Obtaining Preliminary Injunctions under Section 156 of the Railway Labor Act: Is Irreparable Harm Really Needed

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I. Introduction

The Railway Labor Act\(^1\) was the result of an effort by Congress "to bring about stable relationships between labor and management . . . [in the railroad and airline] industries . . ."\(^2\) In furtherance of this end, the Act contains an elaborate set of procedures designed to encourage the peaceful resolution of disputes arising out of the formation, interpretation or application of collective bargaining agreements, and disputes arising out of grievances or the agreements between labor and management, without interruption to commerce.\(^3\)

Disputes between labor and management arising from the formation of or changes in collective bargaining agreements are termed "major disputes."\(^4\) Disputes between labor and management arising out of grievances, or out of the interpretation or application of existing collective bargaining agreements, are termed "minor disputes."\(^5\)


4. Elgin, 325 U.S. at 723. Elgin was the first case in which the term "major dispute" was used. See Brotherhood of Locomotive Eng'rs v. Burlington N. R.R., 838 F.2d 1087, 1090 n.3 (9th Cir. 1988), vacated on other grounds, 109 S. Ct. 3207 (1989).

In Elgin, the United States Supreme Court defined major disputes as disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past. Elgin, 325 U.S. at 723. For further discussion of major disputes under the Railway Labor Act, see infra notes 59-64 and accompanying text.
tive bargaining agreements are considered "minor disputes." The classification of a dispute as major or minor determines the procedures the parties must follow in an effort to resolve the dispute in compliance with the mandate of the Act.

Regardless of whether the dispute is major or minor, the Act requires the parties to engage in negotiation as the first step in the dispute resolution process. Where the dispute is deemed minor, either by the parties or the court, it must be submitted to the National Railroad Adjustment Board (Adjustment Board) for final and binding arbitration. A significant feature of the Act's minor dispute resolution procedures is the requirement that the parties refrain from engaging in economic self-help to enforce their respective interpretations of the collective bargaining agreement.

5. Elgin, 325 U.S. at 723-24. In Elgin, the Court defined minor disputes as those which contemplate[] the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. 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. Id. at 723. For further discussion of minor disputes under the Railway Labor Act, see infra notes 56-76 and accompanying text.

6. Elgin, 325 U.S. at 724; see also International Ass'n of Machinists v. Eastern Air Lines, 847 F.2d 1014, 1017 (2d Cir. 1988) ("The Railway Labor Act . . . establishes separate procedures for resolving major and minor contractual disputes."); Railway Labor Executives' Ass'n v. Consolidated Rail Co., 845 F.2d 1187, 1190 (3d Cir. 1988) (discussing different procedures provided for resolution of major and minor disputes), rev'd on other grounds, 109 S. Ct. 2477 (1989); Locomotive Eng'rs, 838 F.2d at 1090-91 (discussing impact of determination of dispute as major or minor on procedures utilized by parties to dispute); Railway Labor Executives' Ass'n v. Norfolk & W. Ry., 833 F.2d 700, 703-04 (7th Cir. 1987) ("The distinction between major and minor disputes . . . is essential because it determines the procedures the parties must follow to resolve their dispute."); Air Line Pilots Ass'n v. Eastern Air Lines, 129 L.R.R.M. (BNA) 2691, 2695 (D.D.C.) ("The label given to a dispute determines which of the two . . . dispute resolution procedures is appropriate."), rev'd on other grounds, 863 F.2d 891 (D.C. Cir. 1988). For a discussion of the procedures disputants must utilize for the resolution of major and minor disputes, see infra notes 52-79 and accompanying text.


8. 45 U.S.C. § 153, First (i), (m) (1982); see also Elgin, 325 U.S. at 726-27 (discussing minor dispute resolution procedures).

Where the dispute is deemed major, the Act demands that the party seeking formation of or change in the collective bargaining agreement serve notice on the opposing party of the outcome it desires. The parties must then attempt to negotiate a peaceful settlement of the dispute. If they are not able to settle the dispute through negotiation, either party may invoke the services of the National Mediation Board within ten days of the cessation of negotiations. If the National Mediation Board is unable to mediate a settlement, it must attempt to persuade the parties to submit the dispute to binding arbitration. If either party refuses to submit the dispute to arbitration, and the dispute "threaten[s] substantially [to] interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," the National Mediation Board may request the President of the United States to empanel an Emergency Board to investigate the dispute and report the causes of such dispute. The President may then submit the Emergency Board's findings to Congress in order to impose a legislative settlement of the dispute on the parties.

Once the major dispute resolution procedures of the Act are exhausted, the parties are free to engage in economic self-help. How-weapons by the parties. These may include strikes, slowdowns and picketing by labor, lockouts and the hiring of replacement employees by management. See generally Perritt, supra note 2.

11. Id. § 152, Second.
12. Id. §§ 155, First, 156.
14. 45 U.S.C. §§ 155, First, 160 (1982). The President's exercise of this power is discretionary. See id. § 160. A recent example of this discretion is President Bush's refusal to intervene in the dispute between the International Association of Machinists and Aerospace Workers and Eastern Air Lines. See Phila. Inquirer, Mar. 4, 1989, at A4, col. 2 (reporting President Bush's refusal to intervene in dispute).
16. Burlington Northern, 481 U.S. at 445 ("[W]here . . . the parties exhaust . . . [the major dispute resolution] procedures and remain at loggerheads, they may resort to self-help in attempting to resolve their dispute . . . "); see also Jacksonville Terminal, 394 U.S. at 378 ("Implicit in the statutory scheme . . . is the ultimate right of the disputants to resort to self-help . . . "); cf. Brotherhood of Teamsters v. Southwest Airlines, 842 F.2d 794, 802 (5th Cir. 1988) (discussing parties' right to engage in economic warfare upon exhaustion of major dispute resolution procedures), vacated on other grounds on reh'g, 875 F.2d 1129 (5th Cir. 1989).
ever, prior to exhausting these procedures, the Act imposes a status quo obligation on the parties.\[17\] This obligation prohibits management from unilaterally instituting changes in the rates of pay, rules or working conditions of its employees, and prohibits labor from striking.\[18\]

The federal courts may enjoin attempts by either party to unilaterally change the status quo prior to exhaustion of the major dispute resolution procedures.\[19\] While the United States Supreme Court has held that the federal courts may issue both preliminary and permanent status quo injunctions,\[20\] it has not provided guidance as to the standard for determining when preliminary relief should be granted. As a result, the standard applied differs from circuit to circuit.

In particular, there is a conflict among the circuits as to whether a party seeking a preliminary status quo injunction under section 156 of the Railway Labor Act\[21\] must show that it will sustain irreparable harm from the unilateral change by the opposing party.\[22\] This conflict was

21. 45 U.S.C. § 156 (1982). Section 156 imposes a duty to maintain the status quo on the parties pending exhaustion of the negotiation and mediation processes. Id. Section 156 provides in relevant part:

"Carriers and representatives of the employees shall give at least thirty days’ written notice of an intended change in agreements affecting rates of pay, rules, or working conditions. . . . In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon . . . ."

Id.

22. Compare Transport Workers Union v. Eastern Air Lines, 695 F.2d 668, 675 (2d Cir. 1983) (district court required to find irreparable harm will be sustained by moving party prior to issuance of injunction) and International Ass’n of Machinists v. Northwest Airlines, 674 F. Supp. 1387, 1391 (D. Me. 1987) (party seeking preliminary status quo injunction must show that it will sustain irreparable injury from defendant’s unilateral change of working conditions) with Brotherhood of Maintenance of Way Employees v. Burlington N.R.R., 802 F.2d 1016, 1021 (8th Cir. 1986) (district court may issue preliminary status quo injunction without regard to balancing of equities) and Carbone v. Meserve, 645 F.2d 96, 98 (1st Cir.) (district court may, under § 156 of Railway Labor Act, preliminarily enjoin party from unilaterally changing status quo without finding
highlighted in Air Line Pilots Association v. Eastern Air Lines, where the District Court for the District of Columbia held that a party seeking a preliminary status quo injunction under section 156 is not required to show that it will sustain irreparable harm as a result of the defendant's unilateral change of the status quo. This holding is at odds with the position taken by the Second Circuit in Transport Workers Union v. Eastern Air Lines. In the latter case, the court held that a party seeking a preliminary status quo injunction under section 156 must show that it will sustain irreparable harm from the opposing party's unilateral change in the status quo.

In Air Line Pilots, the Air Line Pilots Association (ALPA) filed suit in federal court to obtain an injunction prohibiting Eastern Air Lines from consummating a contract with Orion Airlines. The contract provided that Orion would train 350-400 pilots to perform certain revenue flying for Eastern on thirty-days notice. ALPA claimed that Eastern's attempt to use pilots not listed on the Eastern Air Lines' System Seniority List on the training flights violated a collective bargaining agreement between ALPA and Eastern. ALPA asserted that this violation constituted a unilateral change in rules, or working conditions, and therefore was a major dispute. ALPA argued that, under section 156 of the Act, it was entitled to a preliminary injunction prohibiting Eastern from consummating the deal until Eastern complied with the Act's major dispute resolution procedures.

Eastern moved to dismiss the complaint, asserting that the dispute


24. Id. at 849-50.
25. 695 F.2d 668 (2d Cir. 1983).
26. Id. at 675.
27. Air Line Pilots, 683 F. Supp. at 846-48. At the time of the lawsuit, Eastern was in the process of negotiating with the International Association of Machinists and Aerospace Workers (IAM) which represented mechanics employed by Eastern. Id. at 848. Eastern feared that IAM would ultimately strike, and anticipated a concomitant sympathy strike by ALPA. Id.

28. The scope clause of the collective bargaining agreement provided:

It is agreed that all present or future flying, including flight training (except for initial factory-conducted training in newly purchased equipment), revenue flying, ferry flights, charters and wet leases performed in or for the service of Eastern Air Lines, Inc., shall be performed by pilots whose names appear on the then-current Eastern Air Lines' System Seniority List.

Id. at 847 (emphasis added by court).

29. Id. at 846. Section 152, Seventh provides: "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in a manner prescribed in such agreements or in section 156 of this title." 45 U.S.C. § 152, Seventh (1982).
was minor.\textsuperscript{30} As such, Eastern argued, settlement of the dispute was within the exclusive jurisdiction of the Adjustment Board, and thus was not justiciable in federal court.\textsuperscript{31} In the alternative, Eastern argued that even if the dispute was major, ALPA was not entitled to a preliminary injunction because ALPA would not suffer irreparable harm from the consummation of the Eastern-Orion contract, while Eastern would suffer severe financial harm from the issuance of a preliminary injunction.\textsuperscript{32}

\textsuperscript{30} \textit{Air Line Pilots}, 683 F. Supp. at 846.

\textsuperscript{31} \textit{Id.} at 847. In Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30 (1957), the Court stated that the settlement of minor disputes is within the exclusive jurisdiction of the Adjustment Board. \textit{Id.} at 34-39.

\textsuperscript{32} \textit{Air Line Pilots}, 683 F. Supp. at 846. Eastern argued that the appellate decisions in International Brotherhood of Electrical Workers v. Washington Terminal Co., 473 F.2d 1156 (D.C. Cir. 1972), \textit{cert. denied}, 411 U.S. 906 (1973) and Delaware & Hudson Railway v. United Transportation Union, 450 F.2d 603 (D.C. Cir.), \textit{cert. denied}, 403 U.S. 911 (1971), required that the district court find that the plaintiff will suffer irreparable harm before a preliminary status quo injunction can issue under the Railway Labor Act.

In \textit{Washington Terminal}, the Electrical Workers Union sought a preliminary injunction to prohibit the Terminal from using members of another union to perform work historically performed by members of the Electrical Workers Union. \textit{Washington Terminal}, 473 F.2d at 1167. The Electrical Workers argued that this assignment of work deviated from the parties' historical practice, and was thus a change in rules, or working conditions within the meaning of § 152 of the Railway Labor Act, triggering a major dispute. \textit{See id.} The union argued, therefore, that the Terminal should be enjoined under § 156 from making the assignments until it complied with the major dispute resolution procedures of the Act. \textit{Id.} The Terminal asserted that the dispute was minor, claiming that the assignments were permitted under a clause of the collective bargaining agreement that allowed management the right to assign incidental work to members of other unions. \textit{Id.} at 1164. The court of appeals concluded that the dispute was minor because it concerned the parties' interpretation of the collective bargaining agreement, and thus was within the exclusive jurisdiction of the Adjustment Board. \textit{Id.} at 1173. As a result, the Terminal was free to institute its interpretation of the agreement pending the decision of the Adjustment Board. \textit{Id.} at 1175. The court noted that a finding of irreparable injury frequently turns upon an assessment of the moving party's likelihood of success on the merits of its claim. However, the court did not state that irreparable harm was a necessary prerequisite to a preliminary injunction under § 156. \textit{Id.} at 1167. Rather, the court's analysis was confined to an examination of whether the dispute between the parties was major or minor. \textit{Id.}

In \textit{Delaware & Hudson}, the Railway Company and 170 other rail carriers filed suit to enjoin a selective strike by the Transportation Union against some, but not all members of the carriers' national bargaining group. The Railway Company argued that the selective strike was a violation of the union's duty under § 152 of the Act to exert every reasonable effort to settle disputes. \textit{Delaware & Hudson}, 450 F.2d at 608-09. This argument is based on the principle that once bargaining has "begun on a national level, it is incumbent upon the parties to continue to deal on a national level." \textit{Id.} at 609 (quoting International Ass'n of Machinists & Aerospace Workers v. National Ry. Labor Conference, 310 F. Supp. 905, 912 (D.D.C. 1970). The court of appeals stated that the selective strike violated the obligations imposed by the Act only if the union's decision to strike was for the purpose of forcing the individual members of the carriers' national bargaining group to reach separate collective bargaining agreements.
The court rejected both of Eastern's arguments. First, the court concluded that "[t]he training of Orion pilots on Eastern aircraft constitutes a unilateral repudiation of the collective bargaining agreement," and therefore created a major dispute requiring exhaustion of the major dispute resolution procedures. Second, the court held that a party seeking a preliminary status quo injunction under section 156 is not required to show it will suffer irreparable harm absent relief, but only that it is likely to prevail on the merits of its claim. The court believed that requiring plaintiffs to demonstrate irreparable harm would undermine the objectives of section 156 because it would provide defendants with "a window of opportunity to unilaterally alter their contractual obligations."

The court also rejected Eastern's argument that ALPA was not likely to succeed on the merits of its claim. The court noted that the terms of the collective bargaining agreement's scope clause required Eastern to utilize pilots on the Seniority List to perform all pilot training and revenue flying. The court thus held that ALPA was entitled to a preliminary injunction because it was likely to succeed on the merits of

with the union. Id. at 609-10, 622-23. The court stated that the union's refusal to bargain separately with several of the struck rail carriers suggested that the union was not seeking to force the individual members of the bargaining group to sign separate agreements. The court therefore held that the strike was not illegal. Id. at 618, 623. The court noted that a party seeking a preliminary injunction is generally required to show that it will sustain irreparable injury from the defendant's conduct. Id. at 619. The court stated that a showing of irreparable harm generally turns on an examination of the moving party's likelihood of success on the merits. Id. at 619-20. The court, however, did not distinguish between the standard to apply under the Railway Labor Act and the standard to apply to preliminary injunctions in other contexts. Id. at 619. The court's later opinion in Electrical Workers, however, suggests that there is a distinction between the standards. See Electrical Workers, 473 F.2d at 1167.

34. Id. at 850. Under traditional principles of equity, a party seeking a preliminary injunction must show: (1) likelihood of success on the merits; (2) irreparable injury from the defendant's conduct; (3) that the defendant would not suffer irreparable harm from the issuance of injunctive relief; and (4) that the public interest would be served by the issuance of the injunction. See id. at 849.
35. Id. at 850. The purpose of the status quo provisions of the Railway Labor Act is to maintain the status quo as embodied in collective bargaining agreements until the parties exhaust the Act's major dispute resolution procedures. Id. Thus, a rule requiring plaintiffs to satisfy traditional equitable principles in order to obtain a preliminary injunction to enforce the status quo would allow defendants to unilaterally change the status quo during the period between the filing of the complaint seeking the injunction, and the trial for the permanent injunction.
36. Id. at 852-53.
37. Id. at 853. The court rejected Eastern's argument that the training flights were "in and for the service" of Orion Airlines, and therefore permitted under the terms of the agreement. Id. This argument was defeated by Eastern's own statements that "any revenue flights will inure to the benefit of Eastern," as well as the language of the Eastern-Orion contract. Id.
its claim.38

In *Transport Workers Union v. Eastern Air Lines*,39 Eastern appealed a district court order granting the Transport Workers Union a preliminary injunction prohibiting Eastern from assigning non-union flight attendants to its newly acquired South American routes.40 Eastern argued that the scope clause of its collective bargaining agreement with the union permitted these assignments.41 Eastern also argued that the union failed to show that it would sustain irreparable injury if Eastern was not preliminarily enjoined from using the non-union flight attendants.42

The court of appeals first rejected the union’s position that a party seeking a preliminary injunction under section 156 of the Act was required to show only that it was likely to succeed on the merits of its claim.43 The court stated that a showing of irreparable harm was also necessary in the Second Circuit.44 The court concluded that the district court acted within its discretion when it determined that the union was likely to succeed on the merits of its claim and had met its burden of establishing that it would suffer irreparable harm absent injunctive re-

38. *Id.* at 856.
39. 695 F.2d 668 (2d Cir. 1983).
40. *Id.* at 670.
41. *Id.* at 676. The scope clause provided in relevant part: “It is agreed that any and all flying performed in or for the service of Eastern Air Lines, Inc. will be performed by Flight Attendants whose names appear on the then current Eastern Airlines system seniority list.” *Id.* at 671. Eastern asserted that this clause, at best, “protected union members’ seniority against flight attendants subsequently hired overseas but did not assure union members the right to bid for flying to be performed by flight attendants based abroad.” *Id.* at 676. Eastern attempted to support this claim by introducing evidence of the scope clause originally discussed during contract negotiations. *Id.* At that time, the scope clause contained an additional clause which stated that “all such flying will be done under the then current contract.” *Id.* at n.7.
42. *Id.* at 675.
43. *Id.* at 679.
44. *Id.* As support for this proposition, the court cited its decision in *Jack Kahn Music Co. v. Baldwin Piano & Organ Co.*, 604 F.2d 755 (2d Cir. 1979).

In *Jack Kahn Music*, Kahn moved for a preliminary injunction to prohibit Baldwin from cancelling a dealership contract with it pending resolution of an antitrust action against Baldwin instituted by Kahn. *Id.* at 761. The district court granted the motion, finding “irreparable injury, a substantial question amounting to a fair ground for litigation, and a balance of hardships tipping decidedly in Kahn’s favor.” *Id.* at 759. On appeal, the Second Circuit voiced its dissatisfaction with the practice of simultaneous institution of antitrust actions and service of motions for preliminary injunctions, a procedure which had apparently become common practice in the Second Circuit. *Id.* at 757. The court of appeals reversed the district court’s order, stating that a showing of substantial and irreparable injury is an absolute prerequisite to the granting of preliminary injunction relief. *Id.* at 761-62. The court concluded that the injuries alleged by Kahn were ordinary, and at most, speculative because anything can be a possible or potential result of the cancellation of a dealership agreement. *Id.* at 759, 761-62. Furthermore, the court stated, where the plaintiff shows anything less than a probability of success on the merits of his claim, the showing of irreparable harm must be even stronger. *Id.* at 759.
licef. Irreparable harm was established "because of the difficulty . . . of determining the identity of all the attendants who would suffer lost wages."45

The court next rejected Eastern's argument that section 107 of the Norris-LaGuardia Act limited a federal court's ability to grant injunctive relief in cases growing out of labor disputes.46 The court concluded that the district court was correct in issuing a preliminary injunction prohibiting Eastern from utilizing the non-union flight attendants pending exhaustion of the major dispute resolution procedures of the Railway Labor Act.47

II. BACKGROUND

A. The Railway Labor Act

The Railway Labor Act48 was enacted by Congress in 1926, in an effort to encourage collective bargaining by railroads and their employees to avoid "wasteful strikes and interruptions of interstate commerce."49 Toward this end, the Act recognized two types of disputes between labor and management, major and minor disputes,50 and pro-

45. Transport Workers, 695 F.2d at 675-76.
46. Id. at 678-79. Section 107 of the Norris-LaGuardia Act prohibits a federal court from issuing an injunction in a case growing out of a labor dispute, unless the court holds a hearing in which testimony of witnesses is received with an opportunity for cross-examination, and the court finds: (1) unlawful acts have been threatened or will be committed; (2) substantial and irreparable harm will be sustained to the complainant's property; (3) greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief; (4) the complainant has no adequate remedy at law; and (5) public officials charged with protecting the complainant's property are unable or unwilling to furnish adequate protection. 29 U.S.C. § 107 (1987). The court refused to address whether a showing of irreparable harm was required under § 107 because such a showing was required independently under precedent in the Second Circuit. Transport Workers, 695 F.2d at 678-79. For a more complete discussion of the requirements of the Norris-LaGuardia Act and the accommodation principle, see infra notes 97-167 and accompanying text. For a general discussion of the ability to issue injunctions under the Norris-LaGuardia Act, see H. Perritt, supra note 22.
47. Transport Workers, 695 F.2d at 680.
50. See Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 722-24 (1945). In Elgin, the Court recognized that the Act distinguished between disputes growing out of changes in rates of pay, rules, or working conditions, and disputes growing out of grievances, or out of the interpretation, or application of existing collec-
vided separate dispute resolution machinery for each.51

The 1926 version of the Act required the parties to submit minor
disputes for arbitration.52 A board of adjustment formed voluntarily by
labor and management, and consisting of an equal number of labor and
management appointees handled the arbitration.53 If the board of ad-
justment was not able to reach a majority decision in the case, it turned
the dispute over to the Board of Mediation for resolution.54

The procedures established by Congress for the resolution of major
disputes consisted entirely of a process of non-compulsory adjust-
ment.55 The 1926 version of the Act required the parties to submit ma-
ajor disputes to the Board of Mediation.56 If the Board was not able to
successfully mediate a settlement, it had to encourage the parties to sub-
mit the dispute for binding arbitration.57 If the parties refused, and the
dispute threatened to interfere substantially with interstate commerce,
the Act authorized the President of the United States to empanel an
Emergency Board to engage in fact-finding.58 The parties were re-
quired to maintain the status quo throughout the entire period of dis-
pute resolution.59 However, once the parties exhausted the major
dispute resolution procedures, they were free to engage in economic
self-help.60

The period between 1926 and the 1934 amendments to the Act re-
vealed three major weaknesses in the structure of the Act’s major and

(1982)) (authorizing creation of voluntary boards of adjustment for settlement
of minor disputes); Ch. 347, §§ 4-5, 44 Stat. 577 (1926) (current version at 45
U.S.C. §§ 155-156 (1982)) (creating board of mediation to resolve major dis-
putes and disputes not settled by boards of adjustment, and imposing status quo
obligation on parties to major dispute).

(1982)).

53. Id.

(1982)).


56. Ch. 347, §§ 4-5, 44 Stat. 577 (1926) (current version at 45 U.S.C.
§§ 155-156 (1982)).

(1982)).

(1982)); see also Pervitt, supra note 2, at 225-24.

(1982)).

369, 379-80 (1969) (discussing parties’ right to engage in economic self-help
upon exhaustion of major dispute resolution procedures).
minor dispute resolution procedures. First, either party to a minor dispute could defeat the purpose of the board of adjustment by refusing to join in creating one. Second, action taken by the boards of adjustment often resulted in deadlock because the boards consisted of an even number of labor and management nominees. Finally, the Board of Mediation, having jurisdiction over minor disputes left unresolved by the boards of adjustment, was deluged with deadlocked disputes and, consequently, was left paralyzed.

In 1934, Congress amended the Railway Labor Act in an effort to cure these weaknesses. As amended, the Act imposes a duty on labor and management to "exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruptions to commerce . . .."

The 1934 amendments abolished the boards of adjustment and replaced them with the National Railroad Adjustment Board (Adjustment Board). The amendments also required labor and management to submit all minor disputes not settled through negotiation under section 152, Second to the Adjustment Board for arbitration. The amend-

62. Id. See also Hearings Before Committee on Interstate Commerce, 73d Cong., 2d Sess. 137 (1934) (Chairman of committee stated his disapproval of Act's provision for voluntary adjustment boards).
63. Elgin, 325 U.S. at 726; see also H.R. REP. No. 1944, 73d Cong., 2d Sess. 3 (1934) ("thousands of these disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked").
64. Elgin, 325 U.S. at 726-27.
66. Ch. 691, § 2, 48 Stat. 1186 (1934) (codified at 45 U.S.C. § 152, First (1982)). Section 152, First provides:
It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
Id. See also Chicago & N. Ry. v. United Transp. Union, 402 U.S. 570, 583 (1971) (holding that "strike injunctions may issue when such a remedy is the only practical, effective means of enforcing the duty to exert every reasonable effort to make and maintain agreements").
68. Section 152, Second provides: "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." Ch. 691, § 2, 48 Stat. 1186 (1934) (codified at 45 U.S.C. § 152, Second (1982)).
ments made the decisions rendered by the Adjustment Board binding and final as to the parties. Additionally, these amendments prohibited labor from striking to enforce its interpretation of the contract during a minor dispute.

The 1934 amendments also abolished the Board of Mediation, and established in its place the National Mediation Board (Mediation Board). The amendments limited the jurisdiction of the Mediation Board, allowing it only to provide mediation services to labor and management in major disputes. The amendments required that the party seeking to change the collective bargaining agreement give thirty-days written notice of the intended changes to the other party. In addition, either party could submit disputes over changes in rates of pay, rules or working conditions that were not settled by the parties through negotiation to the Mediation Board. The amendments also authorized the Mediation Board to request the President to empanel an Emergency Board if the normal mediation process failed to bring about a settlement and a strike by labor threatened to interfere substantially with interstate commerce. The amendments also required the parties to maintain the status quo throughout the major dispute resolution process.

Section 153, First (i) provides in relevant part:

The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner . . . but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to . . . the Adjustment Board

Ch. 691, § 3, 48 Stat. 1189 (1934) (codified at 45 U.S.C. § 153, First (i) (1982)); see also Chicago River, 353 U.S. at 39 (holding that language of § 152, First should be construed literally to impose duty upon parties to submit unresolved disputes to Adjustment Board for mandatory arbitration).


70. See Brotherhood of Locomotive Eng'rs v. Louisville & N.R.R., 373 U.S. 33, 40 (1963) (holding union was precluded, under Act, from striking to enforce Adjustment Board decision in its favor); Chicago River, 353 U.S. at 39, 42 (holding union may not strike while dispute is pending before Adjustment Board).


73. Ch. 691, § 6, 48 Stat. 1197 (1934) (codified at 45 U.S.C. § 156 (1982)).

74. Ch. 691, §§ 2, 5, 6, 48 Stat. 1186, 1195, 1197 (1934) (codified at 45 U.S.C. §§ 152, Seventh, 155, 156 (1982)).


parties exhausted the major dispute resolution process they were free to engage in economic self-help. The exhaustion requirement creates an almost interminable procedure whereby "[e]very facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied." The Act’s procedures are designed so that management is prohibited from taking any action that would justify a strike by labor.

The status quo provisions of the Railway Labor Act are central to its purpose of facilitating a peaceful resolution of railway labor disputes. This requirement, by preventing the parties from engaging in economic self-help, provides time for rational bargaining to occur.

Disputes usually arise when one party wants to change the status quo without undue delay, and the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.

[shall occur] except in a manner prescribed in ... section 156 of this title. Id. § 152, Seventh.

Section 156 provides in relevant part:

In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon... unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

Id. § 156. Additionally, § 160 provides in relevant part that "[a]fter the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." Id. § 160.


81. Detroit, 396 U.S. at 150.

82. Id. See also Brotherhood of Ry. Clerks v. Florida E. Coast Ry., 384 U.S. 238, 246 (1966) ("[P]rocedures of the Act are drawn out...[for the purpose of inducing] an agreement which resolves the dispute.").
The scope of the status quo requirement was delineated by the United States Supreme Court in *Detroit & Toledo Shore Line Railroad v. United Transportation Union.* In Detroit, the railroad appealed an order enjoining it from making outlying assignments to its train and engine crews prior to exhaustion of the major dispute resolution procedures. The railroad argued that outlying assignments did not violate its status quo obligation because the collective bargaining agreement was silent as to the location at which its employees were required to report for work. The Court rejected this argument and stated that the status quo obligation extended not only to items specifically covered by the collective bargaining agreement, but also "to those actual, objective working conditions out of which the dispute arose." The Court stated that a condition will be deemed to be an actual and objective working condition if it occurs for such "a sufficient period of time with the knowledge and acquiescence of . . . [the parties] to become in reality a part of the actual working conditions." The Court held that because the railroad


84. *Id.* at 147. The railroad notified the union that it intended to reassign some workers to a yard 35 miles away from the yard at which they were currently working. *Id.* at 144. In response, the union filed a notice under § 156 seeking to amend the collective bargaining agreement to prohibit outlying assignments. *Id.* at 144-45. While the case was pending before the Mediation Board, the railroad announced it would change the assignments to yet another yard. *Id.* at 145. The union then filed a grievance under § 153 challenging the railroad’s right to make outlying assignments under the collective bargaining agreement. *Id.* After the Adjustment Board ruled that the collective bargaining agreement did not prohibit outlying assignments, the railroad announced it was reviving “its plan for work assignments at [the yard 35 miles away].” *Id.* at 146. The union responded by again filing a § 156 notice with the Mediation Board. *Id.* While the case was pending before the Mediation Board, the railroad began requiring the employees to report for work at the outlying assignments. *Id.* The union countered by threatening a strike. *Id.* The Railroad filed a complaint with the district court seeking to enjoin the threatened strike under § 156 pending exhaustion of the Mediation Board proceedings. *Id.* The union filed a counterclaim to enjoin the railroad from making the outlying assignments. *Id.* at 146-47. The district court dismissed the railroad’s complaint, and granted the union’s request for a preliminary injunction. *Id.* at 147. The court of appeals affirmed. *Id.*

85. *Id.* at 147-48.

86. *Id.* at 152-53. The Court stated that the railroad’s construction of the language of the status quo provision of § 156 was fundamentally at odds with the Act’s objective in that it would facilitate strikes. See *id.*

87. *Id.* The courts of appeals have developed several variations of the *Detroit* test for determining whether a disputed item is part of the actual and objective working conditions. See, e.g., Brotherhood of Teamsters v. Southwest Airlines, 842 F.2d 794, 804 (5th Cir. 1988) (“When longstanding practice ripens into an established and recognized custom between the parties, it ought to be protected against sudden and unilateral change . . . .”), *vacated on other grounds on resh’g,* 875 F.2d 1129 (5th Cir. 1989); Brotherhood of Locomotive Eng’rs v. Burlington N.R.R., 838 F.2d 1087, 1091 (9th Cir. 1988) (collective bargaining agreement includes not only express terms, but terms implied by law and past practice), *vacated on other grounds,* 109 S. Ct. 3207 (1989); Burlington N.R.R. v. United Transp. Union, 129 L.R.R.M. (BNA) 3119, 3125 (7th Cir. 1988) (“[P]ast
had required its employees to report for work at one particular yard for many years and had never made outlying assignments before, the location became an actual and objective condition of employment which the railroad could not unilaterally change unless it exhausted the Act's major dispute resolution procedures.88

B. The Norris-LaGuardia Act

In 1932, Congress enacted the Norris-LaGuardia Act89 to limit the federal courts' power to issue injunctions in controversies growing out of labor disputes.90 The Act was passed largely to restore the balance of economic power between labor and management which had been disturbed by the overly restrictive construction by the United States Supreme Court of section 20 of the Clayton Act.91 The Court had narrowly construed section 20 to allow federal courts the power to enjoin, practice in effect becomes a part of the implied-in-fact contract between the carrier and union . . . ."

88. Detroit, 396 U.S. at 154.
91. Burlington Northern, 481 U.S. at 438. Section 20 of the Clayton Act was enacted by Congress to limit the ability of the federal courts to enjoin employees from organizing into labor unions. Section 20 provides in relevant part:

No restraining order or injunction shall be granted by any court of the United States, or a judge . . . thereof, in any case . . . involving, or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law . . . .

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any other act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

among other things, secondary boycotts\textsuperscript{92} and picketing.\textsuperscript{93} This led the public to believe that the federal courts, with their liberal pro-management labor injunctive policies, were merely the tools of management.\textsuperscript{94} As a result of this growing public sentiment, Congress enacted the Norris-LaGuardia Act which, except in very limited circumstances, stripped the federal courts of jurisdiction to issue injunctions in labor disputes.\textsuperscript{95}

Section 101 of the Norris-LaGuardia Act boldly states that:

[n]o court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter; nor shall any such . . . order . . . be issued contrary to the public policy declared in this chapter.\textsuperscript{96}

\textsuperscript{92} Duplex Printing Press Co. v. Deering, 254 U.S. 443, 475-79 (1921).
\textsuperscript{93} American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 190, 207 (1921) (section 20 does not prevent federal court from issuing injunction limiting number of persons picketing plant to one representative per entry gate).
\textsuperscript{94} Senator Norris, the Act's co-sponsor, stated during debate on the Act: Is it any wonder that there has gradually grown up in the minds of ordinary people a feeling of prejudice against Federal courts? . . . [C]an anyone doubt that such action on the part of the Federal judiciary has gradually developed in the minds of ordinary people a fear that where a system of jurisprudence prevails which enables one man . . . to write a law and then order its enforcement, and then, refusing a jury, to try alleged offenders and punish them . . . it will lead us to the common knowledge . . . that there can be no public liberty.
\textsuperscript{75} CONG. REC. 4507 (1932) (statement of Sen. Norris).
\textsuperscript{95} Burlington Northern, 481 U.S. at 437-38; see also 75 CONG. REC. 5478 (1932) (statement of Rep. LaGuardia) ("If the courts had not . . . purposely misconstrued the Clayton Act, we would not . . . be discussing an anti-injunction bill.").
\textsuperscript{96} Ch. 90, § 1, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 101 (1985)). The United States Supreme Court has declared that the purpose of the Act is "to protect working men in the exercise of organized, economic power, which is vital to collective bargaining. The Act aimed to correct existing abuses of the injunctive remedy . . ." Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 953 U.S. 50, 40 (1957).

Section 102 of the Norris-LaGuardia Act provides in relevant part:

[T]he public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, 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, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self organization or in
Section 113(c) of the Act defines a labor dispute as "any controversy concerning terms or conditions of employment . . ." 97 Section 113(a) states that a controversy grows out of a labor dispute when, among other things, "the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have a direct interest . . . therein . . ." 98 In Jacksonville Bulk Terminals v. International Longshoremen's Association, 99 the United States Supreme Court examined whether a politically motivated work-stoppage constituted a case involving or growing out of a labor dispute within the meaning of the Norris-LaGuardia Act. 100 The Terminals argued that the Norris-LaGuardia Act did not prevent the district court from enjoining the work-stoppage. They claimed that the political motivation underlying the action removed it from the Act's definition of a labor dispute. 101 The Court rejected the Terminals' narrow construction of the term "labor dispute." The Court concluded that the Act merely requires that the "employer-employee relationship is the matrix of the controversy." 102 Because the issue was whether the collective bargaining agreement's no strike clause permitted the work-stoppage, the Court concluded that the employment relation other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore the following . . . limitations upon the jurisdiction and authority of the courts of the United States are enacted.


97. 29 U.S.C. § 113(c) (1985). The statute further provides that a labor dispute may exist irrespective "of whether . . . the disputants stand in the proximate relation of employer or employee." Id.

98. Id. § 113(a).


100. Id. In Jacksonville Bulk Terminals, the union announced that it would not handle any cargo bound to or from the Soviet Union in protest of the Soviet Union's invasion of Afghanistan. Id. at 705. When members of the local affiliate refused to unload cargo from a Soviet ship, the Terminals filed suit under § 301 of the Labor Management Relations Act, alleging that the union violated the no strike and arbitration clauses of their collective bargaining agreement. Id. at 706. The Terminals sought an injunction prohibiting the union from refusing to handle Soviet cargo pending exhaustion of the arbitration process. Id. The district court granted the injunction and ordered the parties to arbitrate the dispute. Id. The court held that the political motivation underlying the union's work stoppage brought the dispute outside the protection of the Act's anti-injunction prohibition. Id. at 706-07. The court of appeals affirmed the district court's decision requiring the union to submit the dispute to arbitration, but reversed the order granting the injunction. The court concluded that the work-stoppage fell within the Act's definition of a labor dispute, and that the dispute was not arbitrable under the decision in Buffalo Forge v. Steelworkers, 428 U.S. 397 (1976). Jacksonville Bulk Terminals, 457 U.S. at 707.


102. Id. at 712-13 (quoting Columbia River Packers Ass'n. v. Hinton, 315 U.S. 143, 147 (1942)).
was the matrix of the controversy, and thus determined that the dispute
was a case growing out of a labor dispute within the meaning of the
Act. 103

Section 104 of the Norris-LaGuardia Act specifically delineates acts
that the federal courts may not enjoin. 104 These include striking, be-
coming a member of a labor organization, paying strike benefits, assist-
ing interested persons in pursuing legal action, publicizing the dispute,
picketing, advising any person of the intention to do any of the pro-
tected acts, and urging others to engage in any of the protected acts. 105

Section 107 of the Act prescribes strict procedures that must be ob-
served and specific findings that a court must make prior to issuing an
injunction in a labor dispute. 106 A court must hold a hearing prior to
issuing any order. 107 During the hearing, the party seeking the injunc-
tion must introduce sworn witness testimony to support the allegations
in the complaint. 108 The opposing party is then given the opportunity
to cross-examine and introduce rebuttal witnesses. 109 The testimony
elicted during the hearing must demonstrate: "(a) [t]hat unlawful acts
have been threatened and will be committed unless restrained," or un-
lawful acts have been committed and will continue unless restrained;
(b) that substantial and irreparable injury to the plaintiff’s property will
follow; (c) that greater injury will be inflicted on the plaintiff by the de-
nial of relief than will be inflicted upon the defendant by granting relief;
(d) that the plaintiff has no adequate remedy at law; and (e) that public
officers charged with protecting the plaintiff’s property are unable or
unwilling to do so. 110

Section 108 of the Norris-LaGuardia Act bars a person from ob-
taining injunctive relief "who has failed to comply with any obligation
imposed by law which is involved in the labor dispute . . . or who has
failed to make every reasonable effort to settle such dispute either by
negotiation or with the aid of any available governmental machinery of
mediation or voluntary arbitration." 111 This section has been labelled

103. Id. at 713. The Court’s analysis suggests that a “labor dispute” exists
where either the underlying dispute is over the actual terms and conditions
of employment or where the employment relation is used as leverage by either
party to the controversy, regardless of whether the underlying cause is actually
employment-related. See id. at 712-13.


105. Id. For further discussion of the limitations imposed by §§ 101 and
104 of the Norris-LaGuardia Act on the federal courts’ power to grant injunctive
relief in labor disputes, see infra notes 106-12 and accompanying text.


107. Id.

108. Id.

109. Id.

110. Id.

111. Id. § 108.
the Act’s "clean hands" provision.  

In *Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western Railroad*, the United States Supreme Court examined whether section 108 imposed a legally enforceable duty on a party seeking an injunction to exert every reasonable effort to settle the dispute. The Court faced the question whether, under section 108, the railroad's failure to accept an offer of binding arbitration by the Mediation Board barred it from obtaining an injunction against the union. The union argued that the railroad's refusal to accept the proffer of arbitration violated its duty under section 108 to exert every reasonable effort to settle the dispute, and thus barred the railroad from obtaining injunctive relief. The railroad argued that the union's interpretation of section 108 transformed a voluntary arbitration procedure into a compulsory process. The Court held that the railroad was not required to arbitrate the dispute, but by failing to arbitrate, did not perfect its right to injunctive relief under the Norris-LaGuardia Act. The Court stated that section 108 imposed two obligations on a party seeking injunctive relief. First, it imposed a duty to comply with all obligations required by law. Second, it required the party to exert every reasonable effort to settle the dispute. The Court stated that the second obligation was broader than the first, and required the party to use all available means to settle the dispute, whether or not required by law. 

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114. *Id.* at 56. The railroad and trainmen commenced negotiations over proposed changes in their collective bargaining agreement in October 1940. *Id.* at 51. The parties exhausted the Railway Labor Act's major dispute resolution procedures in November 1941. *Id.* Anticipating that the railroad would institute unilateral changes in their working conditions, the trainmen voted to strike commencing December 9, 1941. *Id.* at 51-52. The Mediation Board intervened after the Japanese attack on Pearl Harbor, and requested that the parties submit the dispute to binding arbitration in light of the national crisis. *Id.* The trainmen agreed, but the railroad rejected the proposal. *Id.* On December 28, 1941, the trainmen struck, after the railroad unilaterally imposed the disputed changes in their working conditions. *Id.* at 52. After clashes between the striking trainmen and groups of "special agents" hired by the railroad to protect the trains, the railroad filed a complaint seeking an injunction prohibiting the trainmen from interfering with its property or operations. *Id.* The district court granted the injunction, and the court of appeals affirmed. *Id.* at 54.

115. *Id.* at 55.

116. *Id.* at 62.

117. *Id.* at 63.

118. *Id.* at 56-57.

119. *Id.* at 56.

120. *Id.* at 56-57. The Court stated that failure to meet either of these obligations would eliminate the possibility of injunctive relief for the complainant. *Id.*

121. *Id.* at 57. The Court noted that the second obligation would be ren-
C. The Accommodation Principle

The plain language of the Norris-LaGuardia Act states that the federal courts lack jurisdiction to enter injunctions in labor disputes.¹²² However, a literal interpretation of Norris-LaGuardia would render both the major and minor dispute resolution procedures of the Railway Labor Act impotent. If the federal courts could not enjoin a unilateral change in the status quo, a party could not be compelled to comply with the dispute resolution procedures. This would render the compulsory procedures voluntary.¹²³ In response to this tension, the United States Supreme Court developed the accommodation principle. This principle permits federal courts to enjoin conduct which would undermine the processes and objectives of the Railway Labor Act.¹²⁴

The first case to suggest that the Norris-LaGuardia Act does not bar a federal court from issuing an injunction to force compliance with a mandate of the Railway Labor Act was Virginian Railway v. System Federation No. 40.¹²⁵ In Virginian Railway, the union brought an action in federal district court to obtain an injunction to compel the railroad to bargain with it.¹²⁶ The railroad argued that the dispute was a case "growing out of a labor dispute" within the meaning of section 113 of the Norris-LaGuardia Act, and therefore, the lower court lacked jurisdiction under section 101 of the Norris-LaGuardia Act to issue an injunction.¹²⁷ The Court rejected the railroad's argument, and held that section 152, Ninth of the Railway Labor Act imposed a legal obligation

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¹²² 29 U.S.C. § 101 (1982) ("No court of the United States . . . shall have jurisdiction to issue any . . . injunction in a case involving or growing out of a labor dispute . . . ."); see also Note, supra note 2, at 209-32 (arguing that plain meaning of Norris-LaGuardia Act prohibits federal courts from enjoining secondary activity in railway labor disputes).


¹²⁵ 300 U.S. 515 (1937).

¹²⁶ Id.

¹²⁷ Id. at 559.
on the Railroad to bargain with the Union which was enforceable in equity, notwithstanding section 101 of the Norris-LaGuardia Act. The Court stated that the Norris-LaGuardia Act limits the power of a federal court to enter an injunction in a labor dispute only to the extent that it does not conflict with section 152, Ninth of the Railway Labor Act. The Court justified this conclusion on the theory that the specific provisions of the Railway Labor Act cannot be "rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act."

In *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad*, the United States Supreme Court moved beyond the general-specific theory developed in *Virginian Railway* to an analysis that examined the underlying legislative purposes of both statutes. In *Chicago River*, the Court examined whether the Norris-LaGuardia Act deprived the federal courts of jurisdiction to enjoin a threatened union strike while a grievance was pending before the National Railroad Adjustment Board. The union argued that the plain language of the Norris-LaGuardia Act deprived the federal courts of the power to issue injunctions in labor disputes, and that this limitation extended to railway labor disputes. The Court rejected this argument, holding that there must be an accommodation of the Norris-LaGuardia Act and the Railway Labor Act "so that the obvious purpose in the enactment of each is preserved." The Court stated that Congress enacted the Railway Labor Act to bring about peaceful resolutions of labor disputes in the railroad industry by channeling the economic forces of labor and management

128. *Id.* at 562-63.
129. *Id.* at 563.
132. *Id.* at 39. In *Chicago River*, a dispute arose between the union and the railroad over the accumulation of 21 unresolved union grievances. *Id.* at 32. After negotiations between the parties failed, the union called a strike. *Id.* The Mediation Board proffered its services due to the serious nature of the impending work stoppage. *Id.* The Mediation Board was not successful, and the railroad submitted the dispute to the Adjustment Board for arbitration. *Id.* The union, however, issued a strike call four days after the submission of the dispute to the Adjustment Board. *Id.* The railroad filed a complaint in federal district court seeking to enjoin the threatened strike while the dispute was pending before the Adjustment Board. *Id.* The railroad claimed the strike threatened irreparable injury to its employees, and other industries and railroads with which it dealt. *Id.* The district court, after issuing a temporary restraining order, dismissed the complaint, concluding that § 101 of the Norris-LaGuardia Act deprived it of jurisdiction to enjoin the threatened strike. *Id.* The Seventh Circuit reversed, and on remand the district court granted the order enjoining the strike. *Id.* at 33. The court of appeals then affirmed the district court's issuance of a permanent injunction for the railroad. *Id.*
133. *Id.* at 39-40. The union argued that each statute should be read without reference to the other. *Id.*
134. *Id.* at 40.
into a dispute resolution system.\textsuperscript{135} The Norris-LaGuardia Act, on the other hand, was enacted to correct past abuses of the injunctive power by the federal courts. These abuses upset the "natural interplay of the competing economic forces" of labor and management essential for effective collective bargaining.\textsuperscript{136} The Court then reasoned that the issuance of injunctive relief to vindicate the processes of the Railway Labor Act would not upset the natural balance of power between labor and management because the Railway Labor Act provided labor with a reasonable substitute for striking in the form of mandatory arbitration.\textsuperscript{137} As a result, the Court concluded that an injunction would further the purpose of the Railway Labor Act without undermining the purpose of the Norris-LaGuardia Act.\textsuperscript{138}

The Court's analysis in \textit{Chicago River} suggests that the Norris-LaGuardia Act should not prevent a federal court from enjoining a strike over a minor dispute. The issuance of an injunction in such a situation would not upset the natural interplay between labor and management because the Railway Labor Act provides a mechanism for a final resolution of the dispute.\textsuperscript{139} The Court's analysis also suggests that an examination of the purpose underlying the enactment of each statute is an essential component of an accommodation analysis.\textsuperscript{140} While the Court embraced the accommodation principle, it failed to provide any clear guidance as to the standard lower federal courts should apply in determining whether accommodation is appropriate.\textsuperscript{141}

In \textit{International Association of Machinists v. Street},\textsuperscript{142} the Court briefly touched on the standard federal courts should apply when determining whether to grant injunctive relief under the Railway Labor Act. In \textit{Street}, the Court reversed a state court order enjoining the union from enforcing a closed shop provision in their collective bargaining agreement with Southern Railway Systems.\textsuperscript{143} The Court noted that closed shop agree-

\begin{enumerate}
\item \textsuperscript{135} \textit{Id.} at 40-41.
\item \textsuperscript{136} \textit{Id.} at 40.
\item \textsuperscript{137} \textit{Id.} at 41.
\item \textsuperscript{138} \textit{Id.} at 42.
\item \textsuperscript{139} \textit{Id.} at 42 n.24. The Court compared the minor dispute resolution procedures, which provide for final and binding arbitration, with the major dispute resolution procedures, which merely provide for self-adjustment. \textit{Id.} The Court suggested that the Norris-LaGuardia Act would bar a federal court from issuing an injunction prohibiting a strike in a major dispute because that process did not provide for final resolution. \textit{Id.}
\item \textsuperscript{140} \textit{Id.} at 40.
\item \textsuperscript{141} In its accommodation analysis, the \textit{Chicago River} Court examined the purposes underlying the enactment of the Norris-LaGuardia Act and the Railway Labor Act. It also applied the general-specific theory developed in \textit{Virginia Railway}. See \textit{id.} at 41-42. However, it was not clear whether the Court was replacing the general-specific test with the legislative purpose analysis, or merely adding an additional factor for consideration in an accommodation analysis.
\item \textsuperscript{142} 367 U.S. 740 (1960).
\item \textsuperscript{143} \textit{Id.} at 749.
\end{enumerate}
ments were permitted under section 152, Eleventh of the Railway Labor Act, but concluded that the Act did not authorize the union to use a member's dues to support a political candidate whom the member did not support.\textsuperscript{144} However, the Court concluded that a blanket injunction prohibiting the union from spending funds in furtherance of the disputed political activities was inconsistent with the Norris-LaGuardia Act's policy against labor injunctions.\textsuperscript{145} The Court briefly noted that the principles underlying the enactment of the Norris-LaGuardia Act require a court to be "hesitant in fixing upon injunctive relief" for breaches of duties owed under federal labor laws.\textsuperscript{146} The Court stated that the injunctive remedy should not be utilized by a court "unless that remedy alone can effectively guard the plaintiff's right."\textsuperscript{147}

The Court faced the accommodation issue again in \textit{Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad}.\textsuperscript{148} In \textit{Locomotive Engineers}, the issue was whether the Norris-LaGuardia Act prevented a federal court from enjoining a union strike to enforce its interpretation of a money award made by the Adjustment Board.\textsuperscript{149} The union, relying on the \textit{Chicago River} decision, argued that a court may exercise its power to

\textsuperscript{144} \textit{Id.} at 768-69.

\textsuperscript{145} \textit{Id.} at 772-73. The Court stated that "[a] blanket injunction against all expenditures of funds for the disputed purposes, even one conditioned on cessation of improper expenditures, would not be a proper exercise of equitable discretion." \textit{Id.} at 772. The court remanded the case for reconsideration, and suggested two possible remedies: an injunction against the union restricting the total amount of money available for political expenditures to the proportion of those employees not opposing the political cause; and restitution to those employees whose dues were used to support a political cause which they opposed. \textit{Id.} at 774-75.

\textsuperscript{146} \textit{Id.} at 773.

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} 373 U.S. 33 (1963).

\textsuperscript{149} \textit{Id.} at 35. In \textit{Locomotive Engineers}, the railroad fired an employee for assaulting two of its other employees. \textit{Id.} at 33. The union protested the dismissal by invoking the customary grievance procedures, but was unsuccessful. \textit{Id.} at 34. The union then threatened to strike, but before a strike could be called, the railroad submitted the dispute to the Adjustment Board for arbitration. \textit{Id.} The Adjustment Board ruled in favor of the employee, and ordered the railroad to reinstate him with compensation for lost wages. \textit{Id.} The railroad complied with the order, but insisted that the employee submit a record of the income he earned during his period of dismissal in order to offset the total amount of lost compensation awarded. \textit{Id.} The union resisted this request, and threatened to strike unless the railroad paid the employee full wages for the entire period of time that he was not working for the railroad. \textit{Id.} After negotiations failed, the railroad submitted the question to the Adjustment Board for a clarification of its order. \textit{Id.} at 35. The Board denied the petition, and the union threatened to strike unless the railroad capitulated. \textit{Id.} As a result, the railroad filed suit in federal district court seeking an injunction prohibiting the union from striking to enforce its interpretation of the Adjustment Board's order. \textit{Id.} The district court issued the injunction, finding that the Railway Labor Act denied the union the right to strike to enforce a monetary award ordered by the Adjustment Board, and required the union to utilize the Act's judicial enforcement procedures. \textit{Id.}
grant injunctive relief in minor disputes only if a strike is called during an Adjustment Board proceeding. The Court, also relying on Chicago River, rejected the union's argument, stating that the Norris-LaGuardia Act did not prevent a federal court from enjoining a strike over a minor dispute. The Court stated that decisions of the Adjustment Board concerning controversies over monetary awards are not final and binding on the parties. The Court stated that the judicial enforcement provision of the Act was an integral and essential part of the Act's minor dispute resolution machinery since an Adjustment Board decision awarding a party monetary compensation was not final and binding, especially in situations where the railroad did not comply with the order. The Court reasoned that the inability of the district court to enjoin a union from striking after an Adjustment Board decision that awarded money would severely undermine the integrity of the minor dispute resolution process.

In Chicago & North Western Railway v. United Transportation Union, the Court again addressed the accommodation issue. The issue presented was whether the Norris-LaGuardia Act prohibited a federal court from enjoining a strike where a union violated the obligation imposed on it by section 152, First to exert every reasonable effort to settle a dispute with the Railroad. The union argued that the Norris-LaGuardia Act deprived the federal courts of jurisdiction to enjoin a strike during a major dispute. The Court rejected the union's argument, and held that the Norris-LaGuardia Act will be accommodated to the

150. Id. at 40.
151. Id.
152. Id. at 41. While the Adjustment Board's decision was not final and binding, it did constitute "prima facie evidence of the facts stated in the complaint" in the judicial enforcement procedures. Id.
153. Id. At the time of the dispute in Locomotive Engineers, the decisions of the Adjustment Board were final and binding, except as to money awards. Id. at 37 n.9. Section 153, First (m) has now been revised to provide that all Adjustment Board decisions are final and binding. 45 U.S.C. § 153, First (m) (1982).
154. Locomotive Eng's, 373 U.S. at 41-42.
156. Id. at 572-73. In Chicago & North Western, the railroad filed suit in federal district court to obtain an injunction prohibiting the union from striking while the dispute was pending before the Mediation Board. Id. at 571. The railroad claimed that the union failed to bargain in good faith, in violation of its duty under § 152, First. Id. The district court declined to reach the merits of the complaint, ruling that the matter should be handled by the Mediation Board. Id. at 572. The court also ruled that §§ 104, 107, and 108 of the Norris-LaGuardia Act deprived it of jurisdiction to grant injunctive relief. Id. The Seventh Circuit affirmed the lower court decision, holding that § 152, First was merely a general policy provision of the Railway Labor Act and "not a specific requirement anticipating judicial enforcement." Id. The Seventh Circuit also agreed that the lower court lacked jurisdiction under the Norris-LaGuardia Act to entertain the request for injunctive relief. Id.
157. Id.
specific mandates of the Railway Labor Act whenever an injunction is the only practical and effective means of enforcing the Act's processes. The Court reasoned that if an injunction was the only practical and effective method of protecting a plaintiff's right under section 152, First of the Railway Labor Act, the Norris-LaGuardia Act would not bar a federal court from enjoining the defendant's violation. The Court cautioned the lower courts to be reluctant to grant injunctive relief for violations of section 152, First if a party "structure[s] ... [its] negotiating positions and tactics with an eye on the courts, rather than restricting ... [its] attention to the business at hand."

In Burlington Northern Railroad v. Brotherhood of Maintenance of Way Employees, the Court faced the issue of whether the Norris-LaGuardia Act deprived a federal court of jurisdiction to enter an injunction prohibiting secondary activity by a union where the parties had exhausted the major dispute resolution procedures of the Railway Labor Act. The

158. Id. at 581-82.
159. Id. at 582.
160. Id. at 583. The Court noted that the vague wording of the section could be used to justify the "freewheeling judicial interference with labor relations of the sort that called forth the Norris-LaGuardia Act in the first place," and therefore cautioned against liberally issuing injunctive relief for violations of section 152. Id.
162. Id. at 437. In Burlington Northern, the union was engaged in negotiations with the Maine Central Railroad, a subsidiary of Guilford Transportation Industries, over the railroad's decision to abolish the jobs of 300 of the 400 union members. Id. at 432. After exhausting the Act's major dispute resolution procedures, the union commenced a strike against the railroad, and several days later extended the strike to all of the railroads owned by Guilford. Id. Initially, the strike brought about the desired effect, causing the cessation of the railroad's operations, but within several weeks Guilford was able to increase its volume of traffic to near normal levels. Id. Subsequently, the union received information from which it concluded that Guilford was receiving financial assistance from other carriers. Id. As a result, the union attempted to extend the strike by picketing railroads that interchanged large volumes of traffic with Guilford, but the picketing was enjoined by two federal district court orders. Id. at 433. The union then notified the President of the Association of Railroads of its intention to picket the facilities of other carriers and to ask employees of the other railroads to strike until Maine Central was willing to bargain. Id. The union also commenced picketing at major railroad interchanges throughout the country. Id. Sixty-two railroads filed suit in the United States District Court for the District of Columbia against the union seeking a temporary restraining order against the picketing. The order was denied. Id. Burlington Northern, however, was granted a temporary restraining order in the district court in Illinois, prohibiting the union from picketing or striking Burlington Northern. Id. Later, the Illinois district court entered a preliminary injunction prohibiting the union from picketing. Id. The district court held that the Norris-LaGuardia Act did not prevent it from issuing the injunction because secondary activity did not fall within the definition of a "labor dispute" within the meaning of the Act, unless the carrier against whom the pressure is exerted is substantially aligned with the primary employer. Id. The district court found that none of the railroads seeking injunctive relief had an ownership interest in Guilford or shared a significant commonality of interest with it. Id. As a result, the court stated that the Norris-
Court rejected the railroad's argument that secondary activity was unprotected under the Norris-LaGuardia Act. In the alternative, the railroad argued that the federal courts could enjoin the activity under the accommodation principle because secondary activity was prohibited by the Railway Labor Act. The Court briefly noted that the Norris-LaGuardia Act did not prevent a federal court from enjoining acts which violated a specific mandate of the Railway Labor Act. However, the Court pointed out that the Railway Labor Act was silent as to whether secondary activity was a permissible form of economic self-help, and stated that the railroad's argument "read too much . . . into the silence of the Act." The Court, therefore, declined to read a prohibition against secondary activity into the Railway Labor Act. Because the union exhausted the major dispute resolution procedures, and violated no specific provision of the Railway Labor Act, the Court held that the Norris-LaGuardia Act barred the lower court from enjoining the union's secondary activity.

LaGuardia Act did not bar it from granting injunctive relief. Id. at 435. On appeal, the Seventh Circuit rejected the lower court's adoption of the substantial alignment test, and held that secondary activity was a protected "labor dispute" within the plain meaning of the Norris-LaGuardia Act. Id. The Seventh Circuit also held that secondary activity was not illegal under the Railway Labor Act, and that, in the alternative, even if it was illegal, the Norris-LaGuardia Act prohibited the use of injunctions against economic self-help once the parties exhausted the major dispute resolution procedures. Id.

163. Id. at 441. The Court stated that the legislative history indicated that Congress intended the Norris-LaGuardia Act's protection to extend to primary and secondary activity. Id. In addition, the Court noted that the 1959 amendments to the National Labor Relations Act, which made secondary activity an unfair labor practice in the industries covered by the Act, expressly exempted railroads and their employees from the amendment's coverage. Id. at n.7.

164. Id. at 444.

165. Id. at 445. The Court stated that "[e]ven when a violation of a specific mandate of the [Railway Labor Act] is shown," a court should be reluctant to grant injunctive relief "unless that remedy alone can effectively guard the plaintiff's right." Id. at 446 (quoting International Ass'n of Machinists v. Street, 367 U.S. 740, 773 (1960)).

166. Id. at 447. The Court stated that congressional silence could suggest a legislative intention to permit the parties to engage in any form of economic self-help available to them. Id. In addition, the Court expressed its reluctance to infer a prohibition against secondary activity from the Act's language because the Act did not provide any standards for distinguishing between permissible primary activity and impermissible secondary activity. Id. The Court stated that the ambiguity created by the Railway Labor Act's silence as to the legality of secondary activity was for Congress, and not the Court to resolve. Id.

167. Id.

168. Id. at 447, 453. The Railroad also argued that the Court could infer a prohibition against secondary activity from the general language and structure of the Railway Labor Act. Id. at 449. The Railroad asserted that the Act manifests an intention to avoid wasteful strikes and interruptions to commerce, and a preference for peaceful resolution of major disputes. Id. at 451-52. Since secondary activity fosters strikes and interruptions to commerce, the Railroad argued that any interpretation of the Railway Labor Act that permitted secon-
D. The Circuit Split Over the Requirement of Irreparable Harm

The federal courts of appeals have split on the question of whether a party seeking a preliminary status quo injunction under section 156 of the Railway Labor Act is required to demonstrate that irreparable harm will result from the failure to enjoin a unilateral change in the status quo. The majority position, taken by the First,\textsuperscript{169} Third,\textsuperscript{170} Fourth,\textsuperscript{171} Fifth,\textsuperscript{172} Seventh,\textsuperscript{173} Eighth,\textsuperscript{174} Ninth,\textsuperscript{175} and District of Columbia Circuits,\textsuperscript{176} holds that the moving party must demonstrate only that it is likely to succeed on the merits of its claim. The minority position, adhered to by the Second Circuit only,\textsuperscript{177} requires that the moving party also demonstrate that irreparable injury will result from the failure to grant injunctive relief.\textsuperscript{178}


\textsuperscript{172} See, e.g., International Bhd. of Teamsters v. Southwest Airlines, 842 F.2d 794, 798 n.9 (5th Cir. 1988), vacated on other grounds on reh'g, 875 F.2d 1129 (5th Cir. 1989); Texas Int'l Airlines v. Air Line Pilots Ass'n, 518 F. Supp. 203, 216 (S.D. Tex. 1981).

\textsuperscript{173} See, e.g., Burlington N.R.R. v. United Transp. Union, 688 F. Supp. 1261, 1268 n.6 (N.D. Ill.), vacated on other grounds, 862 F.2d 1266 (7th Cir. 1988).

\textsuperscript{174} See, e.g., Brotherhood of Maintenance of Way Employes v. Burlington N.R.R., 802 F.2d 1016, 1021 (8th Cir. 1986).

\textsuperscript{175} See, e.g., Brotherhood of Locomotive Eng'rs v. Burlington N.R.R., 838 F.2d 1087, 1091 (9th Cir. 1988), vacated on other grounds, 109 S. Ct. 3207 (1989).


\textsuperscript{178} Several district courts in other circuits have also required a showing of irreparable harm. See, e.g., International Ass'n of Machinists v. Northwest Airlines, 674 F. Supp. 1393, 1397 (D. Minn. 1987) (preliminary status quo injunction granted if, among other things, party seeking injunction makes showing of irreparable harm), rev'd on other grounds, 842 F.2d 206 (8th Cir. 1988); Trans World Airlines v. International Ass'n of Machinists, 629 F. Supp. 1554, 1557
The opinion in *Air Line Pilots Association v. Eastern Air Lines*\(^{179}\) provides a clear theoretical justification for the majority position. Traditionally, a party seeking a preliminary injunction must demonstrate the following: (1) likelihood of success on the merits, or sufficiently serious questions going to the merits to make those questions fair ground for litigation; (2) irreparable harm absent interim relief; (3) no irreparable harm to defendant from the issuance of interim relief; and (4) that public interest would be served by granting interim relief.\(^{180}\) In *Air Line Pilots*, the District Court for the District of Columbia eliminated consideration of these four criteria when determining whether to issue a status quo injunction under section 156, stating that their application would undermine the objectives of the Railway Labor Act by encouraging actions which could lead to strikes and other interruptions of commerce.\(^{181}\) Courts subscribing to the minority position justify the irreparable harm requirement under one of two theories: that section 107 of the Norris-LaGuardia Act requires a court to find irreparable harm before issuing a labor injunction;\(^{182}\) or simply that a party seeking equitable relief must always demonstrate irreparable harm.\(^{183}\)

(W.D. Mo. 1986) (TWA required to demonstrate irreparable harm to obtain preliminary status quo injunction).


180. See, e.g., Transport Workers Union of Am. v. Eastern Air Lines, 695 F.2d 668, 675 n.5 (2d Cir. 1983). For further discussion of these four criteria, see J. Dobbyn, INJUNCTIONS 151-79 (1974).

181. *Air Line Pilots*, 683 F. Supp. at 849-50. The justification for not requiring a party to demonstrate the four traditional criteria is not clear. Compare Brotherhood of Maintenance of Way Employees v. Burlington N.R.R., 802 F.2d 1016, 1021 (8th Cir. 1986) ("[I]f the dispute is major, the courts have broad power to enjoin unilateral action by either side .... Such injunction may issue without regard to the usual balancing of the equities.") and Railway Labor Executives' Ass'n v. Consolidated Rail Co., 845 F.2d 1187, 1188 (3d Cir. 1988) ("[T]he issue .... presented is whether the railroad's ... addition of a drug screen component to its employees' medical examinations gives rise to ... a major dispute which would entitle the parties to an injunction maintaining the status quo.")., rev'd on other grounds, 109 S. Ct. 2477 (1989) with Carbone v. Meserve, 645 F.2d 96, 98 (1st Cir.) ("[A] district court may enjoin either party ... [during a major dispute] from altering the status quo during the course of the proceedings with no showing of irreparable harm.")., cert. denied, 454 U.S. 859 (1981) and Burlington N.R.R. v. United Transp. Union, 688 F. Supp. 1261, 1268 n.6 (N.D. Ill.) ("Once the plaintiff has established the existence of a major dispute and a threatened change in the status quo, we may issue the preliminary injunction without finding that the plaintiff may suffer irreparable injury .... for such injury is ordinarily presumed.")., vacated on other grounds, 862 F.2d 1266 (7th Cir. 1988).

182. See Transport Workers Union of Am. v. Eastern Air Lines, 695 F.2d 668, 678-79 (2d Cir. 1983). For a further discussion of the limitations imposed by the Norris-LaGuardia Act on a federal court's ability to grant injunctive relief in labor disputes, see supra notes 89-131 and accompanying text. For a further discussion of *Transport Workers*, see supra notes 42-51 and accompanying text.

The first step in determining whether to issue a preliminary status quo injunction is classifying the dispute as major or minor. A court following the majority approach will issue a preliminary status quo injunction if it concludes that the moving party is likely to succeed at trial in proving that the dispute is major, and that there has been a change in the status quo. A court following the minority approach will issue a preliminary injunction if it concludes not only that the dispute is major, and that a unilateral change in the status quo has occurred, but also that the party seeking injunctive relief will suffer irreparable harm if the preliminary injunction is not granted.

Circuit held that its prior holding in Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755 (2d Cir. 1979), required a party seeking a preliminary status quo injunction to demonstrate that it will suffer irreparable harm from the denial of relief. Transport Workers, 695 F.2d at 679 n.11; see also International Ass'n of Machinists v. Northwest Airlines, 674 F. Supp. 1387, 1391 (D. Minn. 1987) (prior circuit precedent required party seeking preliminary injunction under Railway Labor Act to demonstrate irreparable harm), rev'd on other grounds, 842 F.2d 206 (8th Cir. 1988).

184. See, e.g., Air Line Pilots Ass'n v. Eastern Air Lines, 683 F. Supp. 845, 851 (D.D.C. 1988) (central issue in determining whether to issue preliminary status quo injunction is whether dispute is major or minor), rev'd on other grounds, 869 F.2d 1518 (D.C. Cir. 1989); see also Transport Workers, 695 F.2d at 673 (same).

In determining whether a dispute is major or minor under the Railway Labor Act, a court's first point of reference is the parties' collective bargaining agreement. See, e.g., Air Line Pilots Ass'n v. Eastern Air Lines, 129 L.R.R.M. (BNA) 2691, 2696 (D.D.C.), rev'd on other grounds, 863 F.2d 891 (1988). The collective bargaining agreement is determined by reference to both the written document and the parties' past course of dealing. Id. See also Burlington N.R.R. v. United Transp. Union, 129 L.R.R.M. (BNA) 3119, 3123 (7th Cir. 1988) (collective bargaining agreement embodies terms included by implication of parties' past conduct). A court will find that the dispute is minor if it can be characterized as concerning the "proper application or meaning" of a provision of the collective bargaining agreement. Id. See also Transport Workers, 695 F.2d at 673.

The dispute will be presumed minor unless a party's asserted contractual justification for its action is "frivolous or obviously insubstantial." Burlington Northern, 129 L.R.R.M. (BNA) at 3123. If a court cannot find any contractual justification for the disputed action, or the asserted contractual justification is frivolous or insubstantial, the dispute will be deemed major. Id. For a further discussion of the distinction between major and minor disputes under the Railway Labor Act, see supra notes 48-88 and accompanying text.

185. Air Line Pilots, 683 F. Supp. at 851. The determination of a party's likelihood of success on the merits is actually merged with the inquiry into whether the dispute is major or minor. A conclusion that the dispute is major necessarily involves an inquiry into the likelihood that the moving party will be able to establish this fact at trial. Id. The only additional fact to be proved by the movant is that there was a change in the status quo prior to the exhaustion of the dispute resolution procedures.

186. Transport Workers, 695 F.2d at 677-78.
III. Analysis

A. The Norris-LaGuardia Act Does Not Require a Finding of Irreparable Harm Under Section 156 of the Railway Labor Act Prior to the Issuance of Injunctive Relief

In Detroit & Toledo Shore Line Railroad v. United Transportation Union, 187 the United States Supreme Court held that the Norris-LaGuardia Act did not deprive a federal court of jurisdiction to issue an injunction prohibiting a unilateral change in the status quo prior to the exhaustion of the major dispute resolution procedures of the Railway Labor Act. 188 As a result of this decision, the issue raised in subsequent cases is not whether sections 101 and 104 of the Norris-LaGuardia Act 189 block a federal court from issuing status quo injunctions, but whether the federal courts must follow the procedures and dictates of section 107(b) of the Norris-LaGuardia Act when issuing them. 190

In Transport Workers, 191 the Second Circuit suggested that section 107(b) of the Norris-LaGuardia Act required that a federal court, prior to issuing a preliminary status quo injunction, find that the party seeking injunctive relief will suffer irreparable harm if relief is denied. 192 However, the court refused to decide this issue because it concluded that Second Circuit precedent required that irreparable harm be demonstrated, regardless of the mandates of the Norris-LaGuardia Act. 193

A close examination of the accommodation principle suggests that section 107(b) should be accommodated to the status quo provisions of the Railway Labor Act to permit a court to enjoin a unilateral change in the status quo regardless of whether irreparable harm would result from the change. Although the United States Supreme Court has only provided a vague framework for an accommodation analysis, several general principles can be gleaned from an examination of the relevant case law. First, Virginian Railway v. System Federation No. 40 suggests that accommodation is appropriate where a general provision of the Norris-LaGuardia Act conflicts with a specific provision of the Railway Labor

188. id. at 154. For other United States Supreme Court cases discussing the accommodation principle, see supra notes 122-68 and accompanying text.
189. 29 U.S.C. §§ 101, 104 (1982). For the relevant text of § 101, see supra note 96 and accompanying text. For the relevant text of § 104, see supra notes 104-05 and accompanying text.
190. For the relevant text of this section, see supra note 106.
191. 695 F.2d 668. For a further discussion of the facts and holding in Transport Workers, see supra notes 39-47 and accompanying text.
192. Transport Workers, 695 F.2d at 678.
193. Id. at 679 n.11. The court concluded that § 107(c) of the Norris-LaGuardia Act should be accommodated to the Railway Labor Act. Id. at 678. The court stated that balancing the harm to the parties from the denial of relief would undermine the mandatory major dispute resolution procedures of the Railway Labor Act. Id.
Act. Second, *Chicago & North Western Railway v. United Transportation Union* suggests that a federal court should be reluctant to accommodate the Norris-LaGuardia Act to a provision of the Railway Labor Act if the duty imposed by the Railway Labor Act is ill-defined or vague. Third, *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad* suggests that accommodation should occur only under circumstances where the "obvious purpose" of both statutes will be furthered. Fourth, *Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad* suggests that accommodation is appropriate if the provision of the Railway Labor Act is an essential and integral part of its dispute resolution machinery. Finally, *International Association of Machinists v. Street* suggests that accommodation is appropriate whenever an injunction is the only effective means to protect the mandates of a provision of the Railway Labor Act. Application of these principles suggests that section 107(b) of the Norris-LaGuardia Act should be accommodated to section 156 of the Railway Labor Act.

Application of the general-specific test of accommodation analysis set forth in *Virginian Railway* leads to the conclusion that accommodation is appropriate. The mandate of section 156 is specific. It explicitly states that while the parties are engaged in the Act's major dispute resolution processes, "rates of pay, rules, or working conditions shall not be altered . . . ." Conversely, the language of section 107(b) is vague. Section 107(b) requires a court to find that "substantial and irreparable injury to the complainant's property will follow" from the denial of injunctive relief. A comparison of the language of the two provisions leads to the conclusion that the duty imposed by section 156 is more definite than that imposed by section 107(b). "[R]ates of pay, rules, and working conditions" are readily ascertainable from an examination of the collective bargaining agreement or the actual and objective working conditions. Once these terms of employment are discovered, the Railway Labor Act explicitly states that the parties may not change them.

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194. 300 U.S. 515 (1937). For a further discussion of *Virginian Railway*, see *supra* notes 125-30 and accompanying text.

195. 402 U.S. 570, 583 (1971). For a further discussion of *Chicago & North Western*, see *supra* notes 155-60 and accompanying text.

196. 355 U.S. 30, 40 (1957). For a more complete discussion of *Chicago River*, see *supra* notes 131-41 and accompanying text.

197. 373 U.S. 33, 41 (1963). For a further discussion of *Locomotive Engineers*, see *supra* notes 148-54 and accompanying text.

198. 367 U.S. 740, 773 (1960). For a more complete discussion of *Street*, see *supra* notes 142-47 and accompanying text.

199. 45 U.S.C. § 156 (1982). Section 156 provides an exception to this rule if "a period of ten days has elapsed after termination of conferences without a request for or proffer of the services of the Mediation Board." *Id.* For a further discussion of the Railway Labor Act's status quo provisions, see *supra* notes 80-88 and accompanying text.


The irreparable harm language of section 107(b), however, presents an abstract concept that is not easily defined.\textsuperscript{202} Consequently, the general-specific test suggests that accommodation is appropriate.

In addition, accommodation is not barred by application of the principle set forth in \textit{Chicago & North Western} because the duty imposed by section 156 is not ill-defined or vague. The duties imposed by section 156 on the parties to a major dispute are clear. The obligation on the parties to exert every reasonable effort to settle the dispute, and the requirement that the parties maintain the status quo pending the exhaustion of the Act’s dispute resolution procedures are unambiguous.\textsuperscript{203} As a result, the second principle of accommodation is satisfied.

The principle of accommodation set forth in \textit{Chicago River} is satisfied because accommodation will further the purpose of both legislative enactments. The case law and legislative history of the Railway Labor Act strongly suggest that the purpose of the major dispute resolution procedures is to channel the disputes into processes designed to encourage compromise between the competing economic interests.\textsuperscript{204} The status quo provisions are important to this end because they give one party the power to freeze the conditions which caused the dispute. Once the dispute is submitted to the Mediation Board, the party seeking change is forced to compromise in order to hasten implementation of the desired changes.\textsuperscript{205} The purpose of the Norris-LaGuardia Act is to prevent the federal courts from issuing injunctions which upset the “natural interplay” between the competing economic forces of labor and management, thus encouraging a fair and effective collective bargaining

\textsuperscript{202} See, e.g., Transport Workers Union of Am. v. Eastern Air Lines, 695 F.2d 668, 677 (2d Cir. 1983) (“[W]e think it was within the district court’s discretion to find irreparable injury here because of the difficulty . . . of determining the identity of all the attendants who would suffer injury.”) (emphasis added); see also J. DOBBYN, supra note 180 (discussing discretionary nature of court’s decision concerning existence of irreparable harm to movant from denial of relief).


\textsuperscript{204} See id. § 151a (“The purposes of this Chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; . . . (4) To provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions . . . .”); see also Detroit, 396 U.S. at 149 (“[T]he procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute.”) (quoting Railway Clerks v. Florida E.C. Ry., 384 U.S. 238, 246 (1966)); Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 41 (1957) (“[M]achinery of the Railway Labor Act [channels] . . . economic forces . . . into special processes intended to compromise them”). For a more complete discussion of the legislative history of the Railway Labor Act, see supra notes 52-88 and accompanying text.

\textsuperscript{205} Detroit, 396 U.S. at 150.
process.206

If a federal court requires a party seeking a status quo injunction to demonstrate that irreparable harm will result from the denial of relief, it will defeat the objectives of both statutes. First, the major dispute resolution procedures of the Railway Labor Act will be rendered impotent. The primary reason for their effectiveness is the power section 156 gives the party opposing change to almost indefinitely postpone change in the status quo.207 If the party opposing change is required to demonstrate irreparable harm, the Railway Labor Act’s purpose of encouraging peaceful settlement of disputes will be undermined because the discretionary nature of the irreparable harm finding will lead to unpredictable and inconsistent enforcement of the status quo obligation.

In addition, the purpose of the Norris-LaGuardia Act will be hindered by requiring a party seeking a status quo injunction to demonstrate irreparable harm because it will disrupt the natural balance between labor and management which the Act seeks to preserve. This imbalance will almost certainly occur because labor frequently will be unable to demonstrate that it will suffer irreparable injury from such action as wage and benefit cuts because the harm inflicted by these actions can be readily compensated by damages. Management, on the other hand, frequently will be able to demonstrate that a labor strike will result in irreparable injury in the form of lost business opportunities or lost goodwill because these losses are not easily quantified. If a court requires a party seeking a status quo injunction to demonstrate irreparable injury, it would, in effect, be permitting the Norris-LaGuardia Act to be used as a vehicle for disrupting the balance of power between labor and management.

The principle of accommodation set forth in Locomotive Engineers is also satisfied. Section 156 is an essential and integral part of the major dispute resolution process. In Detroit, the Court examined the purpose of section 156 of the Railway Labor Act, and concluded that the status quo obligation was “central to its design.”208

Finally, application of the principle set forth in Street also shows that accommodation is appropriate. Accommodation of section 107(b) of the Norris-LaGuardia Act to section 156 of the Railway Labor Act is the only effective method available to protect a party’s right to have the status quo maintained while engaging in the Act’s major dispute resolution procedures.209 The status quo provisions of the Act are an integral part of the major dispute resolution machinery because it gives a party the

206. See Chicago River, 353 U.S. at 40 (discussing purpose underlying enactment of Norris-LaGuardia Act). For a more complete discussion of the legislative history of the Norris-LaGuardia Act, see supra notes 89-95 and accompanying text.
207. Detroit, 396 U.S. at 150.
208. Id.
power to freeze the status quo for an almost indefinite period, thereby promoting compromise.210

These general principles suggest that accommodation of section 107(b) of the Norris-LaGuardia Act to section 156 of the Railway Labor Act is appropriate. As a result, the Norris-LaGuardia Act should not be interpreted to require a party seeking a preliminary injunction under section 156 of the Railway Labor Act to demonstrate that irreparable harm will result from the denial of injunctive relief.

B. The Traditional Irreparable Injury Requirement Should Not be Applied When it Will Defeat National Railway Labor Policy

In Air Line Pilots Association v. Eastern Air Lines,211 the court stated that the objectives of the Railway Labor Act would be undermined by requiring a party seeking a status quo injunction to demonstrate that irreparable harm would result from the denial of relief.212 This reasoning, adhered to by courts following the majority approach, runs counter to the position taken by the Second Circuit in Transport Workers.213 In that case, the court imposed an irreparable harm requirement based on

210. Id.
213. Transport Workers, 695 F.2d 668.

A sentence in the Supreme Court’s decision in Consolidated Rail Corp. v. Railway Labor Executives’ Association, 109 S. Ct. 2477 (1989), does not resolve the inter-circuit conflict. Conrail says, in explaining the major dispute category of cases under the Railway Labor Act, “The district courts have subject matter jurisdiction to enjoin a violation of the status quo . . . without the customary showing of irreparable injury.” Id. at 2480 (citing Detroit, 396 U.S. 142). The statement is dictum because whether irreparable injury is required for a major dispute injunction does not determine whether the Third Circuit was correct to enjoin Conrail’s drug testing, given the Supreme Court’s conclusion that the drug testing controversy constituted a minor dispute. More analytically, the Supreme Court’s sentence does not answer the question addressed by this article, whether proof of irreparable injury to property is a prerequisite to a Railway Labor Act status quo injunction. One can conclude that irreparable injury is an intrinsic requirement of equity and thus of the case or controversy requirement under Article III of the United States Constitution and, therefore, that the Congress could not constitutionally dispense with the requirement. But if one accepts this proposition, one also could construe irreparable injury broadly enough to encompass injury to any sort of legal interest. Therefore, the irreparable injury requirement in a Railway Labor Act major dispute status quo injunction case could be satisfied merely by showing irreparable injury to the right established by the status quo requirement. So the Conrail dictum is best read to endorse the view adopted by this article that factual proof of irreparable injury to economic interests should not be required in the case satisfying the requirement of Detroit. One sentence obviously does not dispose of all of the arguments about what “injury” means and whether the constitutional case or controversy requirement places some equitable jurisdictional prerequisite beyond the reach of Congress. See generally H. Perritt, supra note 22, §§ 6.20, 15.11.
prior circuit case law which mandated such a showing.\textsuperscript{214} It is submitted that the result reached by the Second Circuit in \textit{Transport Workers} is untenable in light of the strong national policy favoring peaceful resolution of labor disputes manifested in the Railway Labor Act.

In \textit{Transport Workers}, the court based its holding on its decision in \textit{Jack Kahn Music}.\textsuperscript{215} A careful reading of \textit{Jack Kahn Music} suggests that the court’s holding was in response to its dissatisfaction with the use of preliminary injunctions by antitrust plaintiffs to freeze short term terminable retail dealerships indefinitely.\textsuperscript{216} It is submitted that the Second Circuit’s reliance on this case is misplaced because it undermines national railway labor policy.

Congress enacted the Railway Labor Act in an effort to create more stable relations between labor and management in the railroad industry.\textsuperscript{217} Although Congress did not enact a scheme of compulsory arbitration to resolve major disputes, the procedures it did enact manifest its intent that the parties exhaust a carefully considered set of procedures designed to produce compromise without resort to economic self-help.\textsuperscript{218} The status quo provisions of the major dispute resolution machinery are essential to the Act’s ability to promote peaceful compromise.\textsuperscript{219} A requirement that a party show irreparable harm in order to receive a preliminary status quo injunction is inconsistent with this objective. It renders the major dispute resolution procedures impotent by removing the cog that helps produce compromise and peaceful solutions.

Moreover, there is a strong public interest in the peaceful resolution of labor disputes which, if frustrated, could result in an interruption to interstate commerce.\textsuperscript{220} Congress recognized this interest when it enacted the Railway Labor Act.\textsuperscript{221} The use of case law and legal princi-

\begin{itemize}
\item \textsuperscript{214} \textit{Transport Workers}, 695 F.2d at 675, 679. For a more complete discussion of \textit{Transport Workers}, see supra notes 39-47 and accompanying text.
\item \textsuperscript{215} \textit{Jack Kahn Music}, 604 F.2d at 755.
\item \textsuperscript{216} \textit{Jack Kahn Music}, 604 F.2d at 757.
\item \textsuperscript{217} \textit{See} Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 40 (1957). For a further discussion of the legislative history of the Railway Labor Act, see supra notes 52-88 and accompanying text.
\item \textsuperscript{219} \textit{Id.}
\item \textsuperscript{220} \textit{Id.}
\item \textsuperscript{221} \textit{See} 45 U.S.C. § 151a(1), (4) (1982). Section 151a(1) and (4) provide in relevant part: “The purposes of the chapter are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; . . . .” \textit{Id.} For a more complete discussion of the legislative history of the Railway Labor Act, see supra notes 52-88 and accompanying text.
\end{itemize}
cases that concern the adjustment of private rights is not justified where the result will defeat the strong national policy favoring peaceful resolution of railway labor disputes by emasculating the machinery designed to implement it. Case law which undermines the purposes of the Railway Labor Act should not be utilized by courts in fashioning the standards for enforcement of its processes.

IV. Conclusion

It is submitted that the position taken by a majority of the circuits, that a party seeking a preliminary injunction under section 156 of the Railway Labor Act is not required to demonstrate irreparable injury, is correct. An examination of United States Supreme Court cases suggests that section 107(b) of the Norris-LaGuardia Act should be accommodated to section 156 of the Railway Labor Act, thus not requiring a showing of irreparable harm. Moreover, traditional equitable principles should not be used to defeat a clear national policy favoring the peaceful resolution of railway labor disputes by destroying the machinery that Congress created to implement the policy.

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