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MAJOR DISPUTES UNDER THE RAILWAY LABOR ACT

By A. J. Harper III

I. Introduction

A. Background And Legislative History

The Railway Labor Act (hereinafter "RLA" or "Act") is the culmination of over fifty years of experimental legislation concerning labor-management relations on railroads. In 1936 Congress passed Title II of the Act, which extended coverage to the airline industry.

In 1934, the Act was amended to eradicate several shortcomings of the original 1926 Act. The most important creation of the 1934 amendment was section 2, Ninth providing a means for the resolution of representative disputes. The reasons for the extension of the Act, in 1936, to the airline industry were varied. Among them, the following seem to have been controlling: (1) By 1936 almost all aspects of air transportation were regulated and this was deemed evidence of a strong public interest in this field which was sufficient to overcome any Congressional doubts as to whether labor should also be regulated; (2) At the time of passage of the Act, it was contemplated that the airlines would be placed under ICC jurisdiction, and, hence, there was a feeling that uniformity could be achieved by placing airlines under the same labor act as existed for the railroads; (3) The airline industry, charged with public responsibility, needed experienced and detailed labor regulation which only the RLA could provide, and there was a crying need for legislation of some sort due to the depression and consequent labor unrest; and (4) At the time of the hearings on the Act, the Wagner Act had not yet passed the House, and there was a good deal of skepticism as to its constitutionality.

The Air Line Pilots Association (ALPA) was the leading proponent of Title II before Congress. The desire of the pilots for a craft type organi-
zation can be appreciated when it is realized that they are a definite minority of the total number of employees. Airline management did not even bother to attend the hearings, evidently on the assumption that the bill would fail as it had done before. At the time of passage of Title II, there were no collective bargaining agreements in the airline industry, and ALPA was the only union of any strength. The first labor agreement was not even signed until 1937, and it was not until the late 1940's that the NMB began considering labor problems and organization in the airline industry.

B. Structure Of Bargaining Units

Unlike the NLRA where unit organization can take a variety of forms such as single or multi-plant units, or craft units, or a combination of both, the RLA is based solely on "craft or class." The Act fails, however, to define this term, and this task has fallen on the NMB. The NMB has done this through representation disputes under section 2, Ninth. The determination of craft or class, according to the NMB, is but a part of determining who is to be the collective bargaining representative for the employees. The NMB has tended to construe this term narrowly and to equate the term "class" as tantamount to "craft" which follows the established railroad practice. Had the NMB defined the term "class" more liberally, many of the criticisms of the Act's application to the airlines could have been avoided. The craft concept results in a horizontal structure of bargaining units rather than the usual vertical structure common under the NRLA. As determined by the NMB in representation proceedings this has resulted in seven to nine crafts or classes in the airline industry, all represented by different unions. The NMB has also required system-wide units rather than single plant organization. This also seems to be a result of the practice on the railroads where system-wide organization has always been the established form.

This horizontal structure of system-wide units does have some advantages which make it particularly adaptable to the transportation industries. Unlike manufacturing companies, the transportation industry is without any central "plant" and its employees are spread out among all of the communities which it services. This would make it difficult to organize on a vertical type of structure because of the great number of units which would thereby be created. A large number of units each bargaining for its particular location would create multiplicity of bargaining and pose a serious threat to the labor peace. Also, organization on the horizontal level tends to establish national uniformity in wages and benefits

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9 Airline Labor Policy, supra note 4, at 462.
10 Id. at 464 n.20 & 21.
13 See generally, Comment, 32 J. AIR L. & COM. 249, 251 n.8 (1966).
14 Id. See United Transp. Serv. Employees v. NMB, 179 F.2d 446 (D.C. Cir. 1949).
15 Airline Labor Policy, supra note 4, at 472-73.
among workers performing the same or similar types of labor and with a
similar degree of skill or training, but, of course, absent negotiated adjust-
ments, does not provide for differences in the cost of living from locale
to locale.

While these practices of the NMB have been the cause of much criti-
cism, part of which is undoubtedly valid, it should be pointed out that
this criticism is aimed at the NMB's interpretation rather than at the Act
itself. It is the interpretation and application of the craft or class con-
cept rather than the concept itself which has created the complaints. The
NMB has been accused of superimposing the railroad structure onto the
airlines. Examples of this are the placing of stores personnel in the general
clerical craft rather than the mechanics craft with whom they closely
work and by dividing the janitors into two crafts, one mechanics (shop)
and one clerks (office). This type of division tends to create labor un-
rest in the form of jurisdictional disputes between unions by splitting
natural occupational groups. In defense of the NMB, it did hold extensive
hearings in the first airline case establishing the craft or class units. How-
ever, it is hard to deny that the NMB's frame of reference during these
hearings was the railroad industry's structure with which it was familiar.

II. ENFORCEMENT

While the Act provides an elaborate procedure for the settlement of
major disputes between the parties, it fails to provide any means of en-
forcement for the duties it imposes on the parties, except for provisions
added in 1966 providing for enforcement of NRAB awards by the courts.
The only sanction provided is a criminal penalty aimed at the carrier which
has not been used to any great extent. However, the Supreme Court, in
1930, held that the duties of the Act were enforceable in the courts; that
is, compliance with the Act, to prevent either party from violating its
terms, was a judicially enforceable right. This decision was reaffirmed in
In holding that the duty "to treat only with the true representative, and
hence the negative duty to treat with no other" was judicially enforce-
able, the Court went on to hold that the more general provisions of the
Norris-LaGuardia Act did not control over the more specific provisions of the
Railway Labor Act. This doctrine has subsequently been applied

17 See Hearings on S. 3295 Before Subcomm. of Senate Committee on Labor and Public Wel-
19 See Byrer, The Railway Labor Act and the National Labor Relations Act—A Comparison, 44
the carrier from interfering with employees in the selection of their representative in violation of
§ 2, Third).
23 300 U.S. at 547-49. See also Ruby v. American Airlines, Inc., 329 F.2d 11 (2d Cir. 1964).
to unions as well as carriers. Specifically, carriers have been compelled to bargain,\(^7\) to comply with the commands of the Act in regard to major disputes, i.e., to hold conferences following a section 6 notice,\(^8\) and to file a section 6 notice before instituting changes affecting working conditions.\(^9\) Further, carriers have been compelled to refrain from interfering with the employees' rights to choose a representative without carrier influence or coercion,\(^10\) and to establish a system board to hear a dispute between it and the union as required by the Act.\(^11\) Unions have been compelled to fairly represent all employees within its craft or class without discrimination in addition to complying with the procedures of the Act.\(^12\) In addition, courts have jurisdiction under the Act to declare the duties of the parties, usually by way of a declaratory judgment suit or a suit for injunctive relief,\(^13\) i.e., the duty to bargain about a particular subject or to determine the validity of a contract as applied.\(^14\)

The courts have clearly held that they have power to compel compliance with the procedures of the Act (as distinguished from its substantive duties) in minor disputes, that is, to compel submission to a system board.\(^15\) However, some question seems to exist in the minds of some commentators (for example Benjamin Aaron) as to whether the courts can use their injunctive power to prevent resort to self-help while the Act's procedures are being followed.\(^16\)

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[U]nder the Railway Labor Act the status quo is maintained throughout all of the various steps of negotiation, conciliation, mediation and voluntary arbitration, and in the event all these agencies and instrumentalities fail, the status quo is still further maintained . . . [if a Presidential Emergency Board is created].

The question thus becomes whether, during the "cooling off" periods, the parties can be compelled to maintain that status quo.

It seems relatively settled, however, that once the procedures established for the settlement of major disputes are exhausted, the Act contemplates and allows the parties to resort to self-help; therefore, the proscriptions of Norris-LaGuardia prevents the issuance of an injunction to prevent such resort. Generally, when the procedures are exhausted, the time period cannot be restated by a second section 6 notice. However, there is authority supporting the view that if the second section 6 notice is unrelated to the first dispute, then a strike can be enjoined, at least where the strike is obviously over the second dispute.

Also, in the major dispute area, the courts are seemingly without power to issue an injunction unless the moving party has itself complied with the Act, the courts using section 8 of the Norris-LaGuardia Act to deny jurisdiction.

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56 Byer, The Railway Labor Act and the National Labor Relations Act—A Comparison, 44 W. Va. L.Q. 1, 3 (1937-38). The purpose of Section 6 is "to prevent rocking of the boat by either side until the procedure of the Railway Labor Act is exhausted." Manning v. American Airlines, Inc., 329 F.2d 32, 35 (2d Cir. 1964), cert. denied, 379 U.S. 817 (1964). There are three different descriptions of what must be maintained during the cooling-off periods: (1) after the Section 6 notice is served and until the controversy has been finally acted on by the NMB, there can be no change in rates of pay, rules or working conditions; (2) for thirty days after mediatory efforts and offer of arbitration have failed, there can be no change in "rates of pay, rules or working conditions or established practices"; (3) after an emergency board has been created, and for thirty days after its report, there can be no change in "the conditions out of which the dispute arose." On injunctions in major disputes, see generally Azar, The Labor Injunction Reappraised, 10 U.C.L.A. L. Rev. 292, 300-22 (1963); Murphy, Injunctive Prevention of Strikes on Railroads and Airlines, 9 Lan. L.J. 329, 338-42, 350 (1918); Comment, 60 Colum. L. Rev. 381 (1960).

57 Locomotive Eng'rs v. Baltimore & O. R.R., 372 U.S. 284 (1963); Brotherhood of R.R. Trainmen v. Atlantic C.L. R.R., 362 F.2d 649 (5th Cir.), aff'd by equally divided Court without opinion, 385 U.S. 20 (1966); Pan American World Airways, Inc. v. FEIA, 306 F.2d 840 (2d Cir. 1962); American Airlines, Inc. v. ALPA, 169 F.Supp. 777 (S.D.N.Y. 1958). This sword cuts both ways. In FEIA v. Eastern Air Lines, Inc., 208 F.Supp. 182 (S.D.N.Y.), aff'd per curiam, 307 F.2d 510 (2d Cir. 1962), cert. denied, 372 U.S. 945 (1963), the court held that the union was also barred from obtaining injunctive relief once the procedures of the Act had been exhausted. "To allow a union but not an employer 'self-help' in that situation is a possible but unattractive result, which stacks the deck heavily in favor of one of the parties to a labor dispute after a strike has started." 208 F. Supp. at 190. See also Manning v. American Airlines, Inc., 329 F.2d 32, 35 (2d Cir.), cert. denied, 379 U.S. 817 (1964). It should be noted, however, that there are limits to the exercise of self-help, at least for the carriers. See Brotherhood of Ry. & S.S. Clerks v. Florida E.C. Ry., 348 U.S. 238 (1966).


59 KLM Royal Dutch Airlines v. TWU, 8 Av. Cas. 18,395 (E.D.N.Y. 1964); Pullman Co. v. Order of Ry. Conductors, 49 L.R.R.M. 3162 (N.D. Ill. 1962). See dissent in Pan American World Airways, Inc. v. FEIA, 306 F.2d 840, 847 (2d Cir. 1962); and dicta in Northwest Airlines, Inc. v. ALPA, 181 F. Supp. 77 (D. Minn. 1960), to the effect that since the second Section 6 notice did not involve new issues, a strike could not be enjoined.

The question has more frequently arisen where one party has resorted to self-help, or threatens to do so, before exhausting the administrative procedures of the Act, and the other party seeks to enjoin such action as a violation of the Act. In dicta in the Burley case, the Supreme Court seemingly approved of the injunction to insure compliance with the major dispute procedures:

[The Act] retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. . . . The parties are required to submit to the successive procedures designed to induce agreement . . . . But compulsions go only to insure that these procedures are exhausted before resort can be had to self-help.

However, the Court subsequently "muddied the water" in a footnote in its decision in Chicago River. While accommodating Norris-LaGuardia with the RLA and holding the latter controlling in a minor dispute situation insofar as insuring compliance with the procedures of the Act, the Court stated:

The Norris-LaGuardia Act has been held to prevent issuance of an injunction in a railway labor case involving a "major dispute," Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co., 321 U.S. 50. In such case, of course, the Railway Labor Act does not provide a process for a final decision like that of the Adjustment Board in a "minor dispute" case.

An examination of the cited Toledo case reveals two important factors. First, the processes of the Act had been exhausted; and second, there was no claim by the carrier that the Act had been violated. And, as pointed out by one writer in the field, the footnote was irrelevant to the decision. As stated in Chicago, R.I. & Pac. R.R. v. Switchmen's Union: "the injunction in the Toledo P. & W. case had been denied, not because the dispute was 'major' but because § 8 of Norris-LaGuardia prevented issuance of an injunction . . . ." Section 8 of Norris-LaGuardia embodies the so-called "clean hands doctrine" which has been held to bar a party from the right to injunctive relief where it had not itself complied with the procedures of the RLA.

Further, the right to injunctive relief may be limited to situations where the party-defendant has violated the RLA. This was the basis on which the Court in the Telegraphers case distinguished prior cases allowing injunctions. "It is true that . . . where collective bargaining agents stepped outside their legal duties and violated the Act . . . we held that they could


325 U.S. 711, 725 (1945).
33. 173 U.S. 30, 47 n.24 (1917).
5. 292 F.2d 61, 66 (2d Cir. 1961).
6. See cases cited note 40, supra. Two recent decisions have stated that the lack of "clean hands" is not an absolute bar to injunctive relief, but rather that this is but one factor to be considered in the weighing of equities (i.e., a balancing of competing interests) which may tip the scales away from granting the requested relief. Brotherhood of R.R. Trainmen v. Akron & B.B.R.R., 385 F.2d 181, 614 (D.C. Cir. 1968); Illinois Cent. R.R. v. Brotherhood of R.R. Trainmen, 66 L.R.R.M. 2817 (7th Cir. 1968).
be enjoined. Perhaps the best construction of this area is that presented in *American Airlines, Inc. v. ALPA* wherein the court stated that a strike in a minor dispute situation was illegal per se, but "in the case of a major dispute a strike is not illegal per se and can not be enjoined if the processes of the Railway Labor Act have been complied with and exhausted." The court went on to hold that the procedures of the Act in a major dispute were mandatory, and set out excerpts of the legislative history of Norris-LaGuardia which tended to show that that Act did not bar injunctive relief. The burden of proof to show a failure to comply with the Act is on the seeking party, and this seemingly applies to one seeking to show non-compliance on counterclaim.

Where the procedures of the Act in major disputes have not been exhausted, and there is no finding that the moving party has itself violated the Act, courts have generally granted an injunction to prevent circumvention of the Act's processes, i.e., to maintain the status quo pending the exhaustion of those procedures. Carriers have been enjoined from making unilateral changes in rates of pay, rules, or working conditions without filing a section 6 notice; from instituting a change in working conditions while NMB mediation is in progress; and courts have used their equitable power to compel the carrier to bargain. Unions have been enjoined for failure to bargain in good faith; for striking over an issue without having filed a section 6 notice; for engaging in strikes, work stoppages, and slow-downs during NMB mediation; for threatening to strike over a proposed merger; for refusing to bargain during the thirty day cooling-off period; for picketing and engaging in work stoppages while negotiations were going on; for threatening to strike during the

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48 Id. at 788-89.
55 KLM Royal Dutch Airlines v. TWU, 8 Av. Cas. 18,395 (E.D.N.Y. 1964).
investigation of an Emergency Board,\textsuperscript{60} and finally for attempting to
force the carrier to bargain about an unlawful subject.\textsuperscript{61}

In summary, it can be said that the courts have not been hesitant to
assume jurisdiction to compel compliance with the procedures of the RLA
by means of a labor injunction. Unlike the NLRA, the parties are not
free to engage in self-help during the bargaining stages. The Railway Labor
Act has established an elaborate dispute settlement procedure in this area
to prevent disruption of interstate commerce, and the duty has been placed
on the parties to exhaust this procedure before engaging in self-help with
its consequent disruption of interstate transportation facilities. Thus, the
position assumed by the courts is entirely consistent with, and a means
of achieving, this goal.

III. MAJOR DISPUTES

A. Statutory Procedures

The RLA divides disputes into two categories and sets out separate pro-
cedures which the parties must follow in each. Although the Act did not
label these two categories of disputes, the terms "minor disputes" and
"major disputes" have commonly been applied to them. The statutory
basis for minor disputes is found in section 3(i) of the Act; minor dis-
putes are generally described as involving employee grievances or the in-
terpretation or application of an existing and effective agreement.\textsuperscript{62} In a
1945 case differentiating the two categories, the Supreme Court said that
a minor dispute "contemplates the existence of a collective agreement
already concluded or, at any rate, a situation in which no effort is made
to bring about a formal change in terms or to create a new one."\textsuperscript{103}

The statutory basis for a major dispute is set out in sections 5 and 6 of
the Act; these disputes are generally described as controversies over rates
of pay, rules, or working conditions in the negotiation of a new contract.\textsuperscript{64}
The Supreme Court distinguished these disputes from minor disputes by
describing major disputes as ones which "arise where there is no such agree-
ment or where it is sought to change the terms of one, and therefore the
issue is not whether an existing agreement controls the controversy."\textsuperscript{105}
The definition of these terms is not difficult, but the application of them
poses a serious problem to the courts as will be discussed below.

In both major and minor disputes the parties are first required to at-
tempt to reach a settlement between themselves without assistance.\textsuperscript{66} If
the parties fail to reach a settlement at this stage, the procedures as to each
diverge widely.

Where there is a major dispute, the party desiring to change the terms

\textsuperscript{61} Pullman Co. v. Order of Ry. Conductors, 49 L.R.R.M. 3162 (N.D. Ill. 1962).
\textsuperscript{64} See Wisehart, infra note 62.
of the collective agreement must give at least thirty days written notice to the other party in order to impose a duty to bargain, the so-called "section 6 notice." Changes made without filing a section 6 notice are invalid and constitute a violation of the Act. However, if the parties bargain over a proposed change without a section 6 notice having been filed, they have waived their right to such notice. After the section 6 notice is filed, the parties must agree within ten days after receipt of such notice on the time and place for the beginning of negotiations. If the parties reach an impasse in their negotiations, the NMB may step in, either at the request of one of the parties to the dispute or on its own motion where it finds that a labor emergency exists. The NMB attempts to mediate the dispute and to encourage the parties to reach a settlement. This is the second step of the major dispute procedure, and it is known as the "mediation" stage. Once the NMB concludes that no settlement will be reached through mediation, it is required to make an effort to get the parties to agree to voluntary arbitration by the provisions of the Act.

If, as is the usual case, one party refuses to submit the matter to voluntary arbitration, the NMB has two choices: (1) it may officially withdraw from the dispute, and if it should do so, the parties must maintain the status quo as to rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose for thirty days after the official withdrawal of the NMB or (2) it may notify the President of the United States that the dispute in its opinion threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service" and may recommend that the President appoint an emergency board. It is then in the President's discretion whether to create an emergency board.

Once an emergency board has been set up, the parties must maintain the status quo during the period the emergency board is investigating the dispute and for a period of thirty days after the board submits its report.
to the President. The emergency board is given thirty days to make its investigation and to submit its report, but it can, and usually does, get extensions of this period. Each party presents its side of the dispute before the emergency board, and although there is no express statutory authority, the board attempts further mediation to reach a settlement. The emergency board then submits its findings and recommendations for settlement in its report to the President. These findings and recommendations are not in any way binding on the parties to the dispute. In the majority of cases the findings of the emergency board are rejected by one or both of the parties and in many cases they merely create a floor for further bargaining. If after the expiration of the thirty day period following the submission of the board’s report to the President a settlement has not been reached, then the parties are free to resort to self-help, and no injunction can issue to prevent this.

B. Major Or Minor?

When a dispute between the parties arises, the initial question becomes whether the subject matter is a major or a minor dispute. The courts ultimately must decide if the parties cannot agree, and the test used is the classic definition of major and minor disputes set forth in *Elgin, J. & E. Ry. v. Burley*:

The first [major disputes] relates to disputes over the formation of collective agreements or efforts to secure them. They 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.

The second class [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 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. In either case the claim is to rights accrued, not merely to have new ones created for the future. . . . The so-called minor disputes . . . affect the smaller differences which inevitably appear . . . or arise incidentally in the course of employment.

All subsequent decisions have relied on this distinction in reaching a conclusion of whether the dispute is major or minor. This question has generally arisen in a suit for injunctive relief from an alleged violation of the Act, or in a suit for declaratory judgment on the duty to bargain,

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76 See, e.g., Emergency Boards Nos. 120, 121, 123, 124.
77 Id.
79 323 U.S. 711, 723 (1945).
or in a suit to compel submission to a system board. Courts have generally held that determination of the question of jurisdiction, as well as the merits, is for the system board; the courts limit themselves to a preliminary determination as to whether the agreement arguably covers the action taken.

Major and minor disputes are not mutually exclusive, however. The problem arises in the close case which has elements of both. Most courts have recognized that a dispute can contain elements of both, i.e., have an affect on rates of pay, rules, and working conditions and at the same time involve interpretation of the agreement, and decisions rendered in this overlapping area are predictably conflicting. One court, for example, has held a refusal to cross a picket line of another union to be a minor dispute on the theory that its right to refuse was a matter of interpretation under the collective bargaining agreement. Other courts have held just the opposite on the theory that the refusal was a part of the major dispute between the carrier and the second union and did not present a question of interpretation of the agreement. These cases illustrate the problem, which ultimately is one of characterization faced both by the parties and the court. By characterizing the dispute as involving a question of whether the action taken was authorized by or violates the agreement, the court finds a minor dispute; and by characterizing the dispute as one involving a change in working conditions, rates of pay, or rules in violation of the act, the dispute is major. Thus, the same type of dispute can be characterized as either major or minor. This distinction, however, like many others in the law, is more easily stated than applied.  

*See*, e.g., *Aaxico Airlines, Inc. v. ALPA*, 331 F.2d 433 (5th Cir. 1964); *FEIA v. American Airlines*, 303 F.2d 5 (5th Cir. 1962); *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 331 F.2d 183 (5th Cir. 1965); *Southern Ry. v. Brotherhood of Loco. Firemen*, 337 F.2d 127 (D.C. Cir. 1964); *Aaxico Airlines, Inc. v. ALPA*, 331 F.2d 433 (5th Cir. 1964), cert. denied, 379 U.S. 933 (1964); *Rutland Ry. v. Brotherhood of Loco. Eng'rs*, 307 F.2d 21 (2d Cir. 1962); *FEIA v. American Airlines*, 303 F.2d 5 (5th Cir. 1962); *Baltimore & O.R.R. v. United R.R. Workers*, 271 F.2d 87 (2d Cir. 1959), *jdg. vacated on other grounds*, 364 U.S. 278 (1960).  


*IAM v. Northwest Airlines, Inc.*, 304 F.2d 206 (8th Cir. 1962) (in effect, the court separated the pre-existing major dispute from the present controversy and held the refusal to cross the picket line presented a different question.)


Where the parties disagree as to whether the dispute is major or minor, the courts, though not always clear, have formulated some sort of guidelines, relying in large part on the Burley case. Generally, the courts have held that the characterization of the parties is not controlling because the substance of the controversy controls rather than the parties’ characterization. As stated in Rutland Ry. v. Brotherhood of Loco. Eng’rs:10

We readily recognize that here . . . the difference . . . between the interpretation and application of an existing agreement, and . . . a change in an original intended basis of agreement is often a question of degree.

In reaching for resolution of this problem of course we must not place undue emphasis on the contentions or the maneuvers of the parties. Management will assert that its position, whether right or wrong, is only an interpretation or application of the existing contract. Unions, on the other hand, in their assertions about the dispute at issue, will obviously talk in terms of change. Since a Section 6 notice is required by the statute in order to initiate a major dispute, the labor representatives are likely to serve such a notice in any dispute arising out of any ambiguous situation so as thereby to make the controversy more like a major dispute. . . .

In United Industrial Workers v. Board of Trustees of Galveston Wharves,90 the court, in holding the dispute major, said:

[Whether a dispute is major or minor] is to be tested as a matter of substance since a carrier imposing changes in nowise contemplated or arguably covered by the agreement is not to escape . . . the Act merely through the device of unilateral action. . . . This follows from . . . the law’s refusal to determine “major” or “minor” by the labels affixed by the interested combatants . . . [Footnotes omitted.].

To some extent, however, the characterization of these disputes is going to depend on the action of the parties. If the carrier makes a unilateral change, and the union protests the action as a violation of an existing agreement as well as a change in working conditions, the courts will more than likely find a minor dispute. Conversely, if the union protests the action and files a section 6 notice and does not mention the existing agreement, then, assuming the carrier is relying on the agreement as justification, it is a toss-up as to whether the dispute is major or minor, the outcome depending in some degree on the carrier’s ability, or lack thereof, to point to contract provisions which seem to support its action. If a union protests unilateral action by a carrier as a violation of the agreement, even if it at the same time files a section 6 notice to modify the agreement to prevent such action in the future, it would seem that the union has implicitly recognized that the existing agreement arguably allows the unilateral action, hence a minor dispute, and intends by its section 6 notice to modify the agreement to prevent any further action along similar lines while contesting the validity of the action under the present agreement.91

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90 351 F.2d 183, 188-89 (5th Cir. 1965).
It is where the parties fail to agree on the nature of the dispute or do not seek to pursue both procedures that the controversy arises. Where both have treated the dispute as major or as minor, it seems the courts have not questioned their construction, evidently because the issue was not raised.

The controversy generally arises when the carrier has instituted a unilateral change, and the union insists that the change constitutes a change in rates of pay, rules, or working conditions, and that, therefore, the carrier must bargain. The union either threatens to strike, or does strike, or goes to court seeking to compel the carrier to bargain, or to enjoin the carrier from making the change in violation of the procedures for major disputes. If the carrier brings the suit, usually where the union has threatened to or actually does strike, the carrier seeks to enjoin the strike or to compel the union to submit the dispute to a system board, or to obtain a declaratory judgment on the duty to bargain. Usually the court is faced with several of the above requests for relief from both parties. It is in this posture that the courts have been faced with the necessity of determining whether a dispute is major or minor. The problem is complicated by the fact that the initial procedure in a major and minor dispute is the same, that is, the parties must negotiate the dispute between themselves before calling in outside assistance.

This problem area can be analogized to cases arising under the NLRA. Under section 8(d) of that Act an employer has a duty to negotiate in good faith on terms and conditions of employment. If a collective bargaining agreement is in effect, neither party has any further duty to negotiate on items covered by the contract. However, the NLRB has held that absent clear waiver by the union, the employer must notify and bargain with the union before it institutes any change in working conditions neither covered by the contract nor expressly discussed by the parties during negotiations leading to such contract. The union also has the alternative of pursuing the arbitration provisions of its contract as well as filing unfair labor practice charges. The NLRB has made this course very profitable by holding that if an employer takes unilateral action which it contends is allowed by the contract, and even though the contract has an arbitration provision, it is an unfair labor practice if the employer failed to notify and offer to negotiate with the union prior to the change, in essence holding that even if the conduct is arguably allowed by the contract, if it has an adverse effect on the employees in the bargaining unit, the employer must offer to bargain with the union or risk a finding by the NLRB or courts that the contract did not cover the action taken.

The NLRB has given very narrow construction to collective bargaining agreements, requiring "a clear and unmistakeable waiver" before holding that the employer has the right to take the proposed unilateral action.66

The result of these decisions is to give the union "two bites at the apple"—pursuit of arbitration, arguing that the contract does not allow the conduct of the employer, and pursuit of unfair labor practice charges against the employer should it fail to notify and offer to negotiate on the change.67 Essentially the same result is reached under the RLA. The carrier announces a change and the union protests; the parties then confer on the proposed change. Under the Act, or by case decision, the status quo is maintained pending resolution of the dispute, be it major or minor. Under the NLRA the employer is free to institute the change after negotiations with the union, subject only to possible back pay awards by an arbitrator. The union, of course, has the right to submit the dispute to arbitration or file unfair labor practice charges or, absent a no-strike clause or arbitration clause, can strike in support of its position. Under the RLA, the union also has certain alternatives. It can submit the dispute to a system board of adjustment or the NRAB if it feels the conduct violates the existing contract or can contend that the action is a change in working conditions without the proper procedures having been followed by the carrier (a major dispute) and hence illegal. In either event, the union can utilize the courts to compel the carrier to maintain the status quo pending resolution of the dispute. The only material distinction between the procedures is whether the union must submit to binding arbitration or whether it has the ultimate right to strike after exhaustion of the major disputes procedures.88

Thus, when the question arises and is brought to the courts for resolution, the issue is really whether the union has the right to strike in support of its contention at the conclusion of the Act's procedures (with the carrier's coexistent right to make the change and to continue to operate in face of the strike). Where there is a pre-existing major dispute pending between the parties, the courts have examined the section 6 notice filed by either party to determine whether the particular point in controversy was covered. This has generally been construed as a question of fact, that is, whether the carrier's action is on a subject being bargained on pursuant to the notice or whether the particular change is not covered by the notice.89

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66 For example, the NLRB has recently ruled that a waiver clause stating each party waived its rights to bargain over all matters, whether covered by the contract or not, whether discussed during negotiations or not, whether or not contemplated or known at the time, did not, in fact, constitute a waiver by the union. Unit Drop Forge Div., 171 N.L.R.B. No. 73 (1968). Compare N.L.R.B. v. Adams Dairy, 330 F.2d 108 (8th Cir. 1965); N.L.R.B. v. Royal Plating & Polish Co., 330 F.2d 191 (3d Cir. 1965); and N.L.R.B. v. Transmarine Nav. Corp., 65 L.R.R.M. 2861 (9th Cir. 1967).


68 See text accompanying notes 147-153, infra.

However, where no section 6 notice has been filed, or the court has determined that the dispute is not covered by the notice, the courts’ examination has seemed to take a different tact. Since, in these cases there is no notice which can be examined, or there has already been a determination that the subject is not covered by the notice, the courts seemingly resort to characterization of the dispute, relying heavily on the Burley distinction.

An initial question which faces the court is whether there is in fact a contract. While the question does not often arise, it has arisen in situations where the consequences of the proposed action can be extremely adverse to employees or the carrier, such as after a merger.

The courts have almost consistently held that the question of contract validity presents a justiciable issue. In this respect, the courts act in a way analogous to section 301 suits to compel arbitration under the L-MRA. Sometimes, however, it is a close question as to whether the question is one of validity or of interpretation. The confusion that can result is pointed out in Aaxico Airlines, Inc. v. ALPA. There, the carrier had a collective bargaining agreement with ALPA covering its pilots. When the carrier lost its MATS contract, it furloughed all its pilots and notified ALPA that the agreement was terminated. ALPA responded by saying that the agreement was merely dormant. When the carrier obtained a new MATS contract it did not recall the furloughed pilots as required by the contract, and ALPA brought suit in a federal district court for injunctive relief and declaratory judgment. The district court held the carrier had violated the Act by refusing to bargain with the union, who was still the certified representative of the craft, and implicitly recognized that ALPA was still the certified representative. The court went on to hold, however, that the question of

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whether the contract was still in effect was for the system board and not the court.

How, then, was this question [of whether the contract was still in effect] to be decided? Obviously, it could be decided only by interpreting the agreement itself and thus it was a minor dispute, one which under the completely uniform holdings of the courts must be submitted to the grievance procedures with final decision to be made by the System Board...108

This holding seems to clearly conflict with all the previous decisions holding that questions of validity are for the courts, i.e., whether or not there is a legally binding agreement.107 Further, there is no provision under the RLA which provides for the termination of agreements, once made, until the procedures provided by section 6 of the Act are exhausted.108 Thus there is no question for a system board, since, as a matter of law, the contract remained in effect, that is to say that there could not be a question raised as to termination since under the Act there could be none, no section 6 notice having been filed.

There is an argument which can be made, however, to support the decision of the court. Since section 204 of the RLA requires the parties to establish a system board and this is separate and apart from the collective bargaining agreement, all questions of contract construction can be thrown to the system board. Unlike arbitration under section 301 of the L-MRA which is based on a contract clause and, therefore, requires a valid contract before there can be arbitration,109 a section 204 system board exists even if the contract does not, and it has the jurisdiction to determine all issues of contract construction, including the question of termination. However, this theory would still seem inapposite in this case under the long line of cases holding that contracts do not terminate until after section 6 procedures have been exhausted.110

Certain standards can be gleaned from the cases as to the criteria used by the courts. Generally, if the action is arguably covered by the agreement, then it must go to the system board for determination of whether the dispute is major or minor, even if there is an affect on rates of pay, rules, or working conditions.111 The courts seem to be holding that if the

106, 108 F.2d at 436.
107 Cf. Railroad Yardmasters v. Pennsylvania R.R., 224 F.2d 226 (3d Cir. 1951); Capitol Airways, Inc. v. ALPA, 7 Av. Cas. 17,165 (M.D. Tenn. 1961) (both holding that a question as to proper execution of the contract presented a question of validity). See also John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) (holding that a question of contract termination under section 301 of the L-MRA is for the courts).
110 See text accompanying notes 158-160, infra.
disputed subject is either arguably allowed or arguably prohibited by the agreement, then the dispute is minor. As stated in *Galveston Wharves*: 

[If] by its terms of [or?] reasonable implication therefrom, the collective agreement apparently affords some arguable basis for the action, the interpretation of the contract, the question of who is right . . . is for determination by the Railroad Adjustment Board, a Court having jurisdiction only to mold equitable relief to preserve the status quo pending . . . decision. The result ordinarily is that unless the proposed change is to be reflected in a change in the agreement, it is not a § 6 situation and remains a minor dispute. . . .

A corollary doctrine has also been developed. The courts have, in line with the arguably covered idea, stated that it will take more than a mere allegation of an affect on working conditions to constitute a major dispute. In *St. Louis, S.F. & Tex. Ry. v. Railroad Yardmasters*, the carrier unilaterally abolished the jobs of certain employees. The union sought an injunction, claiming that the action violated the Act by changing working conditions without complying with the major dispute procedures. The carrier contended its action was authorized by the existing contract. The court, in holding the dispute minor, said that section 6 required bargaining procedures only where there was an intended change in agreements, affecting working conditions. "If there is no intended change in an existing contract or agreement there is no requirement under section 6 that the bargaining procedures be followed." The court went on to state that section 6 was not to be invoked every time a change has an effect on working conditions, at least where the carrier's contention that the action is authorized under the contract raises a substantial issue of interpretation. "It is not a fictitious or merely colorable issue." As stated by the court in *IAM v. Eastern Air Lines, Inc.*, holding that a change in rules was minor even though not covered by the agreement expressly, it takes a substantial and clearly apparent change in the terms of the agreement to constitute a major dispute. Otherwise, the dispute is minor because "the exclusive jurisdiction of the system boards of adjustment could easily be defeated in every case of disputed interpretation, by the facile expedient of labelling the disputed action of the employer or the union as a 'change.'"

While the courts sometimes talk in terms of "exclusive" jurisdiction, the doctrine seems to be one of primary jurisdiction, *i.e.*, a deferral of

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110 351 F.2d 183, 188 (5th Cir. 1965).

111 328 F.2d 749 (5th Cir. 1964), cert. denied, 377 U.S. 980 (1965).

112 Id. at 752.

113 Id. at 753. Subsequently, the union obtained an injunction to maintain the status quo, 231 F. Supp. 986 (N.D. Tex. 1964) (see text accompanying notes 149-53, infra). This order was appealed, but the Board rendered a decision holding it had no jurisdiction, *i.e.*, that the agreement did not cover the dispute, before the Fifth Circuit reached a decision. The appeal was dismissed as moot, 345 F.2d 181 (5th Cir. 1965).

114 9 Av. Cas. 17,947, 17,948 (S.D. Fla. 1963), aff'd, 320 F.2d 451 (5th Cir. 1963).

115 See also IAM v. Eastern Air Lines, Inc., 320 F.2d 451 (5th Cir. 1963) (unilateral cancellation of earned vacations and extension of work week minor because mere allegations of violation of the Act as well as of the agreement does not affect system board jurisdiction).

jurisdiction to the system board for determination of whether the dispute falls within its jurisdiction. Courts, in these cases, do have jurisdiction to determine the dispute, since an allegation by the union that the carrier has refused to bargain or has instituted change without notice is an allegation that the carrier is violating the Act’s duties, which are enforceable by the courts.

An analogous situation exists where the collective bargaining agreement is silent on a point and no section 6 notice has been filed. In this situation, the courts have held the dispute to be minor on the basis of the Burley distinction, i.e., it is "an omitted case" or one which arises "incidentally in the course of employment" and is "a situation in which no effort is made to bring about a formal change in terms." This was the situation in *Illinois Cent. R.R. v. Brotherhood of Loco. Firemen,* where the court held that a change in a tie-up point and the union’s request for transportation to and from the point, while it did affect working conditions, was a minor dispute since there was no section 6 notice filed and the contract was silent on the point. Similarly, in *Missouri-Kan.-Tex. R.R. v. Brotherhood of R.R. Trainmen,* the court held that a dispute over whether working conditions were in an unsafe condition was minor. While the agreement was silent about safe working conditions, the carrier was under a common law duty to maintain safe conditions and failure to do so was a minor dispute—one arising incidentally in the course of employment.

There are exceptions to this "general rule" as there are to most other "rules of law." A dispute in a major/minor situation will be held major if two facts are present. The unifying characteristic of all these cases is the filing by one or both parties of a section 6 notice directed at the specific point in controversy. This factor, however, has also been present in many of the cases where the dispute was held to be minor.

The distinguishing factor in these cases has been that the parties by their actions were obviously looking to the acquisition of new rights such as implementation and improvement of an existing contract term, or...
that the change was of such an extreme nature that it was obvious that the terms and conditions of employment were being changed in violation of the existing contract. This is a matter of degree, however slight,184 from the "assertion of rights claimed to have vested in the past . . . [and which] relates either to the meaning or proper application of a particular provision. . . ."185 Courts, however, have given substance to the distinction. In Order of Ry. Conductors v. Spokane, P. & S. Ry.,186 the court held that a dispute relating to lodging at away from home lay-over points presented a major dispute. The issue was characterized as one looking to the acquisition of new rights for the future, and the facts tended to show that the parties were not fighting over the interpretation of the existing agreement, but rather over the implementation and improvement of the existing terms.187

In Florida E. C. Ry. v. Brotherhood of R.R. Trainmen,188 the carrier’s action in instituting unilateral changes went to an extreme. The situation was complicated by the fact that the union was honoring the picket lines of other unions lawfully striking the carrier, while, at the same time, negotiating with the carrier over subjects covered by section 6 notices. During these negotiations the carrier instituted changes in pay, in hours, and abolished the union shop agreement—all unilaterally.189 The court held that a major dispute was presented. "In short, the controversy is not over what the bargaining contract now permits as a matter of contract construction."190 The court found that this action by the carrier did, in substance, impose "changes in nowise contemplated or arguably covered by the agreement. . . ."191 Thus, the facts showed not only that a section 6 notice had been filed but also that the carrier’s action was obviously changing working conditions. In Galveston Wharves,192 the court held that the carrier had to bargain over the leasing-out of grain elevators. The parties were negotiating over a new contract and the union’s second section 6 notice, filed after the carrier’s action, expressly covered subcontracting. The carrier declined to negotiate over the grain warehouse lease. The carrier contended that the existing contract gave it the power to make the lease. The court held that the leasing-out presented a major dispute, and that the carrier had violated the Act by failing to file a section 6 notice and by refusing to bargain over its action. The court based

184 As stated in Rutland Ry. v. Brotherhood of Loco. Eng’rs, 307 F.2d 21, 33 (2d Cir. 1962): "We readily recognize that here . . . the difference . . . between the interpretation and application of an existing agreement, and . . . a change in an original intended basis of agreement is often a question of degree." See also text accompanying notes 87-90, supra.
186 366 F.2d 99 (9th Cir. 1966).
187 The existing terms here were part of the national arbitration award and the parties were negotiating over what was to be required in way of facilities furnished—an acquisition of rights for the future and not a claim to rights vested in the past.
188 336 F.2d 172 (5th Cir.), cert. denied, 379 U.S. 950 (1964).
189 The carrier was using replacement workers when it instituted the changes as to wages and hours.
190 366 F.2d at 179.
192 351 F.2d 183 (5th Cir. 1965).
its decision on the ground that the contract then in force expressly covered work at the grain elevator facilities, and the carrier's action terminated work which was guaranteed by the contract. Thus, the carrier had, in substance, changed working conditions in a way obviously contrary to the agreement. The court stated:

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 prerogative . . .

From this it can be seen that the court has added to the test enunciated above. As pointed out by the dissent, the contract provisions in this case, on their face, could arguably cover the action taken by the carrier. Under the normal doctrine this would have been sufficient to send the dispute to the adjustment board for determination. The court here has seemingly shifted the emphasis from justification of an act under the terms of a contract to the effect of the action taken on the employees and the agreement as a whole. Under the doctrine enunciated, the examination of the dispute encompasses much more than a mere examination of the particular clauses relied on by the carrier; it includes an examination of the effect of the action on other rights of employees guaranteed by the contract and whether the clauses relied on were intended for the purposes to which they were used. If, after such an examination, the court can say that the clauses arguably cover the dispute, then the dispute is minor. If, on the other hand, the court finds that the carrier is attempting to use the clauses in a way that was "in nowise contemplated or arguably covered by the agreement" as a matter of substance, then the dispute is major. Under the Galveston Wharves doctrine, courts will have to engage in a more detailed preliminary examination than is required under the normal doctrine. The exact limits of this examination, to avoid "trespassing on the exclusive domain of the Adjustment Board," is yet to be delineated. Obviously, however, an examination, in some detail, of the dispute itself without reference to the agreement is involved. Possibly the second step is a weighting of the effect of the action as found by this examination against the claimed justification of the carrier under the contract as found by a most perfunctory examination. Whether this doctrine or the normal doctrine will prevail will have to await future decisions, and, in the Fifth Circuit at least, the decision should be en banc.

There remains but one case which throws doubt on the whole area. However, an examination of the case reveals that it is distinguishable, and, in fact, reconcilable with the later decisions of the court of appeals. In

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132 Id., at 189.
133 This seems to be what was done by the district court in Railroad Yardmasters v. St. Louis, S.F. & Tex. Ry., 218 F. Supp. 193 (N.D. Tex. 1963), rev'd, 328 F.2d 749 (5th Cir.), cert. denied, 377 U.S. 980 (1964).
Order of R. R. Telegraphers v. Chicago & N.W. R.R.,\textsuperscript{150} the Supreme Court, in holding the scope of the so-called management prerogative a proper subject of bargaining,\textsuperscript{128} answered a claim by the carrier that the dispute was minor by saying:

Only a word need be said about the railroad's contention that the dispute here with the union was a minor one. . . . [I]t is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of the provisions of that agreement. Particularly since the collective bargaining agreement which the union sought to change was a result of mediation under the Railway Labor Act, this is the type of major dispute that is not governed by the Adjustment Board.\textsuperscript{127}

The carrier in both the lower courts\textsuperscript{150} had relied on a line of cases which held that the exercise of management prerogative was neither a minor dispute, since there was no provision in the agreement, nor a major dispute, since no section 6 notice had been filed.\textsuperscript{129} The carrier had unilaterally consolidated several stations which resulted in lay-offs. It had not claimed the right to do this under the provisions of the existing contract and, therefore, refused to bargain over it. It had asserted its minor dispute claim in the trial court after a temporary restraining order had already been entered. The trial court in rejecting this contention stated that the agreement was reached pursuant to NMB mediation and was therefore, for it, under section 5, Second of the Act,\textsuperscript{160} to interpret—that is to say that the NMB, and not the NRAB, was the proper forum to hear the dispute. In reversing, the Seventh Circuit did not mention the point, resting its decision solely on the ground that there was no labor dispute involved, which was the main contention of the carrier and the point with which the Supreme Court primarily concerned itself. The Court agreed with the trial court on the minor dispute point—that it was for the NMB—and held the dispute major because of the affect on working conditions: "[P]lainly the controversy here relates to an effort on the part of the union to change the 'terms' of an existing collective bargaining agreement.\textsuperscript{33362 U.S. 330 (1960). 136 See Part III, D, infra. 137} \textsuperscript{139} See, e.g., Brotherhood of R.R. Trainmen v. New York Cent. R.R., 246 F.2d 114 (6th Cir.), cert. denied, 355 U.S. 877 (1957). 140 RLA § 5, Second, 44 Stat. 580, as amended, 48 Stat. 1195, 45 U.S.C. § 155, Second (1964). 141 362 U.S. at 336.}
over the implementation of the plan, refusing to bargain only on the abandonment and consolidation of jobs preceding the implementation. This tended to show that the carrier was not in fact relying on the existing contract for authority. If the carrier had actually relied on the contract and based its action thereon, it is submitted that the Court would, as the courts in later cases have, make a "major/minor examination."\textsuperscript{142} The question is which test, \textit{Galveston Wharves} or the normal one, the Court would use. \textit{Telegraphers} formed the basis for \textit{Fibreboard}\textsuperscript{143} and \textit{Town & Country Mfg.}\textsuperscript{144} Together, the three cases stand for the broad proposition that the exercise of the so-called management right is subject to bargaining, at least where the exercise of the right has a significant affect on working conditions. In the absence of a claim by the carrier that the contract authorizes such action, \textit{i.e.}, a naked claim of right, it seems clear that the dispute is major, since the effect on employees is substantial and could not fall within the omitted case category. Where, however, as in \textit{Galveston Wharves}, there is an arguable basis in the contract authorizing the action, different results can be obtained depending on the test used. If the normal test is followed, the dispute will be referred to a system board. The complaint usually levied against this process is the delay involved. As pointed out below, much of the adverse consequences flowing from this delay has now been alleviated. On the other hand, if the \textit{Galveston Wharves} test is used, and the court, relying heavily on the effect of the action, holds the dispute major, the possibility exists that the court has voided a valid contract right of the carrier. However tenuous the claim may seem to the court in light of the effect the change accomplishes, the claim is still there and the carrier has been denied the right to have the expert forum, the system board, pass on its claim. While the claim may be frivolous in many cases, it is the case where the claim is not frivolous that the court has denied the carrier valid rights under an existing contract. As noted below, the profit has been taken out of using the minor dispute procedures as a delay mechanism, thereby probably eliminating most, if not all, of the frivolous claims that the contract covers the disputed action. The desirability of substituting a court's judgment on the effect of the change for a determination of a system board on the carrier's claimed justification seems highly questionable, especially since prompt resolution of contractual claims is now available.

One area of major/minor disputes remains to be examined—that of procedural safeguards. While either party could obtain an injunction to preserve the jurisdiction of the system board, \textit{i.e.}, to compel submission of the dispute and to prevent strikes,\textsuperscript{146} there was no provision for maintaining the status quo in a minor dispute situation.\textsuperscript{146} Any action taken by

\textsuperscript{142} In fact, the Court has done this in the past. See Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945).
\textsuperscript{146} The Act provides for maintenance of the status quo in major disputes. RLA \textsection 6, 44 Stat. 182, as amended, 48 Stat. 1197, 45 U.S.C. \textsection 156 (1964).
a carrier or a union, aside from refusing to comply with the procedures, which the other party claimed was a violation of the agreement could be effectuated immediately. Many times the decision of the system board or, more generally, the NRAB came to late to be of any value. Since the action complained of was an accomplished fact, it was impossible in many situations to return to the status quo ante. In 1960, the Supreme Court attempted to correct this deficiency in *Brotherhood of Loco. Eng'rs v. Missouri-Kan.-Tex. R.R.*[^147^] The Court there held that an injunction, sought by a party to compel compliance with the minor dispute procedures (here a carrier seeking to enjoin a threatened strike), could be conditioned so as to compel the maintenance of the status quo pending resolution of the dispute. The Court held that imposing conditions on the issuance of an injunction was within the traditional equity powers of a court, and did not constitute a preliminary determination on the merits of the dispute.

[^147^]: The action of the district judge [in conditioning an injunction], rather than defeating the Board's jurisdiction, would operate to preserve that jurisdiction by preventing injury so irreparable that a decision of the Board in the union's favor would be but an empty victory. . . . The balancing of these competing claims [by the carrier and the union] of irreparable hardship is, however, the traditional function of the equity court, the exercise of which is reviewable only for an abuse of discretion [Emphasis added.].[^148^]

The Court, however, left open the question of "whether a federal court can, during the pendency of a dispute before the Board, enjoin a carrier from effectuating the changes which gave rise to and constitute the subject matter of the dispute, independently of any suit by the railroad for equitable relief."[^149^] Lower courts have seemingly proceeded to answer this question affirmatively.[^150^] Logically, an affirmative answer is proper since the thing sought to be avoided is present whether or not the union threatens to strike. It should not be a prerequisite to maintaining the status quo that the union call a strike if under equitable principles of irreparable harm, no adequate remedy at law, etc., there is a need for the equitable relief. As stated in *Westchester Lodge 2186*,[^151^] while allowing an independent suit by the union to maintain the status quo:


[^149^]: 363 U.S. at 531 n.3.


[^151^]: 329 F.2d at 752-53.
But because a dispute is minor, it does not follow that the District Court had no jurisdiction to grant a preliminary injunction to maintain the status quo pending the outcome of a determination by the Adjustment Board. . . . The effect [of requiring a suit by the carrier to enjoin a threatened strike] is to encourage unions to take insincere strike votes to provoke the carrier into seeking an injunction, hoping that the District Court will deem retention of the status quo proper. . . . [W]e find . . . [nothing] in the Railway Labor Act which prohibits a federal court from issuing an injunction to restore the status quo in a minor dispute if the court's discretion is soundly exercised to preserve the primary jurisdiction of the Adjustment Board.

This new procedural remedy has accomplished two things. First, it has provided a safeguard against a party carrying an act into effect when that act, the authority to do it, is being disputed and effectuation would result in irreparable harm. Secondly, it has eliminated, to some degree, the use of the minor dispute procedures as a delay mechanism. Since a party can no longer act with impunity in making changes, the profit in delaying decision of the right to do so has been removed. The 1966 amendments to the Act, allowing creation of system boards on the railroads, should also aid in alleviating this problem since the time factor involved will be substantially less, thereby eliminating much of the basis for the claim of irreparable injury. Further, even if a status quo injunction is issued no tremendous burden will be placed on either party since there will be a prompt resolution of the conflicting claims.

One final point should be noted. The construction given by the courts to this question of whether a dispute is major or minor, and the formulation arrived at, bears a strong resemblance to the test enunciated by the Supreme Court in cases arising under section 301 of the LMRA, most notably the Steelworkers Trilogy. The Court, in one of these cases, United Steelworkers v. Warrior & Gulf Navigation Co., stated:

An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Thus, it is for the courts to determine the question of arbitrability—whether the arbitration clause covers the disputed point—under section 301. This would seem to be analogous to a court determination of whether the dispute is covered by the agreement under the Railway Labor Act, and, therefore, for the NRAB or system board, i.e., the arbitrator. However, if the Galveston Wharves test is followed, it would seem that the examination under the Railway Labor Act is balanced in favor of requiring bargaining rather than requiring arbitration. But even under

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155 363 U.S. 574, 582-83 (1960).
157 See text accompanying 132-34, supra.
Galveston Wharves “doubts” will seemingly be resolved in favor of arbitration.

C. Agreements—Section 6 Notice And Effect

Changes in agreements are brought about by the procedures established in the RLA. "The effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination. . . . [T]he very purpose of § 6 is to stabilize relations by artificially extending the lives of agreements for a limited period regardless of the parties' intentions." Once the section 6 notice is filed, or possibly even without such notice if the parties bargain over a subject not covered by a section 6 opener, the courts seem consistently to hold that the agreement remains in effect until the procedures of the Act are exhausted. This position is in accord with the purpose of the Act—to maintain the status quo.

Agreements have also been held to survive a variety of adverse consequences not related to the duration clause of the contract. In FEIA v. Eastern Air Lines, Inc., the court stated that, while the agreement had terminated following the exhaustion of the major dispute procedures, the system board created between the parties by the contract was probably still the proper forum to hear complaints arising before the expiration of the contract, even though there was no grievance procedure available since the contract had expired. The court held that claims arising after expiration date were not referable to a system board—that the carrier could not be compelled to establish one since there was no duty under the Act to do so, as FEIA was no longer the bargaining representative. Compare ALPA v. Southern Airways, Inc., wherein the court held that the employer/employee relationship was not terminated by the expiration of the contract, that employees on strike were entitled to the right of reinstatement subject to the rights of replacement workers, and, finally,


165 This is the so-called theory of waiver, i.e., by bargaining on a subject not covered by a section 6 notice, the parties have waived the right to have such a notice served as required by the Act. See Childers v. Brotherhood of R.R. Trainmen, 192 F.2d 956, 959 (8th Cir. 1951); ALPA v. Southern Airways, Inc., 208 F. Supp. 182, 190-91 (S.D.N.Y.), aff'd, 307 F.2d 510 (2d Cir. 1962), cert. denied, 372 U.S. 941 (1963).

166 See, Brotherhood of R.R. Trainmen v. Akron & B.B.R.R., 61 L.R.R.M. 2229, 2233 (D.C. Cir. 1967) (effect of § 6 "is to prolong agreements . . . regardless of what they say as to termination"); FEIA v. Eastern Air Lines, Inc., 329 F.2d 303 (2d Cir. 1964) (carrier does not have to establish system board since contract expired after procedures of Act exhausted); Manning v. American Airlines, Inc., 329 F.2d 32 (2d Cir. 1964) (purpose of section 6 is to prevent "rocking the boat by either side" and keep the old agreement in effect until Act's procedures are exhausted, hence carrier must continue to check-off dues); United Industrial Workers v. Board of Trustees of Galveston Wharves, 351 F.2d 183 (5th Cir. 1965) (contract remains in effect until exhaustion of Act's procedures, hence carrier could not unilaterally lease out facility and terminate employees without filing section 6 notice); and FEIA v. Trans World Airlines, Inc., 305 F.2d 675 (8th Cir. 1962) (contract expired after exhaustion of Act's procedures and hence supplemental letter of understanding had also expired).

167 319 F.2d 303 (2d Cir. 1966).

that striking workers could not be deprived of grievance machinery concerning any disciplinary action taken by the carrier. The distinction between the two cases is that FEIA was no longer the certified representative at Eastern, but ALPA was the bargaining representative at Southern, and the carrier, therefore, was still under a duty to treat with ALPA.\footnote{Compare United States Gypsum Co. v. Steelworkers, 384 F.2d 38 (5th Cir. 1967) (holding that duty to arbitrate with union survived merger of company and also survived decertification of union) with FEIA v. Eastern Air Lines, Inc., 359 F.2d 303 (2d Cir. 1966) (no duty to establish system board). See also Aaxico Airlines, Inc. v. ALPA, 331 F.2d 433 (5th Cir. 1964), cert. denied, 379 U.S. 933 (1964) (duty to establish system board even though carrier had previously ceased operation, since union was still certified representative).}

Further, agreements have been held to survive when the carrier lost its MATS contracts and had to close down indefinitely.\footnote{Brotherhood of Ry. & S.S. Clerks v. United Air Lines, Inc., 325 F.2d 376 (2d Cir. 1963), cert. dismissed, 379 U.S. 26 (1964). Compare Bath Iron Works Corp. v. Draftsmen's Ass'n, 393 F.2d 407 (1st Cir. 1968) (holding that non-survivor's contract controls over survivors).} Similarly, agreements probably survive a merger,\footnote{RLA § 2, First, 44 Stat. 377, as amended, 48 Stat. 1168, 45 U.S.C. §§ 152, First (1964).} but where two different unions (one on the survivor and one on the merging carrier) represent the same craft or class, the agreement of the survivor with its union controls, at least until the NMB settles the question of which of the two unions is entitled to represent the group of employees.\footnote{Compare United States Gypsum Co. v. Steelworkers, 384 F.2d 38 (5th Cir. 1967) (holding that duty to arbitrate with union survived merger of company and also survived decertification of union) with FEIA v. Eastern Air Lines, Inc., 359 F.2d 303 (2d Cir. 1966) (no duty to establish system board). See also Aaxico Airlines, Inc. v. ALPA, 331 F.2d 433 (5th Cir. 1964), cert. denied, 379 U.S. 933 (1964) (duty to establish system board even though carrier had previously ceased operation, since union was still certified representative).}

While the Act does not specifically require written agreements, it does require that the carrier file copies of all its agreements with its employees with the NMB.\footnote{The NMB has interpreted this to mean that contracts between a carrier and employees negotiated under the Act must be written.} Once an agreement is consummated, there is a moritorium on change during its term.\footnote{While the Act does not specifically require written agreements, it does require that the carrier file copies of all its agreements with its employees with the NMB. The NMB has interpreted this to mean that contracts between a carrier and employees negotiated under the Act must be written.} This moritorium may also apply to "established working conditions" not embodied in the contract.\footnote{RLA § 2, First, 44 Stat. 377, as amended, 48 Stat. 1168, 45 U.S.C. §§ 152, First (1964).} If the Sixth Circuit's construction in the Detroit case is correct, the union can effectively preclude the carrier from exercising any right reserved under the contract by omission or system board construction by the mere expenditure of filing a

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section 6 notice. This achieves a result somewhat similar to the doctrine developed under the NLRA, requiring a company to notify and bargain with a union prior to instituting any unilateral action not expressly covered in negotiations or allowed by the contract or on which the union has not clearly waived its right to bargain. This does not of course prevent disputes from arising as to whether the conduct in question is covered, in violation of or permitted by the agreement, or whether the conduct constitutes an unlawful unilateral change in the terms of the agreement. This is substantially similar to the doctrine developed under the NLRA, holding that there is no duty to bargain after an agreement is reached on subject matters covered by the agreement, but there is a duty to bargain on subject matters not negotiated or covered or contemplated by the agreement. It should be noted that unlike the NLRA an agreement under the RLA survives changes in bargaining representatives.

D. Subjects Of Bargaining

Here, more than in any other area, the Railway Labor Act and the NLRA are substantially similar. The RLA establishes certain guidelines for the parties to follow in their negotiations in establishing or changing an agreement. There is a duty to bargain about matters "concerning rates of pay, rules and working conditions," and about union security and check-off agreements. Further, in the airline industry, the RLA requires the establishment of a system board of adjustment, but does not define its jurisdiction except in terms of its maximum authority—not to exceed that of the National Railroad Adjustment Board.

Aside from these general guidelines, the RLA is silent on the subject of bargaining. There is no agency such as the NLRB to which the parties may turn to determine bargainability; thus, the courts have assumed responsibility for determining whether a subject is bargainable. However, the Supreme Court, in delineating the extent of this power, has stated:

The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulations of wages, hours or working conditions. Instead, it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by these Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be as good as they will bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions.

171 See text accompanying notes 92-97, supra.
172 See Part III, B, text accompanying notes 92-97, supra.
The Court in *Telegraphers* indicated that determination of the proper subjects of bargaining should be left to the parties. Even more importantly, the Court stated that "the right of the representatives of the unit [is] to be consulted and to bargain about the exceptional as well as the routine rates, rules and working conditions." Further, the Court concluded:

In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation . . . has been to broaden, not narrow, the scope about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs . . . [of the parties].

While this statement involved the railroads, its language would seem equally applicable to the airlines.

Thus, the subject of bargaining under the RLA are initially for the parties to resolve, and only in exceptional cases will the courts intervene. And, as under the NLRA, the trend is to require bargaining if the subject bears any slight relationship to "rates of pay, rules or working conditions." Unlike the situation which exists under the NLRA, there are relatively few cases in which courts have considered and decided whether a particular subject falls within "rates of pay, rules or working conditions." Of course, a subject does not have to be specifically mentioned in the Act to be bargainable. Subjects which have been held to be within the bargainable category include: management right to make changes affecting working conditions; type of qualifications required for a particular position; seniority rights after a merger; seniority rights of replacements for strikers; grounds for discharge; and, extent of right to discipline strikers.

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180 The statute does not undertake to compel agreement . . . but it does command these preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, . . . to make reasonable efforts to compose differences—in short, to enter into negotiation for the settlement of labor disputes such as contemplated by § 2, First.

181 Id. at 347.


186 Pan American World Airways, Inc. v. FEIA, 7 Av. Cas. 18,331 (2d Cir. 1962) (issue of whether flight engineers must have mechanics' certificate is bargainable). Contra, FEIA v. Western Airlines, Inc., 7 Av. Cas. 17,500 (S.D. Cal. 1961).


purchase and maintenance of uniforms;\textsuperscript{190} pension plans;\textsuperscript{191} compulsory retirement;\textsuperscript{192} check-off agreements for union dues;\textsuperscript{193} job security;\textsuperscript{194} safe conditions at work;\textsuperscript{195} rescheduling of train runs;\textsuperscript{196} sub-contracting out of work formerly performed by employees;\textsuperscript{197} and leasing out of facilities formerly operated by employees.\textsuperscript{198} The subjects of physical fitness and examinations have also been held to be within the Act on the theory that it is "of vital concern to the employer, fellow-employees, and the public."\textsuperscript{199} Generally, any change in the existing incidents of employment is a proper subject for bargaining.\textsuperscript{200} However, the right to bargain collectively on any particular subject cannot contravene regulations dealing with air safety promulgated by the Federal Aviation Administration. In case of conflict, the FAA regulation is controlling.\textsuperscript{201}

Further, the parties seemingly cannot by agreement limit or condition a right granted in the Act. In \textit{Felter v. Southern Pac. Co.}\textsuperscript{202} the Supreme Court held that a union and the carrier could not by agreement impose requirements over and above those in the Act in regard to the manner of revoking an authorization for the check-off of union dues. Such a provision was held in violation of the Act and therefore void.\textsuperscript{203}

The subjects of bargaining under the RLA and NLRA seem to be substantially the same. Although the Seventh Circuit in \textit{Inland Steel v. NLRB}\textsuperscript{204} indicated the subjects of bargaining under the LMRA are broader than those under the RLA, this seems to be a minority view. The Supreme Court in \textit{Steele v. Louisville & N.R.R.}\textsuperscript{205} referred to the duty to bargain under the acts as "like provisions." The Tenth Circuit has stated that the provisions of the two acts were intended to include substantially the same

\textsuperscript{196} Rutland Ry. v. Brotherhood of Loco. Eng'rs, 307 F.2d 21 (2d Cir. 1962).
\textsuperscript{197} KLM, Royal Dutch Airlines v. TWU, 7 Av. Cas. 18,425 (E.D.N.Y. 1962).
\textsuperscript{198} United Industrial Workers v. Board of Trustees of Galveston Wharves, 351 F.2d 183 (5th Cir. 1965).
\textsuperscript{199} Wilburn v. Missouri-Kan.-Tex. Ry., 268 S.W.2d 726, 732 (Tex. 1954).
\textsuperscript{201} ALPA v. Quesada, 286 F.2d 319 (2d Cir.), \textit{cert. denied}, 366 U.S. 962 (1961). Cf. American Airlines, Inc. v. ALPA, 6 Av. Cas. 18,083 (N.D. Ill. 1960) (strike threat enjoined where reason was FAA Regulation required that pilot's seat be used by FAA Inspector for en-route inspection).
\textsuperscript{202} 359 U.S. 326 (1959).
\textsuperscript{203} The RLA, in section 2, Eleventh, provides that an employee may revoke an authorization by putting it in writing. The parties had established a form and procedure in the agreement for this purpose.
\textsuperscript{204} 170 F.2d 247, 254 (7th Cir. 1948), \textit{cert. denied}, 336 U.S. 960 (1949).
\textsuperscript{205} 323 U.S. 192 (1944).
subjects.' The Supreme Court in _NLRB v. Jones & Laughlin Steel Corp._ lends support to the Tenth Circuit's construction by pointing out that certain of the provisions of the LMRA were derived from, and are comparable to, those of the RLA. Further support is found in the Court's opinion in _NLRB v. American Nat'l Ins. Co._ wherein the Court indicated that the two acts were similar; while citing the _Terminal R.R. Ass'n_ case, the Court talked in terms of section 8(d) of the NLRA. In _Fibreboard Paper Products v. NLRB_ the Court equated "working conditions" with "terms and conditions of employment," thus indicating that little distinction exists between the acts as to subjects of bargaining. The court in _Brotherhood of Ry. & S.S. Clerks v. Atlantic C.L.R.R._ followed NLRA precedents in finding a carrier guilty of a failure to bargain. Other courts hearing cases under the RLA have relied on NLRA precedents to hold that management rights are a proper subject of bargaining; that check-off of union dues is proper; and that seniority for replacement workers and the right to discipline strikers are proper subjects. Conversely, the Supreme Court has relied on RLA precedents to hold that management must bargain with a union over contracting out of work previously performed by employees of the company, i.e., that this was a mandatory subject of bargaining.

There is, however, one major point of difference in the treatment of subjects of bargaining between the two acts. Under the NLRA, the courts have developed the "mandatory/permissive/illegal" dichotomy when describing subjects of bargaining. While some courts have used these terms with reference to the Railway Labor Act, the dichotomy does not seem appropriate to the RLA.

In the first place, under the NLRA the import of the dichotomy is that the parties may reach impasse on mandatory subjects, but must withdraw

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206 301 U.S. 1, 33-34, 43-49 (1937).

207 343 U.S. 191, 197 n.3 (1952).


209 379 U.S. 203 (1964). The equation was made by citing the Telegraphers case, 362 U.S. 330 (1960), for the statement: "The subject matter of the present dispute is well within the literal meaning of the phrase 'terms and conditions of employment.'" Id. at 210.

210 201 F.2d 36 (4th Cir.), cert. denied, 343 U.S. 992 (1933).


permissive subjects before impasse is reached. Insisting to the point of
impasse that a permissive subject of bargaining be included in the con-
tract is an unfair labor practice. Of course, no duty exists to bargain at
all on a subject that is illegal under either the NLRA or the RLA.

In the second place, there is no "unfair labor practice" under the Rail-
way Labor Act, but rather only an order from a court either compelling
bargaining or declaring that no duty to bargain exists. There are no "man-
datory" or "permissive" subjects under the RLA, but rather there are
"bargainable" subjects, relating to changes in rates of pay, rules, working
conditions, and unlawful subjects, such as trying to force an employer
to bargain with other companies about job security for its employees.
Under the RLA it may possibly be that any subject is bargainable, regard-
less of whether it would be a mandatory or permissive subject under the
NLRA, if it has an effect on rates of pay, rules, or working conditions—
\textit{unless} it is unlawful, \textit{i.e.}, contrary to FAA safety regulations or in con-
travention of some duty imposed by the RLA, or on a subject outside
the realm of employer/employee relations. The sole question under the
RLA seems to be whether the subject in dispute is unlawful, or whether
it bears the necessary relation to rates of pay, rules, and working condi-
tions. If such relationship exists, an impasse may be reached, \textit{i.e.}, there is
a proper subject of bargaining. As indicated by the Supreme Court in the
\textit{Telegraphers} case, the tendency has been to broaden the scope of bar-
gainability.

A like trend is noticeable under the NLRA, with permissive subjects
becoming fewer and narrower. No case has been found under the RLA
where the courts have held a point to be subject to bargaining under sec-
section 6, but restricted the scope of bargaining so as to require withdrawal
as would be the case with a permissive subject under the NLRA.

To superimpose the mandatory/permissive language of the NLRA cases
on those involving the RLA is to create unnecessary confusion. Under
the RLA there is no duty to bargain on an unlawful subject. Under the
NLRA there is no duty to bargain on a permissive subject, and also a
duty to withdraw that subject before impasse is reached. To the extent that
"unlawful" equates with "illegal" under the NLRA, the two acts are the
same—there is no duty to bargain. However, to the extent that "unlaw-
ful" includes "permissive" or to the extent that a bargainable subject under
the RLA includes "permissive," the acts are contrary. No cases have been
found under the RLA declaring a subject unlawful because it is a permis-
sive subject under the NLRA, and no case has been found declaring a

\begin{itemize}
\item[218] See, \textit{e.g.}, NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952); NLRB v. Wooster Div.
\item[219] \textit{Id.}
\item[220] Id.
\item[222] Pullman Co. v. Order of Ry. Conductors, 49 L.R.R.M. 3162 (N.D. Ill. 1962).
\item[223] \textit{Id.}
\item[224] See, \textit{e.g.}, Felter v. Southern Pac. Co., 359 U.S. 326 (1959); Southern Pac. Co. v. Switchmen's
Union, 362 F.2d 332 (9th Cir. 1966).
\item[226] \textit{Id.}
\end{itemize}
subject bargainable because it was permissive under the NLRA. Thus, it would seem that the question of whether a permissive subject under the NLRA was a proper or improper subject under the RLA is still open. Because under both acts the trend has been to broaden the scope of bargainable subjects, it would seem likely that permissive subjects are within the meaning of rates of pay, rules, and working conditions under the Railway Labor Act.

This broadening trend of bargainability is easily seen in the area of the so-called "management prerogative." Earlier cases had treated a unilateral change in business by management affecting working conditions as a management right and not a change in working conditions subject to bargaining. The theory of these cases was that management did not have to bargain over changes in something "subject to its continuing authority to supervise and direct the manner of rendition of . . . [an employee's] service." In Railroad Trainmen v. New York Cent. R.R., the court held that a strike over the closing of train yards at Toledo could be enjoined since the agreement did not prevent it, and management had a right to make the change. The court reasoned that since there was not a provision in the agreement, the dispute was not "minor"; since there had been no section 6 notice filed for changing the agreement, it was not "major." Hence, it was not a labor dispute within the meaning of the Norris-LaGuardia Act, and could be enjoined.

The Supreme Court in the Telegraphers case has seemingly abolished the so-called management prerogative area of non-bargainability. In reversing the Seventh Circuit, which had granted the railroad an injunction to stop a strike over its refusal to bargain on a proposed amendment to the agreement which would have required negotiation over job abolition, the Supreme Court held that such a proposal was a proper subject, as job abolition has an effect on rates of pay, rules, and working conditions. The railroad had contended that its decision to do away with one-man stations was a management right and was, therefore, not a proper subject of bargaining. The Supreme Court flatly rejected this contention, holding that such a decision had an effect on working conditions and was therefore a proper subject.

E. Requirement Of Good Faith

Although the Railway Labor Act does not require that agreement be reached by the parties, "it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences
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in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First. That section of the RLA requires the parties to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." Because this is a duty imposed by the Act, it is judicially enforceable, that is, failure to bargain in good faith is failure to comply with the Act and is enjoinderable. The duty, of course, exists on both sides. "Empty motions and hollow gestures are not enough," and thus, as under the NLRA, good faith exhaustion of negotiation is required. A flat refusal to bargain constitutes lack of good faith, as does a failure to comply with the section 6 procedures. Such action entitles the aggrieved party to an injunction, or prevents the party refusing to bargain from obtaining judicial

321 Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515, 548 (1937). The duty to bargain runs only to the "authorized representative" and hence, there is the "negative duty to treat with no other." Where there are two unions fighting for representation rights, one currently certified, the courts have seemingly adopted the NLRB's Midwest Piping doctrine, 63 N.L.R.B. 1065 (1945), to the effect that if the company negotiates with one of two unions, it does so at the peril of being found guilty of an unfair labor practice if the union it chose to negotiate with was not in fact the majority representative. See Shea Chemical Corp., 121 N.L.R.B. 1027 (1958); St. Louis Ind. Packing Co. v. N.L.R.B., 291 F.2d 708 (7th Cir. 1961). This was the result reached in Pan American World Airways, Inc. v. Teamsters, 66 L.R.R.M. 2159 (S.D.N. Y. 1967) (citing Ruby v. American Airlines, Inc., 323 F.2d 248 (2d Cir. 1963); FEIA, EAL Chap. v. Eastern Airlines, Inc., 311 F.2d 745 (2d Cir.), cert. denied, 373 U.S. 924 (1963) for the proposition that the courts could not compel a carrier to bargain with one of two disputing unions where there was a "substantial representation dispute" which, under the Act, is for exclusive determination by the NMB) where the court held it did have jurisdiction to enter a declaratory judgment on the duty of the carrier to bargain, although not to determine which union was the proper representative. Compare Long Island R.R. v. Local 808, Teamsters, 67 L.R.R.M. 2465 (E.D.N.Y. 1967) wherein the court held the carrier was entitled to an injunction to prevent a strike by the Teamsters who had been certified on 20 January 1967 as the bargaining representative. The Teamsters Union was threatening to strike because of the carrier refusing to bargain with it, having entered into an agreement with the predecessor union on 13 January 1967, which was after the election had been held and before certification. The NMB had ruled the contract valid and binding. See cases cited in note 173, supra. Compare the result reached here with the NLRB's contract-bar doctrine. Delux Metal Furniture Co., 121 N.L.R.B. 995 (1958). Of course an NLRB determination a contract bar, Food Machinery Corp., 36 N.L.R.B. 491, 493 n.3 (1941), but a contract held not to be contract bar may be valid and binding on the newly certified union, at least where it was the incumbent. Kroger Co., 167 N.L.R.B. No. 131 (1967).

322 "...This duty is not merely perfunctory. Good faith exhaustion of the possibility of agreement is required to fulfill it." Elgin, J. & E. Ry. v. Burley, 321 U.S. 711, 721 n.12 (1944). See also American Airlines, Inc. v. ALPA, 169 F. Supp. 777, 793 (S.D.N.Y. 1958); Brotherhood of R.R. Trainmen v. Akron & B.B.R.R., 65 L.R.R.M. 2229, 2237-44 (D.C. Cir. 1967); Brotherhood of Loco. Firemen v. Bangor & A.R.R., 65 L.R.R.M. 2995, 3000 (D.C. Cir. 1967) (on rehearing) ("Ultimatums do not constitute negotiations and it is necessary for the parties when meeting at a conference to discuss and argue the merits of various proposals. It is bad faith to decline to argue the merits or to refuse to entertain or discuss a counter proposal ... [T]he Act does not compel ... a concession and all that is required is that parties enter into a sincere, genuine discussion to consider ... [proposals and counter-proposals] and finally if convinced to make such concessions as may be deemed appropriate.").

323 See Part II, supra, and cases cited note 232, supra.


325 Id. at 357, comparing decisions under NLRA.


328 KLM, Royal Dutch Airlines v. TWU, 8 Av. Cas. 18,395 (E.D.N.Y. 1964) (refusal by union to continue negotiations under existing section 6 notice and striking to force the carrier to bargain over subcontracting of work which was not covered by "openers.").

relief from counter measures by the aggrieved party, i.e., a strike. However, action which will bar a party from obtaining an injunction is not necessarily a refusal to bargain in good faith under the Act.

There are many cases in which the allegation by one or the other of the parties of lack of good faith bargaining has been raised, but very few cases have given a detailed analysis of the factors involved in constituting good faith or its lack, beyond the broad categories of refusal to bargain. Where an allegation is made with some basis, courts have entered temporary restraining orders pending a hearing on the merits.

Beyond the obvious violations, such as a refusal to negotiate, which can be considered to constitute "per se" violation of the duty to bargain in good faith, the courts under the RLA have not developed to any great extent standards or indicia of bad faith, as have been developed by the NLRB and the courts under the NLRA. The burden of proof seems to be on the party asserting bad faith to prove the allegation by a "clear and convincing showing that the union has failed to comply. . . ." The basic test seemingly used by the courts in determining good faith, or lack thereof, is "totality of circumstances"—whether, after an examination of the entire conduct surrounding a dispute, it can be said that the conduct violated the requirements of the Act "to exert every reasonable effort to make and maintain agreements." This is, of course, a factual question, and necessitates an examination of the dispute by the court. As stated in American Airlines, Inc. v. ALPA: "The question [of good faith] . . . is one of subjective intent, to be determined by the facts and circumstances." The few cases which have discussed the requirements of good faith have relied heavily on NLRA precedents. As noted in Steele v. Louisville & N.R.R.: the duty to bargain in both acts are "like provisions."

248 Id. See also Pan American World Airways, Inc. v. TWU, 7 Av. Cas. 18,428 (E.D.N.Y. 1962); FEIA v. Eastern Air Lines, Inc., 8 Av. Cas. 17,149 (S.D.N.Y. 1962), aff'd, 8 Av. Cas. 17,424 (2d Cir. 1963); Pan American World Airways, Inc. v. Brotherhood of Ry. & S.S. Clerks, 185 F. Supp. 350 (E.D.N.Y. 1960). "What constitutes good faith bargaining . . . is colored by how all parties have actually bargained in the past." Brotherhood of R.R. Trainmen v. Atlantic C.L.R.R., 383 F.2d 225, 226 (3d Cir. 1967). The court in this case examined the historical background of how the parties had bargained in the past and determined that national handling of the crew consist issue on the railroads was not mandatory, i.e., that good-faith bargaining did not require it. Compare the doctrine of multi-employer/multi-union negotiations established under the NLRA, to wit: That such negotiations are dependent upon the mutual consent of all parties to both sides and that either side can withdraw from such arrangement unilaterally if timely notice of such withdrawal is given. See, e.g., Evening News Ass'n, 154 N.L.R.B. 1494 (1965), enf'd sub nom., Detroit Newspaper Publishers Ass'n v. NLRB, 372 F.2d 569 (6th Cir. 1967).
249 169 F. Supp. at 793.
250 323 U.S. 192, 200 (1944). See also Brotherhood of R.R. Trainmen v. Toledo, P. & W. R.R.,
And in *Brotherhood of Ry. & S.S. Clerks v. Atlantic C.L.R.R.* the court relied heavily on NLRA precedents to find the carrier guilty of a refusal to bargain in good faith. In *Chicago, R.I. & Pac. R.R. v. Switchmen’s Union,* the court held that the fact that the bargaining representative conducting the negotiations did not have the authority to enter into a binding agreement was not in and of itself bad faith, but was “a factor which should be taken into consideration in order to decide whether the . . . effort to negotiate was really made in good faith. . . .” Further the court went on to state that it was not bad faith for a representative of either party to report a proposal as the best obtainable without resort to strike or lock-out, but still as something they did not recommend. The court also found from examination of the facts that the union’s representative had not stood pat on the union’s original demand, but had tried to find an alternative which tended to show a good faith endeavor. The court stated that the parties had satisfied the test of section 8 (d) of the NLRA, and assuming that the RLA imposed a greater duty to endeavor to reach agreement, the Act did not require either side to abandon all efforts toward their respective objectives. The court therefore held that the carrier had failed to make the necessary showing of bad faith.

In *Pan American World Airways, Inc. v. TWU* the court held that a carrier which invoked NMB mediation before it had reasonable grounds to believe negotiations would not result in agreement acted in bad faith. Also, the carrier had limited negotiations to a narrower spectrum than that covered by the section 6 notices; and this was an act of bad faith. However, a carrier can urge a proposal as a means of settlement and such action does not constitute bad faith, but if the carrier sets the proposal as a condition to settlement, such action would then constitute bad faith. The courts apparently look to the prior bargaining conduct between the parties, at least insofar as it relates to the present charge of bad faith. In *FEIA v. Eastern Air Lines, Inc.* the court relied on Eastern’s past refusals to accede to the demands of ALPA which would have encroached on FEIA’s domain as an indication of the carrier’s good faith with FEIA. (The carrier had proposed a merger of the two unions as a solution to the crew complement issue, and FEIA had charged that the carrier was imposing the proposal as a condition to settlement.)

In contrast to the *FEIA* case above, the Civil Aeronautics Board (CAB) held, in applying the RLA, that a carrier’s refusal to withdraw a subject (super-seniority of replacement workers) found to be discriminatory and unreasonable, was a failure to bargain in good faith. The CAB relied heavily on NLRA precedents in this area in reaching its determination.

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122 201 F.2d 36 (4th Cir.), *cert. denied*, 345 U.S. 992 (1953).
123 292 F.2d 61 (2d Cir. 1961).
124 7 Av. Cas. 18,428 (E.D.N.Y. 1962).
126 *Id.*
127 *Id.*
The case is rather unique since a federal district court had, in a separate action, held there was no failure to bargain in good faith. Both the court and the CAB held the carrier’s (Southern Airways) refusal to submit striking pilot’s grievances to a system board violated section 204 and was illegal per se. Both also recognized the right of the carrier to hire replacements to continue business, but the CAB found the carrier’s insistence on super-seniority for replacements was discriminatory and unreasonable and hence was a refusal to bargain in good faith. In reaching its conclusion the Board relied heavily on NLRA precedents and made an exhaustive analysis of these cases. The court on the other hand, also relying on NLRA precedents, held that Southern’s insistence on its proposal for striker seniority “was not, per se, a failure to bargain in good faith.” The CAB discussed, but did not rely, on the NLRB’s opinion in Erie Resistor. It did rely, however, upon the rationale of *Potlatch Forests*. Based upon this rationale the CAB found that Southern’s insistence on super-seniority was not based upon economic motives but, rather, was punitive, and Southern’s refusal to withdraw its demands constituted a failure to bargain in good faith. “The general principle is well-established that insistence on a demand which is illegal as a condition of settlement of a dispute . . . constitutes in substance a failure to bargain in good faith.” The court, on the other hand, made a different analysis of the facts and found Southern’s demands were not illegally motivated, and, further, that the impasse was not caused by the carrier, but rather that ALPA was at fault. Hence there was no failure to bargain in good faith.

In summary, it can be said that aside from the per se violations, such as a refusal to negotiate or to comply with the procedures of the Act, there is little case law defining what is required to constitute good faith compliance with the Act’s mandate to “exert every reasonable effort to make and maintain agreements.” The standards would seem to be substantially the same as those developed under the NLRA, and reliance on NLRA precedents therefore would seem appropriate. As stated in *American Airlines, Inc. v. ALPA*: The requirement of good faith bargaining is really a requirement of absence of bad faith. In order to show such a lack of good faith it is necessary to establish facts from which it can be reasonably inferred that a party enters upon a course of bargaining and pursues it with the desire or intent not to enter into an agreement at all.

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258 E.g., NLRB v. Mackay Radio Co., 304 U.S. 333 (1938); NLRB v. Potlatch Forests Co., 189 F.2d 82 (9th Cir. 1951); NLRB v. California Date Growers Ass’n, 259 F.2d 587 (9th Cir. 1958).
260 NLRB v. Potlatch Forests Co., 189 F.2d 82 (9th Cir. 1951). See also, Olin Mathieson Chem. Corp. v. NLRB, 232 F.2d 158 (4th Cir. 1956), aff’d, 312 U.S. 1020 (1957); Ballas Egg Prods., Inc. v. NLRB, 283 F.2d 871 (6th Cir. 1960).
There must be some reasonable effort in some direction to compose differences, and the party asserting a lack of good faith must clearly show a wish to defeat rather than reach agreement. The test is whether under all the facts and circumstances the parties acted in good faith—that is to say with a sincere desire to reach an agreement—or whether they acted in bad faith—that is, with the affirmative intention not to reach agreement.

