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Recent Decisions: Railway Labor Act - Peaceful Strikes - Right to Preliminary Injunction [*Piedmont Aviation, Inc. v. Air Line Pilots Association*, 416 F.2d 633 (4th Cir. 1969), *cert. denied*, 397 U.S. 926 (1970)]

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holders.[45] Here there seems to be no cogent reason, in light of the policy considerations underlying the proxy rules, to preclude a plaintiff-shareholder from at best establishing the solicitors' liability for violation of section 14(a) and obtaining the recovery of reasonable attorney's fees.

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RAILWAY LABOR ACT — PEACEFUL STRIKES — RIGHT TO PRELIMINARY INJUNCTION

Piedmont Aviation, Inc. v. Air Line Pilots Association, 416 F.2d 633 (4th Cir. 1969), *cert. denied*, 397 U.S. 926 (1970).

The primary economic bargaining weapon of organized labor — the right to strike — is jealously guarded by the anti-injunction provisions of the Norris-LaGuardia Act.[1] An effective means of averting strikes affecting the transportation industry is also a matter of national concern, and to this end the desideratum of the Railway Labor Act (RLA)[2] is extremely relevant. By suggesting interpretive guidelines for resolving the inevitable conflict between these two acts, the decision of the Court of Appeals for the Fourth Circuit in *Piedmont Aviation, Inc. v. Air Line Pilots Association*[3] highlights an analogous conflict between the Norris-LaGuardia Act and section 301 of the Labor Management Relations Act (LMRA),[4] and perhaps foreshadows a shift in judicial attitude concerning the jurisdictional capacity of district courts to issue injunctions against strikes in violation of collectively bargained-for no-strike agreements.

The *Piedmont* case involved a dispute between Piedmont Aviation, Inc. (Piedmont), and its employee pilots represented by the Air Line Pilots Association (the union), concerning the crew complement required to fly Piedmont's Boeing-737 jets.[5] The union attempted to implement a 1966 union bylaw which provided that all

[45] However, in a recent case, Laufer v. Stranahan, [Current Binder] CCH FED. SEC. L. REP. ¶ 92,617, at 98,773 (S.D.N.Y. Mar. 25, 1970), the court retracted from the expansive spirit of *Mills*. The *Laufer* court held that the plaintiff could not obtain rescission of a consummated merger where the solicitors had control of the acquired corporation (85 percent of the outstanding shares). It is unfortunate that the court did not even mention the policy considerations enunciated by the *Mills* Court nor the rationale of Laurenzano v. Einbender, 264 F. Supp. 356 (E.D.N.Y. 1966).

turbine-powered aircraft be manned by three-man flight crews; Piedmont, however, insisted upon two-man crews in reliance upon the Federal Aviation Administration's 1967 certification that the twin-engine B-737 could be flown safely by two pilots. On July 24, 1968, the parties entered into a collective bargaining agreement that covered all terms and conditions of employment except the crew size for the B-737 aircraft. By a supplemental agreement with the union, Piedmont consented to operating with three-man crews pending the outcome of a similar dispute between the union and United Airlines. The negotiations with United failed to resolve the impasse at Piedmont, and neither further negotiations nor mediation proved fruitful.[6] On June 6, 1969, the National Mediation Board's proffer of arbitration was rejected by the company and the union failed to respond.[7] When Piedmont scheduled flights of

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[1] 29 U.S.C. §§ 101-15 (1964). In response to the fact that the injunction had become the primary weapon of employers against union strikes, Congress enacted in 1932 the Norris-LaGuardia Act, often characterized as the "Anti-Injunction Act." For a discussion of the early abuses of the injunction, see F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930).

[2] Ch. 347, §§ 1-11, 44 Stat. 577 (1926), *as amended*, 45 U.S.C. §§ 151-63, 181-88 (1964) [hereinafter cited as RLA].

[3] 416 F.2d 633 (4th Cir. 1969), *cert. denied*, 397 U.S. 926 (1970).

[4] 29 U.S.C. § 185 (1964) [hereinafter cited as LMRA].

[5] By the enactment of Title II, Congress extended the RLA to the airline industry in 1936. 45 U.S.C. §§ 181-88 (1964). The provisions of Title I, as well, were applied to the airlines, with the exception of section 3 regarding the National Railroad Adjustment Board. 45 U.S.C. § 153 (1964).

At this juncture, it is helpful to clarify definitionally the two categories of disputes which are governed by RLA procedures. Parenthetically, it should be noted that the terminology with respect to these disputes is nowhere set forth in the RLA; rather, the labels evolved as a judicial shorthand. "Minor disputes" are those relating to the interpretation and application of *existing* collective bargaining agreements. "Major disputes," on the other hand, are those arising in the absence of a collective bargaining agreement or where the parties seek to change the terms of an existing agreement. *See generally* Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723 (1945); Harper, *Major Disputes Under the Railway Labor Act*, 35 J. AIR L. & COM. 3 (1969).

Minor disputes between air carriers and their employees are handled by system boards of adjustment according to regional crafts or classes of employees. *See* 45 U.S.C. §§ 184-85 (1964).

In major disputes, the services of the National Mediation Board are as readily available to the airlines as to the railway industry. *See* 45 U.S.C. § 183 (1964).

[6] The union's position concerning the supplemental agreement was that in the event of a decision in favor of a three-man crew in the negotiations with United Airlines, Piedmont would automatically be required to continue with three-man crews. Piedmont's position was that a decision for a three-man crew meant only that negotiations would be reopened. 416 F.2d at 639 n.10.

[7] The National Mediation Board, established by the 1934 amendment to the RLA [44 Stat. 579 (1926), *as amended*, 45 U.S.C. § 154 (1964)] has three members appointed by the President who serve a 3-year term. Its two major duties are (1) mediation of major disputes and (2) ascertaining and certifying the representative of any

the B-737 with two-man crews, the union struck following an unsuccessful effort to secure an injunction against Piedmont's unilateral decision.[8] Two weeks after the union's walkout, the company obtained an interlocutory injunction in district court against the strike.[9]

On appeal to the Fourth Circuit, the union contended that section 4 of the Norris-LaGuardia Act unequivocally deprives federal district courts of jurisdiction to enjoin all peaceful strikes. Refusing to endorse the union's interpretation of Norris 4, the court of appeals held that the district court had jurisdiction to issue an injunction. The court was persuaded that an injunction would not contravene the purpose of Norris 4 and that its issuance was necessary to effectuate the conciliation process of the RLA.[10] The union, however, argued that, even if the district court had jurisdiction, the issuance of an interlocutory injunction in this case was an abuse of discretion. This contention was predicated upon the company's refusal of voluntary arbitration, which the union claimed was a violation of section 8 of the Norris-LaGuardia Act.[11] The court of appeals similarly rejected this argument, holding that even if the company was in violation of the literal requirement of Norris 8 to "make every reasonable effort to settle [a] . . . dispute either by

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craft or class of employees to the carrier in controversies among employees over the choice of a collective bargaining agent.

[8] Ruby v. Piedmont Aviation, Inc., Civil No. 1820-69 (D.D.C., filed Aug. 1, 1969). The court refused the union's request for a temporary injunction on the ground that both parties were free to resort to self-help because they had engaged in good-faith negotiations and, thus, had exhausted the RLA's major dispute procedures.

[9] Piedmont Aviation, Inc. v. Air Line Pilots Ass'n, 60 CCH LAB. CAS. ¶ 10,318, at 17,102 (M.D.N.C. Aug. 14, 1969). Although the union had been denied a temporary injunction against the employer in the district court for the District of Columbia on the ground that both parties had bargained in good faith [*see* note 8 *supra*], the district court for the Middle District of North Carolina found that questions of law and fact *were* present concerning the union's good faith, following the general rule that a substantial allegation of bad-faith bargaining entitles the plaintiff to a temporary restraining order pending a trial on merits. *E.g.*, Pan American World Airways, Inc. v. Brotherhood of Ry. & S.S. Clerks, 185 F. Supp. 350 (E.D.N.Y. 1960); American Airlines, Inc. v. Air Line Pilots Ass'n, 169 F. Supp. 777 (S.D.N.Y. 1958).

[10] In *Piedmont*, both parties conceded the existence of a major dispute; they were thus governed by the statutory procedure set out in sections 5 and 6 of the RLA. 45 U.S.C. §§ 155, 156 (1964). The parties' characterization of their dispute was arguably correct, because the bargaining agreement in effect made no reference to crew complement. Hence, questions of the interpretation and application of an existing agreement — the touchstone of minor disputes — were irrelevant to the *Piedmont* controversy. *See* Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723 (1945).

[11] One or both of the parties may decline; however, if the parties do accept this method, the RLA provides a comprehensive arrangement by which the arbitration proceedings will be conducted. *See* RLA §§ 7-9, 45 U.S.C. §§ 157-59 (1964).

negotiation or with the aid of any governmental machinery of mediation or voluntary arbitration,"[12] its failure to accept voluntary arbitration should not frustrate the purpose of the RLA, to provide machinery to prevent strikes.

An employer's request for a temporary injunction restraining a peaceful strike raises the initial question of whether section 4 of the Norris-LaGuardia Act deprives the district court of jurisdiction. The plain meaning of section 4 is clear: "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving . . . any labor dispute."[13] The mandate of the RLA, that the parties refrain from self-help until they have complied with the duty to negotiate in good faith according to the conciliatory steps set out in the RLA, is equally clear.[14]

In holding that section 4 did not deprive the district court of jurisdiction to issue a temporary injunction, the Fourth Circuit circumvented the stark language of that section by means of the doctrine of accommodation, reasoning that an injunction did not negate the right to strike but merely postponed the union's exercise of that right until it had bargained in good faith.[15] The court thus reconciled the purposes of both acts. A good-faith effort to utilize the RLA's conciliatory procedures effectuates the congressional goal regardless of whether a settlement is reached; and since the union is free to resort to self-help after having met the obligation imposed by the RLA, the congressional intent to protect the peaceful strike is also vindicated.[16]

An examination of the legislative history of both the RLA and the Norris-LaGuardia Act reveals scant substantive support for the doctrine of accommodation employed in *Piedmont*. In enacting the Norris-LaGuardia Act, Congress intended to curtail the use of antistrike injunctions as a weapon against the primary economic bargaining tool of labor, the right to strike.[17] The legislators gave

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[12] 29 U.S.C. § 108 (1964).

[13] *Id.* § 104.

[14] 416 F.2d at 635-36.

[15] "Accommodation" is a judicially created doctrine first articulated by the Supreme Court in Brotherhood of R.R. Trainmen v. Chicago River & I.R.R., 353 U.S. 30 (1957) (holding that in a minor dispute accommodation of the Norris-LaGuardia Act to the RLA is necessary to preserve the purposes of both acts).

[16] *E.g.*, Brotherhood of Locomotive Eng'rs v. Baltimore & O.R.R., 372 U.S. 284 (1963); Pan American World Airways, Inc. v. Flight Eng'rs Int'l Ass'n, 306 F.2d 840 (2d Cir. 1962).

[17] *See* S. REP. NO. 163, 72d Cong., 1st Sess. 18 (1932).

relatively little attention to the question of accommodating this policy to the competing protective policy of the RLA.[18] However, there is some indication that the Norris-LaGuardia Act was not designed to preclude injunctive relief in a case where the RLA's conciliatory procedures had not been exhausted.[19]

Notwithstanding the inconclusiveness of the legislative history of the acts, accommodation between section 4 of the Norris-LaGuardia Act and the RLA as a judicially created rule of statutory construction has been articulated by the Supreme Court in *Brotherhood of R.R. Trainmen v. Chicago River & I.R.R.*[20] In *Chicago River*, the Supreme Court established the authority of the federal courts to compel compliance with the RLA's procedural duties by the parties to a *minor* dispute within the meaning of the Act.[21] However, the capacity of the district courts to enjoin peaceful strikes relating to *major* disputes before the procedures of the RLA have been exhausted has not always been entirely certain. The *Piedmont* court distinguished the leading case holding that injunctive relief is not available to prevent a strike in a major dispute, *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*,[22] on the ground that therein

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[18] *See* Aaron, *The Labor Injunction Reappraised*, 10 U.C.L.A.L. REV. 292, 301-02 (1962).

[19] Congressman LaGuardia, the sponsor of the bill in the House, when asked whether the bill could possibly tie up the railroads, stated:

> We then passed the railroad labor act, and that takes care of the whole labor situation pertaining to the railroads. They could not possibly come under [the Norris-LaGuardia Act] for the reason that we provided the machinery [in the RLA] for settling labor disputes. 75 CONG. REC. 5499 (1932).

The 1934 amendments of the RLA added the requirement in section 5 that the employer maintain the status quo for 30 days after the notice by the National Mediation Board that its mediation had failed, thus making cooling-off periods applicable throughout the whole statutory procedure. RLA § 5, ch. 691, § 5, 48 Stat. 1195 (1934), *as amended*, 45 U.S.C. § 155 (1964). The legislative history surrounding the enactment of the cooling-off period indicates that Congress intended that the employer's maintaining the status quo would be the quid pro quo for the union's surrendering its right to strike pending exhaustion of the RLA's major dispute procedures. *See* 67 CONG. REC. 4524, 4588 (1926). During the cooling-off period there can be no change in rates of pay, rules, or working conditions after the section 6 notice is served and until the controversy has been finally acted upon by the National Mediation Board; additionally, there can be no change in the "conditions out of which the dispute arose" after an emergency board has been created, and for 30 days after its report. 45 U.S.C. §§ 156, 160 (1964).

[20] 353 U.S. 30 (1957).

[21] The facts in *Chicago River* indicate that the union struck while the dispute in question was pending before the National Railroad Adjustment Board. The Supreme Court reasoned that minor disputes fall within the jurisdiction of the National Railroad Adjustment Board, an "industrial court" consisting of an equal number of union and carrier representatives, and, thus, injunctive relief was necessary to protect the Board's jurisdiction and the RLA's requirement of compulsory arbitration in minor disputes.

[22] 362 U.S. 330 (1960). This case involved a union demand that the carrier should

the Court had expressly found that the union's conciliatory efforts complied with the Act.[23]

The *Piedmont* court extended the accommodation rationale underlying *Chicago River* in two important respects. The Supreme Court in *Chicago River* merely implied that if a union failed to comply with the specific procedures outlined by the RLA an injunction *might* issue in a major dispute.[24] The Fourth Circuit, however, is the first court to firmly hold that accommodation preserved jurisdiction to issue an antistrike injunction in a major dispute. Moreover, the decision is the first to employ the accommodation doctrine where the mandatory procedures under the RLA had been exhausted.[25] Instead of a purely mechanical determination of whether the parties had instituted any of the conciliatory measures, the *Piedmont* court's inquiry was directed to the more subjective question of whether the union had exhausted the RLA procedures *in good faith.*

Having concluded the jurisdictional analysis, the court faced the question of whether section 8 of the Norris-LaGuardia Act barred an interlocutory injunction because of Piedmont's rejection of the National Mediation Board's invitation of arbitration. The union argued that the case was governed by *Brotherhood of R.R. Trainmen v. Toledo P. & W.R.R.*,[26] wherein the Supreme Court held that, even though Norris 4 did not deprive the district court of jurisdiction, denial of an antistrike injunction was proper because the employer's refusal of voluntary arbitration contravened the requirement of Norris 8, which provides that the complainant make every reasonable effort to settle the dispute by negotiation, mediation, or voluntary arbitration.[27] The court distinguished *Toledo* on two

not abolish preexisting jobs without its consent. Before striking, the union's efforts to negotiate the dispute had been in vain.

[23] 416 F.2d at 636.

[24] For a discussion of those RLA procedures which are mandatory in a major dispute, see notes 34-35 *infra* & accompanying text. The union in *Chicago River* had not undertaken any of the RLA procedures and, thus, the injunction therein compelled the union to take its first steps toward conciliation.

[25] In broadening the accommodation concept, the *Piedmont* court recognized that the RLA established a machinery to handle both minor and major disputes, the only difference being that the minor dispute procedure provides for compulsory arbitration and thus a final decision, whereas in regard to major disputes successive steps are offered which hopefully will lead to an agreement. The RLA, in both instances, interposes reasonable alternatives to self-help which Congress would not have provided if it were intended that the parties could circumvent these alternatives by resorting to self-help either before exhausting the procedures or after a pro forma compliance. 416 F.2d at 638.

[26] 321 U.S. 50 (1944).

[27] *Id.* at 56. The *Toledo* case arose out of a labor dispute relating to working

factual grounds: (1) In *Toledo*, there was no showing of bad faith on the part of the union, and (2) the union therein had accepted arbitration.[28]

Recent decisions in the courts of appeals lend support to the *Piedmont* court's conclusion that a violation of the literal requirement of Norris 8 is not an absolute bar to injunctive relief.[29] In *Brotherhood of R.R. Trainmen v. Akron & B.B.R.R.*,[30] the Court of Appeals for the District of Columbia stated that in certain cases the "imperatives of the Railway Labor Act may override section

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conditions and rates of pay. Both parties exhausted the negotiation and mediation steps required by the RLA in good faith, but failed to resolve their dispute. Initially, both parties refused voluntary arbitration, but after further entreaties by the National Mediation Board, only the union accepted arbitration. The employer notified the union that it intended to put into effect its proposed schedules, and the union struck 1 day before these changes went into effect.

Although the lower federal courts were in agreement that they had jurisdiction to issue an antistrike injunction, the Supreme Court reversed, holding that the employer, by refusing voluntary arbitration, had not complied with the prerequisites for an injunction set forth in section 8 of the Norris-LaGuardia Act.

[28] The respondent employer in *Toledo*, pointing to the fact that arbitration under the RLA is voluntary, made the argument, which the Supreme Court rejected, that if "voluntary arbitration" within the meaning of Norris 8 encompassed arbitration under the RLA, then the effect is to force the respondent to submit to compulsory arbitration. *Id.* at 62. Conceding that arbitration in a major dispute under the RLA is voluntary, the *Toledo* Court reasoned that respondent's failure or refusal to arbitrate was not violative of any obligation imposed either by the RLA or by the Norris-LaGuardia Act in the sense that anyone would have legal recourse for respondent's shortcoming in this respect. But, in speaking to the propriety of an injunction where the respondent failed to meet the conditions set forth in Norris 8, the Court concluded:

> Respondent is free to arbitrate or not, as it chooses. But if it refuses, it loses the legal right to have an injunction issued by a federal court or, to put the matter more accurately, it fails to perfect the right to such relief. This is not compulsory arbitration. *It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court.* *Id.* at 63 (emphasis added).

Absent further analysis, it is difficult to see why *Piedmont* should not have been governed by the holding in *Toledo*. The answer lies in a comparison of the behavior of the *union* at the bargaining table in each case. Although the union engaged in violent picketing in the *Toledo* dispute, the Court decided that the presence of union violence did not alter the applicability of Norris 8. *Id.* at 65. Significantly, however, the union in *Toledo* did accept arbitration in the face of the employer's consistent refusal to arbitrate. [*See id.* at 52]. The *Toledo* Court, therefore, never reached the "clean hands" analysis employed in the *Piedmont* court's balancing test because the negotiating conduct of the union in *Toledo* was beyond reproach. This distinction strongly implies that the impetus for distinguishing *Toledo* and for extending the *Toledo* Court's accommodation rationale was the bad-faith negotiation on the part of the Air Line Pilots Association.

[29] *See* Brotherhood of R.R. Trainmen v. Akron & B.B.R.R., 385 F.2d 581 (D.C. Cir. 1968); Illinois Cent. R.R. v. Brotherhood of R.R. Trainmen, 398 F.2d 973 (7th Cir. 1968); Rutland Ry. v. Brotherhood of Locomotive Eng'rs, 307 F.2d 21 (2d Cir. 1962).

[30] 385 F.2d 581 (D.C. Cir. 1968).

8,"[31] reasoning that a balancing of interests with section 8 is necessary in certain situations, particularly where the balance is between the complainant's unclean hands and the strong public interest protected by the RLA. Additionally, where a lack of information concerning the parties' bargaining behavior is such that the extent of the Norris 8 violation is uncertain, it is arguable that a restraining order is also proper in order to preserve the public interest.[32]

An analysis of the *Piedmont* court's reasoning with respect to the propriety of the injunction in light of the standards imposed by Norris 8 demonstrates that the court employed a balancing test to compare the gravity of the parties' violations of the RLA.[33] The court first noted that both parties followed, at least in form, the procedures prescribed in the RLA. The parties first attempted to reach a settlement through private conciliation.[34] Having reached an impasse, they turned to the National Mediation Board.[35] When the Board foresaw no settlement of the dispute, it attempted to get the parties to agree to voluntary arbitration,[36] which both parties declined. However, the court determined that the union did not exhaust these procedures in good faith, consistent with the RLA's mandate "to exert every reasonable effort to make and maintain

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[31] *Id.* at 614.

[32] *Id.*

[33] It should be noted that, in the course of its opinion, the court employed two balancing tests: (1) In determining whether the district court was deprived of *jurisdiction* by the literal language of Norris 4, the court balanced the respective policy interests of the Norris-LaGuardia Act and the RLA, *i.e.*, the court "accommodated" the two statutes; and (2) in determining the *propriety* of issuing the injunction, the court balanced the negotiating conduct of the respective parties.

[34] If the parties cannot settle the dispute themselves, the party desiring to change the terms of the collective agreement must give at least 30 days written notice to the other party in order to impose upon him a duty to bargain. 45 U.S.C. § 156 (1964). Statistics are not available as to the number of disputes settled at this level, but it is known that such settlements outnumber those that are made with the assistance of the National Mediation Board. 35 NMB ANN. REP. 6 (1969).

[35] If the parties reach an impasse in their negotiations, either party may invoke the services of the National Mediation Board, or the Board may step in of its own volition if it finds a labor emergency exists. 45 U.S.C. § 183 (1964).

[36] *See* 45 U.S.C. § 157 (1964), which provides for the voluntary submission of disputes to a three-man arbitration board whenever private negotiation and mediation have failed to resolve the controversy. If either party refuses voluntary arbitration [*see* note 11 *supra*], the parties are free to resort to self-help after a period of 30 days from the Board's withdrawal, unless the Board notifies the President that it feels the dispute threatens to "substantially interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service." 45 U.S.C. § 160 (1964). If this occurs, the President will appoint an emergency board to investigate and make recommendations for a settlement, but such recommendations are not binding on the parties. *Id.* In *Piedmont*, the final step was the rejection of voluntary arbitration by both parties, since no emergency board was created.

agreements concerning . . . working conditions, and to settle all disputes . . . in order to avoid any interruption of commerce."[37]

In balancing the respective conduct of the parties, the court distinguished substantive violations from procedural violations of the RLA. The court found that the union's adherence to its bylaw requiring three-man crews, in light of FAA certification for two-man crews, was evidence of an inconsistency with the substantive duty to bargain in good faith. Apparently because Piedmont's bargaining posture was free of intransigence, the court determined that the employer's refusal of voluntary arbitration was merely a procedural shortcoming.[38]

In contrast with the delimited, somewhat mechanical analysis employed in reviewing the propriety of the temporary injunction,[39] the court of appeals emphasized that more thorough scrutiny of the parties' bargaining session would be undertaken at the trial on the merits, at which point the substantive-procedural test would be supplanted by a "totality of the circumstances" standard in examining the parties' conduct surrounding the entire dispute.[40]

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[37] 45 U.S.C. § 152 (1964).

[38] A question unanswered by *Piedmont* is whether an injunction is ever proper where both the union and the employer are in violation of a substantive duty under the RLA. If section 8 is to have any effect at all, it would seem that the courts would conclude that accommodation is impossible in cases where the employer is in violation of the substantive duty to bargain in good faith. However, assuming both parties are in violation of a substantive duty through mutual failure to bargain in good faith during the conciliatory procedures of the RLA, it is possible that a court might nevertheless grant injunctive relief under the condition that the complainant fulfill his substantive statutory obligations and that the status quo be maintained until the statutory procedures were exhausted. The courts seem more willing to accommodate two inconsistent federal regulatory policies, if by so doing, there exists a reasonable alternative to resolve a dispute, such as the RLA procedures that merely postpone the right to resort to self-help. *See* Aaron, *supra* note 18, at 305.

[39] It is possible that the union may not, in fact, haxe been guilty of bad faith, because the district court cannot investigate in detail the conduct of the parties in determining whether a temporary injunction should issue. The possible injustice is mitigated by the fact that the employer, in effect, has also been enjoined from self-help alternatives, such as taking unilateral action, because the antistrike injunction is conditioned on the maintenance of the prestrike status quo.

[40] Upon remand, the district court will be faced with two issues: (1) Whether there is a substantial question concerning the nature of the dispute in *Piedmont*, *i.e.*, whether it is a major or minor dispute; and (2) whether, as a matter of law, the union was guilty of bad faith. The first issue stems from the existence of the supplemental agreement between the parties. *See* note 6 *supra* & accompanying text. If the union's position that the supplemental agreement covers the dispute with Piedmont is valid, the court may decide that there is a substantial question concerning the character of the dispute. Should the district court determine that the parties were involved in a minor dispute, it will condition injunctive relief upon a prompt resolution by the System Board of Adjustment, which has primary jurisdiction to make this determination. *See* Flight Eng'rs Int'l Ass'n v. American Airlines, Inc., 303 F.2d 5, 11 (5th Cir. 1962). If the Board decides that the dispute is major, or if the district court de-

The court further stated that if the trial on the merits failed to establish a lack of good-faith bargaining by the union, the interlocutory injunction would have to be dissolved.[41] The court of appeals admonished that, even if the full trial established bad faith, the duration of a permanent injunction was strictly limited to such time as the parties agreed to comply in good faith with the Act. Because resort to self-help is so carefully preserved following compliance with the substantive obligation under the RLA, the issuance of either a temporary or permanent injunction would not permanently affect the union's fundamental right to strike.

Analogous to the problem in *Piedmont* is the question of the enforcement of collectively bargained-for no-strike agreements through accommodation of section 4 of the Norris-LaGuardia Act and section 301 of the Labor Management Relations Act.[42] It is arguable that the accommodation rationale does not apply in the section 301 context. This assumes, however, that the clear policy expressed in section 4 of the Norris-LaGuardia Act — to protect the union's fundamental right to strike from interference by injunction — is not outweighed by the competing policy of the LMRA. The policy of the LMRA is to promote industrial peace and stability; secondarily, Congress envisaged that the provisions of the LMRA would make unions more responsive to their contractual obligations arising out of the collective bargaining agreements.[43]

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cides that there is no substantial question concerning the dispute despite the supplemental agreement, the district court will have jurisdiction to hear a trial on the merits.

With respect to the "totality of the circumstances" standard of judicial review, see Chicago, R.I. & Pac. R.R. v. Switchmen's Union, 292 F.2d 61 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962); American Airlines, Inc. v. Air Line Pilots Ass'n, 169 F. Supp. 777, 795 (S.D.N.Y. 1958).

[41] Courts are often reluctant to find bad faith at a trial on the merits for a permanent injunction because they do not have the advance administrative screening provided by the NLRB. *See* Chicago, R.I. & Pac. R.R. v. Switchmen's Union, 292 F.2d 61 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962). Because of the subjectiveness of the concept, the courts usually require clear and convincing proof. American Airlines, Inc. v. Air Line Pilots Ass'n, 169 F. Supp. 777, 793 (S.D.N.Y. 1958).

[42] 29 U.S.C. § 185 (1964).

[43] *See* S. REP. NO. 105, 80th Cong., 1st Sess. 15-17 (1947); H. REP. NO. 245, 80th Cong., 1st Sess. 6 (1947).

The policy of the LMRA was explicated by the Supreme Court in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 452 (1957), wherein the Court noted that an employer's agreement to arbitrate is the quid pro quo for the union's agreement not to strike over the grievances subject to arbitration. Although *Lincoln Mills* decided that the federal courts could compel arbitration under section 301 of the LMRA, it is arguable that the no-strike clause is equivalent to the arbitration agreement for the purpose of a section 301 enforcement action. Furthermore, Congress has clearly expressed its desire that collective bargaining contracts be "equally binding and enforceable on both parties." S. REP. NO. 105, 80th Cong., 1st Sess. 15 (1947). But for the

Judicial response to accommodating Norris 4 and section 301 of the LMRA has not been favorable. In *Sinclair Refining Co. v. Atkinson*,[44] the Supreme Court held that Norris 4 deprived federal courts of jurisdiction to issue an injunction against a strike in violation of a no-strike clause in a collective bargaining agreement.[45]

Even if the strike-preservation policy of section 4 does not outweigh the policy of preserving industrial peace of section 301, it is arguable that accommodation is permissible in the section 301 area because of the limited effect that enforcement of the no-strike provision has on the union's right to strike. The viability of a union's right to strike over fundamental economic issues of wages, hours, and conditions of employment will not be substantially lessened because the typical provisions incorporated into a no-strike clause do not concern these fundamental economic rights.[46] Because the right to strike peacefully, as guaranteed by section 4 of the Norris-LaGuardia Act, was meant to assist the bargaining position of labor primarily in these fundamental economic areas, it is arguable that injunctions enforcing violations of a no-strike clause are outside the protective scope of the Norris-LaGuardia Act.

Furthermore, the decisions subsequent to *Sinclair* indicate that a shift in judicial response to the issuance of an injunction in the section 301 context is not idle speculation. The federal courts have recognized the value of arbitration as a major factor in peaceful industrial relations by holding that arbitration awards against breach of no-strike clauses are enforceable in federal court. In *General Longshore Workers, Local 1418 v. New Orleans S.S.*

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strictures of the Norris-LaGuardia Act, section 301 would, therefore, provide such an enforcement mechanism.

[44] 370 U.S. 195 (1962).

[45] The dissent in *Sinclair* argued that the majority had rendered meaningless the contractual promise of the union not to strike, which was the quid pro quo for management's promise to arbitrate. *Id.* at 219. Furthermore, the Supreme Court's decision in Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968), in effect, removed the only remaining forum for enforcing no-strike provisions. *Avco* held that removal of a section 301 case from state court to the federal judiciary was permissible. Without even deciding the question of whether state courts had jurisdiction to issue anti-strike injunctions for violations of no-strike agreements, *Avco* provided the unions with the tactical weapon of removal from state courts to the federal courts which, of course, are bound by *Sinclair*.

[46] *See* M. BERNSTEIN, PRIVATE DISPUTE SETTLEMENT 279, 363-65 (1st ed. 1968), wherein the author observes that the majority of no-strike clauses apply only to disputes subject to grievance procedures and/or arbitration. Because arbitration clauses invariably apply to disputes involving interpretation or application of existing contracts, no-strike clauses have no effect upon the union's right to strike over fundamental employment rights.

Association,[47] the Court of Appeals for the Fifth Circuit held that neither *Sinclair* nor section 4 of the Norris-LaGuardia Act deprives the federal judiciary of jurisdiction to issue a court order enforcing an arbitrator's award directing a union to cease and desist from a work stoppage, pursuant to the prescribed procedure in the collective bargaining agreement.[48]

Significantly, the Supreme Court has announced its intention to reexamine the entire *Sinclair* imbroglio by granting certiorari in *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*.[49] In *Boys Markets*, a California state court had issued an injunction against the union for striking in violation of its no-strike agreement,[50] whereupon the union removed the case to federal court expecting to find a "safe harbor" by virtue of the controlling rule of *Sinclair*. The district court, however, issued another injunction which was later dissolved by the Court of Appeals for the Ninth Circuit.[51] The two questions presented to the Supreme Court on certiorari are: (1) Do federal courts have jurisdiction under section 301 to enjoin strikes in violation of arbitration and no-strike clauses, notwithstanding provisions of section 4 of the Norris-LaGuardia Act? (2) Should the decision in *Sinclair* be overturned?[52] Although the court in *Boys Markets* neglected to focus upon the limited effect which the enforcement a no-strike clause has upon the right to strike in fundamental economic areas, the decision does evidence judicial recognition of the need for enforcement of collectively bargained-for no-strike clauses in order to insure meaningful arbitration. Hopefully, in its consideration of *Boys Markets* the Supreme Court will recognize that the injunction is the most effective means of ob-

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[47] 389 F.2d 369 (5th Cir. 1968), *cert. denied*, 393 U.S. 828 (1968).

[48] Orders enforcing an arbitrator's cease-and-desist ruling have been distinguished from direct judicial injunctions on the grounds that in arbitration the parties themselves have agreed to be bound by the arbitrator's decision, and, moreover, the decision is presented after a consideration of the entire case with ample opportunity for both sides to present their views. Although this is an arguable difference, it is really a glorification of form over substance to allow court enforcement merely because of the interposition of arbitration between the strike and the back-to-work order as opposed to direct enforcement of the mutual expectancies of both parties to the agreement. New Orleans S.S. Ass'n v. General Longshore Workers, 389 F.2d 369, 372 (5th Cir. 1968).

[49] 416 F.2d 368 (9th Cir. 1969), *cert. granted*, 396 U.S. 1000 (1970) (No. 768).

[50] Boys Mkts., Inc. v. Retail Clerk's Union, Local 770, Civil No. 948823 (Cal. Super. Ct., *filed* Feb. 19, 1969).

[51] 59 CCH LAB. CAS. ¶ 13,366, at 23,799 (C.D. Cal. Mar. 13, 1969), *rev'd*, 416 F.2d 368 (9th Cir. 1969), *cert. granted*, 396 U.S. 1000 (1970) (No. 768).

[52] 396 U.S. 1000 (1970) (No. 768).

taining union compliance with its obligations under the collective bargaining agreement.

The *Piedmont* decision affirms the fact that accommodation in major disputes between section 4 of the Norris-LaGuardia Act and the RLA is preferred by the courts over literal adherence to the Norris-LaGuardia Act where statutory procedures of the RLA have not been exhausted in good faith. Moreover, accommodation is now judicially recognized between section 8 of the Norris-LaGuardia Act and the RLA. More important, perhaps, is the *Piedmont* court's implicit recognition that an injunction is the most effective means of obtaining peace in the transportation industry by insuring compliance with the RLA without undermining the fundamental right of the union to strike. The Supreme Court, by granting certiorari in *Boys Markets*, has now accepted an invitation to reconsider its position concerning accommodation in the area of section 301 of the LMRA and may find persuasive the conceptual implications of *Piedmont*.

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ADDENDUM

While this Recent Decision was at press the Supreme Court reversed the Ninth Circuit Court of Appeals in *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*.[53] The Court held that in an action under section 301 of the LMRA, where the employer has agreed to arbitrate the dispute, the federal courts may enjoin strikes in violation of a collectively bargained-for no-strike clause. In so holding, the Court expressly overruled *Sinclair Refining Co. v. Atkinson*,[54] reasoning that "*Sinclair* stands as a significant departure from . . . [a] consistent emphasis upon the congressional policy of § 301 to promote peaceful settlements through arbitration and . . . efforts to accommodate and harmonize this policy with those underlying the anti-injunction provisions of the Norris-LaGuardia Act."[55] By this significant extension of the accommodation rationale to injunction suits under section 301 of the LMRA, the Court reaffirmed the fact that the union's right to strike, although protected by the Norris-LaGuardia Act, is to be tempered by the conciliation obligations imposed by Congress upon both labor and management.

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[53] 38 U.S.L.W. 4462 (U.S. June 1, 1970).

[54] 370 U.S. 195 (1962).

[55] 38 U.S.L.W. at 4463.