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The Shore Line Status Quo Requirement

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THE *SHORE LINE* STATUS QUO REQUIREMENT

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In 1969, the Supreme Court decided *Detroit & Toledo Shore Line Railroad v. United Transportation Union*.[2] The Court held that the carrier cannot implement a change in the actual, objective working conditions broadly conceived throughout the mandatory period of bargaining required under section 6 of the RLA. Since this decision, the Supreme Court and the circuit courts of appeals have weakened this holding to the point where it seems to have less effect. By doing so, the courts also have undermined a principal purpose behind the Railway Labor Act.

I. BACKGROUND OF THE RAILWAY LABOR ACT STATUS QUO REQUIREMENTS

Under the Railway Labor Act ("RLA"),[3] neither the employer nor the labor organization may change the status quo [rates of pay, rules or working conditions] with regard to existing agreements and practices without first filing a notice of such intended change as required by section 6 of the RLA.[4] Section 6 of the RLA provides:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of

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[1]J.D., Ohio State College of Law, 1989; A.B., University of Michigan, 1985.

[2]Detroit & Toledo Shore Line Railroad v. United Transportation Union, 396 U.S. 142 (1969).

[3]45 U.S.C. §§ 151 *et seq.* (1995).

[4]45 U.S.C. § 156 (1995).

> the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, *rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon,* as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.[5]

In other words, the filing of a section 6 notice triggers a mandatory period of bargaining, mediation by the National Mediation Board ("NMB") under section 5 of the RLA,[6] and the possible appointment of Emergency Board(s) by the President of the United States under section 10 of the RLA.[7] Section 5 of the RLA provides in pertinent part:

> In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act [45 U.S.C. 160 (1995)]) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.
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> If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act [45 U.S.C. 160 (1995)], *no change shall be made in the rates of pay, rules or working conditions or established practices in effect prior to the time the dispute arose.*[8]

Throughout this mandatory period of bargaining required under section 6 of the RLA and the mediation process set forth in section 155 including the 30 day cooling-off period after the failure of the mediatory efforts, the parties may not alter the status quo, i.e., neither party may implement a change in the

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[5] *Id.* (emphasis added).

[6] 45 U.S.C. § 155 (1995).

[7] 45 U.S.C. § 160 (1995). Section 9A of the RLA, 45 U.S.C. § 159A (1995), is applicable on commuter railroads.

[8] *Id.* (emphasis added). 45 U.S.C. § 155 (1995).

actual objective working conditions broadly conceived, whether embodied in agreements or not.[9]

After the failure of mediation and rejection of the voluntary arbitration, the NMB may release the parties to their own devices.[10] As mentioned, a thirty day cooling off period follows this release by the Board.[11] Once the thirty days expire, the parties are free to exercise self-help.[12]

However, the RLA provides one additional method to resolve the dispute between the carrier and the labor organization. Section 10 of the RLA,[13] provides in pertinent part:

> If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten 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 thereupon, in his discretion, create a board to investigate and report respecting such dispute. . . .
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> . . . .
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> . . . After the creation of such board and for thirty days after such board has made its report to the President, *no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.*[14]

This final dispute resolution mechanism also requires the parties to maintain the status quo throughout the emergency board procedure until thirty days after the board has made its report to the President. While this mechanism is the last statutory dispute resolution procedure, Congress has stepped in after the failure of this mechanism to avert the use of self-help, by imposing the recommendations of the Board[15] or submitting the matter to binding arbitration.[16]

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[9] *See Shore Line*, 396 U.S. 142 (1969).

[10] 45 U.S.C. § 155 (1995).

[11] *Id.*

[12] *See* Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299, 303 (1989).

[13] 45 U.S.C. § 160 (1995).

[14] *Id.* (emphasis added).

[15] Maine Cent. R.R. v. Maintenance of Way Employees, 873 F.2d 425, 428 (1st Cir. 1989); Maine Cent. R.R. v. Maintenance of Way Employees, 835 F.2d 368, 369 (1st Cir. 1987); Maine Cent. R.R. v. Maintenance of Way Employees, 813 F.2d 484, 486 (1st Cir. 1987); Alton & S. Ry. v. Machinists, 463 F.2d 872, 875 (D.C. Cir. 1972); Electrical Workers v. Washington Terminal, 473 F.2d 1156, 1158-59 (D.C. Cir. 1972).

[16] Locomotive Eng'rs v. Chicago, Rock Island & Pac., 382 U.S. 423, 431-33 (1986); Railroad Trainmen v. Akron & Barberton Belt Co. R.R., 385 F.2d 581, 590 (D.C. Cir. 1967).

These procedures when read with section 2 of the RLA,[17] which requires the parties "to exert every reasonable effort" to settle disputes "in order to avoid any interruptions to commerce," evidence Congress' intent to make this a long, drawn-out process.[18] These dispute resolution mechanisms have been described as an "almost interminable process."[19]

> The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interest of the other side and thus reach agreement without interruption to commerce.[20]

Due to the interminable nature of this process, the party who desires to make a change does not want to follow the mandatory negotiation and mediation procedures since this process would delay the possible implementation of the alteration. Conversely, the party who opposes the change wants the status quo procedures to be followed since the change could not be unilaterally made and the length of the process may create some bargaining leverage.

On the other hand, where the change is not subject to the status quo provisions of the Railway Labor Act , the party may immediately make the change.[21] The opposing party can dispute the right to make the change through the dispute process set forth in section 3 of the RLA.[22] During this arbitration dispute process, a party may change immediately and may later have to reverse this alteration if a Board of Adjustment decides against its right to make the change.[23]

Moreover, where a party makes a change which is subject to the status quo provisions before exhausting these procedures, the opposing party has the

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[17] 45 U.S.C. § 152 (1995).

[18] *See Shore Line*, 396 U.S. 142, 149 (1969); Railway Clerks v. Florida E. Coast Ry. Co., 384 U.S. 238, 246 (1966).

[19] *Shore Line*, 396 U.S. at 149.

[20] *Id.* at 150.

[21] *See Consolidated Rail*, 491 U.S. 299, 304 (1989) (citing Locomotive Eng'rs v. Missouri - Kan. - Tex. R. Co., 363 U.S. 528, 531 (1960)).

[22] 45 U.S.C. § 153 (1995).

[23] *Consolidated Rail*, 491 U.S. at 310.

right to exercise self-help.[24] As a result, the parties constantly argue over whether a change is subject to the notice, negotiation and mediation process versus the arbitration dispute process. The question that often arises is whether a dispute or change is subject to the status quo dispute resolution mechanisms or the Adjustment Board dispute resolution process.

In response to this crucial question, the courts have developed terms, which are not included in the statutory language, to characterize these two different types of disputes under the Railway Labor Act. A "major dispute" concerns an intended change in agreements affecting rates of pay, rules or working conditions and is subject to the mandatory negotiation and mediation provisions of the RLA.[25] A "minor dispute" involves matters arising "out of grievances or out of the interpretation or application of agreements" and is disposed of through the RLA's arbitration provision.[26] Usually, the carrier takes the position that a dispute is "minor" since it can then immediately implement the change. The union in certain instances claims that the dispute is major, which denies the carrier the right to make the change without going through the long dispute resolution process. Moreover, if it is major, the union can exercise self-help in the event that a carrier makes an unauthorized change.

The Supreme Court originally described these terms in *Elgin, Joliet & Eastern Railway v. Burley*:[27]

> The first relates to disputes over formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where there 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.
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> The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.[28]

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[24] *Id.* at 303.

[25] 45 U.S.C. § 156 (1995).

[26] 45 U.S.C. § 153.

[27] 325 U.S. 711 (1945).

[28] 325 U.S. at 723.

While the language in *Elgin Joliet* which discusses the size of the issue as significant is confusing, the Supreme Court has clarified any debate by stating the level of impact of a dispute does not relate to a decision on whether an issue is "major" or "minor."[29]

Though the difference between a "major" and "minor" dispute became more distinct in *Elgin Joliet*, a party could blur this distinction by filing a section 6 notice when a dispute arose where the labor organization or carrier wanted to maintain the status quo. On the other hand, a party who wanted to make a change without delay could assert that the dispute was subject to the arbitration procedure.[30] As a result, the courts began to ignore these manipulations by the parties and focus on the true nature of the controversy. The Second Circuit described its solution to this dilemma:

> [W]e must not place undue emphasis on the contentions or maneuvers of the parties. Management will assert that its position, whether right or wrong, is only an interpretation or application of the existing contract. Unions, on the other hand, will obviously talk in terms of change. Since a section 6 notice is required by the statute in order to initiate a major dispute, the labor representatives are likely to serve such a notice in any dispute arising out of any ambiguous situation so as thereby to make the controversy appear more like a major dispute.[31]

As a result, in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, the Supreme Court established a standard to determine whether a dispute was "major" or "minor":

> Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties collective-bargaining agreement. Where in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major.[32]

In this case, the carrier decided to unilaterally implement a urinalysis drug screening test as part of all periodic and return-from-leave physical examinations. The Railway Labor Executives' Association denied that Conrail had the right to unilaterally implement this drug screening test. The Court applied the standard quoted above to determine whether the dispute was "major" or "minor." While neither party relied on an express provision of the collective-bargaining agreement to justify its position, the Court found Conrail's contractual claim to be "arguably justified" based "solely upon

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[29] *Consolidated Rail*, 491 U.S. at 305.

[30] *See id.* at 305-06.

[31] Rutland Ry. Corp. v. Brotherhood of Locomotive Eng'rs, 307 F.2d 21 (2d Cir. 1962).

[32] 491 U.S. at 307.

implied contractual terms, as interpreted in light of past practice."[33] Based on this finding, the Court declared this dispute to be "minor."

As written by Congress, the status quo requirement requires the parties to maintain the status quo [rates of pay, rules or working conditions] for a long period of time during the negotiation process. However, *Consolidated Rail* appears to allow the carrier to change working conditions if it is "arguably justified" in making the change. This result to some extent appears to conflict with RLA's central design as set forth in *Shore Line* to maintain the status quo during the negotiation process.

II. THE *SHORE LINE* DECISION

It is undisputed that *Consolidated Rail* provided the new standard for establishing whether a dispute was "major" or "minor." However, the interesting question arises with respect to what effect this decision and others have had on the holding regarding the status quo in *Shore Line*.[34]

In *Shore Line*, a 1969 case, the carrier and the union were engaged in mediation before the National Mediation Board after the union had served a section 6 notice on the carrier regarding the location of work assignments. While the parties were in mediation, the carrier posted a notice creating work assignments which were the subject of the dispute in RLA section 5 mediation. The labor organization as a result threatened to strike. The railroad in response sought to enjoin the union from striking whereas the union counterclaimed for an injunction against the carrier denying its right to create the disputed outlying work assignments.

The carrier argued that since the collective-bargaining agreement did not expressly forbid the creation of these assignments, the status quo requirement ["rates of pay, rules, or working conditions shall not be altered"] did not apply. In other words, the carrier proposed that the status quo provisions only applied to working conditions specifically covered in existing collective-bargaining agreements. The union countered that the actual objective working conditions out of which the dispute arose, irrespective of whether these conditions were covered in the existing collective-bargaining agreement, must be maintained.

The Supreme Court ruled that the union's position was correct and held that the "obligation of both parties during a period in which any of these status quo provisions is properly invoked [2 First, 5, 6, 10] is to preserve and maintain unchanged those actual objective working conditions, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute."[35] The Court's position regarding the

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[33] *Id.* at 312.

[34] 396 U.S. 142 (1969).

[35] *Shore Line*, 396 U.S. at 153-54.

status quo provisions' application to past practice which amounts to implied contractual terms has certainly not changed.[36]

However, *Shore Line* also provides that if a union properly serves a section 6 notice regarding a working condition or practice, the carrier cannot change that working condition or practice while the status quo procedures run their course.[37] This holding seems to be nothing more than what the status quo provisions of the RLA expressly provide.

The Court in *Shore Line* makes no mention of a carrier's right to change the working condition or practice when the procedures have been properly invoked where the action is "arguably justified" by the terms of the parties' collective-bargaining agreement.[38] Therefore, it appears, based on the reasoning in *Shore Line*, that a carrier should not be able to change a working condition or practice that is the subject of the major dispute resolution procedures even if the "arguably justified" standard is satisfied. The status quo requirement holding in *Shore Line*, therefore, seems to conflict with the "arguably justified" standard in *Consolidated Rail* when the major dispute resolution process has been properly invoked.

The Supreme Court in *Shore Line* reasoned with regard to the carrier's attempt to change the status quo during the major dispute resolution procedure:

> The Shore Line's interpretation of the status quo requirement is also fundamentally at odds with the Act's primary objective the prevention of strikes. This case provides a good illustration of why that is so. The goal of the [labor organization] was to prevent the Shore Line from making outlying assignments, a matter not covered in their existing collective agreement. To achieve its goal, the union invoked the procedures of the Act. The railroad, however, refused to maintain the status quo and, instead, proceeded to make the disputed outlying assignments. It could hardly be expected that the union would sit idly by as the railroad rushed to accomplish the very result the union was seeking to prohibit by agreement. The union undoubtedly felt it could resort to self-help if the railroad could, and, not unreasonably, it threatened to strike. Because the railroad prematurely resorted to self-help, the primary goal of the Act came very close to being defeated. The example of this case could no doubt be multiplied many times. It would be virtually impossible to include all working conditions in a collective-bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others. When the union moves to bring such a

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[36] *See Consolidated Rail*, 491 U.S. 312.

[37] 396 U.S. at 153-54.

[38] *See Consolidated Rail*, 491 U.S. at 307.

> previously uncovered condition within the agreement, it is absolutely essential that the status quo provisions of the Act apply to that working condition if the purpose of the Act is to be fulfilled. If the railroad is free at this stage to take advantage of the agreement's silence and resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. Only if both sides are equally restrained can the Act's remedies work effectively.[39]

Since the status quo requirements have not changed since this decision, the reasoning in *Shore Line* still should ring true. However, the courts seemed to have now wrongfully eroded the *Shore Line* standard to such an extent that both sides clearly are not equally restrained from exercising self-help and the carrier can prematurely act based on *Consolidated Rail*, thereby defeating the primary goal of the RLA.

III. THE EFFECT OF THE SUPREME COURT'S SUBSEQUENT RLA STATUS QUO DECISIONS ON *SHORE LINE*

It is difficult to reconcile the *Shore Line* Court's reasoning regarding status quo obligations during the major dispute resolution process with the "arguably justified" standard set forth in *Consolidated Rail*. If the "arguably justified" standard does apply while the parties are pursuing the section 6 dispute resolution process, then the reasoning just quoted above from *Shore Line* seems to be at risk.

In this event, when the union serves a section 6 notice regarding a previously uncovered condition, the essential status quo requirement of the RLA described in *Shore Line* can easily be side-stepped by a clever employer who can devise a justifiable argument for its unilaterally implemented change of the disputed working condition or practice. Accordingly, a primary objective of the Act, which is the status quo requirement, would be defeated since the railroad seems free at this stage to prematurely take advantage of the agreement's silence by making this unilateral change if it can come up with a sufficient argument. As a result, the union would still be required to hold back its own economic weapons, including the strike. Thus, both sides would not be equally restrained, and the Act's remedies would not be effective if the status quo provisions could be avoided by the employer in this manner.

Since *Consolidated Rail* clearly involved different facts, as the unilateral change by the carrier took place without any section 6 notice being served by the union regarding the disputed action, the holding in this case is clearly distinguishable from *Shore Line*. The Supreme Court in *Consolidated Rail* did not really discuss *Shore Line* at any length. "It did note that the express status quo requirement imposed by section 2 of the RLA, 45 U.S.C. § 152, only applied to major disputes and had no direct application to a minor dispute. However, this language was in reference solely to maintenance of the status quo pending an

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[39] 396 U.S. at 154-55 (footnotes omitted).

Adjustment Board decision."[40] As a result, *Consolidated Rail* does not appear to explicitly overrule or even criticize the holding in *Shore Line*. However, the general holding in *Consolidated Rail*, if it is applied when the parties have entered the status quo dispute resolution process, would seem to significantly weaken the holding in *Shore Line*, though without specific mention by the Court.

Subsequently, in *Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives' Association* ("P&LE"),[41] the Supreme Court seemed to criticize the holding in *Shore Line*. *P&LE* involved a carrier's decision to sell itself and to cease to be a railroad employer. In response, various unions served section 6 notices proposing changes in existing agreements to lessen the proposed sale's adverse effect on employees. The carrier refused to bargain about the effects of the sale claiming that the transaction was within the exclusive jurisdiction of the Interstate Commerce Commission. The Railway Labor Executives' Association ("RLEA") filed suit seeking a declaratory judgment regarding P&LE's obligations to bargain over the effects of the sale and asked for an injunction against the sale until the carrier's bargaining obligations under the RLA were completed. Shortly thereafter, the unions went on strike, and the P&LE sought a strike injunction. Subsequently, P&LE obtained an exemption from the prior approval requirements of 49 U.S.C. 10901 from the Interstate Commerce Commission, the federal regulatory agency which, *inter alia*, approves the sale of railroad carriers, which exemption caused the sale to be effective pursuant to the Interstate Commerce Act.

The Supreme Court reviewed whether P&LE's sale should be enjoined until the carrier satisfied a duty to bargain under the RLA about the effects of the sale. The Court held that since there was no agreement or implied agreement not to sell, the carrier had no obligation to serve a section 6 notice about this change. Also, the Court found P&LE had no obligation to bargain about the sale or delay its implementation. The Court, in making this decision, discussed the RLEA's argument that *Shore Line* forbade a change in the status quo once the unions had filed a section 6 notice. In rejecting this position, the court recited the facts in *Shore Line* and reasoned:

> Shore Line, in our view, does not control these cases. In the first place, our conclusion in that case that the status quo provisions required adherence not only to working conditions contained in express or implied agreements between the railroad and its union but also to conditions "objectively" in existence when the union's notice was served, and that otherwise could be changed without violating any agreement, extended the relevant language of 156 to its outer limits, and we should proceed with care before applying that decision to the facts of this case. Second, reporting at Lang Yard, we thought, had been the unquestioned practice for many years, and we considered it

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[40] *Consolidated Rail*, 491 U.S. at 304-05 n.5.

[41] 491 U.S. 490 (1989).

> reasonable for employees to deem it sufficiently established that it would not be changed without bargaining and compliance with the status quo provisions of the RLA. Third, and more fundamentally, the decision did not involve a proposal by the railroad to terminate its business. Here, it may be said that the working conditions existing prior to the 156 notice was that P&LE was operating a railroad through the agency of its employees, but there was no reason to expect, simply from the railroad's long existence, that it would stay in business, especially in view of its losses, or that rail labor would have a substantial role in the decision to sell or in negotiating the terms of the sale. Whatever else *Shore Line* might reach, it did not involve the decision of a carrier to quit the railroad business, sell its assets, and cease to be a railroad employer at all, a decision that we think should have been accorded more legal significance than it received in the courts below. Our cases indicate as much.[42]

Obviously, the Supreme Court's use of the term "outer limits" in describing *Shore Line* limited the holding in that case. Moreover, regarding the second point, the Supreme Court appears to say that in *Shore Line*, the dispute was assumed to involve a major dispute, because the carrier did not assert a minor dispute argument. However, the court's rejection of the *Shore Line* argument in *P&LE* seems to almost exclusively rely on the third point, that an employer's "decision to close down a business is so much a management prerogative that only an unmistakable expression of congressional intent will suffice to require the employer to postpone a sale of its assets pending the fulfillment of any duty it may have to bargain over the subject matter of union notices such as were served in this case."[43] Thus, the Supreme Court did limit the holding in *Shore*

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[42]491 U.S. at 506. However, in a footnote referencing the first point regarding *Shore Line*, the *P&LE* Court stated:

> Section 156 deals with bargaining and settlement procedures with respect to changes in *agreements* affecting rates of pay, rules, or working conditions. There must be notice of such intended changes, as well as bargaining and mediation if requested or proffered. And in every case involving *such* notice, i.e., of intended changes in *agreements*, rates of pay, rules or working conditions shall not be changed by the carrier until the specified procedures are satisfied. Because 156 concerns changes in agreements, it is surely arguable that it is open to a construction that would not require the status quo with respect to working conditions that have never been the subject of an agreement, expressed or implied, and that, if no notice of changes had been served by the union, could be changed by the carrier without any bargaining whatsoever. Shore Line rejected that construction, but as indicated in the text, we are not inclined to apply Shore Line to the decision of P&LE to go out of business.

Id. at 506 n.15.

[43]*P&LE*, 491 U.S. at 509 (citing Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965)).

Line, but only specifically with respect to the facts in *P&LE*: a sale of a railroad business.

Generally, however, the Court's holdings in *P&LE* and *Consolidated Rail* appear to have eroded the status quo requirement in *Shore Line*. This erosion developed further from the lower courts' decisions which seemed to begin to render *Shore Line* less meaningful.

IV. RELATED CASE LAW ALSO SEEMS TO DEMONSTRATE THE EROSION OF THE *SHORE LINE* HOLDING

In various cases, the courts have examined issues involving different facts from *Shore Line* and examined the applicability of the status quo requirement in that context. For example, some courts have examined a related issue regarding an air carrier's ability to change a working condition which is the subject of a section 6 notice after the expiration of a collective-bargaining agreement. In *Air Cargo, Inc. v. Local Union 851, Intern. Brother of Teamsters*,[44] the court held that where the contract between the parties had expired, disputes over weekends and overtime work during layoffs and place of reporting to work were found to be major disputes since the parties had served section 6 notices requiring maintenance of the status quo. The court held that a party to a major dispute may not introduce a disputed practice pending the exhaustion of the notice, negotiation and mediation procedures set forth in the RLA.[45] The court in this case appears to rely on the reasoning in *Shore Line* in characterizing the dispute as major even though it seems apparent that the carrier had an arguable position.

Similarly, in *International Ass'n of Machinists & Aerospace Workers v. Aloha Airlines, Inc.*,[46] the Court of Appeals for the Ninth Circuit held that where a collective-bargaining agreement had expired and a section 6 notice was filed, a disagreement over wages was a major dispute. The court stated that "[t]he purpose of the status quo provision is to impose an obligation on the parties to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo until the period ends."[47] The court concluded that "[o]nce a Section 6 notice is filed and after the collective-bargaining agreement terminates, neither party may alter the condition of employment in effect, but must maintain the 'status quo' during the course of settlement."[48]

However, it is important to note in these two cases that the collective-bargaining agreement had expired, and as a result, the court could not look to the contract to determine whether the dispute was "major" or "minor" because there was technically no existing collective-bargaining

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[44] 733 F.2d 241 (2d Cir. 1984).

[45] *Id.* at 245.

[46] 776 F.2d 812 (9th Cir. 1985).

[47] *Id.* at 816 (citing *Shore Line*, 396 U.S. at 149).

[48] *Aloha Airlines*, 776 F.2d at 816.

agreement to interpret. On the other hand, these decisions do seem to uphold the reasoning in *Shore Line* with regard to the status quo requirement.

However, after *Consolidated Rail* and *P&LE*,[49] the court stated:

> The Court of Appeals for the District of Columbia Circuit . . . rejected *Aloha*, finding no reason why a dispute that is independent of the collective-bargaining agreement and occurs after the twin occurrences of contract expiration and a section 6 filing should be automatically treated as major when, a short time earlier, it would unquestionably have been found to be minor. . . . It also reasoned that such a dispute does not look toward "the acquisition of rights for the future," the traditional standard for finding a major dispute but only towards "rights claimed to have vested in the past," which normally indicated only a minor dispute. More importantly, the court noted that the Railway Labor Act sets forth two tracks for resolving disputes: arbitration for minor disputes and district court jurisdiction for major ones. It then pointed out that "[t]he expiration of the collective-bargaining agreement tells little or nothing about the track for which a dispute is suitable." Instead, the *Aloha* rule implies that once the agreement expires and a section 6 notice is filed, *no* dispute can ever proceed along the "minor" track.
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> We agree with the reasoning of *Eastern Air Lines* and also reject *Aloha* . . . . To follow *Aloha* would mean that *every* dispute, no matter how firmly based in the existing but expired contract and no matter how insignificant, would become a major dispute subject to federal court jurisdiction. The *Aloha* rule upsets settled law governing post-expiration disputes that the mere filing of a section 6 notice does not turn a minor dispute into a major one. We see no valid reason for making an exception to that rule merely because of the "twin occurrences" of contract expiration and section 6 filing.[50]

In other words, the *Miklavic* court held, that the mere submission of an RLA section 6 notice to bargain, coupled with the expiration of a collective-bargaining agreement, would not automatically transform every dispute into a major one, especially if the dispute concerned competing interpretations of the terms of the collective-bargaining agreement or if the employer could demonstrate that it was "arguably justified" in taking the complained of unilateral action by the provision of an agreement.

This line of cases all involved disputes in the airline industry where contracts expire at a specified date. However, in the rail industry, collective-bargaining agreement's generally do not expire.[51] As a result, the twin occurrence of a

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[49] Miklavic v. U.S. Air, Inc., 21 F.3d 551 (3d Cir. 1994) (citing Airline Pilots Ass'n v. Eastern Airlines, Inc., 863 F.2d 891 (D.C. Cir. 1988)).

[50] *Miklavic*, 21 F.3d. at 554-55 (internal citations omitted).

[51] *See* Railway and Airline Supervisors v. Soo Line R.R., 891 F.2d 675, 678 (8th Cir.

section 6 notice with the expiration of the agreement is highly unlikely, and these cases are generally not too helpful in that context. Moreover, the court in *Aloha* seemed to base its holding on the fact that there was no collective-bargaining agreement to interpret after the expiration. In sum, the reasoning in *Miklavic, supra,* and *Eastern, supra,* seems to conflict with the holding in *Shore Line* with regard to the effect the service of a section 6 notice has on the status quo; however, *Air Cargo* and *Aloha,* which are both pre-*Consolidated Rail* and *P&LE,* both seem to require the maintenance of the status quo requirement after the service of a section 6 notice without regard to the carrier's position.

In another line of related cases, courts have examined the applicability of the reasoning in *Shore Line* when the union is newly certified and a collective-bargaining agreement has not been reached. In *Aircraft Mechanics Fraternal Ass'n v. Atlantic Coast Airlines, Inc.,*[52] the court found that the status quo provisions of the RLA "simply do not impose an obligation on the carrier to maintain the status quo in the *absence* of an agreement" (emphasis by court). The court reasoned that *Shore Line* only applied when a collective-bargaining agreement was in effect.[53]

However, in *International Ass'n of Machinists and Aerospace Workers v. Transportes Aeroes Mercantiles Pan Americandos,*[54] the court, applying *Shore Line*'s reasoning, held that section 2 first prohibited the carrier from making unilateral changes in working conditions after the onset of negotiations with a newly certified representative. In this case, bargaining had already begun between the parties and a prior, unratified agreement existed. As a result, the court reasoned that *Williams* was inapplicable and the holding in *Shore Line* applied because "[i]f management is permitted to make unilateral changes in working conditions during collective bargaining, the union's position will be undermined, interruptions to interstate commerce are likely to occur, and the purposes of the act will be frustrated."[55] The court makes no mention of whether the carrier's position is arguable.[56] The decision in *Transportes Aeroes* seems to hold that *Shore Line* still has meaning, as do *Air Cargo* and *Aloha.*

1989).

[52]55 F.3d 90, 93 (2nd Cir. 1995).

[53]*Id.* (citing Williams v. Jacksonville Terminal Co., 315 U.S. 386, 402-03 (1942)) ("The prohibition on unilateral changes set forth in these sections are aimed at preventing changes in conditions previously fixed by collective-bargaining agreements"); *see also* International Ass'n of Machinists & Aerospace Workers v. Trans World Airlines, 839 F.2d 809, 814 (D.C. Cir. 1988); Virgin Atlantic Airways v. National Mediation Bd., 956 F.2d 1245, 1253 (2d Cir. 1992); Regional Airline Pilots v. Wings W. Airlines, 915 F.2d 1399 (9th Cir. 1990); International Ass'n of Machinists & Aerospace Workers v. Northwest Airlines, Inc., 843 F.2d 1119 (8th Cir. 1988); Automotive, Petroleum and Allied Industries Employees Union v. Trans States Airlines, 926 F. Supp. 869 (E.D. Mo. 1996); Tee v. UAL Corp., 902 F. Supp. 1572 (N.D. Ga. 1995).

[54]924 F.2d 1005 (11th Cir. 1991).

[55]*Id.* at 1009.

V. LANGUAGE IN VARIOUS CIRCUITS CONFLICT WITH THE HOLDING IN *SHORE LINE*

Many courts have conflicted the *Shore Line* holding regarding the status quo requirement where a section 6 notice has been served.[57] In *Airline Pilots Ass'n v. Eastern Airlines, Inc.*[58] and numerous other cases, the courts have reasoned that allowing a party "to characterize all disputes as 'major' through a unilateral action such as serving section 6 notices on the other party is unwise and contrary to the two-track procedure of the [Railway Labor Act]."[59] In fact, in *Missouri Pacific*, the court held that "*Shore Line* is not applicable . . . as the employer in *Shore Line* did not assert any reliance on past practices and the possibility of minor dispute was not addressed.[60]

While the Eighth Circuit clearly appears to call into question the viability of the holding regarding the status quo requirement in *Shore Line*, the other cases, like *RLEA v. CSX*, *CNW v. RLEA*, *CSX v. UTU*, and *RLEA v. Chesapeake*, all relate to a carrier's decision to leave the railroad business as in *P&LE*.[61] Generally, the courts recognize that these cases are distinguishable from *Shore Line* because of the carrier's decision to leave the railroad business. Therefore, while the language in these holdings is damaging to *Shore Line*, they do not explicitly overrule the holding.

Some of the cases like *Air Cargo*, *Aloha*, and *Transportes Aeroes* seem to still follow the holding in *Shore Line* that a railroad must maintain the status quo with respect to "actual objective working conditions . . ., irrespective of whether

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[56] *See also Northwest Airlines*, 843 F.2d at 1127 (dissent).

[57] *See* Brotherhood of Ry. Carmen v. Missouri Pacific R.R. Co., 944 F.2d 1422, 1427-28 (8th Cir. 1991) (citing Sheet Metal Workers Int'l Ass'n v. Burlington Northern R.R., 893 F.2d 199, 202 (8th Cir. 1990); Chicago & N.W. Transp. Co. v. Railway Labor Executives' Ass'n, 908 F.2d 144, 151 (7th Cir. 1990); Railway Labor Executives Ass'n v. Chesapeake W. Ry., 915 F.2d 116, 120 (4th Cir. 1990); CSX v. United Transportation Union, 879 F.2d 990, 997 (2d Cir. 1989) (once a dispute is found to be minor, the service of section 6 notices "would have no transforming or alchemizing effect upon that situation"); Airlines Pilots Int'l v. Eastern Airlines, 863 F.2d at 900 (agreement had expired); *see also* Chicago and North Western Transp. Co. v. International Brotherhood of Electrical Workers, 820 F.2d 1424 (7th Cir. 1987) (citing Brotherhood of Ry. Carmen, v. Norfolk & W. Ry., 745 F.2d 370, 376 n.6 (1984) (where the union argued that the carrier had previously raised the issue through the major dispute provisions of section 6, even though no section 6 notice was pending, the court rejected that this carrier action necessarily makes the dispute "major"); St. Louis Sw. Ry. v. United Transportation Union, 646 F.2d 230, 233-34 (6th Cir. 1981).

[58] 863 F.2d 891 (D.C. Cir. 1988).

[59] *Id.* at 900; *see also* Railway Labor Executives' Ass'n v. CSX Transp. Inc., 938 F.2d 224 (D.C. Cir. 1991); Brotherhood of Ry. Carmen v. Alton & Southern Ry. Co., 849 F.2d 1111 (8th Cir. 1988).

[60] 944 F.2d at 1427 n.5.

[61] *See also Airline Pilots*, 863 F.2d 891 (D.C. Cir. 1988) (involving an action where the agreement had expired).

these conditions are covered in an existing collective agreement."[62] Therefore, while the holding in *Shore Line* appears to have been partially swept away by these cases which seem to ignore the primary objective of the RLA - the status quo requirement - the Supreme Court has not expressly overruled *Shore Line* and the circuit courts' should respect this important holding.

VI. CONCLUSION

The courts now generally ask whether the collective-bargaining agreement can arguably be interpreted to permit the railroad to do what it wants to do. As a result, the courts ignore the status quo rule in *Shore Line* which seems to have been conflicted by many courts.

However, it seems that when long standing practice ripens into an established and recognized custom between the parties, it ought to be protected against sudden and unilateral change. The erosion of *Shore Line* has hurt that protection that the status quo requirements of the RLA were put in place to provide. Moreover, when a section 6 notice is served and a carrier can prematurely make a unilateral change regarding the matter in dispute based on *Consolidated Rail*, this situation creates an unfair advantage for the carrier. This unfair advantage is clearly created because the carrier can exercise self-help whereas the union cannot strike. As a result, the carrier gains the upper hand during negotiations because it is not equally restrained by the status quo provisions.

This result would strike at the RLA's design to prevent the union from striking and management from doing anything that would justify a strike. If the parties are pursuing the major dispute resolution procedures, and the carrier unilaterally implements a change in working conditions, the union is obviously going to be upset and talks could break down as a result. Moreover, the union should have the right to strike at this moment based on the carrier's action in order to maintain the balance in the bargaining procedure. However, if the carrier can arguably justify its change, the union may not be able to which seems unfair.

Therefore, the weakening of the holding in *Shore Line* has severely injured the negotiation balance by tipping the scales in favor of the employer. As a result, the unions have been placed in a frustrating position since it appears that the carrier is free to act and the union must sit on its hands.

Unless the courts begin to reevaluate the unfair situation they have created by ignoring the status quo requirement of the RLA described in *Shore Line* and clearly provided in the RLA status quo procedures, the balance will continue to tip in favor of the employer during negotiations and the purpose of the RLA's dispute resolution procedures will continue to be undermined. This cannot be what Congress envisioned when the RLA was drafted. Since the Supreme Court has not explicitly overruled *Shore Line* and certain courts seem to apply *Shore Line* in certain situations, the door is still open to correct this problem.

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[62] *Shore Line*, 396 U.S. at 143.