹⁴ *Id.* at 982. "A lawful strike by the three unions would however, cause economic hardship to the airline, its employees, its customers and the general public. . . . The Court concludes that the public interest will be best served by maintaining the status quo." *Id.*

To be sure, courts are generally not an appropriate place for questioning business policies. Judges are not trained to understand the complex economic issues that a company faces in today's corporate world, and particularly in an industry so complex, uncertain and risky for entrepreneurs as the airlines. Certainly, however, the courts are not to blame for becoming involved in such complex inquiries. Rather, the blame lies with the prevalent labor jurisprudence in the United States which, by making the distinction between mandatory and permissive subjects of bargaining, has involved the courts in issues better left at the bargaining table. From the moment the court must designate appropriate bargaining subjects, it cannot, and probably should not, avoid becoming involved in an analysis of the accuracy and good faith of management's financial arguments. The best solution is not to say the courts should avoid this second-guessing, but rather to remove the complex issues of collective bargaining from the courts and put them back on the bargaining table.

Not surprisingly, the district court's decision in *Eastern I* was overturned within a month. The Court of Appeals for the District of Columbia Circuit reversed the decision and ruled that the case involved minor disputes.¹⁹⁵ Following traditional methods of distinguishing between major and minor disputes,¹⁹⁶ the court examined, separately, the bargaining relationship between the carrier and each of the three unions that had sued.¹⁹⁷ Hence, the court did not discuss the furlough of 4000 employees, but rather the particular furloughs of each class of employees, represented by each of the three unions.¹⁹⁸ The court thus found, for example, that the furloughing of 1050 flight attendants covered by the collective bargaining agreement

¹⁹⁵ ALPA v. Eastern Air Lines, 863 F.2d 891 (D.C. Cir. 1988) [hereinafter, *Eastern II*].

¹⁹⁶ *Id.* at 895.

¹⁹⁷ *Id.* at 897-900.

¹⁹⁸ *Id.*

with Transport Workers Union of America (TWU) was not unprecedented and did not, therefore, violate any established practice.¹⁹⁹ As to the pilots' and mechanics' furloughs, the court found that they were contemplated by the existing collective bargaining agreements which provided some protection for the employees.²⁰⁰ According to the court's rationale, the protection offered by the bargaining agreement meant that as long as management fulfilled the obligations stated therein, it was free to proceed with its decisions.²⁰¹

The court then examined the issue of anti-union animus

¹⁹⁹ *Id.* at 897-98. The court pointed to two large furloughs of flight attendants as well as the broad language in the TWU collective bargaining agreement which "evidences an awareness that work reductions might be necessary in the future." *Id.* at 897. The court concluded that "the record compels a finding that Eastern's proposal was covered by the collective bargaining agreement and the course of dealing between the company and TWU." *Id.* at 898.

²⁰⁰ *Id.* at 900 ("The agreement clearly contemplates large-scale furloughs").

²⁰¹ *Id.* The district court had rejected this argument, stating:

While it is true that the collective bargaining agreements contain furlough provisions, they provide no justification for a wholesale restructuring of the airline workforce. Instead, such provisions have been used to implement minor operational "adjustments" and seasonal schedule changes. Defendant cannot now use these provisions to dismantle a significant portion of Eastern's labor force.

Eastern I, 703 F. Supp. at 974.

The circuit court's majority opinion was strongly criticized by Judge Mikva, who, writing for four circuit judges who dissented from the court's refusal to rehear the case *en banc*, stated:

It is of course implausible on its face to assert, as the panel does, that the largest furlough in Eastern's history, undertaken at a time of unprecedented bitterness in labor-management relations and affecting thousands of employees, is not a major dispute. The whole purpose of the RLA is to prevent inflammatory unilateral actions by either side that threaten to disrupt national transportation.

Eastern II, 863 F.2d at 918 (Mikva, J., dissenting).

The circuit court's approach is characteristic of how meaningless legal formalities can be used for the sole purpose of justifying a court's predetermined decision. The problem in *Eastern II* was not, as the decision would have us believe, that some pilots, some flight attendants, and some mechanics were separately dismissed. Rather, the dispute was created by a single managerial decision to close the carrier's Kansas City hub and certain gates at other airports. Eastern's decision to furlough these employees was part of one single plan to ameliorate the financial situation of the company (assuming that management's claims about its real motives were correct). Thus, the furloughs must be seen as a whole and in this way compared to past practices. The approach adopted by the panel sees the trees, but misses the forest.

that was found to characterize the decisions of Eastern's management.²⁰² Applying the *NLRB v. Wright Line*²⁰³ doctrine, developed under the NLRA, the court held that if a decision containing anti-union considerations can be justified by other legitimate business considerations, the decision is not illegal.²⁰⁴ Citing the lower court's finding that there were also legitimate business reasons for the company's decision quite apart from anti-union feelings, the court held the decision did not violate of the RLA's protection of the right to unionize.²⁰⁵ Nevertheless, the court re-examined the lower court's finding of anti-union animus.²⁰⁶ In a decision full of factual findings that is unusual at the appellate level,²⁰⁷ the court held the allegation that Eastern's affairs were conducted for the benefit of non-unionized Continental was unsubstantiated by the facts of the case.²⁰⁸

An interesting final point is the court's statement, in the initial typed form of the opinion, that "to determine whether the status quo protected by [the RLA] encompassed an entitlement in the ALPA and IAM members to be immune from a furlough such as the present one, we

²⁰² *Eastern II*, 863 F.2d at 900.

²⁰³ 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

²⁰⁴ *Eastern II*, 863 F.2d at 902.

²⁰⁵ *Id.* at 903. "We are persuaded that the *Wright Line* principle is applicable here. . . . Workers' Railway Labor Act rights to unionize are adequately protected so long as management is limited to taking any measures that it would have taken in the absence of any anti-union animus." *Id.*

²⁰⁶ *Id.* at 903.

²⁰⁷ *Id.* at 914 (Mikva, J., dissenting). This fact was severely criticized by Judge Mikva in his dissent, in which he said:

This case convinces me that we should install a witness stand and a jury box in the courtroom of this court of appeals. The panel's own findings of fact are so extensive, and revise the district court's conclusions so completely, that they do genuine violence to the deference we owe to the determinations of our fellow judges on the district court An administrative agency would have received more deference than did the district judge in this case.

Id. at 914-15.

²⁰⁸ *Id.* at 905-07 (discussing various actions, such as work transfers and asset transfers, taken by Texas Air affecting the operations of Eastern and Continental, and concluding that "the evidence misses the crucial link between forbidden intent and conduct").

look to the expired bargaining agreements and to past practice."²⁰⁹ The court here made an important shift in the burden of proof. Generally, the issue is whether management's action is part of the status quo as determined by reviewing the collective bargaining agreement and established practice. In this case, however, the court examined whether the unions' claims to bargaining were part of the status quo. The court thus shifted its focus, and accordingly the burden of proof, from the actions of the employer to the rights of employees.²¹⁰ Oddly, this part of the court's reasoning was omitted from the final edition of the panel's decision. The decision is in accord with the line of cases that favor finding a minor dispute regardless of the influence that such decisions have upon employees' jobs.

Plainly, the distinction between major and minor disputes is hardly clear cut. In understanding the confusion, it is important to note that judges, accustomed to the distinction between mandatory and permissive subjects of bargaining under the NLRA and the concept of management prerogative which developed therein, are the delimiters of the distinctions between major and minor disputes. The muddle is exemplified by the filing of six separate opinions by the D.C. Circuit judges in *Eastern II*, who rejected, by a narrow majority, the unions' petition for rehearing *en banc*.²¹¹ As these judges, some of the best

²⁰⁹ See *ALPA v. Eastern Air Lines, Inc.*, Daily Lab. Rep. (BNA) No. 192, at D-1 (Oct. 4, 1988).

²¹⁰ Compare *supra* text accompanying note 209 with *supra* notes 66-78 and accompanying text (all discussing *Toledo's* holding). The Court in *Toledo* found that the status quo was not violated if the employer's action had occurred in the past, to the extent that it had become part of an established practice. *Toledo*, 396 U.S. at 153-54.

²¹¹ 863 F.2d at 892. Regarding the six separate opinions, Judge Mikva said:

Four statements have explained why the case should not be reheard *en banc*, and two have advocated that it be so reheard. There have appeared four different interpretations of how the Railway Labor Act's system for classifying disputes as "major" or "minor" ought to be applied in this case: the panel believes the dispute here is "minor"; Judge Silberman thinks it may be "major," but contends that classifying it as "major" would not alter the outcome of the case;

circuit judges in the United States, are unsettled in the dispute, the need for guidelines and simpler solutions is obvious.

c. *Pittsburgh & Lake Erie Railroad v. Railway Labor Executives' Association*

At this point of total confusion concerning appropriate boundaries of the duty to bargain over lay-offs and the distinction between major and minor disputes, the Supreme Court granted certiorari in *Pittsburgh & Lake Erie Railroad v. Railway Labor Executives' Association*²¹² to provide some guidance to the lower courts.²¹³ Whether it succeeded in this quest is doubtful.

Facing severe financial problems, the Pittsburgh & Lake Erie Railroad (P&LE) decided to sell its assets to Chicago West Pullman Transportation Company (CWP), which had previously engaged in road transportation only.²¹⁴ Under the terms of the sale, CWP would continue to operate the railroad but would reduce the labor force from 750 to 250.²¹⁵ When the sale agreement was announced on July 8, 1987, the unions notified P&LE that they wanted to bargain over the sale, but no formal proposal was made at that time.²¹⁶ Management denied any legal obligation to bargain its decision with the unions, so the unions proposed an amended collective bargaining agreement designed to protect employees from the sale's ef-

Judge Edwards has proposed that the dispute may be both "major" and "minor"; and I have argued that the dispute is "major" and that this classification would affect the result. . . . These disparate views, it seems to me, suggest that the panel opinion cannot serve as any significant guidepost in this circuit on these difficult and unsettled areas of law.

Id. at 919 (Mikva, J., dissenting).

²¹² 109 S. Ct. at 2584.

²¹³ See Campbell & Hiers, *supra* note 9, at 344 (stating the hope that "the carriers will finally receive [from the Supreme Court] additional direction concerning this management prerogative dilemma").

²¹⁴ *Pittsburgh & Lake Erie*, 109 S. Ct. at 2588.

²¹⁵ Id.

²¹⁶ Id.

fects.²¹⁷ The employer again refused to bargain and the union went on strike.²¹⁸ Meanwhile, the Interstate Commerce Commission approved the proposed sale and refused to impose any Labor Protective Provisions.²¹⁹ The dispute ended in the courts where the unions sought an injunction against the sale, pending the exhaustion of bargaining procedures under the RLA, and the employer sought an injunction against the strike.²²⁰ The district court ruled that the dispute was major, that the status quo, as far as the existing jobs were concerned, should be maintained, and that the company had a duty to bargain over its decision's effects.²²¹ On appeal, the Third Circuit affirmed the lower court's decision, by finding "little difficulty in concluding that the railroad's decision to sell its rail assets and the consequential elimination of a substantial number of rail jobs presents a so-called 'major dispute' under the Railway Labor Act and, therefore, that the railroad must bargain over the effects of that decision."²²² Citing *Toledo*,²²³ Judge Becker, writing for the majority, concluded that "the very existence of the workers' jobs" was covered by the "objective working conditions" existing when the dispute arose, which *Toledo* held to be part

²¹⁷ *Id.* The union's proposals were the following:

1. No employee . . . shall be deprived of employment or placed in a worse position with respect to compensation or working conditions for any reason except resignation, retirement, death or dismissal for justifiable cause
2. If an employee is placed in a worse position . . . , that employee shall receive, in addition to a make-whole remedy, penalty pay equal to three times the lost pay, fringe benefits and consequential damages suffered by such employee.
3. P&LE agrees to obtain binding commitments from any purchaser of its rail line operating properties and assets to assume all [P & LE's] collective bargaining agreements.

Id. at 2589-90 n.5.

²¹⁸ *Id.* at 2590.

²¹⁹ *Id.* at 2590-91; see *supra* note 158.

²²⁰ See *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 677 F. Supp. 830 (W.D. Pa. 1987), *aff'd*, 845 F.2d 420 (3d Cir. 1988), *rev'd*, 109 S. Ct. 2584 (1989).

²²¹ *Pittsburgh & Lake Erie*, 677 F. Supp. at 835.

²²² *Pittsburgh & Lake Erie*, 845 F.2d at 423.

²²³ 396 U.S. at 142; see *supra* notes 66-78 and accompanying text.

of the status quo.²²⁴

The court deemed *First National* inapplicable to RLA disputes since "NLRA and RLA cases are not freely interchangeable, as the two statutes have distinctly different histories and different approaches to the problem of labor-management relations."²²⁵ Even if *First National* were applicable to RLA cases, the court explained, bargaining over the decision's effects is required and, during negotiations, the status quo must be maintained.²²⁶

Despite the uniquely managerial nature of the case, Judge Becker relied on *Telegraphers* for the proposition that the Supreme Court clearly encourages RLA bargaining over the effects of a decision.²²⁷ According to Judge Becker, *Telegraphers* implicitly rejected "the idea that a subject is off-limits to RLA bargaining merely because it could be labeled a 'managerial prerogative.'"²²⁸ Acknowledging that its decision would have a "profound and damaging effect on [the company's] very ability to proceed with the transaction," the court excused this result by stating that "the power of delay and the leverage given to labor is inherent in the design of the RLA, and surely was understood and contemplated by its framers."²²⁹

The Supreme Court granted certiorari²³⁰ to resolve a division among those circuits that had faced the company sale problem and the duty to bargain in connection there-

²²⁴ *Pittsburgh & Lake Erie*, 845 F.2d at 428.

²²⁵ *Id.* at 429.

²²⁶ *Id.* at 431.

²²⁷ *Id.* "[I]n spite of the unique managerial nature of [*Telegraphers*], the Supreme Court has plainly countenanced RLA bargaining over the effects of the decision." *Id.*

²²⁸ *Id.* at 430.

²²⁹ *Id.* at 432 n.15. In the second part of its decision, the Third Circuit rejected the company's argument that since the transaction was approved by ICC without any labor protective provisions, there is no duty to bargain over the effects of the approved transaction. *Id.* at 433. This argument, also rejected by the Supreme Court, is of limited importance for the airlines.

²³⁰ *Pittsburgh & Lake Erie v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989).

with.²³¹ A five member majority reversed the lower court's ruling that there was no duty to bargain over the decision to sell, and thus rejected the lower court's stance that such a decision was covered by management's prerogative.²³²

Speaking for the majority, Justice White virtually shifted the court's focus from the *effects* of the decision to sell to the *decision* itself. Instead of trying to see whether the massive lay-offs were part of the company's past practice, he searched for "an implied agreement that P&LE would not go out of business, would not sell its assets, or if it did, would protect its employees from the adverse consequences of such action."²³³ Finding no such agreement, the Court denied that the company's decision changed the status quo.

The majority had difficulty with the *Toledo* precedent, which included in the status quo actual working conditions and practices in effect prior to the pending dispute.²³⁴ In response to the unions' argument that *Toledo's* broad language covered the existence of job positions, Justice White first criticized *Toledo* for extending "the relevant language of [the RLA] to its outer limits,"²³⁵ and, second, distinguished the case on its facts.²³⁶ Finally, and most significantly, the majority distinguished *Toledo* on the

²³¹ See, e.g., *Chicago & N.W. Transp. Co. v. Railway Labor Executives' Ass'n*, 855 F.2d 1277 (7th Cir. 1988); *Railway Labor Executives' Ass'n v. Galveston Wharves*, 849 F.2d 145 (5th Cir. 1988) (requiring railroad to bargain with union over consequences of sale and lease).

²³² *Pittsburgh & Lake Erie*, 109 S. Ct. at 2595-96. The decision did not deal with the major/minor distinction. Rather, the issue was whether collective bargaining was precluded by managerial prerogative. *Id.*

²³³ *Id.* at 2593. In its initial decision, the three-member panel of the district court in *Eastern I* applied a similar analysis. See *supra* text accompanying notes 209-210.

²³⁴ *Toledo*, 396 U.S. at 142. See *supra* text accompanying notes 66-78 for a discussion of *Toledo*.

²³⁵ *Pittsburgh & Lake Erie*, 109 S. Ct. at 2594.

²³⁶ *Id.* In distinguishing *Toledo*, the Court noted that the employer's decision affected an "unquestioned practice for many years, and [the Supreme Court, thus,] considered it reasonable for employees to deem it sufficiently established that it would not be changed without bargaining and compliance with the status quo provisions of RLA." *Id.*

basis that "it did not involve the decision to quit the railroad business, sell its assets, and cease to be a railroad employer at all."²³⁷

In support of his holding, Justice White surprisingly cited *Darlington*, a case involving a total closure rather than a sale.²³⁸ With regard to his reliance on that case, Justice White explained:

Although *Darlington* arose under NLRA, we are convinced that we should be guided by the admonition in that case that the decision to close down a business entirely is so much a management prerogative that only an unmistakable expression of congressional intent will suffice to require the employer to postpone a sale of its assets pending the fulfillment of any duty it may have to bargain over the subject matter of union notices such as were served in this case. Absent statutory direction to the contrary, the decision of a railroad employer to go out of business and consequently to reduce to zero the number of available jobs is not a change in the conditions of employment forbidden by the status quo provision of [the RLA]²³⁹

In a footnote, Justice White addressed *Telegraphers*, distinguishing it on the basis that only a partial closure was involved, rather than a decision to go completely out of business.²⁴⁰

The *Pittsburgh & Lake Erie* decision stressed that a status quo injunction would cancel the sale and thus frustrate the Congressional policy encouraging both the deregulation of the rail and air industries and the assistance of small, financially troubled rail carriers,²⁴¹ a policy evi-

²³⁷ *Id.*

²³⁸ *Darlington*, 380 U.S. at 263. For a discussion of the case, see *supra* notes 108-112 and accompanying text.

²³⁹ *Pittsburgh & Lake Erie*, 109 S. Ct. at 2595-96.

²⁴⁰ *Id.* at 2595 n.17. Justice White explained that "[n]otwithstanding the policy considerations prompting the enlarged scope of mandatory bargaining under the RLA, in light of *Darlington*, which *First National Maintenance* reaffirmed, we are not inclined to extend *Telegraphers* to a case in which the railroad decides to retire from the railroad business." *Id.*

²⁴¹ *Id.* at 2597. The decision refers to the various amendatory acts passed in the 1970s and 1980s. See, e.g., the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No.94-210, 90 Stat. 30, (codified at 45 U.S.C. § 802 (1982 &

denced by the ICC's authority to approve and disapprove railroad sales. The Court concluded that a union's demand to bargain over a decision to sell, once the sale has been announced, cannot justify a status quo injunction that would "postpone the sale beyond the time the sale was approved by the Commission and was scheduled to be consummated."²⁴² It did, however, recognize that effects bargaining could occur in the time period between the plan's announcement and the sale's consummation.²⁴³ Finally, the Court unanimously found that ICC approval of the sale did not prohibit the union from entering a strike in connection with issues covered by the effects bargaining, provided the strike conformed with the RLA's provisions.²⁴⁴

The dissent relied primarily on *Telegraphers*, noting that

[T]here is no relevant difference between the partial abandonment in *Telegraphers* and the transfer of ownership proposed in this case: in both, rail service would continue as before, but many employees would lose their jobs

Had the sale in this case proceeded, the railroad would have operated the same service with a work force of 250 as compared to 750 employees. The economic benefits of that reduction are as obvious as those that would have been achieved by closing obsolete stations on the railroad

Supp. V 1987)), and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, (codified at 49 U.S.C. 10101 (1982)). By amending the Interstate Commerce Act with regard to the ICC's regulatory authority, Congress attempted to revitalize the ailing railroad industry. *Pittsburgh & Lake Erie* 109 S. Ct. at 2596-97.

²⁴² *Id.* at 2597. The Court emphasized that at this point, it was not addressing the issue concerning the consequences of unions demanding bargaining over labor protective provisions before any plan of sale has been announced. *Id.*

²⁴³ *Id.* at 2597. (The Court observed that "to the extent that the unions' proposals could be satisfied by P & LE itself, [the effects of the sale upon the employees] were bargainable but only until the date for closing the sale arrived.").

²⁴⁴ *Id.* at 2598. The Court refers to a strike against the selling employer. The Court did not deal at all with what happens after the sale is consummated. The question remains whether the contract survives in this situation. If it does not, is the employer required to bargain with the union of the purchased company? See *supra* note 156 and accompanying text for further discussion of these issues. See also Gallagher, *Procedures for Determining Representation Following Mergers and Acquisitions*, in *CLEARED FOR TAKEOFF* 99 (J. McKelvey ed. 1988).

system in *Telegraphers*.²⁴⁵

Noting the inconsistency of the decision with *Toledo*, the dissent criticized the majority's reliance on *Darlington* and *First National* because those cases involved unregulated industries, dissimilar to the highly regulated railroad industry. The dissent concluded that:

Perhaps the RLA's restrictions on [the freedom of the employer to leave the market], as interpreted in *Telegraphers* and *Shore Line*, do not best serve national transportation interests. But since Congress has not overruled those interpretations, it is, as Judge Becker observed, inappropriate for judges to undertake to fill the perceived policy void.²⁴⁶

When reviewing this 5-4 decision, it becomes apparent that the Court went too far in its attempt to save the sale, which it considered the best solution for the viability of the company. The problem with this decision is not only that it undertook to achieve something best left to Congress, but also, that it totally disregarded established precedents and the structure and philosophy of the RLA.

Three primary bases exist for the holding in *Pittsburgh & Lake Erie*: its reliance on *Darlington*, its attempt to distinguish *Telegraphers*, and its interpretation of status quo under the RLA. As discussed below, the Supreme Court erred on all three points.

First, the Court incorrectly relied upon *Darlington*. Not only was *Darlington* governed by the NLRA,²⁴⁷ which the Supreme Court has repeatedly recognized as having a different structure and philosophy than RLA,²⁴⁸ but it was also based on a managerial decision to totally shut down and liquidate an entire business, rather than to sell as a

²⁴⁵ *Pittsburgh & Lake Erie*, 109 S. Ct. at 2602 (Stevens, J., dissenting) (citation omitted).

²⁴⁶ *Id.* at 2603.

²⁴⁷ See *supra* note 107 and accompanying text.

²⁴⁸ See *First National*, 452 U.S. at 686-87 n.23; *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. at 579 n.11.

going concern, as in *Pittsburgh & Lake Erie*.²⁴⁹ The difference is not only conceptual. From a labor point of view, the difference is critical. Unlike a total closure, the sale of a business does not terminate its operations as jobs continue to exist and labor relations remain. The only common element is that one employer ceases to exist. Labor law, however, is not concerned with the subjective situations of each party. Its primary concern is the reality of industrial relations within a company attempting to function in society. It is from this point of view that labor laws should be interpreted. To analogize, for labor law purposes, a total closure to a sale of a business is simply incorrect. The business continues to exist. If this fact is insufficient to support a holding that an unexpired contract survives the sale of a business,²⁵⁰ employees should at least have some say in a decision that significantly affects their jobs.²⁵¹

Furthermore, a decision to sell a business is much more amenable to negotiations than a decision to close a business. The alternatives that a union may offer to negotiate are much more varied in the case of a sale. A union may seek to preserve jobs after the sale and bind the purchaser of the company to other conditions. The issues do not exist in the context of a total closure of a business.²⁵²

Moreover, the employer's interest in freely implementing his decisions is much greater in the case of a total shut-down and liquidation of the company than in the case of a sale. In a sale, the timing of going out of busi-

²⁴⁹ See *supra* note 212 and accompanying text.

²⁵⁰ The issue is not settled even under the NLRA. See Bernstein & Cooper, *Labor Law Consequences of the Sale of a Unionized Business*, 36 LAB. L.J. 327 (1985); Krupman & Kaplan, *The Stock Purchaser After Burns: Must He Buy the Union Contract?*, 31 LAB. L.J. 328 (1980).

²⁵¹ The problem of bargaining over mergers would be less acute if a labor contract survived the sale of a business. In such a case, the employees would have a low level of interest in the sale because it would only nominally impact their employment. Under current American labor law, however, it is highly unlikely that a contract survives a company's sale. Interestingly, in *Pittsburgh & Lake Erie*, the contract did not survive the agreement. 109 S. Ct. at 2588 n.3.

²⁵² See *id.* at 2589-90 n.5, for the union's proposals.

ness depends much less on managerial decisions than in the case of liquidation. Bargaining with the buyer is an uncertain process, and when negotiations begin, the seller never knows whether or when the sale will be concluded. If collective bargaining takes place at this point, management's right to go out of business is not violated because management itself has not yet reached a final decision on the matter.

Finally, despite the recent wave of deregulation in the airline and railroad industries, both remain somewhat regulated. Indeed, RLA was passed at a time of heavy industry regulation. Accordingly, an employer's expectations as to his freedom to act independently are necessarily lower than in unregulated industries.²⁵³ Recently, in *Skinner v. Railway Labor Executives' Association*,²⁵⁴ the Supreme Court ruled that in a regulated industry, such as the railroads, employees have a diminished expectation of privacy.²⁵⁵ In that case, the public policy rationale behind diminishing the employees' expectations was that of public safety. In *Pittsburgh v. Lake Erie*, the public policy rationale of preserving labor peace in an industry vital to the economy is of equal importance.²⁵⁶ The Court, it seems, should acknowledge that such a strong public policy, which applies to regulated industries, and has led to RLA's limitations on the right to strike,²⁵⁷ diminishes the employer's expectations in the free conduct of his affairs.

The Supreme Court was also incorrect in attempting to distinguish *Telegraphers*. Examining a partial closure of the business, the Court in *Telegraphers* rejected the idea of decision bargaining and insisted on effects bargaining. The effects of both cases upon the employees shall be examined. The effects of a partial closure and a sale of a

²⁵³ *Id.* at 2603.

²⁵⁴ 109 S. Ct. 1402 (1989).

²⁵⁵ *Id.* at 1418.

²⁵⁶ See *supra* note 212 and accompanying text.

²⁵⁷ See *supra* notes 52-53 and accompanying text.

business, as in *Pittsburgh & Lake Erie*, would have been identical for the employees. A large proportion of them would lose their jobs. Yet, with the same effect on employees imminent, the Supreme Court essentially ruled in *Telegraphers* that the decision of the employer could not be initiated until bargaining under the RLA had been exhausted. Thirty years later, under identical circumstances, the Supreme Court in *Pittsburgh & Lake Erie* held the reverse. Instead of overruling *Telegraphers*, however, it preferred to make unpersuasive distinctions. Even if there is a difference between the *Pittsburgh & Lake Erie* sale of a business and the partial closure in *Telegraphers*, the difference is small when compared with *Darlington's* total closure, on which the Court so heavily relied.²⁵⁸

The Supreme Court did not limit itself to the analysis of management prerogative. The union's clever move to file notices for bargaining in accordance with the RLA created a status quo obligation for the employer to maintain during bargaining over the effects of the sale. This bargaining was authorized by the Court. Thus, the Court had to determine whether this status quo prevented the abolition of negotiated jobs. Unfortunately, the Court failed to grasp this concept. Justice White questioned whether the decision to sell was prohibited by the existing status quo. This was not the correct question to ask. Status quo is not related to business decisions but rather, to the "actual, objective working conditions and practices, broadly conceived. . . ."²⁵⁹ Working conditions do not involve business decisions per se, but rather the job positions they affect or even abolish. The change in the status quo in *Toledo* was not the business decision to change the outlying work assignments of the railroad, but rather the nega-

²⁵⁸ At first glance, it seems surprising that the Supreme Court did not rely on *First National*, which was more recent and more influential than *Darlington*. There is, however, an explanation: *First National* involved a partial closure. If Justice White had relied on that decision, he would have had to explain why he found *First National* more applicable than *Telegraphers*, which also involved a partial closure and, moreover, was governed by the RLA.

²⁵⁹ See *Toledo*, 396 U.S. at 153.

tive way in which the employees were affected in their work. Similarly, the Court in *Pittsburgh & Lake Erie* should have looked at the abolition of 500 jobs and whether past established practice gave examples of similar furloughs, in which case there would have been no change in the status quo by the employer. This analysis was applied by the D.C. Circuit in *Eastern II*, when it ruled in favor of the employer.²⁶⁰ In refusing to follow the D.C. Circuit's lead, the Supreme Court simply distorted the meaning of the status quo.

Justice White additionally cast doubt upon the wisdom of *Toledo*. Fortunately, he did not reverse the case outright, as he realized that this would create confusion in the lower courts which have long relied on *Toledo* for construing the meaning of status quo. This continued reliance supports the contention that the *Toledo* court correctly understood the meaning and purpose of the RLA status quo requirements. The drafters of the RLA, in imposing the status quo obligations, wanted parties to abstain during negotiations from any moves which would destroy the delicate bargaining climate. They wanted to prevent *fait accomplis* that would either render negotiations purposeless or would anger the other party excessively. Only a broad interpretation of the status quo provisions can achieve this goal. Abolition of job positions is precisely the kind of decision that would destroy the climate of trust which must exist during negotiations.

The last point to make about the *Pittsburgh & Lake Erie* decision concerns its effects bargaining rationale. By imposing the consummation of the sale as a deadline on collective bargaining over effects, the Court virtually destroyed any chance for negotiations to be fruitful. The RLA is not like the NLRA. The National Labor Relations Board has authority to scrutinize the employer's behavior and good faith in collective bargaining. No such board exists under the RLA, and courts have generally abstained

²⁶⁰ *Eastern II*, 863 F.2d at 891. For a discussion of the analysis, see *supra* note 201 and accompanying text.

from making such inquiries into the parties' behavior in negotiations. The only legal pressure on the parties to bargain seriously comes from the NMB's power to prolong bargaining indefinitely while an agreement is still possible. The fear that the status quo will continue indefinitely provides an incentive for the parties to bargain in good faith. By imposing the sale's consummation as a deadline, the Court alleviated this pressure. And while the union is pressured by possible lay-offs to bargain seriously, the employer has no such incentive. Thus the employer can behave as he pleases,²⁶¹ unlike the NLRA case where at least he is pressured by the threat of the NLRB.

IV. SUGGESTIONS AS TO THE PRESENT STATE OF LAW

In this section, some conclusions will be drawn as to where case law stands today. This task is not easy because, as has been shown so far, courts have taken contradictory approaches to the issue of collective bargaining over lay-offs. The confusion is even worse because economic circumstances in the airline industry, as well as the railroads, are rapidly changing in the eighties and nineties. Today, when parties are unable to find mutually acceptable solutions, they resort to extensive litigation.

As previously mentioned, two legal questions arise in the context of collective bargaining over lay-offs under the RLA. First, is the employer's decision part of management prerogative which precludes collective bargaining? If not, is bargaining precluded under express or implied arrangements arising from the parties' relationship? Second, should this question be resolved by arbitration, or should collective bargaining be required in the absence of any explicit contrary agreements? Each question will be examined separately in an attempt to bring some order to

²⁶¹ See *Pittsburgh & Lake Erie*, 109 S. Ct. at 2600 n.7. "If the railroad knows its obligations will end when the sale is consummated, it will have no incentive to expedite bargaining. Thus the Court's imposition of a minimal bargaining duty affords employees scarcely more protection than they would have absent any duty." *Id.* (Stevens, J., dissenting).

the confusion that has clouded the lay-off bargaining issue.

A. *Management Prerogative v. Major/Minor Disputes*

The management prerogative issue was addressed by the Supreme Court in *Pittsburgh & Lake Erie v. Railway Labor Executives' Association*.²⁶² As clearly enunciated in that opinion, the announcement of an employer's decision to sell his business or to shut it down is considered a managerial prerogative under the RLA and is not subject to union override. In RLA terms, it is not a union-management dispute. Therefore, it can be neither major nor minor. Effects bargaining may take place, but the consummation of the sale imposes a strict deadline upon the negotiations, a deadline beyond which the status quo cannot be maintained.²⁶³

Despite *Pittsburgh & Lake Erie's* clear holding, many questions remain unanswered. For example, what will happen in the case of a partial closure as seen in *Eastern II*? Furthermore, if a union seeks bargaining over the effects of a possible sale, and negotiations begin with the status quo maintained, can the employer suddenly announce, in the midst of negotiations, a decision to sell, claiming that the mediation services of the NMB will not continue beyond the execution of the sales contract?

The Supreme Court failed to address these problems. On the issue of partial closure, the court only mentioned, without reversing, *Telegraphers*. On the employer interrup-

²⁶² 109 S. Ct. 2584 (1989).

²⁶³ Negotiations with the new employer may continue after the sale of the business. Given that the Supreme Court is reluctant to hold that a contract survives the change of employer, however, it is highly unlikely that the Court will hold that the successor employer is bound by the status quo obligations of his predecessor. Bargaining without status quo requirements under the RLA is meaningless. See *supra* notes 60-61. Thus, with its unfortunate decision in *Pittsburgh & Lake Erie*, the Supreme Court left the employees without either influence over the sale of their company or protection from its adverse effects. Given the representation problems that arise after a merger, it is arguable that the option to strike is, in reality, unavailable and the employees are left defenseless. See *supra* note 156 and accompanying text.

tion issue, the court merely said that it did not "deal with a railroad employer's duty to bargain in response to a union's § 156 duty to [bargain] notice proposing labor protection provisions in the event that a sale, not yet contemplated, should take place."²⁶⁴ What should a lower court do when dealing with those issues or other similar issues such as subcontracting, not mentioned by *Pittsburgh & Lake Erie*?

Pittsburgh & Lake Erie, which actually inserted the concept of management prerogative into the RLA, should be viewed as an exception to long-established case law. As such, it should be interpreted restrictively. As previously discussed, the reasoning in *Pittsburgh & Lake Erie* is weak and results in an unfortunate innovation. It should not be extended to cover other cases. *Telegraphers* governs the partial closures issue. Other types of managerial decisions, not covered by *Pittsburgh & Lake Erie*, should not deviate from the traditional approach that recognizes the extensive scope of the duty to bargain under RLA. After all, *Pittsburgh & Lake Erie* acknowledged that "policy considerations prompting the enlarged scope of mandatory bargaining" exist under the RLA.²⁶⁵

This suggestion not only conforms with long established precedents, but also with legislative history and the philosophy behind the RLA. The RLA was built on the theory that the right to strike should be limited in exchange for a more cooperative bargaining relation between the parties. As one writer put it, "[t]he RLA is a collective bargaining statute. Its whole emphasis is on the full acceptance of that bilateral relationship and the free exercise of both parties' rights in determining rates of pay, rules and working conditions, but with the duty imposed to seek to avoid interruptions to commerce."²⁶⁶

The question that arises is whether the law intended to

²⁶⁴ *Pittsburgh & Lake Erie*, 109 S. Ct. at 2597 n.19.

²⁶⁵ *Id.* at 2595; see *supra* text accompanying note 240.

²⁶⁶ Burgoon, *Mediation Under the Railway Labor Act*, in RLA AT FIFTY, *supra* note 12, at 73.

limit the duty to bargain when decisions seriously affecting employees' jobs are involved. The RLA was a confirmation of a practice favoring extensive collective bargaining, which already existed in the railroad industry. The unique circumstances under which the RLA was enacted were primarily a result of the broad view of bargainable subjects. The congressional hearings reports state that "as long as the right of the employer to conduct his own business is an essential to business and is part of accepted business practice, it must be clear that the freedom of the employee to act equally to protect his own interest should be equally preserved."²⁶⁷ Even more interesting is the statement that: "the way to industrial peace and harmony is . . . to provide for the fair ironing out of all their disputes across the table, in such a manner that each party can feel it has been fairly represented and fairly treated in the negotiations."²⁶⁸ The drafters of the agreement thus believed that the interests of each side must be respected equally and that their freedom to negotiate should be channeled through collective bargaining. That is why Justice Frankfurter once said that "[t]he assumption as well as the aim of that Act is a process of permanent conference and negotiation between the carriers on the one hand and the employees through their unions on the other."²⁶⁹

The whole structure of the RLA is based on the premise that no external force should intervene in the collective bargaining process, with the sole exception of the National Mediation Board (NMB). And this exception is evidence of the statute's policy that NMB intervention is intended to assist parties in their bargaining. Bargaining was considered so important by the parties that the only external interference they accepted was one that would

²⁶⁷ *Hearings*, *supra* note 25.

²⁶⁸ *Id.* For the importance attributed by the Supreme Court to these statements, see *supra* note 25 and accompanying text.

²⁶⁹ *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 753 (1945) (Frankfurter, J., dissenting).

both prolong bargaining and maintain the status quo to an extent unknown to the NLRA. Apart from this exception, the parties refused any other intervention. Neither the NMB nor the President's emergency commission have the power to impose their will upon the parties.²⁷⁰ Significantly, the RLA provides for no administrative agency such as the NLRB, which has broad powers to control and impose penalties upon parties for their conduct in collective bargaining. Thus, any attempt to limit the scope of the duty to bargain under the RLA, by inviting the courts to intervene and determine bargainable subjects, actually violates the legislative purpose of the Act.²⁷¹ Instead of the parties bargaining over subjects important to them, the courts may now substitute their own judgment for that of the interested parties. Moreover, the absence of an administrative agency like NLRB, with its history of experience, leaves the courts unguided in their attempt to define bargainable issues, creating even more confusion than under the NLRA.

For these reasons, the Supreme Court in *First National* wisely felt the need to distinguish *Telegraphers* on the ground that the duty to bargain under the RLA is not co-extensive with that duty under the NLRA. In a frequently quoted phrase in *Telegraphers* "whose specific relevance to

²⁷⁰ Even the emergency commission, which is created in cases of serious threat against the national transportation system, has not the power to make binding recommendations. The commission is rather seen as a pressure upon the parties to find a solution by bargaining. See *supra* note 49.

²⁷¹ Cf. *Elgin*, 325 U.S. at 751.

The nature and the history of the industry, the experience with unionization of the [rail] roads, the concentration of authority on both sides of the industry in negotiating collective agreements, the intimacy of relationship between the leaders of the two parties shaped by a long course of national, or at least regional, negotiations, the intricate technical aspects of these agreements and the specialized knowledge for which their interpretation and application call, . . . these and similar considerations admonish against mutilating the comprehensive and complicated system governing railroad industrial relations by episodic utilization of inapposite judicial remedies.

Id. at 752. (Frankfurter, J., dissenting).

the R.L.A. is often overlooked,"²⁷² Justice Jackson said: "[E]ffective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules and working conditions."²⁷³ This view was recognized recently in *International Association of Machinists v. Eastern Air Lines* when the D.C. Circuit noted that under the RLA, the duty to bargain is "'extremely broad'" and "'has comprehended fields frequently reserved to management in other industrial contexts.'"²⁷⁴ In his dissent in *ALPA v. Eastern Air Lines*, Judge Mikva accurately described the traditional RLA jurisprudence when he explained that "the RLA envisions a much greater role for unions in decisions to scale back operations."²⁷⁵

B. *Major v. Minor Disputes*

Even if a decision is not within the scope of managerial prerogative, a court might nonetheless find the dispute to be minor, and thus bargaining is precluded and status quo maintenance is not required. In cases involving the duty to bargain under the RLA, courts generally avoided, at least until *Pittsburgh & Lake Erie*, getting involved in the concept of management prerogative. Instead, the courts speak in terms of the distinction between major and minor disputes. This is not a coincidence. On one hand, the *Telegraphers* precedent made it very difficult, if not impossible, for lower courts to talk about management prerogative as precluding collective bargaining. On the other hand, if an employer succeeds in characterizing a dispute as minor, he gains several advantages. Specifically, the

²⁷² See Weber, *supra* note 26, at 57.

²⁷³ Order of R.R. Telegraphers v. Chicago & North W. Ry., 362 U.S. 330, 347 (1960).

²⁷⁴ International Ass'n of Machinists v. Eastern Air Lines, 849 F.2d 1481, 1487 (D.C. Cir. 1988) (citing Brotherhood of R.R. Trainmen v. Akron & Barberton Belt R.R., 385 F.2d 581, 601 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968)).

²⁷⁵ ALPA v. Eastern Air Lines, 863 F.2d 891, 917 (D.C. Cir. 1988) (Mikva, J., dissenting).

employer may implement his decision immediately, given the reluctance of the courts to issue status quo injunctions over minor disputes. Additionally, the unions are precluded from striking over minor disputes.

In *Pittsburgh & Lake Erie*, the Supreme Court did not address the major/minor dispute issue, since it found the employer's decision to be covered by managerial prerogative. Therefore, *Elgin* is the seminal decision dealing with the distinction.²⁷⁶ The Supreme Court, in that case, distinguished the two classes of disputes in the context of collective bargaining agreements:

[Major disputes] arise where there is no such 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.

[Minor disputes], however, contemplate[] 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. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case.²⁷⁷

These definitions are constantly quoted by courts, especially those adopting an approach that favors minor disputes. The court in *Elgin* seems to view the distinction between major and minor disputes in terms of rights and interests disputes. This approach justifies a ruling finding a dispute to be minor whenever the employer can point to a provision of the agreement or to past practice that arguably justifies his challenged act. The question becomes one of interpretation, and therefore, according to *Elgin*, would constitute a minor dispute. Dispute characterization is not so simple, however. In another part of the *El-*

²⁷⁶ *Elgin*, 325 U.S. at 723.

²⁷⁷ *Id.* at 723.

gin opinion that is often neglected, the Supreme Court states:

The [major disputes] present the large issues about which strikes ordinarily arise Because they more often involve those consequences and because they seek to create rather than to enforce contractual rights, they have been left for settlement entirely to the processes of noncompulsory adjustment.

The so-called minor disputes, on the other hand, involving grievances, affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so. Because of their comparatively minor character and the general improbability of their causing interruption of peaceful relations and of traffic, the 1934 Act sets them apart from major disputes²⁷⁸

Managerial decisions which result in massive layoffs are precisely the types of disputes that cause strikes. These types of disputes certainly are not of "comparatively minor character" unlikely to cause "interruption of peaceful relations." Thus, *Elgin* also gives support to the other approach for distinguishing between major and minor disputes. That is the method that determines, in close cases, the characteristics of the dispute on the basis of its actual importance.²⁷⁹

As the foregoing reveals, existing precedent is inadequate to provide the proper criteria for distinguishing between major and minor disputes. For this reason, a more

²⁷⁸ *Id.* at 723-25. See *Local 553, Transp. Workers Union v. Eastern Air Lines, Inc.*, 695 F.2d 668, 674 (2d Cir. 1983) (emphasizing the major/minor distinction).

²⁷⁹ See also *Hearings on H.R. 7650 Before Committee on Interstate Commerce*, 73d Cong., 2d Sess. 47 (1934). Commissioner Eastman testified before Congress that "the national adjustment board is to handle only the minor cases growing out of grievances or out of the interpretation or application of agreements." *Id.* Given the fact that at that time disputes had not yet been characterized as major and minor, it is apparent that the use of the word "minor" reflects the actual importance the drafters had in mind about these disputes.

practical solution should be advanced. First, there should be a distinction between the cases in which the contract has expired and those in which its term is still running. When the contract has expired, the solution should be obvious: the dispute is always major. Even if the parties' contract gave the employer the right to unilaterally lay off employees, when the contract expires, a new situation arises. The parties can then renegotiate whatever they want (as long as it is not covered, as a matter of law, by managerial prerogative) and rearrange their prior allocation of rights. A collective agreement does not freeze forever a particular distribution of rights and obligations. The very fact that it has a fixed term means that the allocation is temporary and subject to renegotiation when the contract expires.

The above statements are so obvious to those familiar with labor law, it is a wonder that they have not become settled law. There are two likely reasons for this. First, most of the cases dealing with the major/minor distinction arise in the railroad industry, where labor contracts, unlike those in the airline industry, do not have a definite term. Unfortunately, some courts dealing with airline disputes fail to recognize this fundamental difference and thus incorrectly apply railroad precedents in analyzing the major/minor distinction. Second, quite simply, hard cases make bad law. In this regard, courts hold that disputes are rendered major if they concern issues agreed generally to be subject to mandatory bargaining, and arise after expiration of the bargaining agreement.²⁸⁰ In contrast, courts have refused to deem disputes major if they concern employee reduction decisions and arise after expiration of the collective bargaining agreement. This refusal is consistent with the *First National* philosophy that

²⁸⁰ See, e.g., *International Ass'n of Machinists v. Aloha Airlines*, 776 F.2d 812 (9th Cir. 1985) (dispute over salaries and benefits deemed major); *Air Cargo, Inc. v. Local 851, Int'l Bhd. of Teamsters*, 733 F.2d 241 (2d Cir. 1984) (dispute over weekend and overtime work during lay-offs held a "major" dispute).

bargaining over such decisions should be required.²⁸¹ In fact, in its review of *Aloha*, the court in *Eastern II* distinguished *Aloha* because of its different managerial decision.²⁸² This approach is plainly wrong. The type of managerial decision is relevant only in determining whether the matter is required by law to be bargained. Once the matter is determined bargainable, the analysis focuses on dispute characterization, which turns on the post expiration viability of specific arrangements made between the parties during the contract's term.

The problem becomes more difficult when the employer makes a decision that creates a labor dispute *before* the expiration of the collective agreement. To determine whether the dispute is major or minor, it is important to keep in mind that bargaining, in a lay-off scenario, is not precluded by the RLA, with the exceptions imposed by *Pittsburgh & Lake Erie*. Thus, the union has a statutory right to bargain over the lay-off decision. The question then, is whether the union has waived its statutory right for the duration of the contract. It is settled law that "the waiver of a protected right must be expressed clearly and unmistakably."²⁸³ Under this approach the difficulty in distinguishing major and minor disputes evaporates. Even under the light burden many courts impose upon the employer to show that the dispute is minor,²⁸⁴ the "clear and unmistakable" approach makes it very difficult for the employer to show that his interpretation of the contract is not "frivolous." In fact, a union probably has never waived in "clear and unmistakable" terms its right to bargain over lay-offs.²⁸⁵

²⁸¹ ALPA v. Eastern, 863 F.2d at 898-99.

²⁸² *Id.* at 899.

²⁸³ Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 n.12 (1983) (citing with approval court of appeals decisions in several circuits).

²⁸⁴ See *supra* notes 129-16 and accompanying text.

²⁸⁵ This is not surprising. If the company is profitable, management will not attempt to engage in the difficult negotiations that most matters entail. On the other hand, if the company is financially troubled, the union will almost never be persuaded to concede such a valuable right.

If implemented, this approach will reverse the tendency of the courts to deem disputes minor, and thus bring them more in line with the structure of the RLA. To the extent that a statute can do so, the RLA is designed to promote labor relations by equalizing the bargaining positions of the disputing parties. The situation in which employers can legally make radical changes in existing working conditions, by discharging large numbers of employees, while the unions are forbidden to strike because the dispute is judicially characterized as minor, should not be tolerated under the Act. Yet, this is exactly the situation created by the approach presently employed by a majority of courts.²⁸⁶

The unreasonableness of the approach favoring the characterization of disputes as minor becomes more clear when the no-win situation in which unions often find themselves is considered. If, during usual negotiations for contract renewal, the unions are able to get management to agree to certain job security provisions, they then face the possibility that if the employer makes a decision involving lay-offs, the courts will use these provisions to rule the dispute minor, arguing that they merely involve the interpretation of the job-security clauses.²⁸⁷ This, of course, leaves the unions in a worse position than if they had not obtained the protective provisions in the first

²⁸⁶ The prospect of arbitration offers little consolation to the employees, given the courts' reluctance to issue status quo injunctions in minor disputes when job losses are involved. But this rarely happens under the RLA. See *supra* text accompanying note 128. Considering the extent of the psychological harm caused to employees and their families by furloughs—a harm which cannot be compensated by monetary damages—the refusal by courts to find irreparable harm and therefore issue a preliminary injunction is of questionable wisdom. For an interesting discussion of the problem under both the NLRA and the RLA, see Payne, *Enjoining Employers Pending Arbitration - From M-K-T to Greyhound and Beyond*, 3 IND. REL. L. J. 169 (1979); cf. Note, *Rejection of Collective Bargaining Agreements Under the Bankruptcy Amendments of 1984*, 71 VA. L. REV. 983, 985-86 (1985) (arguing that many items in a labor relationship are not easily translated into monetary terms and therefore only specific performance remedies can offer adequate protection to the employees).

²⁸⁷ For a discussion of this approach in *Eastern II*, see *supra* text accompanying note 201.

place. If no provisions have been obtained, no "interpretational" issue would exist, and the court would rule the dispute major, requiring the employer to bargain with the unions. To think that any legislative scheme would tolerate such a situation requires a lot of imagination.

There are also practical considerations which justify the approach that favors characterizing disputes as major. Arbitration in the airline industry is a time-consuming process. A recent survey indicates that arbitration awards now take more than two years to be issued.²⁸⁸ In airline disputes, the delay can be even longer. If the arbitration board decides that collective bargaining is required before the implementation of the employer's decision, the following unfortunate situation arises: two years after the arbitration process started and the employer implemented his decision to furlough a large number of employees,²⁸⁹ the arbitration board requires bargaining, which may take another one or two years because of the RLA's lengthy procedures. A case in point is *ALPA v. Eastern Air Lines, Inc.*²⁹⁰ In the months that passed after the court ruled that Eastern's decision was minor, leaving the airline free to lay off 4000 workers without bargaining, the carrier filed bankruptcy and a bitter strike ensued. One wonders what will happen if the arbitration board, to which the case was sent by the courts, rules that bargaining was required. It is doubtful that meaningful bargaining can occur so many months after such drastic changes. The situation is untenable both under the RLA and as a matter of common sense.

What distinguishes airline disputes from other arbitration cases, apart from their impact on employees, is that

²⁸⁸ For a report on the the preliminary results of a survey conducted by Mark Kahn and Dana Edward Eischen, see *Grievances Are Growing Problem for Airlines, Unions, Meeting Told*, Daily Lab. Rep. (BNA) No. 207, at A-4 (Oct. 27, 1989). The results were announced in a conference of the Society of Professionals In Dispute Resolution (S.P.I.D.R.) on Oct. 19, 1989 in Washington, D.C. *Id.*

²⁸⁹ This scenario assumes that no status quo injunction has been issued, as is usually the case.

²⁹⁰ 863 F.2d at 891.

the arbitration procedure does not lead to definite and final results. The arbitration board will not determine actual amounts of furlough payments, nor decide whether or not the furlough is legal. The only thing the arbitration board may decide is whether bargaining was required from the beginning. Thus, at the end of the arbitration procedure, the employees might be back where they started; bargaining must begin, but may now be meaningless. In sum, the preference that American courts show for labor arbitration is understandable to the extent they see the choice as between the courts and the arbitration boards. The belief that the specialized boards are more capable of handling the labor disputes than the courts appears to be justified. However, in an airline dispute, the choice is not between the courts and the arbitration boards, but between arbitration and collective bargaining. Labor policy in this country is firmly in favor of collective bargaining as the primary means of resolving conflicting interests between labor and management.

V. CONCLUSION

This article has examined the duty of air carriers to bargain with unions before implementing decisions leading to lay-offs. The courts, in analyzing this duty, have interpreted the RLA in varying ways. The latest Supreme Court decision on the issue has many flaws in its analysis, and reveals a lack of familiarity with the philosophy and structure of the RLA. Finally, this article determined that management prerogative should be interpreted very restrictively under the RLA, and, in distinguishing major and minor disputes, the courts should favor the former in cases of employee reduction decisions.

The analysis was based primarily on legal arguments attempting to provide solutions consistent with the RLA. The RLA itself, however, was not examined to determine if amendment is needed to provide more efficient solutions. The economic implications the issues raise cannot be ignored. In particular, those familiar with the RLA

know the magnitude of the problems created by the lengthy bargaining procedures under the RLA.²⁹¹ What must be emphasized here, however, is that the answers to these economic problems involve delicate considerations of various competing economic and social interests. These interests were weighed by Congress when it enacted the RLA. The time has come for Congress to reconsider the balance it reached in the existing Act. For now, courts should avoid such considerations if the doctrine of separation of powers in this country means anything at all.

²⁹¹ See Perritt, *Aspects of Labor Law Affecting Labor-Management Cooperation in the Railroad and Airline Industries*, 16 PEPPERDINE L. REV. 501, 551 (1989) (arguing that "the pace of negotiations could be substantially increased by setting time limits on the duration of NMB mediation, freeing the employer of its status quo obligation and freeing the union to strike at an earlier stage in the bargaining process."). But see Decision of D.C. Circuit in *Teamsters Local 808 v. NMB*, Daily Lab. Rep. (BNA) No. 219, at D-1, D-3 (Nov. 15, 1989) (excellent account of the reasoning behind leaving to the NMB an almost absolute discretion as to how long to prolong mediation).

Comments

