The Status Quo of the Railway Act

Stephen J. Kolski

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Recommended Citation
Available at: http://repository.law.miami.edu/umlr/vol25/iss3/6
From the point of view of industrial relations our railroads are largely a thing apart. The railroad world is like a state within a state. [It] has its own customs and its own vocabulary, and lives according to rules of its own making.¹

I. INTRODUCTION

The Railway Labor Act,² originally enacted in 1926,³ has long been the target of criticism. Members of both labor and management as well as observers from the academic world have voiced opinions as to its weaknesses and advanced ideas for improvement. Recently, the Administration itself proposed an amendment to the RLA.⁴ The most recent criticisms have been primarily directed towards the RLA's collective bargaining process and its inability to effectively cope with the rash of recent crippling strikes in the railroad and airline industry.⁵ In addition, the representation provisions of the RLA and its administering body, the three-member National Mediation Board,⁶ have also been attacked as inadequate.⁷ Curt-

* Member of the Editorial Board, University of Miami Law Review.


⁴ EMERGENCY PUBLIC INTEREST PROTECTION ACT OF 1970, a bill submitted by the Administration to Congress on February 27, 1970, (H.R. 16226 and S. 3526), see 91st Congress, 2d Session, U.S. CODE CONG. & AD NEWS 408 (1970), for President Nixon's message to Congress wherein he encourages passage of the bill. The message also highlights the bill's weapons for dealing with threatened nationwide transportation strikes.


⁶ [hereinafter referred to as NMB or Board].

rently, the decision of the Supreme Court in *Detroit & T.S.L. R.R. v. United Transportation Union* has highlighted the status quo provisions of the RLA in such a manner as to potentially threaten tranquil day-to-day labor-management relations under the RLA.

The words "status quo" do not appear in the RLA. Neither do the phrases "major dispute" or "minor dispute." However, these concepts provide the fulcrum upon which stable industrial relations under the RLA must be balanced. This comment will analyze these concepts and survey the case law concerning them, especially the *Shore Line* decision which will be analyzed in depth, particularly with regard to problems which now appear on the horizon. In so doing, this comment will look to the RLA itself and industrial relations as practiced under the RLA, with a view toward suggesting solutions which will help "to avoid any interruption to commerce or the operation of any carrier engaged therein," the first of five avowed general purposes of the RLA.

II. A LOOK AT STATUS QUO

A. Major v. Minor Dispute Dichotomy

Essential to an understanding of the rights and duties of carriers and unions vis-à-vis the status quo is the distinction between what have been judicially labeled as major and minor disputes. Recognizing that the major purpose of Congress in passing the RLA was "to provide the machinery to prevent strikes," the Act clearly distinguishes between two types of employer-union disputes.

Section 2 of the RLA states:

> The purposes of the Act are: ... (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.

8. 396 U.S. 142 (1969) [hereinafter cited as *Shore Line*].

> The first [the major dispute] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to the assertion of rights claimed to have vested in the past.

> The second class, [the minor dispute] however, contemplates the existence of a collective agreement already concluded, or at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. ... In either case, the claim is to rights accrued, not merely to have new ones created for the future. ... The so-called minor disputes ... affect the smaller differences which inevitably appear ...

> The so-called minor disputes ... affect the smaller differences which inevitably appear ...

> or arise incidentally in the course of an employment.
Subsection (4) refers to what is known as a major dispute, or a dispute over a new collective bargaining agreement; while subsection (5) refers to a dispute concerning the terms of an existing agreement.

A formal major dispute begins when either party submits what is generally termed a "Section 6 notice," i.e., a written notice of an intended change. If an agreement is not reached in mediation under the auspices of the NMB, the Board shall "endeavor . . . to induce the parties to submit their controversy to arbitration. . . .'" If either or both parties refuse arbitration, the Board, in RLA parlance, "releases the case." Unless the President invokes a Presidential Emergency Board, the Act provides no further procedure for settlement of a major dispute. Implicit in the scheme of settling a major dispute is that neither party is required by the Act to accept an involuntary settlement. In other words, absent Congressional intervention, neither party is required to accept binding arbitration.

Minor disputes follow a somewhat different scheme. First, settlement is contemplated by negotiation and discussion. If settlement is not reached in this manner, either party may refer the dispute to a Board of Adjustment. These boards are composed of both company and union representatives and, if they do not reach a majority decision in the matter, the Act provides for the appointment of a neutral referee to sit with the Board and break the deadlock. In other words, minor disputes, if not

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14. After direct negotiations have been "deadlocked," either party may request NMB service within ten days. RLA § 6, 45 U.S.C. § 156 (1964). Also, the NMB may proffer its services sua sponte "in case any labor emergency is found by it to exist at any time." RLA § 5 First (b), 45 U.S.C. § 155 First (b) (1964).
15. RLA § 5 First (b), 45 U.S.C. § 155 First (b) (1964). The NMB has broad discretion as to when such proffer of arbitration shall occur. Absent the continuation of mediation on a basis that is completely and patently arbitrary for a period that is completely and patently unreasonable courts, irrespective of which party requests it, are without jurisdiction to provide injunctive relief designed to force the Board to proffer arbitration. The court's lack of jurisdiction to force a proffer of arbitration continues even though there is no genuine hope or expectation that the parties will arrive at an agreement. International Assn. of Machinists & Aerospace Workers v. National Mediation Bd., 425 F.2d 527 (D.C. Cir. 1970).
18. RLA § 3(1), 45 U.S.C. § 153(1) (1964) (railroads); Title II of the RLA makes all of the provisions of Title I applicable to air carriers except section 3 and does not expressly require a "neutral referee" to sit and break a deadlock; however, Title II places a duty on carriers and employees to establish boards "not exceeding the jurisdiction which may be lawfully exercised by . . . boards . . . under the authority of Section 3. . . ." RLA § 204, 45 U.S.C. § 184 (1964). In practice, air carriers and unions, in establishing such boards, usually termed "System (for the particular airline's system) Boards of Adjustment," provide for the appointment of a neutral referee when a deadlock occurs. Airline Arbitration Reports,
adjusted by the parties, are submitted to binding arbitration.\textsuperscript{19}

Thus, theoretically, minor disputes should never bring about an interruption to commerce, although they sometimes do. Generally, however, legal work stoppages are only envisioned in major disputes.\textsuperscript{20}

B. Statutory Provisions

Presently, the RLA is applicable to railroads, airlines,\textsuperscript{21} and certain related companies.\textsuperscript{22} At most, there are four places in the RLA where "status quo" provisions appear. Section 2 Seventh states:

No carrier, its officers or agents shall change the rates of pay, rules or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act.\textsuperscript{23}

On its face, section 2 Seventh imposes an obligation on the carrier to maintain rates of pay, and to maintain rules and working conditions as embodied in existing agreements only in the manner set forth in such agreements until such time as either party submits what is termed a "section 6 notice" and commences a formal major dispute.\textsuperscript{24}

In every case where such [a Section 6] notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been published by the Personnel Relations Conference of the Air Transport Association, Washington, D.C., contains significant decisions of neutral referees who have sat as members of various airline System Boards of Adjustment.

19. Whether the dispute goes to arbitration or not, the Board's decision, unless it contains a monetary award, is final and binding on the parties. RLA § 3(i),(m),(n), 45 U.S.C. § 153(i),(m),(n) (1964). See Union Pac. R.R. v. Price, 360 U.S. 601 (1959).

20. Minor disputes were not always required to be submitted to binding arbitration. The creation of Boards of Adjustment with binding arbitration to break deadlocks was the most significant change when the Act was amended in 1934. 44 Stat. 578 (1934). See generally Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L.J. 567 (1937).


23. RLA § 2 Seventh, 45 U.S.C. § 152 Seventh (1964) (emphasis added). In Shore Line, the Court did not regard § 2 Seventh as imposing any status quo duties attendant upon major dispute procedures, viewing it rather as a provision giving legal and binding effect to agreements and requiring that existing agreements be changed only by statutory procedure.

24. Carriers, their officers and agents, who willfully fail or refuse to comply with the terms of § 2 Seventh are subject to prosecution by the United States on a misdemeanor charge "subject to a fine of not less than $1,000 nor more than $20,000, or imprisonment for not more than six months, or both," for each offense and each day during which the carrier, officer or agent willfully fails or refuses to comply. RLA § 2 Tenth, 45 U.S.C. § 152 Tenth (1964).
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 5 of this Act, 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.\textsuperscript{25}

Just as section 2 Seventh expressly places a duty solely on the carrier, so does section 6. Also worth noting is that section 6 does not refer to "rates of pay" or "rules or working conditions as embodied in agreements" as section 2 Seventh does. The period of time covered by section 6 is from the moment a section 6 notice is exchanged up to and through any proceedings before the NMB.

Section 5 First then provides that if arbitration of the major dispute is refused:

[The] Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter . . . no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.\textsuperscript{26}

Therefore, for thirty days, neither party can exercise self-help. Normally, during this period, the NMB will, although not required to do so by the Act, make another attempt to reach a settlement by mediation. This usually occurs toward the end of the period when the pressure on both parties is the greatest. This procedure has been called "super mediation," in that one of the Board's three members will lend his mediatory efforts to the staff mediator assigned to the case. However, this does not always occur.

Finally, section 10 commands that if a Presidential Emergency Board is created within the thirty days referred to in Section 5 First:

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the condition out of which the dispute arose.\textsuperscript{27}

Nothing in the RLA expressly requires adherence to the condition out of which a "minor dispute" arises during the period of time taken to resolve a minor dispute.

C. RLA Injunctions Vis-à-Vis The Norris LaGuardia Act

Despite the anti-injunction provisions of the Norris LaGuardia Act,\textsuperscript{28} it is well established that injunctive relief may be granted in fur-

\textsuperscript{25} RLA § 6, 45 U.S.C. § 156 (1964).
\textsuperscript{26} RLA § 5 First (b), 45 U.S.C. § 155 First (b) (1964) (emphasis added).
\textsuperscript{27} RLA § 10, 45 U.S.C. § 160 (1964).
therance of the purposes of the RLA. The Supreme Court has viewed the Norris LaGuardia Act and the RLA as a "pattern of labor legisla-
30 tion" and has stated that the "specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris La-
31 Guardia Act." But, when will the specific provisions of the RLA take this precedence? For an answer to this question, it becomes necessary to actually determine whether a dispute is major or minor. Further, in either instance, injunctive relief may or may not issue depending upon the circumstances in which it is sought. Analysis of such situations becomes complex, as the parties do not always agree on whether a dispute is major or minor. Further, minor disputes can ripen into major disputes and, apparently, under certain circumstances, parties can choose to treat a dispute as major or minor as they desire.

D. Obligations in Minor Disputes

Since there are no express provisions in the RLA requiring the parties to return to the condition out of which a minor dispute arose pendente litem the decision of the Adjustment Board, it is seldom asserted that the status quo has been violated when the dispute is deemed minor. However, courts have referred to the "status quo" when injunctive relief is sought in connection with a minor dispute.32

The parties to a minor dispute do not always agree that the dispute is minor.35 When this occurs, courts generally refer to the classic definition of major and minor disputes set forth in Elgin, J. & E. Ry. v. Burley,34 and attempt to apply it to the facts of the case sub judice, to determine whether the dispute is in fact major or minor.

In Order of Ry. Conductors v. Pitney,35 the plaintiff union asserted that the defendant carrier violated section 6 of the Act when it replaced its employees with members of another union and sought to enjoin the

32. It is submitted that use of the phrase "status quo" is misleading unless § 6 notices have been exchanged, as there are no status quo provisions which apply when such notices have not been submitted. See note 23 supra and note 36 infra.
34. 325 U.S. 711 (1945).
carrier's action. The district court referred the case to a master who found: (1) the plaintiff's contract with the carrier did not provide that its members do the work in question, and (2) that the carrier's contract with the other union did so provide. Mr. Justice Black, who wrote the Court's opinion, noted that section 2 Seventh referred to rates of pay, rules or working conditions as embodied in agreements, and that "the only conduct which would violate section 6 is a change in those working conditions which are 'embodied' in agreements." Since the plaintiff's contract did not provide that its members do the work involved, the meaning of that contract was put in issue. The Court felt it improper, therefore, for the district court to interpret the agreements and held that the court should have allowed the parties an opportunity to interpret the agreements. "Any rights clearly revealed by such an interpretation might then, if the situation warrants, be protected in this proceeding."

The Court stated:

[I]nterpretation of these contracts involves more than mere construction of a 'document' in terms of the ordinary meaning of words and their position, . . . [E]vidence as to usage, practice and custom . . . must be taken into account and properly understood. The factual question is intricate and technical. . . .

The Pitney holding was not unqualified, for the court implied that if the RLA was clearly violated or if the threatened action would be prejudicial to the public interest, the district court could properly enjoin the carrier's action in the first instance.

In Order of Railroad Telegraphers v. Chicago & N.W. R.R., the Court dealt directly with the issue of what constitutes a major and minor dispute. As to the contention that layoffs from station abandonments were a minor dispute, the Court was emphatic.

[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.  

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36. Id. at 565. Mr. Justice Black has since cautioned that this language should not be taken out of context. "Thus, Pitney, at most, involved a question of the necessity of filing a § 6 notice and was not at all concerned with the status quo provision of that section." Detroit & T.S.L. R.R. v. United Transp. Union, 396 U.S. 142, 157 (1969).


38. Id. at 566-67.

39. 362 U.S. 330 (1960). The case dealt primarily with what carriers must legally bargain about. Its holding typifies the sad economic state of this nation's railroads today. Mr. Justice Whittaker's dissent, joined by Mr. Justice Frankfurter, Mr. Justice Clark and Mr. Justice Stewart, at 362 U.S. 345 is highly recommended.

Various courts of appeal have also wrestled with the distinction. Judge Waterman of the Second Circuit articulated the following standard:

Whether it be a major or a minor dispute, the disagreement is a dispute over the scope of the railroad's managerial perogative. It is a major dispute if the present agreements . . . contain express provisions contrary to the position taken by the railroad or if the clear implication of these agreements is inconsistent with the railroad's proposals. It is a minor dispute if there is a clearly governing provision in the present agreements, although its precise requirements are ambiguous; and it is also minor if what the railroad seeks to do is supported by customary and ordinary interpretations of the language of the agreements.

The Fifth Circuit considered a dispute major when the carrier involved leased its facilities resulting in the total displacement of its labor force. The court concluded that the carrier,

in imposing changes in nowise contemplated or arguably covered by the agreement is not to escape the impact of the Act merely through the device of unilateral action which it purposefully intends is not to become a part of the written agreement.

Another test was set forth by the D.C. Circuit. Here the controversy would be major unless the claimed defense is so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures prescribed by Section 6 for alteration of existing agreements.

Recently, the First Circuit, relying on the reasoning of its sister circuits, succinctly stated that "in order for there to be a finding that a dispute is 'major' there must be a showing that the company's defense constitutes a 'substantial and clearly apparent change.'"

Can any "common threads" be gleaned from the various attempts to distinguish major disputes from minor ones? It is submitted that when

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the classification of a dispute is contested, the results may well depend on just what type of action the carrier has taken. If the hardship on the employees is relatively light, the existing collective bargaining agreement is more likely to be allowed to govern. This result is reached by labeling the dispute minor and allowing the appropriate Adjustment Board to rule on the action, unless the carrier's action is obviously and clearly contrary to the terms of the existing agreement. However, as the hardship on the affected employees increases, the existing employment agreement must, to a corresponding degree, substantiate the action taken. And, if the carrier's action results in permanent loss of jobs, then the existing employment agreement must expressly and affirmatively permit the conduct. Another factor which may be of significance is whether a formal major dispute is in progress. In Order of Railway Conductors v. Pitney, no section 6 notice had been exchanged, while in Order of Railroad Telegraphers v. Chicago & N.W. R.R., the union had submitted such a notice which would, if agreed upon, prohibit the employer from taking the complained of action.

When faced with the issue, it would seem that courts should not limit themselves to the confines of the existing employment agreement. Many issues are bargained over and only partially, if at all, find their way into the employment agreement. For example, suppose that a carrier has a past practice of sub-contracting part of its work, and the union unsuccessfully seeks to obtain, in prior major dispute negotiations, an “anti-farm out” provision. In such a case a union should not be allowed to succeed in alleging that a subsequent farm out violates section 2 Seventh and section 6. Such a practice would make a mockery of collective bargaining and allow unions to gain in court what they could not obtain at the bargaining table or before an adjustment board. Also, although the issue may have never been bargained over, and the existing employment agreement may only indirectly refer to the matter complained of, the existing agreement, taken as a whole, may implicitly prohibit or permit the questioned conduct. However, when the existing employment agreement


47. 323 U.S. 561 (1946).


49. This was the basis used by the Rutland court in determining that the action taken by the carrier was permitted under the agreement. 307 F.2d 21, 36 (2d Cir. 1962). Also worth noting is the "omitted case" language used by the Burley Court in its classic definition of major and minor disputes. See note 10 supra. Cf. Illinois Cent. R.R. v. Brotherhood of Loco. Firemen & Enginemen, 332 F.2d 850 (7th Cir.), cert. denied, 379 U.S. 932 (1964); Missouri K.T. R.R. v. Brotherhood of R.R. Trainmen, 342 F.2d 298 (5th Cir. 1965).
is silent as to the subject matter of the dispute, courts, as a rule, should not readily find violations of section 2 Seventh and section 6. This is so because, as the *Pitney* court stated, "the only conduct which would violate Section 6 is a change in those working conditions which are 'embodied' in agreements."\(^{50}\) Of course, working conditions, just as management rights, may be implicitly embodied in agreements.

To sum up, although the RLA distinctly recognized two types of disputes, one cannot with any degree of certainty predict whether a dispute will be adjudged minor or major until the relative hardships have been weighed on the equity scale. Without passing on the merits of such a procedure in general, the procedure appears inappropriate for deciding such cases under the RLA. If such a procedure is followed both carriers and their employees would be unable to judge their actions before they make them, and they would be placed in circumstances where the result is inevitable interruption of commerce, or at least, a threat of such an interruption.

Consequently, as an alternative, the existing employment agreement should be regarded as containing all the rates of pay, rules or working conditions, plus all management rights either in express form or contained impliedly within the contract, considering the contract along with the history of bargaining between the parties. With this background, disputes should, with rare exception, be referable to the Adjustment Board unless the formal major dispute procedures have run their course as discussed in the later stages of this paper. The exception to this scheme would be, as the Court implied in *Pitney*, confined to a case where the RLA was clearly violated or if the threatened action would be prejudicial to the public interest. For those cases where irreparable injury may result to the affected employees pending the Adjustment Board’s determination of the dispute, courts may still, in the exercise of sound discretion, enjoin the carrier’s action as discussed below.\(^{51}\) While this alternative may be considered too systematized to be workable, it must be remembered that the RLA, in a very systematic manner, funnels two very distinct types of disputes into two very different channels for adjudication. To find otherwise minor disputes to be major frustrates this procedure, increases the possibility of legal work stoppages, and places the courts in the highly inappropriate position of interpreting agreements, the very function which Adjustment Boards are uniquely designed to accomplish.

When the dispute is minor,\(^{52}\) the carrier's action which gave rise to and constitutes the subject matter of the dispute is rarely sought to be enjoined pending the outcome of the Adjustment Board proceeding. The reason for this is that, the RLA lacks any express status quo provisions

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51. See notes 54-58 infra and accompanying text.
52. Either because the parties regard it as minor or because it is judicially determined to be minor.
in connection with a minor dispute. Consequently, when faced with the issue, courts will generally deny a request to enjoin the carrier's action which is the subject matter of the minor dispute.\(^{53}\) An exception to this general rule is when the district court's discretion is soundly exercised to preserve the primary jurisdiction of the Adjustment Board. In *Brotherhood of Locomotive Engineers v. Missouri-K.-T. R.R.*,\(^{54}\) the Court held that the district judge has the discretionary power to condition the granting of a strike injunction sought by the carrier upon equitable considerations. Therefore, it is proper to require, as a condition of granting the injunction, that the carrier return to and maintain the situation as it existed before the dispute arose, or, at least, that the carrier pay the adversely affected employees the wages they would lose had the order not issued. However, the Court, in a footnote, carefully pointed out that it was not deciding whether the carrier's action could be subject to an injunction independently of any suit by the carrier for equitable relief.\(^{55}\)

The *M.K.T.* Court reasoned that:

> [F]rom the point of view of these [laid off] 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.\(^{56}\)

While such reasoning is rational, one question remains: Can the carrier be made whole if the Adjustment Board rules in its favor? It is submitted that it cannot and that the only answer is to allow the district judge to balance the relative hardships on a case by case basis.

Should a court enjoin the carrier's action which is the subject matter of the minor dispute only when the carrier is also seeking injunctive relief against a strike? While the Supreme Court has not considered the issue,\(^{57}\) several appellate courts have stated that a district judge may enjoin the carrier independently of any suit by the carrier for equitable relief.\(^{58}\) This seems to be the better view, for if a union or its members must threaten a strike before the court will enjoin the action of the carrier which is the subject matter of the minor dispute, the result may be the encouragement of strikes.

When will the relative hardships weigh in the favor of the employees? As in all instances where such a process is employed, it is impossible to

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55. Id. at 531 n.3.

56. Id. at 534.

57. See note 55 *supra* and accompanying text.

establish hard and fast rules. However, in those instances where there is
loss of jobs, the chances of obtaining the injunctive relief are greater than
where no loss of jobs is involved.\textsuperscript{60}

Although equitable consideration may warrant requiring a carrier to
rescind the action which was the subject matter of a minor dispute, self-
help on the part of employees over a minor dispute is never allowed. In
the leading case of \textit{Brotherhood of Railroad Trainmen v. Chicago River & I. R.R.},\textsuperscript{60} the Court rejected the brotherhood’s contention that self-help
or economic pressure was permissible while a minor dispute was before
the Adjustment Board and held that the strike injunction should issue.
Since \textit{Chicago River}, it may be said with great certainty that a strike
over a minor dispute is always enjoinable.\textsuperscript{61}

If the dispute had not reached the Adjustment Board level, there is
authority for the position that the injunction should be dissolved if the
dispute is not submitted to the Adjustment Board within a reasonable
time.\textsuperscript{62}

Applying the term “status quo” to minor disputes, although probably
without justification, it may be concluded from the foregoing that courts
will require unions to maintain the status quo in a minor dispute when
carriers seek relief from an authorized strike or a “wildcat strike.” How-
ever, the carrier will only be required to maintain the “status quo” in
those instances where the court’s discretion is soundly exercised to pre-
serve the jurisdiction of the Board of Adjustment. It follows, therefore,
that if the Board should find the carrier’s action to be in violation of the
existing employment agreement, a carrier may not be allowed to continue
with the action. The carrier will either be required to comply with the
Board of Adjustment’s decision or be regarded as having violated section
2 Seventh.

\textbf{E. Obligations in Major Disputes}

When no section 6 notice has been exchanged and a carrier is found
to have violated section 2 Seventh, a major dispute is said to exist. This

\textsuperscript{59} Compare Local 2144, Bhd. of Ry. Clerks v. Railway Express Agency, Inc., 409 F.2d
312 (2d Cir. 1969) with Brotherhood of Locomotive Firemen v. New York, N.H. & H. R.R.,
296 F. Supp. 1044 (D. Conn. 1968). \textit{But see Railway Express Agency, Inc. v. Lodge 2147,

\textsuperscript{60} 353 U.S. 30 (1957). The case is thoroughly analyzed in Murphy, \textit{Injunctive Prevention of Strikes on Railroads and Airlines}, 9 LAB. L.J. 329 (1958).

\textsuperscript{61} See, e.g., \textit{In Re Hudson & M. R.R., 172 F. Supp. 329 (S.D.N.Y.), aff'd sub nom.,
Stichman v. Brotherhood of R.R. Trainmen, 267 F.2d 941 (2d Cir. 1959), cert. denied, 361
U.S. 928 (1960); Missouri-Illinois R.R. v. Order of Ry. Conductors, 322 F.2d 793 (8th Cir.
1963); Murphy, \textit{Injunctive Prevention of Strikes on Railroads and Airlines}, 9 LAB. L.J., 329,
Disputes}, 60 COLUM. L. REV. 381, 386-87 (1960).

\textsuperscript{62} Manion v. Kansas City Terminal Ry., 353 U.S. 927 (1957); Hilbert v. Pennsylvania
R.R., 290 F.2d 881 (7th Cir.), cert. denied, 368 U.S. 900 (1961); The issue is explored in
Murphy, \textit{Injunctive Prevention of Strikes on Railroads and Airlines}, 9 LAB. L.J. 329, 337-38
(1958).
The effect of a Section 6 is to prolong agreements subject to its provisions regardless of what they say as to termination. . . . [T]he very purpose of § 6 is to stabilize relations by artificially extending the lives of agreements for a limited period regardless of the parties' intentions. 64

Consequently, RLA collective bargaining agreements do not "expire," but rather become "amendable" and remain in full force and effect until changed in accordance with the RLA.

Until the Supreme Court's decision in Detroit & T.S.L. R.R. v. United Transportation Union,65 the submission of a section 6 notice was not generally regarded as altering the parties' obligations to any degree insofar as status quo was concerned. This belief was derived from three sources: The Court's two decisions in Order of Railway Conductors v. Pitney66 and Williams v. Jacksonville Terminal Co.67 and the interpretations placed on section 6, section 5 First and section 10 by the NMB.

As previously discussed, the Court in Pitney stated that "the only conduct which would violate section 6 is a change in those working conditions which are embodied in agreements."68 In Williams, the Court, in considering the question of whether the status quo of section 6 applied, stated:

The institution of negotiations for collective bargaining does not change the authority of the carrier. The prohibition of Section 6 against change of wages or conditions pending bargaining and those of Section 2, Seventh, are aimed at preventing changes in conditions previously fixed by collective bargaining agreements. Arrangements made after collective bargaining obviously are entitled to a higher degree of permanency and continuity than those made by the carrier for its own convenience and purpose.69


64. Manning v. American Airlines, Inc., 329 F.2d 32, 34 (2d Cir.), cert. denied, 379 U.S. 817 (1964) (purpose of section 6 is "to prevent rocking of the boat by either side"); and keep the old agreement in effect until RLA's major dispute procedures are exhausted; therefore, carrier is required to continue to abide by dues check-off provision in old agreement. Id. at 35.


67. 315 U.S. 386 (1942).

68. See note 36 supra.

The NMB’s position on the status quo obligations of section 6, section 5 First, and section 10 is best reflected by the following excerpt from its 1968 Annual Report.

[T]he rights of the parties which they had prior to serving the notice of intention to change remain the same during the period the proposal is under consideration, and remain so until the proposal is finally acted upon. The Board has stated . . . that the serving of a Section 6 notice . . . does not operate as a bar to carrier actions which are taken under rules currently in effect.\textsuperscript{70}

The NMB also consistently responded to inquiries from unions alleging carrier violation of status quo by adhering to the principle set forth in the above quote.\textsuperscript{71} It would be impossible to even estimate just how many unions and carriers have, over the years, based their actions upon the NMB’s interpretation of the status quo provision. Indeed, such an effort would be fruitless, in light of \textit{Shore Line}.

In \textit{Shore Line}, the carrier, in 1961, notified the union that it intended to establish an outlying work assignment at Trenton, Michigan, thirty-five miles to the north of Lang Yard in Toledo. For many years prior to 1961, Lang Yard had been the only reporting point for all train and engine crews. The union filed a section 6 notice, proposing an amendment to the collective bargaining agreement to cover working conditions of employees who would work out of Trenton. Direct negotiations did not produce an agreement. While the matter was pending before the NMB, the carrier abandoned its intention to establish the Trenton assignments and announced outlying assignments at another point, Dearoad, Michigan, fifty miles to the north of Lang Yard. The union then withdrew from the NMB proceedings concerning the working conditions for the Trenton assignments and challenged the right of the carrier to make outlying assignments under the existing agreement. The union treated the carrier’s action in making the Dearoad assignments as a minor dispute. The case was submitted to a Special Board of Adjustment,\textsuperscript{72} which held that the existing collective bargaining agreement did not prohibit the railroad from making outlying assignments.\textsuperscript{73}


\textsuperscript{72} Special Boards of Adjustment may be convened at the request of either the rail carrier or the representative of the craft or class to handle, in a hopefully more expeditious manner, minor disputes otherwise referrable to the NRAB. RLA § 153, 45 U.S.C. § 153 Second (1954). This procedure has only been available since 1966 when the Act was amended. 80 Stat. 208, 209 (1966).

\textsuperscript{73} Specifically, the Board found:

What took place here was not a change in the recognized terminal, but simply amounted to an outlying assignment. There is nothing in the rules of agreement which precludes this carrier from establishing an outside assignment. Detroit & T.S.L. R.R. v. United Transp. Union, 396 U.S. 142, 146 n.9 (1969). The entire award is reproduced in Petitioner’s Brief for Certiorari at 32a-33a.
The carrier, relying on the Special Board’s holding, subsequently revived its plan to move work assignments to Trenton. The union responded with another section 6 notice, this time seeking to amend the agreement to forbid the railroad from making outlying assignments at all. Negotiations between the parties failed to produce a settlement and the union invoked the services of the NMB. While Mediation Board proceedings were pending, the carrier created the disputed work assignments at Trenton.

The union then threatened to strike and the carrier sought an injunction in a federal district court. The union counterclaimed for an injunction prohibiting the carrier from establishing the outlying assignments at Trenton. The district court dismissed the carrier’s complaint, but granted the injunction sought in the union’s counterclaim restraining the carrier from establishing any new assignments at Trenton or elsewhere. The Sixth Circuit affirmed.

In affirming the Sixth Circuit, the Supreme Court, for the first time, elucidated the rights and duties imposed by the status quo provisions in connection with major disputes. Interpreting the RLA to have three status quo provisions, section 6, section 5 First, and section 10, the Court, noting that the Act’s status quo requirement is central to its design, stated:

While the quoted language of §§ 5, 6, and 10 is not identical in each case, ... the intent and effect of each is identical so far as defining and preserving the status quo is concerned. The obligation of both parties during a period in which any of these status quo provisions is properly invoked is 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.

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74. The union lost its case when it sought to have the Special Board of Adjustment rule that the existing agreement prevented outlying assignments set aside. Nothing in the RLA prohibits the union from subsequently seeking to amend the agreement to prohibit such occurrences from happening again.


77. The district judge in his oral decision stated:
There doesn't appear to be any case law that precisely covers ... this case .... So that this Court apparently has got to take a pioneering position and establish a rule; whether it be a precedent or whether it will stand, there is no way of telling.


The Court pointed out that these working conditions need not be covered in an existing agreement. Further, the mere fact that the present collective agreement does not expressly prohibit outlying assignments would not have barred the carrier

from ordering the assignments . . . [if they] . . . had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions.80

The Court rejected the petitioner's interpretation of status quo requirements as being fundamentally at odds with the RLA's primary objective—of strike prevention. The Court: (1) noted that the "embodied in agreements" language of section 2 Seventh81 should not be read into the status quo provisions of Sections 5, 682 683 and 1084; (2) viewed section 2 seventh as not imposing any status quo obligations in major dispute procedures; (3) distinguished Pitney by stating that it, at most, involved the necessity of filing a section 6 notice and was not concerned with its status quo provision; (4) viewed the Williams case as inapposite in that the issue in Williams was whether the status quo requirement of section 6 applied at all, as there was no prior collective bargaining; and (5) dismissed the NMB's interpretation of section 6 as changing the plain, literal meaning of the RLA, a power not extended to the NMB by the Act itself.

Based on the foregoing, it is quite evident that the Court has reversed the heretofore commonly accepted interpretation of the status quo requirement of sections 6, 5 and 10, and, has fashioned a very mechanical and objective test for determining status quo violations.85 In doing so, however, it is submitted that the Court has provided the spark which may, depending on how the Shore Line holding is applied by the lower courts, lead to a fire which can only be put out, if at all, by Congress.

III. Shore Line and the Horizon

The most striking feature of the Shore Line holding is that the union had once previously and unsuccessfully tried to keep the carrier from making outlying assignments by treating such assignments as a minor

added). Compare the "both parties" requirements with the plain language of section 6. See note 25 supra and accompanying text. The Court had previously found the status quo of section 6 to be applicable to "both parties." Brotherhood of Ry. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969).

80. 396 U.S. at 154 (emphasis added).
81. See note 23 supra and accompanying text.
82. See note 26 supra and accompanying text.
83. See note 25 supra and accompanying text.
84. See note 27 supra and accompanying text.
85. Mr. Justice Harlan, joined by the Chief Justice, in an opinion in which he concurred in part and dissented in part, favored a more subjective test which would look to all of the parties dealings and not simply allow one party, by the mere serving of a section 6 notice, "to shackle his adversary and tie him to a condition that has historically and consistently been controverted." Detroit & T.S.L. R.R. v. United Transp. Union, 396 U.S. 142, 159 (1969).
Conceding the fact that a union may, in subsequent major disputes, seek to prospectively reverse holdings of the Adjustment Boards, it seems contrary to the well-established ideal that the RLA does not require a carrier or a union to either agree to a proposal in a major dispute to nevertheless permit involuntary agreement by allowing the union to submit a section 6 notice on the subject and forestall the carriers' activity until either the carrier accepts the union's proposal or the union withdraws it. Even if the union's proposal is withdrawn, what is there to keep the union from submitting it again and starting the major dispute procedure over again? The answer, of course, is to adopt the dissent in Shore Line, or, write “effective date and duration” clauses into agreements which will preclude the submission of section 6 notices for a specified period of time.

Notwithstanding the exclusion of section 6 notices by moratorium clauses, the time will come when they will expire. When they expire, how should a carrier judge its actions before it makes a change? Can the carrier look to prior Adjustment Board holdings as the Shore Line Railroad did? If the matter is not covered by the existing agreement, the answer is obviously no, at least where only one such instance was disputed.

In dismissing the Special Board’s holding which resulted when the union chose to treat the right to make outlying assignments as a minor dispute, the Shore Line Court merely quoted the Special Board’s holding in a footnote. Recognizing that the union was the moving party in the

86. See note 72 and 73 supra and accompanying text.
87. See note 85 supra.
88. Moratoriums on section 6 notices are commonly found in RLA collective bargaining agreements and are in keeping with section 2 Seventh. See note 23 supra and accompanying text. On moratorium clauses generally, see Harper, Major Disputes Under the Railway Labor Act, 35 J. Am. L. & Com. 3, 28-29 (1969). In practice, a complete moratorium on all section 6 notices for a specified period of time is the most advantageous from a management viewpoint. An example of such a clause is the agreement between Pan American World Airways and the IBT covering Clerical and Related Employees, signed August 12, 1969, wherein it is stated in Article 45:

The parties acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, (i) the Company and the Union each voluntarily and unqualifiedly waives the right to serve any notice of intended change until after May 2, 1972, and (ii) during the period prior to May 3, 1972, each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.

More prevalent is the “modified moratorium clause” which places a complete moratorium for a specified period on matter included in negotiations and a moratorium against the progressing of other section 6 notices on other matters beyond the procedures for peacefully resolving disputes. The clause may also limit the type of section 6 notices which may be submitted for a specific period, or may combine any of the above. The type of moratorium clause, if any, that is placed in an agreement, is a negotiable item.

89. See note 73 supra.
Special Board proceeding, one wonders what the Board would have ruled if the question presented to the Special Board was whether, under the agreement in effect, the carrier has the right to make outlying assignments? In other words, it appears that the *Shore Line* Court forgot what it said in *Pitney* about the interpretation of collective agreements being intricate and technical.\(^90\) The Court seemingly interpreted the Special Board's award as meaning that there is nothing in the agreement which gives the carrier the right to make outlying assignments.\(^91\) Consequently, what the Court so carefully avoided doing in *Pitney*, *i.e.*, interpreting the existing agreement, the Court seemingly did, one step removed, without hesitation in *Shore Line*, *i.e.*, interpreting an interpretation of the agreement.

Therefore, parties to a minor dispute should use great care in phrasing the issue to be decided in minor disputes. While the argument may be advanced that the *Shore Line* doctrine of status quo cannot be affected by an Adjustment Board decision, if this be the case, then indeed the distinction between minor and major disputes mysteriously disappears in the waves of *Shore Line*, in the form of a section 6 notice.

Unions, obviously, will now assert status quo violations any time a major dispute is in progress when a carrier takes some action which is distasteful to the union. While it is predictable that few of these assertions will wind up in court as a claim for injunctive relief, there is, since *Shore Line*, nothing to prohibit a union from taking a particular dispute through minor dispute proceedings and, if unsuccessful, to then allege status quo violations in federal court. Indeed, the union will improve its position in a minor dispute by arguing both issues before the Adjustment Board, *i.e.*, if the contract does not prohibit the action then the status quo provisions do.

*Shore Line* does not answer all of the questions that will arise. For example, what does “involved in or related to that dispute” mean? On its face, it would seem, taking the *Shore Line* facts as an example, that if the carrier made the assignments and then the union submitted the section 6 notice, status quo would not apply. “Not so,” said a federal district judge recently when he held that a working condition imposed by the carrier more than a month before the section 6 notice was submitted which would, if the change were agreed to, cancel the working condition, violated the status quo of Section 6.\(^93\) Therefore, it seems as though while one

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90. See note 38 *supra* and accompanying text.
91. Nothing in the record indicates this point was raised in *Shore Line*. It is worth noting that apparently the Shore Line Railroad could have had the same Special Board interpret its award. RLA § 3 First (m), 45 U.S.C. § 3 First (m) (1964). Or, at least, if it were felt that section 3 First (m) was not applicable to Special Boards convened under section 3 Second, then the carrier could have requested another Special Board be convened to consider the issue of whether anything contained in the agreement gave the Shore Line Railroad the right to make outlying assignments.
92. See note 79 *supra* and accompanying text.
major dispute is running its course, a carrier's action not involved in or related to that dispute may still be brought under the status quo penumbra by the submission of another section 6 notice. An opportunity for an early determination of just what that language means was lost when the Supreme Court refused to review a recent Fifth Circuit decision which held that discipline in the form of mass discharge of illegal "wildcat" strikers while a section 6 notice was effective, is a violation of status quo.\footnote{National Airlines, Inc. v. International Ass'n of Machinists, 430 F.2d 957 (5th Cir. 1970), rev'd, 308 F. Supp. 179 (S.D. Fla. 1970), cert. denied, 39 U.S.L.W. 3297 (U.S. 1970).}

In this unique case, there was no assertion made that the right to discharge employees or otherwise discipline them was involved in or related to the major dispute that was running its course. Even if such an assertion had been made, questions would have remained: What if that right to discipline was expressly granted to the carrier in the agreement? Or, if it had not been granted, under \textit{Shore Line} guidelines, what was in fact an actual objective working condition?\footnote{Seemingly, the \textit{Shore Line} decision does not prevent carriers from continuing to exercise rights established by an agreement, even if a section 6 notice proposing to prohibit the exercise of those rights has been served. The court implicitly recognized that where the agreement covers the subject matter of the dispute, it will govern the parties' rights pending exhaustion of major dispute procedures with respect to a proposal to change the agreement. The Court stated that section 2 Seventh "operates to give legal and binding effect to collective agreements, . . . ." Detroit & T.S.L. R.R. v. United Transp. Union, 396 U.S. 142, 156 (1969). If a union could unilaterally abrogate a carrier's right to take action expressly authorized by the existing agreement, the agreement would have no legal and binding effect.}

Other questions which this case raises include whether discipline, heretofore normally regarded as a minor dispute or grievance, becomes a question of status quo when it occurs during the period while a section 6 notice is running its course. Does it remain minor if it is confined to a few employees and a question of status quo if it affects the preponderance of the carrier's employees? Would it be a "major dispute," \textit{i.e.}, violate section 2 seventh, if it occurred during a moratorium period on section 6 notices, \textit{i.e.}, when no formal major dispute was in progress?

What probably will become the hardest part of the \textit{Shore Line} doctrine to apply is in those cases where the subject matter of the dispute is not covered by the written agreement and the carrier takes action claiming the condition to have occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions.

In \textit{United Transportation Union v. St. Paul Union Depot},\footnote{Case No. 3-70-90 (D. Minn. filed April 17, 1970).} after both parties had exchanged section 6 notices dealing with job abolishments, the carrier abolished three switchtender positions. The parties stipulated that there was an established practice on the property where job assign-
ments had been discontinued and that such practice was known and accepted by the union. The court, in view of the past practice and the *Shore Line* decision ruled that the carrier had the right to abolish established job assignments.

In another case, where the past practice was not so well-established, a California federal district court granted a preliminary injunction prohibiting the company from abolishing regular tugboat crews. Quoting from the *Shore Line* decision, the court found that although efforts had been made to reduce the number of crews for ten years, these efforts were resisted by the unions and, therefore, there had been no actual objective working condition or practice in effect prior to the time the pending dispute arose which permitted management to reduce at will the number of regular tugboat crews. In this case, for the past six years, the unions have filed section 6 notices covering the issue of reduction in crews and job protection formulas and a formal major dispute was in progress at the time of this writing. The case is not clear on the point, but again the issue is raised: What effect do unsuccessful prior attempts to incorporate provisions in an agreement have on determining whether the one party had a right to do that which the other party unsuccessfully sought to prohibit? Items such as these must be considered by courts when they are asked to rule on status quo violations. In other words, it appears that the dissenters in *Shore Line* had a valid point when they rejected the objective test of the majority in determining status quo violations.

IV. Conclusion

In 1945, the Court in *Burley* judicially defined major and minor disputes. Since that time courts have continually been asked to apply these definitions. In this writer's opinion, the answers have generally been slanted toward a "management rights" concept of industrial relations. In this context management has a particular right until the Adjustment Board rules otherwise or unless the action taken is found to be wholly and patently contrary to the existing agreement. Now the Court has judicially defined status quo and it is predicted that the same furor which followed *Burley* will also follow *Shore Line*. Will the major-minor distinction be dissolved when a section 6 notice has been submitted? Will parties be able to upset final and binding awards of Adjustment Boards by merely submitting section 6 notices? Will carriers have the collective bargaining strength necessary to limit the ability of unions to submit section 6 notices? Only time will enable one to assess the true effect of *Shore Line* on the world of industrial relations under the RLA.

98. See note 85 supra.