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Merging the RLA and the NLRA for Eastern Air Lines: Can It Fly?

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I. INTRODUCTION

In 1988, Eastern Air Lines attempted to implement three business decisions that would affect thousands of its employees: a contract for the replacement of Eastern pilots in the event of a strike,¹ an elimination of flights with corresponding employee furloughs,² and the sale of Eastern's Northeast shuttle to businessman Donald

1. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 869 F.2d 1518, 1519 (D.C. Cir. 1989) (*Eastern Pilots II*).

2. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 863 F.2d 891, 892-93 (D.C. Cir. 1988) (*Eastern Furlough II*), *reh'g en banc denied*, 863 F.2d 891, 913 (D.C. Cir. 1989).

Trump.³ In response, Eastern's unions⁴ filed suit in federal district court to block implementation of the decisions.⁵ The unions claimed that Eastern must first bargain over the changes before implementing them.⁶ Eastern contended that both existing and expired collective bargaining agreements supported its actions⁷ and that it therefore could act unilaterally without bargaining.⁸

These labor-management conflicts at Eastern Air Lines raise the issue of whether disputes over management's prerogative to act unilaterally should be resolved in a bargaining or arbitration forum. The Railway Labor Act (RLA),⁹ which governs railroads and airlines, mandates that labor-management disputes be resolved through a two-phased dispute resolution procedure, with each phase consisting primarily of either collective bargaining or arbitration.¹⁰ The RLA, however, does not address the new need for managerial flexibility that the deregulated airline market created. Courts have recognized the problem and attempted to resolve it by incorporating doctrine from the National Labor Relations Act (NLRA),¹¹ the RLA's statutory

3. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 701 F. Supp. 865, 867-68 (D.D.C. 1988) (*Trump Shuttle*).

4. Eastern employees are represented by the International Association of Machinists (IAM), the Air Line Pilots Association (ALPA), and the Transport Workers Union of America (TWU).

5. *Eastern Pilots II*, 869 F.2d at 1519; *Eastern Furlough II*, 863 F.2d at 893; *Trump Shuttle*, 701 F. Supp. at 867-68.

6. *Eastern Pilots II*, 869 F.2d at 1519; *Eastern Furlough II*, 863 F.2d at 893; *Trump Shuttle*, 701 F. Supp. at 867.

7. *Eastern Pilots*, 869 F.2d at 1520; Brief for Appellant at 14, *Eastern Furlough II*, 863 F.2d 891 (D.C. Cir. 1988) (Nos. 88-7201, 88-7202, 88-7203).

8. Brief for Appellant at 14, *Eastern Furlough II*, 863 F.2d 891 (D.C. Cir. 1988) (Nos. 88-7201, 88-7202, 88-7203).

9. Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-188 (1982 & Supp. V 1987)) (RLA).

10. See RLA §§ 2-10, 45 U.S.C. §§ 152-160.

11. The National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982 & Supp. IV 1986)), was amended by the Labor Management Relations (Taft-Hartley) Act, 1947, ch. 120, tit. I, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-200) (1982 & Supp. IV 1986) (amending and incorporating 29 U.S.C. §§ 151-169 and adding 29 U.S.C. §§ 141-144, 171-200). The National Labor Relations Act was further amended in 1959 by the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 5419 (1959). Hereinafter, the "Act" or "NLRA" refers to the National Labor Relations Act, as amended; "LMRA" refers to the Labor Management Relations Act, 1947, as amended. The United States Court of Appeals for the Second Circuit has noted the differences between the policies underlying the formation of the RLA and the NLRA:

The special situation in the railroad industry, where strong unions and management had become used to dealing with each other, differed vitally from the host of problems at which the Wagner Act was aimed—businesses of every size and description, many with a history of strong anti-union bias and with ample opportunity for strong-arm tactics. It was thus natural that the Wagner

counterpart for primarily unregulated industries, into the RLA. The Eastern cases demonstrate how the judiciary's ad hoc engrafting of the policies underlying the NLRA onto the RLA's two-phased dispute resolution procedure has often resulted in a distortion of the policy concerns of both statutes.

Under the RLA, whether to place a dispute in an arbitration or a bargaining forum is a decision that has significant ramifications for both labor and management. The RLA's first dispute resolution phase, the "major" dispute classification, is a complex, lengthy process¹² geared toward the formation and amendment of collective agreements.¹³ Simply stated, the major dispute procedure requires collective bargaining between the parties,¹⁴ followed by mediation,¹⁵ succeeded either by arbitration (if both parties agree),¹⁶ or a cooling-off period.¹⁷ Until the entire negotiation procedure is exhausted, the parties must maintain the status quo:¹⁸ management may not alter working conditions unilaterally and labor may not strike.¹⁹ When labor-management tensions are high, it is not uncommon for this process to span more than a year.²⁰

Act should stress administrative adjudication whereas the earlier Railway Labor

Act relied primarily on mediation.

Ruby v. American Airlines, 323 F.2d 248, 256 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964). For a historical discussion of the RLA, see *infra* Section II.

12. See RLA §§ 3-6, 10, 45 U.S.C. §§ 153-156, 160. The United States Supreme Court has described the process as "almost interminable." *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 148-49 (1969). Furthermore, "[t]he procedures of the [RLA] are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Brotherhood of Ry. Clerks v. Florida E. Coast Ry.*, 384 U.S. 238, 246 (1966).

13. See RLA §§ 3-6, 10, 45 U.S.C. §§ 153-156, 160. For a description of the major dispute procedure, see *infra* note 117.

14. See RLA §§ 2(Fourth), 6, 45 U.S.C. §§ 152(Fourth), 156.

15. RLA §§ 4-6, 45 U.S.C. §§ 154-156.

16. RLA § 7, 45 U.S.C. § 157. Arbitration, in turn, may be followed by presidential intervention if the dispute threatens to disrupt commerce. RLA § 5(First)(b), 45 U.S.C. § 155(First)(b); see also *infra* note 117.

17. RLA § 5(First)(b), 45 U.S.C. § 155(First)(b).

18. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 869 F.2d 1518, 1519 (D.C. Cir. 1989) (*Eastern Pilots II*); *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 863 F.2d 891, 893 (D.C. Cir. 1988) (*Eastern Furlough II*), *reh'g en banc denied*, 863 F.2d 891, 913 (D.C. Cir. 1989); *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 701 F. Supp. 865, 867 (D.D.C. 1988) (*Trump Shuttle*). The status quo requirement compels the parties "to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 152-53 (1969). For a discussion of the status quo requirement, see *infra* notes 125-28 and accompanying text.

19. See RLA § 5(First), 45 U.S.C. § 155; *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30 (1956).

20. See *infra* note 477.

Because the potential length of the major dispute resolution procedure is coupled with the status quo requirement, the party who desires a change in working conditions may concede certain issues in order to obtain a new contract more quickly. In the Eastern cases, the proposed changes were financially beneficial for management but detrimental for labor. Classification of the disputes as major would have given labor both the leverages of time and the status quo, while limiting management's capacity to implement its decisions. Consequently, unions argue that disputes, such as the Eastern cases highlighted in this Comment, are major.²¹

The minor dispute procedure, the RLA's second phase of dispute resolution, focuses on grievance arbitration to resolve disputes that arise over contractual interpretations.²² After parties have finalized the terms of their collective agreement through the major dispute procedure, they use the minor procedure to resolve subsequent disagreements over disputes arising under the agreement. Thus, the RLA's two-phased resolution process rests on the assumption that the parties first set the terms of their relationship by bargaining over the substance of the agreement and then use the minor dispute resolution procedure to resolve disputes over the agreement's meaning.

The choice of forum has great implications on the relative power of the parties. Management typically has more bargaining leverage during minor disputes because it is not statutorily obligated to maintain the status quo pending arbitration; it may act unilaterally during the pendency of an adjustment board's ruling while labor is prevented from reacting with a strike.²³ In the Eastern cases, Eastern's management contended that the disputes fell within expansive interpretations of its right to act under present or expired collective bargaining agreements, and thus the disputes were "minor."²⁴

This distinction between major and minor disputes—between contract formation and amendment on the one hand and contract interpretation on the other—may be phrased precisely. Yet in application, it is often difficult to discern within which classification a given dispute should fall. As the United States Court of Appeals for the Seventh Circuit has observed: "A refusal to follow apparently clear contractual language could be a unilateral modification of the contract, thereby generating a major dispute, or a bold and possibly erro-

21. *Eastern Pilots II*, 869 F.2d at 1519; *Eastern Furlough II*, 863 F.2d at 893; *Trump Shuttle*, 701 F. Supp. at 867.

22. For a description of the minor dispute procedure, see *infra* note 171.

23. See *infra* notes 418-19 and accompanying text.

24. *Eastern Pilots II*, 869 F.2d at 1520; Brief for Appellant at 8, *Eastern Furlough II*, 863 F.2d 891 (D.C. Cir. 1988) (Nos. 88-7201, 88-7202, 88-7203).

neous interpretation of the contract, thereby generating a minor dispute."²⁵

Much of the confusion about distinguishing between major and minor disputes has arisen because the two terms, a judicial gloss on the RLA,²⁶ have evolved definitionally through decades of change in the railroad and airline industries. Congress enacted the RLA as a mechanism for resolving labor disputes and preventing strikes in the regulated railroad industry.²⁷ The statute was structured to accommodate an industry that was not only vital to commerce, but was also known for its strong labor presence.²⁸ The RLA's exhaustive negotiation procedures and the government's regulation of the railroad industry produced a situation in which the relative economic power of the parties was more balanced than was the case with the NLRA. The RLA's complex bargaining and arbitration procedures reflect the notion that the parties should be compelled to make every effort to resolve their differences before resorting to commerce-crippling economic warfare.

The deregulation of airlines a decade ago, however, fostered a new tension in the characterization of disputes.²⁹ The set of legal concepts that grew out of a labor environment that was protected by government regulation was ill-adapted for resolving disputes in a newly competitive business environment.³⁰ In today's market, management's struggle to reduce labor costs—a move it views as crucial for

25. *Brotherhood of Locomotive Eng'rs v. Atchison, T. & S.F. Ry.*, 768 F.2d 914, 920 (7th Cir. 1985).

26. The United States Supreme Court first applied the terms "major" and "minor" to the RLA's dispute procedures in *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945).

27. Rehmus, *Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries*, in *THE RAILWAY LABOR ACT AT FIFTY: COLLECTIVE BARGAINING IN THE RAILROAD AND AIRLINE INDUSTRIES 2* (1976); see *infra* note 66.

28. Rehmus, *supra* note 27, at 2. The statute incorporated the policy that the federal government had the right to regulate the economic life of industries vital to the country's economy. *Id.*

29. See *infra* Section II.

30. See *infra* notes 77-88 and accompanying text. Although the rail industry is still partially regulated, the United States Supreme Court noted the increasing deregulation of railroads when it allowed railroad employers a greater range of freedom from labor constraints than in the past. *Pittsburgh & L.E. R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2596-97 (1989) (*P&LE II*). In *P&LE II*, Justice Stevens criticized the Court's application of management-protective NLRA doctrine, which was formulated for deregulated industries, to the regulated railroad industry. *Id.* at 2602-03 (Stevens, J., dissenting). Justice Stevens emphasized the fact that railroads are still regulated when he dissented from the Supreme Court's holding that a railroad's sale of assets does not require notice to a union or imposition of the status quo during bargaining over the sale's effects on employees (effects bargaining). *Id.* at 2599-2603. For a further discussion of *P&LE II*, see *infra* notes 324-26 & 371-82 and accompanying text, and *infra* Section V(B)(1).

profitability and survival³¹—thrusts labor into the more defensive bargaining posture of attempting to preserve jobs, wages, and benefits.³² Consequently, the protracted nature of collective bargaining under the major dispute classification inhibits management's ability to react to market forces and provides labor with considerable bargaining leverage with which to counter management's demands for concessions.³³

In response to the heightened dispute resolution tension, federal courts have borrowed an NLRA policy which, in a similarly competitive marketplace, has enlarged management's capacity to quickly respond to market forces.³⁴ The result under both the NLRA and the RLA is that more disputes are designated arbitrable. Under both statutes, the arbitration process permits management to implement business decisions while the dispute is processed through contractual grievance procedures.³⁵ In the NLRA context, the deferral of the National Labor Relations Board (NLRB) to grievance arbitration effectively has placed unfair labor practice charges that overlap with contractual rights in the hands of arbitrators.³⁶ Additionally, courts have restricted labor's statutory right to force management to bargain by excluding many of management's business restructuring decisions from mandatory bargaining.³⁷

Under the RLA, the presumption of arbitrability produces a somewhat different balance of power and dissimilar results. The effect of applying the NLRA policy of strengthening management rights to the RLA has been to shift to the arbitration forum disputes that previously were resolved through collective bargaining. Because the choice of an arbitration or bargaining forum greatly affects the contractual rights and relative power of the parties, it is necessary to apply the RLA with an eye toward distinguishing between rules that govern labor-management relations when a collective bargaining agreement is in effect, from rules that operate when parties continue to bargain

31. See *infra* notes 82-93 and accompanying text.

32. See Curtin, *Labor Mediation: A Management View*, in *CLEARED FOR TAKEOFF: AIRLINE LABOR RELATIONS SINCE DEREGULATION* 185, 191 (J. McKelvey ed. 1988); Rosen, *A Union Perspective*, in *CLEARED FOR TAKEOFF: AIRLINE LABOR RELATIONS SINCE DEREGULATION* 11, 12 (J. McKelvey ed. 1988).

33. See *infra* notes 117-24 & 146-50 and accompanying text.

34. See *infra* notes 363-84 and accompanying text.

35. See *infra* note 171.

36. Lynch, *Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again*, 44 U. MIAMI L. REV. 237 (1989).

37. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349-50 (1958). For a discussion of the mandatory-permissive distinction under the NLRA, see *infra* notes 129-45 and accompanying text.

over a new collective agreement after expiration of the old one. The RLA, which was designed to accommodate the railroads' unexpiring agreements, does not address the issue of whether collective agreements are in force or expired.³⁸

Airlines, however, unlike railroads, typically employ collective bargaining agreements that expire in the sense that the parties agree that the contract will be open for amendment on certain dates.³⁹ This fact and the deregulation of airlines have prompted courts to seek more effective responses to labor disputes than the nearly automatic triggering of major disputes that railroads used in the past.⁴⁰

Recently, the United States Supreme Court agreed with the trend among federal courts of appeals that it is appropriate to borrow the NLRA's policy protecting management in order to place an RLA controversy arising during the mid-term stage of a collective agreement into the minor classification's grievance arbitration procedure.⁴¹ The move provides management with the right to implement changes while it participates in the minor classification's grievance arbitration procedure.⁴² The Supreme Court designated as minor any managerial actions that "arguably" fall within the provisions of existing collective bargaining agreements.⁴³

Among the courts of appeals, the United States Court of Appeals for the District of Columbia Circuit has been at the forefront of the incorporation of NLRA doctrine into the RLA. The District of Columbia Circuit has drawn the heaviest presumption to date—going beyond the Supreme Court's recent holding—that RLA disputes arising during the term of existing agreements are arbitrable. In *Air Line Pilots Association International v. Eastern Air Lines (Eastern Pilots II)*,⁴⁴ the court held that a mid-term dispute is minor even if a party's

38. The RLA was designed instead to accommodate the railroad industry's custom of using collective bargaining agreements that do not expire but which are amendable when unions serve notice on management that they wish to bargain over an issue through the major dispute procedure. See *infra* notes 445-51 and accompanying text. Because the RLA was first applied only to the open-end agreements of the regulated railroad industry, early courts interpreted the statute as requiring management to bargain over virtually any union challenges to "rates of pay, rules, or working conditions" until the major dispute procedure was exhausted. RLA § 6, 45 U.S.C. § 156; see *infra* notes 355-62 and accompanying text.

39. See *infra* notes 439-51 and accompanying text.

40. *Id.*

41. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477 (1989). For a discussion of the trend among the federal appellate courts, see *infra* notes 371-79 and accompanying text.

42. See *infra* notes 412-17 and accompanying text.

43. *Consolidated*, 109 S. Ct. at 2477.

44. 869 F.2d 1518 (D.C. Cir. 1989). For a discussion of *Eastern Pilots II*, see *infra* Section III(A).

claim of contractual justification for its position is frivolous.⁴⁵ Thus, according to the District of Columbia Circuit, mid-term disputes arising under the RLA would be presumptively minor unless a union could establish a bad faith claim of contractual justification on the part of its employer.

In *Air Line Pilots Association International v. Eastern Air Lines (Eastern Furlough II)*,⁴⁶ the District of Columbia Circuit made another bold move by extending the presumption of arbitrability into collective agreements' post-expiration periods.⁴⁷ The court determined that the status quo concept, which examines past practices to impose a freeze on working conditions during the major dispute procedure, required an examination of the parties' past practices in order to determine whether a post-expiration dispute was minor.⁴⁸ In so concluding, the court collapsed the two separate inquiries of status quo and dispute classification into one query that expansively interpreted management rights by relying on an expired collective bargaining agreement and the past practices of the parties. This move not only confused the delineation between the status quo and the classification of the dispute, but also shifted the parties' relative power and rights during the post-expiration period. Additionally, by determining that the dispute was permitted by the collective agreements, the court encroached on the authority of an arbitration board to decide the merits of the claim of contractual justification.

In yet another precedential step, the *Eastern Furlough II* court used pro-management NLRA policy⁴⁹ to hold that the record did not support the union's claims that management's actions were motivated by impermissible union animus.⁵⁰ The court held that if any animus was present, it was negated by legitimate financial considerations.⁵¹

45. *Eastern Pilots II*, 869 F.2d at 1522. The court held that in order to be subject to the major dispute procedure, a party's proposed action must not only "repudiate" an existing collective bargaining agreement, but it also must be grounded on a contractual justification that is "so inherently unreasonable as to amount to bad faith." *Id.* at 1523 (quoting *Southern Ry. v. Brotherhood of Locomotive Firemen*, 384 F.2d 323, 327 (D.C. Cir. 1967)).

46. 863 F.2d 891 (D.C. Cir. 1988), *reh'g en banc denied*, 863 F.2d 891, 913 (D.C. Cir. 1989).

47. *Id.* at 898-900.

48. *Id.* The court concluded that an examination of the parties' past practices and collective bargaining agreements indicated that the parties had implicitly agreed to the furloughs. *Id.* at 896-900. For a discussion of the parties' relative power in minor disputes, see *infra* notes 418-19 and accompanying text.

49. The court borrowed from the NLRB's *Wright Line* principle, which permits a legitimate business justification to overcome a union animus charge. *Wright Line*, a Div. of *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

50. *Eastern Furlough II*, 863 F.2d at 911-13. The RLA forbids management from using coercive anti-union action. See *id.* at 901.

51. *Id.* at 911-13.

Disagreeing over the proper methodology for classifying post-expiration disputes and for resolving the union animus issue, a badly fractured en banc court⁵² denied a petition for review.⁵³

Following the *Eastern Furlough II* court's lead, the United States District Court for the District of Columbia, in *Air Line Pilots Association International v. Eastern Air Lines (Trump Shuttle)*,⁵⁴ applied NLRA doctrine to an asset transfer dispute.⁵⁵ The district court held that the Trump Shuttle sale was a permissible use of management prerogative that was within the contemplation of the expired collective bargaining agreements; thus, the sale presented a minor dispute.⁵⁶ The court also found that post-transaction arbitration over the sale's effects on employees satisfied the NLRA's requirement that effects bargaining be meaningful.⁵⁷ It further concluded that financial considerations negated any possible anti-union motivation for management's decisions.⁵⁸

The merger of NLRA and RLA statutory doctrines in order to create a presumption of arbitrability during both existing and post-

52. Judge Mikva noted:

This case has spawned, at the *en banc* stage alone, six separate statements involving eight judges on our court. . . . There have appeared four different interpretations of how the Railway Labor Act's system for classifying disputes as "major" or "minor" ought to be applied in this case: the panel believes the dispute here is "minor"; Judge Silberman thinks it may be "major," but contends that classifying it as "major" would not alter the outcome of the case; Judge Edwards has proposed that the dispute may be both "major" and "minor"; and I have argued that the dispute is "major" and that this classification would affect the result. There are also divisions among us in our understandings of the appropriate role of the *Wright Line* test in the context of large-scale corporate restructurings under the Railway Labor Act. These disparate views, it seems to me, suggest that the panel opinion cannot serve as any significant guidepost in this circuit on these difficult and unsettled areas of law.

Id. at 919 (Mikva, J., dissenting from the denial of rehearing en banc).

53. *Id.* at 913 (denial of a rehearing en banc).

54. 701 F. Supp. 865 (D.D.C. 1988).

55. *Id.* at 867.

56. *See id.* at 873-74, 878-80.

57. *Id.* at 876. In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Supreme Court held that bargaining over the effects of a sale must be meaningful and must take place at a meaningful time. *Id.* at 681-82.

58. *Trump Shuttle*, 701 F. Supp. at 877-78. The Supreme Court recently clarified the effects bargaining standard for the RLA by holding that when a collective agreement is silent regarding management's duty to bargain over a sale of assets, the RLA imposes a duty to bargain over effects only to the extent that the terms of the sale are not impacted. *Pittsburgh & L.E. R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989) (*P&LE II*). The Court relied on NLRA precedent to arrive at its holding. *Id.* at 2595-99. Thus, the Court placed effects bargaining in the bargaining forum rather than in the arbitration forum, as had the *Trump Shuttle* court, but it refused to impose the status quo pending bargaining, an action that would have prevented management from going forward with the sale. *Id.* at 2597.

expiration contract periods is not an optimal solution to the judiciary's concern that the RLA's major dispute procedure is too cumbersome for today's competitive marketplace. In comparison, the NLRA's bargaining process, like the RLA's, requires maintenance of the status quo during the resolution of contract formation and amendment issues.⁵⁹ The NLRA, however, mandates that the parties bargain collectively to impasse, a point that is merely the first stage of the RLA's bargaining procedure.⁶⁰ This shorter time frame in the NLRA context makes the threat of economic pressure a more imminent and therefore more powerful weapon, with the relative bargaining power shifting to the economically stronger party.⁶¹ Under the RLA, however, the leverage of time proves more consistently to labor's advantage in the current concession bargaining atmosphere of the deregulated airline industry.⁶²

Thus, both the time and economic aspects of the major dispute procedure often provide labor with leverage at the expense of the airlines' opportunity for profitability or survival. On the other hand, using a grievance-oriented procedure in a collective agreement's post-expiration period in order to decide reorganizational issues that are not explicitly reserved to management in an existing agreement is an equally unbalanced approach. Classification of a dispute over statutorily defined bargaining topics⁶³ as minor frees management to make unilateral decisions while processing the dispute through arbitration;⁶⁴ the classification, however, does not provide labor with the

59. Subsections 8(a)(5) and 8(d) of the NLRA require an employer to bargain collectively with employee representatives over "wages, hours, and other terms and conditions of employment." NLRA § 8(a)(5), (d), 29 U.S.C. § 158(a)(5), (d). Section 8(a)(5) provides: "(a) It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees" NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5). The obligation to bargain collectively is defined in Section 8(d) of the NLRA as the obligation to bargain in good faith but without compulsion or binding results. NLRA § 8(d), 29 U.S.C. § 158(d). As with the RLA, judicial interpretation of the NLRA requires that management and labor maintain the status quo while bargaining over contract formation and amendment. See *NLRB v. Katz*, 369 U.S. 736, 737-48 (1962); *International Woodworkers, Local 3-10 v. NLRB*, 380 F.2d 628, 630-31 (D.C. Cir. 1967); *First Nat'l Maintenance Corp. v. NLRB*, 242 N.L.R.B. 462, 462 (1979).

60. Impasse is the point at which the parties' negotiations are deadlocked. See *infra* note 121. For a discussion of the parties' relative power during NLRA collective bargaining, see *infra* notes 128-45 and accompanying text.

61. The balance of relative negotiating power under the arbitration procedures of the two statutes is more similar. Under both the RLA and the NLRA, management is effectively free to act while labor is prevented from striking. See *infra* notes 410-19 and accompanying text.

62. See *infra* Section III(D).

63. The RLA considers "wages, hours, and working conditions" to be the topics over which parties must bargain. RLA § 2(First), (Sixth), 45 U.S.C. § 152(First), (Sixth); see *infra* notes 146-48 and accompanying text.

64. A status quo injunction will prevent management's unilateral action, but the extent of

protection of the status quo and prevents labor from striking in response to the decision. Thus, in the post-expiration time frame, placement of the statutorily mandated topics of wages, hours, and working conditions in the arbitration forum often leaves labor with little power to protect its livelihood.⁶⁵

Along with addressing the major-minor classifications, the Eastern Air Lines cases present broader questions. To what extent is the presumption of arbitrability appropriately applied to the Railway Labor Act in mid-term and post-expiration disputes? Does the RLA have the flexibility to more effectively accommodate the rights of management and labor in the deregulated airline market? Perhaps nowhere is a balance between the concerns of management and labor so difficult to strike under the RLA as in the Eastern cases, in which labor sought to protect its livelihood by bargaining with a financially distraught carrier over restructuring decisions.

This Comment examines the shift in bargaining power created by carrier restructuring decisions, as exemplified by the Eastern Air Lines cases. Section II of this Comment briefly examines the consequences of deregulation on labor relations in the airline industry. The discussion in Section III compares the relative balance of power between management and labor with respect to management prerogative issues under the dispute procedures of the NLRA and RLA. Section IV focuses on Eastern's struggle with its unions to resolve subcontracting, furlough, and asset transfer disputes. The analysis in Section V describes how the various courts' interpretations of the NLRA and RLA have often produced results that are at odds with the policy concerns of the statutes. Finally, Section VI of this Comment concludes that a streamlined version of the RLA may produce results that are more reflective of policy and more responsive to the deregulated market.

II. HISTORICAL PERSPECTIVE

A. *The Airlines' Deregulatory Evolution*

Although the RLA once encompassed railroads and airlines when they were both regulated industries,⁶⁶ the common paths of the

the injunction's availability is not clear. See *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 869 F.2d 1518, 1519 n.2 (D.C. Cir. 1989) (*Eastern Pilots II*).

65. Although labor may be at a disadvantage in the arbitral setting because of management's freedom to act, the parties' assessment of available remedies has a bearing on the parties' willingness to arbitrate. It is unlikely that an arbitration board would rectify a managerial action by awarding a union back pay, for example, if the award would be fatal to a financially crippled employer.

66. Railroad regulation was effected by the Interstate Commerce Act, now codified at 49

carriers eventually diverged.⁶⁷ In 1978, Congress examined the inefficiency of the airline industry and withdrew its protection.⁶⁸ After a short deregulation phase-in, airlines were permitted to fly wherever they wanted for whatever prices they wished to charge.⁶⁹ New, non-unionized carriers entered the arena with cut-rate prices, thereby heightening the battle for passengers and creating pressure on other airlines at the bargaining table.⁷⁰

The deregulation turmoil created unexpected casualties among both carriers and unions.⁷¹ In the decade since deregulation, nearly

U.S.C. §§ 10,101-11,917 (1982 & Supp. V 1987). Airline regulation was pursuant to the Civil Aeronautics Act, Pub. L. No. 75-706, 52 Stat. 973 (1938), which was later modified by the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958) (current version at 49 U.S.C. app. §§ 1301-1557 (Supp. III 1985)). When the RLA was enacted in 1926, railroads enjoyed a virtual monopoly on transportation. Wilner, *Railroads and the Marketplace*, 16 TRANSP. L.J. 291, 292 (1988). The RLA was drafted to promote collective bargaining in the thriving railroad industry and thereby prevent crippling railroad strikes. See *Railway Labor Executives Ass'n v. Norfolk & W. R.R.*, 833 F.2d 700, 704-05 (7th Cir. 1987) (citing *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 154 (1969)).

In 1936, Congress expanded the RLA to encompass the infant airline industry. Ch. 166, 49 Stat. 1189 (1936). This sheltering of the two industries under one statutory umbrella was a natural expansion of the RLA, given the extensive governmental regulation of railroads and, to a somewhat lesser extent, airlines. See Comment, *Airline Labor Policy, the Stepchild of the Railway Labor Act*, 18 J. AIR L. & COM. 461 (1951). In both industries, inefficiently operated carriers were able to transfer much of their debt (including labor costs) to customers through noncompetitive fare structures; carriers thereby averted strikes. E. BAILEY, D. GRAHAM & D. KAPLAN, *DEREGULATING THE AIRLINES* 96 (1985).

67. With the enactment of the Airline Deregulation Act in 1978, airlines competed in a more volatile marketplace than did railroads. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.). Regulatory agencies and courts interpreted congressional policy as permitting "competition among carriers and reliance upon market forces to meet the needs of the public." *Air Line Pilots Ass'n Int'l v. Department of Transp.*, 791 F.2d 172, 177 (D.C. Cir. 1986). The RLA now encompasses two dissimilar industries: railroads, which have experienced a virtual steady decline in employment since 1920, and airlines, which have almost as steadily seen their employment rate grow. Northrup, *Airline Labor Protective Provisions: An Economic Analysis*, 53 J. AIR L. & COM. 401, 415 (1987).

68. The Airline Deregulation Act of 1978 states in its preamble that it was enacted to "encourage, develop and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services." Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.). See Kahn, *In Defense of Deregulation*, in *CLEARED FOR TAKEOFF: AIRLINE LABOR RELATIONS SINCE DEREGULATION* 343 (J. McKelvey ed. 1988).

69. Kahn, *Introduction*, in *CLEARED FOR TAKEOFF: AIRLINE LABOR RELATIONS SINCE DEREGULATION* 1 (J. McKelvey ed. 1988). For a discussion of the new competitive environment, see Rosen, *supra* note 32, at 12-15.

70. See Kahn, *supra* note 69, at 3; Rosen, *supra* note 32, at 13.

71. See Grebey, *A Management Perspective*, in *CLEARED FOR TAKEOFF: AIRLINE LABOR RELATIONS SINCE DEREGULATION* 37, 39 (J. McKelvey ed. 1988); Kahn, *supra* note 68, at 343-47; Kahn, *supra* note 69, at 2.

200 airlines have failed.⁷² In spite of a sixty-three percent rise in airline passenger traffic,⁷³ there has been an increase of less than nine percent in employment.⁷⁴ Furthermore, fewer employers now control a greater part of the business than a decade ago.⁷⁵ Unions, however, have begun rebuilding from the period of heavy concessions, and today all but two major carriers are unionized.⁷⁶

B. *The Deregulated Airline Marketplace*

The deregulated airline market demands vastly different business strategies than did the regulated airline market. The regulated market discouraged efficient operations.⁷⁷ For example, salary increases that were demanded on a unified basis by unions at various carriers could be passed on to passengers through fare increases.⁷⁸ Addition-

72. Greenberg, *Did Deregulation Help Travelers? Well, Yes and No*, Miami Herald, Oct. 16, 1988, at J9, col. 1.

73. The number of airline passengers has increased from 275 million to 447 million since deregulation. Carroll, *Airline Deregulation Has "Mixed" Results*, Miami Herald, Oct. 24, 1988, at A1, col. 1 (citing the Air Transport Association as authority).

74. McDonald, *Airline Management Prerogative in the Deregulation Era*, 52 J. AIR L. & COM. 869, 927 (1987).

75. See Kahn, *supra* note 69, at 3-6.

While airlines experienced competition from within the airline industry, railroads faced competition from without the railroad industry. The railroad was the first American industry to be regulated when the Interstate Commerce Commission (ICC) was created more than a century ago; its main competition was from horse-drawn wagons and steamboats. Wilner, *supra* note 66, at 292. Other forms of transportation soon emerged, however, and railroads competed ineffectively because they were constrained by rigid regulatory controls. See *id.* at 296-302. Their near-monopoly on transportation deteriorated. *Id.* Finally, in 1980, the Staggers Rail Act effected partial deregulation, expediting approval of sales of railroads, particularly those in danger of failing. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. See generally H.R. CONF. REP. NO. 1430, 96th Cong., 2d Sess. 4110, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 3978, 4110. The Staggers Rail Act was largely successful but, regrettably, a half-century overdue. Wilner, *supra* note 66, at 292-95.

At present, profits in the railroad industry remain substandard. *Id.* at 309-16. The industry has weathered its 21% bankruptcy rate of a decade ago, but many carriers continue to struggle. *Id.* at 330. Union rights are also uncertain. Congress has mandated continued protection of railroad employee interests; however, the scope of that mandate, in light of other apparently conflicting statutory mandates, is unclear. See *Chicago & N.W. Transp. Co. v. Railway Labor Executives' Ass'n*, 855 F.2d 1277 (7th Cir. 1988), cert. denied, 109 S. Ct. 493 (1988); *Railway Labor Executives' Ass'n v. Pittsburgh & L.E. R.R.*, 845 F.2d 420 (3d Cir. 1988) (*P&LE I*), rev'd, 109 S. Ct. 2584 (1989) (*P&LE II*). Still, the ICC may not "relieve a carrier of its obligation to protect the interests of employees," even though it may exempt certain carrier actions from regulation. 49 U.S.C. § 10,505(g)(2) (1982).

76. See Kahn, *supra* note 69, at 6. Unions have regained part of their strength through tighter labor markets, particularly for pilots, and through intervention in airline mergers. *Id.* The major non-unionized carriers are Continental Airlines (Eastern Air Lines' sister carrier) and Delta Air Lines (where only pilots and dispatchers are affiliated with a union). *Id.*

77. See, e.g., McDonald, *supra* note 74, at 918.

78. Cappelli, *An Economist's Perspective*, in CLEARED FOR TAKEOFF: AIRLINE LABOR RELATIONS SINCE DEREGULATION 49, 52 (J. McKelvey ed. 1988).

ally, inefficient carriers often were awarded new routes in order to maintain a competitive balance in the industry.⁷⁹ During this regulated period, the government granted increased fares to cover union demands.⁸⁰ There was little incentive for carriers to risk strikes by rejecting union demands, and little incentive for unions to agree to concessions.⁸¹ Market stability fostered job stability and high wages.

Against this backdrop, Congress ordered deregulation and removed most of the government controls over market entry and exit, routes, and fares.⁸² The resulting market was a chaotic free-for-all in comparison with the one it replaced.⁸³ This new market, unlike its regulated predecessor, eliminated inefficient carriers.⁸⁴ Surviving carriers fought to strengthen their market positions by merging,⁸⁵ closing bases,⁸⁶ selling routes,⁸⁷ and contracting out support work.⁸⁸

Today, fewer carriers share more of the market than a decade ago.⁸⁹ Despite a slight increase in overall airline employment and

79. McDonald, *supra* note 74, at 918 (citing J. MEYER, C. OSTER, I. MORGAN, B. BERMAN & D. STRASSMAN, *AIRLINE DEREGULATION: THE EARLY EXPERIENCE* 213-14 (1981)).

80. Crandall, *The Airlines: On Track or Off Course?*, in *CLEARED FOR TAKEOFF: AIRLINE LABOR RELATIONS SINCE DEREGULATION* 349, 350 (J. McKelvey ed. 1988).

81. *Id.*

82. International routes are still regulated. 49 U.S.C. app. § 1502 (Supp. I 1983). Service to small communities also continues to be federally mandated. 49 U.S.C. app. § 1389 (Supp. I 1983).

83. Carroll, *supra* note 73, at A6, col. 1.

84. For a discussion of the shake-out in the airline industry following deregulation, see Rosen, *supra* note 32, at 18-29.

85. Recent mergers include Southwest with Muse, Northwest with Republic, Pan American with National, Texas Air with Eastern, TWA with Ozark, Frontier with People Express, People Express with Britt and PBA, Delta with Western, Alaska with Jet America, Texas Air with People Express, American with Air California, Alaska with Horizon, and USAir with PSA. Kahn, *supra* note 69, at 4-5. Former Civil Aeronautics Board Chairman Alfred Kahn has criticized the federal government for failing to apply antitrust laws to bar the formation of airline oligopolies. Kahn, *supra* note 68, at 344-47. Instead, approval of mergers was transferred to the Department of Transportation, which has overridden objections against mergers made by the Antitrust Division of the Department of Justice. *Id.*

86. See, e.g., *Independent Union of Flight Attendants v. Pan Am. World Airways*, 502 F. Supp. 1013 (D.D.C. 1980).

87. For example, Braniff sold its Latin American route system to Eastern Air Lines, and Pan Am sold its Pacific Division to United Air Lines. Adams, *Seniority Integration: A Management Perspective*, in *CLEARED FOR TAKEOFF: AIRLINE LABOR RELATIONS SINCE DEREGULATION* 163, 164-65 (J. McKelvey ed. 1988).

88. Qantas Airways, 121 L.R.R.M. (BNA) 2312 (1984).

89. Before deregulation, the top nine airlines shared about 85% of the domestic passenger market. Kahn, *supra* note 69, at 5. Today, the top six airlines—Texas Air, United, American, Delta, Northwest, and TWA—share roughly 81% of that market. *Id.* Among the carriers who fell victim to deregulation were Air Florida, People Express, New York Air, Western Airlines, Jet America, Frontier Airlines, Republic Airlines, PSA, AirCal, and Ozark Airlines. Carroll, *supra* note 73, at A6, col. 1-2; Winpisinger, *What Lies Ahead for Labor?*, in *CLEARED*

average compensation,⁹⁰ the intense competition (particularly from non-unionized carriers with lower labor costs), continues to force many unions to concede a substantial amount of the jobs, wages, and benefits that they enjoyed in the regulated market.⁹¹ Much of the financial relief granted by labor is used to subsidize fare wars and to diversify, rather than to improve carrier operations.⁹² In response, labor has begun to question management's actions, demand changes in operating procedures and, in some instances, demand changes in management as well.⁹³

C. *Employee Protection in the Deregulated Airline Market*

Historically, the national policy of airline employee protection largely mirrored that of the railroad industry. The first statutory source of airline regulation, the Civil Aeronautics Act of 1938 (CAA),⁹⁴ was similar in many respects to its railway counterpart, the Interstate Commerce Act of 1887 (ICA).⁹⁵ Unlike the ICA, however, the CAA did not explicitly require airlines to protect their employees when approving consolidations, mergers, route transfers, and other transactions.⁹⁶ Instead, the Civil Aeronautics Board (CAB) derived that protection from the "public interest" requirement of the CAA,⁹⁷ thereby imposing employee protection requirements on airlines that

FOR TAKEOFF: AIRLINE LABOR RELATIONS SINCE DEREGULATION 365, 368 (J. McKelvey ed. 1988).

90. Northrup, *supra* note 67, at 429.

91. Crandall, *supra* note 80, at 350.

92. Rosen, *supra* note 32, at 24.

93. *Id.*

94. Ch. 601, 52 Stat. 973 (1938), *repealed by* Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.

95. Law of Feb. 4, 1887, ch. 104.

96. The Interstate Commerce Commission (ICC) read into Section 407 of the Transportation Act of 1920 an authorization to protect the interests of railroad employees who might lose jobs, wages, or benefits in the event of consolidations and asset transfers. McDonald, *supra* note 74, at 887-88. The United States Supreme Court upheld the ICC's interpretation of the Transportation Act, articulating a national policy of protecting labor morale in a commercially critical industry. *United States v. Lowden*, 308 U.S. 225, 234-36 (1939). One year later, Congress enacted the Transportation Act of 1940 which provided that, as a condition of approval of railroad transactions, the ICC "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." Transportation Act of 1940, ch. 722, § 7, § 407, 54 Stat. 898, 906 (codified as amended at 49 U.S.C. § 11,347 (Supp. V 1987)). The revised section provides that any transaction requiring the ICC's approval must incorporate an arrangement requiring "that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following [the action]." 49 U.S.C. § 11,347 (Supp. V 1987).

97. Ch. 601, § 401, 52 Stat. 973, 989. Section 401(i) of the CAA provided that "[n]o certificate may be transferred unless such transfer is approved by the Authority as being consistent with the public interest."

were similar to those required in the railroad industry. The judiciary applied to airlines the ICA's policy of giving preferential treatment to employees in order to avoid the commercial disruption that would occur through strikes.⁹⁸

The deregulation of airlines, however, brought a narrower focus to the public interest requirement of airline transactions.⁹⁹ The fear of interrupted commerce was no longer a compelling factor in averting airline labor strikes.¹⁰⁰ The Airline Deregulation Act (ADA)¹⁰¹ appears to reflect a policy of reduced employee protection in its interpretation of the public interest. Instead of employee protection, the ADA advocates efficient, low-priced air service¹⁰² and "the need to encourage fair wages and equitable working conditions for air carriers."¹⁰³ As the United States Court of Appeals for the District of Columbia Circuit has noted, the old policy of special employee protection for airlines is "out of step with the new national policy favoring competition among carriers and reliance upon market forces to meet the needs of the public."¹⁰⁴ The CAB's successor, the Department of Transportation (DOT),¹⁰⁵ has also adopted this entrepreneurial policy.¹⁰⁶

98. See *Western Air Lines v. CAB*, 194 F.2d 211, 214 (9th Cir. 1952) (holding that the reasoning in *United States v. Lowden*, 308 U.S. 225, 238 (1939), which permitted the ICC to impose labor protective provisions upon railroad mergers and consolidations notwithstanding the absence of express statutory authority, is in large part equally applicable to the airline industry). For a history of employee protection, see S. ROSENFELD, *LABOR PROTECTIVE PROVISIONS IN AIRLINE MERGERS* (1981); McDonald, *supra* note 74, at 922-30; Nichols & Kennedy, *Seniority Integration in the Absence of Mandatory Labor Protective Provisions*, in *CLEARED FOR TAKEOFF: AIRLINE LABOR RELATIONS SINCE DEREGULATION* 143 (J. McKelvey ed. 1988).

99. See McDonald, *supra* note 74, at 923.

100. See *infra* note 349 and accompanying text.

101. Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.).

102. 49 U.S.C. app. § 1302(a)(3) (1982).

103. *Id.*

104. *Air Line Pilots Ass'n Int'l v. Department of Transp.*, 791 F.2d 172, 176-77 (D.C. Cir. 1986).

105. The Department of Transportation (DOT) replaced the CAB as the agency responsible for authorizing mergers, sales, and acquisitions. Dempsey, *The Rise and Fall of the Civil Aeronautics Board—Opening Wide the Floodgates of Entry*, 11 *TRANSP. L.J.* 91, 93 (1979); Nichols & Kennedy, *supra* note 98, at 149. The CAB was phased out in a procedure culminating in 1984. Civil Aeronautics Board Sunset Act of 1984, 49 U.S.C. app. § 1551 (1982 & Supp. V 1987).

106. The CAB did order labor protective provisions in at least four merger cases that occurred after deregulation, reasoning that unions had not had sufficient time to respond to the changed circumstances. See *Western Air Lines, Control by AFSI*, 93 C.A.B. 545, 568 (1982); *Airwest, Acquisition by Republic Airlines*, 86 C.A.B. 1971, 1976 (1980); *Seaboard Acquisition by Tiger Int'l*, 86 C.A.B. 29, 117 (1980); *National Airlines Acquisition*, 84 C.A.B. 408, 474 (1979). With those exceptions, however, the CAB and DOT have consistently refused to

The CAB and the DOT determined that labor protective provisions, which may be imposed as a condition to the approval of airline mergers, are only appropriate when labor unrest threatens a systemwide disruption of the airways.¹⁰⁷ Except in the event of inter-airline sympathy strikes, a nationwide disruption is improbable because deregulation permits any carrier to provide the service normally provided by a strike-ridden carrier, as is the case in most industries.¹⁰⁸

Considering the apparent governmental recognition of a reduced need to prevent strikes in the airline industry, the extent to which the RLA continues to mandate a voice for airline employees in operational decisionmaking remains an unsettled question. Theoretically, carriers recognize that employees' active participation and full commitment is essential for the successful operation of a service industry.¹⁰⁹ Labor's corresponding assumption is that its opportunities for

impose labor protective restrictions as a condition to merger. See American Airlines, No. 44498 (D.O.T. Mar. 30, 1987) (LEXIS, Trans library, Dotav file) (American's takeover of Air California); Texas Air Corp., No. 44365 (D.O.T. Oct. 24, 1986) (LEXIS, Trans library, Dotav file) (Texas Air's takeover of People Express); Texas Air Corp., No. 44346 (D.O.T. Oct. 1, 1986) (LEXIS, Trans library, Dotav file) (Texas Air acquired control of Eastern Air Lines); NWA-Republic Acquisition Case, No. 43754 (D.O.T. July 31, 1986) (LEXIS, Trans library, Dotav file) (Northwest acquired Republic); Pacific Div. Transfer Case, No. 43065 (D.O.T. Dec. 2, 1985) (LEXIS, Trans library, Dotav file) (United's purchase of Pan American's Pacific routes).

When Texas Air Corporation acquired Eastern Air Lines, the DOT expressly rejected an argument by the union that a potential strike would disrupt the national air transportation system. Texas Air-Eastern Acquisition Case, No. 44346 (D.O.T. Aug. 26, 1986) (LEXIS, Trans library, Dotav file). The DOT found that "the labor parties had failed to show that LPP's [Labor Protective Provisions] would be necessary to prevent labor strife that would disrupt the national air transportation system or, due to special circumstances, for the encouragement of fair wages and working conditions." *Id.* at 4. The DOT made a similar finding in its approval of Pan American's sale of its Pacific routes to United. Pacific Div. Transfer Case, No. 43065 (D.O.T. Oct. 31, 1985) (LEXIS, Trans library, Dotav file), *aff'd sub nom.* Independent Union of Flight Attendants v. Department of Transp., 803 F.2d 1029 (9th Cir. 1986).

107. See McDonald, *supra* note 74, at 923-24; Nichols & Kennedy, *supra* note 98, at 149-50; see, e.g., Transamerica Corp., No. 42035 (C.A.B. Dec. 28, 1984) (LEXIS, Trans library, Cab file); Frontier Horizon, Inc., Fitness Investigation, No. 41640 (C.A.B. Jan. 6, 1984) (LEXIS, Trans library, Cab file); New York Air, Fitness Investigation, 87 C.A.B. 677 (1980), *aff'd sub nom.* Air Line Pilots Ass'n Int'l v. Civil Aeronautics Bd., 643 F.2d 935 (2d Cir. 1981).

108. The United States Supreme Court has held that, consistent with the purposes of the RLA, the Norris-LaGuardia Act precludes injunctions over secondary activity. Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees, 107 S. Ct. 1841, 1854-55 (1987). No-strike clauses, however, may prevent secondary picketing. During the IAM strike at Eastern Air Lines that began on March 4, 1989, courts issued preliminary injunctions preventing secondary activity at other carriers in support of the IAM strike until no-strike clauses could be interpreted in the minor dispute setting. See Northwest Airlines v. International Ass'n of Machinists, 712 F. Supp. 732 (D. Minn. 1989); International Ass'n of Machinists v. United Airlines, No. 89-0514, 89-0556, 89-0557 (D.D.C. Mar. 20, 1989).

109. Crandall, *supra* note 80, at 351.

increased wages and benefits depend on a carrier's ability to grow and be profitable.¹¹⁰ To the extent that these assumptions fade in the face of reality, however, a workable dispute resolution mechanism must strike a balance between the rights of the two parties without creating undue hardship for either.

III. A COMPARISON OF RELATIVE POWER UNDER RLA AND NLRA DISPUTE RESOLUTION PROCEDURES

A. *The Duty to Bargain*

Congress established rules for collective bargaining within industries governed by the NLRA and the RLA in order to provide a mechanism by which workers could participate in the establishment and administration of rules governing the workplace.¹¹¹ The two statutes were structured to accomodate two disparate labor-management concerns;¹¹² thus, one framework cannot be neatly superimposed on the other for comparative purposes. Nevertheless, because deregulation has brought the labor-management concerns of RLA industries conceptually closer to those of NLRA industries¹¹³ and because courts interpreting the RLA are borrowing NLRA doctrine, it is instructive to contrast the dispute resolution obligations under both statutes.

Management's statutory duty to bargain under both statutes affords workers the ability to affect decisions that directly concern their livelihood.¹¹⁴ Inevitably, that duty often chafes against management's freedom to determine how to spend its capital.¹¹⁵ With respect to a business' operational changes, labor's relative bargaining position is determined by the extent to which management's power to effect those changes is subject to statutory bargaining restraints. Management prerogative doctrine tends to favor management by limiting labor's right to bargain and to make use of its economic strength once a contract is in place. Thus, an examination of management prerogative doctrine and its impact on the relative power of the parties

110. *Id.* at 351-52.

111. For a discussion of the social and economic functions of collective bargaining, see D. BOK & J. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 222 (1970).

112. See *supra* notes 26-27 and accompanying text.

113. See *supra* Section II(B).

114. Section 2(First) of the RLA requires parties to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." RLA § 2(First), 45 U.S.C. § 152(First). Section 8(a)(5) of the NLRA provides that management has a duty to bargain with a union over "wages, hours and other terms and conditions of employment." NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5).

115. See Kohler, *Distinctions Without Differences: Effects Bargaining in Light of First National Maintenance*, 5 INDUS. REL. L.J. 402, 403 (1982).

focuses on the status of the collective bargaining agreement: whether it is initially being negotiated with the union as the employees' recognized representative, whether it is presently operative, or whether it has expired.

B. *Resolving Disputes During the Formation of an Initial Collective Bargaining Agreement*

When management and labor meet to negotiate a collective bargaining agreement for the first time, the NLRA and RLA both mandate that the parties' representatives follow collective bargaining procedures.¹¹⁶ The NLRA requires a much less extensive collective bargaining process than the RLA, which incorporates collective bargaining within the "major" classification.¹¹⁷ As interpreted, the

116. RLA § 6, 45 U.S.C. § 156; NLRA § 8(d), 29 U.S.C. § 158(d).

117. RLA § 6, 45 U.S.C. § 156. When labor wishes to trigger the major dispute procedure, it sends a Section 6 notice to management. A party must give a Section 6 notice at least 30 days before an intended change in the agreement. *Id.* Within 10 days after the notice is received, the parties must agree to a reasonable place for a conference and convene within the 30 days provided for in the notice. *Id.* The parties must then confer. RLA § 2(Second), 45 U.S.C. § 152(Second).

If the conference is unsuccessful, either party may request the services of the National Mediation Board (NMB), or the NMB may offer its services. RLA §§ 5-6, 45 U.S.C. §§ 155-156. The NMB is an administrative agency composed of three members appointed by the President of the United States and approved by the Senate. RLA § 4(First), 45 U.S.C. § 154(First). The NMB appoints a staff of mediators, who serve in a capacity similar to NLRB attorneys and agents. RLA § 4(Third)-(Fourth), 45 U.S.C. § 154(Third)-(Fourth); see T. KHEEL, *LABOR LAW* § 50.04[1], at 50-9 (rev. ed. 1984). The length of time for negotiating and mediating is entirely at the discretion of the NMB. See, e.g., *International Ass'n of Machinists v. National Mediation Bd.*, 425 F.2d 527 (D.C. Cir. 1970); *Lan Chile Airlines v. National Mediation Bd.*, 115 L.R.R.M. (BNA) 3665 (S.D. Fla. 1984); *Seaboard World Airways v. Local 851, Int'l Bhd. of Teamsters*, 501 F. Supp. 47 (E.D.N.Y. 1980).

If the NMB's efforts at mediation fail, it must attempt to "induce [the parties] to submit their dispute to binding arbitration." RLA § 5(First), 45 U.S.C. § 155(First). Then, if either party rejects arbitration, the status quo must be maintained for a 30 day cooling-off period before the parties may resort to self-help remedies. *Id.* The NMB may notify the President of the United States if it determines that the dispute threatens to deprive a region of essential service. RLA § 10, 45 U.S.C. § 160. The President may then create an emergency board to investigate the dispute. *Id.* If the President creates a factfinding board to investigate and report on the dispute, the parties must again maintain the status quo until 30 days after the emergency board has reported to the President. *Id.* This additional 30 days allows the board time to act and subjects the parties to political and social pressures while they "cool off." T. KHEEL, *supra*, § 50.05[1], at 50-30. Only one emergency board has been established in the airline industry since 1976. Curtin, *supra* note 32, at 187. That board was congressionally imposed in the Wien Air Alaska and Air Line Pilots Association dispute, which led to the enactment of the Airline Deregulation Act. *Id.* at 187 n.6.

If both parties accept arbitration, the NMB sets up a three or six person arbitration board. RLA § 7(First), 45 U.S.C. § 157(First). The parties and the NMB each name an arbitrator. RLA § 7(Second), 45 U.S.C. § 157(Second). At this stage, the parties are involved in an adversarial proceeding for the first time. After each side presents evidence and testimony, the arbitration board grants an award that is conclusive as to the merits and facts of the dispute

NLRA provides that parties may use collective bargaining as an exclusive means of forming and amending agreements;¹¹⁸ mediation, or the assistance of third parties, is strictly voluntary.¹¹⁹ In contrast, the RLA mandates collective bargaining under these circumstances merely as a procedure of first resort;¹²⁰ if the parties collectively bargain to impasse,¹²¹ they are then assisted by a National Mediation Board (NMB) mediator and later, if both parties consent, by an arbitration board.¹²²

Thus, RLA parties encounter an additional burden before the employer is free to act consistently with offers placed on the table and before the union is free to strike; they must bargain to impasse, then engage in mediation to the NMB's satisfaction. Because of the additional requirement of mediation and because the NMB may be reluctant to declare an impasse,¹²³ the RLA's collective bargaining phase may be substantially longer in duration than that of the NLRA. The protracted length of the RLA's major dispute procedure and the

unless a party successfully petitions to impeach it. RLA § 9(Second), 45 U.S.C. § 159(Second). The petition must be filed in a federal district court within 10 days after the filing of the award. *Id.* The award should be construed liberally by the court. RLA § 9(Third), 45 U.S.C. § 159(Third).

118. See NLRA § 8(d), 29 U.S.C. § 158(d).

119. Beyond the fact that mediation is statutory under the RLA and voluntary under the NLRA, there are further differences in the two procedures. Under the NLRA's voluntary mediation, the mediator has no power to compel agreement, and the parties can virtually ignore him. Krislov, *Mediation Under the Railway Labor Act: A Process in Search of a Name*, 27 LAB. L.J. 310 (1976). The RLA's mediation procedure, "quasi-judicial" in nature, requires that the NMB determine when the parties' efforts have been "satisfactory." *Id.* at 311. Delay is a tactic used more in RLA mediations than in voluntary mediation sessions, and the NMB has used the process to wear down parties. *Id.* at 312. It is possible for the RLA's process to last for years. *Id.* at 311-12.

120. RLA § 6, 45 U.S.C. § 156; see *supra* note 117.

121. Impasse is the point at which negotiations are deadlocked. According to the NLRB:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967).

122. See *supra* note 117. Both mediation and arbitration use the assistance of third parties. Mediation primarily differs from arbitration in the sense that it is strictly conciliatory; it is not binding on the parties. See Hart, *Techniques of Collective Bargaining*, 26 PRAC. LAW. 9 (1980). Mediators are government officials who work for the Federal Mediation and Conciliation Service or for a similar state or local agency. *Id.* Although mediation is strictly voluntary in most NLRA industries, the RLA mandates its use if the parties bargain to impasse while negotiating agreements or their amendments. RLA §§ 5-6, 45 U.S.C. §§ 155-156. For a discussion of the circumstances in which mediation is mandated under the RLA, see *supra* note 119.

123. See *supra* note 119.

NMB's sole power to determine the point of deadlock have enormous economic consequences.¹²⁴

The force of the RLA's time factor results from the statutory imposition of the status quo. Both the RLA and the NLRA attempt to equalize the bargaining positions of the parties during the collective bargaining process by mandating maintenance of the status quo. Pursuant to that mandate, management may not effectuate changes and labor may not strike while bargaining.¹²⁵ This requirement recognizes that the consequences of economic action are potentially severe for both parties. If management unilaterally implements a change in operations, labor loses an opportunity to protect its livelihood through influencing the decisionmaking process.¹²⁶ If labor strikes, striking employees may lose income or be replaced, and management may be unable to maintain service or production.¹²⁷ Under the NLRA, the possibility of a short status quo period and imminent economic action is greater than under the RLA's major dispute procedure. Thus, for NLRA parties, the threat of immediate economic force is the predominant factor forcing an agreement between the parties.¹²⁸

Within the collective bargaining framework, the availability of

124. See T. KHEEL, *supra* note 117, § 50.05[1], at 50-27.

125. Under the RLA, both parties must maintain the status quo from the filing of a Section 6 notice through the 30 day post-impasse period or, if an emergency board is appointed, during the 30 days after it reports to the President. RLA § 5(First), 45 U.S.C. § 155(First). The requirement prevents union strikes as well as management actions, and it is presumably designed as a final effort at rational resolution before a disruption of commerce might occur. See, e.g., *Railway Clerks v. Florida E. Coast Ry.*, 384 U.S. 238, 246 (1966) ("[The process is] purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute."). The United States Supreme Court has held that a carrier's obligation to maintain the status quo applies not only to the terms of the agreement, but also to a broad concept of the working conditions and practices that gave rise to the dispute. *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 153 (1969).

The NLRA similarly requires maintenance of the status quo during collective bargaining. See *First Nat'l Maintenance Corp. v. NLRB*, 242 N.L.R.B. 462 (1979). In the NLRA context, the status quo requirement has been restricted to mandatory topics contained in an agreement. *Milwaukee Spring Div. of Ill. Coil Spring Co.*, 268 N.L.R.B. 601, 602 (1984) (*Milwaukee Spring II*); see *infra* notes 346-53 and accompanying text.

126. See Kohler, *supra* note 115, at 413.

127. See J. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 19-43 (1983).

128. See *id.* at 120. Under the NLRA, if all the requirements of Section 8(d) have been met, labor is free to strike not only at impasse but also at the expiration of a collective bargaining agreement. NLRA § 8(d), 29 U.S.C. § 158(d). Section 8(d) provides that "no party to [the] contract shall terminate or modify [it], unless the party desiring [the] termination or modification . . . (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract . . . until its expiration date." *Id.* The employer, however, cannot act unilaterally prior to impasse.

economic weaponry hinges on the designation of topics and their inclusion or exclusion from the collective bargaining agreement. At an initial level of analysis, labor's power lies in the breadth of topics over which management must bargain and in the extent of management's bargaining obligation.¹²⁹ Under the NLRA, Subsections 8(a)(5) and 8(d)¹³⁰ define mandatory topics of bargaining as "wages, hours and other terms and conditions of employment."¹³¹ Congress left the exact definitional boundaries of mandatory topics for the determination of the NLRB and the courts.¹³² In recent years, those tribunals have substantially narrowed the topics over which management must bargain, and allowed it more freedom from statutory constraints.¹³³ In *NLRB v. Wooster Division of Borg-Warner Corp.*,¹³⁴ the United States Supreme Court determined that NLRA Subsections 8(a)(5) and 8(d) require bargaining to impasse¹³⁵ over "mandatory" subjects.¹³⁶ Bargaining over permissive subjects, however, is strictly at the election of the parties, who may not insist on bargaining to impasse over them.¹³⁷

Because management is required to maintain the status quo until it bargains to impasse over mandatory topics, the mandatory-permissive distinction creates the foundation for bargaining over topics in an initial agreement. As an illustration, parties must bargain in good faith until they reach an impasse over a topic, such as wages, that clearly falls within the ambit of the statute.¹³⁸ Conversely, although the boundaries of the mandatory-permissive distinction are imprecise,¹³⁹ one might imagine that if labor desired to discuss the purchase of a replacement computer system with management,¹⁴⁰ the permis-

129. Lynch, *supra* note 36, at 271-312.

130. NLRA § 8(a)(5), (d), 29 U.S.C. § 158(a)(5), (d).

131. *Id.*

132. See Kohler, *supra* note 115, at 403.

133. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958); Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*).

134. 356 U.S. 342 (1958).

135. For a definition of impasse, see *supra* note 121.

136. *Borg-Warner*, 356 U.S. at 349. The status quo was further limited when the NLRB held that if management seeks to modify a mandatory term contained in a collective bargaining agreement, it must first obtain the union's consent. *Milwaukee Spring II*, 268 N.L.R.B. at 602. If the mandatory term is not contained in the agreement, however, management need not obtain the union's consent, but it must bargain in good faith to impasse before implementing the change. *Id.*

137. *Milwaukee Spring II*, 268 N.L.R.B. at 602.

138. See *UAW v. NLRB*, 765 F.2d 175, 181 (D.C. Cir. 1985).

139. See J. ATLESON, *supra* note 127, at 120-21; Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447, 1454 (1982).

140. For the purpose of illustration, assume that the purchase would not eliminate jobs and

sive nature of the topic would inhibit labor's demands. It would not be incumbent on management to discuss the topic, and management could purchase any computer system it chose.

Theoretically, therefore, the designation of a topic as permissive allows NLRA employers to take unilateral action without bargaining and without fear of economic pressure.¹⁴¹ When several items are on the bargaining table, however, as is the case during the formation of an initial collective agreement, a party may concede on a mandatory issue in order to obtain agreement on a permissive one.¹⁴² To illustrate, if the parties are bargaining concurrently over wages and the computer system, labor might consent to a wage concession in order to influence the decision regarding the selection of a computer system.

In conjunction with the topical classification during the negotiation of an initial agreement, the availability of economic weapons determines the parties' relative power. The parties are not yet bound by a collective agreement and thus are not contractually prevented from exercising economic force. Labor may strike prior to impasse if all the requirements of Section 8(d) of the NLRA have been met.¹⁴³ At impasse, management may act unilaterally.¹⁴⁴ The likelihood that management's acts may cause a strong union to retaliate maximizes the union's leverage during the bargaining relationship. If the union is powerful and a strike would be devastating to management, the reality of labor's economic strength would affect its presentation of the overall package of topics—as well as management's receptiveness—and overshadow the mandatory-permissive distinction.¹⁴⁵ Thus, a strong union may convince management to allow it a voice in a decision concerning the purchase of a computer system, notwithstanding the fact that the topic is permissive.

The RLA similarly requires parties to bargain over any changes in "rates of pay, rules and working conditions."¹⁴⁶ Aside from the topical similarity, however, the two statutes establish their collective bargaining mechanisms very differently. The RLA was developed as a framework for dispute resolution in an industry that was not only crucial to commerce, but was also pervaded with a strong labor presence. Congress sought to balance these economic concerns by

that the issue arises in isolation; such a situation, however, would not occur during bargaining over an initial agreement.

141. Kohler, *supra* note 115, at 405.

142. J. ATLESON, *supra* note 127, at 120.

143. For a description of Section 8(d), see *supra* note 128.

144. *Id.*

145. J. ATLESON, *supra* note 127, at 111-35.

146. RLA § 2(First), (Sixth), 45 U.S.C. § 152(First), (Sixth).

extending the period over which parties could work out their differences by themselves.¹⁴⁷ Thus, the RLA requires parties to bargain in good faith to impasse, and then mediate to impasse, over all legitimate bargaining topics.¹⁴⁸

After the deregulation of the airline industry, the major dispute procedure frequently has been too rigid to accommodate the altered concerns of the parties. The time element embodied in the mediation requirement profoundly affects the bargaining relationship. Either the parties or the mediator may stall the process, waiting for events that might change the outcome.¹⁴⁹

Because of the potential length of the process, the parties' bargaining positions during the pre-agreement stage of bargaining are predetermined to favor the party least desirous of the new terms. It is axiomatic that when a union organizes within a company, it does so because employees are unhappy with their present wages, benefits, or working conditions. When RLA parties are negotiating an initial agreement, labor may concede some of its demands in order to hasten the implementation of higher wages or better working conditions. It follows that the RLA's major dispute classification, when used during the formation of an initial collective agreement, may add to management's bargaining power. Thus, the length of the RLA's major dispute procedure functions like the economic threat in the NLRA context by encouraging compromise.¹⁵⁰ Under the RLA, however, instead of the economically weaker party yielding to the stronger, the time factor may more subtly sway the party desiring the change to make concessions, notwithstanding the parties' economic strength.

147. See *supra* notes 26-28 and accompanying text.

148. In 1945, the Supreme Court attempted to clarify the RLA's designation of bargaining topics by delineating the difference between grievance disputes and disputes over the formation of collective agreements. *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 722 (1945). The Court termed controversies over the formation of agreements "major" and held that they are disagreements that arise when there is no collective bargaining agreement or when the parties seek to change the terms of an existing agreement. *Id.* at 723. Thus, the parties are disputing the acquisition of future rights, not the determination of vested rights. *Id.*

The Court went on to hold that "minor" disputes are arbitrable disputes concerning accrued rights, not the creation of new ones. *Id.* These disputes may arise from either the interpretation of provisions in existing agreements or from an event independent of the agreement. *Id.* In the latter category, the Court included situations that are omitted from a collective bargaining agreement as well as claims that are not contained in the agreement. *Id.*

149. T. KHEEL, *supra* note 117, § 50.05[1], at 50-27 to -28; Krislov, *supra* note 119, at 311.

150. Krislov, *supra* note 119, at 313 (citing *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 148-50 (1969)).

C. Resolving Disputes During the Term of an Agreement

1. MID-TERM COLLECTIVE BARGAINING

It is during mid-term bargaining that the NLRA's mandatory and permissive subjects exhibit their clearest distinction.¹⁵¹ When a party presents a single issue for discussion during the term of an agreement, no other issues generally cloud its consideration.¹⁵² Thus, labor may wish to discuss a permissive topic, such as which computer system to purchase, but it may not insist that management bargain over the topic or that management refrain from making its decision.¹⁵³ Conversely, management's desire to lower wages would constitute an action concerning a mandatory topic. As a result of the mandatory designation, management is statutorily obligated to bargain over the topic and to refrain from unilaterally modifying the contract pending bargaining. If, for purposes of discussion, wages were not contained in the existing agreement, management must first present the issue to labor, and labor may insist on bargaining to impasse over the issue before management can implement the reduction.¹⁵⁴ Although labor may then assert a statutory violation based on management's failure to bargain over a mandatory topic, labor's freedom to retaliate with a strike may be thwarted by management's claim that the collective agreement grants management the right to act. In that event, if the employer is willing to arbitrate, the NLRB will defer the dispute to arbitration, and an injunction may issue to enforce the no-strike clause.¹⁵⁵ Absent a rare status quo injunction,¹⁵⁶ management may lower wages pending arbitration pursuant to the "obey and grieve" doctrine.¹⁵⁷ Labor's recourse against management's unilateral

151. See J. ATLESON, *supra* note 127, at 120.

152. It is possible, however, for the economic power of the parties to be a factor. See *supra* notes 125-28 and accompanying text.

153. See NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

154. See Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601, 602 (1984) (*Milwaukee Spring II*). If the collective bargaining agreement contained a management rights clause that permitted the employer to control wages, the topic of wages would be "contained in" the agreement within the meaning of Section 8(d), and it would be subject to arbitration. See *infra* notes 168 & 346-53 and accompanying text.

155. The Supreme Court has held that, under the NLRA, an express or implied no-strike clause is the quid pro quo for an employer's agreement to arbitrate disputes. See *Boys Mkts., Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 247-48 (1970); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957); see also Lynch, *supra* note 36, at 294-95. For a discussion of the NLRA's arbitration procedure, see *infra* notes 171-73 and accompanying text.

156. See Lynch, *supra* note 36, at 294-95.

157. For a discussion of the "work first, grieve later" principle, see Lynch, *supra* note 36, at 294 n.303.

action is limited to arbitrating for a contractual remedy.¹⁵⁸ If, however, labor has succeeded in including wages or any other mandatory topic in an agreement, management must not only convince labor to bargain over the proposed change, but must also obtain labor's consent before taking any action.¹⁵⁹ Management is statutorily and contractually compelled to obtain that consent.¹⁶⁰

Management can avoid bargaining and the corresponding threat of economic force if it can persuade labor to contractually waive labor's statutory right to bargain under specified circumstances.¹⁶¹ Such a waiver effectively places potential collective bargaining topics into an arbitration framework and thus reduces the threat of strikes.¹⁶² For example, management may substantially increase its freedom to make business decisions by persuading labor to incorporate "reserved rights" or "management rights" clauses in an agreement. Under those clauses, management may unilaterally effectuate any operational changes not explicitly prohibited by the agreement, without submitting the issues to labor.¹⁶³ Conversely, under the NLRA, labor may seek "zipper" clauses that close out bargaining during the contract term. These zipper clauses effectively prevent management from changing the status quo with regard to mandatory topics unless labor's consent is obtained or unless the change is authorized by the agreement.¹⁶⁴ The RLA's functional equivalent of zipper clauses are moratorium clauses, which prevent the filing of Sec-

158. The union will claim in arbitration that management's action was prohibited by the collective bargaining agreement.

159. See *UAW v. NLRB*, 765 F.2d 175, 179-80 (D.C. Cir. 1985).

160. Thus, labor's best recourse is to bargain to incorporate the items into the agreement. It is then assured of at least a contractual remedy if management unilaterally makes a change that violates the agreement's terms. See *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20, 187-88 (1971). If the topic is permissive and is incorporated into an agreement, labor has a contractual, not a statutory, remedy. *Id.* Section 301 of the LMRA provides a federal remedy for breach of contract actions. *Id.* at 181 n.20 (interpreting LMRA § 301, 29 U.S.C. § 185). Conversely, if labor succeeds in incorporating a mandatory topic into an agreement and if management acts without labor's consent, labor has the additional statutory remedy of an unfair labor practice charge under Section 8(d) of the NLRA. *Milwaukee Spring II*, 268 N.L.R.B. 601, 602 (1984). For a discussion and excerpt of NLRA § 8(d), see *supra* note 128. Management can also contract around mandatory topics through management rights clauses. See *infra* notes 161-70 and accompanying text.

161. See Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23 (1985).

162. See *id.* at 30; see also *UAW v. NLRB*, 765 F.2d 175, 180 (D.C. Cir. 1985).

163. See Hart, *supra* note 122, at 25.

164. *UAW*, 765 F.2d at 180. Additionally, work preservation clauses prevent management from making job-related changes without labor's consent. See Edwards, *supra* note 161, at 32-33.

tion 6 notices during the term of the agreement.¹⁶⁵ Even when contracts contain such clauses, disputes arise over whether a proposed action fits within those actions permitted by the contract, thereby comprising a minor dispute.¹⁶⁶

In summary, if a dispute over a single subject occurs during the term of an agreement, the topical distinction may operate either to protect labor's right to bargain or consent or to protect management's right to respond to product market changes.¹⁶⁷ A mandatory designation grants labor either the right to be heard in a bargaining forum before management acts¹⁶⁸ or, pursuant to a zipper clause, the potential right to prevent management's action completely.¹⁶⁹ If, however, a topic is designated as permissive, management has more freedom to take unilateral action. An employer need not bargain over a permissive topic that is not contained in an agreement.¹⁷⁰

2. MID-TERM ARBITRATION

Under both the Railway Labor Act and the National Labor Relations Act, parties draw from statutory language to contractually provide for binding arbitration, a grievance-oriented procedure.¹⁷¹

165. Moratorium clauses close out Section 6 bargaining during the term of an agreement. An example of a moratorium clause is one that provides in part: "This entire agreement shall continue in full force and effect through December 31, 1987, and thereafter shall be subject to change as provided for in Section 6 . . . of the Railway Labor Act, as amended." International Ass'n of Machinists, AFL-CIO v. Eastern Airlines, 849 F.2d 1481, 1482 (D.C. Cir. 1988) (quoting from labor agreement).

166. See Section IV(A) (discussing Air Line Pilots Ass'n Int'l v. Eastern Air Lines, 869 F.2d 1518 (D.C. Cir. 1989) (*Eastern Pilots II*)).

167. See Lynch, *supra* note 36, at 280-83.

168. If the mandatory topic is not contained in an agreement, management may act after bargaining to impasse. See Lynch, *supra* note 36, at 281.

169. UAW v. NLRB, 765 F.2d 175, 180 (D.C. Cir. 1985).

170. Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601, 602 (1984) (*Milwaukee Spring II*). Conversely, management may retain the power to act unilaterally by excluding permissive topics from arbitration, either through a specific reference to the topic or through a general reference in a management rights clause. See *supra* notes 161-70 and accompanying text.

171. Although the starting points for enforcement of arbitration under the statutes were poles apart, courts have borrowed doctrine until the end results are now largely interchangeable. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 676 (1973).

Minor disputes arising in the railroad industry are subject to compulsory, binding arbitration before either the National Railroad Adjustment Board (NRAB) or a board established by management and labor. RLA § 3, 45 U.S.C. § 153. The airlines' minor disputes under the RLA are submitted to arbitration panels called System Boards of Adjustment (system boards), which operate on a carrier-wide basis. RLA § 3, 45 U.S.C. § 153; RLA § 204, 45 U.S.C. § 184; T. KHEEL, *supra* note 117, § 50.06[2], at 50-39. The system board's jurisdiction over a minor dispute is exclusive, and its result is binding. RLA § 4(Fourth), 45 U.S.C. § 154(Fourth). The boards are usually composed of an equal number

Under the NLRA, labor will typically accept the quid pro quo of a no-strike clause in return for management's agreement to arbitrate grievances.¹⁷² Additionally, the NLRB and the courts interpreting the NLRA have adopted a policy of deferral to arbitration; as a result, arbitration has become known as the cornerstone of the NLRA.¹⁷³

Although arbitration was a judicial gloss on the NLRA, it was mandated by the RLA at its inception.¹⁷⁴ Whereas disputes concerning the negotiation of new agreements or the amendment of existing agreements constitute major disputes subject to collective bargaining,¹⁷⁵ those concerning the interpretation of existing agreements are minor disputes subject to binding arbitration.¹⁷⁶ For example, a dis-

of management and labor members. RLA § 3(First)(a), 45 U.S.C. § 153(First)(a). If the board deadlocks, a neutral referee is appointed to break the tie. RLA § 153(First)(1), 45 U.S.C. § 153(First)(1). During the pendency of a minor dispute and absent a status quo injunction, management is allowed to implement its interpretation of the agreement. See *Maine Cent. R.R. v. United Transp. Union*, 787 F.2d 780, 781 (1st Cir. 1986), *cert. denied*, 479 U.S. 848 (1986); *Local 553, Transp. Workers Union v. Eastern Air Lines*, 695 F.2d 668, 675 (2d Cir. 1983); *United Transp. Union v. Penn Cent. Transp.*, 505 F.2d 542, 545 (3d Cir. 1974).

In comparison, the 1935 version of the NLRA did not consider the enforcement of collective bargaining agreements. Ch. 372, 49 Stat. 449 (1935); Feller, *supra*, at 687. Congress amended the NLRA in 1947, ch. 120, tit. 1, 61 Stat. 136 (1947), although the result was unlike the RLA's minor dispute procedure. Feller, *supra*, at 689. Section 301 of the Taft-Hartley Amendments to the Wagner Act states: "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties . . ." LMRA § 301(a), 29 U.S.C. § 185(a). Thus, unlike the RLA, the NLRA did not establish or require the parties to establish an arbitration mechanism for disputes over the interpretation of collective bargaining agreements. See Feller, *supra*, at 687-90. The Supreme Court held that Section 301 mandated the federal courts to create a federal substantive law of collective bargaining. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). The *Lincoln Mills* Court held that congressional intent indicated that "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." *Id.* at 453-54.

RLA tribunals began to borrow NLRA doctrine to fill an omission in the RLA's minor dispute procedure. Feller, *supra*, at 692. When Congress extended the RLA to the airlines, it neglected to provide for judicial enforcement of arbitration board decisions. *Id.* at 692-93. The Supreme Court filled the gap in *International Association of Machinists v. Central Airlines*, 372 U.S. 682, *reh'g denied*, 373 U.S. 947 (1963), holding that labor agreements and arbitration boards should be governed by federal law.

Thus, the general arbitration requirements of the two statutes merged: *Lincoln Mills* proceeded from jurisdiction to substance, while *Central Airlines* proceeded from substance to jurisdiction. Feller, *supra*, at 693.

172. See Feller, *supra* note 171, at 757.

173. The United States Supreme Court established grievance arbitration as the basis of NLRA bargaining in three cases collectively known as the *Steelworkers Trilogy*. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

174. See *supra* note 171.

175. For a discussion of the major dispute procedure, see *supra* note 117.

176. For a discussion of the minor dispute procedure, see *supra* note 171.

pute over accrued rights, such as insurance benefits, would constitute a minor dispute.¹⁷⁷ The problem over classification of a dispute arises when a managerial action can be viewed either as permissible under an expansive interpretation of an agreement, thereby constituting a minor dispute, or as an attempt to amend an agreement, thereby triggering a major dispute.

D. *Resolving Disputes After an Agreement Has Expired*

After an agreement has expired, negotiations over new collective agreements follow collective bargaining frameworks under both the NLRA and RLA.¹⁷⁸ During this stage of the agreement, however, the effects of deregulation have a crucial bearing on a determination of the parties' relative bargaining positions under the RLA.

In NLRA industries, which are primarily unregulated, the balance of power during the post-expiration phase is closely related to the parties' potential use of economic force. In this sense, post-expiration collective bargaining in NLRA industries is often similar to the bargaining which takes place during the formation of an initial agreement. In the post-expiration time frame, the mandatory-permissive distinction may have less bearing on the relative power of the parties than during the term of the agreement because the bargaining is influenced by the weight of the total bargaining package, as well as by the availability of economic force if impasse is reached over a group of topics that includes a mandatory topic.¹⁷⁹

In the RLA context, the effects of deregulation, coupled with the protracted major dispute procedure, produce different concerns. When the airline industry was regulated, government control virtually guaranteed collective bargaining agreements that were more desirable than previous ones.¹⁸⁰ Moreover, carriers were often permitted to offset the higher contractual wages with higher fares.¹⁸¹ During regulation, therefore, the extensive major dispute procedure worked for the benefit of management by allowing management to prolong the process; labor typically would make concessions in order to more quickly implement the desirable agreement. Deregulation, however, brought concession bargaining to the airline industry. In today's marketplace, the relative bargaining positions of management and labor are reversed, with management now having the most to gain by having a

177. See *St. Louis Southwestern Ry. v. United Transp. Union*, 646 F.2d 230, 231 n.1 (5th Cir. 1981).

178. See *supra* notes 117-22 and accompanying text.

179. See *supra* notes 129-45 and accompanying text.

180. See *supra* notes 77-79 and accompanying text.

181. See *supra* notes 80-81 and accompanying text.

new agreement in place. As a consequence, the benefits that result from prolonging the bargaining process have shifted to labor, which may now use the time element to force concessions from management.

Thus, the doctrinal frameworks of the NLRA and the RLA impact differently on the rights and relative negotiating power of the parties. Courts' varying interpretations of the RLA during the mid-term and post-expiration phases of collective agreements, however, do not always consider the implications of applying NLRA policy to the RLA. This confusion is illustrated in three disputes that arose at Eastern Air Lines.

IV. EASTERN AIR LINES

The tumultuous relationship¹⁸² between management and labor

182. In recent years, Eastern attempted to implement many operational changes, and its unions filed suit to block them. *See, e.g.*, International Ass'n of Machinists v. Eastern Air Lines, 849 F.2d 1481 (D.C. Cir. 1988) (spin-off of fleet service employees); International Ass'n of Machinists v. Eastern Air Lines, 826 F.2d 1141 (1st Cir. 1987) (layoffs); Local 553, Transport Workers Union v. Eastern Air Lines, 695 F.2d 668 (2d Cir. 1983) (route purchases); International Ass'n of Machinists v. Eastern Air Lines, 320 F.2d 451 (5th Cir. 1963) (work vacations and wage reductions); Air Line Pilots Ass'n Int'l v. Eastern Air Lines, 683 F. Supp. 845 (D.D.C. 1988) (subcontracting of pilots for training flights); Eastern Air Lines v. Air Line Pilots Ass'n Int'l, 670 F. Supp. 947 (S.D. Fla. 1987) (sale of airline to Texas Air); International Ass'n of Machinists v. Eastern Air Lines, 125 L.R.R.M. (BNA) 3491 (D.D.C. July 2, 1987) (transferring employees without notice).

The disputes did not prevent the loss of jobs, nor did they prevent the airline from growing financially weaker. At the time of *Eastern Furlough II*, Eastern employed 12,500 fewer people than it employed two years previously; the work force had shrunk by 40%. Lyons & Merzer, *As Eastern is Slowly Dismantled, So Are Lives*, Miami Herald, Nov. 13, 1988, at A18, col. 1. Meanwhile, Eastern was losing \$100 million per quarter. Lyons, *Lorenzo: Texas Air Chief Offers Last Hope to Eastern*, Miami Herald, Oct. 30, 1988, at F1, col. 2.

Eastern maintained that until its unions agreed to major wage concessions, it would be forced to continue selling assets. *Id.* at col. 5. Frank Lorenzo, chairman of Texas Air Corp., the holding company for Eastern, stated that his goal was to achieve at least \$790 million in wage cuts and work-rule changes over three years. Lyons, *No One Can Arrive at a Deal That Would Satisfy Everyone*, Miami Herald, Nov. 13, 1988, at A18, col. 1. As of the second quarter of 1988, Eastern had borrowed more than \$2.53 billion and was spending \$544 million annually to service the debt. Airline Pilots Ass'n Int'l v. Eastern Air Lines, 863 F.2d 891, 893 (D.C. Cir. 1988) (*Eastern Furlough II*), *reh'g en banc denied*, 863 F.2d 891, 913 (D.C. Cir. 1989).

The unions contended that Eastern was interested only in short-term profits, not in long-term viability. Airline Pilots Ass'n Int'l v. Eastern Air Lines, 703 F. Supp. 962, 966 (D.D.C. 1988) (*Eastern Furlough I*), *rev'd and remanded*, 863 F.2d 891 (D.C. Cir. 1988) (*Eastern Furlough II*). They claimed that Eastern was "cannibalizing itself" for the benefit of Continental Air Lines, a predominantly non-unionized carrier also owned by Texas Air Corp. Lyons & Merzer, *supra*, at A18, col. 4. The unions also contended that poor management was responsible for the carrier's financial condition, and they claimed that they would not stop fighting until they owned the airline. Lyons, *Court OKs Job Cutbacks at Eastern*, Miami Herald, Oct. 1, 1988, at A1, col. 4.

at Eastern Air Lines has provided three recent conflicts, addressed by the federal courts of the District of Columbia, that vividly illustrate the difficulty of applying the Railway Labor Act's major-minor classification to disputes in the deregulated airline industry. The discussion that follows explores the manner in which these courts attempted to classify conflicts that arose during the operation of collective bargaining agreements and after their expiration.

A. Eastern Pilots II: *Mid-Term Dispute Classification*

*Air Line Pilots Association International v. Eastern Air Lines (Eastern Pilots II)*¹⁸³ involved a dispute that occurred during the term of a collective bargaining agreement between the Air Line Pilots Association (ALPA) and Eastern Air Lines. The dispute arose when Eastern's management contracted with Orion Lift Services (Orion) to provide pilots to Eastern in the event of a pilots' strike.¹⁸⁴ Eastern entered into a contract for Orion's pilot replacement service because it feared that a potential strike by the Eastern machinists union would be supported by an ALPA sympathy strike.¹⁸⁵ ALPA filed a complaint and a motion for a preliminary injunction in the United States District Court for the District of Columbia.¹⁸⁶ The union contended that the use of non-Eastern pilots in preparation for a sympathy strike was a violation of the collective bargaining agreement and thus constituted a major dispute.¹⁸⁷ Claiming that the agreement allowed it to build up a reserve of pilots and that the dispute was therefore minor, Eastern moved to dismiss.¹⁸⁸

The relevant clauses in the agreement were a moratorium clause, which provided that the agreement was neither amendable nor subject to renegotiation until its expiration,¹⁸⁹ and a scope clause, which provided that "all present or future flying, including flight training" would be performed by Eastern pilots.¹⁹⁰ Of the two clauses, the dis-

183. 869 F.2d 1518 (D.C. Cir. 1989).

184. *Id.* at 1519.

185. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 683 F. Supp. 845, 848 (D.D.C. 1988) (*Eastern Pilots I*), *rev'd*, 869 F.2d 1518 (D.C. Cir. 1989) (*Eastern Pilots II*).

186. *Id.* at 846.

187. *Id.* The major dispute procedure is the RLA's forum for constructing and amending collective agreements. It consists primarily of collective bargaining and mediation.

188. *Eastern Pilots I*, 683 F. Supp. at 846. The minor dispute resolution procedure is the RLA's forum for arbitrating disputes over interpretations of collective bargaining agreements.

189. *Id.* at 847. For a discussion of moratorium clauses, see *supra* notes 161-66 and accompanying text.

190. *Eastern Pilots I*, 683 F. Supp. at 847. The scope clause provided:

It is agreed that all present or future flying, including flight training (except for initial factory-conducted training in newly purchased equipment), revenue flying, ferry flights, charters and wet-leases performed in or for the service of Eastern

strict court examined only the scope clause; it held that the dispute was major because the training constituted a unilateral repudiation of the agreement that was not justified by past practices.¹⁹¹ The court supported its conclusion that contract repudiation comprises a major dispute by referencing cases that held that a "change" or "violation" of a collective bargaining agreement would trigger the major classification.¹⁹²

Although the conclusion that contract repudiation constitutes a major dispute was well supported, the district court did not address the inherent conflict between this conclusion and the existing moratorium clause. If a change or repudiation of a collective bargaining agreement constitutes a major dispute, then major disputes cannot arise without the other parties' consent during the term of an agreement that contains a moratorium clause, which would preclude changes to the agreement during its term. The parties would have waived their right to amend the agreement through the moratorium clause; presumably, the moratorium clause should have precluded bargaining by foreclosing changes or amendments until the agreement's expiration date.

On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed.¹⁹³ In an opinion written by Judge Edwards, the court of appeals not only redefined the standard of repudiation, but also held that contract repudiation alone is insufficient to qualify a mid-term dispute as major.¹⁹⁴ Disagreeing with the rule followed in other circuits that major disputes may be based on violations

Air Lines, Inc., shall be performed by pilots whose names appear on the then-current Eastern Air Lines' System Seniority List.

Id.

191. *Id.* at 852.

192. *Id.* at 851-52 (citing *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945)). The court also referenced *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142 (1969) (unilateral repudiation is a major dispute); *Brotherhood of Maintenance of Way Employees v. Chicago & N.W. Transp. Co.*, 827 F.2d 330, 333 (8th Cir. 1987) (formal change in an agreement is a major dispute); *St. Louis Southwestern Ry. v. Brotherhood of R.R. Signalmen*, 665 F.2d 987 (10th Cir. 1981), *cert. denied*, 456 U.S. 945 (1982) (violation of a collective bargaining agreement is a major dispute); *International Bhd. of Elec. Workers v. Washington Terminal Co.*, 473 F.2d 1156, 1172-73 (D.C. Cir. 1972) (quoting *Switchmen's Union v. Southern Pac. Co.*, 398 F.2d 443, 447 (9th Cir. 1968)) (a change that "is in nowise contemplated or arguably covered by the agreement" is a major dispute); *United Indus. Workers v. Board of Trustees*, 351 F.2d 183, 190 (5th Cir. 1965) (violation of collective bargaining agreement is a major dispute); *Local 553, Transport Workers Union v. Eastern Air Lines*, 544 F. Supp. 1315 (E.D.N.Y.), *aff'd as modified*, 695 F.2d 668 (2d Cir. 1982) (violation of collective bargaining agreement is major dispute).

193. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 869 F.2d 1518, 1519 (D.C. Cir. 1989) (*Eastern Pilots II*).

194. *Id.* at 1522-23.

of collective bargaining agreements, Judge Edwards wrote that a repudiation is more than just a clear violation of an agreement.¹⁹⁵ Instead, a major dispute must arise from a repudiation that is so severe that it amounts to bad faith:

That is, even if the court is absolutely convinced that the agreement prohibits the party's action, it may not infer that the party has repudiated the agreement, thus generating a major dispute, unless the court makes the "essential finding" that the party's proffered interpretation is "so inherently unreasonable as to amount to bad faith." To hold otherwise would allow the court to find a major dispute based solely on its view of the merits—usurping the role of the arbitrator in interpreting and applying the contract.¹⁹⁶

Because the court's view of mid-term major disputes was so restrictive, its view of minor disputes was correspondingly expansive. Building on the NLRA policy of deferral to arbitration¹⁹⁷ and adding to the Seventh Circuit's conclusion that mid-term disputes are minor unless a party's claims are frivolously based on an agreement,¹⁹⁸ the District of Columbia Circuit determined that if a dispute can be resolved by reference to an agreement, then the dispute is minor even if the claim of contractual justification is frivolous.¹⁹⁹

The District of Columbia Circuit's conceptualization of the presumption of arbitrability for mid-term disputes under the RLA reaches beyond the Supreme Court's later holding that arbitration is the proper forum for settling disputes that are arguably grounded in contractual interpretation. In *Consolidated Rail Corp. v. Railway Labor Executives' Association*,²⁰⁰ the Supreme Court held that past practices constituted an implied contract term that arguably permitted a railroad employer to implement drug screening as part of its required medical examinations.²⁰¹ The Court therefore molded a somewhat narrower version of mid-term minor disputes than the District of Columbia Circuit, holding in effect that frivolous contractual justifications constitute major disputes. Although the distinction may seem slight, a close case such as *Eastern Pilots* might produce a different result under each perspective. In *Eastern Pilots I*, the collective bargaining agreement prohibited Eastern from using pilots who were

195. *Id.* at 1523.

196. *Id.* (citing *Southern Ry. v. Brotherhood of Locomotive Firemen*, 384 F.2d 323 (D.C. Cir. 1967)).

197. For a discussion of NLRA deferral policy, see *infra* notes 385-87 and accompanying text.

198. For a discussion of the Seventh Circuit's rule, see *infra* note 390.

199. *Eastern Pilots II*, 869 F.2d at 1522.

200. 109 U.S. 2477 (1989).

201. *Id.* at 2489.

not on its seniority roster to conduct "training flights . . . in or for the service of Eastern."²⁰² Therefore, applying the Supreme Court's standard, Eastern's claim that the collective bargaining agreement permitted its contract with Orion might not be legitimately arguable (consistent with the district court's conclusion that the dispute was major), but it might be frivolous although not brought in bad faith (consistent with the court of appeals' definition of a minor dispute).²⁰³

Judge Edwards relied on NLRA policy to support his heavy presumption of arbitrability, noting that the policy favoring arbitration is crucial because a collective agreement may include the "common law" of the parties and of the industry, as well as explicit contractual terms.²⁰⁴ He also noted that the question of an industry's "common law" is uniquely within the province of an arbitrator.²⁰⁵ The *Consolidated* Court referred to the same NLRA policy in arriving at its definition of minor disputes.²⁰⁶

Although the court of appeals' view is grounded in well-settled NLRA policy, its vision of arbitration is similar to that contemplated by one of the NLRA's most expansive interpretations of arbitration, *UAW v. NLRB*.²⁰⁷ In *UAW*, an opinion also written by Judge Edwards, the District of Columbia Circuit implied that an unfair labor practice charge under Section 8(d)²⁰⁸ was a question for the arbitrator if the parties' agreement contained an arbitration clause, a no-strike clause, and a zipper clause.²⁰⁹ *Eastern Pilots* differs from *UAW* by not explicitly requiring the contractual inclusion of a mora-

202. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 683 F. Supp. 854, 857 (D.D.C. 1988) (*Eastern Pilots I*).

203. *Eastern Pilots II*, 869 F.2d at 1523. A possible reason for the Supreme Court's and the District of Columbia Circuit's different constructions of minor disputes is the dissimilarity of issues before each court. The District of Columbia Circuit's definition of minor disputes related to an issue that was more entrepreneurial in nature than drug testing, an issue that implicated privacy concerns.

204. *Id.* at 1522 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 (1960)).

205. *Id.* (citing *Warrior & Gulf*, 363 U.S. at 581).

206. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2484 (1989).

207. 765 F.2d 175 (D.C. Cir. 1985). For a discussion of *UAW*, see *infra* notes 350-53 and accompanying text.

208. Section 8(d) prohibits unilateral modifications of terms "contained in" a collective bargaining agreement. NLRA § 8(d), 29 U.S.C. § 158(d). For a further discussion of Section 8(d), see *supra* notes 128-37 and *infra* notes 346-53 and accompanying text.

209. *UAW*, 765 F.2d at 182 n.26. Zipper clauses effectively incorporate into an agreement all bargaining topics that might arise during the term of a collective bargaining agreement. See *id.* at 180. For a discussion of zipper clauses, see *supra* notes 163-64 and accompanying text.

torium clause,²¹⁰ the RLA's equivalent of a zipper clause, in order for an agreement to mandate arbitration during the term of an agreement.²¹¹ Thus, the *Eastern Pilots II* court effectively incorporated a moratorium clause into collective bargaining agreements. Although most airline collective agreements contain moratorium clauses, the court's move provides management with more power in bargaining over new agreements because the clause is presumptively included. Thus, management may close out bargaining during the term of a contract unless labor contracts to retain the right to bargain. Typically, the right to instigate mid-term bargaining under the RLA is to labor's advantage because such bargaining occurs as a reaction to unilateral managerial actions that management contends are allowed under the contract. If issues are placed in the bargaining context rather than in arbitration, labor can impose maintenance of the status quo throughout the lengthy major dispute process and thereby thwart management's unilateral action.²¹² The *Eastern Pilots II* presumption of arbitrability, however, would not permit labor to take advantage of the RLA's prolonged bargaining procedure during virtually all mid-term disputes.

Because of the similarities between the NLRA and the RLA, when a mid-term dispute arises over management's unilateral action, the *Eastern Pilots II* version of arbitration under the RLA should raise implications similar to those of the NLRA waiver doctrine. In the NLRA context, when the issue is whether a managerial action was properly taken, the statutory issue of whether the employer has breached its statutory duty to bargain over the action²¹³ was often subordinated to the question of whether the parties contractually waived their statutory rights.²¹⁴ Waiving of the statutory duty impacts on the nature of the process and the remedies available in

210. Moratorium clauses close out Section 6 bargaining during the term of a collective agreement.

211. Although the district court noted an apparent moratorium clause in the ALPA-Eastern collective bargaining agreement, the court of appeals did not refer to it. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 683 F. Supp. 845, 847 (D.D.C. 1988) (*Eastern Pilots I*). To complete the comparison, arbitration under the RLA is statutorily mandated, and a no-strike clause is judicially imposed. See *supra* note 171.

212. For a description of relative bargaining power during mid-term application of the major dispute procedure, see *supra* Section III(C)(1) and accompanying text. For a discussion of the status quo, see *supra* notes 125-28 and accompanying text.

213. The statutory issue may arise from Section 8(a)(5), which provides that refusal to bargain is an unfair labor practice, and Section 8(d), which prohibits unilateral modifications of terms "contained in" a collective bargaining agreement. NLRA § 8(a)(5), (d), 29 U.S.C. § 158(a)(5), (d). For a further discussion of these subsections, see *supra* notes 129-37 and *infra* notes 346-53 and accompanying text.

214. See Edwards, *supra* note 161, at 34.

arbitration. Labor's statutory entitlements are diluted in the arbitration forum, and labor is often limited to compensation awards because employers are free to act pending arbitration.²¹⁵

Similarly, the issue under the RLA is whether the dispute over management's mid-term unilateral action is subject to resolution through bargaining or through arbitration. As under the NLRA, the RLA's arbitration forum permits management to act pending arbitration unless injunctive relief, which typically has not been granted, is obtained.²¹⁶ Judge Edwards has noted that injunctive relief is available to prohibit management's actions "only when an injunction is necessary to preserve the arbitrator's ability to decide the dispute."²¹⁷ Because ALPA did not ask for injunctive relief in *Eastern Pilots II*, however, the court did not further define the availability of its equitable powers in the minor dispute setting.²¹⁸

215. See Lynch, *supra* note 36, at 294-95; *infra* notes 418-19 and accompanying text.

216. Some courts have attempted to equalize the relative power positions of the parties who are resolving disputes within the minor classification by ordering equitable relief. The United States Supreme Court has held that a district court has the authority to enjoin strikes in furtherance of the RLA's mandate to preserve the adjustment board's jurisdiction. *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 534-35 (1960); see also *National Ry. Labor Conference v. International Ass'n of Machinists*, 830 F.2d 741, 750-52 (7th Cir. 1987) ("[E]ffecting further contacts like the [ones at hand] may well make pragmatically impossible any truly complete remedial order of the adjustment board decisions should they favor the unions' position . . ."); *Local 554, Transp. Workers Union v. Eastern Air Lines*, 695 F.2d 668, 675 (2d Cir. 1982) (A status quo injunction is available if it is necessary to prevent arbitration from becoming meaningless.); cf. *Railway Labor Executives' Ass'n v. Pittsburgh & L.E. R.R.*, 845 F.2d 420, 424 (3d Cir. 1988) (*P&LE I*) (same), *rev'd*, 109 S. Ct. 2584 (1989) (*P&LE II*). In doing so, some courts "weigh the competing interests." *International Ass'n of Machinists v. Northeast Airlines*, 473 F.2d 549, 552-53 (1st Cir. 1972).

More often than not, however, courts have refused to use their equitable powers to prevent management from acting where a minor dispute is pending. In *Chicago & Northwestern Transportation Co. v. Railway Labor Executives Association*, for example, the Seventh Circuit ordered injunctive relief to prevent a union from striking over a sale of assets, reasoning that the action was necessary to maintain the adjustment board's jurisdiction over minor disputes. 855 F.2d 1277, 1287 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 493 (1988) (citing *National Ry. Labor Conference v. International Ass'n of Machinists*, 830 F.2d 741, 749 (7th Cir. 1987)); see also *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas Ry.*, 363 U.S. 528, 531 (1960); *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 40-42 (1957); *Railway Labor Executives Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700, 704 (7th Cir. 1987). In *Chicago & Northwestern*, however, the Seventh Circuit did not find it necessary to order the carrier to suspend the sale; it concluded that there would be no irreparable harm to the unions and that no action would be necessary to maintain the NRAB's jurisdiction over the dispute. 855 F.2d at 1288.

217. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 869 F.2d 1518, 1520 n.2 (D.C. Cir. 1989) (*Eastern Pilots II*) (citing *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 863 F.2d 891, 922 (D.C. Cir. 1989) (*Eastern Furlough II*) (Edwards, J., dissenting from the denial of rehearing en banc)); *National Ry. Labor Conference v. International Ass'n of Machinists*, 830 F.2d 741, 749-50 (7th Cir. 1987).

218. *Eastern Pilots II*, 869 F.2d at 1520 n.2. In *Consolidated Rail*, the Supreme Court recently addressed but declined to resolve the issue of enjoining managerial action pending

In creating the heaviest presumption of arbitration to date for mid-term disputes arising under the RLA, *Eastern Pilots II* necessarily embraces the view that disputes between parties to a collective bargaining agreement are better resolved in a private forum. The approaches of the public and private forums are markedly different. A system board²¹⁹ that is faced with a minor dispute will emphasize the parties' agreement, their expectations, and their past practices.²²⁰ On the other hand, a public forum would resolve the dispute with more concern for public policy considerations and precedent.²²¹ The extent to which the system boards' decisions reflect judicial policy considerations is an unexplored question under the RLA.

B. *The 1988 Furlough: Post-Expiration Dispute Classification and Union Animus*

In the summer of 1988, Eastern Air Lines announced the largest job reduction in its history.²²² Two-thirds of the employees affected were union members represented by the International Association of Machinists (IAM), the Air Line Pilots Association (ALPA), and the Transport Workers Union of America (TWU).²²³ IAM, ALPA, and TWU filed suit in the United States District Court for the District of Columbia, requesting a preliminary injunction to halt the moves, and claiming that management's decision was subject to major dispute resolution under Section 6 of the RLA.²²⁴

The district court granted the unions' request for an injunc-

minor disputes. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2481 & n.5 (1989). The *Consolidated* Court noted that it had never recognized a statutory obligation to enjoin management's actions; instead, the question remains open as to whether a status quo injunction based on irreparable injury is available. *Id.* at 2481 n.5. In another case, the Court reaffirmed the availability of injunctive relief to prevent labor from striking over issues that are subject to compulsory arbitration. *Pittsburgh & L.E. R.R. v. Railway Labor Executives Ass'n*, 109 S. Ct. 2584, 2598 (1989) (*P&LE II*) (citing *Railroad Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30 (1957)). For a discussion of *P&LE II*, see *infra* notes 371-82 and accompanying text.

219. System boards are the airlines' arbitration panels. See *supra* note 171.

220. See Lynch, *Statutory Rights and Arbitral Values: Some Conclusions*, 44 U. MIAMI L. REV. 617, 621 (1989).

221. *Id.*

222. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 703 F. Supp. 962, 974 (D.D.C. 1988) (*Eastern Furlough I*), *rev'd*, 863 F.2d 891 (D.C. Cir. 1988) (*Eastern Furlough II*), *reh'g en banc denied*, 863 F.2d 891, 913 (D.C. Cir. 1989). Eastern's plans included closing its Kansas City hub, a move eliminating 143 flights and furloughing 3388 employees. *Eastern Furlough II*, 863 F.2d at 892-93.

223. The unions represent, respectively, Eastern's aircraft mechanics and ground services personnel (including airline servicers, flight dispatchers, and baggage and cargo handlers), Eastern's pilots, and Eastern's flight attendants. *Eastern Furlough I*, 703 F. Supp. at 965.

224. *Eastern Furlough II*, 863 F.2d at 893. For a discussion of the major dispute procedure, see *supra* note 171.

tion.²²⁵ Applying reasoning that was rejected in a later Supreme Court decision,²²⁶ the district court examined the magnitude of the proposed changes and found the disputes to be major.²²⁷ The court also concluded that the furloughs constituted anti-union bias because "the clear and obvious targets of the downsizing are Eastern's unions."²²⁸ Finally, the court enforced the status quo and enjoined Eastern from proceeding with the operational changes pending exhaustion of Section 6 bargaining procedures.²²⁹

On appeal, the District of Columbia Circuit unanimously reversed.²³⁰ The court of appeals classified the dispute as minor²³¹ and concluded that if Eastern had taken any anti-union action, it was based on a sufficient and independent motivation.²³² The court also found that because the dispute was minor, a preliminary status quo injunction was unauthorized under Section 6 of the RLA.²³³ On the unions' petition for rehearing, a divided en banc panel denied the

225. *Eastern Furlough I*, 703 F. Supp. at 982.

226. In *Consolidated Rail*, the Court noted that "the formal demarcation between major and minor disputes does not turn on a case-by-case determination of the importance of the issue presented or the likelihood that it would prompt the exercise of economic selfhelp." *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2481 (1989).

227. *Eastern Furlough I*, 703 F. Supp. at 977-78. The court's reasoning that a dispute must be classified according to the extent of its impact has some support in RLA case law. See Local 553, *Transp. Workers Union v. Eastern Air Lines*, 695 F.2d 668, 673-74 (2d Cir. 1982). For an examination of the impact approach, see *National Ry. Labor Conference v. International Ass'n of Machinists*, 830 F.2d 741, 747 n.5 (7th Cir. 1987).

228. *Eastern Furlough I*, 703 F. Supp. at 969-71. The court made extensive findings concerning "Eastern's transfer of work and operations to Continental." *Id.* Those findings included: (1) Frank Lorenzo's personal control and ownership of 50.7% of the voting stock of Texas Air Corp., Eastern's parent corporation; (2) Continental's operation as a predominantly non-unionized carrier since its acquisition by Texas Air Corp. in 1982; (3) Texas Air Corp.'s placement of both Texas Air and Continental officials in key positions at Eastern; (4) the "close relationship" between officials of Eastern and Continental in resolving problems of overlapping operations during pre-acquisition; (5) the coordination of efforts in order to "assist Continental and frustrat[e] the collective bargaining representatives of Eastern's employees"; (6) since acquisition, Texas Air's "exert[ion of] every effort to curb union influence at Eastern and to reduce wage rates and economic benefits previously obtained"; (7) a former Texas Air official's unsuccessful attempt to reduce pilot wages after his transfer to Eastern; (8) Eastern's unsuccessful transfer of fleet service work, previously performed by union employees, to a wholly-owned subsidiary; (9) Texas Air's unsuccessful attempt to acquire all outstanding shares of a special class of Eastern preferred stock; (10) Eastern's withdrawn attempt to transfer its Northeast Shuttle to a new corporate entity controlled by Texas Air; and (11) Eastern's withdrawn attempt to abrogate a scope clause with ALPA by utilizing non-Eastern pilots to operate training flights to service Eastern in the event of a strike. *Id.* at 965-69.

229. *Id.* at 972-82.

230. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 863 F.2d 891 (D.C. Cir. 1988) (*Eastern Furlough II*). The case was heard by Judges Buckley, Williams, and Sentelle. Judge Williams wrote the opinion for the court.

231. *Id.* at 911-12.

232. *Id.*

233. *Id.* at 896.

petition.²³⁴

The stark contrast between the district and circuit court opinions attests to the complexities involved in applying a doctrine that is shifting to a new definitional basis that frees management from some of the operational constraints of a prior era. At the heart of each opinion is a sense that the major-minor classification should be used to further opposing policies. The district court's opinion seems to embody the older notion, embedded in early applications of the classification, that management may not unilaterally make an extensive restructuring decision without first talking with labor.²³⁵ At the other extreme, the approach taken by the District of Columbia Circuit has pushed the evolution of the law toward allowing management greater freedom from statutory and contractual restraints in order to accommodate the forces of a deregulated market.

1. THE MAJOR-MINOR DETERMINATION

A balance between the relative bargaining positions of management and labor is particularly difficult to achieve when a financially ailing company seeks to restructure its operations. Under those circumstances, management's unilateral right to act increases in direct proportion to labor's right to retain some control over a potential loss of jobs.

In *Eastern Furlough II*, the District of Columbia Circuit addressed the issue of whether management must bargain with labor in a major dispute proceeding before implementing furloughs.²³⁶ The court first considered the agreement between Eastern and the TWU, the only one of three Eastern labor agreements that was currently in force.²³⁷ The TWU framed an argument based on the district court's narrow interpretation of the scope of bargaining agreements.²³⁸ The union contended that the proposed furloughs were not anticipated by either the existing collective bargaining agreement or the union's acquiescence in past practices.²³⁹ As a result, the union argued, East-

234. *Id.* at 913 (denial of rehearing en banc). Of the ten judges who participated in the en banc proceeding, six wrote separately, and four dissented from the denial of a rehearing en banc. Judges Ginsburg, Starr, Silberman, and Williams wrote separate concurrences. Judge Mikva wrote a dissent in which Chief Judge Wald and Judges Robinson and Edwards joined. Judge Edwards wrote a separate dissent.

235. The district court noted that "[m]assive layoffs are not, and shall never be, business as usual." *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 703 F. Supp. 962, 974 (D.D.C. 1988) (*Eastern Furlough I*).

236. *Eastern Furlough II*, 863 F.2d at 892-93.

237. *Id.* at 897-98. For a discussion of mid-term disputes, see *supra* Section III(C).

238. *Eastern Furlough II*, 863 F.2d at 897-98.

239. *Id.*

ern was prohibited from implementing the furloughs until major dispute procedures were exhausted.²⁴⁰

The District of Columbia Circuit examined the parties' collective bargaining agreement to determine if management's claim of contractual permission for its actions was justified.²⁴¹ The court read the TWU agreement and the past practices of the parties expansively and found that the parties considered furloughs to be permissible.²⁴² Although the agreement did not expressly specify a size limit for permissible furloughs, the court found that furloughs which were insignificantly smaller than the present ones had occurred in the past.²⁴³ Thus, the court's interpretation of the parties' expectations brought the present furloughs "arguably" within the contract's boundaries both by the contract's express terms and by the parties' past practices.²⁴⁴ This broad reading of agreements and past practices during the term of an agreement results in a presumption of arbitrability that has been adopted by other circuits²⁴⁵ and, recently, by the Supreme Court in *Consolidated Rail Corp. v. Railway Labor Executives' Association*.²⁴⁶ The arbitration forum entitled management to furlough TWU members pending resolution of the minor dispute.²⁴⁷ The District of Columbia Circuit's analysis of the dispute, however, implied that the furlough was in fact contractually permitted and suggested that management should win in arbitration.²⁴⁸ The court's implication perhaps intruded on the system board's function of deciding the issue on the merits. The possibility of this kind of judicial overstep-

240. *Id.*; see *supra* notes 216-17 and accompanying text. The unions additionally had argued that the present furlough was different from those occurring in the past because the present furlough was motivated by impermissible union animus in violation of Section 2(Third)-(Fourth) of the RLA. *Eastern Furlough II*, 863 F.2d at 898. The court held that there was no impermissible anti-union motivation for Eastern's actions. *Id.*

241. *Eastern Furlough II*, 863 F.2d at 897-98.

242. *Id.* The agreement outlined "extensive procedures whereby union members may be furloughed due to 'reductions in force.'" *Id.* at 897.

243. *Id.* The court found that furloughs of significant size had occurred in the past—including one involving 1102 flight attendants—that was larger than the furlough of 1050 that the court was evaluating. *Id.* The TWU argued that the past furloughs were qualitatively different from the current one because they were seasonal. *Id.* In answer, the court reverted to the agreement's "broad" language, which did not give a qualitative description of furloughs. *Id.* at 897-98.

244. *Id.*; see *infra* note 390 and accompanying text.

245. See *Chicago & N.W. Transp. v. Railway Labor Executives Ass'n*, 855 F.2d 1277, 1284 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988); *Brotherhood of R.R. Signalmen v. Burlington N. R.R.*, 829 F.2d 617, 620 (7th Cir. 1987); *Maine Cent. R.R. v. United Transp. Union*, 787 F.2d 780, 782 (1st Cir.), *cert. denied*, 479 U.S. 848 (1986).

246. 109 S. Ct. 2477 (1989). For a discussion of *Consolidated*, see *infra* notes 388-94 & 435 and accompanying text.

247. See *supra* notes 203-04 and accompanying text.

248. See *Eastern Furlough II*, 863 F.2d at 897-98.

ping was the subject of a caveat announced by the Supreme Court in *Consolidated*.²⁴⁹ The Court stated that its conclusion that a contractual claim was arguably justified did not impinge on the adjustment board's jurisdiction to decide the merits.²⁵⁰

In the second part of its analysis, the court was faced with a more troublesome dilemma because the other two unions' respective collective bargaining agreements with Eastern had expired.²⁵¹ There is little case law resolving post-expiration disputes, which are largely a product of the deregulation of the airlines.²⁵² A literal interpretation of the RLA would permit labor automatically to trigger a major dispute over wages, hours, or working conditions²⁵³ with the filing of a Section 6 notice during any contractual time frame.²⁵⁴ Upon the filing of the notice, management could not restructure or disturb the status quo until major dispute proceedings were exhausted. This approach has been adopted for the post-expiration period by the United States Courts of Appeals for the Second²⁵⁵ and Ninth²⁵⁶ Circuits, and it was advocated by Judges Mikva and Edwards in their dissents from the denial of a rehearing en banc in *Eastern Furlough II*.²⁵⁷ It remains an open question whether the *Consolidated* Court's adoption of arguable justification for mid-term disputes will also be applied to the post-expiration period.

At the opposite extreme from the literal interpretation of RLA Section 6 is the expansive view of management prerogative that was

249. *Consolidated*, 109 S. Ct. at 2489. For a discussion of the delineation between the major-minor determination and the merits, see *infra* notes 263-75 and accompanying text.

250. *Consolidated*, 109 S. Ct. at 2489.

251. *Eastern Furlough II*, 863 F.2d at 898. For a discussion of post-expiration disputes, see *supra* Section III(D).

252. Historically, railroads have used contracts that do not expire but are amended by the filing of Section 6 notices. The Railway Labor Act was structured to accommodate this custom. See *infra* notes 445-51 and accompanying text.

253. The RLA mandates that parties bargain over "wages, hours and working conditions." RLA § 2(First), (Sixth), 45 U.S.C. § 152(First), (Sixth); see *supra* notes 145-47 and accompanying text.

254. See *infra* notes 445-51.

255. *Air Cargo, Inc. v. Local Union 851, Int'l Bhd. of Teamsters*, 733 F.2d 241 (2d Cir. 1984).

256. *International Ass'n of Machinists v. Aloha Airlines*, 776 F.2d 812 (9th Cir. 1985).

257. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 863 F.2d 891, 914-19 (D.C. Cir. 1989) (*Eastern Furlough II*) (Mikva, J., dissenting from the denial of rehearing en banc). Judge Mikva also noted that according to *Railroad Telegraphers v. Chicago & North Western Railway*, 362 U.S. 330, 341 (1960), the filing of a Section 6 notice during an existing agreement also may create a major dispute automatically. *Eastern Furlough II*, 863 F.2d at 914-19 (Mikva, J., dissenting from the denial of rehearing en banc). For a discussion of *Telegraphers*, see *infra* notes 355-62 and accompanying text. Judge Edwards also expressed his approval of the status quo approach. *Eastern Furlough II*, 863 F.2d at 919 (Edwards, J., dissenting from the denial of rehearing en banc).

adopted in *Eastern Furlough II*. Under this view, the court of appeals construed post-expiration agreements as broadly encompassing the parties' past practices and implied contractual rights based on pre-existing contracts.²⁵⁸ The dispute, therefore, becomes one concerning the interpretation of expired contracts, rather than one involving contract formation or amendment. As a result, the dispute is resolved through the minor classification: Unilateral managerial action is permitted but labor strikes are prohibited pending arbitration.²⁵⁹

A more restrictive view of management prerogative during the post-expiration period effectively would entitle labor to bargain over a broader range of restructuring decisions. Accordingly, management would have to complete the lengthy major dispute procedure before implementing whatever operational change labor challenges. Judge Edwards, in his dissent from the denial of a rehearing in *Eastern Furlough II*, interpreted the RLA as requiring this restrictive approach.²⁶⁰ He added, however, that a dispute that essentially constitutes an amendment to a collective agreement, thus triggering a major dispute, may also trigger a minor dispute for a determination of accrued rights.²⁶¹

In adopting an expansive view of the statute, the District of Columbia Circuit reasoned in *Eastern Furlough II* that the automatic major dispute conclusion conflicts with precedent derived from *Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union*.²⁶² In *Shore Line*, unions filed a Section 6 notice in response to a railroad's creation of outlying assignments that relieved the railroad of crew transportation and overtime expenses.²⁶³ The Supreme Court held that the dispute was major, and imposed the status quo: "[T]he status quo extends to those actual, objective working conditions out of which the dispute arose and clearly these conditions need not be covered in an existing agreement."²⁶⁴ In making its determination, the Court emphasized that the purpose of the major classification's status quo requirement and "elaborate machinery" was to prevent strikes that would interrupt interstate commerce.²⁶⁵

258. *Eastern Furlough II*, 863 F.2d at 897-98.

259. See *supra* notes 216-17 and accompanying text.

260. *Eastern Furlough II*, 863 F.2d at 921-23 (Edwards, J., dissenting from the denial of rehearing en banc).

261. *Id.*

262. 396 U.S. 142 (1969). For a discussion of the Supreme Court's treatment of *Shore Line* in *Pittsburgh & Lake Erie Railroad v. Railway Labor Executives' Association*, 109 S. Ct. 2584 (1989) (*P&LE II*), see *infra* notes 371-82 and accompanying text.

263. *Shore Line*, 396 U.S. at 143-46.

264. *Id.* at 153.

265. *Id.* at 148.

The District of Columbia Circuit, however, miscast the reasoning of *Shore Line* and its progeny in order to arrive at an opposite result. The court used the *Shore Line* status quo inquiry, which evaluated the parties' past practices in order to impose a freeze on working conditions during a major dispute,²⁶⁶ as part of a dispute classification process examining whether a claim was justified by past practices.²⁶⁷ As Judge Edwards pointed out in his dissent from the denial of rehearing, it is anomalous to equate using past practices to determine the scope of a status quo order with the use of past practices to classify a dispute as major or minor.²⁶⁸ Judge Edwards further pointed out that the use of past practices to determine whether a dispute is arbitrable and to use past practices to arbitrate the merits of the dispute are also two separate inquiries.²⁶⁹ The past practices inquiry should not be extended to dispute classification, but instead should be limited to the status quo determination and the resolution of the merits of a dispute.²⁷⁰

The use of the past practices inquiry in the dissimilar manner proposed by *Eastern Furlough II* and *Shore Line* would have inapposite effects.²⁷¹ *Shore Line's* use of past practices did not permit management to act pending the outcome of the bargaining process while a collective agreement was in effect.²⁷² In contrast, *Eastern Furlough*

266. The *Shore Line* Court defined the status quo as requiring the parties to "preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Id.* at 153.

267. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 863 F.2d 891, 896-99 (D.C. Cir. 1988) (*Eastern Furlough II*), *reh'g en banc denied*, 863 F.2d 891, 913 (D.C. Cir. 1989).

268. *Id.* at 923 (Edwards, J., dissenting from the denial of rehearing en banc).

269. *Id.*

270. *Id.* Both the *Eastern Furlough II* court's opinion and Judge Edwards' dissent from the denial of a rehearing en banc referred to a Seventh Circuit opinion addressing the same issue in a case involving a mid-term dispute. *Id.* at 899, 923. The Seventh Circuit agreed with the Sixth Circuit that "the relevance of such arguments [concerning past practices] is more limited in the characterization of the dispute than it is in the resolution of the merits; for example, contractual language clearly prohibiting a certain action generally makes nonfrivolous an argument that the practice is prohibited—no matter what the past practice." *National Ry. Labor Conference v. International Ass'n of Machinists*, 830 F.2d 741, 747 (7th Cir. 1987); *see also* *Brotherhood of Ry. Carmen v. Norfolk & W. Ry.*, 745 F.2d 370, 377 (6th Cir. 1984). Thus, the Sixth and Seventh Circuits appear to allow a limited look at past practices in order to classify a mid-term dispute, but Judge Edwards would not allow the inquiry after an agreement has expired. In *Eastern Pilots II*, Judge Edwards did not refer to past practices for a mid-term classification of disputes. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 869 F.2d 1518 (D.C. Cir. 1989) (*Eastern Pilots II*); *see supra* notes 220-21 and accompanying text.

271. For a further discussion of the manner in which the *Eastern Furlough II* court applied the status quo concept to the classification question, *see infra* notes 433-34 and accompanying text.

272. *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 153-54 (1969). The Court stated that it was "incumbent upon the railroad by virtue of § 6 to refrain from

IP's incorporation of past practices into the major-minor determination allowed management to act pending the arbitral resolution of a dispute that occurred after the collective bargaining agreement had expired.²⁷³ Furthermore, Judge Edwards' refusal to examine past practices for the purpose of classifying a dispute may reflect the policy that the resolution of the merits should occur within certain forums. During mid-term disputes, Judge Edwards advocates a strong presumption of arbitrability that would classify a dispute as minor unless a party's contractual claim was brought in bad faith.²⁷⁴ That presumption recognizes that the parties' agreement may be premised on the common law of an industry, an area peculiarly within the expertise of an arbitrator.²⁷⁵ After an agreement expires, however, a strong presumption of arbitrability would inhibit the parties' efforts to reach a new agreement over the same or similar matters because the parties would be limited to interpreting rights gleaned from an expired agreement. Resolution of a post-expiration dispute within a bargaining framework, however, provides an opportunity for parties to create new rights.

In *Eastern Furlough II*, one senses that the District of Columbia Circuit was attempting to adapt a twenty-year-old railroad opinion to a 1988 airline dispute in order to arrive at a more equitable result. *Shore Line* is a classic example of an application of the RLA as enacted: a mechanism that enables unions in a regulated industry to amend collective bargaining agreements. Because railroad agreements do not expire, a Section 6 notice is often labor's means of signaling that it wishes to amend an agreement and prevent management from acting in the process.²⁷⁶ The use of a Section 6 notice in the deregulated airline market, however, may unnecessarily encumber the carrier when mediation becomes too prolonged.²⁷⁷

The District of Columbia Circuit reasoned that because its

making outlying assignments at Trenton or any other place in which there had previously been none, regardless of the fact that the railroad was not precluded from making these assignments under the existing agreement." *Id.* at 154.

273. The Supreme Court has additionally indicated that *Shore Line's* definition of the status quo was narrowly restricted to the facts of that case. *Pittsburgh & L.E. R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2594-95 (1989) (*P&LE II*). The Court refused to apply *Shore Line* to *P&LE II*, a case involving a railroad's obligation to bargain over the effects of its decision to go out of business. *Id.* at 2594. The Court indicated that the status quo should not be imposed with respect to working conditions that are not the subject of express or implied agreements. *Id.* at 2594 n.15. For a discussion of *P&LE II*, see *infra* notes 324-26 & 371-82 and accompanying text.

274. *Eastern Pilots II*, 869 F.2d at 1522.

275. *Id.*

276. See *infra* notes 445-51 and accompanying text.

277. See *supra* notes 146-50 and accompanying text.

expansive interpretation of the agreement would have resulted in a mid-term determination of a minor dispute, the interpretation should have the same result in the post-expiration period.²⁷⁸ In support of its classification of the dispute as minor, the court reasoned that it was adopting the Supreme Court's determination that disputes that are "independent" of an agreement are minor disputes.²⁷⁹ The Supreme Court created that distinction in *Elgin, Joliet & Eastern Railway Co. v. Burley*²⁸⁰ when it held that the "acquisition of rights for the future" are major disputes, while claims "independent of those covered by the collective agreement" are minor disputes.²⁸¹ Arguably, the *Eastern Furlough II* court is correct: A literal interpretation of the Supreme Court's approach in *Burley* could mean that any claim not explicitly included in a collective agreement could fall into the minor classification. That conclusion, however, creates an overlap with the major classification, which includes amendments to collective agreements. Thus, it is more probable that the *Burley* Court's definition of minor disputes was more limited than the District of Columbia Circuit's interpretation. The *Burley* Court's entire statement classified as minor those disputes "independent of those covered by the collective agreement, e.g., claims on account of personal injuries."²⁸² Presumably, the Court intended as minor those claims that typically were not covered by collective bargaining agreements.²⁸³

In classifying Eastern's post-expiration disputes as minor, the District of Columbia Circuit expanded the definition of arbitrable matters to include the past practices of the parties, as well as matters that are independent of an expired agreement. In doing so, it directly reduced the scope of the major dispute classification and encroached upon labor's statutory right to bargain collectively over the formation and amendment of collective bargaining agreements.²⁸⁴

2. UNION ANIMUS

The operational flexibility that a minor classification gives management can be overridden by an injunction issuing from a finding of

278. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 863 F.2d 891, 898-99 (D.C. Cir. 1988) (*Eastern Furlough II*), *reh'g en banc denied*, 863 F.2d 891, 913 (D.C. Cir. 1989).

279. *Id.*

280. 325 U.S. 711 (1945).

281. *Id.* at 723.

282. *Id.*

283. *See* *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 863 F.2d 891, 922-23 (D.C. Cir. 1989) (*Eastern Furlough II*) (Edwards, J., dissenting from the denial of rehearing en banc).

284. *Id.*; *cf. id.* at 926-29 (Silberman, J., concurring in the denial of rehearing en banc) ("[T]he panel opinion, in my view, does not purport finally to decide this question . . .").

union animus under the RLA. Under Subsections 2(Third)²⁸⁵ and 2(Fourth),²⁸⁶ the RLA broadly mandates that management may not influence or interfere with the organization or activities of its employees.

Eastern's unions claimed that under those sections, Eastern's furlough plan amounted to coercive anti-union action.²⁸⁷ The unions argued that the furlough represented an effort to transfer work to Eastern's less unionized sister carrier, Continental; that it was another step in "downsizing" the airline; that any business motivation resulted from a deliberate attempt to "bleed" Eastern and inhibit unionization; and that the furlough evidenced an intent to send a message to employees that their unions were powerless to help them.²⁸⁸ In dealing with this animus issue, the District of Columbia Circuit took another significant step in its expansion of management prerogative.

285. Section 2(Third) of the RLA provides:

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

RLA § 2(Third), 45 U.S.C. § 152(Third).

286. Section 2(Fourth) of the RLA provides:

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, that nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

RLA § 2(Fourth), 45 U.S.C. § 152(Fourth).

287. *Eastern Furlough II*, 863 F.2d at 900-01. For a description of the unions' claims, see *supra* note 182.

288. *Eastern Furlough II*, 863 F.2d at 901.

Without ruling on the question of whether Eastern's actions constituted union animus, the court found that an "insurmountable hurdle" for the unions was presented by a line of NLRA cases²⁸⁹ descending from *Wright Line*,²⁹⁰ which held that an employer is exonerated if it can establish that it would have taken an action in the absence of union animus.²⁹¹ The hurdle was insurmountable because all the parties and both courts agreed that there were legitimate business reasons for the furlough.²⁹²

The court chose as determinative of the union animus issue the line of NLRA cases that is most compatible with the philosophy of immunizing management decisions from union attack.²⁹³ In *Wright*

289. *Id.* at 902.

290. 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

291. *Id.* at 1088.

292. *Eastern Furlough II*, 863 F.2d at 902. The en banc court criticized the panel's glossing over of factual findings made by the district court. *See id.* at 914-15 (Mikva, J., dissenting from the denial of rehearing en banc); *id.* at 920-21 (Edwards, J., dissenting from the denial of rehearing en banc).

293. Under the NLRA, an expansive view of management prerogative has also led to an erosion of the NLRA's unfair labor practice doctrine. The NLRA provision concerning union animus is Section 8(a)(3), which prohibits an employer from discriminating on the basis of union activity. Section 8(a) provides in part that "it shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3).

Milwaukee Spring II demonstrated that an employer's motivation for restructuring is to cut labor costs; the anti-union motivation will probably not prevent a restructuring decision. *Milwaukee Spring Div. of Ill. Coil Spring Co.*, 268 N.L.R.B. 601, 602 (1984) (*Milwaukee Spring II*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985). For a discussion of *Milwaukee Spring II* in the context of contractual interpretation, see *infra* notes 346-53 and accompanying text. The NLRB said that the employer did not, as the union contended, violate Section 8(d) by modifying the contract's wage provision, because it did not disturb the wages at the Milwaukee facility when it transferred operations to a different plant where workers were not covered by the contract. *Milwaukee Spring II*, 268 N.L.R.B. at 602. Neither did the employer violate the recognition clause, because that clause did not expressly preserve bargaining unit work at the Milwaukee facility. *Id.*

The Board in *Milwaukee Spring I* had found that the employer's motivation of reducing labor costs was "inherently destructive" under the doctrine of *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), and thus constituted an unfair labor practice. *Milwaukee Spring Div. of Ill. Coil Spring Co.*, 265 N.L.R.B. 206, 208 (1982) (*Milwaukee Spring I*), *rev'd on reh'g*, 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985). The *Milwaukee Spring II* Board, however, did not need to address that issue because it found that the prior Board's finding was premised on a Section 8(a)(5) violation. *Milwaukee Spring II*, 268 N.L.R.B. at 604. Section 8(a)(5) of the NLRA provides that management has a duty to bargain with a union over "wages, hours and other terms and conditions of employment." NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5). Because the *Milwaukee Spring II* Board found no violation of Section 8(a)(5), it consequently found no violation of Section 8(a)(3). *Milwaukee Spring II*, 268 N.L.R.B. at 604.

Earlier, the Supreme Court had found no violation of Section 8(a)(3) in a plant closing. In *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263, 268 (1965), the

Line, an employer terminated a union activist who allegedly also had an unsatisfactory work history.²⁹⁴ The NLRB ruled that after a union makes out a prima facie case of unlawful anti-union motivation, the employer can rebut the union's case by proving the existence of a legitimate business reason for its action.²⁹⁵ In other words, the employer must prove that it would have taken the action even in the absence of the unlawful motivation. The *Eastern Furlough II* court reasoned that application of *Wright Line* is particularly critical when there is deep hostility between management and labor.²⁹⁶ On the facts before it the *Eastern Furlough II* court concluded that application of *Wright Line* neutralized claims of "generalized, free-floating union animus" because there was no adequate causal connection between any animus and Eastern's actions.²⁹⁷

Although there are two lines of cases within the NLRA regarding this doctrine, the movement in this area appears to be toward the application of the *Wright Line* principle.²⁹⁸ That principle allows an employer more freedom than the principle derived from *NLRB v. Great Dane Trailers*,²⁹⁹ which either balances the equities if an action was inherently destructive, or permits a union to prove that the employer acted with an improper motive.³⁰⁰ If the *Wright Line* principle is viewed as requiring total deference to any business motive, management could conceivably provide an economic justification for most attempts to replace union labor with non-union labor, thereby depriving NLRA Section 8(a)(3) of much of its effectiveness against

Court held that under the NLRA, an employer has the right to terminate his business for any reason. The Court rejected the AFL-CIO's argument that the action was essentially a "lockout" or "runaway shop," both of which are illegal under the NLRA when used to undermine a union. *Id.* at 271. Reasoning that when an employer goes out of business, it retains no benefit from a diminished union, the Court held that complete liquidation of a business does not implicate Section 8(a)(3), regardless of the employer's motivation. *Id.* at 271-72. The Court further held, however, that a partial closing of a business motivated by the prospect of chilling union activity in remaining plants and having that foreseeable effect, would constitute a violation of Section 8(a)(3). *Id.* at 274-75.

For a comparison of the *Wright Line* and *Great Dane* lines of cases, see Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 96-102 (1988).

294. *Wright Line*, a Div. of *Wright Line, Inc.*, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

295. *Id.* at 1088.

296. *Eastern Furlough II*, 863 F.2d at 912. After quoting statements that each party contended displayed animus on the part of the other, the court noted: "It seems fair to say that tact and courtesy were not the hallmarks of discourse between Eastern and its unions." *Id.* at 913.

297. *Id.* at 912.

298. Stone, *supra* note 293, at 98-102.

299. 388 U.S. 26 (1967).

300. *Id.* at 33-34.

unfair labor practice charges.³⁰¹

The District of Columbia Circuit's application of the *Wright Line* principle to restructuring decisions drew criticism from those judges who dissented from the court's denial of a rehearing en banc in *Eastern Furlough II*.³⁰² Judge Mikva noted that the NLRB developed the *Wright Line* test to determine whether an employer had committed an unfair labor practice in an individual discharge dispute.³⁰³ Judge Mikva contended that, as the NLRB had cautioned, the test was inapplicable to situations involving corporate restructurings.³⁰⁴ When an employer discharges a single employee, he reasoned, there is a relatively straightforward determination of whether or not the employee was discharged as a result of participation in protected union activity.³⁰⁵ In contrast, in cases involving corporate restructuring, the union animus issue is often clouded by post hoc rationalizations.³⁰⁶ Judge Mikva proposed that the appropriate test for restructuring decisions was whether the action was motivated "by more than an insignificant anti-union purpose."³⁰⁷

Thus, in *Eastern Furlough II*, the District of Columbia Circuit rendered what is currently the most expansive interpretation of management prerogative for post-expiration disputes under the RLA. It began by agreeing with other circuit courts that had decided that the scope of existing collective bargaining agreements includes topics "arguably" covered by the agreement.³⁰⁸ Next, the court rejected the Second and Ninth Circuits' method of automatically adopting major

301. The Court in *Eastern Furlough II* noted that the *Great Dane* line of cases was primarily applicable when discrimination was based solely on union membership. It distinguished that situation from one in which both union and non-union employees were furloughed. *Eastern Furlough II*, 863 F.2d at 902-03. But see Stone, *supra* note 293, at 101-02.

302. *Eastern Furlough II*, 863 F.2d at 915-19 (Mikva, J., dissenting from the denial of rehearing en banc). But see *id.* at 930-31 (Williams, J., concurring in the denial of rehearing en banc) (rejecting Judge Mikva's criticism of the court's application of *Wright Line*).

303. *Id.* at 915-16 (Mikva, J., dissenting from the denial of rehearing en banc).

304. *Id.* (citing *NLRB v. Wright Line*, 662 F.2d 899, 904 n.8 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982)). Judge Mikva stated that even if *Wright Line* were the appropriate test in the *Eastern Furlough II* situation, the panel erred by not remanding the case for application of the test by the district court. *Id.* at 916.

305. *Id.* at 917. Judge Mikva noted that in the individual discharge situation, a list of dischargeable offenses (contained in an employee manual or collective bargaining agreement) and an established history of employee termination practices provide information that makes the existence of union animus an easier determination. *Id.*

306. *Id.*

307. *Id.* (citing *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 682 (1981)).

308. *Id.* at 896 (citing *Brotherhood of R.R. Signalmen v. Burlington N. R.R.*, 829 F.2d 617, 619 (7th Cir. 1987); *Maine Cent. R.R. v. United Transp. Union*, 797 F.2d 780, 782 (1st Cir. 1986), *cert. denied*, 479 U.S. 848 (1986)).

disputes in the post-expiration period;³⁰⁹ it held instead that those disputes may be classified by examining expired agreements and past practices.³¹⁰ Additionally, the court expanded the notion that topics "independent" of expired collective bargaining agreements fall within the scope of minor disputes.³¹¹ Finally, the court adopted the NLRA's *Wright Line* test for determining whether union animus exists. Collectively, these concepts substantially increase the probability that a restructuring decision arising after an agreement expires will be deemed minor, thereby permitting management to take unilateral action pending arbitration and significantly reducing both labor's negotiating power over the decision and the scope of topics over which management is subsequently obligated to bargain.

C. *The Trump Shuttle Sale: Effects Bargaining*

In October 1988, Eastern Air Lines announced that it had contracted to sell its Northeast Shuttle division, which operated a shuttle service among three Northeast cities, to Trump Shuttle.³¹² The proposed sale affected approximately 700 full-time Eastern employees.³¹³ The three unions that brought suit in *Eastern Furlough II*—ALPA, IAM, and TWU³¹⁴—filed a motion for a preliminary injunction in the United States District Court for the District of Columbia, contending that the sale constituted a major dispute and should be blocked pending bargaining.³¹⁵ The unions also urged the court to enjoin the sale because the action was motivated by union animus and illegal interference with the unions.³¹⁶

Relying on the legal conclusions of the District of Columbia Circuit in *Eastern Furlough II*, the district court denied the unions'

309. *Id.* at 898 (citing *International Ass'n of Machinists v. Aloha Airlines*, 776 F.2d 812 (9th Cir. 1985); *Air Cargo v. Local Union 851, Int'l Bhd. of Teamsters*, 733 F.2d 241 (2d Cir. 1984)).

310. *Id.*

311. *Id.* at 898-99.

312. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 701 F. Supp. 865, 868 (D.D.C. 1988) (*Trump Shuttle*). Eastern operated the shuttle for 25 years between LaGuardia Airport in New York City and both Logan Airport in Boston, Mass. and National Airport in Washington, D.C. *Id.* Trump Shuttle, Inc., owned and operated by real estate entrepreneur Donald J. Trump, agreed to buy the profitable shuttle division for \$365 million in cash. *Id.* As a result of the March 5, 1989 strike by Eastern Machinists, Mr. Trump announced his intention to reduce his purchase bid by at least a third. *Trump Cuts Bid for Eastern's Shuttle by 33%*, Wall St. J., Mar. 21, 1989, at A2, col. 2.

313. The 700 union members affected by this change comprised 2.3% of Eastern's 30,500 employees, including approximately 200 pilots, 146 machinists, and approximately 250 flight attendants. *Trump Shuttle*, 701 F. Supp. at 868.

314. See *supra* note 223 and accompanying text.

315. *Trump Shuttle*, 701 F. Supp. at 867.

316. *Id.* at 870.

request for an injunction.³¹⁷ It found that the right to sell was comprehended by existing agreements and past practices, and thus the dispute was minor.³¹⁸ It also rejected the unions' assertions of union animus and illegal interference.³¹⁹

Although the shuttle sale raised the same dispute classification problem that was raised in *Eastern Furlough II*, the issues were cast in a different light. In the shuttle sale, the question of management's right to make a unilateral business decision involved an asset transfer, a situation in which there is a greater potential for continued employee protection than with a furlough. The district court disagreed on three grounds with the unions' claim that management must bargain over the sale's effects on employees.³²⁰ First, the district court noted that the District of Columbia Circuit followed the line of RLA authority—later adopted in modified form by the Supreme Court³²¹—that did not require effects bargaining prior to implementation of a business decision.³²² Second, it held that classification of a dispute as minor preempts effects bargaining.³²³ Finally, it held that even if the NLRA requirement of “meaningful bargaining at a meaningful time”³²⁴ over effects were followed, that requirement would be met by Eastern's offer to participate in effects bargaining after proceeding with the sale.³²⁵ By classifying the *Trump Shuttle* dispute as minor, the district court permitted management to unilaterally make and implement the decision to sell assets or restructure while negoti-

317. *Id.* at 879.

318. *Id.* at 873-77.

319. *Id.* at 877-78.

320. *Id.* at 876. “Effects” bargaining, as defined in the NLRA context, is required of an employer that partially terminates its operations. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). For a discussion of *First National Maintenance*, see *infra* notes 338-41 and accompanying text. Effects bargaining may include employee-suggested alternatives to the management decision or suggestions for mitigating the effects of management's decision. See Kohler, *supra* note 115, at 402-03.

321. See *infra* notes 371-82 and accompanying text.

322. *Trump Shuttle*, 701 F. Supp. at 876.

323. *Id.*

324. *Id.* (citing *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981)). In *First National Maintenance*, the Supreme Court held that because an employer's “need to operate freely” outweighed labor's right to participate in a decision to shut down part of a business, the decision itself was not subject to mandatory bargaining. 452 U.S. at 686. In the NLRA context, one commentator has argued that to make the “meaningful manner and at a meaningful time” requirement effective, employers should notify unions of a possible unilateral action as soon as serious planning begins and before the decision is implemented. See Harper, *supra* note 139, at 1483.

325. *Trump Shuttle*, 701 F. Supp. at 876. *Contra* *Railway Labor Executives' Ass'n v. Pittsburgh & L.E. R.R.*, 845 F.2d 420, 429 (3d Cir. 1988) (*P&LE I*), *rev'd*, 109 S. Ct. 2584 (1989) (*P&LE II*) (holding that *First National Maintenance* demonstrates that effects bargaining must occur within the major dispute framework).

ating with employees over effects. The Third Circuit had arrived at an opposite result, however, holding that the major classification is the appropriate forum for effects bargaining over asset transfers.³²⁶

In classifying the dispute as minor, the district court in *Trump Shuttle* applied the principles delineated by the District of Columbia Circuit in *Eastern Furlough II*.³²⁷ Following the court of appeals, rea-

326. *P&LE I*, 845 F.2d at 429-32. In *P&LE I*, there was no disagreement that the collective bargaining agreement did not explicitly permit or prohibit the sale. *Id.* at 428 n.9. Like the district court in *Trump Shuttle*, the Third Circuit relied on the language in *First National Maintenance* concerning entrepreneurial decisions. *Id.* at 429-32. The Third Circuit, however, held that the NLRA's doctrine required the RLA parties to bargain over the effects of the decision in a major dispute setting. *Id.* For a discussion of *First National Maintenance*, see *infra* notes 338-41.

In reviewing the Third Circuit's decision, the Supreme Court recently provided some clarification as to the scope of effects bargaining under the RLA. *Pittsburgh & L.E. R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989) (*P&LE II*). *P&LE II* involved a railroad's sale of assets to a newly formed company, an action for which the Interstate Commerce Commission (ICC) provides expedited approval and, unless the circumstances are exceptional, does not require labor protective provisions. *Id.* at 2596. Noting Congress' general intent to deregulate the rail and air lines and Congress' specific intent to assist financially ailing railroads through the ICC's expedited approval procedure, the Court held that a carrier's decision to quit the railroad business by selling its assets was so much a matter of management prerogative that the sale could go forward without being subject to the status quo provisions of the major dispute procedure. *Id.* at 2597. The *P&LE II* Court supported its conclusion of allowing management prerogative in a total asset sale with NLRA cases that have produced the same result. *Id.* at 2595-96. The Court drew its policy considerations from the NLRA cases of *Textile Workers v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965) ("[A]n employer 'has an absolute right to terminate his entire business for any reason he pleases . . .'") and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) ("[T]he harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision."). *P&LE II*, 109 S. Ct. at 2595 & n.17 (citing *First Nat'l Maintenance*, 452 U.S. at 686 and *Darlington*, 380 U.S. at 268). For a discussion of *Darlington*, see *supra* note 293. For a discussion of *First National Maintenance*, see *infra* notes 338-41 and accompanying text. The Court required management to bargain over the effects of the sale only to the extent that the union's proposals could be satisfied by management itself without influencing the sale. *P&LE II*, 109 S. Ct. at 2595.

After *P&LE II*, only a remnant of effects bargaining remains for unions that file Section 6 notices after learning of an employer's decision to sell its assets and leave the business entirely. Although the Court did not address the extent to which effects bargaining is required for partial liquidations and for pre-sale demands to bargain, it held that an employer is not required to give notice of a sale to its unions. *Id.* at 2597. The Court noted that it was limiting its holding to the facts of the case—Section 6 notices were served after notification of the sale. *Id.* at 2597 n.19. Thus, in order for labor to protect its interests in a sale of assets, it must bargain for prior notice of the sale. Such a clause would be enforceable through arbitration, but unless a status quo injunction issued, the arbitration forum might offer few remedial measures for labor. For a discussion of the availability of status quo injunctions, see *infra* note 411 and accompanying text. See also *Stone*, *supra* note 293, at 118. In the NLRA context, moreover, the NLRB has been reluctant to order employers to undo business decisions even after finding that the employers did not have the contractual right to implement such changes unilaterally. See *Harper*, *supra* note 324, at 1483 & n.134.

327. See *Trump Shuttle*, 701 F. Supp. at 873-77.

soning, the district court considered the sale to be within the contemplation of the parties' past and existing collective agreements.³²⁸ Due to the *Eastern Furlough II* decision and due to the added employee protection in the shuttle sale, the determination that the dispute was minor was an easier task for the *Trump Shuttle* court than its previous contrary conclusion in the Eastern furlough dispute.³²⁹ Additionally, the district court drew on Supreme Court opinions interpreting the NLRA in "analogous" situations that emphasized the concept that management unilaterally may make certain fundamental business decisions (such as the decision to terminate a portion of its business) without incurring an obligation to bargain collectively.³³⁰ In a footnote, the court stated that "parallels between the Railway Labor Act and the National Labor Relations Act should be drawn with caution," but "[w]here . . . the language of the two Acts is nearly identical, the schemes similar, and courts have borrowed freely from the cases decided under both Acts, there is no reason why NLRA precedent may not be relied upon."³³¹

The unions' contention that Eastern was trying unlawfully to undermine the unions through the sale of the shuttle division was essentially the same argument that was unsuccessfully advanced by the unions in *Eastern Furlough II*.³³² As in *Eastern Furlough II*, the district court ruled that the unions failed to make a prima facie showing that Eastern's union animus was a motivating factor in the sale of the shuttle division, a showing that was required by *Wright Line*.³³³ The court reasoned that even if there were evidence of union animus,

328. *Id.*

329. The district court noted that Eastern had agreed to bargain with the unions over the effects of the sale and that Mr. Trump had assured the unions that he would recognize them and honor existing collective bargaining agreements. *Id.* at 869. In the agreement for sale, Mr. Trump also guaranteed employment for Eastern's employees and promised to establish wages and work rules identical to those previously in effect at Eastern. *Id.* Finally, he agreed to change the wages and work rules in compliance with the RLA. *Id.* Because a sufficient number of employees agreed to work for Trump Shuttle under these conditions, it was unlikely that any employee furloughs would result from the transaction. *Id.*

330. *Id.* at 875 (citing *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964)).

331. *Id.* at 875 n.2. The district court also cited *Eastern Furlough II* as authority for drawing parallels between the NLRB and the RLA. That passage, however, concerned the use of economic force during the term of an agreement. The district court quoted the *Eastern Furlough II* opinion: "[N]o reason [has been identified for] why the latter [RLA] requires us to cast a more jaundiced eye on efforts to exert economic pressure than the former [NLRA]." *Id.* (quoting *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 863 F.2d 891, 901 (D.C. Cir. 1988) (*Eastern Furlough II*), *reh'g en banc denied*, 863 F.2d 891, 913 (D.C. Cir. 1989)).

332. *Id.* at 877 (quoting *Eastern Furlough II*, 863 F.2d at 903).

333. *Id.* at 877-78. For a discussion of *Wright Line*, see *supra* notes 290-307 and accompanying text.

legitimate financial considerations supported the sale.³³⁴

As with the District of Columbia Circuit's decision in *Eastern Furlough II*, the parallels drawn by the district court in *Trump Shuttle* raise a concern about the wisdom of superimposing NLRA statutory interpretations on the RLA in disputes that arise after a collective agreement has expired. The *Trump Shuttle* court relied extensively upon Supreme Court cases that formulated the NLRA's concept of fundamental management decisionmaking. Specifically, the district court referred to Justice Stewart's *Fibreboard* concurrence advocating managerial freedom for decisions emanating from a "core of entrepreneurial control,"³³⁵ and noted the Court's *First National Maintenance* determination that no bargaining obligation was required in a partial closure situation.³³⁶ Application of the NLRA doctrine to resolve the RLA major-minor classification question for post-expiration disputes is problematic, however, because of its impact on the rights and relative power of the parties during the time that they are bargaining over a new agreement with no existing agreement in effect.³³⁷ The issues that this application raises are discussed in the following section.

V. AN ANALYSIS OF THE APPLICATION OF NLRA MANAGEMENT PREROGATIVE DOCTRINE TO THE RLA

A. *Doctrinal Considerations for Mid-Term Disputes*

1. MID-TERM BARGAINING

Generally speaking, the mandatory-permissive distinction has enabled tribunals resolving mid-term NLRA disputes to interpret management prerogative in two expansive ways. The first method categorizes many business restructuring decisions as permissive, thereby freeing management to act without bargaining unless it is contractually prohibited from doing so.³³⁸ For example, in *First*

334. *Trump Shuttle*, 701 F. Supp. at 871. Eastern argued that its rapidly deteriorating financial condition necessitated the sale. *Id.* More than \$100 million in losses were expected for the fourth quarter of 1988. *Id.* Eastern's management maintained that the sale would enable the carrier to stay in business, stem rumors of near insolvency, and allow maintenance measures. *Id.* The unions did not contest the fairness of the \$365 million sale price, but they disputed Eastern's claim that the sale was necessary for continued financial viability. *Id.* at 868, 871-72.

335. *Id.* at 875 (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring)). For a discussion of *Fibreboard*, see *infra* note 338.

336. *Trump Shuttle*, 701 F. Supp. at 875 (citing *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981)). For a discussion of *First National Maintenance*, see *infra* notes 338-41 and accompanying text.

337. See *infra* Section V(B).

338. Those tribunals have identified an "employer's need for unencumbered

National Maintenance Corp. v. NLRB,³³⁹ the United States Supreme Court held that an employer need not bargain over a decision to close part of its business, even if the decision was motivated primarily by a desire to lower labor costs.³⁴⁰ The Court designated as mandatory those decisions that are "amenable to resolution" and suggested a balancing test.³⁴¹ The NLRB attempted to provide a more principled basis for determining management rights in *Otis Elevator Co.*³⁴² In that decision, which remains the dominant NLRA interpretation of the duty to bargain,³⁴³ a plurality stated that an employer must bargain over operational changes only if the decision turns on a desire to reduce labor costs.³⁴⁴ After *Otis*, the NLRB's approach has often been to exempt from bargaining any decisions that management can justify with a profit motive.³⁴⁵

The second method tribunals use to enlarge mid-term management prerogative under the NLRA is to broadly construe management's rights under collective bargaining agreements. One version of this view, exemplified by *Milwaukee Spring II*, is that the collective agreement either does not explicitly contemplate a particular mandatory topic or that it implicitly allows management the right to unilateral action.³⁴⁶ In *Milwaukee Spring II*, an employer relocated part of its operation to a non-union plant after bargaining to impasse

decisionmaking." First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 679 (1981). The springboard for an expansive interpretation of management rights under the NLRA was *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). In *Fibreboard*, the Supreme Court held that subcontracting is a decision of vital concern to management and labor and, thus, is a mandatory subject of bargaining. *Id.* at 211. Although the *Fibreboard* Court seemed to take a broad view of Section 8(a)(5), the narrower scope given to the statute in Justice Stewart's influential concurring opinion was perhaps of greater significance. *Id.* at 217 (Stewart, J., concurring). He cautioned that the majority's opinion should not be read to impose a duty to bargain over decisions that "lie at the core of entrepreneurial control." *Id.* at 223. According to Justice Stewart, those decisions are embodied in the free enterprise system. *Id.* at 225-26. They include decisions regarding investments and the basic scope of the enterprise, and they are not subject to bargaining even though their implementation may result in the loss of jobs. *Id.*

339. 452 U.S. 666 (1981).

340. *Id.* at 676. The Court noted that when enacting the statute, Congress did not anticipate that unions would become equal partners in business operations. *Id.*

341. *Id.* at 679.

342. 269 N.L.R.B. 891 (1984).

343. Stone, *supra* note 293, at 93.

344. *Otis*, 269 N.L.R.B. at 893. Further, the NLRB stated that it would no longer make decisions based on the kind of operational change involved in *Otis*. *Id.*

345. Stone, *supra* note 293, at 95-96. In *Garwood-Detroit Truck Equip., Inc.*, 274 N.L.R.B. 113, 114-15 (1985), the NLRB viewed an employer's subcontracting decision, motivated by a desire to reduce labor costs, as a legitimate decision to reduce overhead; thus, the decision was a permissive topic. Stone, *supra* note 293, at 96.

346. See *Milwaukee Spring Div. of Ill. Coil Spring Co.*, 268 N.L.R.B. 601, 602 (1984) (*Milwaukee Spring II*), *aff'd sub nom. UAW v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985).

with its employees.³⁴⁷ The parties and the Board treated the relocation decision as a mandatory topic of bargaining.³⁴⁸ Because the agreement contained no explicit language restricting the employer's action, however, the NLRB ruled that employee consent was not necessary; thus, the employer could act after bargaining to impasse.³⁴⁹ On appeal, in *UAW v. NLRB*,³⁵⁰ the District of Columbia Circuit agreed with the NLRB that Section 8(d) prohibited management from altering mandatory topics without union consent unless management had succeeded in obtaining a contractual waiver.³⁵¹ Writing for the court, Judge Edwards further reasoned that a topic is "contained in" an agreement through a specific reference or through a "zipper" clause.³⁵² The inclusion of a zipper clause in a collective agreement therefore precludes either party from implementing a change regarding a mandatory topic or from demanding that the other party bargain.

Thus, *Milwaukee Spring II* demonstrates that management is only slightly restrained with regard to unilateral action over mandatory topics by the necessity of bargaining to impasse with labor. It is unclear, however, whether the policy of the courts and the NLRB of allowing management more discretion in business decisions is perpetuated in the arbitration setting.³⁵³

A corresponding judicial trend under the RLA furthers similar policies of greater management discretion in decision-making and the postulate that the parties' expectations should be resolved through arbitration. Perhaps because of the airlines' transition from a regulated to a deregulated market, and as a result of some courts' struggle to accommodate that transition, at least four different approaches to management prerogative issues exist. The first two approaches are limited to the issue of whether a dispute is subject to bargaining. The first method consists of an almost automatic deferral to union

347. *Id.* at 601.

348. *Id.* at 601 n.5. In *Inland Steel*, 275 N.L.R.B. 929, 936 (1985), however, the NLRB determined that a relocation decision was not subject to mandatory bargaining because a desire to reduce labor costs was not its sole motivation.

349. *Milwaukee Spring II*, 268 N.L.R.B. at 602. The Board held that the relocation decision was not contained in the wage and benefit provisions or the union recognition clause. *Id.* The Board may have based its decision to grant management the right to act on the management rights clause or on a reserved management rights theory. *UAW v. NLRB*, 765 F.2d 175, 178 (D.C. Cir. 1985).

350. 765 F.2d 175 (D.C. Cir. 1985).

351. *Id.* at 180.

352. *Id.* Zipper clauses incorporate all topics of bargaining into an agreement, effectively closing out bargaining during the agreement's term. For a discussion of zipper clauses, see *supra* note 164 and accompanying text.

353. See generally *Lynch*, *supra* note 36.

demands to bargain over the statutorily mandated topics of "rates of pay, rules, or working conditions."³⁵⁴ The second analysis adopts the NLRA's mandatory-permissive distinction to determine whether management must bargain over the issue. In the third and fourth approaches, which involve the question of whether disputes are subject to the major or minor classification, courts have used the automatic deferral to bargaining analysis or varying degrees of deferral to arbitration.

The first route involves a literal statutory interpretation of whether the RLA mandates bargaining over the disputed issue. To that end, an old yet still surviving line of authority appears to grant labor an absolute right to demand bargaining over statutorily mandated topics unless a collective agreement explicitly permits the proposed action. In *Order of Railroad Telegraphers v. Chicago & North Western Railway*,³⁵⁵ a union filed a Section 6³⁵⁶ notice, which signifies a major dispute, to prevent a financially ailing railroad from abolishing and consolidating railroad stations.³⁵⁷ The notice demanded that the terms of the collective bargaining agreement be amended to include terms that would prohibit abolition of jobs without union consent.³⁵⁸ Noting that the union's action "represent[ed] an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations,"³⁵⁹ the United States Court of Appeals for the Seventh Circuit held that the carrier was not required to bargain over the deci-

354. RLA § 6, 45 U.S.C. § 156.

355. 362 U.S. 330 (1960).

356. Section 6 is the popular name for RLA § 6, which provides:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

RLA § 6, 45 U.S.C. § 156.

357. *Telegraphers*, 362 U.S. at 332.

358. *Id.* Historically, RLA agreements do not expire; thus, any changes to an agreement must be accomplished through the filing of a Section 6 notice. See *infra* notes 445-51 and accompanying text.

359. *Chicago & N.W. Ry. v. Order of R.R. Telegraphers*, 264 F.2d 254, 259 (7th Cir. 1959).

sion.³⁶⁰ The United States Supreme Court reversed.³⁶¹ The carrier must bargain, the Court reasoned, because congressional intent, as well as the custom of the railroad industry, justified a restrictive view of management's right to unilateral action over statutorily mandated bargaining topics.³⁶²

In the second approach, which is also limited to the bargainability issue, some courts have adopted the NLRA's mandatory-permissive distinction by placing restructuring decisions that are not expressly prohibited by a collective bargaining agreement in the permissive category, and therefore outside the RLA's major dispute procedure.³⁶³ For example, in *Japan Air Lines v. International Associ-*

360. *Id.* at 260.

361. *Telegraphers*, 362 U.S. at 343.

362. *Id.* at 337-38. The Court noted: "[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." *Id.* at 341.

Subsequent courts have found that layoffs, work transfers, and wage concessions were amendments to collective bargaining agreements and thus subject to major dispute procedures. *United Indus. Workers v. Board of Trustees*, 351 F.2d 183 (5th Cir. 1965) (layoffs); *Air Line Pilots Ass'n Int'l v. Wien Air Ala.*, 120 L.R.R.M. (BNA) 2289 (D. Ala. 1984) (wage concessions); *Ruby v. Airlift Int'l*, 81 L.R.R.M. (BNA) 2610 (D.D.C. 1972) (work transfers).

Recently, in *Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives' Association*, 109 S. Ct. 2584 (1989) (*P&LE II*), the Supreme Court refused to apply *Telegraphers* to a case in which a railroad company wished to retire from the railroad business; the Court held that only a modicum of bargaining over the effects of the sale on employees was necessary. *Id.* at 2595 & n.17. For a discussion of *P&LE II*, see *supra* notes 324-26 and *infra* notes 371-82 and accompanying text.

363. The First Circuit held, for example, that the RLA does not require a carrier to bargain over its decision to sell the business. *International Ass'n of Machinists v. Northeast Airlines*, 473 F.2d 549, 557 (1st Cir. 1972), *cert. denied*, 409 U.S. 845 (1972). The court rejected the union's argument that *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), should control, stating that the decision to merge is "much nearer the core of entrepreneurial control." *Northeast Airlines*, 473 F.2d at 557. For a discussion of *Fibreboard*, see *supra* note 338.

A party may include permissive topics among its Section 6 proposals. See T. KHEEL, *supra* note 117, § 50.05[2], at 50-33. A strike may occur despite the failure to resolve a non-bargainable demand. *REA Express, Inc. v. BRAC*, 358 F. Supp. 760, 773-74 (S.D.N.Y. 1973). Additionally, labor may argue the permissive topic to impasse, but may not strike over it. *Japan Air Lines v. International Ass'n of Machinists*, 538 F.2d 46 (2d Cir. 1976).

Courts have disagreed over the appropriateness of applying the mandatory-permissive scheme to the RLA. See *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 n.23 (1981) ("The mandatory scope of bargaining under the Railway Labor Act . . . [is] not coextensive with the National Labor Relations Act."); *Brotherhood of R.R. Trainmen v. Jacksonville Terminal*, 394 U.S. 369, 383 (1969) ("[T]he National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes.") (footnote omitted), *reh'g denied*, 394 U.S. 1024 (1968); *Air Line Pilots Ass'n Int'l v. United Air Lines*, 802 F.2d 886, 902 (7th Cir. 1986) ("The use of the mandatory-permissive distinction under the RLA is entirely consistent with its statutory framework."); *Japan Air*

ation of *Machinists*,³⁶⁴ a union proposed a "scope" clause that would prevent the carrier from subcontracting.³⁶⁵ The union argued that Section 2(First) of the RLA³⁶⁶ mandates bargaining over any proposal advanced by either party.³⁶⁷ The Second Circuit disagreed.³⁶⁸ It held that because the beneficiaries of the proposal would be newly hired, the proposal did not concern present employees' "rates of pay, rules, and working conditions"³⁶⁹ and thus, was not a mandatory subject of bargaining.³⁷⁰

Although most cases applying the mandatory-permissive distinction to the RLA have addressed only the statutory question of whether the dispute was subject to bargaining,³⁷¹ recent courts have borrowed the entrepreneurial policy behind the mandatory-permissive distinction to determine whether a dispute should be resolved by collective bargaining or arbitration.³⁷² In this third group of cases, courts combine a contractual and statutory approach by considering whether a management prerogative issue is statutorily mandated as being subject to major dispute resolution or rather is a matter of contractual interpretation that is more properly left to the system board

Lines, 538 F.2d at 51-52 (mandatory-permissive distinction applied to reject union's argument that parties must bargain over any proposal).

364. 538 F.2d 46 (2d Cir. 1976).

365. *Id.* at 47-48. *Japan Air Lines* is illustrative of the mandatory-permissive distinction where the dispute over the necessity of bargaining arose in the post-expiration period.

366. Section 2(First) of the RLA provides:

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

RLA § 2(First), 45 U.S.C. § 152(First).

367. *Japan Air Lines*, 538 F.2d at 51.

368. *Id.*

369. RLA § 2(First), 45 U.S.C. § 152(First).

370. *Japan Air Lines*, 538 F.2d at 52.

371. *See, e.g., id.* at 48-49 (The carrier filed suit to enjoin the union from striking after the parties' major dispute negotiations had ended in impasse.); *Air Line Pilots Ass'n v. Transamerica Airlines*, 123 L.R.R.M. (BNA) 2682 (E.D.N.Y. 1986) (The court found that the carrier's decision to go out of business was neither a major nor a minor dispute.); *Independent Union of Flight Attendants v. Pan Am. World Airways*, 502 F. Supp. 1013 (D.D.C. 1980) (Noting that the union had not yet filed a grievance, the court held that the closing of a flight attendant base was neither a major nor minor dispute.).

372. The Supreme Court used a similar philosophical vision of the RLA, citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965). *Pittsburgh & L.E. R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2595 & n.17 (1989) (*P&LE II*). For a discussion of *First National Maintenance*, see *supra* note 338-41. For a discussion of *Darlington*, see *supra* note 293.

in the minor dispute setting. In deciding this major-minor issue, the district court in *Trump Shuttle*³⁷³ and the Third Circuit in *Railway Labor Executives' Association v. Pittsburgh & Lake Erie Railroad (P&LE I)*³⁷⁴ arrived at opposite results in classifying disputes over asset transfers.³⁷⁵ Although the *Trump Shuttle* dispute arose after the expiration of a collective bargaining agreement and the *P&LE I* dispute arose during the term of an agreement,³⁷⁶ both courts used similar methods for classifying disputes. Each court examined agreements for language contemplating the action,³⁷⁷ then relied on the entrepreneurial language of *First National Maintenance*³⁷⁸ to determine, respectively, a minor and major dispute over the effects of the decision to sell.³⁷⁹ The *P&LE I* court relied on the *Telegraphers* decision to hold that the dispute was major because the collective agreement did not address the action.³⁸⁰ Conversely, the *Trump Shuttle* court examined the parties' expired collective bargaining agreements for evidence of past practices, found that the action was "arguably" contemplated by the agreements, and held that the dispute was minor.³⁸¹ In reviewing the Third Circuit's *P&LE I* decision, the United States Supreme Court held that *Telegraphers* did not apply to

373. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 701 F. Supp. 865 (D.D.C. 1988) (*Trump Shuttle*). For a discussion of *Trump Shuttle*, see *supra* Section IV(C).

374. 845 F.2d 420 (3d Cir. 1988) (*P&LE I*), *rev'd*, 109 S. Ct. 2584 (1989) (*P&LE II*).

375. The *P&LE I* court determined that management's decision to sell a rail line was neither permitted or prohibited by the collective bargaining agreement. *Id.* at 428 n.9. The *Trump Shuttle* court, on the other hand, found that the shuttle sale was "arguably" covered by the collective bargaining agreement. *Trump Shuttle*, 701 F. Supp. at 873.

376. *P&LE I*, 845 F.2d at 428; *Trump Shuttle*, 701 F. Supp. at 873.

377. *P&LE I*, 845 F.2d at 428 n.9; *Trump Shuttle*, 701 F. Supp. at 873.

378. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Other courts have also applied the *First National Maintenance* reasoning in an RLA context. See *Air Line Pilots Ass'n Int'l v. Transamerica Airlines*, 123 L.R.R.M. (BNA) 2682, 2686-87 (E.D.N.Y.). For a discussion of *First National Maintenance*, see *supra* notes 338-45 and accompanying text. The *Transamerica* court noted that Section 8(d) of the NLRA was "nearly identical" to Section 2(First) of the RLA, which requires a carrier to bargain over "rates of pay, rules, and working conditions." *Transamerica*, 123 L.R.R.M. (BNA) at 2687 (comparing RLA § 2, 45 U.S.C. § 152, and NLRA § 8(d), 29 U.S.C. § 158(d)). The court concluded that it could find no reason why an air carrier should be required to bargain over its decision to go out of business solely because it is covered by the RLA. *Id.*; see also *Air Line Pilots Ass'n Int'l v. United Air Lines*, 802 F.2d 886, 902 (7th Cir. 1986) (The mandatory-permissive distinction is consistent with the RLA dispute resolution mechanism.), *cert. denied*, 480 U.S. 946 (1987).

379. *P&LE I*, 845 F.2d at 429-32; *Trump Shuttle*, 701 F. Supp. at 876. The *Trump Shuttle* court noted that the District of Columbia Circuit in *Eastern Furlough II* had split from the Third and Ninth Circuits, holding that effects bargaining may take place after a unilateral act. *Id.* (quoting *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 863 F.2d 891, 898, 900, 913 (D.C. Cir. 1988) (*Eastern Furlough II*), *reh'g en banc denied*, 863 F.2d 891, 913 (D.C. Cir. 1989)). For a discussion of these cases, see *supra* Section IV.

380. *P&LE I*, 845 F.2d at 430-31.

381. *Trump Shuttle*, 701 F. Supp. at 873-74.

a situation in which a railroad sells assets in order to leave the business.³⁸²

Other courts, such as the District of Columbia Circuit in *Eastern Pilots II*,³⁸³ classify disputes under a fourth approach that tends to default to arbitration for the major-minor determination by expansively interpreting collective agreements for purposes of the question of arbitrability. This move designates all disputes as minor unless claims of contractual justification are brought in bad faith.³⁸⁴ Thus, this approach, like the *Telegraphers* analysis, presumes arbitration rather than bargaining for mid-term disputes.

As the courts' various approaches demonstrate, the determination of whether a dispute arising during the term of a collective agreement is major or minor may lead to disparate results. The trend toward allowing management more prerogative to act has created a shift away from the bargaining forum and toward a presumption of arbitrability during this stage of the collective agreement.

2. MID-TERM ARBITRATION

Increasingly, arbitration is becoming the primary means for resolving mid-term disputes over managerial actions under both the RLA and the NLRA. In addition to deferring questions of contract interpretation, the NLRA's deferral doctrine operates to defer statutory issues, such as unfair labor practice charges, to arbitration. For example, in the context of NLRA mid-term disputes over proposed restructuring actions, the underlying question is usually a straightforward contractual issue: whether labor waived its statutory right to bargain or to consent to the action.³⁸⁵ This issue may create a tension between contractual provisions, typically management rights clauses and "zipper" clauses.³⁸⁶ The tension is resolved by an arbitrator, who may also consider the parties' past practices and expectations in inter-

382. *Pittsburgh & L.E. R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2595 n.17 (1989) (*P&LE II*). The Supreme Court did not frame the issue as a major-minor question, but rather as whether, and to what extent, the employer was required to bargain over the asset sale's effects on employees. *Id.* at 2592. In dissent, Justice Stevens stated that "[t]here is no relevant difference between the partial abandonment in *Telegraphers* and the transfer of ownership proposed in this case: in both, rail service would continue as before, but many employees would lose their jobs." *Id.* at 2602 (Stevens, J., concurring in part and dissenting in part, with Brennan, Marshall & Blackmun, JJ., joining).

383. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 869 F.2d 1518 (D.C. Cir. 1989) (*Eastern Pilots II*). For a discussion of *Eastern Pilots II*, see *supra* Section IV(A).

384. *Eastern Pilots II*, 869 F.2d at 1523.

385. See Edwards, *supra* note 161, at 34.

386. See *UAW v. NLRB*, 765 F.2d 175, 177 (D.C. Cir. 1985).

preting the agreement.³⁸⁷

In the RLA context, courts are also focusing on arbitration as the key dispute resolution forum during the life of the collective bargaining agreement. In *Consolidated Rail Corp. v. Railway Labor Executives' Association*,³⁸⁸ the Supreme Court adopted the view of many federal courts of appeals.³⁸⁹ Minor disputes include those that are "arguably" covered by existing bargaining agreements.³⁹⁰

387. See Edwards, *supra* note 161, at 34.

388. 109 S. Ct. 2477 (1989).

389. See *Brotherhood of R.R. Signalmen v. Burlington N. R.R.*, 829 F.2d 617 (7th Cir. 1987); *Maine Cent. R.R. v. United Transp. Union*, 787 F.2d 780, 782 (1st Cir. 1986), *cert. denied*, 479 U.S. 848 (1986).

390. *Consolidated*, 109 S. Ct. at 2482. Thus, disputes that might have been considered major disputes in regulated days because they determined future rights are now subjected to a determination of whether they are "arguably covered" by an agreement; if so, they are assimilated into the minor classification. The federal courts of appeals appear to echo an NLRA concern that bargaining obligations should not attach to those decisions that are at the "core of entrepreneurial control." That concept was first articulated in Justice Stewart's concurrence in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring), and later broadened in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). See *supra* notes 338-41 and accompanying text.

The Seventh Circuit has been at the forefront of the "arguable" standard. *National Ry. Labor Conference v. International Ass'n of Machinists*, 830 F.2d 741, 746 (7th Cir. 1987) (citing *Atchison, T. & S.F. Ry. v. United Transp. Union*, 734 F.2d 317, 321 (7th Cir. 1984)); see also *Railway Labor Executives Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700, 704 (7th Cir. 1987); *Brotherhood of R.R. Signalmen v. Burlington N. R.R.*, 829 F.2d 617, 619 (7th Cir. 1987). In *Chicago & North Western Transportation Co. v. Railway Labor Executives Association*, 855 F.2d 1277, 1279 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988), a financially distraught carrier decided to sell a portion of a rail line and concurrently eliminate more than 300 related jobs. The union filed Section 6 notices, but the carrier refused to bargain. *Id.* at 1280. The Seventh Circuit held that because the job elimination issue was "arguably" covered by the collective bargaining agreement and the past practices of the parties, the dispute was minor. *Id.* at 1285. The court ruled that:

[W]here a rail carrier and a union(s) disagree as to the proper categorization of a labor dispute under the RLA, the federal courts must delineate a matter a minor dispute unless the carrier's claims of contractual justification are so frivolous or obviously insubstantial as to indicate that it is attempting to circumvent the § 6 RLA major disputes resolution procedure.

Id. Thus, the Seventh Circuit's incorporation of past practices into an expansive interpretation of collective bargaining agreements grants management the right to implement restructuring decisions pending arbitration unless management's claim of contractual justification is frivolous or unless a court issues a status quo injunction pending arbitration. The court grounded its conclusion on a theory of deferral to the National Railroad Adjustment Board, which has exclusive jurisdiction over minor disputes in the railroad industry. *Id.* at 1286. The court also stated a concern for minimizing strikes, which would also be prevented by enforcement of the status quo for the duration of a major dispute proceeding. *Id.* at 1286-87.

The federal courts of appeal have not been in complete agreement on the standard to be applied in this area. The Eighth Circuit has held that only a "clear departure" from the parties' past practices falls in the major dispute category. *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington N. R.R.*, 802 F.2d 1016, 1017 (8th Cir. 1986). The Fifth Circuit has adopted a "wholly spurious" standard. *Ruby v. Taca Int'l Airlines, S.A.*, 439 F.2d 1359, 1363 n.5 (5th Cir. 1971).

Although *Consolidated* raised the issue of whether a railroad's attempt to expand its implied right to test its employees for drugs was a major or minor dispute,³⁹¹ the Court did not limit its discussion of major and minor disputes to the facts of the case. Rather, the Court drew heavily from NLRA precedent to emphasize both the employer's "right to be flexible"³⁹² and the desirability of allowing arbitrators to use their peculiar expertise to decide issues that reflect "'the common law of [the] particular industry.'" ³⁹³ Because the Court found that the railroad's claim was neither frivolous nor obviously insubstantial, it deemed the dispute a minor one.³⁹⁴

In a recent decision written before *Consolidated*, the District of Columbia Circuit, with Judge Edwards writing for the court, pushed the presumption of arbitrability for mid-term disputes to its greatest length in the RLA context. In *Eastern Pilots II*,³⁹⁵ the court held that a dispute is minor even if it is frivolous.³⁹⁶ The court correspondingly narrowed the operation of mid-term major disputes, holding that a major dispute must arise from an agreement's "repudiation" that is so severe it amounts to bad faith.³⁹⁷

Because arbitration under both statutes is becoming so crucial to the resolution of mid-term disputes, it is useful to examine the scope of an arbitrator's authority. If a topic is judicially determined to be arbitrable in the NLRA context, the Supreme Court in *AT&T Technologies v. Communications Workers*³⁹⁸ has held that the determination is dispositive of the threshold issue of arbitrability.³⁹⁹ In other words, after a court decides whether a dispute is arbitrable, an arbitrator may not again address the question of whether the dispute is grounded in a collective bargaining agreement and therefore arbitrable. Rather, the arbitrator's authority is restricted to deciding the merits of the dispute. The Court's presumption recognizes the greater competence of arbitrators in interpreting agreements, the national labor policy of peaceful dispute resolution, and the parties'

391. *Consolidated*, 109 S. Ct. at 2479.

392. *Id.* at 2483.

393. *Id.* at 2484 (citing *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 (1960)).

394. *Id.* at 2489. For a discussion of the injunctive relief dicta in *Consolidated*, see *infra* note 411.

395. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 869 F.2d 1518 (D.C. Cir. 1989) (*Eastern Pilots II*). For a discussion of *Eastern Pilots II*, see *supra* Section IV(A).

396. *Eastern Pilots II*, 869 F.2d at 1522.

397. *Id.* at 1523 (citing *Southern Ry. v. Brotherhood of Locomotive Firemen*, 384 F.2d 323 (D.C. Cir. 1967)).

398. 106 S. Ct. 1415 (1986).

399. *Id.* at 1420.

objectives.⁴⁰⁰

A related dilemma surfaces when the question of whether a dispute is subject to bargaining depends on whether a moratorium clause, which provides that an agreement is not amendable until a certain date, precludes the dispute.⁴⁰¹ For example, in *St. Louis Southwestern Railway v. United Transportation Union*,⁴⁰² a union filed a Section 6 notice regarding caboose design specifications.⁴⁰³ After the carrier participated in the major dispute procedure, it obtained an injunction against the union's strike,⁴⁰⁴ arguing that the collective agreement contained a moratorium provision that precluded the union from filing Section 6 notices over certain managerial actions.⁴⁰⁵ The Fifth Circuit framed two issues: (1) Was the dispute concerning whether the moratorium provision precluded a major dispute over the caboose proposal a matter of contractual interpretation and therefore a minor dispute; and (2) if so, did resolution of the minor aspect of the dispute control the resolution of the major aspect?⁴⁰⁶ The court answered both questions affirmatively.⁴⁰⁷ It held that the union's desire to bargain over the caboose proposal was a question that was arguably comprehended by the moratorium provision in the collective agreement.⁴⁰⁸ The court further held that the union must be precluded from striking pending resolution of the arbitrable issue in order to preserve the purpose of the moratorium.⁴⁰⁹ Most courts agree that the interpretation of a moratorium clause is a minor dispute and that strikes may be enjoined pending resolution of the dispute.⁴¹⁰

As *St. Louis Southwestern* illustrates, when issues are comprehended by a collective bargaining agreement, there are two divergent sets of rules contained in the major and minor classifications that could potentially govern the parties' actions. The courts' solution

400. *Id.*

401. For a discussion of moratorium clauses, see *supra* notes 161-66 and accompanying text.

402. 646 F.2d 230 (5th Cir. 1981).

403. *Id.* at 231.

404. *Id.*

405. *Id.* at 232.

406. *Id.*

407. *Id.* at 232-33.

408. *Id.* at 233.

409. *Id.* at 232.

410. See *Seaboard World Airlines v. Transport Workers Union*, 425 F.2d 1086, 1090 (2d Cir. 1970); *Burlington N. R.R. v. Railroad Yardmasters*, 79 Lab. Cas. (CCH) ¶ 11,797, 11,798 (N.D. Ill. 1976); *Southern Pac. Transp. v. Railway & Steamship Clerks*, 81 Lab. Cas. (CCH) ¶ 13,113 (N.D. Cal. 1975); *Illinois Cent. R.R. v. Brotherhood of R.R. Trainmen*, 69 L.R.R.M. (BNA) 2616, 2618 (N.D. Ill. 1968).

that the parties must first arbitrate the bargainability of the dispute does not resolve the potential imbalance in the parties' relative positions should the arbitration board find that the dispute is subject to bargaining. Management's ability to unilaterally act during the minor dispute process would necessarily relegate labor to bargaining over the effects of management's actions. A judicial determination of the bargainability of a dispute, or an injunction issuing to prevent management from acting, would provide a more equitable result than permitting management to act pending arbitration for a determination of bargainability.⁴¹¹

Viewed from the perspective of the arbitration procedure itself, the presumption of arbitrability operates in dissimilar fashions under the NLRA and under the RLA. During the NLRA's arbitration procedure, management is free to act under the obey and grieve doctrine,⁴¹² and is subject to no statutory restraints if it acts regarding a permissive subject.⁴¹³ On the other hand, no-strike clauses typically prevent labor from striking as a quid pro quo for management's consent to arbitrate disputes.⁴¹⁴ Furthermore, courts are reluctant to enjoin management's actions over contractual interpretation issues.⁴¹⁵ If the topic is mandatory, however, and the agreement contains a clause regarding the topic, management's unilateral action may result in a Section 8(d) unfair labor practice charge that would probably be deferred to arbitration for an interpretation of the contractual clause.⁴¹⁶ Deferral may result in no injunctive restraint on manage-

411. In a recent Supreme Court case, the union argued for such an injunction by suggesting that a dispute over management's expansion of an implied right to test for drugs be termed a "hybrid" dispute. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477 (1989). The union proposed that a hybrid dispute should go before the adjustment board for a determination of its classification while the employer is enjoined from implementing the change. *Id.* at 2483. The *Consolidated* Court rejected the union's argument. *Id.* That approach, the Court noted, "unduly constrains the freedom of unions and employers to contract for discretion." *Id.* The Court made clear that although it was classifying the conflict as minor, it was not deciding the merits of the case; the adjustment board might rightfully decide that the dispute was, in fact, a major one. *Id.* The Court refused, however, to anticipate a major dispute by enjoining the employer's actions. *Id.* Because the union did not base its claim for injunctive relief on irreparable injury, the Court left open the question of whether status quo injunctions based on irreparable injury would be appropriate in such circumstances. *Id.* at 2481 n.5. No showing of irreparable injury is required for an injunction to issue against an employer during a major dispute. See *Detroit & T. Shore Line R.R. v. Transportation Union*, 396 U.S. 142 (1969).

412. For a discussion of the "work first, grieve later" principle, see Lynch, *supra* note 36, at 294 n.303.

413. For a discussion of permissive topics, see *supra* notes 129-45 and accompanying text. See also Lynch, *supra* note 36, at 278-84.

414. See *supra* notes 171-74 and accompanying text.

415. See Lynch, *supra* note 36, at 294.

416. See *id.* at 281-82.

ment's actions regarding a mandatory issue. Thus, for both mandatory and permissive issues, the practical deterrent for management's action is the possibility of an eventual arbitral damages assessment. Pending arbitration, however, courts may enjoin a strike.⁴¹⁷

Few courts interpreting the RLA have borrowed the NLRA's mandatory-permissive doctrine. The Supreme Court, however, in *Pittsburgh & Lake Erie Railroad v. Railway Labor Executives' Association (P&LE II)*,⁴¹⁸ appeared to find that an asset sale occurring midterm was, in effect, permissive. Thus it would be incumbent on labor to incorporate the right to bargain over a sale in a collective agreement, with the dispute shifting to the arbitration forum for interpretation. Pending arbitration, RLA parties' relative power somewhat resembles that of NLRA parties. Injunctive relief against managerial action has not been widely used, however, partly because it has not been argued.⁴¹⁹ In that sense, the relative power of the parties under the RLA minor dispute procedure appears to be similar to that under the NLRA if the disputed NLRA topic is permissive; moreover, the practical consequences of eventual arbitral remedies may similarly operate to effectively restrain managerial action under both statutes.

The RLA's counterpart to an NLRA unfair labor practice charge is a statutory claim of union animus based on Subsections 2(Third) and 2(Fourth), a claim which is resolved by the courts.⁴²⁰ Although cases deciding the union animus issue are few, the District of Columbia Circuit has adopted an NLRA standard that is protective of management's right to make operational decisions based on

417. *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30 (1957).

418. 109 S. Ct. 2584 (1989). The judicial construction of the RLA permits only management to use economic force pending arbitration; management may take unilateral action, but labor may not strike. *Chicago River*, 353 U.S. at 30. *Contra* T. KHEEL, *supra* note 117, § 50.06, at 50-36 ("[J]udicial rule prohibits either party from taking unilateral economic action to enforce its position . . .") (citing *St. Louis S.W. Ry. v. United Transp. Union*, 646 F.2d 230 (5th Cir. 1981)). A federal court may exercise its discretion to issue a status quo injunction when allowing management to act would foreclose meaningful relief. *See Railway Express Agency v. Brotherhood of Ry. Clerks*, 437 F.2d 388, 394 (5th Cir.), *cert. denied*, 403 U.S. 919 (1971); *Independent Union of Flight Attendants v. Pan Am. World Airways*, 502 F. Supp. 1013, 1019 (D.D.C. 1980).

419. *See Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 869 F.2d 1518, 1521 n.2 (D.C. Cir. 1989) (*Eastern Pilots II*) ("In the present case, however, the Union has not claimed that it is entitled to a minor dispute injunction."); *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 863 F.2d 891, 913, 922 (D.C. Cir. 1989) (*Eastern Furlough II*) (Edwards, J., dissenting from the denial of rehearing en banc) ("Since TWU has not sought application of this equitable principle, we need not consider the issue.").

420. For a discussion of the union animus charge brought in *Eastern Furlough II*, see *supra* Section IV(B)(2) and accompanying text.

economic concerns.⁴²¹ The issue therefore has little effect on the classification of a dispute as major or minor.

B. *Doctrinal Considerations for Post-Expiration Disputes*

1. POST-EXPIRATION BARGAINING

The expansion of management prerogative under the RLA in this bargaining time frame can be seen in the restriction of the status quo during bargaining and misapplication of the status quo concept to classify disputes. Both the NLRA and the RLA statutorily mandate maintenance of the status quo during negotiations for new agreements, thereby blocking the use of economic weapons during bargaining. This requirement lacks more than minimal force within the NLRA because the bargaining process may quickly result in impasse, thereby releasing management from the status quo. In the RLA context, however, the length of the major dispute procedure gives the status quo requirement more impact and, after deregulation, results in more bargaining power for labor.

With post-expiration disputes, as with mid-term disputes, some courts have narrowed the operation of the major classification and expanded the minor classification, a move that frees management to act. Presuming arbitration after an agreement expires, however, is more troublesome than presuming arbitration during the term of an agreement. The problems are evident in some courts' use of the status quo.⁴²² In *Detroit & Toledo Shore Line Railroad v. United Transportation Union*,⁴²³ the Supreme Court defined the status quo as the obligation of the parties "to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute. . . . [C]learly these conditions need not be covered in an existing agreement."⁴²⁴

After the Supreme Court's recent decision in *Pittsburgh & Lake Erie Railroad v. Railway Labor Executives' Association (P&LE II)*,⁴²⁵ however, it is uncertain to what extent the status quo definition in *Shore Line* survives. *P&LE II* involved the question of whether a railroad must bargain over the effects of its decision to sell its assets and

421. *Id.*

422. See, e.g., *Eastern Furlough II*, 863 F.2d 891 (D.C. Cir. 1988), *reh'g en banc denied*, 863 F.2d 891, 913 (D.C. Cir. 1989); *Maine Cent. R.R. v. United Transp. Union*, 787 F.2d 780, 782-84 (1st Cir. 1986), *cert. denied*, 479 U.S. 848 (1986).

423. 396 U.S. 142 (1969).

424. *Id.* at 152-53.

425. 109 S. Ct. 2584 (1989) (*P&LE II*).

go out of business.⁴²⁶ In its discussion of the status quo provision of Section 6, the Court noted that *Shore Line*'s inclusion of "objective working conditions"⁴²⁷ in the status quo requirement "extended the relevant language of [Section 156] to its outer limits."⁴²⁸ The Court further noted:

[I]t is surely arguable that [Section 156] is open to a construction that would not require the status quo with respect to working conditions that have never been the subject of an agreement, expressed or implied, and that, if no notice of changes had been served by the union, could be changed by the carrier without any bargaining whatsoever.⁴²⁹

The Court's refusal to apply the status quo resulted in a limited bargaining requirement in *P&LE II* despite the dissent's argument that the working conditions that should be preserved must include employees' jobs.⁴³⁰ Rather, the Court was protective of the employer's right to make an unrestrained decision to close its business.⁴³¹ The Court's refutation of the status quo with respect to the asset sale appears to be a reflection of the policy underlying the mandatory-permissive distinction in the NLRA.⁴³² Management is not obligated to bargain over the "permissive" decision to sell a business unless labor previously had succeeded in incorporating the right to consent to a sale in the collective agreement.

Although *Shore Line*'s facts involve the application of a status quo injunction in a major dispute,⁴³³ the *Eastern Furlough II* court borrowed from *Shore Line*'s definition of the status quo concept in order to classify a dispute as minor.⁴³⁴ This move confuses the initial inquiry of dispute classification with the subsequent question—should the dispute be labeled major—of the boundaries of the status quo. Under the *Eastern Furlough II* court's version of dispute classification, a court must examine an expired collective agreement and the past practices of the parties in order to determine the merits of a dispute. In actuality, however, the Court is also necessarily defining the limits of the status quo. This occurs because the parties are simulta-

426. *Id.* at 2592.

427. *Shore Line*, 396 U.S. at 153.

428. *P&LE II*, 109 S. Ct. at 2594.

429. *Id.* at 2594 n.15.

430. *Id.* at 2602 (Stevens, J., concurring in part and dissenting in part, with Brennan, Marshall & Blackmun, JJ., joining).

431. *Id.* at 2595-96.

432. For a discussion of the mandatory-permissive doctrine under the NLRA, see *supra* notes 129-45 & 151-70.

433. *Shore Line*, 396 U.S. at 143.

434. See *supra* Section IV(B) (discussing *Eastern Furlough II*).

neously engaged in bargaining over a new collective agreement; the status quo inquiry also requires examination of expired collective agreements and the past practices of the parties. Using the definition of the status quo to classify disputes therefore creates an overlap between the RLA's arbitration and bargaining frameworks, and confuses the RLA's dispute resolution mechanism.

To illustrate, during the term of an existing agreement, a controversy over whether a restructuring decision constitutes a major or minor dispute is initially a question of whether the collective bargaining agreement specifically addresses the restructuring. The Supreme Court recently held in *Consolidated Rail Corp. v. Railway Labor Executives' Association*⁴³⁵ that disputes arguably comprehended by existing agreements are within the system board's jurisdiction for resolution of the merits.⁴³⁶ The District of Columbia Circuit would go even further than the Supreme Court in applying a liberal standard for mid-term disputes; *Eastern Pilots II*⁴³⁷ requires that all mid-term conflicts be submitted to the system board for arbitration unless contractual claims are brought in bad faith.⁴³⁸

After an agreement has expired, however, some courts hold that service of a Section 6 notice⁴³⁹ regarding a conflict over wages, hours, or working conditions automatically triggers a dispute over future rights and establishes a major dispute.⁴⁴⁰ Management is thereby prohibited from acting, and labor from striking, while the two bargain over the subject of the Section 6 notice. The *Eastern Furlough II* court took the opposite approach and created a presumption of arbitrability during the post-expiration period.⁴⁴¹

After a party signals that it wishes to begin bargaining over a new agreement, a dispute may result when management acts in a manner that it claims is permitted by the status quo. If labor disagrees, it will file a Section 6 notice demanding bargaining over the action, and demanding that management adhere to the status quo,

435. 109 S. Ct. 2477 (1989).

436. *Id.* at 2482; see *supra* notes 388-94 and accompanying text.

437. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 869 F.2d 1518 (D.C. Cir. 1989) (*Eastern Pilots II*).

438. See *supra* Section III(A); *supra* notes 395-97 and accompanying text.

439. The RLA provides that a party may file a Section 6 notice to signify that it desires to bargain over a term. For a description of Section 6 notices, see *supra* note 117.

440. See *International Ass'n of Machinists v. Aloha Airlines*, 776 F.2d 812, 816 (9th Cir. 1985); *Air Cargo v. Local 851, Int'l Bhd. of Teamsters*, 733 F.2d 241, 245-46 (2d Cir. 1984).

441. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 863 F.2d 891, 896-97 (D.C. Cir. 1988) (*Eastern Furlough II*), *reh'g en banc denied*, 863 F.2d 891, 913 (D.C. Cir. 1989). For a more complete discussion of the *Eastern Furlough II* court's approach, see *supra* notes 251-84 and accompanying text.

which labor will claim does not permit the action. At this point, the issue is to define the rules that govern management's actions. The District of Columbia Circuit's "status quo" concept examined expired agreements and past practices to find that the parties' expectations encompassed management's proposed actions.⁴⁴² Accordingly, the court labeled the dispute as minor.⁴⁴³

This move to classify post-expiration disputes as minor has been criticized as an usurpation of the arbitrator's function.⁴⁴⁴ It is within the special province of an arbitration board to examine the "common law" of an industry by considering expired collective bargaining agreements and past practices in its resolution of the merits. Thus, the District of Columbia Circuit took the statutory concept of preserving the parties' environment while bargaining over a new agreement, and expanded the arbitration forum to encompass it. This definitional circularity blurs the parties' rights in both forums, and severely limits management's duty to bargain with labor over the full range of a new collective agreement.

The conflicting interpretations of the status quo result in part from a transition in the operation of collective bargaining agreements. Congress structured Section 6 notices, which trigger the status quo, to accommodate the railroads' custom of using "open-end" agreements.⁴⁴⁵ Open-end agreements are those that do not expire but may be modified when one party notifies the other through a Section 6 notice that it wishes to change certain contractual provisions.⁴⁴⁶ The Section 6 filing works primarily to enable labor to force management to bargain over new demands. For example, in *Order of Railroad Telegraphers v. Chicago & North Western Railway*,⁴⁴⁷ the Supreme Court held that a union could force management to bargain over the union's proposed amendment to its collective bargaining agreement

442. *Eastern Furlough II*, 863 F.2d at 913.

443. *Id.*

444. *Railway Labor Executives Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700, 704-05 (7th Cir. 1987); *National Ry. Labor Conference v. International Ass'n of Machinists*, 830 F.2d 741, 746-47 (7th Cir. 1987) ("[T]he relevance of such arguments is more limited in the characterization of the dispute than it is in the resolution of the merits . . ."); *Maine Cent. R.R. v. United Transp. Union*, 787 F.2d 780, 782 (1st Cir.), ("[T]he court's role is limited to determining whether [the railroad's] assertion is 'even "arguable."'), *cert. denied*, 479 U.S. 848 (1986).

445. See Burgoon, *Mediation Under the Railway Labor Act*, in *THE RAILWAY ACT AT FIFTY: COLLECTIVE BARGAINING IN THE RAILROAD AND AIRLINE INDUSTRIES* 71, 72 (1976).

446. *Id.*

447. 362 U.S. 330 (1960). For a discussion of *Telegraphers*, see *supra* notes 355-62 and accompanying text.

by filing a Section 6 notice.⁴⁴⁸ That amendment would have prevented management from abolishing railroad stations, an action that would have resulted in the elimination of jobs.⁴⁴⁹ Today, most airlines use agreements that have fixed termination dates or that are amendable on certain dates.⁴⁵⁰ In either case, Section 6 notices usually open the full range of agreements to bargaining.⁴⁵¹

In his dissent from the *Eastern Furlough II* denial of a rehearing en banc, Judge Edwards reasoned that the status quo requires parties to adhere to the terms of their expired collective bargaining agreement, as well as to working conditions, while bargaining over a new agreement.⁴⁵² The RLA mandates that a Section 6 notice be filed over disputes relating to rates of pay, rules, or working conditions.⁴⁵³ Thus, when a party files a Section 6 notice regarding the statutorily-defined topics during the post-expiration period, the dispute “‘look[s] to the acquisition of rights for the future’”⁴⁵⁴ and automatically triggers a major dispute.⁴⁵⁵

Under an extension of Judge Edwards' view, the filing of Section 6 notices during the post-expiration period would be similar to creating mandatory topics of bargaining under the NLRA in any dispute concerning rates of pay, rules, or working conditions. This interpretation of the RLA preserves labor's opportunity to acquire new rights in the statutorily mandated areas while bargaining over a new collective agreement.

2. POST-EXPIRATION ARBITRATION

When a management prerogative issue is classified as minor, the question arises whether, in disputes occurring after expiration of a collective bargaining agreement, the arbitrability of the dispute and the rights granted to the parties by the expired agreement survive the agreement. In *Nolde Bros. v. Local No. 358, Bakery & Confectionery*

448. *Telegraphers*, 362 U.S. at 332.

449. *Id.*

450. See *Airline Pilots Ass'n Int'l v. Pan Am. World Airways*, 765 F.2d 377, 382 (2d Cir. 1985) (holding that RLA agreements may have termination dates); Campbell & Hiers, *Carriers' Rights to Self-Help During Strikes*, in *CLEARED FOR TAKEOFF: AIRLINE LABOR RELATIONS SINCE DEREGULATION* 221, 228-29 (J. McKelvey ed. 1988).

451. Burgoon, *supra* note 445, at 72.

452. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 863 F.2d 891, 913, 921 (D.C. Cir. 1989) (*Eastern Furlough II*) (Edwards, J., dissenting from the denial of rehearing en banc).

453. *Id.*

454. *Id.* (quoting *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945), *aff'd on reh'g*, 327 U.S. 661 (1946)).

455. *Id.*

Workers Union,⁴⁵⁶ an NLRA employer that closed a bakery refused to arbitrate the union's claim for severance pay, maintaining that its contractual obligation to arbitrate had expired with the agreement.⁴⁵⁷ The United States Supreme Court held that the parties' confidence in the arbitration process does not terminate with the agreement, and thus disputes concerning expired contractual rights continue to be subject to binding arbitration.⁴⁵⁸ The Court held that arbitration is presumed in the post-expiration period unless the parties contract otherwise.⁴⁵⁹

In contrast, the related RLA issue is more enigmatic. Under the RLA, the issue of whether post-expiration contractual rights are arbitrable is intertwined with the issue of what limits define the parties' working conditions while they are bargaining over a new collective agreement. If the expired agreement and past practices comprise the status quo, does the court or the system board define those rights? Are there, in fact, surviving contractual rights, or are the rights more appropriately designated as new ones that are subject to bargaining?

In his separate concurring opinion to the denial of a rehearing en banc for *Eastern Furlough II*,⁴⁶⁰ Judge Silberman appeared to conclude that, because the expiration of an agreement extinguishes entitlements and because past practices are insufficient to create entitlements, the expiration of a collective bargaining agreement necessarily forecloses arbitration of disputes.⁴⁶¹ Judge Edwards, dissenting from the en banc decision, disagreed.⁴⁶² According to Judge Edwards, a unilateral action by management in an agreement's post-expiration period gives rise both to an arbitrable issue of whether labor had any accrued rights under the expired agreement and to a bargainable issue of new contractual claims.⁴⁶³ Thus, Judge Edwards' conclusion is compatible with the NLRA's presumption of arbi-

456. 430 U.S. 243 (1977).

457. *Id.* at 247.

458. *Id.* at 254.

459. *Id.* at 255.

460. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 863 F.2d 891 (D.C. Cir. 1988) (*Eastern Furlough II*), *reh'g en banc denied*, 863 F.2d 891, 913 (D.C. Cir. 1989).

461. *Id.* at 927. (Silberman, J., concurring in the denial of rehearing en banc) (citing *Flight Eng'rs Int'l Ass'n v. Eastern Air Lines*, 359 F.2d 303, 310-11 (2d Cir. 1966)) ("Expiration of agreement releases employer from obligation to submit to system board otherwise minor disputes turning on provisions of extinct agreement."). *But see* *Nolde Bros. v. Local 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 247 (1977) (holding that under the NLRA, the "duty to arbitrate exists with respect to entitlements based on and surviving expired agreement").

462. *Eastern Furlough II*, 863 F.2d at 919 (Edwards, J., dissenting from the denial of rehearing en banc).

463. *Id.* at 922-23.

trability for expired collective bargaining agreements. His view also seems to reach beyond *Nolde* to accept the continuation of contractual rights during the post-expiration period.⁴⁶⁴

If the terms of a collective bargaining agreement survive its expiration, two possible conflicts could arise from the interaction between major and minor disputes in the post-expiration period. The first conflict also arises in mid-term disputes, and it is illustrated in *St. Louis Southwestern Railway v. United Transportation Union*,⁴⁶⁵ in which a dispute may be presented to a system board for a decision about whether a moratorium clause in an expired agreement would control the bargainability of an issue.

The second conflict between major and minor disputes in the post-expiration period arises when a dispute has both major and minor aspects, as Judge Edwards suggested was the case in the *Eastern Furlough II* dispute.⁴⁶⁶ Judge Edwards indicated that the parties in situations like the furlough dispute should bargain over the furlough as a new right while arbitration would settle any claims to accrued rights (such as, presumably, insurance benefits) under the collective agreement.⁴⁶⁷ During this time, the status quo would control. Management would not be able to act unilaterally, if that action is inconsistent with the expired agreement and past working conditions, until a new collective agreement is negotiated. The fact that management cannot act would also inhibit its power during arbitration; thus, in both forums, management's relative position typically would be weaker than labor's.

The difficulty in arriving at a balanced solution to management prerogative issues in the post-expiration period under the RLA largely results from the imbalance in the present application of major and minor classifications. Although the major classification is too heavily leveraged for labor when agreements are either in force or expired, the minor classification, which is essentially a grievance procedure, is an inadequate mechanism for collective bargaining purposes. The minor classification may leave labor at a disadvantage because labor has no economic weapon and no opportunity to bargain

464. Judge Edwards stated: "Thus, for example, it would be possible for a union to . . . claim that employees had 'accrued' rights under an expired agreement including a right to arbitrate their grievances protecting them from layoffs pending negotiation of a new agreement." *Id.* at 922.

465. 646 F.2d 230 (5th Cir. 1981). For a discussion of *St. Louis Southwestern*, see *supra* notes 401-11 and accompanying text.

466. *Eastern Furlough II*, 863 F.2d at 922 (Edwards, J., dissenting from the denial of rehearing en banc).

467. *Id.* at 922-23.

over future rights. It must restrict its arguments to those derived from existing or expired collective agreements regarding the agreement's implied limitations, past practices, and the parties' intent. Some balance in relative power is maintained in light of the fact that, even without a simultaneous major dispute, management does not have an unfettered license to act. Management, moreover, may contain its own actions in light of the possibility that the system board may grant damages to the union.

The courts' various interpretations of the RLA during the post-expiration period give the parties to a collective bargaining agreement little guidance regarding their rights while resolving disputes and creating new agreements. The interchange of definitions regarding the status quo and dispute classification has resulted in a circularity of functions within the bargaining and arbitration forums of the RLA.

VI. A STREAMLINED STATUTE

In addition to the courts' struggle to adapt the Railway Labor Act to today's deregulated airline market, efforts to revise the RLA's major and minor classifications have taken place within the airline industry itself. In some instances, labor has successfully negotiated for expedited arbitration procedures to replace the sluggish statutory procedures of the minor classification.⁴⁶⁸ Faster, less costly steps have eliminated all but the last step in the arbitration process—a three-person arbitration board—or have substituted a single neutral arbitrator for the statutory procedure.⁴⁶⁹

This more efficient version of the RLA's minor dispute resolution procedure would have a significant impact on the effect of the heavy presumption of arbitrability for mid-term disputes advanced by the District of Columbia Circuit in *Eastern Pilots*.⁴⁷⁰ Because management is free to act pending the resolution of arbitration, with an arbitrator's potential damage award as its only deterrent, a more expedited procedure would reduce the extent of the effects of any managerial action and thereby better protect the employees' interests.

468. See Crable, *System Boards of Adjustment: The State of Expedited Arbitration*, in *CLEARED FOR TAKEOFF: AIRLINE LABOR RELATIONS SINCE DEREGULATION* 255 (J. McKelvey ed. 1988); Singer, *Pan Am's Experience with Expedited Arbitration Procedures*, in *CLEARED FOR TAKEOFF: AIRLINE LABOR RELATIONS SINCE DEREGULATION* 261 (J. McKelvey ed. 1988).

469. Crable, *supra* note 468, at 256-57. Thus, the parties avoid the time and expense of the longer procedure in cases where a deadlock is inevitable and the four-member board would be a formality. See also Singer, *supra* note 468, at 262.

470. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 869 F.2d 1518 (D.C. Cir. 1989) (*Eastern Pilots II*).

Additionally, the ready availability of a status quo injunction would increase the possibility that employees would be sufficiently compensated with an award.⁴⁷¹

The major classification, however, remains cumbersome. When Congress structured the RLA, it installed the elaborate major dispute procedure in order to prevent interruption to commerce and to protect employees in the highly regulated railroad industry.⁴⁷² The dispute resolution process thus reflects the notion that parties whose economic strengths are somewhat evenly balanced may profit from an extended opportunity to resolve their differences. In the modern marketplace, however, additional alternative sources of transportation within the airline industry and without the railroad industry are available. Consequently, there is reduced risk that a strike against a single carrier in those industries would cripple commerce.

Courts addressing the major-minor classification issue therefore have less reason to be motivated by the policy that existed when the RLA was formed. Many courts understandably are reluctant to place disputes in the major classification, where management may be unduly constrained from effectively competing in the deregulated market. These courts have applied the NLRA's management prerogative doctrine to carrier restructuring decisions, with the result that a dispute is now termed minor rather than major, as was the case in the regulated past. The use of the NLRA doctrine to move disputes to the minor classification and grant RLA management greater latitude

471. The Supreme Court has stated:

From the point of view of these employees, the critical point in the dispute may be when the change is made, for, by the time of the frequently long-delayed Board decision, it might well be impossible to make them whole in any realistic sense [A status quo injunction] would operate to preserve [the Board's] jurisdiction by preventing injury so irreparable that a decision of the Board in the unions' favor would be but an empty victory.

Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas R.R., 363 U.S. 528, 534 (1960). For a discussion of the availability of status quo injunctions pending the resolution of minor disputes, see *supra* note 411 and accompanying text.

472. The purposes of the RLA are:

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

RLA § 1(a), 45 U.S.C. § 151(a).

is a move that may be effective during the term of an agreement if injunctive relief is available to prohibit management from unilaterally implementing actions that would render the arbitration process virtually meaningless.

When courts apply the presumption of arbitrability to disputes arising after the expiration of an agreement, however, they create inapposite results and a disparity in bargaining power. By classifying post-expiration restructuring disputes as minor, courts interpreting the RLA deprive unions—then involved in bargaining over a new collective agreement—of the opportunity to create new rights from the disputed rights in the bargaining forum. When the shift to arbitration occurs during this time frame, it limits labor's arguments to topics covered or implied by an expired collective bargaining agreement and it denies labor the use of its economic strength while allowing management to take unilateral action.

By thus presuming arbitrability in the post-expiration period, courts have diminished labor's rights in the collective bargaining process. The courts' attempt to reshape the RLA appears to be an effort to arrive at a similar conceptual plane for labor-management relations within both the NLRA and the RLA. The courts' dual objectives—of freeing RLA management from the often tedious constraints of the major dispute classification and harmonizing the policy concerns of the two statutes—is possible through a more restrained application of the major classification. The length of the major dispute procedure has already been somewhat shortened in recent years with the dormancy of the emergency board procedure.⁴⁷³ Additionally, the major classification's arbitration procedure, which requires the mutual consent of the parties for its utilization, is virtually nonexistent.⁴⁷⁴

Thus, on a practical level, the predominant factor distinguishing the RLA's collective bargaining procedure from that of the NLRA is

473. For a description of the emergency board procedure, see *supra* note 117. See also Curtin, *supra* note 32, at 187. Former Secretary of Labor George Schultz adopted an informal policy abandoning the procedure during the Nixon administration. *Id.* (citing Cullen, *Emergency Boards under the Railway Labor Act*, in *THE RAILWAY LABOR ACT AT FIFTY: COLLECTIVE BARGAINING IN THE RAILROAD AND AIRLINE INDUSTRIES* 154-56 (1976)). Subsequent administrations have followed suit. *Id.*

For a discussion of the "remarkable unsuccess" of emergency boards before deregulation, see Comment, *supra* note 66, at 480-81.

474. Refusal to accept the National Mediation Board's offer of arbitration, however, may deprive the refusing party of the right to injunctive relief based on a claim of bad faith negotiations. T. KHEEL, *supra* note 117, § 50.05[1], at 50-28. Before deregulation, carriers used arbitration as a means to be "compelled" into accepting a wage increase, thereby adding credibility to requests to the Civil Aeronautics Board for fare increases. Comment, *supra* note 66, at 480.

the RLA's requirement of governmentally supervised mediation.⁴⁷⁵ One might argue that any imposition of quasi-judicial mediation upon the airline industry defeats the spirit of collective bargaining.⁴⁷⁶ In any event, it is apparent that mediation may too often alter the result of the collective bargaining process.⁴⁷⁷ When mediation over a recent labor-management agreement at Eastern Air Lines extended over a year,⁴⁷⁸ the duration of the process delayed the economic self-help that would have resolved the dispute more quickly.⁴⁷⁹ The use of mediation in a more restrained manner, followed more quickly by impasse and any necessary economic force, is more in keeping with the faster results necessary for industry survival in a competitive marketplace. It would work well to more accurately balance the bargaining positions of RLA parties, who, like NLRA parties, could rely on economic strength rather than the time factor of the procedure to determine the outcome of disputes.

Were a more practical version of the major dispute procedure available when the disputes arose in *Eastern Furlough II*⁴⁸⁰ and *Trump Shuttle*,⁴⁸¹ the District of Columbia Circuit would have been able to take a more balanced approach to those cases. Instead of holding that those disputes were minor, thereby damaging labor's rights during the parties' bargaining over a new collective agreement, the court would have been able to place the disputes in the major classification, thereby preserving the policy underlying the RLA and freeing management from much of its time constraints.⁴⁸² The new major classification would permit the parties, rather than the forced

475. For a comparison of the quasi-judicial nature of RLA mediation to the voluntary nature of NLRA mediation, see *supra* note 119.

476. One commentator has argued that the purpose of airline mediation diminished with the parties' increased sophistication in collective bargaining techniques. Comment, *supra* note 66, at 479. Additionally, mandated mediation may decrease the parties' efforts to resolve disputes themselves. *Id.*

477. *Air Line Pilots Ass'n v. Transamerica Airlines*, 817 F.2d 510 (9th Cir. 1986) (mediation continued in excess of two years); *Lan Chile Airlines v. National Mediation Board*, 115 L.R.R.M. (BNA) 3655 (S.D. Fla. 1984) (mediation had been going on for sixteen months); *Start the Clock on Eastern Air Lines*, Miami Herald, Jan. 12, 1989, at A26, col. 1. (mediation had continued for a year).

478. *Start the Clock on Eastern Air Lines*, Miami Herald, Jan. 12, 1989, at A26, col. 1.

479. For a discussion of the relative power of bargaining parties with respect to economic self-help, see *supra* notes 125-28 and accompanying text.

480. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 863 F.2d 891 (D.C. Cir. 1988) (*Eastern Furlough II*), *reh'g en banc denied*, 863 F.2d 891, 913 (D.C. Cir. 1989).

481. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 701 F. Supp. 865 (D.D.C. 1988) (*Trump Shuttle*).

482. The *Trump Shuttle* result would now be affected by the recent Supreme Court case, *Pittsburgh & Lake Erie Railroad v. Railway Labor Executives' Association*, 109 S. Ct. 2584 (1989) (*P&LE II*), which did not require management to maintain the status quo pending effects bargaining.

time constraints, to determine the outcome of their dispute by relying more directly on their economic strength during the bargaining process.

Although economic warfare is not the means of choice in resolving disputes, neither is the forced protraction of mediation that may nevertheless eventually result in a strike. In a case involving a financially distraught carrier similar to Eastern Air Lines, it is ironic that:

A bargaining order, and a status quo injunction, designed to foster conciliation, promote labor peace, and ultimately keep the [carrier] running, may ultimately have the perverse effect of destroying the only chance [the carrier] has for survival and perhaps even the very jobs that the unions are . . . trying to protect.⁴⁸³

When parties cannot resolve their disputes within a reasonable length of time, self-help is the best alternative.

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483. *Railway Labor Executives' Ass'n v. Pittsburgh & L.E. R.R.*, 845 F.2d 420, 446 (3d Cir. 1988) (*P&LE I*), *rev'd*, 109 S. Ct. 2584 (1989) (*P&LE II*).