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Labor Law--Railway Labor Act § 2 (First) Good Faith Provision: Accommodation or Return to Judicial Policy Making in Labor Disputes

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proposed in the President's 1963 Tax Message which noted the necessity for legislation due to the lack of certainty and uniformity in this area. Briefly, it provided for a 20 mile radius designated as the "duty area" inside of which no commuting would be deductible. This "duty area" would center around the taxpayer's principle post of duty, or in the proper circumstances, around his residence. The proposal also recognized the "temporary" employment exception in situations in which the employment lasted less than one year. Hopefully, as a result of Correll, Congress will now take the initiative and provide some relief to the taxpayer who does not wish to spend the night.

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LABOR LAW—RAILWAY LABOR ACT § 2 (FIRST) GOOD FAITH PROVISION: ACCOMMODATION OR RETURN TO JUDICIAL POLICY MAKING IN LABOR DISPUTES

The paramount objectives of the Railway Labor Act [hereinafter RLA] are to avoid any interruption in interstate commerce and to promote harmony between the carriers and their employees by establishing collective bargaining machinery designed to prevent strikes. To effectuate these objectives, Congress, in § 2 of the RLA, set forth


2 Id. § 151(a) sets forth the general purposes of the RLA as follows:

The purposes of the chapter are:

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

a number of statutory commands.\textsuperscript{3} § 2 (First), the first sub-section under § 2, is the foremost command within this statutory scheme.\textsuperscript{4} It imposes a duty on the parties to bargain collectively in good faith by providing that the parties are “to exert every reasonable effort” to settle their disputes. The good faith requirement extends to each specific aspect of the statutory scheme of the RLA: conference, conciliation, mediation, and voluntary arbitration.\textsuperscript{5}

This comment presents a discussion of whether an injunction can be issued to prevent a strike until it is ascertained if the good faith duty to bargain has been violated even though the parties have attempted to comply with and have exhausted the mandatory provisions of the RLA. Such a situation was recently presented in Chicago \& North Western Railway Co. v. United Transportation Union.\textsuperscript{6} In

\textsuperscript{3} The Court, in Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969), discussed the procedure required in attempting to reach a settlement in a major dispute as follows:

The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board which may also proffer its services \textit{sua sponte} if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the status quo. §§ 2 Seventh, 5 First, 6, 10. Id. at 378.

\textsuperscript{4} 45 U.S.C. § 152 (First) provides in pertinent part: 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... 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 employer thereof.

The Court in Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 377 (1969) referred to this section as the “heart of the [RLA].”

\textsuperscript{5} See note 3 supra, and accompanying text. See also Bryer, \textit{The Railway Labor Act and the National Labor Relations Act—A Comparison}, 44 W. VA. L.Q. 1, 2 (1937); Comment, 30 Md. L. Rev. 162, 164 (1970).

\textsuperscript{6} 91 S.Ct. 1731 (1971). The carrier seeking injunctive relief filed a complaint in federal district court alleging that the union had failed to perform its obligations under § 2 (First) of the RLA to bargain in good faith. These allegations were founded on the contention that the union entered the negotiations with a fixed opinion and refused to engage in national handling of the dispute. The union answered by contending that §§ 4, 7, and 8 of the Norris-LaGuardia Act deprived the district court of jurisdiction to issue an anti-strike injunction. Finding that it did not have jurisdiction to decide whether § 2 (First) was complied with in good faith, since all the other procedures of the RLA were exhausted, the district court held that §§ 4 and 7 prohibited the enjoining of a (Continued on next page)
this case, the Supreme Court held that the good faith provision of § 2 (First) is enforceable through the issuance of a judicial strike injunction, notwithstanding the anti-strike injunction provision of the Norris-LaGuardia Act. Since it is a statutory duty on the parties to exhaust the requirements established by the RLA before resorting to economic self-help, the result reached in Chicago & North Western Rail-

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strike. It appears that this court believed the matter to be one for administrative determination by the National Mediation Board rather than presenting a justiciable issue. However, an injunction was granted pending an appeal of its decision of the justiciability of § 2 (First). Upon review the federal Court of Appeals affirmed. 422 F.2d 979 (7th Cir. 1970). It was the holding of this court that the enforcement of § 2 (First) was a matter solely for the National Mediation Board.

7 Act of March 23, 1932, 47 Stat. 70 [codified at 29 U.S.C. §§ 101-15 (1964)]. The union relied on § 104 which provides in pertinent part as follows:

No Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;...

8 See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378 (1971). Classification of a dispute as either major or minor is important because it determines the administrative procedures for processing these two categories of labor controversies. Although the terms major or minor will not be found in the RLA "it is commonly recognized that the RLA provides for two different procedures, each of which had different legal consequences." Siegel & Lawton, Stalemate in 'Major' Disputes Under the Railway Labor Act—The President and Congress, 32 Geo. Wash. L. Rev. 8 (1963). In Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711 (1945), the Court discussed the distinctions between these two classes of disputes:

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

The second class [minor disputes], however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. . . . [T]he claim is to rights accrued, not merely to have new ones created for the future. Id. at 723.

The procedure of processing a minor dispute results in final, binding arbitration if the parties cannot reach an agreement during negotiation. Therefore the Court in Brotherhood of R.R. Trainmen v. Chicago River & I.R.R. Co., 353 U.S. 30, 34 (1957) held that self-help in the form of a strike would be barred because such action would be inconsistent with this procedure since a reasonable alternative has been offered to the parties. Otherwise, this procedure would be rendered meaningless.

While there is a mandatory duty to follow the detailed procedure in a major dispute, there is no compulsion to agree at any stage of the proceedings and a strike after the exhaustion of the various steps would be consistent with the purposes of the Act. See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378 (1969); Brotherhood of Ry. & S.S. Clerks v. Florida E.
way Co. would appear reasonable since § 2 (First) is one of the provisions to be exhausted. However, the Court did not provide any

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Coast Ry. Co., 384 U.S. 238, 244 (1966); Brotherhood of Locomotive Engineers v. Baltimore & O. R.R. Co., 372 U.S. 284, 290 (1963); The Order of R.R. Telegraphers v. Chicago & N.W. Ry. Co., 362 U.S. 330, 339-40 (1960); Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711, 725 (1945); American Airlines, Inc., v. Air Line Pilots Ass'n Int'l, 169 F. Supp. 777, 783 (S.D.N.Y. 1958). If the parties cannot reach voluntary agreement, there is no final decision like that imposed by the Railroad Adjustment Board in a minor dispute. Id. at 784. “Indeed, the unquestioned right to resort to self-help is the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.” Florida E. Coast Ry. Co. v. Brotherhood of R.R. Trainmen, 336 F.2d 172, 181 (5th Cir. 1964). It should be remembered that the procedures of a major dispute settlement are long and drawn-out with cooling-off periods and the maintenance of the status quo or freeze periods so that the parties will be induced to reach a peaceful settlement without resorting to economic self-help.

The major-minor distinction would seem to be an adequate aid to judicial handling of railway labor disputes. However “[o]ne of the many reasons why the [RLA] is regarded as an anachronism in labor relations law is that its classification of disputes into major and minor is no longer all-inclusive.” McGuina, Injunctive Powers of the Federal Courts In Cases Involving Disputes Under the Railway Labor Act, 50 Geo. L.J. 46, 65 (1961). The parties have succeeded in manipulating the classification of a dispute for their own particular purpose.

[T]he carrier may unilaterally introduce far reaching changes in operation or work rules during the life of an agreement, claiming that the right to do so is a management prerogative. If the union protests that the action is a breach of the agreement, and the carrier then submits the issue to the NRAB, a strike by the union will be enjoined on the authority of the Chicago River case. But suppose the union waits until the agreement is open for renegotiation and then files a section 6 notice demanding abolition of the changes introduced by the carrier or additional compensation to the employees in lieu thereof; the dispute remains essentially the same, only now it is “major” instead of “minor.” Aaron, The Labor Injunction Reappraised, 10 U.C.L.A.L. Rev. 292, 320 (1963).

The carrier’s tactics in establishing a minor dispute rather than a major dispute is a delaying maneuver. It will enable the carrier to make its changes because the status quo provisions of the RLA do not apply to minor disputes and it sometimes takes the Railroad Adjustment Board five years to adjudicate a dispute from the time of docketing the case until the award is rendered. See Hudson & M.R.R. Co. v. Stichman, 178 F. Supp. 106, 107 (S.D.N.Y. 1959).

Although the union, if successful, can recover an award (a discharged employee could be reinstated with back pay but he normally is not able to afford to wait out a decision but rather gets another job) “the union will find it difficult to arouse economic pressure five years later over a dead issue.” Note, Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia, 70 Yale L.J. 70, 83 (1960). It can also be argued, on behalf of the carrier, that a long delay in introducing operating efficiency changes could prove fatal to the operation of a business. See Aaron, 10 U.C.L.A.L. Rev., supra this note, at 321. The Court, in Brotherhood of Locomotive Engineers v. Missouri-K.T.R.R. Co., 363 U.S. 528 (1960), attempted to balance the competing claims of irreparable hardship and held that the union could not be enjoined until the carrier returned to the status quo ante situation pending adjudication by the Railroad Adjustment Board.

Perhaps the best approach to the problem is suggested in United Indus. Workers v. Board of Trustees of the Galveston Wharves, 351 F.2d 183, 189 (5th Cir. 1965) where the court said:

When we look at the sharp outlines of this case through ordinary glasses, not major or minor lenses, we can see this case for what it really is... This approach could result in a determination of the dispute on the basis of examining the action of the parties rather than the substance of the agreement.
guidelines as to what may represent a "reasonable effort" but rather it deferred the question to the discretion of the federal district court. Although recognizing that clarity is lacking in its decision, the Court suggests that the result reached was unavoidable if the objectives of the RLA are to be fulfilled.

Collective bargaining in the railroad industry has received extensive treatment from Congress. The original RLA and its amendments are the culmination of a variety of legislation which attempted to provide an effective means to attain a peaceful settlement to the recurring labor problems. Prior to the enactment of the RLA, the peaceful settlement of railroad labor controversies was impeded by weak statutes which afforded few alternatives to the strike in resolving disputes. The earliest attempt to give relief to labor strife in the railroad industry was the Arbitration Act of 1888 which was enacted one year after the passage of the Interstate Commerce Act. The Arbitration Act provided for the voluntary arbitration and investigation of labor disputes by ad hoc commissions. Even though the Arbitration Act was in effect for ten years, the arbitration provisions were never utilized and the investigatory provisions were only used once, but to no avail, in attempting to prevent the disastrous Pullman strike of 1894. Following the Arbitration Act, the Erdman Act was enacted in 1898 and its policy formulated the application of mediation, conciliation, and voluntary arbitration to resolve railroad labor disputes. In 1913, the Newlands Act created a permanent Board of Mediation and Conciliation, the first full-time Board established. Under the Newlands Act, the unions became dissatisfied with the Board's procedures of interpreting mediated agreements and arbitration awards since these procedures were rudimentary in form.
and it appeared to the unions that management had attempted to assert a voice in their interpretation.  

During World War I the federal government assumed control of the railroads. This period of time found the unions very active and optimistic because of a large increase in membership, and, "for the first time in history, railroad employees were thoroughly organized under an employer who gave them sympathetic recognition and nationwide rules built around the cherished principles of seniority, reasonable hours, [and] security against arbitrary discharge..." Although the unions supported government control of the railroads, government operation was not economically successful and after the close of the war the railroads were returned to private ownership.  

The last major legislation prior to enactment of the RLA was the Transportation Act of 1920. This act made provisions for hearings and investigations of disputes by the United States Railroad Labor Board in substitution for mediation. However, Congress made the mistake of also charging the Board with quasi-legislative functions such as making rules and passing on wage demands. In combining legislative and judicial functions under the same Board, the impartial atmosphere required for effective judicial decision-making was destroyed. In applying narrow interpretations to the Board's authority,  

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20 In fact, a Senator commented that government operation of the railroads created "the most tangled mess that could possibly be imagined." 113 Cong. Rec. 14967 (1967) (statement of Senator Holland).  
See Pomerene, Our Recent Federal Railroad Legislation, 55 Am. L. Rev. 364 (1921) for a detailed analysis of the government control of the railroads and the Plumb Plan to continue such control put forth on behalf of labor out of the fear that if control of the roads were turned back to private ownership, the wages and other gains made during governmental operation would be lost. To illustrate the feeling of the general public at this time, the following may be of interest to the reader:  
"There never will be more than one nationwide strike in this country on the railroads. And if that one strike comes, the American people will send to Congress men who will have the courage to do their bidding, and not quake like aspen leaves before a few lobbyists in Washington. The great American people are patient and long-suffering, but they can be aroused and when they are aroused there will be a great upswell which will cast aside the autocrats of the country as the great billows of the ocean toss about the flotsam and jetsam of the sea. Id. at 392.  
21 41 Stat. 456 (1920).  
22 Garrison, 46 Yale L.J., supra note 19, at 572. This mistake was not made in the RLA. By amendment in 1934, the National Railroad Adjustment Board was established to act as a judicial body in minor disputes, while the National Mediation Board was to have no adjudicatory authority with regard to major disputes but merely served to persuade the parties and thereby preserved its ability to mediate.  
23 Id.
the Court severely restricted its effectiveness. The Board's recommendations in the form of "decisions" were held enforceable only to the extent that public opinion would pressure acceptance of them. Thus, the parties were able to ignore the decisions of the Railroad Labor Board since it was "armed only with the gentle, unenforceable admonitions of the Transportation Act, 1920." The need for Congressional action became apparent and in the President's message to this body in 1923 he suggested that "if an agreement could be reached between employers and employees, there should be no hesitation in enacting such agreement into law."

After being urged to sit down and develop a workable solution for settling disputes in their industry, the representatives of labor and management agreed on proposing a bill to Congress and this bill with only minor technical changes later became enacted as the RLA.

It is a remarkable fact that all parties concerned were able to lay aside the hostile feelings and suspicions that had too often characterized past negotiations and to act upon the belief that if an agreement were reached, it would be carried out in the same spirit of good faith and fair dealing that characterized the negotiations.

The significance of the passage of this act in the same form as suggested by the parties involved is founded on the premise that if both parties were satisfied, success in the form of peaceful settlements to disputes would be forthcoming. At the time of enactment it was suggested that the "new [RLA] conforms to the spirit of the times in leaving industry to settle its own labor relations without public intervention."

The procedure to prevent crippling strikes to the railroad industry is dependent upon the good faith of the parties in conjunction with

25 In Pennsylvania R.R. Co. v. United States Labor Bd., 261 U.S. 72, 79 (1923) the Court interpreted the Congressional intent behind the scheme of the Transportation Act of 1920 to be enforceable through public criticism rather than being enforceable by process. This intent was premised on the belief that the economic interest of the public in the free flow of interstate commerce was so important that a labor dispute would draw public attention to the side which the Labor Board found to be at fault. See Pennsylvania R.R. System & Federation v. Pennsylvania R.R. Co., 267 U.S. 203, 217 (1925) where a situation was presented in which the carrier made every attempt to avoid compliance with a Railroad Labor Board decision but the Court maintained that this decision was enforceable.
26 Hooper, Labor, Railroads and the Public, 9 A.B.A.J. 15 (1923).
the persuasion applied by the Mediation Board in major disputes. Although the Transportation Act's good faith provision set forth in § 301, Title III, was substantially reenacted in § 2 (First) of the RLA, the Supreme Court, in Virginian Railway v. System Federation No. 40, held that this provision was an enforceable legal obligation and thus, the moral force of public opinion concerning the first act was abandoned. In determining congressional intent the Court looked at the changes made in the RLA especially in the sections following § 2 (First) which impose mandatory procedures on the parties. Indicators used by the Court to ascertain this congressional intent were found in § 2 (First)'s place in the scheme of the Act in conjunction with the general duty to bargain which it promulgated. Its relation to the Act's successful operation, as put forth in the sections following § 2, was deemed imperative. Further, the 1934 amendments to the RLA provided for the establishment of two boards: the National Railroad Adjustment Board, which was charged only with judicial duties in minor disputes and the National Mediation Board, which only had the duty to mediate in major disputes. In separating these two functions the RLA corrected the mistake made in the Transportation Act which charged the Railroad Labor Board with both functions.

During the period of railway labor law development, the federal courts enjoyed jurisdiction over a broad range of union activities. Through the abuse in issuance of injunctive relief, these courts formulated a substantive labor policy. And, since the federal judges were not furnished with legislative guidelines, their decisions to prevent the union's use of economic power reflected their conservative social and political views. Injunctions were issued to provide swift relief to abate a strike's fervor, but provided no solution or reasonable alternative to the underlying problem at hand.

31 300 U.S. 515 (1937).
32 In Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548 (1930), the court profoundly noted:
While an affirmative declaration of duty contained in a legislative enact-
ment may be of imperfect obligation because not enforceable in terms, a
definite statutory prohibition of conduct which would thwart the declared
purpose of the legislation cannot be disregarded. Id. at 568.
33 See notes 22 and 23 supra, and accompanying text.
34 See generally Aaron, 10 U.C.L.A. L. Rev., supra note 9; Bartosic, Injunction
and Section 301: The Patchwork of Avco and Philadelphia Marine on the Fabric
of National Labor Policy, 69 Colum. L. Rev. 980 (1969); F. Frankfurter & N.
Green, THE LABOR INJUNCTION (1930); C. Gregory, Labor and the Law
91-104 (2d ed. 1958); Wimberley, The Labor Injunction—Past, Present, and
Future, 22 S.C.L. Rev. 659 (1970); Witte, The Federal Anti-Injunction Act, 16
Minn. L. Rev. 638, 643 (1932); 70 Yale L.J., supra note 8; Comment, 14
DePaul L. Rev. 94 (1964).
35 70 Yale L.J., supra note 8, at 71.
The Clayton Act\textsuperscript{36} was an early attempt to limit the issuance of injunctions in labor disputes, but this attempt was unsuccessful because the courts did not perceive any intent on the part of Congress to state the law in any different manner than as had been established in previous judicial decisions.\textsuperscript{37} After many such setbacks the struggle to curb injunction abuses successfully culminated in passage of the Norris-LaGuardia Act in 1932. The Norris-LaGuardia Act was responsive to the problems of management-labor relations and its provisions were broadly interpreted by the courts. Thus, it effectively removed the federal district courts from the scene of labor-management bargaining relations and labor policy-making.\textsuperscript{38} The significance of the Norris-LaGuardia Act is founded on the fact that organized labor could now fend for itself without judicial interference.\textsuperscript{39}

The basic language of the Norris-LaGuardia Act is violated when an injunction is issued against a strike during a labor dispute. On the other hand, the RLA establishes substantive rights and duties which require judicial enforcement, since the Act does not provide any machinery for compelling the parties to bargain collectively.\textsuperscript{40} Thus, if an injunction is issued in a situation which the Norris-LaGuardia Act protects from such action, the anti-injunction statute is violated. However, if no injunction is issued the basic commands of the RLA itself are threatened. Therefore a situation may be presented, such as occurred in \textit{Chicago \& North Western Railway}, where these two statutes came into direct conflict.

After the passage of the Norris-LaGuardia Act, \textit{Virginian Railway} was the first case which permitted injunctive relief. In this case the Court held that an injunction could issue where the union or the employer refused to enter into negotiations for the settlement of a labor dispute as contemplated by § 2 (First). The Court believed that the mandatory provisions of the RLA (which included preliminary negotiations) "cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act."\textsuperscript{41} In \textit{Steele v. Louisville\&N.R.R. Co.}, 323 U.S. 192 (1944) stated: '[T]here is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected. \textit{Id.} at 207.'

\textsuperscript{36} 38 Stat. 730 (1914).
\textsuperscript{37} Comment, 59 Ky. L.J. 755, 758 (1971).
\textsuperscript{38} See Aaron, 10 U.C.L.A. L. Rev., supra note 8, at 300; Bartosic, 69 Colum. L. Rev., supra note 34, at 983; Wimberley, 22 S.C.L. Rev., supra note 34, at 690; 70 Yale L.J., supra note 8, at 73; Comment, 14 Vand. L. Rev. 662, 666 (1961).
\textsuperscript{39} Wimberley, 22 S.C.L. Rev., supra note 34, at 697.
\textsuperscript{40} The Court in \textit{Steele v. Louisville \& N.R.R. Co.}, 323 U.S. 192 (1944) stated: '[T]here is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected. \textit{Id.} at 207.'
ville & Nashville Railroad\textsuperscript{42} the Court held that an injunction could issue to prevent a labor organization, as the sole collective bargaining agent for a craft of employees, from discriminating against some members because of their race. It has been suggested that these two cases were justified by the Court on the ground that “the act [Norris-LaGuardia Act] was not intended to apply since the injunctions were the only effective means of protecting the rights of the employees, who were the intended beneficiaries of the Norris-LaGuardia Act.”\textsuperscript{43}

In Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.,\textsuperscript{44} the Court, for the first time, held that even though a strike was specifically protected from injunctive relief by § 4 of the Norris-LaGuardia Act, an injunction could issue in a minor dispute in order to preserve the procedures set out in the RLA. Although the legislative history of the RLA paid little attention to accommodating these policies,\textsuperscript{45} the Court articulated an accommodation doctrine to reconcile the purposes of each enactment.\textsuperscript{46}

Thus, the Norris-LaGuardia Act was designed primarily to protect the union’s right to strike as an economic weapon in collective bargaining situations.\textsuperscript{47} However, railway disputes are unlike those which cause the Norris-LaGuardia Act to be enacted. Reasonable alternatives in the form of administrative procedures are provided in the RLA and in major disputes, the strike is available upon exhaustion of these procedures.

The first case to extend the accommodation rationale to major dis-


\textsuperscript{43}Comment, 70 Harv. L. Rev. 739, 740 (1957).

\textsuperscript{44}353 U.S. 30 (1957).

\textsuperscript{45}See Aaron, 10 U.C.L.A.L. Rev., supra note 8, at 301-2. Representative La Guardia was asked if the Norris-LaGuardia Act would entirely bar injunctive relief in railroad disputes. In response to this question he replied that the RLA “takes care of the whole labor situation pertaining to railroads. They could not possibly come under this for the reason that we provided the machinery there for settling labor disputes.” 75 Cong. Rec. 5499 (1933).

\textsuperscript{46}Brotherhood of R.R. Trainmen v. Chicago River & I.R.R. Co., 353 U.S. 30, 40 (1957). The doctrine of accommodation interlaces the provisions of these two conflicting statutes. It would appear that this doctrine is the result of balancing the importance or significance of the RLA provision against the more general provisions of the anti-injunction statute. The question which must be asked in a particular situation is whether injunctive relief, otherwise unavailable, should be granted to prevent negation of the congressional policy established to settle labor disputes. A situation should not be permitted to exist where the denial of injunctive relief would undermine the major policy of the RLA. See Wimberley, 22 S.C. L. Rev., supra note 35, at 704; 70 Harv. L. Rev., supra note 44, at 741.

putes was *Piedmont Aviation, Inc. v. Air Line Pilots Association International*. Going beyond the theory that the doctrine preserved jurisdiction to issue an anti-strike injunction in major disputes, the Fourth Circuit Court of Appeals extended it in such a manner so as to apply it even after the RLA provisions have been exhausted in good faith.

On the face of the RLA no specific mention is made of good faith bargaining. Nevertheless, "such a requirement has been implied from the language of § 2 (First) interpreted in light of the history of the 'good faith' provisions of the National Labor Relations Act" [hereinafter NLRA]. The Supreme Court has held that § 2 (First) is a preliminary step in the RLA procedure of collective bargaining which must be met if agreement between the parties is to be accomplished. However, the case precedent which has developed concerning this section has been primarily related to fact situations in which there was an outright refusal to bargain. Professor Cox has defined good faith bargaining as related to the NLRA (which can also be applied to the RLA) as follows: "The employer (or union) must engage in negotiations with a sincere desire to reach an agreement and must make an earnest effort to reach a common ground. ..." It is not enough to merely go through the motions. But, beyond a refusal to bargain, very few cases have established a detailed analysis of the factors required to constitute a good faith effort to negotiate. The few cases which have discussed the requirements constituting good

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48 416 F.2d 633 (4th Cir. 1969).
52 Since there has been no helpful case precedent under the RLA, courts have applied the standards of good faith bargaining from the National Labor Relations Board's interpretation of good faith provisions under the NLRA. See, e.g., Steele v. Louisville & N.R.R. Co., 323 U.S. 192, 200 (1944); Norfolk & P.B. Line R.R. Co. v. Brotherhood of R.R. Trainmen, 248 F.2d 34, 45 n.6 (4th Cir. 1957); Brotherhood of Ry. & S.S. Clerks v. Atlantic Coast Line R.R. Co., 201 F.2d 36, 40 (4th Cir. 1953); American Airlines, Inc. v. Air Line Pilots Ass'n Int'l, 169 F. Supp. 777, 793-4 (S.D.N.Y. 1959).
55 See Harper, *Major Disputes Under the Railway Labor Act*, 35 J. Am. L. & Com. 3, 88 (1969). In American Airlines, Inc. v. Air Line Pilots Ass'n Int'l, 169 F. Supp. 777 (S.D.N.Y. 1958) the court noted: The requirement of good faith bargaining is really a requirement of absence of bad faith. In order to show such lack of good faith it is necessary to establish facts from which it can be reasonably inferred that a party enters upon a course of bargaining and pursues it with the desire or intent not to enter into an agreement at all. *Id.* at 794.
faith have relied on NLRA precedents. It has been suggested that the basic test applied to establish good faith is determined by the totality of the circumstances i.e., whether the conduct of the parties on the whole has satisfied or violated the duty to "exert every reasonable effort to make and maintain agreements." It does appear that even if a settlement is not reached the parties are required to make a good faith effort to utilize the RLA procedures.

*Chicago & North Western Railway Co.*, presented the Court with a situation in which the federal courts of appeals had expressed divergent views. In holding that strike injunctions could issue to effectively enforce the duty of § 2 (First) to "exert every reasonable effort" the majority recognized that the decision fell short of desired definiteness and clarity due to the vagueness of the obligation of a good faith effort. The Court noted that there might be a possibility that this ambiguity could "provide a cover for freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act. . ." However, the Court believed that application of the accommodation doctrine was necessary to give effect to this section of the RLA.

The dissent declared that once the step-by-step procedures prescribed by the RLA have been exhausted, the parties are free to resort to self-help. In suggesting that the majority had in fact destroyed the scheme of "gradually escalating pressures," it was stated by Mr. Justice Brennan that:

In essence, the Court holds that a district court has the duty under § 2 (First), to assess the bargaining tactics of each of the parties after the entire statutory scheme has run its course. If then, the court determines that a party had not exerted sufficient effort to reach settlement, it should enjoin self-help measures, and, if such action is to make any sense within this statutory scheme, remand the parties to some unspecified point in the bargaining process. Such a notion is entirely contrary to the carefully constructed premise of the [RLA].

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56 See the cases compiled in note 53 supra, and accompanying text.
58 See notes 3 and 4 supra, and accompanying text.
60 91 S. Ct. at 1738.
61 *Id.*
62 *Id.* at 1744-45 (Brennan, J., dissenting).
Therefore the Norris-LaGuardia Act provisions must be accommodated with those of the RLA so that the duty imposed by § 2 (First) would be enforceable through the issuance of an injunction. However, it may be asked whether the Court in effect thwarted self-help through injunctive relief proscribed by the Norris-LaGuardia Act? Are the federal district courts to return to the injunction business? If the RLA has become ineffective, is it not for Congress and not the Court to redress the deficiencies? But perhaps, the federal district courts are capable of making inquiries into a good faith situation presented in the RLA as readily as they have inquired into § 8 Norris-LaGuardia Act situations.

In retrospect, these questions cannot be answered today. Rather, they await the decisions to be rendered by federal district courts. Hopefully those decisions will not be substantive labor policy determinations but will rather yield to the administrative expertise established by Congress.

John W. Oakley

RECENT STATUTORY DEVELOPMENTS CONCERNING THE LIMITATIONS OF ACTIONS AGAINST ARCHITECTS, ENGINEERS, AND BUILDERS

The imposition of liability on those who design or construct buildings and other structures on real property is in need of re-examination in light of recent legislation in a majority of states which tends to severely limit the duration of civil liability of architects,

62 It has been recognized by at least one student of labor relations that: Congress has not hesitated to provide a remedy when the purposes of the [RLA] could not be achieved through voluntary action. When "free" collective bargaining would not work, Congress made it compulsory; when carriers would not stop interfering with unions, penalties were added; when quarrels over the identity of the bargaining agent and the scope of the bargaining unit blocked negotiations, Congress provided for independent determination of such issues; and, when the parties were unable to settle grievances, Congress provided for the mandatory resort to adjustment boards. ... Wisehart, 66 Mich. L. Rev., supra note 11, at 1710.

64 29 U.S.C. § 108 (1964) provides in pertinent part as follows: No restraining order or injunctive relief shall be granted to any complaint who has failed to comply with any obligation ... 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.