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LABOR LAW—THE SUBSTANCE OF PROCEDURE: DEFINING JUDICIAL AUTHORITY AND THE ROLE OF THE ARBITRATOR IN INDEPENDENT ASSOCIATION OF CONTINENTAL PILOTS v. CONTINENTAL AIRLINES

I. INTRODUCTION

The airline industry is a national asset, depended upon by individuals and industry in much the same manner as railroads were relied upon in the early Twentieth Century. Despite its national importance, the precarious financial state of the airline industry is a threat to its survival. One factor underlying airlines' financial malaise is the historically tenuous, and often antagonistic, relationship between airlines' management and the industry's unions.


2. See Francis Grab, "Share the Pain, Share the Gain": Airline Bankruptcies and the Railway Labor Act, 24 TRANSPI. L.J. 1, 1-2 (1996) (discussing economic problems of airlines and Americans' perceptions of "precarious condition of the industry"); Michele M. Jochner, Note, The Detrimental Effects of Hostile Takeovers, Leveraged Buyouts, and Excessive Debt on the Airline Industry, 19 TRANSPI. L.J. 219, 220-21 (1990) (discussing threat that increased debt poses to airline industry); see also Continental Lawsuit Has Billion Dollar Potential, 33(7) BANKR. COURT. 1, 1A (Nov. 10, 1998) (discussing Continental's economic viability); Bill Poling, Senate Subcommittee Ponders Decreasing Number of Airlines, TRAVEL WRKY., Mar. 5, 1992, at 7 (discussing Senate's review of problem of decreasing number of airlines). For a further discussion of the problems airline bankruptcies present in lieu of labor laws, see infra note 110.


The relationship between labor and management in the airline industry was actually fairly stable from the mid-1930s until the late 1970s. See Stone, supra note 1, at 1489 (noting change in management-labor relationships that occurred during 1970s). At least one author has pointed to the Airline Deregulation Act of 1978, which allowed a number of new, nonunion airlines to enter the industry, and cited rising fuel costs as factors that affected relations. See id. (noting impact of deregulation and rising fuel costs on airline industry). Because fuel prices were so inflated, airlines needed to purchase more efficient aircraft, which they did by

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In 1936, Congress recognized the importance of the emerging airline industry on the national economy, as well as the impact of its labor strife, by covering the industry under the Railway Labor Act ("RLA"). The RLA provides for strict regulation of management-labor relations in an effort to avoid costly strikes. A fundamental piece of the RLA is its emphasis on dispute resolution, which includes binding arbitration, as a means of resolving disagreements efficiently.

Although the RLA provides the framework for labor arbitration, courts must determine the finer points, such as what is arbitrable and who has jurisdiction in labor disputes. As a consequence, the courts have been forced to clarify their own role in labor arbitration. The court's role, including whether the court has jurisdiction over a given dispute, borrowing money at very high interest rates. See id. at 1490. "The result was that these airlines were saddled with enormous interest charges just as price competition became fierce." Id. The larger airlines, financially strapped from high interest loans, had difficulty competing with smaller, nonunion airlines. See id. As a result, airline management attempted to cut nonfuel costs by lowering its labor costs; in its attempt to lower labor costs, management targeted unions. See id. at 1490-91 (discussing management's reaction to financial problems). "And because labor costs are a high proportion of their total costs, management went to war against its unions." Id. at 1490; see Grab, supra note 2, at 8 ("The logical strategy for airline executives was to go after labor expenses.").

4. Ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-188 (1988)). In 1936 the Act was broadened to include the airline industry. See Grab, supra note 2.

5. See Stone, supra note 2, at 1491-92 (discussing impact of RLA on airline unions' ability to strike and noting that RLA makes strikes absolute last resort). Although other statutes, such as the National Labor Relations Act ("NLRA"), may regulate labor-management relations in industry, the RLA is peculiar in that it designates that collective bargaining agreements negotiated pursuant to its authority do not expire. See id. at 1494-95 (comparing NLRA to RLA). For a further discussion of the RLA and its provisions and objectives, see infra notes 33-46 and accompanying text.

6. See Schuler, supra note 1, at 194-95 (reviewing procedural aspects of RLA and how negotiation, mediation and arbitration are called for in statute).

7. See Corrada, supra note 1, at 920-21 (noting impact courts have had on arbitration law and development); Stone, supra note 1, at 1504-05 (discussing impact Supreme Court has had on expanding, and narrowing, labor arbitration under RLA).

8. See Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299, 301 (1989) (distinguishing between "minor" disputes, that are under compulsory jurisdiction of arbitrator and "major" disputes, in which courts may intervene); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546-47 (1964) (discussing "threshold question" of who has jurisdiction—courts or arbitrator); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (discussing role of courts in labor disputes); Elgin, J.E. Ry. Co. v. Burley, 325 U.S. 711, 722-28 (1945) (discussing role of courts and arbitrators in settling labor disputes under RLA); see also Corrada, supra note 1, at 927-28 (discussing history of labor arbitration under statutory law and process of developing "what judicial controls should govern it"); Norman S. Poser, Judicial Review of Arbitration Awards: Manifest Disregard of the Law, 64 Brook. L. Rev. 471, 471 (1998) (noting that "judicial review of arbitration awards is strictly limited"); Gerald F. Rath & Richelle S. Kennedy, Judicial Review of Arbitration Awards, 1062 PLI/Corp. 513, 515 (July-Aug...
may turn on two important distinctions: (1) whether the underlying dispute constitutes a "major" or "minor" issue and (2) whether the question before the court relates to "procedural arbitrability" or "substantive arbitrability." Although it is firmly established that major disputes and issues of substantive arbitrability warrant judicial authority and minor disputes and questions concerning procedural arbitrability do not, the outcome of disputes often turns on the interpretation of these rules and definitions of "major/minor" and "procedural/substantive arbitrability."

For example, such was the issue in Independent Ass'n of Continental Pilots v. Continental Airlines. There, the United States Court of Appeals for the Third Circuit distinguished between the categories of "major" and "minor" and delineated the characteristics of procedural versus substantive arbitrability in labor disputes. In addition, the court analyzed how the two categories fit together under the RLA and ultimately affect the court's role in labor arbitration.

This Casebrief discusses the development of the law in the Third Circuit concerning federal judicial authority and the role of the arbitrator in labor disputes. Part II of this Casebrief provides a historical overview of labor arbitration, including the legislative history and policy behind labor arbitration, the RLA and pertinent Supreme Court decisions. Part II

1998) (stating that narrow judicial review of arbitration awards maintains goal of "preserv[ing] the efficiency and economy of the arbitration process").

9. See John Wiley, 376 U.S. at 556 (noting difference between procedural and substantive arbitrability); Schuler, supra note 1, at 193-94 (noting distinction between major and minor disputes under RLA); Stone, supra note 1, at 1500-09 (discussing major-minor dichotomy); see also Stone, supra note 1, at 1502-09 (reviewing how characterization affects whether courts have jurisdiction over given dispute).

10. See Stone, supra note 1, at 1505 (noting impact characterization of dispute can have on forum and eventual outcome).

11. 155 F.3d 685 (3d Cir. 1998).

12. See id. at 692 (discussing issues on appeal, which included not only determination of whether dispute was minor or major, but whether it involved question of substantive or procedural arbitrability).

13. See id. at 692-97 (reviewing overall framework for analyzing labor disputes within, and between, two categories).

14. For a further discussion of Third Circuit case law concerning the issue of the court's role in labor arbitration and how that determination is made, see infra notes 88-161 and accompanying text.

15. For a further discussion of the historical background of labor arbitration, see infra notes 19-108 and accompanying text. Although issues relating to arbitration of employment discrimination and preemption under the RLA and similar statutes are closely tied, this Casebrief is narrowly focused on the issue of major/minor disputes and substantive/procedural arbitrability. For a discussion of employment discrimination and arbitration, see Richard A. Bales, The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution, 77 B.U. L. Rev. 687, 688-89 (1997) (discussing differences between collective bargaining and individual employment rights and how two models are interpreted under current law); see generally Katherine Van Wezel Stone, The Post-War Paradigm in American Labor Law, 90 Yale L.J. 1509, 1516 (1981) (discussing collective bargaining and arbitration of disputes).
also examines the broader context of federal circuit courts' decisions in this area to provide context for the Third Circuit case law establishing and defining judicial authority in labor arbitration cases. Part III discusses the facts of *Continental Airlines* and reviews the Third Circuit's analysis of major/minor disputes and procedural versus substantive arbitrability. Part IV analyzes the court's decision in the context of the airline industry and comments on potential problems the Third Circuit's decision presents to the creation of collective bargaining agreements.

II. HISTORICAL BACKGROUND ON THE EMERGENCE OF LABOR ARBITRATION

Labor arbitration has become an important means of dispute resolution over the past century. To fully understand the impact a given forum may have on the parties to a dispute—as well as the outcome of a disagreement—it is important to consider the policy reasons behind labor arbitration. Furthermore, complete comprehension of this area requires examination of statutes enacted to govern arbitration as well as Supreme Court decisions that have clarified and impacted this area of labor law.

A. Concerns for Stability and Efficiency Underlie the Emphasis on Labor Arbitration

There have been a number of proposed policy rationales behind labor arbitration. As the labor movement grew in the earlier part of the century, there were a number of proposed policy rationales behind labor arbitration.
Twentieth Century, the emphasis on efficient dispute resolution also in-
creased. As a result of two world wars and an increasing dependence on
industrialization, stability in the workplace became a paramount ob-
jective. With respect to the railroad industry, the need for stability was even
greater. Railroads were the prime method of transport, and labor strife
threatened not only the expediency and ability of the railroads to this end,
but also threatened national security during a time of international
unrest.

One commentator has characterized the growth of arbitration and alternative
methods of dispute resolution as an effort in privatization. See Weinstein, supra
note 19, at 243-44 (discussing emergence of arbitration in all facets of U.S. law).
This author notes a number of concerns that factor into arbitration's popularity.
See id. at 243. These concerns include:

1. anxiety over so-called "litigation explosion" that some say is clogging
our courts; (2) a general sense that even though there are too many law-
yers and too much law, the average person and many commercial enter-
prises are left out of the system and cannot get help at a reasonable cost
when and how it is needed; (3) a consensus that traditional court
processes often unnecessarily exacerbate hostility; and (4) proliferation
of new types of litigation such as many types of discrimination cases and
mass tort class actions often involving hundreds of thousands of plaintiffs,
multiple defendants, and difficult problems of science.

Id. The author also notes that use of arbitration is pervasive and not limited to
"statutorily mandated relationships," such as those that exist between labor and
management. See id. at 243-45 (reviewing legal areas in which arbitration has been
incorporated).

23. See Corrada, supra note 1, at 921 (noting link between labor movement
and arbitration as favored method of dispute resolution).

24. See id. at 922 (noting "need to curtail the number of strikes in this country
in the immediate post-war period").

25. See id. at 926-28 (discussing reasons why unions are open to arbitration
despite negative impact on them). The author points out that arbitration is, in
many ways, adverse to labor unions. See id. at 926 (remarking that openness with
which unions embraced arbitration was unexpected given that arbitration is often
adverse to union interests). For example, the use of arbitration gives up some of
the strike power unions relied on in the past as a means of ensuring the collective
bargaining process. See id. By agreeing to mandatory arbitration, unions lose a
degree of their strike power, which is a major motivator for management to resolve
disputes quickly. See id. In addition, arbitration may have placed the emphasis on
individual, rather than class, consciousness, so important to the union movement.
See id. at 926 (noting emphasis on "particularized workplace politics" within more
recent labor movement). Finally, arbitration may have furthered the interests of
management while reducing transcribed constitutional rights into contract lan-
guage. See id.

26. See Schuler, supra note 1, at 191-92 (discussing historical perspective of
railroad unrest). The railroads were vital to this nation throughout the first half of
this century. See id. at 192. During World War I, the railroad industry expe-
rienced a great deal of labor unrest and shortages. See id. (noting "transportation
crisis" of World War I). The government realized that labor strife in the railroad
industry threatened not only the nation's economy, but national security as well.
See id. (discussing implications of labor strife); see also Stone, supra note 1, at 1498
(noting potential impact of railroad strife on nation's ability to handle interna-
tional conflict).
Although these may have been the reasons for arbitration's initial growth, a desire for efficiency has heightened labor arbitration's attractiveness.27 From the unions' perspective, a long history of judicial hostility towards the labor movement may explain their willingness to embrace this alternative dispute forum.28 For employers, the efficiency interest may be one of lower legal costs.29 Arbitration provides an alternative to litigation, which ultimately means less money spent on legal fees.30 Finally, arbitration means efficiency for the courts.31 Labor arbitration provides a lower cost alternative to judicial litigation as well as a shift in costs from the public to the private sector.32

27. See Corrada, supra note 1, at 921 (describing need for efficiency as predictable of "explosive growth for arbitration").

28. See id. at 926 (noting that arbitration goes against unions' interests). One commentator has characterized unions' acceptance of arbitration as surprising given the fact that a unions' strength lies in its ability to strike. See id. The courts' historical antagonism towards the labor movement may have been one factor contributing to unions' acceptance of arbitration. See id. at 927. Another factor may have been the national concern over labor stability and industrial peace. See id. at 927-28. Regardless of the reasons, by agreeing to arbitration, the unions have abdicated a degree of bargaining power. See id. at 926 (relating consequences of arbitration on unions); Stone, supra note 1, at 1498-1500 (noting impact of RLA on labor unions).

29. See Corrada, supra note 1, at 925-27 (delineating reasons why employers may embrace arbitration over litigation in labor disputes).

30. See id. (reviewing reasons why employers are willing to embrace arbitration).

31. See id. at 928 (noting that arbitration can act as "filter" for courts). But see Weinstein, supra note 19, at 261-62 (discussing risks associated with ADR and possibility that "two-tiered" system will be created). Although arbitration may present a viable, and even preferable, alternative to litigation, some critics warn that too much reliance on ADR may have a negative effect because ADR places judicial authority in private hands. See id. at 261-62 (predicting that in future only rich litigants will have access to ADR while poor will be relegated to underfunded public courts).

In the labor context, arbitration is generally viewed as a positive alternative to litigation and/or strikes. See Corrada, supra note 1, at 919-21 (discussing benefits of arbitration to labor movement). Arbitration, as it is delineated in statutes such as the RLA and NLRA, increases industrial democracy and allows workers a greater say in workplace decisions. See Stone, supra note 1, at 1500-04 (discussing how arbitration should be conducted in theory under RLA and NLRA). This happens because the statutes create "mini-democracies" whereby union members contract with management, creating their own terms concerning what can be disputed and how or when it can be challenged. See id. at 1499 (noting intent of statute procedure); see also Bales, supra note 15, at 745-48 (noting that collective bargaining provides parties with insulation from outside interference). One commentator has warned, however, that the courts' interpretations of statutory language have eroded the equalizing intent behind the legislation. See Stone, supra note 1, at 1499-1506 (positing that courts are expanding management's authority and discretion under RLA by their interpretation of statutory language and Supreme Court precedent). Thus, courts are defining their own jurisdiction more narrowly, to the detriment of the unions. See id. at 1510 (noting that unions are losing protection under RLA as courts employ broad interpretation of statute's language).

32. See Corrada, supra note 1, at 928 & n.51 (discussing reasons why courts have so readily embraced arbitration).
B. Legislation Provides the Basis for Labor Arbitration:  
The Railway Labor Act

Congress has been actively involved with the labor movement and, consequently, with the development of arbitration as a means of dispute resolution in labor conflicts. For example, in 1926, Congress passed the RLA. The RLA was intended to deal with conflicts arising between railroad workers and the industry's management in an effort to protect national security, to end disputes quickly and to avoid costly strikes. In 1936, the RLA was extended to apply to the airline industry. It was hoped that the RLA, with its mandatory arbitration protocol, would help create stability in the airline industry and lessen the economic effects of labor disputes. One distinguishing feature of the RLA is that collective bargaining agreements, formed pursuant to its provisions, do not expire. These agreements remain in force until one party proposes a change, and then, even if a portion of the agreement is changed, the remainder is assumed to stand.

The RLA as amended includes the following two stated policy objectives: (1) "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;" and (2) "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." These two policy objectives

35. See Schuler, supra note 1, at 192 (delineating reasons legislature passed RLA).
36. See id. at 192 n.23 (recognizing that RLA was amended to include airline industry in 1936).
37. See Stone, supra note 1, at 1494-98 (noting intent of RLA).
38. See id. (discussing differences between RLA and other labor-regulating statutes). Two of the RLA's provisions protecting the status quo and ensuring that the collective bargaining agreement does not expire have been recently eroded. See id. at 1492 (noting that original intent of RLA has been changed as applied to airline industry). Although "piecemeal" changes were the practice in the railroad industry, in the airline industry another practice has emerged. See id. at 1496 (discussing how agreements under RLA never expire). Airline industry collective bargaining agreements often incorporate a clause waiving the right to amend the agreement until a specified date, at which time either or both parties may seek to amend the agreement in accordance with the statute. See id. Thus, these waivers give collective bargaining agreements in the airline industry the appearance of having an end date, but in reality they never expire. See id. (noting that courts have upheld these "amendable date" clauses).
39. See id. at 1494-98 (discussing general provisions of RLA).
have given rise to the distinction between "major" and "minor" disputes. The difference is that a major dispute involves a party seeking to change a substantive term of the collective bargaining agreement. Thus, a major dispute is subject to the continuance of the status quo, that is, the terms of the current agreement, until the dispute can be settled. Settling a major dispute involves a purposefully lengthy process that includes negotiation, mediation, judicial intervention and ultimately may result in a strike. A minor dispute, on the other hand, focuses on the interpretation of an existing collective bargaining agreement. Also, a minor dispute is subject to the exclusive jurisdiction of the arbitrator whose decision is usually binding.

C. The Supreme Court's Decisions: The "Steelworkers Trilogy"

Although Congress paved the way for labor arbitration with legislation that defined the role of unions and management in the growing labor movement, much of the substance of labor arbitration law has come from Supreme Court decisions. In 1960, the Supreme Court confronted three labor arbitration cases, which helped define the scope of arbitration and the role of the courts in the arbitral process. In United Steelworkers of

41. See id. at 9-10 (discussing courts' interpretation of policy objectives); see also Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711, 723 (1945) (using terms "major" and "minor" for first time to distinguish between two types of labor disputes under RLA). It is important to note that, under the language of the RLA, there are actually three types of disputes that might occur. See Independent Ass'n of Continental Pilots v. Continental Airlines, 155 F.3d 685, 690 (3d Cir. 1998) (naming types of disputes that can occur). The third type of disagreement, "representation disputes," encompass disputes arising over the selection of collective bargaining representatives. See id. (noting that classification of dispute affects to which forum it is relegated); see also Ronald P. Wilder, Jr. et al., Representation Issues Under the Railway Labor Act, SC25 ALI-ABA 21, 23 (Oct. 23, 1997) (outlining statutory provisions enacted in RLA that pertain to representation issues and disputes).

42. See Grab, supra note 2, at 9-10 (reviewing "major" dispute category).

43. See Stone, supra note 1, at 1498-1500 (discussing "status quo" provisions and their relevance in major disputes).

44. See Grab, supra note 2, at 9-10 (reviewing procedure for settling major disputes under RLA). The process is purposefully long and drawn out as a disincentive to making illegitimate or frivolous changes. See Stone, supra note 1, at 1499 (noting that settlement of major disputes is lengthy and arduous process).

45. See Stone, supra note 1, at 1501-04 (explaining differences between "major" and "minor" disputes).

46. See id. at 1509-12 (noting procedure for settling "minor" disputes). The procedural/substantive arbitrability analysis did not arise under the RLA. See Independent Ass'n of Continental Pilots v. Continental Airlines, 155 F.3d 685, 692 (3d Cir. 1998) (noting that arbitrability distinction comes from NLRA law).

47. See Corrada, supra note 1, at 923-24 (discussing role of Supreme Court in expanding and defining use of arbitration in labor movement).

In the first of these cases, the Court addressed the role of the arbitrator. In United Steelworkers of America v. Warrior & Gulf Navigation Co. and United Steelworkers of America v. American Manufacturing Co., the Court further defined the "substantive" analysis and emphasized the necessity of determining whether an issue lies within the scope of the collective bargaining agreement. These cases are collectively called the "Steelworkers Trilogy," and together underscore the Court's position that labor arbitration is a "mechanism to encourage collective bargaining and industrial peace."

1. Additional Cases Are Evidence of the Court's Willingness to Give Deference to Arbitrators' Decisions.

Both before and after the Steelworkers Trilogy, the Supreme Court stressed the importance of arbitration in the resolution of labor disputes. For example, in Elgin, J. & E. Railway Co. v. Burley, the Court first described the major/minor framework. The major/minor test is based on the policy objectives enumerated in the RLA and was formulated

Steelworkers Trilogy cases mark judicial acceptance of labor arbitration as well as lay out the basis of judicial authority over what cases are arbitrable. See Corrada, supra note 1, at 928 (discussing Supreme Court's "national policy in favor of labor arbitration").

50. See id. at 595 (discussing function of court versus function of arbitrator).
53. See id. at 568 (discussing importance of selecting appropriate forum for dispute settlement).
54. Corrada, supra note 1, at 928. The Steelworkers Trilogy collectively determined that the function of the courts with respect to arbitration agreements is limited to:

- assuring that the claim is governed by the contract;
- ordering the parties to arbitrate unless the arbitration clause "is not susceptible of an interpretation that covers the asserted dispute," and
- refraining from reviewing the merits of an award so long as it "draws its essence from the collective bargaining agreement."

Bales, supra note 15, at 723 (citations omitted).


56. 325 U.S. 711 (1945).
57. See Independent Ass'n of Continental Pilots v. Continental Airlines, 155 F.3d 685, 690 (3d Cir. 1998) ("The Supreme Court set forth the major/minor framework in [Burley]."); see also Stone, supra note 1, at 1501 (discussing inception of major/minor framework).
to determine which forum, the court or arbitration, was appropriate in a
given dispute.\footnote{58}

The Court in \textit{Burley}, however, did not explain how to distinguish be-
tween major and minor disputes.\footnote{59} That was accomplished in a later case, \textit{Consolidated Rail Corp. v. Railway Labor Executives Ass'n}.\footnote{60} There, the Court noted that what distinguishes a minor dispute is that it can be settled by
the terms of the existing collective bargaining agreement.\footnote{61} On the other
hand, a major dispute arises when one party tries to change the terms of
an agreement, create a new agreement or where the “employer’s claims
are frivolous or obviously insubstantial.”\footnote{62} This last requirement was
added in an effort to dissuade management from characterizing a dispute as
minor merely by claiming it was their interpretation of the collective bar-
gaining agreement.\footnote{63} The language of such a requirement, however, has
given rise to debate between circuit courts over the meaning of “frivolous”
and over just how reasonable an employer’s claimed interpretation must
be.\footnote{64}

Another important Supreme Court labor arbitration case, \textit{John Wiley
& Sons, Inc. v. Livingston},\footnote{65} developed the “procedural arbitrability” analy-

agent’s power to act in the various stages of the statutory procedures is part of
those procedures and necessarily is related to them in function, scope and
purpose.”).}

\footnote{59. See Continental Airlines, 155 F.3d at 691 (“Although the \textit{Burley} court estab-
lished the general contours of the distinction between major and minor disputes,
it did not articulate a standard for differentiating the two.”).}

\footnote{60. 491 U.S. 299 (1989).}

\footnote{61. See id. at 305 (“The distinguishing feature of such a case is that the dispute
may be conclusively resolved by interpreting the existing agreement.”).}

\footnote{62. Id. at 307.}

\footnote{63. See Brotherhood of Maintenance of Way Employees v. Atchison, Topeka &
Santa Fe Ry. Co., 138 F.3d 635, 640 (7th Cir. 1997) (discussing Court’s require-
ment that employer’s interpretation of agreement not be “frivolous”); United
1997) (noting that “frivolous” requirement was added to “prevent that party’s char-
acterization of the dispute from undercutting the RLA’s prohibition against unilat-
eral imposition of contractual terms”).}

\footnote{64. See Stone, supra note 1, at 1507 (noting that, in past, courts’ interpretation
of standard put forth by Supreme Court led to numerous differing standards of
how rational employer’s interpretation was required to be); see also Southern Pac.
Transp. Co. v. United Transp. Union, 491 F.2d 830, 833 (9th Cir. 1974) (holding
that dispute is minor if agreement is “reasonably susceptible” to carrier’s asserted
defense); Local 1477 United Transp. Union v. Baker, 482 F.2d 228, 230 (6th Cir.
1973) (stating that dispute was minor where carrier’s interpretation of agreement
was not “obviously insubstantial”); REA Express, Inc. v. Brotherhood of Ry., Air-
lines & S.S. Clerks, 499 F.2d 256, 231 (5th Cir. 1972) (noting that carrier’s inter-
pretation had to be “arguable”); IBEW v. Washington Terminal Co., 473 F.2d 1156,
1173 (D.C. Cir. 1972) (noting defense must be “arguable”); Airlines Steward &
1969) (using “obviously insubstantial” standard).}

\footnote{65. 376 U.S. 543 (1964).}
sis. The John Wiley Court laid out the analysis for determining whether a case contains substantive or procedural issues. The Court stated that substantive issues are those that question whether the parties have even agreed to arbitrate the disputed matter, whereas procedural issues question whether "grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate." The Court in John Wiley was concerned with the interaction of procedural and substantive issues that may arise in a labor dispute. In response to this concern, the Court defined the role of the arbitrator versus the court and stated, "[i]t would be a curious rule which required that intertwined issues of 'substance' and 'procedure' growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding the other." Thus, issues of procedural arbitrability are for the arbitrator to decide, but questions concerning substantive arbitrability are for the courts.


The federal circuit courts have also confronted the issues surrounding labor dispute arbitration with varying results. Although legislation and Supreme Court precedent have created a structured framework for labor arbitration, the finer points of the analysis are often left to the lower courts to decipher. Several important issues, such as whether the court or the arbitrator has jurisdiction over a particular dispute, hinge on distinctions between whether a dispute is deemed "major" or "minor" and of "substantive" or "procedural" arbitrability.

66. See id. at 558 (explaining procedural arbitrability analysis). In John Wiley, the Supreme Court first used the "substantive arbitrability" terminology. See Independent Ass'n of Continental Pilots v. Continental Airlines, 155 F.3d 685, 692-93 (3d Cir. 1998) (discussing John Wiley and its impact on labor law). John Wiley was actually a case arising under the NLRA. See John Wiley, 376 U.S. at 557-58 (using term "substantive arbitrability").

67. See John Wiley, 376 U.S. at 557-58 (discussing difference between cases involving question of substantive arbitrability and procedural arbitrability).

68. Id. at 557.

69. See id. (noting that certain questions involve consideration of merits and must go to arbitrator).

70. Id.

71. See id. at 557-58 (noting that determination of scope of arbitration is for arbitrator where question presented is one of procedural arbitrability).

72. See Stone, supra note 1, at 1507 (discussing fact that courts employed relatively uneven standards until recently when evaluating major versus minor disputes).

73. See id. (noting that lower courts are left to create own standards under guidance of Supreme Court and statutory language).

74. See Grab, supra note 2, at 9-10 (discussing distinctions between categories); Schuler, supra note 1, at 193-94 (recognizing that categorization of dispute affects forum).
Although the overall rules are fairly straightforward, until recently, the courts had not applied consistent standards to determine if a dispute was “major” or “minor.” In addition, there is a tendency for courts to simplify the language of Supreme Court precedent and say that “major” disputes involve a change or creation of an agreement, while “minor” disputes arise over the interpretation of an agreement. This simplification has caused parties to plead their issues in a way that will ensure the forum they prefer. Thus, one side, generally management, might attempt to frame their case as an interpretive issue, while the other side, usually the union, will argue that the dispute is over an effort to change the original agreement. Similarly, the way the parties frame the substantive/procedural arbitrability issue may also affect the forum and, ultimately, the outcome.

As a result, nearly all circuit courts apply an “arguably justified” standard in determining whether a given dispute is major or minor. This standard creates a presumption that the dispute arising under the RLA is a

75. See Stone, supra note 1, at 1507 (discussing courts’ inconsistent results).
76. See id. at 1505 (discussing courts’ simplification of standard that has made defining it “elusive”).
77. See Consolidated Rail Corp. v. Railway Labor Executives’ Ass’n, 491 U.S. 299, 305 (1989) (noting that “the distinction between major and minor disputes is a matter of pleading”); Brotherhood of Maintenance of Way Employees v. Atchison, Topeka & Santa Fe Ry. Co., 138 F.3d 635, 639-40 (7th Cir. 1997) (discussing unions’ tendency to want dispute classified as “major” so that union can opt to “strike or picket”); Stone, supra note 1, at 1505-06 (discussing how parties attempt to characterize disputes based on desired forum).
78. See Atchison, 138 F.3d at 639-40 (noting that railroads generally want dispute classified as minor).
79. See Independent Ass’n of Continental Pilots v. Continental Airlines, 155 F.3d 685, 693 (3d Cir. 1998) (noting that determination of type of arbitrability will affect forum); United Rubber, Cork, Linoleum, and Plastic Workers of Am. v. Pirelli Armstrong Tire Corp., 104 F.3d 181, 184-85 (8th Cir. 1997) (recognizing that, although union attempted to frame issue as one of substantive arbitrability, question presented procedural arbitrability for arbitrator to decide); Association of Flight Attendants v. USAir, Inc., 960 F.2d 345, 349 (3d Cir. 1992) (determining that issues of procedural arbitrability are for arbitrator to decide); Brotherhood Ry., Carmen Div. v. Atchison, Topeka & Santa Fe Ry. Co., 956 F.2d 156, 159 (7th Cir. 1992) (discussing how type of arbitrability determines whether court or arbitrator has jurisdiction).
80. See Atchison, 138 F.3d at 644 (Wood, J., dissenting) (noting that appropriate standard is whether employer’s position is “arguably justified” by terms of collective bargaining agreement); Schiltz v. Burlington N. R.R., 115 F.3d 1407, 1414 (8th Cir. 1997) (recognizing “arguably justified” standard); Railway Labor Executives’ Ass’n v. Consolidated Rail Corp., 845 F.2d 1187, 1190 (3d Cir. 1988) (applying “arguably justified” standard), rev’d on other grounds, 491 U.S. 299 (1989); Local 1477 United Transp. Union v. Baker, 482 F.2d 228, 230 (6th Cir. 1973) (adopting “arguably justified” standard). The Supreme Court in Conrail eventually ended the ongoing debate between the circuit courts by also adopting the “arguably justified” standard. See Conrail, 491 U.S. at 311-12 (applying “arguably justified” standard in determining whether employer’s interpretation of collective bargaining agreement is frivolous).
minor one, with a "relatively light" burden on management to show that arbitration is the appropriate forum.81

With regard to substantive and procedural arbitrability under the RLA, the courts are not as settled.82 Because the RLA does not include language regarding who has jurisdiction over a determination of the scope of the agreement, courts have had to turn to National Labor Relations Act jurisdiction to apply the substantive/procedural analysis to RLA cases.83

The United States Court of Appeals for the Seventh Circuit confronted this issue in Brotherhood Railway, Carmen Division v. Atchison, Topeka & Santa Fe Railway Co.84 In that case, the union sued because of an arbitral award given to a discharged employee.85 There, the appeals court had to determine whether the employer had waived his right to contest the award because it had not introduced its evidence during arbitration.86 The court held that the interpretation of the contractual provisions relating to how the grievances had to be presented was an issue of procedural arbitrability for the arbitrator to decide.87

The United States Court of Appeals for the Third Circuit has also confronted the problem of classifying major/minor disputes and substantive and procedural arbitrability in the context of labor arbitration.88 For

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83. See id. (discussing arbitrability analysis in context of RLA).

84. 956 F.2d 156 (7th Cir. 1992).

85. See id. at 157-58.

86. See id.

87. See id. at 159.

88. See Bell Atlantic-Pa., Inc. v. Communications Workers of Am., 164 F.3d 197, 200-02 (3d Cir. 1999) (discussing major/minor and procedural/substantive distinction); Continental Airlines, 155 F.3d at 685, 689-91 (reviewing relationship between major/minor and procedural/substantive analysis); Teamsters Local 312 v. Matlack, Inc. 118 F.3d 985, 988 (3d Cir. 1997) (reviewing "procedural" analysis); Exxon Shipping Co. v. Exxon Seamen's Union, 73 F.3d 1287, 1291 (3d Cir. 1996) (discussing court's ability to review arbitrator's decision); McQuestion v. New Jersey Rail Operations, 30 F.3d 388, 390-91 (3d Cir. 1994) (discussing major/minor distinction where "de facto" collective bargaining agreement exists); Miklavic v. USAir, Inc., 21 F.3d 551, 553 (3d Cir. 1994) (discussing role of arbitrator versus role of federal courts); Association of Flight Attendants v. USAir, Inc., 960 F.2d
example, in Miklavic v. USAir, Inc.,89 the court had to determine whether a dispute between USAir and its employees constituted a minor dispute under the RLA.90 In Miklavic, despite a collective bargaining agreement guarantee that fleet service personnel employed by USAir had the right to purchase life insurance at the same rates charged to non-union personnel, fleet service personnel were charged a higher rate.91 The employees filed suit in the district court without first filing a grievance.92 Because the Third Circuit found that the dispute was a minor one that could be resolved based on the collective bargaining agreement, it dismissed the complaint for lack of subject matter jurisdiction.93

The major/minor framework can give rise to a substantive/procedural analysis.94 That is, once it has been determined that a dispute is minor and concerns the existing collective bargaining agreement, then an issue may arise as to whether the collective bargaining agreement contemplates the arbitration of that issue.95 The dichotomy rests on the distinction between whether the parties have agreed to arbitrate the issue disputed (substantive arbitrability) and a mere procedural issue, such as whether the failure to follow the grievance procedure precludes arbitration (procedural arbitrability).96 The reason for this distinction lies in the

89. 21 F.3d 551 (3d Cir. 1994).
90. See id. at 552-53.
91. See id.
92. See id. at 558 (recognizing that minor issue was for arbitrator to determine).
93. See id. at 558.
94. See Independent Ass'n of Continental Airlines v. Continental Airlines, 155 F.3d 685, 692 (3d Cir. 1998) (noting that major/minor analysis can be followed by determination of whether dispute concerns issue of procedural arbitrability or substantive arbitrability).
95. See id. (defining distinction between substantive arbitrability and procedural arbitrability); see also John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 556-57 (1964) (describing procedural versus substantive arbitrability); Larsen v. American Airlines, Inc. 313 F.2d 599, 603 (2d Cir. 1963) (discussing characteristics of procedural arbitrability).
96. See Continental Airlines, 155 F.3d at 692-93 (reviewing reasons behind distinction); United Rubber, Cork, Linoleum, & Plastic Workers of Am. v. Pirelli Armstrong Tire Corp., 104 F.3d 181, 188 (8th Cir. 1997) (noting that procedural issues that “grow” out of original disagreement are for arbitrator to decide).
contract nature of arbitration—a party should only be forced to arbitrate what they have agreed is arbitrable.\textsuperscript{97}

This issue has arisen in a number of statutory contexts within the Third Circuit, including securities law and the Federal Arbitration Act.\textsuperscript{98} In two Third Circuit cases, \textit{PaineWebber Inc. v. Hartmann}\textsuperscript{99} and \textit{PaineWebber, Inc. v. Hofmann},\textsuperscript{100} the securities brokerage house sued to stop the arbitration of clients' claims of fraud and mismanagement.\textsuperscript{101} The court held in \textit{Hartmann}, and reiterated in \textit{Hofmann}, that it had jurisdiction over the disputes because, although the disputes were "minor," in both cases the contract placed a substantive limit on the claims the parties had contracted to arbitrate.\textsuperscript{102} Thus, the scope of the arbitration agreement was for the court, not the arbitrator, to decide.\textsuperscript{103}

The Third Circuit addressed the substantive and procedural arbitrability questions under the RLA in \textit{Association of Flight Attendants v. USAir, Inc.}\textsuperscript{104} In \textit{Association of Flight Attendants}, the issue on appeal was whether the district court erred in ruling that the grievant's expunged criminal records must be admitted in arbitration.\textsuperscript{105} The court held that the dispute was neither major nor minor but constituted a question of procedural arbitrability that was for the arbitrator to decide.\textsuperscript{106}

More recently, in \textit{Continental Airlines}, the Third Circuit analyzed this issue of substantive versus procedural arbitrability under the RLA.\textsuperscript{107} There, the court analyzed the relationship between the major/minor framework and the substantive/procedural analysis and defined "substantive arbitrability" and "procedural arbitrability" in determining whether a labor dispute could be resolved by the courts.\textsuperscript{108}

\textsuperscript{97} See \textit{PaineWebber v. Hofmann}, 984 F.2d 1372, 1381 (3d Cir. 1993) ("[N]o party should be forced to arbitrate an issue that it did not agree to submit to arbitration.").

\textsuperscript{98} See id. at 1381-82 (utilizing substantive arbitrability analysis); see also \textit{PaineWebber v. Hartmann}, 921 F.2d 507, 510-11 (3d Cir. 1990) (discussing whether determination of scope of arbitration is for courts to decide).

\textsuperscript{99} 921 F.2d 507 (3d Cir. 1990).

\textsuperscript{100} 984 F.2d 507 (3d Cir. 1993).

\textsuperscript{101} See \textit{Hartmann}, 921 F.2d at 509-10 (reviewing facts of case); see also \textit{Hofmann}, 984 F.2d at 1373-74 (discussing parties' claims).

\textsuperscript{102} See \textit{Hofmann}, 984 F.2d at 1381 (reviewing substantive arbitrability doctrine); \textit{Hartmann}, 921 F.2d at 514 (determining that PaineWebber would "suffer irreparable harm" if forced to arbitrate dispute).

\textsuperscript{103} See \textit{Hartmann}, 921 F.2d at 513 (noting that issues of substantive arbitrability are not for arbitrator to decide); see also \textit{Hofmann}, 984 F.2d at 1383 (concluding that "it is the court's obligation to determine the scope of the arbitration agreement").

\textsuperscript{104} 960 F.2d 345 (3d Cir. 1992).

\textsuperscript{105} See id. at 346-47.

\textsuperscript{106} See id. at 348-50.


\textsuperscript{108} See id. at 692-94 (recognizing that issues of procedural arbitrability are for arbitrator and issues of substantive arbitrability are for court).
III. The Third Circuit's Determinations Analysis of Independent Association of Continental Pilots v. Continental Airlines: The Role of the Courts or the Arbitrator?

A. The Issue, Facts and Procedural Posture

In 1992, after Continental Airlines filed its second petition for protection under Chapter 11 of the Bankruptcy Code, the airline froze pilot pay, and then tried to reduce it. 109 In response to the airline's attempt to reduce their pay, a group of Continental's pilots undertook negotiations with Continental's management that resulted in a written agreement entitled "Cost Reduction Memorandum" ("CRM"). 110 The CRM included a provision calling for the phased restoration of any reduction in pilot pay. 111 The CRM also provided that, should the airline grant a raise to any group of employees other than pilots, the pilots would also receive a comparable pay raise ("me-too" provision). 112

Thereafter, Continental and the Independent Association of Continental Pilots ("IACP") entered into an agreement entitled the "Interim Grievance Procedure" ("IGP"), which was put into place pending the com-

109. See id. at 687 (discussing how to determine whether arbitrator or court has jurisdiction over dispute).

110. See id. (discussing negotiations and agreement between management and union). The Court in Continental Airlines did not address the issue of Continental's bankruptcy and its original attempt to change the terms of the collective bargaining unit. See id. at 687 (mentioning Continental's filing for bankruptcy but not addressing implications of act). There is much debate surrounding the intersection of the RLA and bankruptcy laws. See Grab, supra note 2, at 4-5 (arguing that bankruptcy courts often broaden scope of RLA). Although bankruptcy courts are equitable in nature, their goals are not always in accordance with the goals of the RLA. See id. (noting that bankruptcy courts stress "speedy financial rehabilitation of the debtor" while RLA aims to equalize bargaining process between management and labor). The two areas of law cannot operate separately because, for airlines in the midst of bankruptcy, labor strife can severely compound their problems. See id. at 24 (noting that airlines in financial crisis are particularly susceptible to labor disputes). But see Stone, supra note 1, at 1491-92 ("[Airlines] used bankruptcy laws to repudiate their collective bargaining agreements.").

111. See Continental Airlines, 155 F.3d at 687-88 (describing CRM provisions). The restoration was to occur according to a mutually agreed upon formula as outlined in Paragraph 6(A) of the CRM. See id. The provision reads as follows: The wage reductions (i.e. Fuel bonus, line divisor, training, per diem, and crew meals) ... will be restored progressively by Continental, in accordance with the formula set forth in Attachment A, with full restoration projected by July 1, 1993. As part of the restoration, the program of quarterly fuel bonus payments to pilots shall end, and in lieu thereof pilots rates of pay progressively restored shall be the ... April 1, 1992 rates of pay.

112. See id. at 688 (reviewing "me-too" provision). This "me-too" provision stated: "Should Continental grant a wage or salary increase to any employee group, including management and executive employees, prior to restoration of pilot wage reductions, then the company shall at the same time restore pilot wages on a comparable basis." Id.
The IGP outlined a two-step procedure for resolving grievances.\(^\text{114}\)

On September 9, 1994, after the IGP was implemented, but before the collective bargaining agreement was in effect, a pilot filed a grievance calling for Continental to honor the CRM and its provisions relating to the fuel bonus and the restoration of pilot wage reductions.\(^\text{115}\) The pilot unsuccessfully pursued his grievance through the first two stages of the grievance procedure and then filed an appeal through the System Board.\(^\text{116}\) About one month later, the IACP refiled the pilot’s appeal in an attempt to extend the grievance on a class wide basis.\(^\text{117}\) Subsequently, Continental and IACP underwent arbitration.\(^\text{118}\) During the course of the arbitration proceedings, however, the parties disagreed over whether any determination by the arbitrator concerning the “me-too” provision or the IACP’s right to raise claims for similarly situated pilots would be reviewable de novo by a federal court.\(^\text{119}\)

113. See id. (discussing IGP).

114. See id. (describing grievance procedure). The IGP’s provision was made in accordance with § 204 of the Railway Labor Act, 45 U.S.C. § 184. See id. (noting agreement’s compliance with statute’s requirements). This portion of the Railway Labor Act is one of the amendments made to the statute in extending its application to the airline industry. See id. at n.1. This provision of the Railway Labor Act declares, “it shall be the duty of every carrier to and of its employees, acting through their representatives . . . to establish a board of adjustment . . . . A ‘board of adjustment’ so established is an arbitral tribunal to which the parties may refer any grievances that are not otherwise resolved.” Id. (citing 45 U.S.C. § 184). As such, the IGP established a system board of adjustment (“System Board”) for arbitrating grievances. See id. (noting how System Board was established). The IGP called for a two step grievance procedure that contemplated two preliminary stages, “Step 1” and “Step 2” hearings, followed by an “appeal to the system board of adjustment of any grievance not resolved in the first two stages.” Id.

115. See id. (noting basis of pilot’s grievance). The pilot, Jackson Martin, filed a grievance that stated:

The [CRM] establishes that fuel bonus will be restored, it establishes a protocol for the use of a higher hourly rate in lieu of quarterly fuel bonus payments and it defines Continental’s total liability toward restoration of pilot wage reductions to April 1, 1992 pay rates plus the value of the fuel bonus program. Continental Airlines should honor the Agreement it reached with its pilots under the Cost Reduction Memorandum and fully restore pilot wage reductions; to not do so would substantially alter the letter and intent of the current Pilot Employment Policy.

Id.

116. See id. (noting unsuccessful pursuance of grievances).

117. See id. The pilot Martin filed his initial appeal to the System Board on January 4, 1995. See id. The IACP refiled the appeal on February 8, 1995. See id. The IACP’s appeal denoted the issue as “whether [Continental] is in violation of the [CRM] . . . and all related provisions for failure to properly enact pilot pay restoration rate effective July 1, 1994.” Id.

118. See id.

119. See id. at 688. Prior to the commencement of the arbitration proceeding, Continental took the position that the IACP could not bring the appeal on behalf of the pilots as a class and that the System Board could not decide on the merits of any claim brought under the “me-too” provision of the CRM because Martin had
The IACP, in its complaint, sought an order declaring that Continental Airlines was required to arbitrate the issue of whether or not the company violated the "me too" provision and compelling Continental to resolve this issue on a class-wide basis. Continental moved for judgment on the pleadings, urging the district court that the IACP sought judicial determination of issues that should properly be decided by the System Board as part of the arbitration proceedings. The district court granted Continental's motion for judgment on the pleadings and dismissed the case.

B. The Third Circuit Draws a Line: An Analysis of the Major/Minor and Procedural/Substantive Arbitrability Distinctions

On appeal, the main issue before the Third Circuit was the allocation of authority between the courts and the arbitrators under the RLA. The district court had framed the issue as whether the dispute was "major" or "minor." Finding the dispute in question was "minor," the district court granted Continental's request for judgment on the pleadings. The Third Circuit affirmed the district court's holding, but for two different reasons. Although the Third Circuit agreed that the issue was a "minor" dispute under the RLA, it found that, given the facts of the case, an analysis of whether the issue pertained to procedural arbitrability or substantive arbitrability would be determinative.

1. The Major/Minor Distinction

Applying the major/minor analysis to the facts of Continental, the Third Circuit noted with emphasis that there was "no doubt" that the question invoked the "me too" provision during the early stages of the grievance procedure. Once arbitration began, the IACP announced its intention not to proceed unless Continental would agree that any arbitrator determinations on both of the above-mentioned issues would be reviewable de novo by a federal court. Continental refused and the arbitrator ended the proceedings. (discussing interpretation of issues presented to court).

120. See id. at 689.
121. See id. Continental petitioned that the issues the IACP presented to the court, the class-wide based appeal and Continental's alleged violation of the "me too" provision of the CRM, were issues to be decided by the arbitrator. To counter Continental's motion, the union took the position that these were issues of "substantive arbitrability" that the court should decide before arbitration. (discussing interpretation of issues presented to court).

122. See id. (discussing district court's decision).
123. See id. at 687 (discussing broad issue under appeal) (citing Railway Labor Act, 45 U.S.C. § 151).
124. See id. at 689-91 (reviewing major/minor distinctions as well as procedural/substantive delineations).
125. See id. at 692 (discussing main issue on appeal).
126. See id. at 692-93 (noting district court's holding).
127. See id. (recognizing that dispute would be characterized as "minor" but that does not end analysis).
Whether Continental violated the CRM "me-too" provision was a minor dispute that gave exclusive jurisdiction to the arbitrator. In reaching this decision, the court relied on Supreme Court precedent in Burley and Conrai, as well as its own precedent, and focused on the fact that the issues in contention related back to existing agreements between the IACP and Continental. The court went on to explain, however, that the court would have to examine whether, by broadening the scope of Martin's claim, the IACP introduced additional and "antecedent" issues that must be determined judicially before arbitration, or whether the issues themselves were subject to arbitration. Thus, while the court affirmed the district court's findings that the dispute was a "minor" dispute under the RLA, the court stated that one question still needed to be addressed—whether the issues presented in Continental Airlines concerned questions of procedural or substantive arbitrability.

2. Procedural and Substantive Arbitrability: Who Determines the Scope?

Next the Third Circuit examined the "related" question of whether this "minor" dispute could be characterized as a question of "procedural arbitrability" or "substantive arbitrability." The court noted that, while the major/minor analysis decides the allocation of authority between the arbitration board and the judiciary, the procedural/substantive question addresses the scope of the arbitration and who should decide that scope.

128. See id. at 693 (noting that question presented involved determination of scope of agreement).
129. See id. at 690-92 (affirming district court's determination that underlying dispute was minor and involved question of interpretation).
130. See id. at 692 (relying on Supreme Court precedent in justifying its position).
131. See id. at 693 (discussing fact that determination characterizing dispute as minor did not end analysis). The court points out that "[t]he major/minor question allocates the respective authority of the National Mediation Board on one hand, and the arbitral boards of adjustment on the other, and also delineates the judiciary's role in each respective statutory path." Id.
132. See id. (discussing how to proceed in analyzing facts of case).
133. See id. (reviewing how major/minor analysis fits in with procedural/substantive determination). The court noted that the procedural/substantive issue is related to but different from than the major/minor issue. See id. Although a determination that a dispute is minor may mean it is an arbitrable dispute, the scope of that dispute could be either for the court to decide (substantive arbitrability) or for the arbitrator to decide (procedural arbitrability). See id. at 693-94. Part of the rationale behind this distinction seems to come from the policy concern that arbitration is a creature of contract and, as such, parties should not have to arbitrate issues outside of those they have agreed upon. See Bell Atlantic-Pa. v. Communications Workers of Am., 164 F.3d 197, 199 (3d Cir. 1999) (discussing procedural versus substantive arbitrability); Teamsters v. Matlack, 118 F.3d 985, 990-91 (3d Cir. 1997) (discussing reasons why substantive arbitrability issues are for courts to determine); Miklavic v. USAir, Inc., 21 F.3d 551, 553-56 (3d Cir. 1994) (noting that substantive arbitrability issues fall under court's jurisdiction); Association of Flight
In *Continental Airlines*, the Third Circuit noted the union’s argument that the IGP presented exhaustion principles that put the dispute outside of the parties’ agreement and thus outside of the arbitrator’s jurisdiction. The IACP argued that the issues were of substantive arbitrability, and thus for the court to decide. The court rejected the union’s argument and found that the dispute arose under the context of the agreement. Furthermore, the court pointed out that a determination of the issue would require a determination on the merits of the dispute itself—a determination that falls in the purview of the arbitrator.

In addressing whether the issues involved substantive or procedural arbitrability, the court noted that the distinction does not come from the RLA itself. The court justified its use of this framework by citing to the Seventh Circuit’s decision in *Atchison* as well as the Third Circuit’s decision *Attendants v. USAir, Inc.*, 960 F.2d 345, 349-50 (3d Cir. 1992) (discussing substantive analysis).

The court focused separately on the two issues presented by the IACP. See *id.* at 695 (reviewing IACP’s argument). The court reasoned that an arbitrator might find the...
in Association of Flight Attendants, both of which held the procedural arbitrability doctrine to be applicable under the RLA.\textsuperscript{139} The Court also relied on the Supreme Court's decision in John Wiley.\textsuperscript{140} John Wiley did not arise under the RLA context, but under the context of the NLRA.\textsuperscript{141} The Third Circuit reasoned that in John Wiley the issue at hand was the failure of the grievant, a union member, to exhaust the grievance procedures outlined in the collective bargaining agreement.\textsuperscript{142} Likewise, that was an issue between the IACP and Continental.\textsuperscript{143} Thus, relying on Supreme Court precedent utilizing the procedural arbitrability doctrine as well as its own and the Seventh Circuit's precedent, the Third Circuit determined that the procedural arbitrability analysis was applicable to the case at bar.\textsuperscript{144}

A more problematic challenge was raised by the IACP.\textsuperscript{145} The IACP argued that the exhaustion requirement of the IGP presented a substantive bar to arbitration under the court's prior rulings in Hartmann and Hofmann.\textsuperscript{146} The IACP contended that, under these two cases, language in the agreement that limits the circumstances under which a dispute can be arbitrated presents a question of substantive arbitrability.\textsuperscript{147} The IACP relied on language found in the arbitration provisions in Hartmann and Hofmann that read, "[n]o dispute, claim, or controversy shall be eligible for submission to arbitration . . . where six (6) years have elapsed."\textsuperscript{148}

The IACP presented language from the IGP that stated in part, "Unless the company and the grievant or the IACP mutually agree otherwise, a grievant is precluded from raising in subsequent steps issues not raised in language of the relevant CRM provision to permit or mandate "class-wide relief."\textsuperscript{1999}\textsuperscript{Id.}"

\textsuperscript{139} See id. at 695 & n.8.

\textsuperscript{140} See id. (stating that procedural arbitrability doctrine "has been held applicable to RLA cases by other courts of appeals as well"); see also Association of Flight Attendants v. USAir, Inc., 960 F.2d 345, 348 (3d Cir. 1992) (characterizing issue under RLA as one of procedural arbitrability); Brotherhood of Ry., Carmen Div. v. Atchison, Topeka & Santa Fe Ry. Co., 956 F.2d 156, 159-61 (7th Cir. 1992) (recognizing procedural arbitrability doctrine under RLA).

\textsuperscript{141} See John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 544 (1964) (discussing applicability of Supreme Court's decision in John Wiley to facts presented in Continental Airlines).

\textsuperscript{142} See id. at 557-58 (noting that, in dispute brought under NLRA, subject matter of dispute must be within scope of arbitration agreement).

\textsuperscript{143} See Continental Airlines, 155 F.3d at 692-95 (comparing facts in John Wiley to those in case at bar).

\textsuperscript{144} See id. at 695 (discussing facts of case).

\textsuperscript{145} See id. at 693 (determining whether procedural arbitrability doctrine is applicable under RLA).

\textsuperscript{146} See id. (noting IACP's reliance on Third Circuit cases arising under securities laws).

\textsuperscript{147} See id. at 693-94 (discussing IACP's reliance on prior cases) (citing PaineWebber Inc. v. Hofmann, 984 F.2d 1372 (3d Cir. 1993) and PaineWebber v. Hartmann, 921 F.2d 507 (3d Cir. 1990)).

\textsuperscript{148} Id. at 693.
his original grievance." The IACP urged the court that this language, like the language in the arbitration agreements in *Hartmann* and *Hofmann*, presented a substantive bar to arbitration.\(^{150}\)

The court rejected this argument and held that the issues presented a question of procedural arbitrability for the arbitrator to decide.\(^{151}\) The court reasoned that its holdings in *Hartmann* and *Hofmann* were narrowly tailored and that "[l]anguage less distinct than 'eligible for submission to arbitration' might well be insufficient to overcome the strong jurisprudential pull towards arbitration."\(^{152}\) The court went on to note that, even if the language in the IGP passed the standard laid out in *Hartmann* and *Hoffman*, the public policy favoring arbitration in labor disputes would still relegate the dispute to the arbitral setting.\(^{153}\)

3. **A Note for Practitioner**

The Third Circuit's decision in *Continental Airlines* underscores the court's deference for arbitration in labor disputes.\(^{154}\) Although *Continental Airlines* does not represent the first time the court was faced with a substantive arbitrability question under the RLA, the holding does clarify the factors examined in making a jurisdictional determination.\(^{155}\) The court was clear that a mere characterization of a dispute as major or minor will not end the analysis in all cases because the court will borrow from NLRA law.\(^{156}\) Furthermore, in determining whether a collective bargaining agreement presents an exhaustion provision that would place a substantive bar to arbitration, the court will narrowly construe the language of

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149. Id. at 694.
150. See id.
151. See id. (noting IACP's argument). The IACP's contention was that, by not including the "me too" provision in the first steps of the grievance process set forth in the CRM, a determination of whether it is an arbitrable issue lies outside of the arbitrator's jurisdiction. See id.
152. Id. at 697.
153. See id. at 694 (discussing public policy behind arbitration).
154. See id. at 696-97 ("In the collective bargaining setting, the primacy of the arbitral role is crucial to the stability of the work place."). The Third Circuit's policy emphasis were clearly different in *Continental Airlines* as compared to *Hofmann* and *Hartmann*. Compare *Continental Airlines*, 155 F.3d at 696-97 (emphasizing importance of arbitration in labor context), with PaineWebber, Inc. v. Hofmann, 984 F.2d 1372, 1381 (3d Cir. 1993) (noting policy in favor of freedom of contract), and PaineWebber, Inc. v. Hartmann, 921 F.2d 507, 512-13 (3d Cir. 1990) (discussing appropriate standard of review in contract cases).
155. See *Continental Airlines*, 155 F.3d at 696-97 (discussing importance of arbitration in labor disputes). The Third Circuit seemed to focus on the industry expertise of the arbitrator as well as the efficiency of arbitration procedures as factors in their determination. See id. (noting that "[e]xcessive judicial intrusion can undermine arbitral expertise and authority . . . lengthy court proceedings can seriously undermine the capacity for prompt adjudication which is the hallmark of adjudication").
the agreement in the labor context. 157 Where the language of an agreement is ambiguous and is merely "framed in obligatory terms," the court will not necessarily interpret the provision as a "substantive bar" to arbitration. 158

In addition, in Continental Airlines, the Third Circuit underscored its position that labor arbitration deserves particular deference in accordance with Supreme Court precedent and the intent behind the RLA. 159 Thus, the holding in Continental Airlines is closely tied to the facts and parties involved. 160 Indeed, the court made it clear, by differentiating the securities context of Hartmann and Hofmann from the airline labor context in Continental Airlines, that policy was a strong factor in the decision. 161

IV. CONCLUSION

Today, there is little doubt that the airline industry is in trouble. 162 Plagued by financial strain and labor strife, the industry is in constant flux. 163 As such, the Third Circuit's decision in Continental Airlines appears to be in keeping with a public policy that recognizes the special concerns of this precarious industry. 164 The Third Circuit's holding and rationale in Continental Airlines underscore public policy that favors arbitration in labor disputes. 165 The court's decision solidifies the need for

157. See Continental Airlines, 155 F.3d at 696 (discussing policy in favor of arbitration in labor cases).
158. See id. ("When a court is called upon to determine whether aspects of a dispute arising out of a collective bargaining agreement are to be determined by an arbitrator or by the court, judicial restraint is an institutional imperative.").
159. See id. at 694 (discussing judicial deference toward arbitration).
160. See id. at 696-97 (recognizing importance of labor arbitration); see also Bell Atlantic-Pa., Inc. v. Communications Workers of Am., 164 F.3d 197, 203 (3d Cir. 1999) (discussing procedural arbitrability doctrine and finding that dispute presented issue for arbitrator to decide).
161. See Continental Airlines, 155 F.3d at 696-97 (noting that, at least partly because issue arose in labor context, language did not present "substantive bar" to arbitration); see also Stone, supra note 1, at 1496 (discussing presumption in favor of arbitrability in labor disputes arising under RLA).
162. See Continental Airlines, 155 F.3d at 694-95.
163. See Beth S. Adler, Deregulation in the Airline Industry: Toward a New Judicial Interpretation of the Railway Labor Act, 80 NW. U. L. Rev. 1003, 1005 (1986) (noting changes in airlines since deregulation took effect); Grab, supra note 2, at 24 (stating "airlines encounter turbulent financial conditions"); Jochner, supra note 2, at 220 (recognizing threat that excessive debt poses to airline industry). For a further discussion on the airline industry's financial problems, see supra notes 2-3 and accompanying text. For a discussion about the interaction of bankruptcy laws and the RLA, see supra note 110.
164. See Grab, supra note 2, at 2 (recognizing that labor strife plays important role in airlines' problems); Schuler, supra note 1, at 189 (noting problems in airline industry). For further discussion about the impact of the airline industry's labor strife on its financial problems, see supra note 2 and accompanying text.
165. See Continental Airlines, 155 F.3d at 694 (emphasizing importance of stability in labor arena); Adler, supra note 163, at 1004 (recounting problems associated with airline industry); Grab, supra note 2, at 1-2 (noting public's perception of
precise language in collective bargaining agreements because, when ambigu- 
ity presents itself, "judicial restraint is an institutional imperative." 166

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airlines as "a troubled institution"); Stone, supra note 1, at 1495 (discussing public policy behind labor regulation).

166. Continental Airlines, 155 F.3d at 696; see Bell Atlantic-Pa. v. Communications Workers of Am., 164 F.3d 197, 203 (3d Cir. 1999) (recognizing public policy favoring arbitration in collective baragaining cases); Stone, supra note 1, at 1495 (recognizing that courts' standards for defining jurisdiction have placed strain on unions).