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The Labor Injunction--Past, Present, and Future

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THE LABOR INJUNCTION—PAST, PRESENT, AND FUTURE

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I. INTRODUCTION

> The injunction had been used to break a strike; to take one side of an issue; to determine wages . . . and standards of living by the brute force of judicial power—instead of leaving it to a matter of adjustment by free American workers.**
>
> [But,] [a]s labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act. Thus it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones.***

A. History

The earliest reported American labor case was tried in 1806 when the Philadelphia cordewainers were indicted for striking for higher wages. The case held the association of employees for the purpose of raising wages to be a criminal conspiracy.[1] Later, criminal prosecutions fell into disuse, partly as the result of the adverse decision in *Commonwealth v. Hunt*[2] and partly because of public opinion. On the civil side, however, the volume of labor litigation sharply increased. Suits were grounded on various tort theories such as nuisance, trespass, and interference with advantageous relationship, as well as the Sherman Act. Under the prima facie tort doctrine and the Sherman Act, the legitimacy

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** 75 CONG. REC. 5480 (1932) (Remarks of Rep. La Guardia).

*** Boys Market v. Retail Clerks Union, 398 U.S. 235, 251 (1970).

1. Commonwealth v. Pullis, 3 Commons & Silmore, Soc. Hist. Am. Soc. 59-248 (1910).

2. 45 Mass. (4 Met.) 111 (1842).

of union conduct was required to meet the "objectives test": if the union's objective appeared to the judge to be lawful, only then would he refuse a temporary restraining order. Moreover, even if the objectives were found to be legitimate, economic pressure could only be exerted through means receiving judicial acceptance. The legal doctrines in the labor cases were often illusory and ambiguous and tended to reflect the economic and social views of the judges who applied them.[3]

The foundation of this judicial regulation was the labor injunction. Damages had proved unsatisfactory to employers,[4] while the injunction offered swift and comprehensive relief. A temporary restraining order against the union could be obtained within a matter of hours.[5] Once the injunction was granted, the strikers' fervor was abated, and the strike was lost. That the injunction successfully broke strikes can be seen from the fact that they were rarely appealed and the fact that permanent injunctions were rarely sought.[6] Moreover, violators of the order

3. Professor Gregory has explained the situation in the following manner:

> A referee of a boxing match applies a set of arbitrary rules to the fighters; but he would never think of making up such rules as he goes along or even of introducing into his decisions long-felt personal notions of what he believes is fair in the ring. Referees of sporting contests accept and conform to a set of legislated rules .... Courts are expected traditionally to behave in much the same fashion. ... For any modifications of them strike at very fundamental social policy and should be considered and debated by our traditional policy-making branch of government. In this way such changes will become the resultant of all social opinion and will not tend merely to reflect the notions of a few judges, which vary from man to man. ...
>
> But perhaps the most alarming feature of the labor injunction ... was the ease with which its use increasingly tempted judges to dispense with any well-founded theory of illegality. ... They came to look at much of organized labor's economic coercive activity as enjoinable in itself, without bothering to find or to state in their opinions that it was also unlawful. ... It seemed to lead many courts to grant sweeping injunctions on the basis of personal or class dislike of organized labor's economic program instead of in accordance with settled standards of law. A process of this sort lent itself admirably to the use of the illegal purpose doctrine.

GREGORY, LABOR AND THE LAW 91-104 (2nd rev. ed. 1961).

4. Unions were often judgment-proof; there were procedural difficulties in suing labor organizations as entities; juries were available to the defendant unions; and such actions rarely provided relief until long after the dispute was over. Note, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-La Guardia*, 70 YALE L.J. 70, 72 (1960).

5. *See* WITTE, THE GOVERNMENT IN LABOR DISPUTES 90 (1932).

6. For example, there were 118 reported applications for injunction in the Federal courts between the years 1900 and 1927. Nine were denied, but there were only 33 appeals from the restraining orders. FRANKFURTER & GREENE, THE LABOR INJUNCTION, Apps. 1 & 3 (1930). Of the 88 temporary injunctions reported from 1901-1928, only 32 reached the permanent injunction stage. Witte, *supra* note 4, at 79.

might be subject to criminal and civil contempt proceedings held without a jury and before the same judge who had issued the original decree.[7]

The initial stages of the injunctive process were particularly subject to procedural inadequacies. The severity of the problem is illustrated by Frankfurter and Greene who reported the following data in 1930:

> Of the one hundred and eighteen cases reported in the federal courts during the last 27 years, not less than seventy ex parte restraining orders were granted without notice to the defendants or opportunity to be heard. In but 12 of these instances, was the bill of complaint accompanied by supporting affidavits; in the remaining 58 cases, the court's interdict issued upon the mere submission of a bill expressing conventional formulas, frequently even without a verification.[8]

Nor were these the only criticisms against the labor injunction. A major criticism was that injunctions were essentially repressive in the sense that they required the employees to desist from using the most effective form of self-help but did nothing to solve the underlying problems that drove men first to organize and then strike.[9] Perhaps the sharpest accusation was that the courts had one law for business combinations but another for labor unions.[10]

Moreover, the number of labor injunctions greatly increased after the *Debs*[11] decision in 1895. In the 1880's, twenty-eight injunctions were issued; after the *Debs* decision, 122 were issued in 1890's; 328 were issued from 1900 to 1909; and 446 were issued from 1910 to 1919.[12] Thus, the use of the injunction in labor disputes flourished in state and federal courts and led to the characterization of the period as the era of "Law by injunction."[13]

The use of labor injunctions by the judiciary was not without protest. After the *Debs* injunction, the 1896 Democratic platform contained these words:

7. *See* WITTE, *supra* note 4, at 100-01.
8. FRANKFURTER & GREENE, *supra* note 5, at 64.
9. Cox, *The Role of Law in Labor Disputes,* 39 CORNELL L.Q. 592, 595 (1954).
10. *Id.*
11. In re Debs, 158 U.S. 564 (1895).
12. WITTE, *supra* note 4, at 84.
13. *See* S. REP. No. 163, 72d Cong., 1st Sess. 18 (1932).

> We denounce arbitrary interference by Federal authorities in local affairs as a violation of the Constitution of the United States and a crime against free institutions, and we especially object to government by injunction as a new and highly dangerous form of oppression by which Federal Judges, in contempt of the laws of the states and rights of citizens, become at once legislators, judges and executioners.[14]

By 1908, the platforms of both the Democratic and Republican parties had planks against the unbridled use of the labor injunction. Bills were introduced in each session of Congress for twenty years, from 1894 until 1914, to this effect.

In 1912, Wilson was elected President on the promise of a New Freedom. This campaign pledge of a New Freedom resulted, among other things, in the Clayton Act of 1914.

Section 6 of the Clayton Act provided:

> that the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural and horticultural organizations instituted for the purpose of mutual help and not having capital stock or conducted for profit, or to forbid or restrain individual members from such organizations from lawfully carrying out the legitimate objectives thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws.[15]

Furthermore, section 20 bars the issuance of injunctions by Federal courts "in any case between an employer and employees [involving] . . . a dispute concerning terms or conditions of employment" and concludes with the broad language, "[n]or shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."[16]

Although the legislative history of the Clayton Act was obscure,[17] an apparent attempt was made to narrow the jurisdiction of the federal courts. Indeed, the Act was hailed by labor leader, Samuel Gompers, as the laborer's "Magna Carta."[18]

14. McCulloch, *New Problems in the Administration of the Labor-Management Relations Act: The Taft-Hartley Injunction*, 16 Sw. L.J. 82, 88 (1962).
15. 38 Stat. 731 (1914), *as amended* 15 U.S.C. § 17 (1963).
16. 38 Stat. 738 (1914), *as amended* 29 U.S.C. § 52 (1965).
17. *See* Frankfurter & Greene, *supra* note 5, at 141-45.
18. 21 American Federationist 971.

The federal courts, however, gave a restrictive interpretation of the terms of the Act. In *Hitchman Coal & Coke Co. v. Mitchell*[19] the Supreme Court allowed an injunction against a union seeking recognition on the ground of unlawful purpose without even discussing the Clayton Act sections. The Clayton Act's attempted labor exemption was most totally rendered impotent in the case of *Duplex Printing Press Co. v. Deering*.[20] The Court held that section 6 did not confer immunity, "where . . . [unions] depart from . . . normal and legitimate objects."[21] Nor did section 20 bar an injunction since it was restricted to "a case between an employer and employees"[22] and secondary activity was involved here.

Thus, it became apparent that the objectives test survived the Clayton Act. In the second *Coronado Coal Co. v. UMW*[23] case, Mr. Chief Justice Taft stated:

> The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.[24]

Federal courts still decided according to their views of social and economic policy the question of whether the employees' demands justified their combining to inflict injury on an employer. Following the Clayton Act, injunctions were issued by federal courts in ten of the next thirteen cases in which they were requested.[25] During the period from 1920 to 1930, the number of injunctions granted by state and federal courts actually increased to 921.[26] The first legislative attempt to curtail the use of the injunction in labor disputes became little more than a re-enactment of the Sherman Act. In fact, in one way, the position of labor was distinctly worse. Under the Clayton Act, a

19. 245 U.S. 229 (1917).
20. 254 U.S. 443 (1921).
21. *Id.* at 469.
22. *Id.* at 470.
23. 268 U.S. 295 (1925).
24. *Id.* at 310.
25. McCulloch, *supra* note 13, at 89.
26. WITTE, *supra* note 4, at 84.

private party could obtain injunctions,[27] whereas prior to the Act, the federal government alone could obtain injunctions against unlawful restraint of trade.[28]

Results such as these led to a continued clamor for reform. The 1928 Republican National Convention adopted a plank as follows:

> [T]he party favors freedom in wage contracts, the right of collective bargaining by free and responsible agents of their own choosing which develops and maintains that peaceful cooperation which gains its first incentive through voluntary agreement.
>
> We believe that injunctions in labor disputes have in some instances been abused and have given rise to a serious question for legislation.[29]

The Democratic National Convention spoke as follows:

> We recognize that legislative and other investigations have shown the existence of grave abuse in the issuance of injunctions in labor disputes. No injunctions should be granted in labor disputes except upon proof of threatened irreparable injury and after notice and hearing and the injunction should be confined to those acts which do directly threaten irreparable injury.[30]

Added to the clamor was the theory developed during the Depression that, if workers were allowed to bargain collectively with their employers, they could improve their wages and working conditions, resulting in general economic improvement for the whole country.[31]

The efforts culminated in 1932 with the Norris-La Guardia Act. The Act passed by large majorities in both Houses of Congress,[32] commanded strong support in both parties, and was signed by President Hoover.

B. The Norris-La Guardia Act

The Norris-La Guardia Act brought three interrelated policies to bear in labor disputes.[33] First, it rejected the injunction as a

27. *See* 38 Stat. 737 (1914), *as amended* 15 U.S.C. § 26 (1963).
28. *See* 15 U.S.C. § 4 (1963).
29. 75 CONG. REC. 4502 (1932).
30. *Id.*
31. COX, LAW AND THE NATIONAL LABOR POLICY 4-7 (1960).
32. The vote was 75 to 5 in the Senate and 362 to 14 in the House. BERNSTEIN, THE LEAN YEARS 413 (1960).
33. Note, *Labor Injunctions and Judge-Made Labor Law,* 70 YALE L.J. 70, 73 (1960).

remedy. Second, the Act declared that federal courts were not the proper institution to formulate substantive labor policy.[34] Third, it assured,

> that the government shall occupy a neutral position, lending its extraordinary power neither to those who would have labor unorganized nor to those who would organize it.[35]

The Act reflected a laissez-faire philosophy—that the settlement of labor disputes is best accomplished privately at the primary level of economic competition.[36]

The device chosen by Congress to accomplish these goals was the regulation of the equity jurisdiction of the federal courts under its power in Article III of the Constitution. Section 1 removes from the federal courts "jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute"[37] unless the strict requirements of sections 7 and 8 are met.[38] Section 13 broadly defines a "labor dispute" to include "any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee."[39] In addition to these general statements, section 4 explicitly immunizes nine separate activities, including strikes and work-stoppages, picketing, and payment of strike benefits.

Section 2, which in many respects foreshadowed the National Labor Relations Act, in order to avoid the pitfall that killed the Clayton Act, declares the policy of the United States in relation

34. *See* Marine Cooks v. Panama S.S. Co., 362 U.S. 365, 370 n.7 (1960). (Norris-La Guardia "was prompted by a desire . . . to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige must suffer.")

35. 75 CONG. REC. 4915 (1932) (remarks of Senator Wagner).

36. *See* S. REP. No. 163, 72d Cong., 1st Sess. 18 (1932); H. REP. No. 669, 72d Cong., 1st Sess. 3 (1932).

37. 29 U.S.C. § 101 (1965).

38. Section 7 requires a hearing in open court, substantial and irreparable injury, greater injury by denial than granting, no adequate remedy at law, and inability or unwillingness of public officers to protect property. Section 8 also provides that "every reasonable effort" must be made to settle the dispute before injunctive relief may be granted.

39. 29 U.S.C. § 113 (1965). The House Report described the broad provisions of section 13 as necessary "in order that the limitation may not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes . . . ." H. REP. No. 669, 72d Cong., 1st Sess. 11 (1932).

to labor disputes.[40] Section 3 declares the hated yellow-dog contract to be contrary to public policy and unenforceable in any federal court.[41] Section 5 deals with the question of conspiracy of the enumerated acts.[42]

The purpose of section 6 was to state the principles on which the relationship between principal and agent was to be determined in labor cases.[43] Since, previously, employer relief was often in the form of blanket injunctions against all sorts of

40. 29 U.S.C. § 102 (1965), declared that "[t]he individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor." It also affirmed his right to "full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment and . . . [to] be free from the interference, restraint, or coercion of employers of labor . . . in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

41. For an example of a yellow-dog contract cited by Senator Norris, see 75 CONG. REC. 4626 (1932). Such contracts had been approved by the Supreme Court in *Hitchman Coal and Coke v. Mitchell,* 245 U.S. 229 (1917). There was some doubt as to the constitutionality of the provision under the "right of contract." *See* 75 CONG. REC. 4679 (1932). The constitutionality of Section 3 was upheld in the case of *Laub v. Skinner,* 303 U.S. 335 (1937).

42. 29 U.S.C. § 105 (1965) provides: "No court of the United States shall have jurisdiction to issue an . . . injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in Section 104 of this title." "This section is included principally because many of the objectionable injunctions have been issued under the provisions of the anti-trust laws, a necessary prerequisite for invoking the jurisdiction of which is a finding of the existence of a conspiracy or combination and without which no injunction could have been issued." H. REP. No. 669, 72d Cong., 1st Sess. 8 (1932).

43. Under the law of conspiracy as developed in labor cases, unions "were held responsible not for acts of agents who had authority to act, but for every act committed by any member of a union merely because he was a member, or because he had some relation to the union although not authorized by virtue of his position to act for the union in what he did." United Bhd. of Carpenters and Joiners v. United States, 330 U.S. 395, 419 (1947) (dissenting opinion). Thus, section 6 "remedies a grossly unfair practice that has grown up of holding officers and members of unions liable for damages for the acts of other members without proof of participation or direction or ratification of such acts." 75 CONG. REC. 5463 (1932) (remarks of Rep. O'Connor). 29 U.S.C. § 106 (1965) provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any [federal] court . . . for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

This section was particularly necessary, since, under the reasoning of the *Debs* case, an injunction might be issued to break a strike merely because of unlawful acts which the union had not authorized and for which it would not be responsible under the normal rules of agency. A. COX & D. BOK, LABOR LAW 99 (6th ed., 1965).

activities,[44] section 9 allowed injunctions to prohibit only such specific acts as had been expressly complained of and expressly included in the findings of fact. Section 10 grants to either party the right to appeal from an order granting or denying a temporary labor injunction, and the appeal is to be heard "with the greatest possible expedition, giving the proceeding procedence over all other matters except older matters of the same character."[45] Finally, section 11 grants a jury trial in contempt cases.

It should be noted that the Act makes no distinction between doing the acts in question with a legal object in view and doing them with an illegal object, thus abrogating the "objectives test."[46] Judicial inquiry is limited to the narrow question of whether a "labor dispute" exists.[47] It should also be noted that the Act did not make the conduct listed lawful for all purposes, but rendered it only nonenjoinable.[48] Perhaps the significance of Norris-La Guardia is not what it does for organized labor but what it permits organized labor to do for itself without judicial interference.[49]

44. *See, e.g.*, Reed Co. v. Whiteman, 238 N.Y. 545, 144 N.E. 885 (1924). "[D]efendants . . . are perpetually and permanently enjoined . . . from hampering, hindering or harassing in any other way the free dispatch of business by the plaintiff, and from using any and all ways, means and methods of doing any of the aforesaid forbidden acts, either directly or indirectly, or through their agents, officers or others." 238 N.Y. at 546. *U.S. v. Taliaferro*, 290 F. 214 (W.D.Va. 1922), *aff'd*, 290 F. 906 (4th Cir. 1923), shows the sweeping effect of an injunction which has unnamed defendants. After a dragnet injunction, a barber unconnected with the strike displayed a sign in his window saying, "No scabs wanted in here." He was found guilty of contempt of an injunction against "abusing, intimidating, molesting, or annoying."

45. 29 U.S.C. § 110 (1965).

46. *See* Wilson & Co. v. Birl, 27 F. Supp. 915 (E. D. Pa), *aff'd*, 105 F. 2d 948 (3d Cir. 1939). "In short, [Norris-La Guardia] was an adoption of the philosophy of Justice Brandeis's dissenting opinion in Duplex . . . which condemned the point of view which made conduct actionable 'when done for a purpose which a judge considered socially or economically harmful and therefore branded as malicious and unlawful.'" 27 F. Supp. at 917.

47. *See, e.g.*, Marine Cooks v. Panama S.S. Co., 362 U.S. 365 (1960).

48. *See* Gregory, *supra* note 3, at 187, 190. *But see* United State v. Hutcheson, 312 U.S. 219 (1941): "But to argue, as it was urged before us, that the *Duplex* case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability . . . ." *Id.* at 234-35.

49. *See* Gregory, *supra* note 3, at 186, 197. Norris-La Guardia "belongs to that time bracket in which unions were expected to, and did, depend on their own economic resources to put their programs across. Thus the act is the last monument to the spirit of complete free enterprise for unions. . . . It did not in any way commit the government to intervention on the side of the unions. . . . Another way of looking at it is to suppose that Congress was creating laissez faire, or economic free enterprise, for organized labor as well as for big business." *Id.* at 192, 197.

The Norris-La Guardia Act achieved its intended effect. Prior to its enactment, there were at least 508 labor injunctions issued by the federal courts.[50] During the next eighteen years, only sixty-six injunctions were issued.[51]

The notion that law had no positive role to play in labor relations was short-lived. The amended Railway Labor Act of 1934, the National Labor Relations Act of 1935, and the Labor Management Relations Act of 1947 subjected employers and unions to legal rights and duties. Moreover, the enforcement of these laws may require the use of injunctions in situations inconsistent with Norris-La Guardia, and the federal judiciary may be encouraged again to assume policy-making functions. Therefore, discussion of the contemporary labor injunction must begin with a comparison of these different acts.[52] Hopefully, such a comparison will shed some light on the present-day usefulness of the policies inherent in Norris-La Guardia.

II. The Railway Labor Act

A. The Statutory Background

In its original form, the Railway Labor Act was enacted in 1926, replacing the Transportation Act of 1920. That prior statute placed its reliance upon completely voluntary settlement and was not supported by any legal sanction.[53] Because of the infirmities of the earlier legislation, the 1926 Act was passed. The Act adhered to a policy of the amicable adjustment of labor disputes, but buttressed that policy by creating certain definite legal obligations. The Act "channeled, but did not eliminate the operation of private forces in the determination of labor disputes,"[54] but the legislative history of Norris-La Guardia shows

50. Witte, *supra* note 4, at 84.
51. S. Doc. No. 7, 82d Cong., 1st Sess. (1951).
52. *See generally* Aaron, *The Labor Injunction Reappraised,* 10 U.C.-L.A.L. Rev. 292 (1963); Loeb, *Accommodation of the Norris-La Guardia Act to Other Federal Statutes,* 11 Lab. L.J. 473 (1960); Comment, *Jurisdiction of Federal Courts to Enjoin Labor Disputes,* 32 Tenn. L. Rev. 264 (1965); Comment, *Labor Injunctions and Judge-Made Labor Law,* 70 Yale L.J. 70 (1960).
53. *See* Virginian Ry. v. System Fed'n no. 40, 300 U.S. 515, 542 (1936).
54. Rutland R.R. v. Locomotive Eng'rs, 307 F.2d 21, 37 (1962), *cert. denied,* 372 U.S. 954 (1963). *See* Brotherhood of R.R. Trainmen v. Toledo, P.&W.R., 321 U.S. 50 (1944): "The policy of the Railroad Labor Act was to encourage use of the nonjudicial process of negotiation, mediation and arbitration for the adjustment of labor disputes . . . . The overall policy of the Norris-La Guardia Act was the same." *Id.* at 58.

that Congress gave little attention to the accommodation of the two Acts.[55]

In the original Act of 1926, a distinction was drawn between disputes over the interpretation of existing collective bargaining agreements and disputes over proposed changes in agreements. The former, judicially[56] labelled "minor" disputes, were to be submitted to binding arbitration before boards agreed upon by the parties; the latter, termed "major" disputes, were left to supervised collective bargaining. This voluntary machinery proved unsatisfactory,[57] and, in 1934, amendments were passed, but again no indication was given of the extent to which the anti-injunction statute would limit the remedial power of courts in RLA cases.[58]

In both types of disputes, the Act requires that, as a first step, the parties make every reasonable effort to settle their differences in conference.[59] Where private negotiation fails, the procedures for settling major and minor disputes diverge. In the case of a minor dispute, either party may submit the matter to the National Railroad Adjustment Board, and the Board's decision is final and binding on the parties.[60] Major disputes commence with the issuance of a notice known as a "Section 6 notice," given by the party seeking to change existing agree-

55. In response to a question of whether the anti-injunction bill would make it possible for unions to tie up the railroads, representative La Guardia replied that the RLA "takes care of the whole labor situation pertaining to railroads. They could not possibly come under this for the reason that we provided the machinery there for settling labor disputes." 75 CONG. REC. 5499 (1932). Later, after referring to section 8, La Guardia stated: "So that there is the tie-up between the provisions of the Railway Labor Act and the necessity of exhausting every remedy to adjust any difference which might arise, the workers could not and would not think of going on strike before all the remedies provided in the law have been exhausted. If the railroads have complied, they would not, as has been suggested, be deprived of any relief which they may have in law or equity." *Id.* at 5504-05.

56. These terms were first used in *Elgin J. & E. Ry. v. Burley*, 325 U.S. 711, 722-28 (1945).

57. Deadlocks often resulted from the refusal by one side to participate in the voluntary boards and in many cases in which boards were established no decision could be reached because of the equal number of labor and management members on each board. *See* H. R. REP. No. 1944, 73rd Cong., 2d Sess. 3 (1934).

58. Comment, *Labor Injunctions and Judge-Made Labor Law, supra* note 52, at 76-77.

59. Railway Labor Act § 2 First, 45 U.S.C. § 152 First (1954) [hereinafter cited as RLA].

60. RLA § 3 First (i) (l) (m) (n), 45 U.S.C. § 153 First (i) (l) (m) (n) (1954). *See* Union Pac. R.R. v. Price, 360 U.S. 601 (1959). *See generally* Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567 (1937).

ments.[61] If settlement cannot be reached in conference, the matter is referred to mediation under the auspices of the National Mediation Board.[62] If mediation fails, the Mediation Board proposes voluntary arbitration to the parties.[63] Finally, if the President of the United States desires, he is empowered to set up an emergency board to investigate and report to him with respect to the dispute.[64] The carrier may not alter rates of pay, rules, or working conditions until the Mediation Board has acted upon the dispute.[65]

A large backlog of undecided claims accumulated before several divisions of the National Railroad Adjustment Board (NRAB), delaying decisions from a minimum of several months to ten years or more.[66] To expedite disposition of minor disputes, Congress, in 1966, passed amendments which gave parties to such disputes the right to request special boards.[67]

B. Mandatory Injunctions Commanding the Employer to Bargain

The Railway Labor Act (RLA) was the first important entree of the federal government into the field of labor relations in an attempt to structure the relationship of the parties within a legal framework.[68] In this important interstate industry, Congress concluded that legal as well as economic forces were needed to adjust the respective interests of labor, management, and the public.[69] The RLA guarantees the right to organize[70] and estab-

61. RLA § 2 Seventh, 6, 45 U.S.C. § 152 Seventh, 156 (1954).
62. RLA § 5, 45 U.S.C. § 155 (1954).
63. RLA § 5, 7, 45 U.S.C. § 155, 157 (1954).
64. RLA § 10, 45 U.S.C. § 160 (1954).
65. RLA § 6, 45 U.S.C. § 156 (1954). For a concise statement of the major dispute procedures of Mr. Justice Harlan, see Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 393 (1969).
66. *See* Walker v. Southern Ry., 385 U.S. 196, 198 (1966).
67. A union or carrier may request the establishment of a special board of adjustment for the purpose of resolving disputes otherwise referable to the NRA or disputes which have been pending before the NRAB for a year or more. The award of such boards has the same effect as an NRAB award. 3 CCH LAB. L. REP. ¶ 5675, at 11,255. In addition, the 1966 amendments streamlined the judicial enforcement and review of awards handed down by the NRAB or other adjustment boards. *See* 3 CCH LAB. L. REP. ¶ 6090, 551, at 11,497. Figures on the performance of the special boards of adjustment provided by the 1966 admendments are not available yet, but the Report of the National Mediation Board for 1967 reveals no appreciable decline in NRAB delay, nor any great use of this new device. *See* REPORT OF NMB (1968) at 44.
68. Two earlier attempts to regulate labor-management relations, the Erdman Act and Sec. 7 of the National Industrial Recovery Act, became subject to constitutional difficulties in *Adair v. United States,* 208 U.S. 161 (1908), and *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935).
69. Loeb, *supra* note 52, at 477.
70. RLA § 2 Fourth, 45 U.S.C. § 152 Fourth (1954).

lishes an employer's duty to recognize and bargain with the majority union.[71] Prior to the enactment of Norris-La Guardia, the power of federal courts to restrain violations by an employer of rights guaranteed employees by the RLA had been upheld by the Supreme Court.[72] The question of whether this judicial remedy survived Norris-LaGuardia was first presented in *Virginian Ry. v. System Federation No. 40*,[73] which arose after the 1934 amendments to the RLA had been adopted. There, the Supreme Court held that Norris-La Guardia does not prohibit issuance of a mandatory injunction commanding an employer to bargain with a certified union. Discussing section 9 of Norris-La Guardia, the Court stated the purpose of this section

> was not to preclude mandatory injunctions, but to forbid blanket injunctions against labor unions, which are usually prohibitory in form, and to confine the injunction to the particular acts complained of and found by the court.[74]

Similar objections were dismissed as "strained and unnatural constructions of the words of the Norris-La Guardia Act,"[75] in conflict with its declared purpose as set forth in section 2. Finally, the Court reasoned that, "such provisions [2, Ninth, of the RLA] cannot be rendered nugatory by the earlier and more general provisions of the Norris-La Guardia Act."[76] *Virginian Ry.* was the first case to reconcile the *laissez-faire* policy of Norris-La Guardia with a regulatory statute. The opinion has been criticized on the ground that the crucial issue should have involved a balancing of the importance of the particular provisions to the major policies of the separate acts.[77]

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71. RLA § 2 Ninth, 45 U.S.C. § 152 Ninth (1954).
72. Texas & N.O.R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548 (1930) (enjoining the carrier from interfering with employees in the selection of their representative in violation of § 2, Third). The carrier had argued that the injunction was barred by the Clayton Act. Although the Court did not pass on the point, it stated: "It may be doubted whether Section 20 [of the Clayton Act] can be regarded as limiting the authority of the court to restrain the violation of an explicit provision of an Act of Congress, where an injunction would otherwise be the proper remedy." 281 U.S. at 571.
73. 300 U.S. 515 (1937).
74. *Id.* at 563. However, the statute does not distinguish between mandatory and prohibitory orders and applies to suits against employers as well as unions. *See* Comment, *Labor Injunctions and Judge-Made Law*, *supra* note 52, at 78.
75. 300 U.S. at 563.
76. *Id.*
77. *See* Comment, *Labor Injunctions and Judge-Made Law*, *supra* note 52, at 79.

C. Injunctions Against Racial Discrimination by the Bargaining Representative

The Supreme Court next considered enjoining violations of protected rights under the RLA in the companion cases of *Steele v. Louisville and Nashville R. Co.*[78] and *Tunstall v. Brotherhood of Locomotive Firemen.*[79] Although the Court did not consider the impact of Norris-La Guardia,[80] it interpreted the RLA as requiring the union certified as majority representative to represent equally all the members of its unit, and enjoined the execution of a collective bargaining agreement which discriminated against the Negro members.

Five years later, in *Graham v. Brotherhood of Locomotive Firemen*,[81] under analogous facts, the Court declared that the "Norris-La Guardia Act did not deprive federal courts of jurisdiction to compel compliance with positive mandates of the Railway Labor Act."[82] The Court stated:

> Nor does the Norris-La Guardia Act contain anything to suggest that it would deprive these Negro firemen of recourse to equitable relief from illegal discriminatory representation by which there would be taken from them their seniority and ultimately their jobs. Conversely there is nothing to suggest that, in enacting the subsequent Railway Labor Act provisions insuring petitioners' right to nondiscriminatory representation by their bargaining agent, Congress intended to hold out to them an illusory right for which it was denying them a remedy. If, in spite of the *Virginian*, *Steele*, and *Tunstall* cases, *supra*, there remains any illusion that under the Norris-La Guardia Act the federal courts are powerless to enforce these rights, we dispel it now.[83]

More recently, the Supreme Court in *Glover v. St. Louis-San Francisco Railway Co.*,[84] held that the federal courts had juris-

78. 323 U.S. 192 (1944).
79. 323 U.S. 207 (1944).
80. The *Steele* action was brought in a state court and the propriety of the injunctive remedy was not passed on in *Tunstall*. *See* Chicago, R.I. & Pac. R.R. v. Switchmen's Union, 292 F.2d 61, 64-65 (2d Cir. 1962).
81. 338 U.S. 232 (1949).
82. *Id.* at 237.
83. *Id.* at 239-40. For later cases applying the *Steele* doctrine, *see* Brotherhood of R. R. Trainmen v. Howard, 343 U.S. 768 (1952), and Conley v. Gibson, 355 U.S. 41 (1957). *See generally* Aaron, *The Union's Duty of Fair Representation under the Railroad Labor and National Labor Relations Acts*, 34 J. AIR L. & COM. 167 (1968).
84. 393 U.S. 324 (1969). The Court held that the NRAB did not have exclusive jurisdiction and that resort to contractual or administrative remedies

diction where the dissident workers sought injunctive relief against their union and employer and the complaint alleged a contract violation as well as discrimination.

D. Injunctions in "Minor" Disputes

It should be noted that none of the foregoing injunctions involved an activity specifically immunized by section 4 of Norris-LaGuardia. The situation first arose in *Brotherhood of R.R. Trainmen v. Chicago River and Ind. Ry.*,[85] where the Supreme Court affirmed the issuance of an injunction against a strike, the classic situation with which Norris-La Guardia was concerned. The union had called a strike in an attempt to coerce settlement of a "minor" dispute which the carrier had submitted to the NRAB. The Court viewed the question as

> whether the Federal courts can compel compliance with the provisions of the Act to the extent of enjoining a union from striking to defeat the jurisdiction of the Adjustment Board.[86]

The Court then answered:

> We hold that the Norris-La Guardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable.[87]

The Court reasoned that the Norris-La Guardia Act was aimed against the issuance of injunctions by federal courts in labor disputes where "the injunction strips labor of its primary weapon without substituting any reasonable alternative."[88] It found that the Adjustment Board provided a reasonable alternative to the limited concession of the right to strike.

The Court also distinguished several cases in which the Norris-La Guardia Act's ban on federal injunctions was not lifted even though the conduct of the union was unlawful under some other

would have been futile. *But cf.* Brady v. Trans-World Airlines, 401 F.2d 87 (3d Cir.), *cert. denied*, 393 U.S. 1048 (1969) [Since reinstatement and back-pay were awarded by the court for company and union violation of Section 2 (Fourth) (Eleventh), no award should be made for the lack of fair representation where the employee had failed to exhaust his internal remedies]; *compare* Vaca v. Sikes, 386 U.S. 171 (1967); *see also* Czosek v. O'Mara, 397 U.S. 25 (1970).

85. 353 U.S. 30 (1957).
86. *Id.* at 39.
87. *Id.* at 40.
88. *Id.* at 41.

statute. These cases were inapposite, because "none involved the need to accommodate two statutes, when both were adopted as a part of a pattern of labor legislation."[89]

Finally, the Court reiterated its earlier statements that the specific provisions of the RLA take precedence over the more general provisions of Norris-La Guardia.

The opinion has been criticized on the ground that the Court should not ask whether Congress intended to replace economic warfare with peaceful arbitration, but whether that policy is sufficiently important in this instance to warrant use of an otherwise undesirable remedy.[90]

In *Locomotive Engineers v. Louisville & N.R.R.*,[91] the union threatened to strike *after* the NRAB made an award to enforce the union's interpretation of the back pay award.[92] The Supreme Court held that the statutory enforcement provisions are mandatory and exclusive and that an injunction must issue to bar a strike to enforce a NRAB award. The Court rejected the union's argument that the *Chicago River* principle is limited only to those situations in which a strike is called during the proceedings before the NRAB and that, once a favorable award has been rendered, the union is free to enforce it either by following the judicial procedure or by resorting to economic force.

With respect to minor disputes, the RLA provides that grievances must first be handled in "the usual manner" up to and including the chief operating officer of the carrier.[93] Lower federal courts promptly used the *Chicago River* principle to enjoin strikes at any stage of the procedure, even *before* submission to the NRAB. However, in *Manion v. Kansas City Terminal Railway*,[94] the Supreme Court indicated that injunctive relief would not be available unless the carrier had referred the matter

89. *Id.* at 42. *See also* Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330, 339 (1960). This suggestion seems inconsistent with its decision in *Allen Bradley Co. v. Local 3 Int'l Bhd. of Elec. Workers*, 325 U.S. 797 (1945), upholding antimonopoly policy over anti-injunction policy, and also makes the assumption that the objectives of labor statutes are more important than those of non-labor statutes. *See* Meltzer, *The Chicago and North Western Case: Judicial Workmanship and Collective Bargaining*, SUPREME COURT REVIEW 113, 154 (Kurland ed. 1960).

90. Comment, *Labor Injunctions and Judge-Made Law, supra* note 52, at 81.

91. 373 U.S. 33 (1963).

92. Formerly, the statutory provision making NRAB awards final and binding contained an exception for money awards. The 1966 amendments deleted that exception and gave money awards the same status as non-money awards. *See* note 67. Thus, the problem would probably not arise today.

93. 45 U.S.C. § 153 First (i) (1954).

94. 353 U.S. 927 (1957).

to the NRAB, although they granted leave to apply for reinstatement if the dispute were submitted to the NRAB within a reasonable time.

It should be noted that, in *Manion*, the grievance procedures had been completed and either party could have submitted the dispute to the NRAB. At least two circuits have interpreted the *Manion* rule to apply only to minor disputes which have been fully processed short of the final appeal to the NRAB, and not as a bar to injunctions against strikes over minor disputes which have not been carried through the parties' own grievance procedure.[95]

This solution seems sensible in those situations where the carrier and the union are required to exhaust their own contractual grievance machinery before resorting to the NRAB, and the union strikes before these steps are completed. Moreover, these holdings seem reconcilable with section 8 of the Norris-La Guardia Act.[96] Because the RLA was drafted without consideration of Norris-La Guardia's prohibitions, courts should not employ the all-or-nothing approach implicit in the labels, "repeal" or "takes precedence," when attempting to harmonize the two pieces of legislation.[97] Procedures such as Norris-La Guardia's procedural safeguards, which do not hamper enforcement of the RLA, should be retained in deference to the still vital policy against injunctions. Thus, several circuits have indicated that, even though they are not ousted of jurisdiction to grant injunctions, the "clean hands" provision of section 8 of Norris-La Guardia still is applicable.[98] Under this theory a petitioner may

95. *See* Brotherhood of R.R. Carmen v. Chicago & N.W. Ry., 354 F.2d 786 (8th Cir. 1965); Louisville & Nashville R.R. v. J.N. Brown, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958).

96. *See* Brotherhood of R.R. Carmen v. Chicago & Northwestern Ry., 354 F.2d 786 (8th Cir. 1965). In answering the argument that the injunctive process of the court could not be invoked until a dispute was before the NRAB, the court said: "In answer to the foregoing argument, it is clear that in the instant case, at the time of the illegal and unauthorized strike, the carrier had made 'every reasonable effort' to settle the dispute involved, even though the dispute had not yet gone before the Adjustment Board." *Id.* at 794.

97. Comment, *Labor Injunctions and Judge-Made Law*, *supra* note 52, at 79.

98. *See* Railway Clerks v. Railway Express Agency, 391 F.2d 657 (8th Cir. 1968); Railroad Trainmen v. Akron R.R., 385 F.2d 581 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968); *cf.* Brotherhood of R.R. Trainmen v. Toledo, P.&W. R.R., 321 U.S. 50 (1944) (even though Section 7 satisfied, Section 8 required submission of the dispute to arbitration before injunction would issue). In *Akron*, the court stated: "It may be that in a particular case the District Court might conclude that the imperatives of the Railway Labor Act override Section 8—a statutory focusing so to speak of an equity approach whereby lack of clean hands may be overcome by a balancing of interests, particularly where it is the public interest involved." It has been suggested that a

have to exert "every reasonable effort" to settle a dispute before seeking an injunction against a strike in a minor dispute.[99]

Because of the NRAB backlog of cases, it was possible for an employer to submit the dispute to this crowded docket and make extensive unilateral changes in the collective bargaining agreement shielded by the strike injunction from union reprisals.[100] To remedy this injustice, the Supreme Court, in *Locomotive Engineers v. Missouri-Kansas-Texas R.R.*,[101] said that although a carrier may obtain an injunction against a strike over a minor dispute under *Chicago River*, a district court, in the exercise of its equitable discretion, may impose conditions upon the granting of such injunctive relief. When the disposition of the grievance would take considerable time and the union can show irreparable harm as a result, the district court may condition the issuance of injunctive relief upon the carrier's maintenance of the status quo pending the Board's decision. This comparison of relative hardships may ultimately inject the judiciary into the same type of policy-making that Norris-La Guardia sought to withdraw.[102] However, in light of the 1966 Amendments expediting the NRAB procedure and the availability of the Section 6 notice to terminate the contract,[103] the need for such relief is not likely to be frequent.

Missouri-Kansas-Texas expressly reserved the question of whether the union by independent suit could enjoin the carrier to restore the status quo while the dispute was pending before

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liberal application of this dictum could read Section 8 out of the RLA cases, which by definition, always involve the "public interest." See 1969 ABA SECTION ON LABOR RELATIONS LAW 131.

99. *See* Brotherhood of R.R. Carmen v. Chicago & N.W. Ry., 354 F.2d 786 (8th Cir. 1965); Rutland Ry. v. Brotherhood of Locomotive Eng'rs, 307 F.2d 21 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963) (carrier must "confer" with union representatives).

100. In theory, the union is protected against unilateral changes by this procedure, for if the NRAB decides that the contract did not allow management to make the change, the union can receive retroactive relief for damages suffered while the change was in force. Comment, *Labor Injunctions and Judge-Made Law, supra* note 52, at 83. However, the excessive delay may make this remedy ineffective. *See* Comment, *Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes*, 60 COLUM. L. REV. 381, 393 (1960).

101. 363 U.S. 528 (1960).

102. Other criticisms of the decision are that it may discourage use of the NRAB and deny management freedom to seek more efficient methods on good faith interpretations of the collective bargaining agreement. Comment, *Labor Injunctions and Judge-Made Law, supra* note 52, at 85. Moreover, the decision merely shifts the loss since even if management ultimately prevails there is no way for the union to compensate the carrier. *See* 76 HARV. L. REV. 426 (1962).

103. See Part F. *infra.*

the NRAB.[104] At the present time, there is a split among the lower federal courts,[105] as to whether a union is entitled directly to injunctive relief restraining the carrier from unilateral action arguably in breach of contract. On the one hand, it is argued that it is an anomaly to require a union to seek such interim relief by the circuitous route of threatening a strike in order to draw an injunction application by the carrier so that it might then pray for conditions thereon.[106] In contrast, it is argued that, had Congress intended such a limitation, some kind of status quo provisions would have been legislated for minor disputes as it was for major ones.[107]

It is submitted that the latter approach is correct. The cases accommodating Norris-La Guardia and the RLA have granted injunctions only to compel compliance with the positive mandates of the RLA. The *Missouri-Kansas-Texas* device was not an injunction in the usual sense, for the word "condition" seems to indicate that retention of the status quo by the employer is merely a prerequisite to injunctive relief.[108] Moreover, the availability of the termination procedure[109] should alleviate any hardship. Professor Aaron points out that allowing independent suit by the union would merely shift the hardship to the employer; the former can count on same retroactive relief if it was a favorable NRAB award, but the latter, even though it should win, will not be compensated for the delay.[110]

E. Injunctions in "Major" Disputes

In *Elgin J.&E. Ry. v. Burley*,[111] the Court, in speaking of major disputes, stated:

104. 363 U.S. at 531 n.3.
105. For cases holding that unions are entitled to such relief, see Westchester Lodge 2186 v. Railway Express Agency, 329 F.2d 748 (2nd Cir. 1964); Railroad Yardmasters of America v. St. Louis-San Francisco R.R., 231 F. Supp. 986 (N.D. Texas, 1964); *contra*, Hilbert v. Pennsylvania R.R., 290 F.2d 881 (7th Cir.), *cert. denied*, 368 U.S. 900 (1961); Switchmen's Union v. Central of Ga. Ry., 341 F.2d 213 (5th Cir. 1965).
106. Kroner, *Interim Injunctive Relief Under the Railway Labor Act*, 18 N.Y.U. CONF. LAB. 179, 182 (1965).
107. McGuinn, *Injunctive Powers of the Federal Courts in Cases Involving Disputes Under the Railway Labor Act*, 50 GEO. L. J. 46, 76 (1961).
108. Comment, *Labor Injunctions and Judge-Made Law*, *supra* note 52, at 84. *See also* Order of Ry. Conductors v. Pitney, 326 U.S. 561 (1945), where such independent relief was denied *sub silentio* and Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142 (1969), where the Court's rationale may agreeably be applicable to the minor dispute situation.
109. *See* Part F *infra*.
110. See 35 J. AIR L. & COM. 517 (1969).
111. 325 U.S. 711 (1945).

> The parties are required to submit to the successive procedures designed to induce agreement. Section 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help.[112]

This statement seems to indicate that, under the *Chicago River* doctrine, Norris-La Guardia will not bar the injunctions in major disputes as long as the statutory procedures have not been exhausted. However, some doubt has been cast on this conclusion in later opinions. Citing its prior decision in *Brotherhood of R.R. Trainmen v. Toledo, P. & W. R.R.*,[113] the Court in *Chicago River*, in a dictum footnote, indicated that Norris-La Guardia precludes issuance of an injunction in a major dispute case, since the RLA does not provide a process for final decision as it does in minor disputes. The *Toledo* case, however, is sharply limited by its factual context.[114] Later, in *Order of R.R. Telegraphers v. Chicago and N.W. Ry.*,[115] the Court held that Norris-La Guardia barred a *permanent* injunction against a threatened strike in a major dispute. The court distinguished previous cases allowing injunctions on the ground that the unions had either "stepped outside their legal duties and violated the Act which called them into being," as in the discrimination cases, or had struck "in plain violation of a basic command of the railway Labor Act"[116] as in *Chicago River*. Apparently, the union had complied with the negotiation procedures.[117]

In *Detroit and Toledo Shore Line R.R.*,[118] the Supreme Court cleared up the confusion by clearly holding that an injunction is available to prevent one of the parties from resorting to self-help while the Act's major dispute procedures are being followed. It is also firmly established that, once the procedures for the settlement of major disputes are exhausted, the Act allows the parties to resort to self-help; therefore, the proscripions of

112. *Id.* at 725.
113. 321 U.S. 50 (1944).
114. In Toledo, the union had exhausted all the steps required by the RLA. The Court held that the carrier's attempt to obtain an injunction after all mandatory procedures had been met by the union was prohibited by Norris-La Guardia, and that the carrier's failure to submit to voluntary arbitration meant that it had not used "every reasonable effort to settle" the dispute. 321 U.S. at 65.
115. 362 U.S. 330 (1960).
116. *Id.* at 338.
117. "[N]either the respondent nor anyone else points to any other specific legal command that the union violated here . . . ." *Id.* at 339. Thus, the case can be explained on the ground that it involved no violation of the RLA.
118. 396 U.S. 142 (1969).

Norris-La Guardia prevent the issuance of an injunction to prevent such resort.[119]

The *Detroit* case concisely stated the major dispute settlement provisions:

> There are three status quo provisions in the Act, each covering a different stage of the major dispute settlement procedures. Section 6 . . . provides that "rates of pay, rules, or working conditions shall not be altered" during the period from the first notice of a proposed change in agreements up to and through any proceedings before the National Mediation Board. Section 5 First provides that for 30 days following the closing of Mediation Board proceedings "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," unless the parties agree to arbitration or a Presidential Emergency Board is created during the 30 days. Finally Section 10 provides that after the creation of an Emergency Board and for 30 days after the Board has made its report to the President, "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." These provisions must be read in conjunction with the implicit status quo requirement in the obligation imposed upon both parties by Section 2 First, "to exert every reasonable effort" to settle disputes without interruption to interstate commerce.[120]

These provisions are generally called the "status quo" provisions, and the federal courts have freely enjoined carriers from changing the status quo while the settlement procedures are still active. There had been some question as to whether the status quo "freeze" applied to the total working conditions or only those working conditions embodied in the existing contract. The *Detroit* case answered this question as follows:

> The obligation of both parties during a period in which any of those 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

119. *See* Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969).
120. 396 U.S. at 150-51.

> time the pending dispute arose and *which are involved in or related to that dispute* . . . and clearly these conditions need not be covered in an existing agreement.[121]

Under this test the court apparently must examine the section 6 notice to determine whether the carrier's action is on a subject being bargained on pursuant to the notice or whether the particular change is not covered by the notice.

The Fifth Circuit has held that a federal court may award back pay and reinstatement as part of an order enforcing the status quo in a major dispute, and that such a suit may be brought by individual employees as well as by the union.[122]

The federal courts have consistently refused to grant injunctions designed to extend any of the "cooling-off" periods beyond the specific limits fixed by statute.[123] In similar fashion, to avoid indefinite postponement of the use of self-help, courts have refused to allow the parties to invoke the negotiation procedures a second time,[124] unless perhaps where the second section 6 notice is unrelated to the first dispute and the strike is obviously over the second dispute.[125] However, the Seventh Circuit has recently ruled that the Norris-La Guardia Act does not prohibit a district court from granting an injunction to maintain the status quo pending appeal, even though the court determines that Norris-La Guardia prohibits an injunction below.[126]

Many of the above principles were involved in *Brotherhood of Ry. & Steamship Clerks v. Florida East Coast Ry.*[127] There, employees of the railway went on strike after the major disputes provisions had failed to settle a wage dispute. The railway resumed partial operations soon thereafter by employing a substantially different labor force and negotiated individual agreements with the replacements making changes in working

121. 396 U.S. at 152-53 (emphasis added).

122. *See* Mungin v. Florida East Coast Ry., 416 F.2d 1169 (5th Cir. 1969); United Industrial Workers v. Board of Trustees of Galveston Wharves, 400 F.2d 320 (5th Cir. 1968).

123. *See, e.g.*, Brotherhood of Locomotive Eng'rs v. Baltimore & O.R.R., 372 U.S. 284 (1963).

124. *See* Pan American World Airways v. Flight Eng'rs, 306 F.2d 840 (2d Cir. 1962).

125. *See* Pullman Co. v. Order of Ry. Conductors, 316 F.2d 556 (7th Cir. 1963); Florida East Coast Ry. v. Brotherhood of R.R. Trainmen, 336 F.2d 172 (5th Cir. 1964).

126. Chicago & N.W. Ry. v. United Transportation Union, 422 F.2d 979 (7th Cir. 1970); *but see* Chicago, Rock Island & Pacific R.R. v. Switchmen's Union, 292 F.2d 61 (2d Cir. 1961).

127. 384 U.S. 238 (1966).

conditions unrelated to the original dispute. The union argued that these changes must also go through the statutory bargaining procedures before self-help could be taken.

The Court stated that normally self-help is available to the carrier after the statutory procedures are exhausted, but recognized the Union's position that these changes were not raised during the statutory bargaining. However, under the circumstances, the Court held that a carrier may petition a district court to make unilateral changes in other working conditions as are "reasonably necessary" for continued operation without further negotiation. Although the holding is necessary to avoid an interruption in commerce and to make self-help equally available to the carrier, the procedure may involve the courts in resolving union-management disputes over working conditions.

Of course, the mere fact that major dispute statutory bargaining procedures are pending may not automatically mean that any self-help measure during that period is enjoinable. If a strike is in protest to matters in no way related to the pending negotiations, there is authority to the effect that no mandatory provisions of the RLA are being violated and therefore the conduct is nonenjoinable.[128]

Although the RLA does not require that agreement be reached during the statutory bargaining procedures,

> "it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes as is contemplated by § 2, First."[129]

That section of the RLA requires the parties "to exert every reasonable effort" to settle disputes. "This duty is not merely perfunctory. Good faith exhaustion of the possibility of agreetion against a strike if the union is in violation of this mandate even though the statutory periods are exhausted? The Seventh Circuit has held that § 2, First does not contemplate judicial enforcement of its "reasonable effort" requirement, but is merely

128. *See* Eastern Air Lines v. Flight Eng'rs Int'l Ass'n, 340 F.2d 104 (5th Cir.), *cert. denied,* 382 U.S. 811 (1965).
129. Virginia Ry. v. System Fed'n No. 40, 300 U.S. 515, 548 (1937).

ment is required to fulfill it."[130] Can a carrier obtain an injunc- a statement of the policy of the status quo provisions,[131] but the Second and Fourth Circuits have implied that such an injunction would be proper.[132] Most of the precedents on this point are not helpful since they deal with outright refusals to bargain.[133] It is submitted that § 2, First at least imposes an obligation on the parties to meet and to discuss the issues in question.[134] Any further obligations on the parties, however, would involve the courts in just the kind of determinations that Norris-La Guardia meant to avoid.

The National Mediation Board may have a function in enforcing compliance with § 2, First. The NMB must notify both parties that its mediatory efforts have been unsuccessful in order for the second thirty day "cooling-off" period to begin running.[135] If the NMB is of the opinion that one of the parties is not negotiating in good faith, it might simply retain jurisdiction thereby postponing the exercise of self-help.[136] The NMB has much discretion in this regard.[137]

Finally, § 2, First is also relevant as to whether a moving party has complied with the "clean hands" provision of section 8 of Norris-La Guardia. A party who has not used "reasonable effort" to settle a dispute may not be able to enjoin another party's noncompliance with the statutory bargaining procedures.[138]

F. Problems of Classification

Several problems of classification exist as to whether injunctive relief is available under the RLA. First of all, the difference between a "major" and a "minor" dispute is crucially important because it may be determinative as to the availability of injunc-

130. Elgin, J.&E. Ry. v. Burley, 325 U.S. 711, 721 n.12 (1945).
131. *See* Chicago & N.W. Ry. v. United Transp. Union, 422 F.2d 979 (7th Cir. 1970).
132. *See* Chicago, Rock Island & Pac. R.R. v. Switchmen's Union, 292 F.2d 61 (1961); Piedmont Aviation v. ALPA, 416 F.2d 633 (4th Cir. 1969).
133. *See, e.g.*, Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515 (1937).
134. *Cf.* Brotherhood of Ry. & S.S. Clerks v. Florida E. Coast Ry., 384 U.S. 238, 245 (1965); Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330, 333-34 (1959); *see generally* Harper, *Major Disputes Under the Railway Labor Act*, 35 J. AIR LAW & COM. 3, 34-39 (1969).
135. 44 Stat. 580, *as amended* 48 Stat. 1195, 45 U.S.C. § 155 (1964).
136. *See* Chicago & N.W. Ry. v. United Transp. Union, 422 F.2d 979 (7th Cir. 1970) (dictum).
137. *See* International Ass'n of Machinists & Aerospace Workers v. NMB, 425 F.2d 527 (D.C. Cir. 1970) (NMB not easily amendable to mandamus); *see generally* 35 J. AIR. L. & COM. 509-12 (1969).
138. *See* notes 98 and 99 *supra*, and the accompanying text.

tive relief. Mr. Justice Rutledge, in his oft-quoted opinion in *Elgin J. & E. Ry. v. Burley*,[139] explained the distinction:

> The first [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 claimed to have vested in the past.
>
> The sceond class [minor disputes], 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 the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.[140]

Therefore, the crucial question is whether the dispute concerns the application of an existing agreement or the formation or alteration of collective agreements. Virtually all subsequent decisions have relied on this distinction in reaching a conclusion of whether the dispute is major or minor. This question is crucial because, if the dispute is minor, then the injunctive remedy is available against a strike under the *Chicago River* doctrine; but, if the dispute is major, then self-help is available at the conclusion of the statutory bargaining procedures.

The controversy generally arises when the carrier institutes a unilateral change which the union objects to. Although many decisions hold that the tactics of the parties are not controlling because the substance of the dispute controls rather that the parties' characterizations,[141] it will be seen that the determination of the dispute is largely going to depend on the action of the parties. There seem to be several options open to the union.

139. 325 U.S. 711 (1945).
140. *Id.* at 723.
141. *See, e.g.*, United Indus. Workers v. Board of Trustees of Galveston Wharves, 351 F.2d 183; 188-89 (5th Cir. 1965); Rutland Ry. v. Brotherhood of Locomotive Eng'rs, 307 F.2d 21, 33 (2d Cir. 1962).

It can submit the dispute to the NRAB if it feels the change violates the existing contract, or it can contend that the action is an alteration of the contract without the proper procedures having been followed by the carrier. The union could also file a section 6 notice to modify the agreement to prevent such action in the future, or it could file a section 6 notice while at the same time submitting the issue to the NRAB as a violation of the existing agreement. Each of these possibilities will be discussed in turn.

If the union contends the change violates the existing contract and submits the dispute to the NRAB, the issue will not be raised as the carrier will be perfectly satisfied in having the controversy treated as a minor dispute. The union will not be able to strike in support of its position, but the carrier will probably be able to institute its interpretation unilaterally subject to the later determination of the NRAB, which may take a great deal of time. Of course, if the union strikes anyway, an injunction may be conditioned upon maintenance of the status quo, and several cases have allowed unions to independently obtain such relief.[142]

Suppose that the union contends that the change is an alteration of the contract and that the bargaining procedures must be exhausted before the carrier can unilaterally take such action. In this situation, most of the courts assert a theory of primary jurisdiction that they must await the NRAB's jurisdictional determination of whether the dispute is major or minor.[143] The courts seem to be limiting themselves to a preliminary determination as to whether the agreement either arguably allows or arguably prohibits the disputed subject.[144] As stated in a recent case,

> we think that, where the railroad asserts a defense based on the terms of the existing collective bargaining agreement, the controversy may not be termed a "major" dispute unless the claimed defense is so obviously insubstantial as to warrant the inference that it is raised with

142. See Part D *supra*.
143. *See, e.g.*, Itasca Lodge v. Railway Express Agency, 391 F.2d 657 (8th Cir. 1968); Piedmont Aviation v. ALPA, 416 F.2d 633 (4th Cir. 1969); *see generally* Harper, *supra* note 134, at 12-27.
144. *See, e.g.*, Switchmen's Union v. Southern Pac. Co., 398 F.2d 443 (9th Cir. 1968); United Industrial Workers v. Board of Trustees of Galveston Wharves, 351 F.2d 183 (5th Cir. 1965).

intent to circumvent the procedures prescribed by § 6 for alteration of existing agreements.[145]

The few times that courts are likely to decide the major-minor question on the merits at the time of an application for an injunction occur when the impact of the change is very great.[146] In these circumstances the union may be able to enjoin the changes pending the exhaustion of the major dispute bargaining procedures.[147] But as a practical matter, the union's contention is more likely to be treated as a minor dispute. This is probably the correct result, since it is extremely difficult for courts to decide that a change is covered by the agreement without deciding the merits of the controversy, and the NRAB is the expert agency established for that very purpose. It is also analogous to the presumption of arbitrability enunciated by the Supreme Court in cases arising under the National Labor Relations Act.[148] But the union may not be very satisfied with the long delays in obtaining NRAB rulings, especially when the carrier may be able unilaterally to impose its interpretation.

Perhaps a better approach would be for the union to acquiesce in the carrier's contention that its action is in accordance with the existing bargaining agreement, thereby depriving the NRAB of jurisdiction since there would be no dispute as to interpretation of the existing agreement. Then the union could serve a section 6 notice of its desire to change the agreement, thus transforming the dispute from minor to major and preserving its right to strike after exhaustion of the major dispute settlement procedure.

There has been much confusion on the effect of a section 6 notice on the classification of major-minor disputes. Perhaps much of the confusion arises because, in the railroad industry, collective bargaining agreements generally do not have fixed expiration dates. They are referred to as "open-end" contracts and continue in effect until changed.[149]

145. Southern Ry. v. Brotherhood of Locomotive Firemen & Enginemen, 384 F.2d 323, 327 (D.C. Cir. 1967).

146. *Cf.* Order of R.R. Telegraphers v. N.W. Ry., 362 U.S. 330, 341 (1960); *but see* Itasca Lodge v. Railway Express Agency, 391 F.2d 657, 668 (8th Cir. 1968) (size or magnitude of dispute not ordinarily factor in classifying as major or minor); Hilbert v. Pennsylvania R.R., 290 F.2d 881 (7th Cir.), *cert. denied*, 368 U.S. 900 (1961).

147. *Cf.* Brotherhood of Ry. & S.S. Clerks v. Florida E. Coast Ry., 384 U.S. 238 (1966).

148. *See, e.g.*, United Steelworkers v. Warrior & Gulf Navigation Co., 362 U.S. 574, 582-83 (1960).

149. *See* Railway Clerks v. Atchison, Topeka & Santa Fe R.R., 50 C.C.H. LAB. L. REP. 19, 299 (N.D. Ill., 1964).

Several commentators have asserted that the issuance of a section 6 notice should not determine the classification of a dispute,[150] and there is language in two courts of appeal cases in accord.[151] However, the two cases may be explained on the ground that they involved disputes unrelated to the section 6 notices. It has also been observed that, in prior cases held to involve minor disputes, no effective section 6 notice was served.[152]

It is submitted that a section 6 notice as to the issue in question makes a dispute major, at least as to "open end" agreements. One court has articulated this result as follows:

> "It may be assumed, but without deciding, that both parties might have agreed to submit to the Adjustment Board the simple question as to the meaning, or proper interpretation [of the agreement]. . . . But the union had the right, if it chose, to seek an addition of new provisions. . . . The Railway Labor Act contemplates such changes in or additions to agreements."[153]

The recent *Detroit* Supreme Court case seems to also recognize this result.[154]

But what about the situation where the collective bargaining agreement does have a fixed expiration date, and the union serves a section 6 notice before the contract term would have expired? Are the labor agreements in the railroad industry by statute not written for a fixed term?[155] The cases passing on these issues have granted injunctions against strikes in support of these section 6 notices, either on the theory that the disputes remain minor[156] or that the strike was in violation of the

150. *See* Kromer, *supra* note 106, at 188; McGuinn, *supra* note 107, at 62.

151. Rutland R.R. v. Locomotive Engineers, 307 F.2d 21 (2d Cir. 1962), *cert. denied,* 372 U.S. 954 (1963); Hilbert v. Pennsylvania R.R., 290 F.2d 881 (7th Cir.) *cert. denied,* 368 U.S. 900 (1961).

152. *See* Rutland R.R. v. Locomotive Engineers, 307 F.2d 21, 42 (2d Cir. 1962), *cert. denied,* 372 U.S. 954 (1963) (dissenting opinion).

153. Order of Ry. Conductors & Brakemen v. Spokane, Portland, & Seattle Ry., 366 F.2d 99, 104 (9th Cir. 1966).

154. *See* Detroit & Toledo Shore Line R.R., 396 U.S. 142, 145 (1969); *see also* Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960). In this connection, it is interesting to note the Seventh Circuit's subsequent opinion in *Illinois Central R.R. v. Locomotive Firemen,* 332 F.2d 850 (7th Cir.), *cert. denied,* 379 U.S. 932 (1964), where the court implied that a section 6 notice could convert the minor dispute into a major dispute.

155. *See* 35 J. AIR L. & COM. 509 (1969).

156. *See* Flight Eng'rs' Int'l Ass'n v. American Airlines, 303 F.2d 5 (5th Cir. 1962); Illinois Cent. R.R. v. Brotherhood of R.R. Trainmen, 69 L.R.R.M. 2616 (N.D. Ill. 1968); *cf* Brotherhood of R.R. Trainmen v. Akron & Barberton Belt R.R., 385 F.2d 581 (D.C. Cir. 1967).

RLA.[157] If fixed term agreements are valid under the RLA, then the rationale of the *Boys Markets*[158] case would seem applicable here.

The union's final option would be to contend that the carrier's action is in violation of the existing contract and to also file a section 6 notice to clear up the matter in the future. Under these tactics the union might be able to preserve its right to strike after the exhaustion of the settlement procedures and at the same time seek injunctive relief against change of the "objective working conditions" under *Detroit* pending that exhaustion. And there is always the chance that a special adjustment board might render a decision in the union's favor in the meantime.

Many of these issues arose in *Southern Ry. v. Brotherhood of Locomotive Firemen & Enginemen.*[159] There the controversy was pending before the NMB, and the carrier also submitted the controversy to the NRAB. The union sought an injunction against the carrier's alteration of working conditions in contravention of section 6. The Court of Appeals for the District of Columbia noted that two separate disputes were involved, a minor dispute, of which the NRAB had jurisdiction for a violation of the existing collective bargaining agreement, and a major dispute before the NMB, arising under a section 6 notice. The court did not pass on the minor dispute question but granted an injunction pending the exhaustion of the settlement proceedings, unless the NRAB made a determination as to the proper interpretation of the existing agreement in the meantime.

Could either of the parties while the major dispute settlement procedures are in progress then withdraw their section 6 notice and thereby terminate the major dispute? The courts are divided on this question.[160] This circumstance arose in the *Detroit* case, but the Supreme Court did not pass on the issue.

A second question of classification concerns the scope of the statutory duty to bargain. Major dispute procedures under section 6 are only required if the change concerns matters affecting "rates of pay, rules, or working conditions." The question was

157. *See* Seaboard World Airlines v. Transport Workers Union, 425 F.2d 1086 (2d Cir. 1970).
158. See Part IV *infra.*
159. 337 F.2d 127 (D.C. Cir. 1964).
160. *See* In the Matter of Hudson, 172 F. Supp. 329 (S.D.N.Y.), *aff'd per curiam sub. nom.* Stickman v. General Grievance Comm. of the Bhd. of R.R. Trainmen, 267 F.2d 941 (2d Cir. 1959), *cert. denied,* 363 U.S. 843 (1960) (notice effectively withdrawn); *contra,* Butte, A. & Pac. Ry. v. Brotherhood of Locomotive Firemen, 268 F.2d 54 (9th Cir.), *cert. denied,* 361 U.S. 864 (1959).

presented in *Chicago & N. W. Ry.* There, after the carrier instituted proceedings to abolish certain installations, the union served a section 6 notice demanding negotiation. The carrier took the position that the union's request was not within the scope of section 6 and sought injunctive relief against a proposed strike. The district court held that the proposed contract change was within the scope of the duty to bargain over "rates of pay, rules, and working conditions," but refused to grant a permanent injunction on the ground that this constituted a "labor dispute" within section 13 of Norris-La Guardia. The Seventh Circuit granted the injunction, holding that the matter was outside the scope of mandatory bargaining and, therefore, concluding that Norris-La Guardia was inapplicable.[161] The Supreme Court reversed, holding that the subject of the proposed contract change was within the scope of the duty to bargain under the RLA.[162] The opinion appears to define a broad scope for the duty to bargain under the RLA.

Indeed, it has been persuasively argued that the RLA and the National Labor Relations Act define the same area of collective bargaining.[163] The argument cites the fact that it was the Supreme Court's decision in *Chicago & N. W. Ry.* that prompted the National Labor Relations Board to abandon its view in *Fibreboard I*[164] when it decided *Town and Country.*[165] In addition, the NLRB, in a footnote to its second *Fibreboard*[166] decision stated:

> The substantial identity of the bargaining obligation under the two acts is manifested in *Elgin Railway v. Railroad Trainmen*, 302 F.2d 540 (CA7), where the court held that pensions were a bargainable matter under the Railway Labor Act citing the *Inland Steel* decision where a similar holding had been made under the National Labor Relations Act.[167]

161. 264 F.2d 254, 260 (7th Cir. 1959).
162. 362 U.S. 330 (1960).
163. *See* Kroner, *supra* note 106, at 184-86. Section 8(d) of the NLRA speaks of "wages, hours, and other terms and conditions of employment" as the scope of the duty to bargain.
164. Fibreboard Paper Products Corp., 130 NLRB 1558 (1961).
165. Town and Country Mfg. Co., 136 NLRB 1022, (1962), *enf'd on other grounds*, 316 F.2d 846 (5th Cir. 1963).
166. Fibreboard Paper Products Corp., 138 NLRB 550 (1962), *enf'd*, 332 F.2d 411 (D.C. Cir. 1963).
167. 138 NLRB at 553. *See generally* Harper, *supra* note 134 at 29-34; *see also* Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) (where the Supreme Court discusses in great detail the applicability of NLRA precedents to the RLA).

A third question of classification and perhaps the most difficult arises concerning activity such as strikes over unfavorable government regulation and strikes against secondary employees. An RLA union may become involved in a secondary boycott by picketing a secondary employer or responding to picketing by another union. Although the Supreme Court has not ruled directly on the issue,[168] a majority of the Federal courts, relying upon the broad definition of "labor dispute," have held that the Norris-La Guardia Act applies to secondary boycotts.[169] Since NRLA section 8(b)(4)(B) is inapplicable to RLA employees,[170] the question arises as to how secondary boycotts should be treated under the RLA.

Secondary boycotts do not seem to be major disputes, because the parties to the boycott are the secondary employer and either his employees or the primary employees, who do not want to form a collective bargaining agreement. Likewise, the secondary boycott does not arise directly out of the application of an existing agreement so the dispute does not appear to be minor. Nevertheless, some courts have attempted to classify secondary boycotts as major or minor disputes. One approach is to focus on the secondary dispute,[171] while another is to incorporate the secondary dispute into the primary dispute.[172] Neither of these approaches is satisfactory, however, because there is still no dispute between the secondary employer and his employees or the

168. *But cf.* Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969); Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365 (1960); Bakery Sales Drivers Union v. Wagshall, 333 U.S. 437, 442 (1948) (dictum).

169. *See* Amalgamated Ass'n of Street Employees v. Dixie Motor Coach Corp., 170 F.2d 902 (8th Cir. 1948); East Texas Motor Freight Lines v. International Bhd. of Teamsters, 163 F.2d 10 (5th Cir. 1947); Lee Way Motor Freight v. Keystone Freight Lines, 126 F.2d 931 (10th Cir. 1942); *contra,* Lakefront Dock & R.R. Terminal v. International Longshoremen's Ass'n, 333 F.2d 549 (6th Cir. 1964).

170. *See* Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 376-77 (1968); Local 833, UAW, 116 NLRB 267, 274-75 (1956) [railroad union not labor organization within 8(b)(4)(B)]. On the other hand, where an RLA union responds to picketing by an NLRA union, 8(b)(4)(B) is applicable since the violation consists of inducing any "person." Local 25, Teamsters v. New York, N.H. & H.R.R., 350 U.S. 155, 160-61 (1956); *see also* International Brotherhood of Elec. Workers v. NLRB, 350 F.2d 791 (D.C. Cir. 1965) (which held that 8(b)(4)(B) was applicable where the unions which represented only RLA employees were engaged in joint venture with unions which were labor organizations.) *See generally* Comment, *Judicial Approaches to Secondary Boycotts Under the Railway Labor Act* 42 N.Y.U.L. REV. 928 (1967).

171. *See* Local 143, Machinists v. Northwest Airlines, Inc., 304 F.2d 206 (8th Cir. 1962).

172. *See* Northwest Airlines, Inc. v. Local 523, Transport Workers, 190 F. Supp. 495 (W.D. Wash. 1961).

primary employees which can be mediated or adjusted through RLA procedures.[173]

Even assuming, however, that secondary boycotts are neither major or minor disputes, there is a third possibility. Section 5 of the RLA grants the Mediation Board jurisdiction over major disputes as well as "any other dispute" which is not referable to the Adjustment Board.[174] Perhaps the proper statutory interpretation is to treat disputes which are neither major nor minor as major disputes under section 5. Even this approach is not free from difficulty. It has been asserted that the statute restricts the Board's jurisdiction to a dispute between a carrier and *its* employees.[175] In addition, even if section 5 applies, a definite loophole exists.[176] For such disputes, no section 6 notice is required with its thirty-day "cooling-off" provision and its requirement of conferences. Only at the end of a unsuccessful mediation would the union be under a restraint not to strike for thirty days.[177]

A final rationale offered by some courts is that, if a dispute is neither major nor minor within the meaning of the RLA, then no labor dispute is involved within the meaning of either the RLA or Norris-La Guardia.[178] After having found these two federal laws inapplicable to the dispute, the court finds some jurisdictional basis for an injunction—usually a general provision of a transportation act.[179] This approach construes the scope of the Norris-La Guardia Act as identical to the scope of the RLA and ignores the fact that "labor dispute" is defined more broadly in Norris-La Guardia than in the RLA.[180]

The Supreme Court had these approaches before it in the case of *Brotherhood of Railroad Trainmen v. Atlantic Coast Line*

173. *See* Comment, *supra* note 170 at 937; 42 WASH. L. REV. 935, 942; McGuinn, *supra* note 107, at 72-73.
174. 45 U.S.C. § 155 (First) (1954).
175. Comment, *supra* note 170, at 933. In this connection, the Adjustment Board has only recently been held to have jurisdiction over a tri-party dispute. *See* Transportation-Communication Employees Union v. Union Pac. R.R., 385 U.S. 157 (1966). But this case involved a jurisdictional dispute and so the contending unionists were still employees.
176. *See* McGuinn, *supra* note 107, at 67.
177. Section 5, First (b) provides that the services of the Mediation Board may be invoked in "any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused."
178. Lakefront Dock & R.R. Terminal Co. v. International Longshoremen's Ass'n, 333 F.2d 549 (6th Cir. 1964); American Airlines, Inc. v. Air Line Pilots Ass'n, 187 F. Supp. 643 (N.D. Ill. 1960).
179. *See* Comment, *supra* note 170, at 939; McGuinn, *supra* note 107, at 72.
180. *Compare* 29 U.S.C. § 113 (c) (1965) *with* 45 U.S.C. § 151(a) (1954).

R.R.[181] There, after the major dispute bargaining procedures had been exhausted, the BRT picketed a terminal to force the terminal to stop providing facilities to the railroad. The court of appeals recognized that a primary dispute over work rules existed between the railroad and the BRT, but its inquiry concerned only the secondary boycott. The court deemed the issue to be whether the phrase, "case involving or growing out of any labor dispute,"[182] included secondary boycotts. The court conceded that a literal interpretation would include secondary boycotts, but held that "traditional economic self-interest justification concepts . . . are applicable to determine the intended scope of Norris-La Guardia protection."[183] After having found such an interest, the court denied the injunction, and the Supreme Court affirmed by a 4-4 split among the justices. The Court's division on the issue has been explained on the ground that a majority of the Court was not willing to recognize Norris-La Guardia's application to railroad secondary boycotts.[184]

While that litigation was pending in the federal courts, the terminal company secured an injunction in a state court that barred picketing except at a reserved gate designated for the sole use of the railroad employees. The Supreme Court granted certiorari and in a 4-3 decision held:

> In short, we have been furnished by Congress neither usable standards nor access to administrative expertise in a situation where both are required. In these circumstances there is no really satisfactory judicial solution to the problem at hand. However, we conclude that the least unsatisfactory one is to allow parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law. Hence, until Congress acts, picketing—whether characterized as primary or secondary—must be deemed conduct protected against state proscription. [citations omitted] Any

181. 362 F.2d 649 (5th Cir.), *aff'd per curiam by equally divided court,* 385 U.S. 20 (1966).
182. Norris-La Guardia Act § 4, 29 U.S.C. § 104 (1965).
183. 362 F.2d at 654. This test is a substantial deviation from orthodox interpretations, which usually compare the conduct with the language of the statute. See 42 WASH. L. REV. 935, 936-37 (1967).
184. 42 WASH. L. REV. 935, 940 (1967).

> other solution—apart from the rejected one of holding that *no* conduct is protected—would involve the courts once again in a venture for which they are institutionally unsuited.[185]

It thus appears that the primary employer will be able to get injunctive relief until the major dispute bargaining procedures are exhausted, but that the neutral employer will not even have this device. Although it seems incongrous to disallow secondary boycotts in less crucial industries under the NLRA while allowing them in railroad disputes, perhaps the Supreme Court was correct in relegating to Congress the task of filling this statutory gap left by the RLA.

Strikes over unfavorable government regulation raise similar issues to those involved in secondary boycotts. Those disputes defy normal classification and, moreover, cannot be solved by mediation under section 5. One party to the controversy, the Government, is not present at the mediation, and one party to the mediation, the carrier, is only an adversely affected neutral who has no power to negotiate the controversy.[186]

G. Concluding Observations on Norris-La Guardia and the Railway Labor Act

It would be informative at this time to again consider the policies of the Norris-La Guardia Act[187] and to see how these policies have been affected by the RLA.

First of all, the notion that law has no useful role to play in labor relations is ended. By the imposition of legal rights and duties, it has become clear that law is a vital part of the national labor policy, not only in the organizational phase of labor relations but also in the negotiation and administration of collective agreements.

Second, it is also clear after the RLA that the injunction has at least a limited use as a remedy in labor relations.

The most important effects of the RLA, however, have to do with the judicial formulation of labor policy and the objectives test. The Norris-La Guardia Act abolished the objectives test by making the legality of employee activities depend upon external

185. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 392-93 (1969).

186. *See* McGuinn, *supra* note 107, at 68-70. *See also* U.S. Steel Corp. v. U.M.W., 74 L.R.R.M. 2611 (3d Cir. 1970); Western Air Lines v. Flight Eng'rs, 194 F. Supp. 908 (S.D. Cal. 1961)

187. *See* note 33 *supra* and accompanying text.

conduct rather than the desirability or impropriety of their goals.[188] But it is clear under the RLA that the availability of injunctive relief often depends upon the objective of the employee activity. Nevertheless, there is at least one important distinction. Under the old practice, judges determined the lawfulness of a strike on their own views of social and economic policy. Under the RLA, however, the lawfulness of the objectives has been determined by the legislature, presumably after investigation of the full social and economic ramifications. The danger in this process is that the courts may take the short step from appraisal of objectives in terms of their own sense of legitimacy.[189] This is especially dangerous in a statute like the RLA, where there are unforeseen conflicts and omissions.

Many of these unfortunate results have occurred in states which have enacted anti-injunction statutes modeled upon the Norris-La Guardia Act.[190] Even if these particular pitfalls are avoided, there is a definite limitation in framing restrictions on concerted activities in terms of their objective. When a union is forbidden to strike for a specified purpose but is free to strike for other purposes, the law may accomplish little more than to put a premium on subterfuge.[191]

III. The National Labor Relations Act

The Wagner Act, enacted only three years after Norris-La Guardia, marked the return of law into labor relations, but was generally confined to the organizational phase. In this enactment, Congress was keenly aware of the limitations of Norris-La Guardia, and in section 10(h)[192] made it clear that, except for the authority given to the circuit courts to enforce, modify, or set aside orders of the National Labor Relations Board (NLRB), Norris-La Guardia remained in effect.[193]

There is also a basic difference in the structure of the Wagner Act and the RLA. The Wagner Act created an administrative agency, the NLRB, to make binding adjudications on its obligations. Thus, the problems of accommodating Norris-La Guardia

188. *See* United States v. Hutcheson, 312 U.S. 219, 232 (1940).
189. Loeb, *supra* note 52, at 480.
190. *See* Cox, *The Role of Law in Labor Disputes,* 39 Cornell L. Q. 592, 596-97 (1954).
191. *Id.*
192. 29 U.S.C. § 160 (h) (1935).
193. *See* Donnelly Garment Co. v. International Ladies' Garment Workers, 99 F.2d 309, 315 (8th Cir. 1938).

to the National Labor Relations Act (NLRA) are greatly different from those encountered under the RLA.

The 1947 Taft-Hartley amendments to the NLRA introduced further federal restrictions and expressly permitted the limited use of the labor injunction in cases in which that remedy had previously been outlawed by Norris-La Guardia. It is said that the revival of the labor injunction was a response to several deep causes: distrust of the growing power of unions; resentment toward labor's claim of immunity from regulation; the feeling that Norris-La Guardia had gone too far in freeing even the most undesirable activities from legal restriction.[194] However, the legislative history of Taft-Hartley reveals a congressional belief that Norris-La Guardia would remain in effect where not specifically overruled.[195]

A. Injunctions in Unfair Labor Practices

Under sections 10(j) and (1), the NLRB is empowered to seek injunctions in the federal courts to restrain unfair labor practices committed by either an employer or a union.

Prior to the Taft-Hartley amendments, problems arose in some cases in which a majority representative had been certified or in which certification proceedings were pending. The question was whether a court, upon the petition of a private party, could preserve the status quo by enjoining concerted activity of a rival union which was seeking to compel recognition by the employer. Except for two early cases,[196] the courts held that Norris-La Guardia prohibited such an injunction.[197] These results placed the employer in the predicament of either violating a statutory duty or suffering economic loss. The Taft-Hartley amendments provided relief by declaring such union activity an unfair labor practice.[198] More importantly, section 10(1) provides that when a charge is received concerning alleged violations and when an investigation gives "reasonable cause to believe such charge is true and that a complaint should issue," the NLRB is required

194. *See* Cox, *supra* note 190, at 597-98; *see also* S. REP. No. 105, 80th Cong., 1st Sess. 8 (1947).

195. *See* 2 NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947 at 1365, 1396.

196. Union Premier Food Stores, Inc. v. Retail Food Clerks Union, 98 F.2d 821 (3rd Cir. 1938); Oberman & Co. v. United Garment Workers, 21 F. Supp. 20 (W.D. Mo. 1937).

197. *E.g.*, United States v. Building & Constr. Trades Council, 313 U.S. 539 (1941). *See also* Fur Workers v. Fur Workers, 105 F.2d 1 (D.C. Cir.), *aff'd per curiam*, 308 U.S. 522 (1939) (union had been recognized by employer).

198. 29 U.S.C. § 158 (b)(4)(c) (1947).

to petition the appropriate district court for a temporary injunction pending final Board disposition.[199] Upon a finding of violation, the Board is empowered to grant appropriate relief—including an order to cease and desist from the unlawful practice.[200] Besides jurisdictional disputes, section 10(1) applies to secondary boycotts and was extended to "hot cargo" clauses and "organizational picketing" by the 1959 Landrum-Griffin amendments.

Section 10(j) was added by Taft-Hartley because of the inability of the Board in some instances to correct unfair labor practices until after substantial injury had been done. It authorizes the Board to petition a district court for "appropriate temporary relief or restraining order" in respect to any unfair labor practice, whether committed by an employer or a union, after a Board complaint has been issued.[201]

Although the Board has not formalized the criteria it employs in deciding whether or not to petition for section 10(j) relief, it has suggested guidelines.

> After stating that there are no rigid determinants and that each case is to be decided on its individual merits, the Board listed the following guidelines: (1) the clarity of the alleged violation; (2) the likelihood of a business dispute's resulting in an extraordinary public impact; (3) the presence of special remedy problems that would not be solved by a final Board order absent interim relief; (4) flagrant disregard for the Board's procedures; (5) the continuous or repetitious nature of the alleged violation; (6) the threat of the alleged violation to the public order; and (7) the timeliness of the request for relief.[202]

In acting on the 10(j) petition, the district court will grant relief it deems to be "just and proper."[203] If the district court should decline to issue such an injunction, only the Board may

199. 29 U.S.C., § 160(1) (1947).
200. 294 U.S.C., § 160(c) (1935).
201. 29 U.S.C., § 160 (j) (1947).
202. *See* Note, *Temporary Injunctions Under Section 10(j) of the Taft-Hartley Act,* 44 N.Y.U.L. REV. 181, 192 (1969), *citing* Fusco v. Richard W. Kaase Baking Co., 205 F. Supp. 465, 478 (N.D. Ohio 1962).
203. There has been some disagreement as to the appropriate function of a district court in passing on a Section 10(j) petition. *See generally* Note, *Temporary Injunctions Under Section 10(j) of the Taft-Hartley Act, supra* note 202. Only in rare instances has a court seen fit to refuse to grant a section 10(1) injunction.

appeal from the denial.[204] The district court injunction will terminate at the time the Board resolves the dispute on the merits.[205]

B. Other Injunctions Under the NLRA

Injunctions are authorized under Taft-Hartley against strikes and lock-outs imperiling the national health and safety. However, such injunctive relief is only allowed for a period of eighty days and only upon the discretionary order of the President.[206]

Although the NLRA is silent on the matter of racial discrimination in collective bargaining, the Supreme Court has acknowledged that the *Steele* doctrine is equally applicable under the NLRA.[207] The next question is whether the relief against breach of the duty of fair representation by a union subject to the NLRA is to be obtained by private action or in unfair labor practice proceedings.[208] Although it has not been finally determined whether the breach of the duty of fair representation is an unfair labor practice,[209] the Supreme Court has stated that such actions may be brought in state or federal courts by private parties.[210] It thus appears that, under the NLRA, Norris-La Guardia will not prohibit injunctions forbidding the union from carrying on such unlawful arrangements.

C. Concluding Observations: Norris-La Guardia and the NLRA

With the exception of injunctive relief under the duty of fair representation, the task of accommodating the anti-injunctive policy of Norris-La Guardia with the NLRA has been assumed by Congress.

Although the NLRA revived the use of the labor injunction, steps were taken to insure that the abuses which led to the enactment of Norris-La Guardia did not reappear. The most important change was allowing injunctions only upon the petitioning for an injunction; the Board is charged with the duty of making preliminary findings of fact and law. The courts

204. *See* Sears, Roebuck & Co. v. Carpet Layers, 410 F.2d 1148 (10th Cir. 1969), *aff'd on other grounds*, 397 U.S. 655 (1970).
205. *See* Sears, Roebuck & Co. v. Carpet Layers, 397 U.S. 655 (1970).
206. *See* 29 U.S.C. § 176-80 (1965).
207. *See* Syres v. Oil Workers Union, 350 U.S. 892 (1955).
208. *See generally* Aaron, *supra* note 83; Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 172-74 (1957).
209. *Compare* Miranda Fuel Co., 140 NLRB 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963), *with* Local 12, United Rubber Workers v. NLRB, 368 F. 2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).
210. *See* Vaca v. Sikes, 386 U.S. 171 (1967).

have consistently denied injunctive relief under the NLRA in suits brought by private parties.[211]

There were some interesting findings made in 1961 by a Congressional Subcommittee under the chairmanship of Congressman Pucinski concerning the use of injunctions under the NLRA. The Subcommittee not only did not recommend the repeal of the injunctive provisions but recommended greater use of the 10(j) injunction. It did recommend, however, that section 10(1) "permit" rather than "require" the Board to seek an injunction and criticized the Board for using its discretionary authority almost exclusively against unions.[212] Similar findings were made slightly earlier by an advisory panel appointed by the Senate Labor Subcommittee on the Organization and Procedure of the NLRB.[213]

IV. INJUNCTIONS UNDER SECTION 301 OF THE NLRA

At the time of the Taft-Hartley amendments, the enforcement of labor contracts rested solely in the hands of state courts, except in cases where federal diversity jurisdiction existed.[214] This reservation of authority in state courts resulted in an imbalance in the enforcement of such contracts, since the diverse common law rules resulted in severe procedural obstacles to unions being sued.[215] Therefore, in enacting section 301, making suits for violations of collective bargaining agreements between employers and labor organizations actionable within the federal courts, it appears that Congress's primary purpose was to remove these defects.[216]

It became inevitable that this policy, expressed in section 301, of enforcing collective bargaining agreements would come into conflict with the anti-injunctive policy of Norris-La Guardia. Although section 301 was enacted as part of the NLRA by the

211. *See* Amalgamated Ass'n of Street Employees v. Dixie Motor Coach Corp., 170 F.2d 902 (8th Cir. 1948) (employer against union); Amazon Cotton Mill Co. v. Textile Workers, 167 F.2d 183 (4th Cir. 1948) (union against employer).

212. *See* McCulloch, *supra* note 14, at 84-100; Aaron, *supra* note 52, at 326-27.

213. *Id.*

214. *See* S. REP. No. 105, 80th Cong., 1st Sess. 15-18 (1947).

215. *See* Textile Workers v. Lincoln Mills, 353 U.S. 448, 487-88, 490-92, 496, 498-99, 503-04, 514, 530, 532, 534 (1958) and cases cited therein (appendix to Mr. Justice Frankfurter's dissent).

216. *See* S. REP. No. 105, *supra* note 214, at 15-17; H.R. REP. No. 245, 80th Cong., 1st Sess. 45-46 (1947).

Taft-Hartley amendments, it is helpful to consider this question separately because of the different problems presented.

A. Relevant Background Case Law Under Section 301

Soon after the enactment of section 301, questions were raised as to its scope and constitutionality. The difficulty lay in the fact that, on its face, section 301 appeared to be exclusively jurisdictional without embodying any federal substantive rights. The confusion was cleared with the *Textile Workers v. Lincoln Mills*[217] decision in 1957, in which the Supreme Court made two significant determinations: first, that Section 301 carried substantive content, in that it impliedly authorized federal courts to "fashion a body of Federal law for the enforcement of . . . collective bargaining agreements"[218]; and, second, that the Norris-La Guardia Act did not prevent federal courts from compelling arbitration if the labor contract so provided. With respect to Norris-La Guardia, the Court reasoned that the "kinds of acts which had given rise to abuse of the power to enjoin,"[219] which are listed in section 4, did not include the failure to arbitrate. Moreover, since

> "section 8 of the Norris-La Guardia Act . . . indicates a congressional policy toward settlement of labor disputes by arbitration, . . . there is no reason to submit them to the requirements of section 7 . . . ."[220]

The next question was the effect of this holding on the state courts. In *Charles Dowd Box Co. v. Courtney*,[221] the Court rejected the proposition that section 301 pre-empted state jurisdiction and held that state jurisdiction and federal jurisdiction are concurrent. It pointed out that section 301 was intended to increase enforceability of such agreements, and that this objective would be served by viewing it as supplementing state jurisdiction.

Teamsters Local v. Lucas Flour Co.[222] elaborated on the above principles and held that, while both federal and state courts have jurisdiction over such cases, federal substantive law must be applied to insure uniformity throughout the judicial system.

217. 353 U.S. 448 (1957).
218. *Id.* at 451.
219. *Id.* at 458.
220. *Id.* at 458-59.
221. 368 U.S. 502 (1962).
222. 369 U.S. 95 (1962).

B. Sinclair Refining Co. v. Atkinson

The *Lincoln Mills* opinion announced that arbitration is the *quid pro quo* for the no-strike clause, so the question arose that, if the equity powers of the federal courts could be used to compel arbitration notwithstanding Norris-La Guardia, could the same powers be used to enforce the other end of the *quid pro quo* —the no-strike clause? This problem involved conduct specifically immunized by section 4.

This question was presented in *Sinclair Refining Co. v. Atkinson*,[223] where the majority of the Supreme Court considered the issue to be whether section 301 impliedly repealed section 4. Mr. Justice Black first concluded that this was a "labor dispute" within the terms of section 13 of Norris-La Guardia, and therefore, the federal courts lack jurisdiction to enter an injunction unless the scope of the Act has been narrowed by the subsequent enactment of section 301. The Court found in the legislative history of section 301 proof that Congress had expressly rejected the proposal to repeal Norris-La Guardia, and reasoned that, if Congress had so intended, it would have specifically done so, as it did in other sections of Taft-Hartley. *Chicago River* was distinguished as a situation involving a strike called by the union in defiance of an affirmative duty to submit to compulsory arbitration, whereas under the NLRA such procedures are consensual.

In a powerful dissent, Mr. Justice Brennan argued that there should be a judicial accommodation of the two acts, and, on that basis, an injunction should be allowed.

Regardless of the statutory interpretation, the *Sinclair* result presents many serious problems to the national labor policy. In the famous arbitration trilogy,[224] the Supreme Court expressed a federal policy strongly favoring the resolution of labor disputes by arbitration. But, dissenting in *Sinclair*, Justice Brennan remarked that

> "since unions cannot be enjoined by a Federal court from striking in open defiance of their undertaking to arbitrate, employers will pause long before committing themselves to obligations enforceable against them but not against their unions."[225]

223. 370 U.S. 195 (1962).
224. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).
225. 370 U.S. at 227.

Technically, employers still had access to other remedies for union breach of a no-strike clause such as compelling the union to arbitrate, damages, and discipline and discharge of employees. Against this, it is suggested that the functioning of the arbitration process itself is marred by the coexistence of a strike, that money damages are inadequate, and that, as a practical matter, the employer is more interested in strike settlement than retaliation.[226] Indeed, if there was an adequate remedy at law, courts would presumably not grant injunctions, since equitable relief is predicated on the lack of adequate legal redress.

Perhaps the undesirability of the result is best indicated by the *Sinclair* majority opinion's admission that an injunction would be both desirable and necessary.

The *Sinclair* case was followed by a great deal of comment as to its correctness. Most of the comment was critical,[227] and in 1963 the Section of Labor Law of the American Bar Association adopted a resolution calling for Congress to undo the decision,[228] and bills to implement the resolution were introduced in several sessions of Congress.[229]

C. Between Sinclair and Boys Market

Since employers could no longer get injunctive relief in federal courts for breaches of no-strike clauses, they turned to the state courts for such relief. Norris-La Guardia is directed by its express terms to the *federal* courts, and it is clear from the legislative history of section 301 that Congress did not intend by its enactment to eliminate any previously existing state court jurisdiction.[230] Thus, the first important question left in the wake of *Sinclair* was whether Norris-La Guardia was now part of the federal common law of section 301 and, therefore, to be applied by the states in keeping with the uniformity rationale of *Lucas Flour*, despite section 301's clear purpose to increase the effective enforcement of collective bargaining agreements.

The vast majority of state courts which considered the question decided that they had the power in section 301 suits to

226. *See* Boys Market v. Retail Clerk's Union, 398 U.S. 235, 248-49 (1970).
227. *See, e.g.*, Aaron, *Strikes in Breach of Collective Agreement: Some Unanswered Questions*, 63 COLUM. L. REV. 1027 (1963).
228. *See* 1963 PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION, LABOR RELATIONS LAW, Part II, 226.
229. *See* S. REP. No. 2455, 90th Cong., 1st Sess. (1967); H.R. REP. No. 6080, 89th Cong., 1st Sess. (1965); H.R. REP. No. 12127, 88th Cong., 2d Sess. (1964).
230. *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-12 (1962).

enjoin breach of contract strikes,[231] and today it is settled that Norris-La Guardia does not apply to such actions.[232]

However, the unions were not so easily outdone. They promptly began to remove such state court action to federal courts, which under *Sinclair* may not issue injunctions. The issue then arose whether state court injunction actions were removable to federal courts, since Norris-La Guardia deprives the federal courts of "jurisdiction" to issue injunctions. This question was answered in *Avco Corp. v. Lodge 735, IAM*,[233]

> where the Court held that claims under collective bargaining agreements arise under the "laws of the United States" and that these suits are within the "original jurisdiction" of the district courts. The Court explained the fact that federal courts have no jurisdiction to issue injunctive relief in these circumstances by noting that the ". . . nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy."[234]

There was another interesting point in the *Avco* case. Justice Stewart, who was in the 5-3 majority in *Sinclair*, stated in reference to the accommodation issue: "Accordingly, the Court expressly reserves decision on the effect of *Sinclair* in the circumstances presented by this case. The Court will, no doubt, have an opportunity to reconsider the scope and continuing validity of *Sinclair* upon an appropriate future occasion."[235]

The employer, thus far frustrated in his attempts to secure injunctions against breaches of no-strike clauses, turned to other devices to attain this end result. In *Sinclair*, the injunction was sought *before* arbitration was invoked. In view of the national labor policy favoring arbitration, even expressed by the Norris-

231. The leading case on this point is *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 61, 315 P.2d 322, 332 (1957), *cert. denied*, 355 U.S. 932 (1958).

232. *See* Boys Market v. Retail Clerk's Union, 398 U.S. 235, 247 (1970) (dictum).

233. 390 U.S. 557 (1968).

234. *Id.* at 561. The Court in *Avco* left open the question of what efficacy, if any, the state court injunction has after removal. 390 U.S. at 561 n.4. They have subsequently indicated, however, that dissolution of the state injunction would have been required. *See* General Electric Co. v. Local Union 191, 413 F.2d 964 (5th Cir. 1969), *cited in* Boys Market v. Retail Clerk's Union, 398 U.S. 235, 244 (1970).

235. 390 U.S. at 562.

La Guardia Act itself,[236] what is the status of a suit to seek enforcement of an arbitrator's award, and, as an aspect of that enforcement, an order not to strike in protest against it?

The Third Circuit, in *Philadelphia Marine Trade Association v. International Longshoremen's Association*,[237] allowed an injunction under these circumstances. The court classified the order as the specific performance of a contract rather than an injunction. The Supreme Court granted certiorari, but did not reach the ultimate issue, instead holding that the particular award was unenforceable because of the impreciseness of the order. This "impreciseness" rationale merely paved the way for further confusion, for it was predicated upon a federal procedural rule requiring preciseness in drafting *injunctive* relief.[238]

Sinclair held that Norris-La Guardia does not impair the right of an employer to obtain an order "in the nature of an injunction" compelling arbitration under the provisions of a collective bargaining agreement.[239] A slightly different approach would be a provision giving power to an *arbitrator* to order an end to a work stoppage—an order that might then be judicially enforced. In this situation, the judgment of the arbitrator is precisely what the parties intended when they executed the agreement, and, in the words of the Supreme Court, "The moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for."[240] The Fifth Circuit endorsed this approach in *New Orleans Steamship Association v. General Longshore Workers*.[241] The court distinguished *Sinclair* "on the more than

236. Section 8 provides that no injunctive relief shall issue unless the party requesting it has made "every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or *voluntary arbitration*." While section 8 is technically an additional prerequisite to relief and does not limit the broad provisions of section 4, it nevertheless envisages the possibility that disputes may be settled by arbitration and embodies a congressional policy favoring arbitration. Dannet, *Norris-La Guardia and Injunctions in Labor Arbitration Cases, New York University Proceedings of Sixteenth Annual Conference on Labor* 275, 285 (1964).

237. 365 F.2d 295 (3d Cir. 1966), *rev'd on other grounds*, 389 U.S. 64 (1967).

238. *See* 389 U.S. at 75.

239. The dissent in *Sinclair* points out that an order compelling arbitration may have much the same effect as an injunction for "a strike in face of such an order would risk a charge of contempt." 370 U.S. at 227 n.23. Apparently, no court has yet applied this theory.

240. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 568 (1960).

241. 389 F.2d 369 (5th Cir.), *cert. denied*, 393 U.S. 828 (1968); *contra*, Marine Transport Lines v. Curran, 65 L.R.R.M. 2095 (S.D.N.Y. 1967) ("whatever the form of the proceedings, the court [was] being asked to enjoin a work stoppage").

semantical ground that there is a real difference between an ordinary injunction and an order enforcing the award of an arbitrator although end result is the same."[242]

Less obvious devices were suggestions[243] of the revival of the doctrines developed in *Cates v. Allen*,[244] which remanded a suit to the state court since the federal court had no jurisdiction in equity, and *Westmoreland Coal Co.*,[245] which held that an arbitrator's award became part of the contract itself and a strike in protest of the award without first complying with the requirements of section 8(d) of the NLRA constituted a refusal to bargain. A final suggestion, mentioned by Professor Aaron,[246] is to incorporate a no-removal clause in the collective bargaining agreement.

D. Boys Market and Beyond

Many of these arguments were before the Supreme Court in *Boys Market, Inc. v. Retail Clerks Union*,[247] where Justice Stewart's concurring remark expressing uncertainty regarding the

242. 389 F.2d at 372.

243. These cases were brought to the writer's attention by an interview with David Shapiro, Professor of Law, Harvard University, in Cambridge, May 1, 1969.

244. 149 U.S. 451 (1892). In *Cates*, the plaintiffs were simple contract creditors who had not reduced their claims to judgment, and suit was brought in state court to set aside fraudulent conveyances. The suit was removed to a federal court on the ground of diverse citizenship. State law permitted blended legal and equitable remedies, but under the then applicable federal law, the federal courts had no equitable jurisdiction of such a suit. The court held that, when a suit over which a state court has full jurisdiction in equity is removed to a federal court on the ground of diverse citizenship, and the federal courts have no jurisdiction in equity over such a controversy, the cause should be remanded to the state court, instead of dismissing it for want of jurisdiction. The *Cates* case was decided prior to the promulgation of the present rules of civil procedure, a reason which accounts for the fact that the doctrine has not been recently applied. *See* Texas Employers Ass'n v. Felt, 150 F.2d 227, 231 n.14 (5th Cir. 1945).

245. 117 N.L.R.B. 1072 (1957), *enforcement denied on other grounds*, 258 F.2d 146 (D.C. Cir. 1958). Since section 8(b)(3) of the NLRA makes it an unfair labor practice for a union to refuse to bargain with an employer, it is conceivable that a strike in breach of a collective bargaining agreement might be enjoined by the NLRB as a "refusal to bargain." The NLRB in 1961, however, relying heavily on the *Insurance Agents* case, expressly ruled that a strike in breach of a no-strike clause does not constitute a refusal to bargain. Lumber & Sawmill Workers, 130 N.L.R.B. 235 (1961). Nevertheless, the earlier *Westmoreland* case may have survived that pronouncement. *See also* Sheet Metal Workers, 153 N.L.R.B. 50 (1965).

246. *See* Aaron, *The Strike and the Injunction—Problems of Remand and Removal, New York University, Proceedings of Eighteenth Annual Conference on Labor* 93, 102-03 (1966). Professor Aaron discusses several insurance cases and concludes that such provisions would be contrary to public policy. *See also* United Electrical, Radio & Machine Workers v. NLRB, 409 F.2d 150 (D.C. Cir. 1969) (demand for such a provision not a refusal to bargain).

247. 398 U.S. 235 (1970).

continuing validity of *Sinclair* was finally vented. In a 5-2 decision authored by Justice Brennan, which is substantially an adoption of the Justice's dissent in *Sinclair*, the Court reasons:

> It is substantially because Sinclair stands as a significant departure from our otherwise consistent emphasis upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration and our efforts to accommodate and harmonize this policy with those underlying the anti-injunction provisions of the Norris-La Guardia Act that we believe Sinclair should be reconsidered.[248]

The court discussed the anomaly of the state court jurisdiction question and the devastating consequences toward the federal labor policy favoring arbitration. The Court stated its task in terms of how to accommodate "the literal terms of § 4 of the Norris-La Guardia Act" to "Section 301(a) . . . and the purposes of arbitration"[249] and concluded that

> the unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes, that the core purpose of the Norris-La Guardia Act is not sacrificed by the limited use of equitable remedies to further this important policy, and consequently that the Norris-La Guardia Act does not bar the granting of injunctive relief in the circumstances of the instant case.[250]

The Court then proceeded to limit its holding:

> We deal only with the situation in which a collective bargaining contract contains a mandatory grievance adjustment *or*[251] arbitration procedure. Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance . . . . When a strike is sought to be enjoined because it is over a grievance

248. *Id.* at 241.
249. *Id.* at 250.
250. *Id.* at 253.
251. The question has been raised whether this statement in the alternative was deliberate. Does it mean that the result would be the same if there was not a binding third party arbitration procedure but only a mandatory grievance adjustment procedure? F. Anderson, *The Right to Strike and the Arbitration Clause, Epilogue,* May 26, 1970 (unpublished).

> which *both*[252] parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract does have that effect; and the employer should be ordered to arbitrate as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity . . . .[253]

Unfortunately, the *Boys Market* decision still left several questions unanswered. Although the case concerned a contract with an express no-strike clause, the implication was that the Court would have implied a promise by the union not to strike in response to an arbitrable dispute.[254] But the Court did not deal with the situation where the strike is over a dispute which is not arbitrable, such as where the purpose of the strike is to change the contract, or in support of a demand dealing with a subject not covered by the contract, or involving a subject expressly excluded from arbitration.[255] It is submitted that the Court's emphasis on arbitration leads to the conclusion that in the above areas the employer would be relegated to his traditional legal remedies. *Boys Market* did not say that a strike in breach of a no-strike clause could be enjoined in all instances; the holding was limited to the situation where the union had an arbitration remedy for its grievance.

What about the situation, analogous to cases arising under the RLA,[256] where the union goes out on strike over a grievance which has not yet been carried through the parties own grievance procedure? The rationale of *Boys Market* should still apply as long as the employer is exerting every reasonable effort to proceed with the grievance procedure and arbitration.[257] A strike at this stage of the game would be just as detrimental to the federal policy favoring arbitration as one at the later stage.

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252. This verbalism leaves open the question whether the decision would have been the same if the arbitration clause was of the type in which only the union could demand arbitration. This situation should not make a difference, since the union is the critical party since it is the one waiving its right to strike.
253. 398 U.S. at 253-54.
254. *See* 398 U.S. at 248.
255. F. Anderson, *supra* note 251.
256. *See* note 95 *supra* and accompanying text.
257. *Cf.* 398 U.S. at 254: "[T]he petitioner was ready to proceed with arbitration at the time an injunction against the strike was sought . . . ."

E. Concluding Observations: Norris-La Guardia and Section 301

As can readily be seen, the original policy in the Norris-La Guardia Act that the judiciary served no useful function in labor disputes was reversed by *Lincoln Mills*. Indeed, federal law under section 301 is to be fashioned from the policy of our national labor laws by "judicial inventiveness."

The *Boys Market* holding has little possibility of reviving the old pre-1932 dangers. The injunction remedy would be regulated by the parties' own contract and available only to further a *congressional* policy. There is little danger of judicial policy-making in this regard, since the policy predilections of a court have little influence in deciding an issue based on the express terms of a contract. Moreover, the holding actually furthers the express policy of the Norris-La Guardia Act of providing for "actual liberty of contract" by means of collective bargaining.

Of course there is always the risk that a judge will act on the hasty premise that, because a strike occurs during a contract term and the contract provides for arbitration, it is presumptively enjoinable. Furthermore, the questions involved as to whether the grievance is arbitrable and whether the work stoppage is in support of the grievance are by no means easy.

V. Conclusion

Although it is now well settled that law has an important role in labor relations, Professor Archibald Cox suggests that

> in the final analysis . . . the development of legal rules of conduct in labor relations involves striking a balance—a balance between the need for regulation and the value of freedom, between what the law can do and its inherent limitations.[258]

Whenever possible, the law should encourage private machinery for settling disputes, and should only intrude into areas where the overwhelming consensus of opinion condemns the unlawful conduct. The reason is that the effectiveness of law depends upon its acceptance of the governed. So long as feelings run high on any issue, some work stoppages will be inevitable regardless of the legal rules. It has been demonstrated in the public employment field that, no matter what type of restraints are provided, there is no statute or order that can effectively restrain the em-

258. Cox, *supra* note 190, at 604.

ployees when they feel they are not getting the justice they desire.

This is not to suggest that legal rules are not needed in many aspects of labor-management relations. Moreover, the labor injunction has proved to be the most efficient means of enforcing labor laws in certain types of situations. Labor leaders need not fear that the limited use of the labor injunction will lead to another era of "government by injunction." The economic, social, and political changes in the country have made such a return impossible. "Government by injunction" really meant that judges should not establish labor policy by enjoining conduct they found undesirable. But, since 1934, two years after the enactment of the Norris-La Guardia Act, the *legislature* has spoken and announced labor policy. Indeed, today, the injunction is often used by *labor* to compel employers to obey the law.

One of the evils of the pre-Norris-La Guardia labor injunction was that it prohibited self-help but provided no solution to the underlying problem. Today, the rights of workers to organize and to bargain collectively through representatives of their own choosing has become firmly established as the basis of our labor policy. The declaration of policy in the Norris-La Guardia Act itself indicates that, to some extent, the across-the-board denial of injunctions in labor disputes is unnecessary today:

> [U]nder *prevailing* economic conditions, developed with the aid of governmental authority for owners of property . . . the individual unorganized workers is commonly helpless to exercise actual liberty of contract . . . it is necessary that he have full freedom of *association*, *self-organization*, and designation of representatives of his own choosing, to *negotiate* the terms and conditions of his employment.[259]

As the Supreme Court remarked in *Boys Market*, "[T]he Norris-La Guardia Act was responsive to a situation totally different from that which exists today."[260]

259. 47 Stat. 70 (1932), 29 U.S.C. § 102 (emphasis added).
260. 398 U.S. at 250.