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Pittsburgh & Lake Erie Railroad v. Railway Labor Executives' Association: The Movement to a Competitive Railroad Industry

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The Constitution of the United States grants Congress broad power to regulate commerce among the states. Pursuant to this authority, Congress enacted the Interstate Commerce Act (ICA) in the late nineteenth century, establishing the Interstate Commerce Commission (Commission) to regulate interstate commerce. The Commission has the authority to regulate all modes of transportation carrying passengers and freight across state boundaries. Since the enactment of the ICA, the Commission has regulated the railroad industry. Congress adopted legislation subsequent to the ICA that increased regulatory constraints on the railroad industry and demonstrated the importance Congress attached to developing and maintaining an efficient interstate railroad system.
Prior to the adoption of the ICA, railroads enjoyed a near monopoly over interstate transportation. With the enactment of the ICA, however, and the development of more efficient and economical means of interstate transportation, such as trucking and barge, the railroad industry suffered from increased competition in the transportation market. The fact that the railroad industry remained regulated while the trucking and barge industries were deregulated magnified the effect of this increased competition.

6. Railroad Deregulation Act of 1979: Hearings before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce, Science and Transp., 96th Cong., 1st Sess. 62 (1979) [hereinafter Railroad Deregulation Act Hearings] (statement of Brock Adams, Secretary, Department of Transportation); see also H.R. REP. No. 1430, 96th Cong., 2d Sess. 3 (1980). During this time, railroads carried over 90% of the inter-city freight and passenger traffic. Address by R.L. Banks, President, R.L. Banks & Assoc., Western Coal Transportation Association Meeting and Conference (Sept. 1988) (transcript at 124) [hereinafter Address].

Railroads were able to charge high rates because shippers were dependent on railroads to move their goods. See Railroads 1975: Hearings before the Senate Comm. on Commerce, 94th Cong., 1st Sess. 618 (1975) [hereinafter Railroads 1975: Hearings] (statement of William T. Coleman, Jr., Secretary, Department of Transportation).

The railroads “had an effective monopoly. All commerce was the captive shipper. And... the railroads took advantage of their natural monopoly, and they extracted what made some captive shippers feel was an actual tribute undue and unnecessary. And moreover, they neglected to provide adequate service to a lot of shippers.” Address, supra, at 124.

7. See Railroads 1975: Hearings, supra note 6, at 619. When the Commission was formed, the railroad, in many cases, was the only mode of transportation available to merchants and shippers. Id. at 618. By 1975, however, Secretary Coleman had concluded that:

Protection against rail monopoly should no longer be the main focus of regulation. Sadly, the regulatory system has not kept pace with the economic development of transportation and the competition in transportation. Rather than protecting shippers from the exercise of rail monopoly, the current regulatory system keeps railroads from effectively competing for the kind of traffic they can best handle.

Id. at 619; see Railroad Deregulation Act Hearings, supra note 6, at 62; see also 104 CONG. REC. 10,837 (1958).

By 1975, the conditions of the railroads were deplorable. Railroads 1975: Hearings, supra note 6, at 617. For example, many of the railroad tracks were in such poor condition that standing trains would derail. Id. Often, trains operating on mainline track could not run faster than ten miles per hour. Id.

8. Railroad Deregulation Act Hearings, supra note 6, at 68. By 1977, 92% of the water carrier industry was deregulated and 60% of the trucking industry was deregulated. Id.

Other reasons for the railroad’s decline included the movement of the population into the sunbelt, the decreasing demand for coal as a fuel, and the development of the federal interstate highway system which led to a decrease in the need for passenger service. Address, supra note 6, at 128. Much of the freight “carried by other modes [of transportation] could be carried faster, or less circuitously, or at lower cost by the railroads.” Railroad Deregulation Act Hearings, supra note 6, at 68. Nevertheless, “the regulatory system continues to inhibit the railroads from competing effectively for this traffic.” Id.
Faced with an uneconomical and inefficient railroad industry, Congress amended the ICA by adopting statutory reforms aimed at revitalizing the railroad industry. The Railroad Revitalization and Regulatory Reform Act (Railroad Revitalization Act) allowed rail carriers to earn a greater return on their investment while limiting the Commission's jurisdiction to those situations where a rail carrier dominated the transportation market. The Staggers Rail Act of 1980 (Staggers Act) continued many of the regulatory changes started under the Railroad Revitalization Act. In particular, the Staggers Act increased rail carriers' flexibility in acquiring rail lines by granting the Commission the authority to implement regulations streamlining the regulatory process.

One of the unexpected results of Congress' deregulation efforts was the growth of shortline railroads. In 1986, the Commission, pursuant to its authority under the Staggers Act, adopted procedures to exempt many


10. A carrier includes common carriers such as rail carriers. 48 U.S.C. § 10102(2) & (4) (1982). A rail carrier is defined as "a person providing railroad transportation for compensation." Id. § 10102(19).


12. J. Heller, supra note 11, at 6; see also H.R. Rep. No. 1430, supra note 6, at 80, reprinted in 1980 U.S. Code Cong. & Admin. News 4110, 4111 (implying that one of the goals of the Staggers Act was to provide a more efficient and streamlined regulatory process).


Many shortlines are created when the large rail carriers abandon the less profitable branch lines. Short Line Hearings, supra, at 17. Shortlines are generally profitable because they have a stable traffic base, low labor costs and greater labor productivity. Rapid Growth Hearings, supra, at 83; see also Short Line Hearings, supra, at 87 (statement of O.M. Berge, Chairman of the Railway Labor Executives' Association, indicating that shortlines are created primarily at the expense of the employees).

Flexibility in work assignments is a crucial factor in reducing costs for shortline railroads. Short Line Hearings, supra, at 17. Many of the smaller shortlines employ part-time labor, or utilize their managerial and sales staff in labor positions, thereby reducing the total workforce. Id.
shortline acquisitions from the formal approval process established under the ICA. The adoption of the exemption procedures, together with the Commission's continuing effort to create a more competitive railroad industry, created tension between railroad management and railroad labor unions. This tension developed from the Commission's reduction in regulations governing railroad acquisitions and Congress' continued regulation of railroad labor relationships under the Railway Labor Act (RLA). Consequently, the railroads gained some flexibility in acquiring rail lines, yet they were still required to bargain with the labor unions before implementing changes that might affect railroad employees.

The Supreme Court confronted the tension between the relaxed regulatory environment for acquisitions and the continued regulatory structure governing railroad employers in Pittsburgh & Lake Erie Railroad v. Railway Labor Executives' Association. In this case, the Supreme Court addressed the question of whether the RLA's bargaining provisions applied when railroad management sought to utilize the Commission's new procedures exempting management from the ICA's formal approval requirements when selling its railroad assets. The Court ruled that the Pittsburgh & Lake Erie Railroad (P&LE) was under no obligation to bargain with the employees' unions. The Court based its decision on the fact that the terms of the sale were settled at the time the unions notified P&LE of their intent to bargain with P&LE regarding both the decision to sell and the effects of the sale on P&LE's employees.

14. See infra note 39. Acquisitions are exempted provided that these transactions do not interfere with the national transportation policy. See Short Line Hearings, supra note 13, at 18 (stating that the reason for the exemption provision was the Commission's recognition that shortlines must act rapidly when completing a purchase in order "to take advantage of favorable financing and to ensure uninterrupted service").

15. Address, supra note 6, at 135-36.


17. See infra text accompanying notes 64-79 (discussing the Supreme Court's interpretation of working conditions which trigger the RLA's bargaining provisions).

18. The Pittsburgh & Lake Erie decision is limited to the acquisitions of railroads, therefore, this Note will focus only on the acquisition of a railroad under the Staggers Act amendments to the ICA.


20. Id. at 2592.

21. Id. at 2597.

22. Id. A secondary issue in this case was whether the circuit court of appeals correctly set aside the injunction against the strike. The Supreme Court, however, determined that the record was insufficient to determine this issue and remanded the issue to the court of appeals. Id. at 2598-99.
In *Pittsburgh & Lake Erie*, the railroad needed to sell its assets to satisfy debts. P&LE's labor unions argued that the sale, and the subsequent loss of 500 jobs, which affected the working conditions of P&LE's employees, triggered the RLA's bargaining provisions. P&LE, however, argued that the RLA's bargaining provisions did not apply because the railroad was selling to a noncarrier. Instead, P&LE asserted that the sale was complete once the exemption filed with the Commission became effective.

Writing for the majority, Justice White analyzed the conflict between the RLA and the ICA by focusing on P&LE's duties under the RLA, rather than by examining whether the ICA's requirements would preempt the RLA. The majority decided that the RLA did not require P&LE to notify the unions of the proposed sale. Moreover, under the majority's analysis, the filing of the union's notice to change the collective bargaining agreements to include labor protection provisions did not obligate P&LE to refrain from selling the railroad. The majority reasoned that by the time the unions filed the notice, the terms of the sale were settled. Nevertheless, the majority concluded that P&LE was required to bargain with the unions about those demands which P&LE could settle, without imposing labor protection provisions on the noncarrier buyer.

Writing for the dissent, Justice Stevens focused on the regulated railroad industry's unique position in the American economy. The dissent maintained that the railroad, as a regulated utility, did not have the same freedom to enter or leave the transportation market as nonregulated businesses enjoy. The dissent also noted that before going out of business, a railroad must first obtain Commission approval. According to the dissent, however, this approval does not diminish management's duty under the RLA to bargain with the unions. Thus, the dissent concluded that P&LE violated

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23. *Id.* at 2588; see *infra* text accompanying notes 145-67 (discussing majority opinion in *Pittsburgh & Lake Erie*).
24. *Id.* at 2588.
25. *Id.* at 2589, 2591.
26. *Id.* at 2589.
27. *Id.* at 2597.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. Justices Brennan, Marshall, and Blackmun joined Justice Stevens' dissent. *Id.* at 2599 (Stevens, J., dissenting).
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 2600-02.
its duty to bargain under the RLA by refusing to negotiate with the unions over the proposed sale.

Part I of this Note examines the ICA's exemption procedures in light of the recent trend toward deregulation of the railroad industry. This section then focuses on the RLA's bargaining provisions and how Congress and the Supreme Court have interpreted the term "working conditions" under the RLA. Part II analyzes the Supreme Court's interpretation of management's prerogative to go out of business as developed in nonregulated industries and applied to the railroad industry. Part III examines the decision in *Pittsburgh and Lake Erie* and determines whether, in light of prior law, railroad management should unilaterally be allowed to decide when to go out of business. Finally, this Note concludes that Congress must amend the legislation governing railroad labor relationships to enable railroads to function in a competitive transportation market.

I. REGULATING THE RAILROAD: AN UPDATED INTERSTATE COMMERCE ACT CONFRONTS THE ANTIQUATED RAILWAY LABOR ACT

A. The Interstate Commerce Act: Restructuring the Railroad Industry

The ICA requires the Commission to carry out the nation's rail transportation policy when exercising its regulatory power over the railroad industry.\(^{37}\) In balancing the labor protection provisions of the transportation policy against the need to develop and maintain a competitive railroad industry, Congress granted the Commission the authority to control the acquisition of railroad lines.\(^{38}\) The ICA establishes detailed procedures for

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\(^{37}\) 49 U.S.C. § 10501 (1982); see supra notes 3-4; see also 49 U.S.C. § 10101(a)-(15) (setting forth the rail transportation policy). The rail transportation policy insures that the Commission, when involved in regulating rail carriers and other modes of transportation, seeks to preserve competition among the various modes of transportation; promotes safe, efficient transportation; encourages sound economic conditions both in transportation and among carriers; establishes and maintains reasonable rates without unreasonable discrimination or unfair competition; cooperates with state and local officials on transportation matters; and encourages "fair wages and safe and suitable working conditions in the railroad industry." *Id.*

\(^{38}\) 49 U.S.C. § 10901(a)(3); see 104 CONG. REC. 12,526 (1958) (statement of Rep. Springer that the purpose of the 1958 ICA amendments was to "strengthen and improve our Nation's railroad transportation system so that it may better fulfill its complete role in meeting the transportation needs of the Nation's expanding economy and the requirements of national defense"); see also 77 CONG. REC. 4879 (1933) (statement of Rep. Huddleston that the "interests of railroad labor and of the owners of the railroads, while important, are but secondary; the primary interest is that of the general public").
interstate rail carriers to follow when acquiring rail lines. In determining whether to permit an acquisition, the Commission must weigh the rail transportation policy considerations and decide whether labor protection provisions should be imposed on railroad management. Labor protection provisions may be implemented only if the Commission finds that these provisions are necessary to protect the interests of a railroad's employees.

Due to the ICA's complex and time consuming procedures, which a business involved in rail transportation must comply with when acquiring a railroad, Congress amended the ICA to allow the Commission to exempt acquiring rail carriers and noncarriers from these procedures. In particular,

39. 49 U.S.C. § 10901 (1982). The procedures outlined in section 10901 provide that the rail carrier shall submit an application to the Commission. Id. § 10901(b). This section provides, in relevant part, that once the Commission receives the application it must:

1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;
2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;
3) have a copy of the summary published in the Federal Register;
4) take other reasonable and effective steps to publicize the application; and
5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take action concerning the application.

Id. § 10901(b)(1)-(5).

If the Commission finds that public convenience and necessity warrant proceeding with the rail application, then it may either approve the application as filed or modify the application. Id. § 10901(c)(1)(A)(i)-(ii). Failure to find public convenience and necessity may result in the Commission denying the application. Id. § 10901(c)(1)(B). If the application is approved, the Commission shall issue a certificate to the rail carrier describing the acquisition approved. Id. § 10901(c)(2).

40. In a series of cases, the Commission determined that it would not impose labor provisions on the acquisition of rail lines by noncarriers. See Ex Parte No. 392, Application Procedures for a Certificate to Construct, Acquire or Operate R.R. Lines, 365 I.C.C. 516 (1982) [hereinafter Ex Parte No. 392] aff'd sub nom. Simmons v. ICC, 829 F.2d 150 (D.C. Cir. 1987) (determining that labor protective conditions do not have to be imposed when a carrier purchases a line from a noncarrier); Prairie Trunk Ry., 348 I.C.C. 832 (1977), aff'd sub nom. Illinois v. United States, 604 F.2d 519 (7th Cir. 1979) (imposition of labor protective conditions is discretionary, however, under the section of the ICA governing extensions or abandonment of rail lines). Labor protection provisions shall be provided when abandoning or discontinuing operation of a rail line. Ex Parte No. 392, supra, at 516.

41. 49 U.S.C. § 10505. Congress' findings surrounding the adoption of the Staggers Act concluded that many of the regulations affecting railroads were "unnecessary and inefficient." H.R. REP. No. 1430, supra note 6, at 3. Moreover, railroads were unable to earn enough to generate the necessary funds for financing capital improvements. Id.

Under the regulations implementing the Staggers Act, the exemption applies to the following:

1) Acquisition by a noncarrier of rail property that would be operated by a third party;
2) Operation by a new carrier of rail property acquired by a third party;
lar, Congress mandated that the Commission exempt parties from the procedures when compliance with the formal approval procedures is not necessary in order to carry out the rail transportation policy.\textsuperscript{42} Furthermore, the Commission will allow the exemption to become effective only if the Commission finds that the acquisition is either of "limited scope,"\textsuperscript{43} or that adherence to the procedures is not needed to "protect shippers from abuse of market power."\textsuperscript{44} Accordingly, the Commission may not use the exemption power to release management from its duty to protect the interests of a railroad's employees.\textsuperscript{45}

Although the Commission has discretion to impose labor protections on employees affected by an acquisition, it has refused to impose them.\textsuperscript{46} Generally, the Commission takes the position that the imposition of labor protections discourages the type of acquisitions that Congress determined should be encouraged.\textsuperscript{47} Therefore, absent a demonstrated need, the Com-

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(3) A change in operators on the line; and
(4) Acquisition of incidental trackage rights. Incidental trackage rights include the grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party that occur at the time of the exempt acquisition or operation.


42. 49 U.S.C. § 10505(a)(1). The Commission's regulations implementing the exemption procedure set forth the method that a rail carrier or noncarrier must follow in order to obtain the exemption. The applicant must file a notice with the Commission providing details of the acquisition. 49 C.F.R. § 1150.32(a). Under the regulations, the exemption becomes effective seven days after the notice is filed. 49 C.F.R. § 1150.32(b). Parties affected by the acquisition may petition the Commission to revoke the exemption. \textit{Ex Parte No. 392} (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901, 1 I.C.C. 2d 810, 812 (1985) [hereinafter \textit{Ex Parte No. 392} (Sub-No. 1)]. The Commission will revoke the exemption if the parties are successful in showing that regulation of the acquisition is necessary to carry out the rail transportation policy. 49 U.S.C. § 10505(d).


45. 49 U.S.C. § 10505(g)(2).

46. \textit{See Ex Parte 392} (Sub-No. 1), supra note 42, at 813; \textit{see also} 49 U.S.C. § 10901(e) (stating that the Commission may impose labor protection provisions on railroad employees.).

mission has stated that the imposition of labor protections will render acquisitions more costly and, consequently, inhibit the completion of the transactions.\textsuperscript{48}

\section*{B. The Railway Labor Act: A Remnant of Railroad Regulation}

The Commission's refusal to impose labor protections since the implementation of the Staggers Act amendments has forced a confrontation with the RLA's provisions and policies.\textsuperscript{49} Congress enacted the RLA to prevent disputes between railroads and railroad employees from disrupting interstate commerce.\textsuperscript{50} The passage of the RLA demonstrated Congress' determination that railroad employees be given "separate treatment" distinct from employees of other organized industries.\textsuperscript{51} The RLA's provisions seek to encourage settlement of disputes, while imposing on both parties the obligation not to change the status quo (the status quo provision) by resorting to self-help remedies, such as labor strikes, until the parties exhaust the RLA's bargaining procedures.\textsuperscript{52} After exhaustion, however, both parties can use self-help remedies.\textsuperscript{53}

\begin{itemize}
\item \textsuperscript{48} Ex Parte 392 (Sub-No. 1), \textit{supra} note 42, at 813-14.
\item \textsuperscript{49} \textit{See Staggers Hearings, supra} note 47, at 57, 67. The RLEA believed that the Commission chose not to impose labor protections, unless required to do so, because these protections hinder the railroads' competitive ability. \textit{Id.} at 67.
\item \textsuperscript{50} 45 U.S.C. § 151a (1982). The purposes of the RLA are enumerated in section 151a as follows:
\begin{enumerate}
\item To avoid any interruption to commerce or to the operation of any carrier engaged therein;
\item 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;
\item 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;
\item to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;
\item 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.
\end{enumerate}
\item \textit{Id.}
\item \textsuperscript{51} S. REP. No. 459, 88th Cong., 1st Sess. 8 (1963). The Labor Management Relations Act and other acts governing labor-management disputes (such as the National Labor Relations Act) generally do not apply to railroad labor disputes. \textit{Id.} at 7.
\item \textsuperscript{52} \textit{Detroit & Toledo Shore Line R.R. v. United Transp. Union,} 396 U.S. 142, 150 (1969). The procedures of the RLA are "purposely long and drawn out based on the hope that reason and practical considerations will provide, in time, an agreement that resolves the dispute." \textit{Id.} at 149; see \textit{Brotherhood of Ry. & S.S. Clerks Freight Handlers v. Florida E. Coast Ry.,} 384 U.S. 238, 246 (1966) (citing the same); \textit{see also} 45 U.S.C. § 152 first (delineating the general duties of carriers and employees).
\item \textsuperscript{53} \textit{See Shore Line,} 396 U.S. at 149 (stating that the status quo provision imposes "upon the parties an obligation to make every reasonable effort to negotiate a settlement and to re-
The status quo provision is one of the key provisions of the RLA. This provision encourages the parties involved in a railroad labor dispute to negotiate before utilizing self-help remedies. Under the RLA’s status quo provision, neither management nor the labor unions can change employees’ rates of pay, rules, or working conditions until the RLA’s bargaining provisions are met. The RLA requires the party seeking to make a change to give written notice to the other party at least thirty days prior to the proposed change. The RLA also mandates that the party seeking to make a change provide an opportunity to bargain with the other party about the change. Once this written notice, known as a section 156 notice, is issued, the proposed change cannot be implemented until an agreement is reached, or until negotiations are terminated. If the parties cannot reach an agreement, they may request the services of the National Mediation Board (the Board) which conducts an investigation and issues a report. If

54. 45 U.S.C. § 152 seventh. This provision provides: “No carrier, its officers or agents shall change the rates of pay, rules or working conditions of its employees as a class, as embodied in agreement except in the manner prescribed in such agreements or in section 156 of this title.” Id.

55. The immediate effect of the status quo provision is to “prevent the union from striking and management from doing anything that would justify a strike.” Shore Line, 396 U.S. at 150. Maintaining the status quo during an investigation is “absolutely indispensable to any proper consideration of the controversy.” 67 CONG. REC. 4648 (1926).

56. 45 U.S.C. § 152 seventh. The RLA also imposes a duty on all railroads and their employees to:

- exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Id. § 152 first.

The status quo provision “extends to those actual, objective working conditions out of which the dispute arose.” Shore Line, 396 U.S. at 153.

57. 45 U.S.C. § 156.

58. Id.

59. Throughout this Note the term “section 156 notice” will refer to the notice required from carriers or representatives of railroad employees before either party implements a change affecting the rates of pay, rules or working conditions. Although the original bill refers to this notice as a section 6 notice, the Supreme Court in Pittsburgh & Lake Erie refers to the notice as a section 156 notice. 109 S. Ct. 2584, 2589 (1989); see Railway Labor Act, ch. 347 § 6, 44 Stat. 582 (1926).

60. 45 U.S.C. § 156. Negotiations are terminated when ten days have passed since the conclusion of negotiations and there has been no request for intervention by the Board. Id.

61. Id. After the section 156 notice is filed, the parties must confer in an attempt to reach an agreement. Id. If the parties fail to come to an agreement during the conference, they may request the aid of the Board. Id. § 154.
the Board cannot settle the dispute, and the dispute threatens to "substan-
tially interfere with interstate commerce," the President may appoint an
emergency board to investigate the dispute.62 Only after the parties exhaust
these procedures may they resort to labor strikes or other self-help
remedies.63

Although an attempt to change railroad employees' working conditions
triggers the status quo provision of the RLA,64 the RLA does not define the
term "working conditions." In fact, the legislative debates surrounding the
adoption of the RLA do not provide a definition. One union representative,
testifying during the hearings on the RLA,65 stated that he understood the
term "working conditions" to refer to those exact conditions existing at the
time the dispute arose, including, but not limited to, the payment of wages
and employment relations.66

The Supreme Court's interpretation of "working conditions" has been
consistent with the union representative's understanding as articulated at the
RLA hearings. In Order of Railroad Telegraphers v. Chicago & North-west-
ern Railway,67 the Court determined that job security was a working condi-
tion within the meaning of the RLA because the affected employees were
covered by collective bargaining agreements.68 In Railroad Telegraphers,
the Chicago & North Western Railroad sought to abolish some stations, and
consequently reduce the railroad's workforce, because the railroad had de-
termined that maintaining those stations was no longer profitable.69 The
labor unions filed a section 156 notice requesting an amendment to the ex-
isting collective bargaining agreements which would prevent the elimination
of any positions without the union's consent.70 Chicago & North Western
refused to bargain with the unions because management believed that the
termination of those jobs was not a dispute to which the RLA applied.71
The Supreme Court, however, determined that the dispute was a labor dis-

62. Id. § 160.
369, 378 (1969) (determining that once the RLA's bargaining procedures have been exhausted,
labor unions may strike).
64. 45 U.S.C. § 156.
65. Donald R. Richberg, Counsel for the Organized Railway Employees.
66. 67 CONG. REc. 4588 (1926); Hearings on Railroad Labor Disputes Before the House
68. Id. at 335-36.
69. Id. at 332.
70. Id.
71. Id. at 332-33.
pute covered by the RLA, which barred the district court from issuing an injunction against the strike.

The Supreme Court’s decision in *Detroit & Toledo Shore Line Railroad v. United Transportation Union* further clarified the term “working conditions.” The *Shore Line* Court determined that the RLA’s status quo provision applied to working conditions existing at the time the labor dispute arose, regardless of whether those conditions were covered by an existing collective bargaining agreement. In *Shore Line*, the Court held that the status quo provision applied to the railroad’s decision to establish work assignments away from the principal railroad yard. The Court asserted that the provision was triggered even though there was no prohibition in the collective bargaining agreement against work assignments outside of the railroad’s principal yard.

The *Shore Line* Court also determined that conditions described in collective bargaining agreements are “working conditions” subject to the RLA’s status quo provision. The status quo provision, however, is not limited to those conditions embodied in the agreements. The Court in *Shore Line* focused on the purpose of the status quo provision. The Court concluded that the policies behind the provision would not be served if the provision were not applied to all conditions existing at the time of the dispute, regardless of whether an existing collective bargaining agreement covered those conditions.

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72. *Id.* at 335, 342. The Supreme Court determined that a labor dispute existed as defined under the Norris-LaGuardia Act. The Court recognized that once the unions filed the section 156 notice contesting the abolishment of positions, the RLA’s bargaining provisions were implemented. *Id.* at 335-39; see *supra* note 5 (citing to Norris-LaGuardia Act). The Court’s analysis focused on the Norris-LaGuardia Act, which prevents district courts from granting injunctions to end labor strikes. 362 U.S. at 334-35. The Supreme Court concluded that the Norris-LaGuardia Act barred the district court from issuing an injunction against the strike where the dispute involved a major change affecting jobs under an existing collective bargaining agreement. *Id.* at 341-42.


74. *Id.* at 152-53. The status quo provision “extends to those actual, objective working conditions out of which the dispute arose.” *Id.* at 153.

75. *Id.* at 154.

76. *Id.* The Court reasoned that “where a condition is [satisfactory] to both sides, it is often omitted from the agreement.” *Id.* at 155.

77. *Id.* at 153.

78. *Id.*

79. *Id.*
II. MANAGEMENT'S PREROGATIVE TO GO OUT OF BUSINESS: APPLICATION TO THE RAILROAD INDUSTRY

A. Applying Management's Prerogative to Go Out of Business to the Railroad Industry

In labor disputes involving employees protected under the National Labor Relations Act (NLRA), the Supreme Court has ruled that management has the prerogative to go out of business without triggering the bargaining provisions of the NLRA. The Supreme Court has never applied this management prerogative to employees protected by the RLA. Nevertheless, the Court in Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co. concluded that analogies may be drawn from the NLRA to the RLA to determine the rights of railroad employees.

Trainmen involved a dispute arising under the RLA's status quo provision. In Trainmen, the Florida East Coast Railway and the labor union representing Florida East Coast's employees had exhausted the RLA's bargaining procedures, yet failed to reach an agreement regarding the proposed change in working conditions. Florida East Coast, however, implemented the changes. The workers then went on strike, picketing Florida East Coast and conducting a secondary picket against businesses providing services to the railroad. The secondary picket attempted to force businesses to

80. See generally First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 686 (1981) (concluding that an employer has the right to close down part of his business "purely for economic reasons" without having to negotiate with the unions); Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 268 (1965) (holding that an employer "has the absolute right to terminate his entire business for any reason he pleases, but . . . such right [does not include] the ability to close part of a business no matter what the reason") (emphasis added).

81. In determining that an employer has the prerogative to go out of business without first bargaining with the unions, the Supreme Court stated:

Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. Other management decisions, such as order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively 'an aspect of the relationship' between employer and employee. . . . [A] third type of management decision . . . [has] a direct impact on employment . . . [and has] as its focus only the economic profitability of the [business].

First National, 452 U.S. at 676-77 (citations omitted) (quoting Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971)).

83. Id. at 377.
84. Id. at 371.
85. Id.
86. Id.
87. Id. at 371-74.
discontinue working with Florida East Coast. Florida East Coast obtained an injunction from the state court prohibiting the secondary picketing. The Florida District Court of Appeals affirmed, and the Supreme Court granted certiorari to decide the states power to regulate secondary conduct.

In deciding *Textile Workers*, the Supreme Court first established the applicability of federal law. The Court then analyzed the statutory provisions of the RLA and determined that neither the Act nor the courts had developed any meaningful standards for determining whether secondary picketing was protected conduct. Therefore, the Court used case law developed under the NLRA and examined the policies behind the Act to conclude that secondary picketing was a protected activity. The Court, however, refused to import the whole context of labor law developed under the NLRA into the railway labor arena. Thus, the issue of when to apply law developed under the NLRA to a dispute arising under the RLA remains unsettled.

B. The Court's Justifications for Management's Prerogative to Go Out of Business under the NLRA

In disputes arising under the NLRA, the Supreme Court has allowed employers to go out of business without imposing the duty to bargain with the unions over the decision. The Court has justified these decisions by recognizing management's prerogative to cease business operations. In *Textile Workers*, during the strike the employees picketed various locations where Florida East Coast conducted business, including the Jacksonville terminal. Employees at the Jacksonville terminal provided various services to Florida East Coast including switching, signalling, track maintenance and repairs on the railroad's cars and engines. The picketers at the Jacksonville terminal picketed almost all entrances to the terminal, not just the terminal reserved for Florida East Coast's employees. These picketers urged Jacksonville's employees not to cross the picket line.

A secondary boycott affects a third party who is not involved in the labor dispute. At the Jacksonville terminal's request, the circuit court granted an injunction to stop the picketing at all terminal entrances except where Florida East Coast specifically conducted business. The basis for the injunction was a state law which prohibited secondary boycotts.

The Court determined that the "exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the [RLA's] processes." The standard that the Court used was whether the secondary boycott was "within the general penumbra of conduct held protected under [the NLRA] or whether it [was] beyond the pale of any activity thought permissible." The Court concluded that "if Congress should now find that abuses in the nature of secondary activities have arisen in the railroad industry, it might well decide . . . that this field requires extraordinary treatment of some sort."
Workers Union of America v. Darlington, the Supreme Court ruled that an employer had the right to terminate his business for any reason, provided that the employer was not transferring his work to another plant or opening a new plant to replace the closed plant. Darlington involved a family-owned business that operated several textile mills, including the Darlington mill. When the employees of the Darlington mill voted to unionize, the employer closed the mill claiming that the union's demands for higher wages would make it impossible for the mill to operate competitively. Once the mill was closed, operations at the plant ceased and the employer sold the capital assets. The employer did not seek to reopen the mill with nonunion employees. The Darlington Court recognized that the employer's decision to close down its business terminated the employer-employee relationship. Therefore, the Court held that the employer did not have a duty to bargain with the employees' union about the closing.

The Court's decision in First National Maintenance Corp. v. NLRB reaffirmed management's prerogative to go out of business. In First National, the Court held that an employer's right to close its business for economic reasons outweighed any benefit that might be gained by allowing the unions to bargain with the employer regarding the decision to close down. First National involved a company that contracted with a nursing home to provide housekeeping and maintenance services. When the nursing home

95. Id. at 272-74. The Court further stated that "[a] proposition that a single business-man cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act." Id. at 270.
96. Id. at 265.
97. Id. at 266. The president of Darlington testified that all hopes of achieving competitive costs and taking full advantage of the new machinery that had just been installed diminished when the employees unionized. Id.
98. Id.
99. Id. at 272-73.
100. Id. at 274. The Court stated that the "closing of an entire business, even though discriminatory [based on anti-union animus], ends the employer-employee relationship." Id.
101. Id. The Court clarified its position stating that "[n]othing we have said in this opinion would justify an employer's interfering with employee organizational activities by threatening to close his plant, as distinguished from announcing a decision to close already reached by the board of directors or other management authority empowered to make such a decision." Id. at 274 n.20.
103. Id. at 686. The Court articulated a balancing test stating "that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." Id.
104. Id. at 668.
reduced the weekly fee paid to First National for its services, the company began losing money on the contract. Consequently, First National notified the nursing home that unless the home reinstated the original fee, the company would cease operations at the home. Two weeks before First National ceased working at the nursing home, the employees' union notified First National that the company had a duty to bargain with the union over management's decision to go out of business. Management, however, failed to bargain with the union before discontinuing performance on the nursing home contract. The union then filed an unfair labor practice claim against First National.

In holding that First National did not have to bargain with the employees' union before going out of business, the Supreme Court announced a balancing test for determining when management must bargain with the unions over the decision to shut down part of its business. In determining whether to impose the duty to bargain, this test looks at the harm likely to be done to the employer and weighs it against the benefit to the employees and the collective bargaining process. One commentator believes that the First National Court did not impose bargaining in closing situations because the Court feared that the unions would use bargaining as a tool to delay management decisions and to prevent management from realizing its legitimate business objectives.

The Court's decisions in First National and Darlington indicate that management should be free from bargaining constraints when making decisions regarding a company's continued existence. Both of these decisions, however, involve the application of management's prerogative to go out of business within the context of the NLRA. As the Court noted in Trainmen, decisions under the NLRA cannot be applied wholesale to controversies

105. Id. at 668-69.
106. Id. at 669.
107. Id.
108. Id. at 670.
109. Id.
110. Id. at 686; see supra note 103. This test requires bargaining over management decisions that have a "substantial impact on the continued availability of employment" if the benefit to labor "outweighs the burden placed on the conduct of the business." 452 U.S. at 679.
111. 452 U.S. at 686. In balancing these interests, the Court examines an employer's need for unencumbered decisionmaking, his desire to cut labor costs and whether there was a capital investment and weighs these factors against the effect of the company's decision on its employees. Id. at 679-80.
112. Irving, Closing and Sales of Businesses: A Settled Area?, 33 LAB. L.J. 218, 222 (1982). By imposing bargaining in closing situations, the unions could prevent a company from going out of business or make it so costly for a company to go out of business that it would be forced into bankruptcy. Id. The NLRB has tried to limit the decision in First National to its facts. Id. at 226.
arising under the RLA.\textsuperscript{113} Thus, special concerns must be addressed before railroad management can freely exercise its prerogative to go out of business. In particular, railroad employees have historically been accorded special treatment under the RLA because of the need for free flowing interstate commerce.\textsuperscript{114}

The Staggers Act exemption amendments created a new regulatory environment for the railroad industry. These amendments eliminated the need for companies acquiring rail lines to obtain Commission approval and made the railroad industry more economically competitive with other modes of transportation. The Supreme Court, in \textit{Pittsburgh \& Lake Erie Railroad v. Railway Labor Executives' Association}, considered whether management's prerogative to go out of business should be recognized in the modern railroad industry.

### III. \textit{Pittsburgh \& Lake Erie Railroad v. Railway Labor Executives' Association—The Duty to Bargain Versus the Right to Go Out of Business}

In \textit{Pittsburgh \& Lake Erie Railroad v. Railway Labor Executives' Association},\textsuperscript{115} the Supreme Court analyzed whether railroad management should have the prerogative to go out of business. The dispute in \textit{Pittsburgh \& Lake Erie} arose when P&LE decided to sell its assets and go out of business after operating at a loss for five years.\textsuperscript{116} P&LE sold its track and trackage rights to the Pittsburgh and Lake Erie Rail Company (Railco).\textsuperscript{117} Railco decided to decline the collective bargaining contracts that P&LE had with the unions and to reduce the work force by 500 employees.\textsuperscript{118} When P&LE's unions were notified of the impending sale, the unions asserted that the sale was subject to the RLA's bargaining provisions.\textsuperscript{119} P&LE's unions argued that the RLA's provisions governed because the sale affected the job security of

\textsuperscript{113} See supra notes 90-93 and accompanying text.

\textsuperscript{114} See supra notes 50-63 and accompanying text (discussing the general provisions of the RLA).

\textsuperscript{115} 109 S. Ct. 2584 (1989).

\textsuperscript{116} Id. at 2588. Prior to the sale, P&LE had attempted to improve the railroad's financial condition by reducing the work force, making concessions with its employees, and attempting market expansion. Id. These efforts to improve the railroad's financial condition failed. Id. The reasons for P&LE's losses included: The reduction in railroad regulation which favored the major railroads; the closing of rail shippers, such as steel mills, on P&LE's lines; and increased competition from trucking companies. Brief for Petitioner at 3, \textit{Pittsburgh \& Lake Erie R.R. v. Railway Labor Executives' Ass'n}, 109 S. Ct. 2584 (1989) (Nos. 87-1589 and 87-1888).

\textsuperscript{117} \textit{Pittsburgh \& Lake Erie}, 109 S. Ct. at 2588.

\textsuperscript{118} Id.

\textsuperscript{119} Id.; see supra text accompanying notes 50-63.
500 employees. P&LE, however, refused to bargain with the unions over
the effects of the sale because P&LE believed that the transaction was within
the Commission’s jurisdiction and governed by the ICA’s exemption
procedure.

Pursuant to the RLA, the unions filed section 156 notices proposing
changes to the existing collective bargaining contracts which would lessen
the adverse impact of the sale on P&LE’s employees. P&LE again
declined to bargain with the unions. The Railway Labor Executives’ Asso-
ciation (RLEA), on behalf of P&LE’s unions, then filed suit against the
railroad in the United States District Court for the Western District of Penn-
sylvania. The RLEA sought both a declaratory judgment to determine
P&LE’s bargaining obligations under the RLA, and an injunction against
the sale of the railroad until P&LE fulfilled its duty to bargain. In addi-
tion, the unions went on strike, protesting P&LE’s refusal to bargain over
the effects of the sale. P&LE filed for a restraining order against the
strike, which was subsequently denied by the district court. Railco, a
noncarrier, then filed a notice of exemption with the Commission to exempt
it from the formal approval provisions of the ICA. The exemption be-
came effective almost immediately. The Commission allowed the exemp-
tion to become effective despite the unions’ request for revocation. P&LE
then reapplied to the district court for a temporary restraining order against
the strike. This time, the district court granted P&LE’s request for a re-
straining order. The district court held that once the Commission had
approved the sale, P&LE no longer had any bargaining obligations under the
RLA.

The unions appealed to the United States Court of Appeals for the Third
Circuit, which summarily reversed and remanded the case to the district

court.

120. Pittsburgh & Lake Erie, 109 S. Ct. at 2588.
121. Id. at 2589.
122. Id.
123. Id. at 2589-90.
124. Id. at 2590.
125. Id.
126. Id.
127. Id. The district court denied P&LE’s request for a restraining order against the strike
on grounds that the Norris-LaGuardia Act forbade it from exercising its power in a labor
dispute. Id.
128. Id. at 2591.
129. Id.; see supra note 42.
130. Pittsburgh & Lake Erie, 109 S. Ct. at 2591. The unions did not seek labor protective
provisions pursuant to the Commission’s authority under section 10901. Id.
131. Id.
132. Id.
133. Id.
Labor Law

On remand, the district court was instructed to consider whether either the sale of P&LE or the labor strike violated the RLA. The district court determined that although P&LE did not have a duty to bargain about the decision to sell, the RLA required P&LE to bargain with the unions over the effects of the sale on the employees. Furthermore, the district court found that the sale was incomplete until P&LE met this bargaining obligation. The Third Circuit subsequently affirmed the district court's decision regarding P&LE's duty to bargain with the unions. The United States Supreme Court granted certiorari to decide whether to stay the sale of P&LE until the railroad fulfilled the RLA's bargaining obligations.

The Court's analysis in Pittsburgh & Lake Erie sought to give effect to the provisions of the ICA and the RLA. Although the Court's conclusions complied with the provisions and purposes of the ICA, the decision failed to implement fully the RLA's provisions. Implicit in the Court's analysis was the realization that if the Court strictly followed the RLA's provisions, it would not carry out the purposes underlying the ICA amendments. Therefore, P&LE and other insolvent railroads would be prevented from going out of business. If these railroads are required to bargain with labor unions before going out of business, railroads will be unable to compete with other modes of transportation whose employees fall within the NLRA because the NLRA does not impose a similar duty to bargain.

A. The Majority Opinion: Deregulating Employment Relationships

The majority opinion, written by Justice White, analyzed the RLA's status quo provision to determine whether that provision required P&LE to issue section 156 notices to the unions apprising them of the sale. Justice White determined that P&LE had no such duty because there was no express or implied agreement between P&LE and the unions prohibiting P&LE from going out of business or selling its assets. Moreover, there was

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134. Id. at 2592.
135. Id.
136. Id.
137. Id.
138. Id.
140. 109 S. Ct. at 2596.
141. Id. at 2597.
142. These amendments were enacted to create a more competitive and profitable railroad industry. See supra notes 41-48 and accompanying text.
143. See infra notes 191-99 and accompanying text (discussing the confrontation between the RLA and the ICA).
144. See supra notes 94-114 and accompanying text.
no agreement requiring P&LE to provide labor protections if it did go out of business or sell its assets. Justice White then considered whether the status quo provision required P&LE to bargain regarding the effects of the sale on the employees. Again, he relied on the fact that no express or implied agreement existed between P&LE and the unions requiring management to provide labor protections if it went out of business. He concluded that there was neither a basis for requiring P&LE to issue a section 156 notice to the unions informing them of the proposed sale, nor a reason for imposing bargaining obligations on management.

Justice White then rejected the RLEA's argument that the working conditions subject to the status quo provision were those existing at the time the unions filed their section 156 notice. The RLEA asserted that, under the Supreme Court's decision in Shore Line, the working conditions existing at the time the unions issued their section 156 notice included the relationship of employer-employee and the state of being employed. In rejecting the RLEA's argument, Justice White narrowed the effectiveness of the Court's decision in Shore Line. Specifically, Justice White stated that the Shore Line decision extended the language of section 156 to the "outer limits," and that Shore Line should not apply indiscriminately to all situations involving railway labor disputes. He also distinguished the decision in Shore Line, on the basis that Shore Line did not involve a railroad's decision to sell its assets and cease operations as a railroad. Rather, Justice White noted that the practice at issue in Shore Line was a working condition subject to the RLA's status quo provision because it had been an "unquestioned practice for many years."

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146. Id. at 2593. P&LE was proposing to cease operations as a railroad employer. Id. The Supreme Court noted that the RLEA did not explain how P&LE's decision to go out of business would violate the collective bargaining agreements or require changing those agreements. Id.

147. Id. at 2592.

148. Id. at 2592-93. Justice White relied on Justice Harlan's dissent in Shore Line to define how implied agreements between a railroad and its unions may arise. Quoting from Shore Line, Justice White acknowledged that within the "'context of the relationship between the principals, taken as a whole, there [may be] a basis for implying an understanding on the particular practice involved.'" Id. at 2593 (quoting Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 160 (1969)).

149. Id. at 2593.

150. Id. at 2593-94.

151. Id. at 2593.

152. Id. at 2594.

153. Id.

154. Id. See supra notes 73-79 and accompanying text (discussing the Supreme Court's decision in Shore Line).
Once Justice White concluded that the *Shore Line* analysis was inapplicable to the facts of *Pittsburgh & Lake Erie*, he turned to the Supreme Court's decisions in *Darlington* and *First National*. Reasoning from those cases, Justice White determined that management's prerogative to go out of business should be recognized in the railroad industry absent statutory direction to the contrary.\(^ {155} \) Using the principles developed in *Darlington* and *First National*, Justice White determined that a railroad's decision to go out of business was not a change in the status quo protected by the RLA.\(^ {156} \) By going out of business, Justice White concluded, P&LE would no longer be a railroad employer and, therefore, would have no duties under the RLA.\(^ {158} \)

Justice White completed his analysis of P&LE's duty to bargain with the unions by focusing on the relationship between the RLA and the ICA. He determined that while the ICA required Railco to satisfy the exemption requirements, nothing in either the ICA or the RLA prevented P&LE from completing the sale immediately.\(^ {159} \) Thus, Justice White concluded that the Commission had, in effect, approved the sale of P&LE by allowing the exemption filed by Railco to become effective.\(^ {160} \)

In analyzing the ICA within the context of the P&LE sale, Justice White sought to avoid interpreting the ICA in a way that would conflict with the RLA.\(^ {161} \) He stated that the Court's policy, when confronted with two potentially conflicting federal statutes, was to "give effect to each if [possible]

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\(^ {155} \) *Pittsburgh & Lake Erie*, 109 S. Ct. at 2595-96; see *supra* notes 94-112 and accompanying text (examining the development of management's prerogative to go out of business developed under the NLRA).

\(^ {156} \) See *supra* notes 94-112 and accompanying text. The *Pittsburgh & Lake Erie* Court recognized management's prerogative to go out of business, stating:

[T]he decision to close down a business entirely 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.

109 S. Ct. at 2595-96.

\(^ {157} \) *Pittsburgh & Lake Erie*, 109 S. Ct. at 2596. Justice White declared that "[a]bsent statutory direction to the contrary, the decision of a railroad employer to go out of business and consequently to reduce to zero the number of available jobs is not a change in the conditions of employment forbidden by the status quo provision of § 156." *Id.*

\(^ {158} \) *Id.* Justice White stated that "where the agreement is silent on the matter and the railroad employer has proceeded in accordance with the ICA... there is little or no basis for the unions to expect that a § 156 notice would be effective to delay the company's departure from the railroad business." *Id.*

\(^ {159} \) *Id.*

\(^ {160} \) *Id.*

\(^ {161} \) *Id.*
while preserving their sense and purpose.' Yet, by not imposing labor protections on P&LE, Justice White gave effect to the sense and purpose of the ICA amendments, but failed to implement fully the sense and purpose of the RLA.

Although Justice White held that P&LE did not have a duty to serve section 156 notices on the unions, he concluded that P&LE did have a limited duty to bargain, at least to the extent that P&LE could satisfy the unions' demands concerning the effects of the sale on the employees. Justice White noted that at the time the unions' section 156 notices were served, P&LE's decision to sell, and the terms of the sales agreement between P&LE and Railco, were settled. Justice White concluded that P&LE was under no obligation to bargain about the previously negotiated terms. Accordingly, Justice White asserted that P&LE was only required to bargain about those issues which P&LE, itself, could satisfy. Under Justice White's analysis, the bargaining obligation existed until the exemption, filed with the Commission, became effective.

B. The Dissent: Advocating the Continued Regulation of the Railroad

Justice Stevens, writing for the dissent in Pittsburgh & Lake Erie, adopted a historical approach in his analysis of P&LE's duty to bargain with the labor unions over the railroad's decision to go out of business. He focused initially on the railroad industry's regulated past, discussing the enactment of ICA and the establishment of the Commission. Justice Stevens then addressed the subsequent regulation of railroad employment relationships under the RLA. He noted that for sixty years after the adoption of the

162. Id. (quoting Watt v. Alaska, 451 U.S. 259, 267 (1981)). The Court further stated that it is "not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Id. (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).
163. Id. at 2597.
164. Id.
165. Id. The unions could not "change or dictate the terms of the sale" or challenge the decision to sell because these terms had already been negotiated. Id.
166. Id. at 2597. P&LE's duty to bargain about the effects of the sale existed only with regard to the facts existing at the time the unions' section 156 notices were served. Id. at 2597 n.19. The Court did not address the issue of whether a railroad employer has a duty to bargain with a union in response to the union's section 156 notice "proposing labor protection provisions in the event that a sale, not yet contemplated, should take place." Id.
167. Id.
168. Id. at 2599 (Stevens, J., dissenting). The dissent disagreed with the majority's decision only with respect to the railroad's duty to bargain with its employees under the RLA. Id. at 2603.
169. Id. at 2599.
RLA, when railroad management sought to terminate its relationship with the employees, management had to complete a protracted process to obtain the Commission’s approval. Moreover, approval of the sale was frequently conditioned on the railroad’s acceptance of job protection or severance pay for all affected employees.

Justice Stevens acknowledged that after the Commission announced that labor protections would no longer be imposed on employers during the sale of shortline railroads, collective bargaining agreements became the tool unions used to obtain labor protection provisions. Whereas employment contracts are altered by renegotiation, Justice Stevens stated that rail labor agreements are generally altered only by notification under section 156 of the RLA. Thus, he determined that P&LE’s unions were reasonable in seeking to amend the collective bargaining agreements to include labor protection provisions once P&LE’s plans to sell the railroad became known. Unlike Justice White, Justice Stevens believed that once the unions sought labor protection provisions, P&LE had a duty to maintain the status quo until the dispute was resolved.

In supporting the contention that P&LE had a duty to bargain with the unions over the effects of the sale, Justice Stevens relied on the Supreme Court’s decisions in Railroad Telegraphers and Shore Line. Justice Stevens utilized Railroad Telegraphers to illustrate that “job security is a proper subject for bargaining under the RLA.” His analysis did not distinguish between a partial abandonment of a rail station and a sale of a railroad because, in both instances, employees lost their jobs.

Justice Stevens also disagreed with Justice White’s refusal to apply Shore Line to the facts of Pittsburgh and Lake Erie. Justice Stevens declared it reasonable for the railroad employees’ jobs to be included among the work-

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170. Id.; see supra note 39 (discussing the prior approval process under the ICA).
171. Pittsburgh & Lake Erie, 109 S. Ct. at 2599 (Stevens, J., dissenting).
172. Id. at 2600; see supra notes 41-48 and accompanying text (discussing the Staggers Act exemption amendments to the ICA).
173. Pittsburgh & Lake Erie, 109 S. Ct. at 2600 (Stevens, J., dissenting).
174. Id.
175. Id.
176. Id.
177. Id. at 2601; see supra notes 67-72 and accompanying text (discussing the court’s decision in Railroad Telegraphers).
178. Pittsburgh & Lake Erie, 109 S. Ct. at 2601 (Stevens, J., dissenting); see supra notes 73-79 and accompanying text (discussing the Shore Line analysis).
179. Pittsburgh & Lake Erie, 109 S. Ct. at 2601 (Stevens, J., dissenting).
180. Id. at 2602.
181. Id. at 2601-02; see supra text accompanying notes 150-54 (examining Justice White’s refusal to apply the Shore Line analysis in Pittsburgh & Lake Erie).
Moreover, Justice Stevens believed that *Shore Line* controlled the decision in *Pittsburgh and Lake Erie* because both disputes arose out of changes in established procedure. He also noted that the Court's decision in *Shore Line* rejected the idea that the term "working conditions" applied only to those conditions expressly included in collective bargaining contracts. Therefore, Justice Stevens declared that the RLA commanded P&LE to bargain with the unions regarding the effects of the sale. Justice Stevens summarily dismissed the application of the Court's decisions in *Darlington* and *First National* to the facts of *Pittsburgh & Lake Erie* because both *Darlington* and *First National* involved unregulated industries.

The Court's decision in *Pittsburgh & Lake Erie* highlights the tension between the ICA and the RLA. The majority's decision subordinated the RLA's status quo provisions to the ICA's exemption provisions and, as a consequence, permitted railroad management the prerogative to go out of business. Conversely, the dissent maintained that the RLA bargaining provisions controlled and, therefore, management prerogative to go out of business had no place in the railroad industry. As the majority and dissenting opinions illustrate, whether railroad management possesses the prerogative to go out of business depends on which statute controls when a railroad decides to terminate its operations.

IV. THE HIDDEN TENSION BETWEEN THE ICA AND THE RLA

A. Balancing the Interests of Labor and Management—Management's Prerogative to Go Out of Business Prevails

The majority's decision in *Pittsburgh & Lake Erie* is significant because it permits railroad management the prerogative to terminate business operations. The majority's decision recognized that the railroad industry is a competitive business. The majority concluded that the railroad industry should not be subject to extensive regulation which might stifle railroad management's ability to make prudent business decisions.

The majority's decision, however, failed to recognize that its analysis gave priority to the ICA over the RLA. The majority analyzed the facts giving

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183. *Id.* at 2602.
184. *Id.* at 2601.
185. *Id.* at 2602.
186. *Id.* at 2602-03.
187. *See supra* notes 161-67 and accompanying text (discussing the majority's opinion in *Pittsburgh & Lake Erie*).
188. *See supra* text accompanying notes 145-67.
rise to the dispute in light of the ICA exemption provisions and the purposes behind those provisions. In contrast to the majority's in depth examination of the ICA, the majority never analyzed the dispute in terms of the RLA's purposes. The majority focused only on the RLA's status quo and bargaining provisions. As a result, the majority failed to reconcile the ICA exemption amendments with the RLA's statutory provisions.

Congress enacted the 1980 ICA amendments to "streamline[e] procedures to effectuate economically efficient transactions." In 1926, however, when Congress passed the RLA, it had different concerns. The RLA was passed to promote collective bargaining in the railroad industry, and to avoid unnecessary strikes and interruptions in interstate commerce. Although by their terms these statutes do not conflict, occasionally their purposes have been incompatible. For example, as the dissent noted in Pittsburgh & Lake Erie, the Court had previously determined that job security is a condition triggering the RLA's status quo provisions.

Moreover, the RLA specifically states that wages are a working condition to which the RLA's status quo provision applies. Logically, a reduction in the job force will result in reduced wages for those affected employees. Consequently, it is likely that railroad management's failure to bargain with the employees' unions over changes in employment status could result in strikes and subsequent interruptions in interstate commerce. Therefore, the Court's recognition, in Pittsburgh & Lake Erie, of railroad management's prerogative to go out of business, without requiring management to bargain with the unions, could induce railway labor unions to use strikes as a means to defeat management's decision to sell.

This possible consequence of Pittsburgh & Lake Erie runs afoul of the purposes behind the RLA bargaining provisions. If continued employment had been interpreted in Pittsburgh & Lake Erie as a working condition trig-

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189. Id.
190. See supra notes 161-167 and accompanying text (discussing the majority's reconciliation of the RLA and the ICA).
193. Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330, 336 (1960). The Telegraphers Court disagreed with the court of appeals' findings that the unions' efforts to negotiate job security was "an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations." Id. (quoting Chicago & N.W. Ry. v. Order of R.R. Telegraphers, 264 F.2d 254, 259 (7th Cir. 1959)).
194. See supra notes 54-57 and accompanying text.
giving the RLA’s status quo provision, then P&LE would have been obligated to serve section 156 notices on the unions and to bargain about the effects of the sale. Although this result would have satisfied the RLA’s statutory provisions as well as the RLA’s purposes, it would have ignored the purposes underlying the ICA exemption amendments. If railroad management were required to bargain regarding the decision to sell, even in the absence of an agreement between management and the unions requiring bargaining, then the time-consuming negotiating process might destroy the only chance that an insolvent railroad has for survival.

The majority’s decision promotes the financial viability of the railroad industry by allowing management a limited prerogative to go out of business. By not imposing the RLA’s bargaining provisions on P&LE, however, the majority decided which statute should govern. That decision is one more appropriately left to the legislature.

In contrast, the dissent followed the preamendment decisions in Railroad Telegraphers and Shore Line, and ignored the primary goals of the ICA exemption amendments. Moreover, the dissent failed to perceive management’s need for flexibility when making decisions regarding the railroad’s continued existence. Consequently, the dissent refused to recognize the concept of a management prerogative to cease business in the railroad industry.

B. Finding the Balance: A Congressional Decision

In Pittsburgh & Lake Erie, the Court was forced to resolve an issue based on the RLA, a statute enacted in 1926, when the railroad industry was very different from the current industry. When the RLA was enacted, the railroad was important to the nation’s economy both as the predominant mode of interstate transportation and as a significant component of national de-

195. See supra notes 64-78 and accompanying text (discussing the RLA’s status quo provision).
196. Id.
197. See supra notes 41-48 and accompanying text.
198. Pittsburgh & Lake Erie, 109 S. Ct. at 2602 (Stevens, J., dissenting) (citing the court of appeals’ findings).
199. See supra text accompanying notes 155-58 (focusing on the majority’s application of Darlington and First National to the facts of Pittsburgh & Lake Erie).
200. See supra notes 67-79 and accompanying text (examining the decisions in Railroad Telegraphers and Shore Line).
201. See supra notes 41-48 and accompanying text.
202. The dissent views the railroad industry as heavily regulated and, therefore, sees no role for management prerogative. Pittsburgh & Lake Erie, 109 S. Ct. at 2602-03 (Stevens, J., dissenting).
fense. Therefore, any interruption in the operation of the railroads was viewed with trepidation because of the possible effects on the nation’s economy and security.

The contemporary railroad industry, however, must compete with other transportation industries such as trucking, barge, and airline. A labor strike by railroad employees today would not have the paralyzing effect on the nation’s economy that such a strike would have had in 1926, when other modes of transportation were not yet economically efficient. Moreover, because other types of deregulated and unregulated transportation exist, the management of these competing industries can make business decisions without the encumbrances regulation imposes. Consequently, for railroads to be competitive, railroad management must be able to make economically efficient decisions, or else be forced out of business. The ICA exemption amendments were designed to create an efficient, economically competitive railroad industry. The achievement of the goals behind the ICA exemption amendments, however, are impeded by the RLA which imposes bargaining obligations whenever railroad management attempts to change the employees’ rates of pay, rules, or working conditions.

The Court’s decision in *Pittsburgh & Lake Erie* illuminates the historical limitations inherent in the RLA. In particular, the Court’s decision highlights the need for Congress to update the provisions of the RLA in light of the recent amendments to the ICA. Perhaps the RLA could be updated to resemble the NLRA. Until Congress acts, courts are destined to interpret the RLA and the ICA in an inconsistent manner, determining for themselves which provisions and which policies should apply.

V. Conclusion

The ICA exemption amendments enacted in 1980 have restructured the railroad industry by decreasing the extent of regulation over railroad acquisitions. The ICA no longer requires the Commission to impose labor protections in transactions involving the acquisition of a railroad. The RLA’s status quo provisions impose a duty on railroad management to bargain with respect to labor protections once a section 156 notice is filed. This provision offsets the ICA’s liberal stance toward labor protections in acquisitions. The Supreme Court attempted to reconcile the tension between the ICA’s exemption provisions and the RLA’s bargaining provisions in *Pittsburgh & Lake
Erie. The Court in Pittsburgh & Lake Erie gave priority to the purposes underlying the ICA’s exemption amendments over the purposes behind the RLA.

The decision in Pittsburgh & Lake Erie focused on whether a railroad employer that is selling its assets and going out of business must bargain with the unions regarding either the decision to sell or the effects of the sale. The Supreme Court determined that, absent an agreement to the contrary, the employer had no duty to bargain with the unions over the decision to sell. To reach this result, the Court applied the concept of management prerogative to the railroad employer’s decision to go out of business. The Court, however, concluded that the employer had a limited duty to bargain with the unions over the effects of the sale. This limited duty existed only with respect to those union demands that the railroad employer could satisfy and lasted only until the exemption became effective.

The Court’s decision in Pittsburgh & Lake Erie, continued the trend toward deregulation of the railroad industry. Today, absent an express or implied agreement to the contrary, a railroad employer does not have a duty to bargain with union employees when going out of business. The continued regulation of employment relationships, however, hampers the railroad employer’s ability to operate competitively. Congress has maintained the RLA since 1926, presumably intending to ensure some protection to railroad labor. Yet, the adoption of the ICA amendments indicates that Congress has realized that the imposition of labor protections in certain situations is costly and burdensome to the railroad industry. Whether railroad labor should continue to be regulated by the RLA in light of the ICA amendments is a question Congress must confront.

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