LABOR LAW—THE RAILWAY LABOR ACT: THE EMPLOYEE'S RIGHT TO MINORITY UNION REPRESENTATION AT COMPANY-LEVEL GRIEVANCE HEARINGS

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INTRODUCTION

Congress passed the Railway Labor Act (RLA)1 in 1926 after a long period of instability in relations between labor and management in the railroad industry. The Act represented a fiercely negotiated compromise among competing interests: the labor unions' interest in preserving fair wages and working conditions, the railroads' interest in carrying on profitable businesses, and the congressional interest in protecting the flow of interstate commerce.

In keeping with one of the RLA's primary purposes of strengthening the unions vis a vis the railroads, its drafters included provisions intended to preserve the "exclusive representative" status of a union selected as bargaining agent by the majority of a group of employees. Another concept expressly espoused by the RLA is the prohibition against "any limitation upon freedom of association among employees."2 These two principles are simultaneously realized in the more common circumstance of an employee who is a voluntary member of

the majority union and who seeks representation by the majority union in either collective bargaining or grievance settling proceedings.

A conflict arises between the two principles, and between their respective supporting statutory provisions, however, in the case of a non-union or minority union employee who seeks representation by a minority union. While the statute clearly extends representation authority only to the majority union in collective bargaining, provisions delineating the rights of individual employees to their choice of representation in grievance matters, particularly at company-level proceedings, are equivocal and subject to contrary interpretations. Before the 1988 Supreme Court decision in Landers v. National Railroad Passenger Corp., several federal courts of appeals and district courts considered the right of an individual employee to be represented by a minority union at a company-level grievance hearing. Faced with uncertain statutory language, the courts split evenly on the question of whether such a right exists. Some courts decided that the employee has an undeniable right under the RLA to invoke minority union representation. Others found that the collective bargaining agent, as selected by the majority of employees, exercises the prerogative, through the collective bargaining agreement, over when or whether an employee may be represented by a minority union before a company-level proceeding.

Through Landers, the Supreme Court sought finally to resolve the conflict among the lower courts. The Court concluded that the RLA does not entitle a railroad employee to representation by a union other than the collective bargaining agent at company-level grievance or disciplinary proceedings. Landers adopted the view that, in the context of company-level proceedings, the RLA requires that the majority union's interest in preserving its exclusive representative status prevail over the individual employee's right to choose a representative, despite statutory language protecting both interests.

While the Landers interpretation of the RLA favors the majority union, the alternative interpretation considered and rejected by the Landers Court indulges the individual employee. Like the lower courts before it, the Supreme Court did not recognize a middle ground. This note suggests a third interpretation which secures the

5. For case citations, see infra notes 85, 89-101 and accompanying text.
6. For case citations, see infra notes 84, 102-33 and accompanying text.
representation interests of both the majority and the individual. Company-level grievance procedures can be implemented to recognize limited minority union representation rights while preserving majority union participation if the claim in question impacts the future of the majority of employees. Such a representation scheme strikes the careful balance mandated by the spirit and letter of the Railway Labor Act.

Part I of this note examines the historical roots of railway labor legislation leading to the RLA’s enactment. After identifying the statute’s “right to representation” provisions, Part I discusses the difficulties, resulting from ambiguity, of applying these provisions in the context of grievance and disciplinary proceedings at the company level. Part II reviews the longstanding conflict among the federal courts interpreting these provisions, focusing on the rationales of the United States Courts of Appeals for the Fifth and First Circuits in the recent cases of Taylor v. Missouri Pacific Railroad\(^8\) and Landers v. National Railroad Passenger Corp.\(^9\) respectively. Part II then examines the Supreme Court’s approach in Landers.

Part III observes that while the courts denying minority union representation, including the Supreme Court in Landers, have based their decisions on persuasive statutorily-based arguments focusing on the majority union’s need to preserve its exclusive representative status, decisions permitting such representation have been no less persuasive and no less consistent with the statute in citing provisions protecting the individual employee’s right to choose a representative. Part III notes that the Landers Court fails to explain fully its disapproval of the rationales of Taylor and other decisions supporting Taylor. Finally, Part III suggests that the RLA’s statutory construction, with language protecting the interests of both the majority union and the individual employee, might best be served by a mechanism striking an equitable balance between the two interests. While the Taylor interpretation ignores the exclusive representation provisions of the statute, the Supreme Court’s Landers decision similarly overlooks the individual employee’s statutory right to choose a representative.

Part IV suggests the application, by analogy, of the principles expounded by the Supreme Court in the 1946 case of Elgin, Joliet &

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\(^8\) 794 F.2d 1082 (5th Cir.), cert. denied, 107 S. Ct. 670 (1986). For a discussion of Taylor, see infra notes 89-101 and accompanying text.

\(^9\) 814 F.2d 41 (1st Cir. 1987), aff’d, 108 S. Ct. 1440 (1988). For a discussion of the decision of the Court of Appeals for the First Circuit, see infra notes 102-33 and accompanying text.
EMPLOYEE'S RIGHT TO MINORITY REPRESENTATION

Eastern Railway v. Burley,10 which upholds the right of an individual employee to minority union representation at proceedings before the National Railroad Adjustment Board. In Part IV, this note suggests that the individual’s rights identified in Burley are also recognizable in the context of company-level proceedings. Finally, Part V proposes, in the absence of clarifying legislation, a statutory interpretation based on Burley which strikes a middle ground between Landers and Taylor and which allocates representation authority between the individual’s minority union and the collective agent based on the collective or individualized aspects of the asserted grievance.11

I. BACKGROUND

A. The Railroads and Labor Legislation: Evolution to the Railway Labor Act

Congress enacted the Interstate Commerce Act12 in 1887 in response to increasing public dissatisfaction with the railroad industry’s rate-setting practices. The statute achieved limited success in adequately regulating the railroads. Its passage, however, established, for the first time, congressional power to regulate aspects of the railroad industry critical to the national economy’s well-being.13 In Wabash, St. Louis & Pacific Railway v. Illinois,14 the Supreme Court paved the way for the congressional action by holding that only Congress could set the rates of any railroad in interstate commerce.15 The federal interest in railroad regulation under the “commerce clause”16 soon expanded beyond merely establishing railroad rates.17

Congress increasingly perceived railroad labor-management disputes as potentially interrupting the critically necessary national flow of commerce.18 A sequence of serious nationwide railroad strikes fi-

11. For an illustration of the steps in the proposed scheme, see infra note 239.
14. 118 U.S. 557 (1886).
15. Id. at 577 (overturning precedent vesting such power in the states).
17. RLA AT FIFTY, supra note 13, at 3.
18. Id.
nally led Congress to enact the Arbitration Act of 1888, the first legislative intervention in the resolution of railway labor disputes.

Although its provisions were never invoked before its repeal, the Arbitration Act presented significant new concepts to the area of labor relations. Besides representing the first federal intervention into the resolution of labor law disputes, the Arbitration Act introduced the concept of voluntary arbitration.

Railway workers and the unions favored the Arbitration Act. At the time, the railroads dominated the weaker labor organizations. The unions, therefore, welcomed legislation enhancing their bargaining position. The statute, while buttressing the unions, also recognized rights belonging to individual employees. It specifically identified "the right of any employees engaged in the controversy" to participate in the selection of their representatives in arbitration.

In 1894, President Cleveland invoked the governmental investigatory provisions of the Arbitration Act in an unsuccessful attempt to avert the Pullman strike. The Act’s failure stirred Congress to enact

21. Id. Under the Arbitration Act, both parties in a labor dispute could agree to submit the matter to a board of arbitrators. In addition, the Act granted to the President the power to appoint a temporary commission to investigate the labor controversy. The President could execute the power upon the request of the governor of a state, or by his or her own initiative. Id. at 56.
22. Id.
24. RLA AT FIFTY, supra note 13, at 5. The Pullman strike of 1894 arose out of the worsening economic and work conditions faced by employees of the Pullman Palace Car Company. S. LENS, THE LABOR WARS 87-88 (1973). In 1880, George M. Pullman, owner of the sleeping and dining car manufacturer, constructed a town south of Chicago so his workers could live in a single community near the plant. With the economic depression of the early 1890's, George Pullman imposed a "double squeeze" on his employees. Id. While reducing his work force substantially and cutting wages of remaining workers nearly thirty percent, id. at 88, Pullman refused to reduce rents and utility charges. Id. Contemplating a strike, a committee of employees appealed to the company for arbitration sessions. P. TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 150 (1964). After the company's refusal, the employees, acting through the American Railway Union, struck and called for a boycott of roads using Pullman cars. The boycott found rapid support among railway workers nationally and in five days resulted in the complete paralysis of the country's major railways. Id. at 151. When the railroads sought to circumvent the boycott by hiring replacement workers, violence erupted in Illinois. While President Cleveland invoked the investigatory provisions of the Arbitration Act to assess the problem, his Attorney General, Richard Olney, found adequate justification for more pervasive government intervention in the constitutionally delineated federal interest in interstate commerce. Id. at 152. Citing interference with the mails, Olney succeeded in obtaining broad injunctions proscribing obstruction of the railroads. When striking and boycotting employees refused to observe the injunctions, Olney found justification to increase the scope of federal intervention even
a successor statute, the Erdman Act of 1898. The new statute discarded the investigatory mechanism introduced by the 1888 Act. While retaining the voluntary arbitration provisions, its most significant feature was adopting mediation as a device for resolving railway labor disputes. The Erdman Act provided that either party in the dispute could request that the U.S. Commissioner of Labor and the Chairman of the Interstate Commerce Commission intervene and make every effort to resolve conflicts by mediation.

The Erdman Act also protected the individual employee, as well as minority unions and groups of employees, from the employer and the majority labor organization. With respect to selecting arbitrators, the Act provided that when a controversy "involves and affects the interests of two or more classes and grades of employees belonging to different labor organizations, such arbitrator shall be agreed upon and designated by the concurrent action of all such labor organizations." The Act also prohibited railroad employers from imposing unjust requirements as conditions of employment. In particular, the statute barred employment contracts which required an employee to agree not to become a member of a labor organization.

In 1913, Congress amended the Erdman Act, which, as modified, became known as the Newlands Act. Congress incorporated further. A reluctant President Cleveland dispatched federal troops to Chicago to dissolve the strike. Id. at 154. Only after an escalation of violence and several deaths did the strikers end their campaign. Id. Commentators agree that the strike failed since, in the end, the employees gained no concessions. Id. at 155. The report on the strike compiled pursuant to the Arbitration Act was not completed until after the strike had ended. RLA AT FIFTY, supra note 13, at 4-5.

26. RLA AT FIFTY, supra note 13, at 5. Mediation and arbitration are two distinct methods of resolving bargaining impasses. Both involve third party intervention but are different "in terms of the degree of independence left to the parties to the bargaining impasse. With arbitration, the parties enlist an outside third party to make a judicial-like decision on the points in dispute." R. ALLEN, T. KEAVENY, CONTEMPORARY LABOR RELATIONS 317 (Addison-Wesley Publishing Co. 1983). The parties agree to relinquish their independence and to abide by the arbitrator's decision. In mediation, however, the third party mediator enters the dispute and remains involved in the dispute at the discretion of the parties. The parties may drop the mediator at any time. The mediator is not charged with reaching specific solutions or outcomes but rather with providing a fruitful process through which the parties may reach an agreement. Id.
28. Id. at 425.
broader jurisdiction in the Newlands Act than in the Erdman Act. The new Act's provisions were applicable not only to disputes over the negotiation of agreements but also to disputes arising out of the interpretation of those agreements. The Newlands Act established, for the first time, a permanent mediation and conciliation board.

During World War I, the Railroad Administration assumed control of the railroads and the Administration's Director General entered into national agreements with the unions. The Railroad Administration emphasized the right of employees to gain membership in railroad labor organizations, resulting in increased union membership among employees and giving the unions additional bargaining power.

After World War I, Congress enacted the Transportation Act of 1920, returning the railroads to private ownership. The Transportation Act provided that both parties in a dispute should make every effort to reach a settlement between themselves, and that unresolved disputes should be referred to the United States Railroad Labor Board. Congress assigned the Board the functions of "hearing and decision," making it both a mediator and an arbitrator. The Transportation Act scheme drew criticism from both sides. Labor believed that the right of the Board to determine wages and working rules limited collective bargaining. The railroads, as well as labor, disapproved of the Board's dual mediation and arbitration roles.

The Transportation Act addressed employee representation rights more specifically than did its predecessors. It required that all "disputes . . . be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in

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32. RLA AT FIFTY, supra note 13, at 5. Labor grew distrustful of the Erdman Act's voluntary arbitration provisions. This attitude arose out of dissatisfaction with awards made by an arbitration board in 1914 pursuant to Presidential pressures to reach a resolution in a labor dispute. As a result, mediation became the more popular alternative. J. KAUFMAN, supra note 20, at 62.
33. RLA AT FIFTY, supra note 13, at 6.
35. J. KAUFMAN, supra note 20, at 64.
36. Id.
37. Id. at 65.
the dispute." In addition, the Act recognized the right of an "organization of employees . . . whose members are directly interested in the dispute," or a group of 100 unorganized workers signing a petition, to bring a dispute before an Adjustment Board or the Labor Board for settlement. Similar provisions appeared in the 1926 Railway Labor Act.

General dissatisfaction with the Transportation Act's reliance on compulsory arbitration as the primary method of dispute resolution grew quickly. In 1924, the Republican party platform advocated amending the Transportation Act. At the urging of President Coolidge, a committee of railway executives and union representatives drafted a bill which they jointly presented to Congress in January, 1926. This bill became the Railway Labor Act.

The Railway Labor Act primarily emphasized collective bargaining for the settlement of labor-management disputes and provided for mandatory mediation only if bargaining failed. The Act invoked arbitration only when both parties agreed.

In spite of both labor's and the railways' participation in creating the RLA, conflicts soon arose in interpreting its provisions. As late as 1934, railways challenged the employees' statutory guarantees of free choice of representation. Railways refused to acknowledge and deal with any unions except local company-dominated unions. In 1934, Congress amended the RLA to bar not only yellow-dog con-

40. 45 U.S.C. § 153, First(i) and (j) (1982). See infra notes 63-64.
41. The Republican Party platform stated that "[c]ollective bargaining, mediation, and voluntary arbitration are the most important steps in the maintaining of peaceful labor relations and should be encouraged. We do not believe in compulsory action." RLA AT FIFTY, supra note 13, at 7.
42. Id. at 8.
1. To prevent the interruption of service.
2. To ensure the right of employees to organize.
3. To provide complete independence of organization by both parties.
4. To assist in prompt settlement of disputes over rates of pay, work rules, or working conditions.
5. To assist in prompt settlement of disputes or grievances over interpretation or application of existing contracts.
44. RLA AT FIFTY, supra note 13, at 9.
45. Id. at 13.
tracts, which were individual employment contracts prohibiting union affiliations, but also company-dominated unions.\textsuperscript{46} In addition, the amended version continued the ban established in the 1926 Act on the closed shop, an arrangement by which an employee was required to join a particular union.\textsuperscript{47}

Railway labor legislation leading to the 1926 Railway Labor Act and its amendments consisted of a series of attempts to balance four competing interests: (1) the national interest in preserving the continued flow of commerce via the railroads, (2) the interest of the railways in carrying out their businesses without excessive government interference, (3) the interest of the majority of railroad employees in preserving collective bargaining power to protect their wages and achieve acceptable working conditions, and (4) the interests of individual employees in deciding against union membership or for membership in the union which best protects individual contractual and statutory rights. Congress repealed railway labor statutes enacted prior to the RLA because they failed to strike the proper balance among these interests. The RLA, in contrast to its predecessors, has survived for over sixty years. While the statute's longevity may attest to its relative success in striking the proper balance among these four competing interests, some problems remain. One issue not expressly addressed by the RLA is whether an individual employee may assert a right to minority union representation at a company-level grievance or investigatory proceeding.

\textbf{B. Railway Labor Act Provisions Defining the Right of Representation}

The general purpose of the RLA is to avert industrial strife on the railroads.\textsuperscript{48} Congress intended the RLA to settle labor disputes by inducing negotiations between only the true representatives of the railroad and employees involved.\textsuperscript{49} To this end, RLA Section 151a includes, among the statute's express purposes: (1) to bar any infringement of the employees' freedom of association or their right to join a labor union; and (2) to permit self-organization of railroads and

\begin{footnotesize}
\textsuperscript{46} Id. at 14.
\textsuperscript{47} Id. The closed shop ban was substantially reversed in 1951 when Congress again amended the RLA, this time adopting a form of required union membership as a means of preserving the unions' bargaining strength. Id. at 15.
\end{footnotesize}
employees in order that specific provisions of the statute can be carried out. This section acknowledges that representation in the context of labor relations has two dimensions. First, an individual employee's representation by a union should be a function of that employee's personal choice. In contrast, the reference in Section 151a to the "self-organization" of employees underscores the concern that, for employees to exercise viable bargaining power in dealings with railroad management, they must often speak in one "organized" collective voice.

The RLA's express purposes, therefore, recognize that in applying the RLA's provisions a court should strike a practicable balance between these two potentially conflicting dimensions of "representation."

The scopes of the respective representation rights of the individual employee and of the collective unit of employees cannot be constant throughout the spectrum of disputes which arise between a railroad employer and an employee or group of employees. While some disputes concern matters affecting all employees, others concern individual employment contracts and negligibly affect the collective unit. The Railway Labor Act recognizes this distinction by dividing all disputes into two separate categories, "major disputes" and "minor disputes." The first type of dispute, or "major dispute," is that

50. RLA section 151a provides:

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


51. Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 722-28 (1945), adhered to, 327 U.S. 661 (1946). The RLA itself does not use the terms "major dispute" and "minor dispute." Burley, however, suggested that such a classification could be implied from the statute:

The difference between disputes over grievances and disputes concerning the making of collective agreements is traditional in railway labor affairs. It has assumed large importance in the Railway Labor Act of 1934, substantively and procedurally. It divides the jurisdiction and functions of the Adjustment Board from those of the Mediation Board, giving them their distinct characters. It also affects the parts to be played by the collective agent and the represented employees, first in negotiations for settlement in conference and later in the quite different procedures which the Act creates for disposing of the two types of disputes. . . . In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world.

Id. at 722-23 (footnotes omitted). For a more detailed discussion of the distinction between
which arises over the formation or modification of collective agreements. It involves the "acquisition of rights for the future." These disputes raise the larger issues over which strikes may arise. Minor disputes, on the other hand, which involve grievances and the interpretation of established agreements, are less likely to interrupt commerce or affect relations between employees as a class and railways.

The RLA, in recognition of the difference between major and minor disputes, fashions different procedures, including a unique balancing of collective and individual representation interests, for the two types of disputes. The Act requires negotiation between the parties as the first stage for either major or minor disputes. The post-negotiation procedures, however, differ. Major disputes are presented for mediation to the National Mediation Board. If mediation fails, the parties either accept or reject arbitration. Minor disputes, on the other hand, proceed from negotiations to the National Railroad Adjustment Board, which is empowered "to conduct hearings and make findings."

While the RLA spells out the two procedural settlement mechanisms, the collective and individual representation rights are identified only with respect to major disputes. Section 152, Fourth gives the power to choose a "collective bargaining" representative to the "majority of any craft or class of employees." The statute places exclu-

major and minor disputes as well as the implications of the classification, see infra notes 243-68 and accompanying text.

52. Id. at 723.
53. Id. at 723-24.
54. Id. at 724. The President's National Labor Management Conference of 1945 perceived the machinery for handling grievances [minor disputes] as limited in applicability to disputes "involving the interpretation or application of the agreement in which the arbiter 'should have no power to add to, subtract from, change, or modify any provision of the agreement, but should be authorized only to interpret the existing provisions of the agreement and apply them to the specific facts of the grievance or dispute.' " Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 Colum. L. Rev. 731, 733 (1950) (quoting 3 President's Nat'l Labor-Management Conf. 143 (1945)).
55. Dunau, supra note 54, at 733.
57. Id.
60. Id. RLA section 152, Fourth provides:

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any
sive authority “to negotiate and to conclude agreements concerning major disputes in the duly selected collective agent.”61 This exclusive authority encompasses representation not only at the negotiation level, but at the mediation and arbitration stages as well.62 The representative chosen by the majority of employees acts at every stage of dispute resolution where major disputes arise. Where, in the context of collective bargaining, the representational interests of the collective majority and the individual or minority conflict, the majority interest prevails.

The statute is unclear with respect to who may act as representative for an employee or group of employees in a minor dispute. Section 153, First(j) grants, to the individual or group of employees appearing before the National Railroad Adjustment Board (NRAB), the right to “be heard either in person, by counsel, or by other representatives, as they may respectively elect.”63 However, section 153, First(i), in setting out the grievance resolution procedures through the “chief operating officer of the carrier,” states only that grievances “shall be handled in the usual manner.”64 Whether the exclusive bargaining authority of the majority’s collective agent extends to com-

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carrier to interfere in any way with the organization of its employees . . . Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.


62. Id. at 729.

63. RLA section 153, First(j) provides:

Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

45 U.S.C. § 153, First(i) (1982). In Burley, the Supreme Court determined that the right of exclusive authority of the majority union did not extend to grievance resolution proceedings before the National Railroad Adjustment Board. Burley, 325 U.S. at 733-36 (1945).

64. RLA section 153, First(i) provides:

The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

pany-level grievance proceedings is not clear from the terms of the statute. While the statute does not expressly grant such authority, it does not exclude it either.

Section 153, First(i)'s ambiguity invites consideration of any other possibly applicable RLA provisions. While several provisions refer to representation rights, none specify the type of disputes to which they apply, nor is it clear whether they are applicable to dispute resolution at all. Their common theme appears to be protecting employees from employer manipulation. They do not, however, define the appropriate balance between individual and collective representation rights in major and minor disputes.

RLA section 152, Second, for example, makes "representatives designated . . . by the carrier or carriers and by the employees thereof interested in the dispute" responsible for executing the RLA's dispute resolution mechanisms.65 The provision requires that the representatives "consider[ ], and, if possible, decide[ ]" all disputes in conference.66 One court has referred to section 152, Second as "a general statement of the responsibilities of carriers and employees for resolving disputes,"67 suggesting that section 152, Second does not reach the specific questions of how employees designate representatives and what different representation rights they wield in the separate contexts of minor and major disputes. While the general responsibility bestowed on representatives in this section alludes to the significant consequence of employees' choice of representation, the language of section 152, Second does not identify the different contours of the representation right in major disputes and minor disputes.

Section 152, Third also refers to representation in railway labor disputes. It provides that representatives shall be selected "without interference, influence, or coercion by either party over the designation of representatives by the other."68 This section also states that repre-

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65. RLA section 152, Second provides:
All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.


66. Id.


68. RLA section 152, Third provides:
Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over
representatives need not be persons who are employed by the carrier.\textsuperscript{69} As in section 152, Second, the language of this provision does not contemplate any particular dispute resolution procedure. While it guarantees employees, collectively and individually, the freedom to select a majority union without interference by the employer, it leaves unresolved the question of whether the majority union can preempt an individual employee from selecting minority union representation for disputes of an individual nature.

Section 152, Fifth also appears to protect the freedom of individual employees to choose a representative. It prohibits railways from requiring, as a condition of employment, that employees agree to either join a union or to refrain from joining a union.\textsuperscript{70} Congress incorporated this subsection into the RLA as part of the 1934 amendments in order to eliminate company unions. In a 1951 amendment, however, Congress added section 152, Eleventh,\textsuperscript{71} which retracts some of the effects of section 152, Fifth. Section 152, Eleventh(a) permits a carrier and a "duly designated and authorized" labor organization to enter into an agreement by which employees can be required, as a condition of employment, to become members of the labor organization representing their craft or class.\textsuperscript{72} Subsection Eleventh(c) mollifies the

\begin{itemize}
\item the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.
\end{itemize}


\begin{itemize}
\item \textsuperscript{69} \textit{Id.}
\item \textsuperscript{70} RLA section 152, Fifth provides:
\begin{quote}
No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.
\end{quote}
\item \textsuperscript{71} Railway Labor Act amendment, ch. 1220, 64 Stat. 1238 (1951).
\item \textsuperscript{72} RLA section 152, Eleventh provides in part:
\begin{quote}
Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to em-
\end{quote}

provisions of Eleventh(a) by allowing the union membership requirement to be satisfied by membership in any "labor organization, national in scope, organized in accordance with" the Act. Subsection Eleventh(c) does not, however, expressly address whether a union other than a majority union can act as a representative in a minor dispute.

A review of the RLA's major amendments reveals a persistent congressional concern for preserving the bargaining power of majority unions in collective bargaining and in the handling of major disputes. The amendments have not, however, added clarity to the contours of representation rights in minor disputes. The 1934 amendment of section 152, Fifth targeted the RLA's failure, in its original form, to eliminate company-dominated unions. The amendment successfully handled the company union problem but its practical effect was to disallow agreements between carriers and legitimate labor organizations to provide for the union shop and for the deduction of associated membership fees. In response, labor unions asserted that they could not effectively carry out their responsibilities as "representatives." They argued that RLA Section 152, Fourth and the 1944 Supreme Court decision in Steele v. Louisville & N. R.R. imposed a duty on the union selected by the majority of employees to act fairly as a col-


73. RLA section 152, Eleventh(c) provides in part:

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in anyone of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services . . . .


75. Id. at 3-4.

76. 45 U.S.C. § 152, Fourth (1982). See supra note 60 for text of statute. Section 152, Fourth states that "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class." Id. This statutory scheme contemplates collective action by a group of employees through the representative chosen by the majority. H.R. REP. No. 2811, 81st Cong., 2d Sess. 4 (1950).

77. 323 U.S. 192 (1944).
lective agent for all employees in a craft or class. That duty, the unions claimed, could not be carried out under the proscriptions of section 152, Fifth. The labor unions argued that the law permitted non-union members to share in the benefits of collective agreements negotiated by the majority's union pursuant to its legal duty while not requiring them to share in the cost of securing those benefits.

Congress responded to the unions' concerns in 1951 by adding section 152, Eleventh, authorizing carrier-union agreements creating union shops. Section 152, Eleventh incorporated the idea that an individual's freedom of association could be subjugated to the majority's interest in exclusive representation. Section 152, Eleventh(c) retains some latitude for individual employees by providing an option other than membership in the union that represents the majority of employees. The provision permits employees to select membership in any one of the nationally organized railway labor unions representing their craft or class. This freedom to choose, however, is not, according to the settled interpretation of section 152, Fourth, the right to be represented by that union in major disputes. Until the Supreme Court acted recently in Landers, courts differed over whether the individual employee's right to choose a union encompasses the right to be represented by that union at the company level in minor disputes. The conflict stemmed largely from the equivocation of section 153, First(i), the only RLA provision expressly establishing company-level procedural requirements in minor disputes.

Before Landers, the statutory ambiguity in the definition of the representation right in minor disputes at the company level resulted in several cases seeking judicial interpretation of the contours of the right. Faced with an absence of controlling language in section 153, First(i), the courts relied on two other sets of statutory provisions even though they provide only general characterizations of the right to representation. First, the courts attempted to define the representation right by implication from the statute's purposes. In addition, they referred to

78. Id. at 204. Steele declared that the majority-chosen representative must represent all members of the craft or class fairly, equitably, and in good faith even if they are not members of the union. Id.
79. H.R. REP. NO. 2811, 81st Cong., 2d Sess. 4 (1950). Out of 1,200,000 employees in the railroad industry in 1950, 75 to 80 percent were members of a railway labor union. Id.
80. 45 U.S.C. § 152, Eleventh(c) (1982). For text of § 152, Eleventh(c), see supra note 73.
those provisions which identify the right to representation generally, even though they do not distinguish between major and minor disputes. As a result of the statute's ambiguity, the courts reached one of two contrary but statutorily justifiable interpretations. One group of decisions found that the Railway Labor Act permits representation at a company-level grievance or investigatory hearing only by the party designated in the collective bargaining agreement, usually the exclusive bargaining agent chosen by the majority of the employees. The other group of cases found that the statute grants to an individual the right to choose a representative even if it is a minority union.

II. MINORITY UNION REPRESENTATION AT THE COMPANY LEVEL: CONFLICT AMONG THE COURTS


Taylor v. Missouri Pacific Railroad, decided in 1986 by the United States Court of Appeals for the Fifth Circuit, and Landers v. National Railroad Passenger Corp., decided in 1987 by the United States Court of Appeals for the First Circuit, represented the latest restatements of the conflicting interpretations of the RLA on the question of minority union representation prior to the Supreme Court's decision on the matter on a grant of certiorari in Landers. The Court granted certiorari in Landers "to resolve the conflict between [the] two courts of appeals over this question of federal railway labor law." The follow-

86. 794 F.2d 1082 (5th Cir.), cert. denied, 107 S. Ct. 670 (1986).
88. Landers, 108 S. Ct. at 1442.
ing section discusses the rationales relied upon in *Taylor* and *Landers* by the Courts of Appeals for the Fifth and First Circuits respectively and concludes by examining the Supreme Court's weighing of the two approaches in *Landers*.

1. *Taylor v. Missouri Pacific Railroad*

The most recent case finding a right to minority union representation at company-level grievance hearings is *Taylor v. Missouri Pacific Railroad*. In *Taylor*, the four individual plaintiffs were employees of Missouri Pacific Railroad Company (MOPAC) and were members of the Brotherhood of Locomotive Engineers (BLE), which served as the collective bargaining agent for members of the engineers' craft working for MOPAC. The employees worked as switchmen, a craft represented in collective bargaining with MOPAC by the United Transportation Union (UTU). When the employees became involved in company-level disciplinary proceedings, they sought BLE representation. MOPAC denied the request, relying on the agreement between MOPAC and the UTU which specified that only the UTU could represent switchmen at MOPAC disciplinary hearings. The plaintiffs' complaints sought declaratory relief and an injunction against enforcement of the UTU-MOPAC collective bargaining agreement. The district court granted the relief and the Court of Appeals for the Fifth Circuit affirmed. 89

After dismissing jurisdictional arguments posed by MOPAC as invalid, 90 the *Taylor* court turned to the substantive issue of the RLA's representation guarantees. 91 Paralleling the rationale of the United States Federal District Court for the Southern District of New York in *Coar v. Metro-North Commuter Railroad Co.*, 92 the Fifth Circuit...
Court of Appeals in *Taylor* emphasized the absence of a single disposi-

plaintiffs sought, and were denied, UTU representation at company-level disciplinary proceedings. While the meaning of the terms of the BLE agreement with Metro-North regarding representation was not an issue, the plaintiffs claimed that those terms violated RLA sections 152 and 153. *Id.* at 381. The BLE argued that the controversy was a contract interpretation dispute strictly within the jurisdiction of the NRAB and not properly heard by the courts. *Id.* at 382. The district court granted the employees' motion for summary judgment.

The *Coar* court refused to accept the BLE's characterization of the dispute. Instead, the court identified the issue as whether the BLE/Metro-North agreement was valid under the RLA to the extent that it limited employees' representational rights. *Id.* This issue, the *Coar* court concluded, fell within the court's jurisdiction. *Id.*

In analyzing the RLA, the *Coar* court admitted that "no one provision of the RLA clearly addresses this issue." *Id.* It explained that its decision, by necessity, must rely on "examination of the purposes of the Act and the aggregate rights it provides." *Id.*

The *Coar* court observed that while union membership could be required as a condition of employment under section 152, Eleventh(a), that requirement could be satisfied by membership in either the BLE or a minority union. *Id.* (citing 45 U.S.C. § 152, Eleventh(c) (1982)). "The right of an employee," the court said, "to belong to any union implicitly carries with it the right to enjoy the privileges of membership, including representation by that union." *Id.* (citing Taylor v. Missouri Pac. R.R., 614 F. Supp. 1320, 1323 (E.D. La. 1985), aff'd, 794 F.2d 1082 (5th Cir.), cert. denied, 107 S. Ct. 670 (1986)). Citing McElroy v. Terminal R.R. Ass'n of St. Louis, 392 F.2d 966, 969 (7th Cir. 1968), cert. denied, Terminal R.R. Ass'n of St. Louis v. McElroy, 393 U.S. 1015 (1969), the *Coar* court interpreted RLA section 152, Second as granting the right to employees to choose any representative, "including the minority union," to act for them in a dispute. *Coar*, 618 F. Supp. at 383 (citing McElroy, 382 F.2d at 969). The BLE, the majority union, seeking a more restrictive interpretation of the minority union representation right, attempted to distinguish *McElroy* by noting that, in *McElroy*, the employees were frequently transferred between crafts, whereas Metro-North did not permit such practices. The *Coar* court, however, dismissed the argument, commenting that regardless of whether shuttling was practiced, employees retained the right to remain members of the minority union while working as engineers.

The *Coar* court noted that RLA section 152, Second contemplates the exercise of representation rights by individual employees. Citing General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pac. Lines of S. Pac. Co. v. Southern Pac. Co., 132 F.2d 194 (9th Cir. 1942), rev'd on jurisdictional grounds, the *Coar* court explained that "representatives designated by employees" within the context of the RLA section 152, Second, may reasonably be encompassed as a "representative designated by a single employee." *Coar*, 618 F. Supp. at 383 (citing General Comm., 132 F.2d at 199 (for a discussion of General Comm., see infra note 164)). This interpretation, it reasoned, was consistent with the Supreme Court's observation in *Burley* that an agreement between a railway and a union cannot abridge an individual's representation rights. *Id.* (citing Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 740 n.39 (1945), adhered to, 327 U.S. 661 (1946)).

The *Coar* court also referred, as the *McElroy* court did, to the 1934 congressional hearings on the RLA during which Commissioner Eastman explained that while a company should not have to deal with more than one party in collective bargaining matters, an employee should not be barred from taking up an individual grievance directly with management. *Coar*, 618 F. Supp. at 384 (citing H.R Rep. No. 7650, 73d Cong., 2d Sess. 44 (1934) (for an excerpt from Commissioner Eastman's testimony, see infra note 156)). The court reasoned that if, as Commissioner Eastman had suggested, "an individual may present his own grievances, it follows that he may designate the representative of his choice to do likewise." *Id.*
tive RLA provision. The Taylor court reasoned that it must rely on indications of congressional intent. It identified the "purposes" laid out in RLA section 151a emphasizing the prohibition on "any limitation upon freedom of association among employees" as evidence of congressional intent.

In seeking additional indications of congressional intent, the Taylor court cited section 152, Eleventh(a) and (c), which provide that while a collective bargaining agreement may require an employee to belong to a national labor organization, it cannot require membership in any particular union. "These provisions persuade us," the court said, "that Congress attached significant importance to an employee's freedom to choose his or her representative and to belong to the union preferred by the employee." The Taylor court recognized, as had the United States Court of Appeals for the Seventh Circuit in McElroy v. Terminal Railroad Association of St. Louis, that a minority union

93. Taylor, 794 F.2d at 1085.
94. Id. (citing 45 U.S.C. § 151a (1982) (for text of § 151a, see supra note 50).
95. Id.
96. Id.
97. 392 F.2d 966 (7th Cir. 1968), cert. denied, 393 U.S. 1015 (1969). In McElroy, the plaintiff minority union employees had been shuttled between the engineers' and firemen's crafts according to the employer Terminal's needs. The plaintiffs, working as engineers at the time they filed their time claim grievances, sought representation by the Firemen's Union. Id. at 967.

In addressing the representation issue, the McElroy court first acknowledged the exclusive representation authority of the collective bargaining agent in major disputes. Id. at 968 (citing Virginian Ry. v. Sys. Fed'n No. 40, 300 U.S. 515, 548 (1937)). The court then focused on RLA section 152, Second which provides that all disputes shall be considered "in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." Id. at 968-69 (citing 45 U.S.C. § 152, Second (1982)). In interpreting this provision, the court referred to the RLA's legislative history. In particular, it recalled the 1934 congressional testimony of Commissioner Eastman and railroad spokesman George Harrison in which they presented their view that, in grievance matters, railroad employees have the right to minority union representation. Id. at 969 (citing H.R. REP. No. 7650, 73d Cong., 2d Sess. 44, 89 (1934)). The McElroy court reasoned that the testimony supported the notion that in a grievance matter involving a minority union member, the minority union member is the "employee interested in the dispute" within the meaning of section 152, Second and, therefore, is entitled to minority union representation. Id.

The court proposed that such an interpretation of section 152, Second was consistent with other RLA representation provisions. Id. It noted that section 152, Third, which guarantees employees and carriers the right to choose representatives without interference, and section 152, Fourth, which permits employees to confer with management during working hours themselves or through their local representative, both support the finding of an employee's right to minority union representation at company-level grievance proceedings. Id. Like the Court of Appeals for the Fifth Circuit in Estes v. Union Terminal Co., the McElroy court reasoned that section 153, First(j), which grants employees the right to choose any representative to act before the National Railroad Adjustment Board (NRAB),
could not negotiate another collective bargaining agreement. It noted, however, that "given the apparent importance Congress attached to freedom of choice, that right [to minority union representation] should be limited only when compelled by express language of the RLA."

The Taylor court found additional support for its interpretation in section 152, Second. Taylor construed the language as an individualized guarantee to the parties involved rather than as a generic one evidences similar congressional intent to create the same representation rights in proceedings before the carrier. Id.; see also Estes v. Union Terminal Co., 89 F.2d 768, 770 (5th Cir.), reh'g denied, 89 F.2d 768 (1937), infra note 178.

The McElroy court also cited section 153, First(i) in support of its decision. The court observed that since section 153, First(i) requires that minor disputes "be handled in the usual manner up to and including the chief operating officer of the carrier," and since the standard procedure under McElroy's facts had been to allow minority union representation at grievance hearings, that practice should not be discontinued. McElroy, 392 F.2d at 969. McElroy also cited prior judicial decisions to support its interpretation. It first referred to Elgin, Joliet and Eastern Ry. v. Burley. Id. at 969-70 (citing Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945), adhered to, 327 U.S. 661 (1946)). In Burley, the Supreme Court determined that "the individual employee's rights cannot be nullified merely by agreement between the carrier and the union." Burley, 325 U.S. at 740 n.39. The McElroy court used that rationale to support its contention that the majority union's collective agreement could not bar minority union members from choosing their representative at company-level hearings. McElroy, 392 F.2d at 969. McElroy cited Douds v. Local 1250, 173 F.2d 764, 772 (2d Cir. 1949), as an illustration of the statutory construction of the National Labor Relations Act to grant similar rights. McElroy, 392 F.2d at 970. It found support in General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pac. Lines of S. Pac. Co. v. Southern Pac. Co., 132 F.2d 194 (9th Cir. 1942), rev'd on jurisdictional grounds, 320 U.S. 338 (1943), as well. Id. at 970 (citing General Comm., 132 F.2d at 198 (for a discussion of General Comm., see infra note 164)). The McElroy court focused on the General Comm. language suggesting that the "confidence and trust necessary between a suitor and his representative" are absent when an employee is represented by the majority union of which he or she is not a member. Id.

In McElroy, the majority union, the BLE, argued that Broady v. Illinois Central R.R., 191 F.2d 73 (7th Cir.), cert. denied, 342 U.S. 897 (1951) (for a discussion of Broady, see infra note 114), a decision denying minority union representation, bound the court to reject the employees' claim for minority union representation. McElroy, 392 F.2d at 971. However, the McElroy court distinguished Broady by noting that Broady involved a "rival union" which had no collective bargaining contract with the railroad. Id. A "rival union," by definition, was not among the "labor organizations, national in scope, organized in accordance with this chapter" in which section 152, Eleventh allows railways and unions, via agreements, to compel membership of employees. Id. (quoting § 152, Eleventh (1982)). In McElroy, the minority union was a nationally recognized labor union which, in fact, was a party to a collective bargaining agreement with Terminal on behalf of firemen. The McElroy court's implicit assertion was that while the RLA generally tolerates minority union representation by nationally recognized labor unions, it does not allow representation by "rival unions" at company-level grievance hearings.

98. Taylor, 794 F.2d at 1085.
99. Id.
simply referring to the collective bargaining agent’s duties. The court characterized its decision recognizing a right to minority union representation at company-level grievance proceedings as consistent with the RLA policy of employee freedom of choice, the “desire for labor-management stability,” and “company-level settlement of disputes.”


In Landers, the Court of Appeals for the First Circuit interpreted the RLA to deny minority union representation in a decision reviving the view espoused in Switchmen’s Union of North America v. Louisville and Nashville Railroad Co. over thirty years earlier. During that

100. Id. at 1086 (citing 45 U.S.C. § 152, Second (1982) (for text of § 152, Second, see supra note 65)).
101. Taylor, 794 F.2d at 1086.
103. 130 F. Supp. 220 (W.D. Ky. 1955). Switchmen’s Union followed in the footsteps of Broady v. Illinois Cent. R.R., 191 F.2d 73 (7th Cir.), cert. denied, 342 U.S. 897 (1951) (for a discussion of Broady, see infra note 114), and Butler v. Thompson, 192 F.2d 831 (8th Cir. 1951) (for a discussion of Butler, see infra note 114). In Switchmen’s Union, the United States District Court for the Western District of Kentucky determined that the phrase “in the usual manner,” as used in RLA section 153, First(i), contemplates applying the rules set forth in contractual agreements between majority union and employer. Switchmen’s Union, 130 F. Supp. at 227.

The aggrieved employee in Switchmen’s Union argued that Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945), adhered to, 327 U.S. 661 (1946), supported his position. He contended that Burley recognized the minority union’s representation authority in grievance matters. Switchmen’s Union, 130 F. Supp. at 225. The Switchmen’s Union court rejected the employee’s reliance on Burley. The court concluded that Burley “does not reach the situation in the case at bar where the employee neither sought nor was denied the right personally to present his grievance to the highest operating officer of the Carrier.” Id. The court also dismissed as unpersuasive an Attorney General opinion, 40 Op. Att’y Gen. 494 (1946), which expressly found Burley indicative of an RLA right to free choice of representation at company-level proceedings. Switchmen’s Union, 130 F. Supp. at 226. The court noted that federal court cases since the attorney general’s opinion “seemed to find compelling language in the Railway Labor Act to the contrary.” Id.

The Switchmen’s Union court found support in other judicial decisions for denying minority union representation at company-level proceedings. The court cited United R.R. Workers of Am., Independent v. Atchison, T. & S. F. R. Co., D.C., 89 F. Supp. 666 (D. Ill. 1950), which held that the “usual manner” of handling grievances, to which RLA section 153, First(i), refers, is the procedure laid out in the governing collective bargaining agreement. Switchmen’s Union, 130 F. Supp. at 226 (citing United R.R. Workers, 89 F. Supp. at 672). The United R.R. Workers court found that when employees ignore such a procedure in attempting to progress to the NRAB with a claim, they fail to satisfy a “mandatory condition precedent to submission to the Board.” United R.R. Workers, 89 F. Supp. at 672. The Switchmen’s Union court cited Broady v. Illinois Cent. R.R., 191 F.2d 73, 76 (7th Cir.), cert. denied, 342 U.S. 897 (1951)), as authority supporting this principle as well. Switchmen’s Union, 130 F. Supp. at 226. The Switchmen’s Union court concluded by observing that the provisions of section 153, First(i) and (j) are juxtaposed purposefully:
thirty year period, however, federal courts had decided several cases finding a right to minority union representation at the company level. In 1968, the Court of Appeals for the Seventh Circuit held in *McElroy* that the RLA guarantees a right to minority union representation in grievance matters.\(^{104}\) *Coar*,\(^{105}\) a 1985 decision by the District Court for the Southern District of New York, and *Taylor*,\(^{106}\) a 1986 decision by the Court of Appeals for the Fifth Circuit, were both decided consistently with *McElroy*.

In February 1984, Amtrak charged Paul Landers, an engineer, with work-related misconduct. Landers was a member of the UTU while the bargaining representative for Amtrak’s passenger engineers was the BLE. Amtrak denied Landers the UTU representation which he sought before the company-level investigatory hearing. The collective bargaining agreement between Amtrak and the BLE provided

> The specific authorization for representation at hearings before the Adjustment Board and the use of the term “in the usual manner” with respect to hearings before the Railroad officers authorizes the construction that the inclusion of unlimited representation only before the Adjustment Board includes representation only as provided in the bargaining agreement.

*Id.* at 227.

104. 392 F.2d 966, 970 (1968), *cert. denied*, 107 S. Ct. 670 (1986). For a discussion of the *McElroy* decision, see *supra* note 97. Between 1955, when the District Court for the Western District of Kentucky decided *Switchmen's Union of N. Am. v. Louisville and Nashville R.R.*, 130 F. Supp. 220 (W.D. Ky. 1955), and 1987, when the Court of Appeals for the First Circuit decided *Landers*, the right of minority union representation before company-level grievance proceedings was not specifically renounced by any federal court. Two courts, however, dealt with related issues involving the procedural rights of individual employees in grievance proceedings before their employers. Both courts issued decisions adverse to the claims of the individual employees.

In *D'Amico v. Pennsylvania R.R.*, 191 F. Supp. 160 (S.D.N.Y. 1961), using RLA interpretations similar to those employed in *Broady, Butler, and Switchmen's Union*, the Federal District Court for the Southern District of New York denied an employee's claim to a right to legal counsel in a company disciplinary hearing. The *D'Amico* court rested its decision on the need to avoid making company-level proceedings rigid and awkward as well as on the RLA right, guaranteed in section 153, First(j), to any representation, including legal counsel, before the NRAB as a remedy for any employee dissatisfied with the resolution of grievance matters at the company level. *Id.* at 163.

In *Edwards v. St. Louis - San Francisco R.R.*, 361 F.2d 946 (7th Cir. 1966), an employee sought a judgment declaring the impropriety of a company disciplinary fact-finding hearing during which accusing witnesses had not been brought before the employee. The employee had been discharged as a result of the hearing. The court ruled that the RLA does not dictate procedures to be followed by a carrier for either the “conduct of an investigation hearing” or in the discharging of employees. *Id.* at 953. Where a dispute is between private parties, concluded the court, their conduct is governed by contract. *Id.* at 954.


that only the bargaining agent could represent an engineer at such a proceeding. Landers represented himself, and received and served a suspension.¹⁰⁷

Rather than appeal the suspension to the NRAB, where he had a statutory right to UTU representation in accordance with section 153, First(j), Landers filed suit in federal district court seeking declaratory relief against Amtrak and the BLE. Landers claimed that the collective bargaining agreement clause violated his RLA right to a representative of his choice. The district court found the terms of the collective bargaining agreement, which prohibited representation at company-level investigatory hearings by parties other than the bargaining agent, binding.¹⁰⁸ Landers agreed with the district court’s interpretation of the collective agreement, but argued that, regardless of the terms of the agreement, the RLA granted him an absolute right to representation by his chosen representative at a company-level hearing. The Court of Appeals for the First Circuit disagreed and affirmed the district court’s decision.¹⁰⁹ The Landers court considered the employee’s argument that the RLA should be read in view of legislative history. The RLA’s legislative history, according to Landers, suggests that employees traditionally enjoyed minority union representation. The court noted, however, that the legislative history consists largely of the testimony of two witnesses who lobbied before Congress for amendments which never passed.¹¹⁰ The Landers court declared that the absence of these proposed changes in the current statutory language indicates an outright congressional rejection of the practice of minority union representation before grievance hearings.¹¹¹

The employee Landers also relied on section 153, First(j) as support for his right to choose a representative.¹¹² The court pointed out, however, that while section 153, First(j) expressly provides that “[p]arties may be heard either in person, by counsel, or by other representatives,” the language applies only to proceedings before the NRAB and not to company-level hearings.¹¹³ Citing Butler v. Thompson,¹¹⁴ the Landers court observed that in hearings before company

¹⁰⁷. Landers, 814 F.2d at 42.
¹⁰⁸. Id.
¹⁰⁹. Id.
¹¹⁰. Id. at 43-44.
¹¹¹. Id.
¹¹². Id. at 43-44.
¹¹³. Id.
¹¹⁴. Butler v. Thompson, 192 F.2d 831 (8th Cir. 1951) involved a suit by a dining
officers, "an existing legal contract controls," while before the NRAB,
car employee seeking reinstatement and lost wages resulting from a dismissal for disciplinary reasons. In rejecting the plaintiff's claim that his RLA company-level representation rights were violated, the Court of Appeals for the Eighth Circuit found that such rights existed only to the extent that they were created by a collective bargaining agreement. Id. at 833.

The plaintiff argued that RLA section 152, Third bars interference with his choice of representation. Id. at 832-33 (citing 45 U.S.C. § 152, Third (1982) (for text of § 152, Third, see supra note 68)). The court, however, in a novel analysis, found that section 152, Sixth limits the scope of the protections extended elsewhere in the Act including those in section 152, Third. Id. at 833 (citing 45 U.S.C. § 152, Sixth (1982)).

The Butler court's reliance on section 152, Sixth was unprecedented. Broady v. Illinois Cent. R.R., 191 F.2d 73 (7th Cir.), cert. denied, 342 U.S. 897 (1951) (for a discussion of Broady, see infra), which had also denied minority union representation to an employee, did not refer to this provision. Section 152, Sixth of the RLA provides:

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferencees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

45 U.S.C. § 152, Sixth (1982). The court also pointed to section 152, Fourth, which sets out the rights of the majority to select a collective bargaining agent and to bargain through that agent. Butler, 192 F.2d at 833 (citing 45 U.S.C. § 152, Fourth (1982) (for text of § 152, Fourth, see supra note 60)). The Butler court found that section 152, Fourth and Sixth compel the conclusion that the provisions of a collective bargaining agreement must be observed, including those provisions restricting employee representation at a company-level hearing. Id.

The Butler court cited Broady v. Illinois Cent. R.R., 191 F.2d 73 (7th Cir.), cert. denied, 342 U.S. 897 (1951), to support its perception that the RLA provides different representation rights to individual employees as they pass from company-level proceedings to the NRAB. Butler, 192 F.2d at 833 (citing Broady, 191 F.2d at 76). In investigations before the NRAB, the RLA governs. At the company level, the Butler court concluded, the collective bargaining contract determines procedural rights, including representation. Id.

Broady v. Illinois Cent. R.R., 191 F.2d 73 (7th Cir.), cert. denied, 342 U.S. 897 (1951), was decided the same year as Butler. The Court of Appeals for the Seventh Circuit, which later decided McElroy v. Terminal R.R. Ass'n of St. L., 392 F.2d 966 (1968), cert. denied, 393 U.S. 1015 (1969) (for a discussion of McElroy, see supra note 97), determined that the RLA does not give employees the right to choose their representative at a company-level investigatory proceeding. Broady, 191 F.2d at 76. Broady also arose when a dining car waiter claimed that his RLA rights were violated when he was denied minority union representation at a company disciplinary hearing.

The Broady court found "no provision of the Railway Labor Act which gives to employees the right to a representative of their own choice at an investigation by company officials of a charge that the employee has violated company rules." Id. at 76. First, the
the RLA governs.115 The court noted that the proximity of section
153, First(i), which conspicuously omits any mention of representation
rights at the company level, to section 153, First(j), which specifically
guarantees the right before the NRAB, demonstrates legislative intent
to exclude the choice of representation right at a company-level griev­
ance proceeding.116

The court also rejected Landers' reliance on section 152, Second,
which provides that "disputes between a carrier . . . and its . . . em­
ployees shall be considered . . . in conference between representatives"
of the parties interested in the dispute.117 The court referred to the
provision as "a broadly general reference to the many kinds of contro­
versies that might arise, not to specific procedures or to particular
rights."118 The non-interference language in section 152, Third, added
the Landers court, is also inapplicable to the representation rights of
the individual employee because that provision is designed to prohibit
impairment of the majority's right to choose a collective bargaining
agent.119

The court next considered Landers' interpretation of section 152,
Eleventh(c), which permits an employee to satisfy the requirement to
be a union member by joining any of the national unions organized in
accordance with the RLA.120 Landers argued that the right to be rep­
resented by the union of which an employee is a member should flow
from this provision.121 Citing Pennsylvania Railroad Co. v. Rychlik,122

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Broady court cited RLA section 153, First(i) which provides that disputes arising from
grievances or contract interpretation "shall be handled in the usual manner up to and in­
cluding the chief operating officer of the carrier." Id. at 76-77 (citing 45 U.S.C. § 153,
First(i) (1982) (for text of § 153, First(i), see supra note 64)). The court referred, as well, to
section 153, First(j) which grants, to parties appearing before the NRAB, the right to be
heard "either in person, by counsel, or by other representatives, as they may respectively
elect." Id. at 77 (citing 45 U.S.C. § 153, First(j) (1982) (for text of § 153, First(j), see supra
note 63)). Resting its decision almost entirely on its interpretation of these two provisions,
the Broady court observed that the statute presented a scheme under which the employee's
right to representation arises only after the company renders a decision adverse to the
employee. Id.

115. Landers, 814 F.2d at 44 (citing Butler v. Thompson, 192 F.2d 831, 833 (8th Cir.
1951) (for a discussion of Butler, see supra note 114)).

116. Id.

117. Id. (citing 45 U.S.C. § 152, Second (1982) (for text of § 152, Second, see supra
note 65)).

118. Id. (citing General Comm. of Adjustment of the Bhd. of Locomotive Eng'rs of

119. Id. (citing H.R. REP. No. 1944, 73d Cong., 2d Sess. 2 (1934)).

120. Id. at 44-45 (citing 45 U.S.C. § 152, Eleventh(c) (1982) (for text of § 152, Elev­
enth(c), see supra note 73)).

121. Id. at 45.

the *Landers* court noted that the purpose of section 152, Eleventh(c) was to prevent dual unionism and to prevent the shuttling of craft members between unions. In light of the majority union’s interest in maintaining its status as exclusive representative, argued the court, section 152, Eleventh(c) should be read narrowly and should not be interpreted as “implying an automatic right of elective (minority union) representation at company-level disciplinary hearings.”

The *Landers* court recognized the existence of precedent contrary to its view, particularly *Taylor v. Missouri Pacific Railroad Co.* The *Landers* court refused to distinguish the facts in *Taylor*, admitting that it was “very much in point.” The court observed, however, that the *Taylor* court did not mention the statute’s “usual manner” language, nor did it attempt to discern the “usual manner” of dispute resolution in the company before it. This analytical step, in the opinion of the *Landers* court, should have been controlling in *Taylor*. *Landers* also found fault with *Taylor*’s reliance on *McElroy*, a case in which minority union representation was permitted. According to *Landers*, *McElroy* granted minority union representation due to the peculiar circumstance of employees frequently transferring back and forth between crafts. That special circumstance, said the *Landers* court, did not exist in either *Taylor* or *Landers*. The *Landers* court also rejected *Coar v. Metro-North Commuter Railroad Co.*, indicating

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123. *Landers*, 814 F.2d at 45 (citing Pennsylvania R.R. v. Rychlik, 352 U.S. 480, 489 (1957)). In *Rychlik*, the Court explained the plight of the railroad worker under a statutory scheme recognizing union-shop contracts as valid. Railroad labor on the railroads is structured by crafts rather than by industry such that a different union represents each craft. Another inherent feature of railroad labor is the high degree of mobility (“shuttling”) of individual employees between the crafts. A standard union-shop contract would impose one of two requirements on shuttling employees. They would need to either join two unions (dual unionism) or shuttle between unions as they changed crafts. Both alternatives, according to *Rychlik*, were detrimental to the individual employee. Dual unionism “would, of course, be expensive and sometimes impossible” while shifting between unions “would be complicated and might mean loss of seniority and union benefits.” *Rychlik*, 352 U.S. at 490 (footnote omitted).


126. *Landers*, 814 F.2d at 47 (citing *Taylor*, 794 F.2d at 1086).

127. *Id.*

128. *Id.*

129. For a discussion of *McElroy*, see supra note 97 and accompanying text.

130. *Landers*, 814 F.2d at 48 n.4.

131. *Id.*

132. For a discussion of *Coar*, see supra note 92 and accompanying text.
that Coar suffered from the same deficiencies as did Taylor.\footnote{133. Landers, 814 F.2d at 48 (citing Coar, 618 F. Supp. at 383).}

B. The Supreme Court Decision

The Supreme Court granted certiorari in \textit{Landers v. National Railroad Passengers Corp.}\footnote{134. 108 S. Ct. 1440 (1988).} to resolve the conflict between \textit{Taylor} and \textit{Landers} below.\footnote{135. Id. at 1442.} Affirming the \textit{Landers} decision of the Court of Appeals for the First Circuit and rejecting the \textit{Taylor} view, the Court concluded that the RLA does not entitle an employee to representation by a union other than the collective bargaining representative.\footnote{136. Id.} A unanimous Court, in an opinion by Justice White, followed the rationale of the First Circuit Court of Appeals in \textit{Landers} and cited legislative history and policy considerations to support its holding.

The Court's opinion focused on Landers' contention that section 152, Eleventh of the RLA\footnote{137. 45 U.S.C. § 152, Eleventh (1982). For text of § 152, Eleventh, see \textit{supra} notes 72-73.} provides railroad operating employees with the right to minority union representation at company-level grievance or disciplinary proceedings. Acknowledging that section 152, Eleventh(a) permits a railroad and a union to require all employees, as a condition of employment, to become members of a union, and that section 152, Eleventh(c) allows employees to satisfy the membership requirement by becoming members of a minority union,\footnote{138. The Court defined a minority union as "a union other than [the employee's] collective-bargaining representative." \textit{Landers}, 108 S. Ct. at 1442.} the Court observed that no provision of the Railway Labor Act defines the role of a minority union in company-level proceedings.\footnote{139. Id.} The Court also noted that while section 153, First(j) establishes that once a dispute rises to the National Railroad Adjustment Board level, the employee may "be heard either in person, by counsel, or by other representatives,"\footnote{140. 45 U.S.C. § 153, First(j) (1982). For text of § 153, First(j), see \textit{supra} note 63.} section 153, First(i) merely provides that disputes arising from grievances or interpretation of the collective bargaining agreement "shall be handled in the usual manner up to and including the chief operating officer of the carrier."\footnote{141. 45 U.S.C. § 153, First(i) (1982). For text of § 153, First(i), see \textit{supra} note 64.} This construction of section 153, First, determined the Court, suggests that Congress "did not believe that the participation of minority unions or other outsiders \textit{in company-level proceedings}" was necessary to realize the Act's purpose.
but that Congress did consider such representation critical at Adjustment Board proceedings.\textsuperscript{142} Referring to legislative history, the Court cited the lack of congressional action in 1934, in response to proposals by union and federal agency officials to amend the RLA, as additional evidence of congressional reluctance to extend a minority union representation right at the company level.\textsuperscript{143} The 1934 amendment proposals advocated adding express terms guaranteeing minority union representation to employees pursuing a grievance with their employer.\textsuperscript{144}

The Court also presented policy considerations supporting its decision. To recognize a statutory right to minority union representation in proceedings on an employer's property, the Court contended, would frustrate the statutory purpose expressed in section 151a(5) of "provid[ing] 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."\textsuperscript{145} Inefficiency and delays would result from the participation in company-level proceedings of representatives unfamiliar with the procedural mechanisms established between the employer and the collective bargaining agent.\textsuperscript{146}

The Landers Court drew another policy argument from its own opinion in Republic Steel Corp. v. Maddox,\textsuperscript{147} as well as from the writings of Professor Archibald Cox, against interpreting the statute to guarantee company-level minority union representation. In Republic Steel, the Court explained that the functions of processing grievances and defending disciplinary charges at the company level complement the majority union's exclusive representative status "by permitting it to participate actively in the continuing administration of the contract."\textsuperscript{148} To permit minority unions to perform this function, as Professor Cox had argued, would make grievances merely vehicles for "'dissident groups . . . belong[ing] to rival unions'" to create friction, competition, and ultimately employee dissatisfaction.\textsuperscript{149}

The Court finally returned to Landers' argument that section 152,

\textsuperscript{142} Landers, 108 S. Ct. at 1442 (emphasis added).
\textsuperscript{143} Id. at 1442 n.3.
\textsuperscript{144} For a discussion of legislative history surrounding the 1934 proposals for amendment of the RLA, see supra notes 44-47 and accompanying text.
\textsuperscript{145} Landers, 108 S. Ct. at 1442-43.
\textsuperscript{146} Id. at 1443.
\textsuperscript{147} 379 U.S. 650 (1965).
\textsuperscript{148} Id. at 653.
\textsuperscript{149} Landers, 108 S. Ct. at 1443 (quoting Cox, Rights Under a Labor Agreement, 69 HARV. L. REV. 601, 626 (1956)).
Eleventh(c) implicitly extends the right to company-level minority union representation to railroad employees. The Court referred, as had the Court of Appeals for the First Circuit below, to Pennsylvania Railroad Co. v. Rychlik. The Rychlik Court considered similar arguments and had concluded "that Congress . . . enacted [section 15][Eleventh(c)] for the single narrow purpose of 'prevent[ing] compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts.'" This purpose is realized in the facts before the Court. Landers' continued membership in the minority union is not threatened nor is he required to also join the majority union. He must merely recognize that the minority union to which he belongs cannot represent him in company-level grievance and disciplinary proceedings. The Court concluded that since there is no evidence that the petitioner is likely to suffer "appreciable prejudice" from the lack of the minority union's representation or from the majority union's representation, and since the "duty of fair representation" binds the majority union in this instance, the petitioner's interests are adequately protected.

III. EXAMINING THE ARGUMENTS: DOES LANDERS OVERLOOK A THIRD ALTERNATIVE?

Prior to the Supreme Court's consideration of the issue, the Landers decision of the Court of Appeals for the First Circuit and the Taylor decision last expressed the two opposing interpretations of the Railway Labor Act's treatment of minority union representation at company-level grievance or disciplinary proceedings. The judicial analyses in the two lines of cases represented respectively by Taylor and Landers attest to statutory language, legislative history, and judicial precedent which are so malleable as to have allowed different courts to persuasively reach opposite conclusions when presented with identical factual situations. While some courts construed the RLA to permit employees minority union representation at a company grievance hearing regardless of governing collective bargaining contract provisions, other courts interpreted the statute to limit employees to the representation which their employers and collective bargaining agents determined to be appropriate. With Landers, the Supreme

150. 352 U.S. 480 (1957). For an explanation of the Rychlik rationale, see supra note 123.
151. Landers, 108 S. Ct. at 1443 (citing Rychlik, 352 U.S. at 492).
152. Id. at 1444.
153. See supra note 85.
154. See supra note 84.
Court reduced the possibility of future inconsistencies in interpretation of the employee's right to minority union representation at the company level. However, the *Landers* Court also declined to address the compelling rationales guiding the *Taylor* court and others to the contrary conclusion. Rather than acknowledging the persuasiveness of arguments for protecting both the individual's right to the representation of the union he or she has chosen and the majority union's interest in preserving its strength as the exclusive bargaining representative, the Court recognized the rationale defending only the latter interest.

In interpreting the scant legislative history on the issue of company-level minority union representation, for example, the Court failed to recognize both schools of thought. The legislative history consists primarily of testimony before the House Committee on Interstate and Foreign Commerce in 1934 by Commissioner Eastman.\textsuperscript{155} During congressional hearings held to consider amending the RLA in 1934, Commissioner Eastman testified:

> When it comes to collective bargaining in the matter of wages and working conditions, it seems to me plain that a company ought not be compelled to deal with more than one organization. It ought not to have to make bargains with two or three different organizations. But when it comes to the presentation of grievances, that is a different matter, and certainly an individual employee ought not to be stopped in any way from taking his grievance up directly with management, and I think that ought to apply to any group of employees.\textsuperscript{156}

Congress, in fact, amended the RLA in 1934.\textsuperscript{157} The courts, however, disagreed on the significance of the Commissioner’s statements. The Federal District Court for the Southern District of New York, in *Coar v. Metro-North Commuter Railroad*,\textsuperscript{158} assumed that Eastman’s concerns were embodied, albeit not expressly, in the amended statute. “If an individual may present his own grievances,” it concluded, “it follows that he may designate the representative of his choice to do likewise.”\textsuperscript{159} The Court of Appeals for the First Circuit in *Landers*, on the other hand, not seeing Eastman’s perceptions embodied in the

\textsuperscript{155} *Coar*, 618 F. Supp. at 384.

\textsuperscript{156} *Hearings of House Committee on Interstate and Foreign Commerce on the Railway Labor Act*, H.R. REP. No. 7650, 73d Cong., 2d Sess. 44 (1934).


\textsuperscript{159} *Id.* at 384 (citing *Hearings of House Committee on Interstate and Foreign Commerce on the Railway Labor Act*, H.R. REP. No. 7650, 73d Cong., 2d Sess. 44 (1934)). For a discussion of *Coar*, see supra note 92.
amended statute’s express language, reasoned that Eastman “lobbied for amendments which never saw the legislative light of day.” The *Landers* court further observed that, because Eastman considered such changes necessary, and since corresponding language was not inserted into the statute in 1934, such a right did not exist either before or after the 1934 amendment. The Supreme Court adopted the analysis of the First Circuit Court of Appeals, disregarding *Coar*’s reasonable contention that, in 1934, the statute already contemplated some company-level minority union representation rights which Commissioner Eastman merely wished to see documented as express statutory provisions.

As with the legislative history, the *Landers* Court avoided a discussion of the conflicting meanings derivable from the express statutory provisions referring to a railroad employee’s representation and procedural rights at company-level proceedings. The definition of “representative” appearing in section 151, for example, was cited as support by courts of appeals and district courts both upholding and denying minority union representation under the RLA. Section 151, Sixth provides that a representative is “any ... union ... designated either by a carrier ... or by its or their employees, to act for it or them.” In *General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pacific Co. v. Southern Pacific Co.*, the Court of Appeals for the Ninth Circuit interpreted

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160. *Landers*, 814 F.2d at 43.
161. *Id.*
162. *Landers*, 108 S. Ct. at 1442 n.3.
164. 132 F.2d 194 (9th Cir. 1942), rev’d on jurisdictional grounds, 320 U.S. 338 (1943). The *General Committee* court also faced the issue of whether a collective bargaining representative for a particular craft or class must be the exclusive representative of an individual member of that craft or class in disputes stemming from the individual’s employment contract. *Id.* at 195-96. The court found that a collective bargaining contract between a carrier and an engineers’ union, covering wages and working conditions of engineers, cannot legitimately bar a firemen’s union from representing an engineer at a grievance hearing if the engineer is a member of the firemen’s union. *Id.*

The *General Committee* court focused initially on RLA section 152, Fourth, particularly the language in that section which provides that “nothing in this Act shall be construed to prohibit a carrier from permitting an employee ... from conferring with management during working hours without loss of time.” *Id.* at 196 n.3 (citing 45 U.S.C. § 152, Fourth (1982) (for text of § 152, Fourth, see *supra* note 60)). The court also noted that section 152, Eighth requires all individual employment contracts to include the express provisions of section 152, Fourth. RLA section 152, Eighth provides:

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed
the words "any . . . union" to mean any union "whether [representing] a majority or minority of a craft." At least one other court, in contrast, focused on the word "them," and observing that it is a plural verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

45 U.S.C. § 152, Eighth (1982). Construing the language of section 152, Fourth and Eighth together, the court stated that "[o]bviously, this right of conference by the engineer individually with the employer, includes the right to confer as an individual concerning claims that the Railway has failed to perform the individual's contract." General Comm., 132 F.2d at 196.

The General Committee court distinguished between a collective bargaining agreement and an individual employment contract. Relying on Virginian Ry. v. System Fed'n, 300 U.S. 515 (1937), it noted that "[t]he individual engineer in making his contract has the right also to negotiate for and agree to any terms of employment with the Railway, and is not required by the Act to accept the rates of pay, rules, or working conditions of the Engineers' Schedule[,] [the Engineers' collective agreement]." General Comm., 132 F.2d at 196 (citing Virginian Ry. v. System Fed'n, 300 U.S. 515 (1937)). Consequently, the court stated, the Firemen's Committee has the lawful right to represent any individual in the presentation of "any type or class of individual claims or grievances . . . and plaintiff [Engineer's Committee] does not have the sole . . . right of representation." Id. at 197.

In reaching its decision, the General Committee court specifically referred to RLA section 153, First(i), which requires that grievances at the initial or company level be handled "in the usual manner." Id. at 197-98 (citing 45 U.S.C. § 153, First(i) (1982)). Citing the statutory language, the General Committee court observed that section 153, First(i) encompasses disputes between an "employee" and a railway. General Comm., 132 F.2d at 198. The court explained that the phrase "an employee" connotes disputes over individual employment contracts as opposed to collective agreements. Id. It reasoned that because section 152, Eighth requires that section 152, Fourth, guaranteeing employees the right to confer with their employer individually or through a local representative, be a written part of any individual employment contract, employees may confer with the employer regarding the grievance either individually or through a local representative. Id. The court concluded that the phrase "in the usual manner" meant "the steps usually taken by an engineer personally or by his representative through . . . the chief operating officer." Id...

The General Committee court also illustrated circumstances in which imposing exclusive representation would be inequitable. Id. at 198. If three engineers, for example, assert that they are entitled to a position by their seniority and the union predetermines which of the three it believes is eligible, the other two employees are less likely to enjoy zealous representation before railway management from the exclusive representative. Id. Similarly, employees who are delinquent in paying union dues or who are critical of the majority union are justified in expecting less than wholehearted representation from the exclusive representative. Id. The court pointed to section 151, Sixth, which defines "representative." General Comm., 132 F.2d at 199 (citing 45 U.S.C. § 151, Sixth (1982)). RLA section 151, Sixth provides: "The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them." 45 U.S.C. § 151, Sixth (1982). The General Committee court concluded that "any . . . labor union" necessarily means even a minority union. General Comm., 132 F.2d at 199. Only in collective bargaining must a union be chosen by the majority. Id.

165. General Comm., 132 F.2d at 199. For a discussion of General Committee, see supra note 164.
form reference to employees, construed the language to exclude applicability of the provision to an individual in a grievance matter. The Supreme Court disregarded section 151 altogether in Landers.

The Landers Court made no mention of either section 152, Second or section 152, Third. Section 152, Second provides that "[a]ll disputes . . . shall be considered . . . in conference between representatives [of the] employees . . . interested in the dispute," while section 152, Third proscribes interference with employees' choice of unions. The Court of Appeals for the Seventh Circuit determined in McElroy v. Terminal Railroad Association of St. Louis that section 152, Second, on its face, guarantees an individual the choice of any representative. The McElroy court also interpreted section 152, Third, the non-interference provision, as a guarantee to individuals against interference with choosing their own representatives. The First Circuit Court of Appeals, in Landers, referred to section 152, Second as "a broadly general reference to the many kinds of controversies that might arise, not to specific procedures or to particular rights in dispute resolution proceedings between parties." The non-interference language of section 152, Third, the court of appeals added, was intended to prevent employers' meddling with the majority's choice of a union representative. The Supreme Court, however, chose to steer clear of the inherent ambiguity of section 152, Second and section 152, Third by not discussing the provisions whatsoever, despite the apparent applicability of the express statutory language to the issue at hand.

The thrust of the Supreme Court's rationale in Landers lies in the Court's interpretation of the language of section 152, Eleventh (a) and (c) and of the purpose of the provision's enactment. The Landers Court observed that section 152, Eleventh (a) permits a collective bargaining agreement to require that an employee belong to a union as an employment condition. The Court also noted that section 152, Eleventh(c) provides that membership in any one of the national labor

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169. 392 F.2d 966 (7th Cir. 1968), cert. denied, 393 U.S. 1015 (1969). For a discussion of McElroy, see supra note 97.


171. McElroy, 392 F.2d at 969 (citing 45 U.S.C. § 152, Third (1982) (for text of § 152, Third, see supra note 68)).

172. Landers, 814 F.2d at 44.

173. Id. (emphasis added).

organizations satisfies the Eleventh(a) requirement. The Court concluded that the only purpose of section 152, Eleventh(c)'s enactment was to protect railroad employees, who were frequently shifted between crafts, from having to join multiple unions. The Court dismissed the petitioner employee's section 152, Eleventh(a) and (c) arguments without addressing all of their merits. Landers' arguments resemble the conclusions of the Coar court. The Coar court interpreted the statutory scheme comprised by section 152, Eleventh(a) and (c) to include implicitly the "right to enjoy the privileges of membership, including representation by [the minority] union." The Landers Court did not identify what benefit, if any, an employee can derive from membership in a minority union when representation by that union is not available.

The Supreme Court's Landers decision also discussed section 153, First(i) and section 153, First(j) again expressing, however, only the interpretation which supports denial of minority union representation despite longstanding debate in the lower courts over their composite meaning. In 1937, the Court of Appeals for the Fifth Circuit in Estes v. Union Terminal Co. determined that the guarantees made ex-

175. Id. (citing 45 U.S.C. § 152, Eleventh(c) (1982)).
176. Id. at 1443.
177. Coar, 618 F. Supp. at 382 (emphasis added) (citing 45 U.S.C. § 152 Eleventh(a) and (c) (1982)).
178. 89 F.2d 768 (5th Cir.), reh'g denied, 89 F.2d 768 (5th Cir. 1937). The Estes court was the first to recognize a right to representation at a company-level hearing by a representative other than the majority union. Id. at 770. The case arose when a union employee brought a claim for a non-union employee's work position on the grounds of seniority. The NRAB ruled in favor of the union employee but did so without notifying the non-union employee of the impending hearing. The court addressed the preliminary issue of whether the non-union member was a "party," within the meaning of RLA section 153, First(j) of the RLA, and thus was due the rights of notice and choice of representation in proceedings before the NRAB. Once the Estes court found that the non-union employee was "involved" in the dispute as contemplated by section 153, First(j), and, therefore, was a "party," the court proceeded to interpret the right of representation to which the employee was entitled under the Railway Labor Act. Id. The court found that "[u]nder the plain provisions of the act an employee may conduct his negotiations with his employer and the proceedings before the Board, if necessary, either personally or through a chosen representative, which may or may not be a labor organization." Id. (emphasis added).

pressly in section 153, First(j) regarding free choice of representation at the NRAB are implicitly applicable to company-level hearings since the NRAB proceedings are merely an extension of the matter at the company level.\textsuperscript{179} The Supreme Court instead appeared to rely on a view espoused earlier in \textit{Broady v. Illinois Central Railroad}\textsuperscript{180} by the Court of Appeals for the Seventh Circuit. The \textit{Broady} court focused on the juxtaposition of section 153, First(j) with section 153, First(i), observing that, in imposing procedural requirements to be met at the company level, section 153, First(i) requires that grievances be handled "in the usual manner" while not mentioning any representation rights as does section 153, First(j).\textsuperscript{181} This distinction between the otherwise related provisions, as stressed in \textit{Landers} as it was in \textit{Broady}, indicates that the right to unrestricted representation is available only before the NRAB.\textsuperscript{182}

The RLA's express provisions lend themselves, either by design or by congressional oversight, to at least two vastly different interpretations on the issue of minority union representation at the company level. Case law at the federal court of appeals and district court levels developed two irreconcilable and extreme positions before the Supreme Court's \textit{Landers} decision. By denying either majority union participation or individual employee choice of representation in company-level grievance proceedings, neither of the two opposing interpretations achieved the delicate balance called for, by the spirit and letter of the RLA, between the competing interests of exclusive bargaining representative and individual employee.\textsuperscript{183} Instead, both ap-

\textsuperscript{179} Estes, 89 F.2d at 770.

\textsuperscript{180} 191 F.2d 73 (7th Cir.), cert. denied, 342 U.S. 897 (1951). For a discussion of \textit{Broady}, see supra note 114.

\textsuperscript{181} Id. at 76-77.

\textsuperscript{182} \textit{Landers}, 108 S. Ct. at 1442; \textit{Broady}, 191 F.2d at 77.

\textsuperscript{183} Because the lower courts found the RLA's legislative history and language to be a flexible statutory scheme, they interpreted specific RLA provisions on an ad hoc basis, attempting to realize the Act's purposes. In \textit{Broady v. Illinois Cent. R.R.}, 191 F.2d 73 (7th Cir.), cert. denied, 342 U.S. 897 (1951), and \textit{Butler v. Thompson}, 192 F.2d 831 (8th Cir. 1951), for example, the complaining employees both sought representation from officers of "rival unions." \textit{Broady}, 191 F.2d at 76; \textit{Butler}, 192 F.2d at 832. This common distinction of \textit{Broady} and \textit{Butler} was identified in \textit{McElroy v. Terminal R.R. Ass'n of St. L.}, 392 F.2d 966, 971 (7th Cir. 1968), cert. denied, 393 U.S. 1015 (1969). The McElroy court indicated that in \textit{Broady}, as well as in \textit{Butler}, "the employee sought to be represented not by a union with a collective bargaining contract with the railroad, but by a 'rival union.'" Id. The court then specified that the "term 'rival union' as used herein excludes those unions de-
proaches protected one interest at the expense of the other.

fined in Section [15]2 Eleventh(c) of the Railway Labor Act and qualified by the National Mediation Board.” Id. at 971 n.11. The decisions to deny the representation in both Broady and Butler were consistent with the Act’s policy objectives of (1) preserving the collective bargaining power of the majority unions and other nationally organized and certified unions; (2) preserving the peace between nationally recognized labor organizations and the railroads; and (3) protecting the continued flow of interstate commerce. For discussion of RLA policy objectives, see Taylor v. Missouri Pac. R.R., 794 F.2d 1082, 1086 (5th Cir.), cert. denied, 107 S. Ct. 670 (1986). See also RLA AT FIFTY, supra note 13, at 2, 13. Neither case, however, cited these policy objectives as the rationale for its interpretation.

The RLA’s ambiguity on the issue of minority union representation at company-level hearings resulted in other trends in court decisions which do not appear related to any identified statutory policy objectives. A survey of the decisions issued between Estes v. Union Terminal Co., 89 F.2d 768 (5th Cir. 1937), in 1937, and McElroy v. Terminal R.R. Ass’n of St. L., 392 F.2d 966 (7th Cir. 1968), cert. denied, 393 U.S. 1015 (1969), in 1968, reveals a strong correlation between the facts surrounding the claims of individual employees and whether the courts granted them the desired minority union representation. Estes involved a railroad’s removal of an employee from a work position in violation of the collective bargaining agreement’s seniority scheme. Estes, 89 F.2d at 769-70. For a discussion of Estes, see supra note 178. In General Comm. of Adjustment of Bhd. of Locomotive Eng’rs for Pac. Lines of S. Pac. Co. v. Southern Pac. Co., 132 F.2d 194 (9th Cir. 1942), rev’d on jurisdictional grounds, 320 U.S. 338 (1943), the employer railroad denied certain benefits claimed, by the employee, to be guaranteed to him under his individual employment contract. General Comm., 132 F.2d at 197. For a discussion of General Comm., see supra note 164. Later, in McElroy, the representation issue arose when seventeen employees filed claims against the employer, most of them claiming that the employer failed to maintain certain working conditions. McElroy, 392 F.2d at 967. For a discussion of McElroy, see supra note 97. In the three cases mentioned, all arguably involving injudicious behavior by the railroad, the respective courts found that the RLA provides individual employees the right to minority union representation at company-level proceedings. In Broady, Butler, and Switchmen’s Union of N. Am. v. Louisville and N. R.R., 130 F. Supp. 220 (W.D. Ky. 1955), the courts faced employees accused of disciplinary infractions. In these cases, which involved possibly improvident behavior by the individual employees, the results were different. The courts determined that the RLA does not provide minority union representation to an employee at company-level proceedings. Butler, 192 F.2d at 832-33; Broady, 191 F.2d at 75-77; Switchmen’s Union, 130 F. Supp. at 221-25. For a discussion of Broady, see supra note 114. For a discussion of Butler, see supra note 114. For a discussion of Switchmen’s Union, see supra note 103. Coar v. Metro-North Commuter R.R., 618 F. Supp. 380 (S.D.N.Y. 1985), and Taylor, decided in 1985 and 1986 respectively, were the first cases to hold that there is a right to minority union representation at the company level in factual situations involving disciplinary proceedings. Taylor, 794 F.2d at 1086; Coar, 618 F. Supp. at 381, 384; for a discussion of Taylor, see supra notes 86-101 and accompanying text; for a discussion of Coar, see supra note 92.

The RLA’s equivocation on the question of minority union representation in minor dispute resolution proceedings at the company level even allowed the Court of Appeals for the Seventh Circuit to reach opposite decisions in Broady and McElroy. In Broady, the court denied minority union representation during company-level disciplinary hearings. In McElroy, however, the same court granted minority union representation seventeen years later in a case involving affirmative employee claims. The McElroy court distinguished Broady by focusing on the fact that the Broady employees sought representation by a “rival” union which was not nationally certified in accordance with section 152, Eleventh(c).
By granting certiorari in *Landers*, the Supreme Court assumed the task of clarifying the contours of an employee's right under the RLA to minority union representation at company-level proceedings. It appears that the Court had three alternatives before it: (1) to find that, as *Taylor* found, there is an undeniable right to minority union representation in all instances of a minor dispute at the company level, thereby protecting the individual employee's associational freedoms identified in the RLA; (2) to find that, as the Court of Appeals for the First Circuit established in *Landers*, an employee is limited to the minority union representation rights created by the collective bargaining agreement, thereby defending the majority union's interests in preserving exclusive representation which are also identified in the RLA; or, (3) to reach a third interpretation which, at least partially, protects both the individual employee's and the majority union's RLA rights concurrently.

The conflict between the lower courts invited the *Landers* Court to restore adherence to the RLA's multiple purposes and to avoid the one dimensional results of both prevailing views. A third RLA interpretation, unlike the interpretations of both *Taylor* and *Landers* below, might better embody the spirit of the RLA by effectively striking a practicable compromise between the majority's organizational interests and the individual employee's associational freedom as well as by satisfying all of the statute's express language. The Supreme Court, however, chose to affirm the rationale of the Court of Appeals for the First Circuit, thereby declining to fashion an interpretation fostering a balance between the majority and individual employee interests.

**IV. THE *ELGIN, JOLIET & EASTERN RAILWAY CO. V. BURLEY* ANALOGY: A NEED TO BALANCE THE INTERESTS**

The statutory provisions and their interpretations which today comprise the Railway Labor Act represent the sixty year development of an equitable balance among the interests of the government, railroads, exclusive bargaining representatives, and individual employees, which accommodates the essential continued operation of the industry. The most exhaustive judicial discussion of the individual employee's position in this balance appears in the 1945 Supreme Court decision *Elgin, Joliet & Eastern Railway*.184 The *Burley* Court observed that the individual employee's interests are not wholly sub-

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merged in the collective interest.185 Perhaps the application of principles described in Burley might have led the Landers Court to a different result. The following sections first describe the evolution by which the various interests in the railway labor environment reached their current disposition and then review the Burley principles delineating individual employee rights under the RLA.

A. Railroad Labor Legislation: Traditional Interests and the Emergence of the Individual Employee’s Interests

The frequent succession of ineffective railway labor legislation between 1888, when the Arbitration Act was enacted, and 1926, the year of the RLA’s passage, convinced Congress that, to protect the national interest in uninterrupted operation of the railroads, a statute could not rely principally on governmental arbitration as a means of settling railroad labor disputes. In passing the RLA, as drafted by the unions and the railroads jointly, Congress recognized that the country’s interests would be best served by a self-balancing system of collective bargaining backed up by voluntary mediation. Through the RLA, Congress rested the health of interstate commerce on the delicate balance of power between labor unions and the railroads. The protection of the federal interest lay in the preservation of a peaceful coexistence between railroads and labor unions.

Railroads and unions, however, historically did not enjoy equal footing in negotiations.186 To reinforce the inherently less stable unions in this critical balance, Congress and the courts developed the concept of “exclusivity.”187 RLA section 152, Fourth provides that the majority of any craft or class of employees shall determine who will be the representative of the craft or class.188 Congress intended, through the RLA, to make the majority-selected representative the exclusive collective bargaining agent for all employees in a craft.

185. Id. at 733.
186. RLA AT FIFTY, supra note 13, at 25.
187. F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 152 (1977). The authors note that:
To remedy the “inequality of bargaining power” between employers and unorganized employees, Congress not only guaranteed employees the right to organize but also declared that the representative chosen by a majority of the employees in an appropriate bargaining unit is the exclusive representative for all unit employees. The unit chosen by the majority, therefore, represents even those who vote for another union or for no-union. This principle of exclusivity, almost unique to the United States, is fundamental to national labor policy and the collective bargaining process.

Congressional indulgence in strengthening the majority unions through codification of the exclusivity principle, however, had the important consequence of encroaching upon the interests of yet another party in railroad labor relations, the individual employee. As the Supreme Court said in *J.I. Case Co. v. NLRB* concerning the somewhat similar National Labor Relations Act, "[t]he very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group."

Professor Benjamin Aaron observes, however, that the statutory powers given to the unions by the RLA made it inevitable that the "courts would read into them a corresponding duty by unions to exercise that power reasonably and fairly." In *Steele v. Louisville & N. R.R.*, the Supreme Court explained the union's general duty of fair representation inherent in its authority as a bargaining representative. *Steele* involved non-union blacks whose jobs as firemen in diesel locomotives on southern railroads were coveted by white union members. The Court concluded that the union, in “collective bargaining and in making contracts with the carrier, ... [must] represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.” *Steele* assuaged somewhat the concerns of non-union and minority union employees that their interests would be ignored by collective agents negotiating collective bargaining agreements with the railroads. It did not, however, appease those who recognized that, in the context of individual grievances, claims arise about which an individual and the majority union will unavoidably differ. It was not until *Elgin, Joliet & Eastern Rail-

191. Id. at 338.
194. Id. at 204.
195. Summers, Individual Rights in Collective Agreements and Arbitration, 37 N.Y.U. L. REV. 362, 393 (1962). In the context of both the RLA and the analogous NLRA, Professor Summers indicates that “[m]ost grievances involve some factual issue, and the union, by rejecting the employees’ version, can act ‘responsible’ and wear the face of fairness.” Id. He adds: “The individual’s interest may more often be vitiated without vindictiveness or deliberate discrimination.” Id.
way Co. v. Burley\textsuperscript{196} that the Supreme Court found that the RLA guarantees individual employees the right to act on their own behalf in resolving "minor disputes" before the NRAB.\textsuperscript{197}

Prior to Burley, the unions generally denied employees the right to process their own grievances on the theory that the exclusive bargaining agent enjoyed complete authority to settle grievances as well as to negotiate collective agreements.\textsuperscript{198} Burley, however, observed that Congress distinguished "disputes concerning the making of collective agreements" from "disputes over grievances."\textsuperscript{199} The first class of disputes, the Court explained, arises when there is no collective agreement or when the employer or the majority union seeks to change the terms of an agreement. "They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past."\textsuperscript{200} These future-looking disputes, known as major disputes, involve the "larger" issues over which strikes may arise, consequently threatening railroad traffic.\textsuperscript{201}

Burley also defines minor disputes. Minor disputes appear in the administration or carrying out of a collective agreement and are the "smaller differences" which develop in the course of employment.\textsuperscript{202} They are individual in nature and unlikely to disrupt peaceful labor-management relations or railroad traffic.\textsuperscript{203}

In Burley, the petitioner, a labor union, while recognizing that there are two distinct types of disputes, urged the Court to find that the RLA makes the collective agent the employees' exclusive representative for either type of dispute.\textsuperscript{204} In particular, the union sought to have declared valid its exclusive representation of employees in griev-

\textsuperscript{196} 325 U.S. 711 (1945), adhered to, 327 U.S. 661 (1946).
\textsuperscript{197} Id. at 738. In Burley, a group of majority union member employees filed a grievance through the union seeking back pay for violations by the railroad of starting time provisions in the collective bargaining agreement. The union routed the grievance through the standard grievance handling procedure. Finally, however, in exchange for the insertion of a new express provision in the collective bargaining agreement creating employee rights in the case of similar future railroad violations, the union agreed to withdraw the grievance originated by the group of employees. The employees objected to the settlement and brought suit seeking back pay for the violations. The railroad contested the suit arguing that the union had settled the grievance on the employees' behalf. The Supreme Court held that, in the absence of express authorization by the individual employees, the union could not represent the employees in settling grievances at the NRAB. Id. at 711-18.
\textsuperscript{198} Aaron, \textit{supra} note 192, at 169.
\textsuperscript{199} Burley, 325 U.S. at 722-23.
\textsuperscript{200} Id. at 723.
\textsuperscript{201} Id. at 723-24.
\textsuperscript{202} Id. at 724.
\textsuperscript{203} Id. at 723-24.
\textsuperscript{204} Id. at 731.
ance matters before the NRAB. The Court, however, found that "such a view of the statute's effects, in so far [sic] as it would deprive the aggrieved employee of effective voice in any settlement and of individual hearing before the Board, would be contrary to the clear import of its provisions and to its policy."205 The Burley Court concluded that while a union, as collective bargaining agent, is empowered to make settlements for the future, it is not entitled to assume authority to settle claims or provide representation for employees in all instances.206 In minor disputes, the collective agent may act as a representative before the NRAB only when the individuals involved authorize it to do so.207 The Burley Court held that for an NRAB decision to be valid, it must appear that, if the collective bargainer is to represent the employee at the NRAB, the employee authorized the union in some legally sufficient way to act in his or her behalf.208

B. Elgin, Joliet & Eastern Railway Co. v. Burley: A Basis for the Individual Employee’s Right to Minority Union Representation in the Handling of Company-Level Grievances

Burley only determined the collective agent’s right to represent employees at NRAB proceedings. It specifically declined to determine whether Congress intended the RLA “to leave the settlement of grievances altogether to the individual workers, excluding the collective agent entirely except as [the employees] may specifically authorize it to act for them.”209 In describing the individual employee’s representation rights in NRAB proceedings, however, Burley suggests that similar rights exist in the context of company-level hearings.

The Burley Court reasoned that Congress could not have intended, by the 1934 RLA amendments, “to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency.”210 The Court focused on RLA section 152, Fourth, which reserves the right of “‘an employee individually’ to confer with management.”211 Burley interpreted section 152, Fourth as assuring the employees’ right to confer with their employer regarding individual grievances. The legislative history, the

205. Id. at 733.
206. Id. at 738-39.
207. Id. at 741.
208. Id. at 738.
209. Id. at 737.
210. Id. at 733.
211. Id. at 734 (quoting 45 U.S.C. § 152, Fourth (1982) (emphasis added in Burley)).
Court added, supports such an interpretation.\textsuperscript{212}

In a 1946 opinion construing \textit{Burley}, Attorney General Clark explained that section 153, First(j), which guarantees to employees the right to choose their representative before the NRAB, creates a "strong inference" that they have a similar right in negotiations before the employer.\textsuperscript{213} Attorney General Clark added that this inference becomes stronger by virtue of the fact that employees can ultimately bring suit, with the assistance of counsel, to enforce a NRAB finding.\textsuperscript{214} Individual employees may designate as their representative, Attorney General Clark concluded, either the collective agent or "any other union or person otherwise qualified to act."\textsuperscript{215} The employee has the statutory right to negotiate either personally or by a chosen representative.\textsuperscript{216}

The \textit{Burley} Court, however, also acknowledged the need for limiting the individual's representation right at the company level. The Court noted that even if a controversy is a "minor dispute," the collective agent may still have an interest in its resolution by virtue of the likely impact on the majority's future wages and working conditions.\textsuperscript{217} The uncertainty surrounding the future impact of a grievance proceeding at the negotiations or company level suggests that the majority union has a strong interest in participating in such hearings. "The statute," said the Court, "does not expressly exclude grievances from the collective agent's dut[ies] . . . . Both collective and individual interests may be concerned in the settlement where . . . the dispute concerns all members alike."\textsuperscript{218}

\begin{itemize}
  \item \textsuperscript{212} \textit{Id.} at 735.
  \item \textsuperscript{213} 40 Op. Att'y Gen. 494, 497 (1946).
  \item \textsuperscript{214} \textit{Id.} at 497.
  \item \textsuperscript{215} \textit{Id.} at 499.
  \item \textsuperscript{216} \textit{Id.} at 499-500.
  \item \textsuperscript{217} \textit{Burley}, 325 U.S. at 737.
  \item \textsuperscript{218} \textit{Id.} The second major issue raised in \textit{Burley} involved the manner in which the bargaining agent obtains the authorization from an employee to act as the representative in a grievance hearing before the NRAB. The majority union and the employer cannot, as the Court determined, nullify the employee's individual rights with a collective bargaining agreement. The Court revisited this issue in a rehearing of the \textit{Burley} case two years later. \textit{See} Elgin, J. & E. Ry. v. Burley, 327 U.S. 661 (1946). The second opinion, while "adhering" to the first, suggested that "custom and usage," a union's by-laws, or its constitution, might extend to the majority union the authority to act as representative for its members before grievance hearings. \textit{Id.} at 663 n.2. It cautioned, however, that it was not creating an "all-inclusive rule" by which a union could obtain blanket representation authorization. \textit{Id.} at 663. In response to the decision, unions in the late 1940's modified their by-laws and constitutions, declaring that voluntary membership in a union authorized representation at grievance hearings.

The appeasement evident in the \textit{Burley} rehearing appeared to be aimed at simplifying
While *Burley* firmly establishes the right of minority union representation at the NRAB, its language is equivocal, as is the statute, about the scope of that right at the company level. The decision recognizes that individuals enjoy rights, "separate and distinct" from the majority union's entitlements, in minor disputes. On the other hand, *Burley* also brings attention to the possibility that an employee's claim may concern the collective majority. The *Burley* Court declined to address the specific question of minority union representation at the company level which already had been raised in *Estes v. Union Terminal Co.* and *General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pacific Co. v. Southern Pacific Co.* As a result, two federal courts of appeals in *McElroy v. Terminal Railroad Association of St. Louis* and *Taylor* were able to justify finding that an employee has a right, implicitly guaranteed by the RLA, to be represented by a minority union in a minor dispute at the company level while three other courts of appeals, in *Broady v. Illinois Central Railroad*, *Butler v. Thompson*, and *Landers v. National Railroad Passenger Corp.*, decided that a majority union can preclude such minority union representation by denying the right in the collective bargaining agreement. The lack of precise language in *Burley* contributed to the subsequent split between the lower courts and, as a result, to the Supreme Court's granting of certiorari in *Landers*. *Burley*’s description of the nature of the individual employee's rights under the RLA should have served as a springboard from which the *Landers* Court could proceed. Instead, the *Landers* opinion abstains from recognizing any individual employee rights in the context of company-level proceedings, finding that, in the absence of a contractual agreement to the contrary, the exclusive bargaining representation...
tative enjoys an unfettered right to represent any employee in grievances or disciplinary matters regardless of the employee's union membership.227

In a general discussion about the relationship between a collective unit and an individual under a collective bargaining agreement, Professor Summers suggests that interpretations of the governing statute, whether the RLA or the NLRA,228 which unconditionally either grant or deny a right to an individual, defeat the spirit of the statute:

The interests of the collective parties and the interests of the individual employees do not stand in simple opposition to each other; they cannot be lumped for weighing on the scale of judgment to determine whether individuals should or should not have rights under collective agreements. The interests do not clash directly, and the choice is not whether the union should have complete control or the individual full independence.229

The proper inquiry must be similar to that which guided Congress through the legislative process which generated the RLA: what interpretation of the RLA consistently best serves the interests of all the parties involved?

While Burley provided the courts, such as those which decided the Taylor and Landers lines of cases, with language supporting either of two opposite conclusions regarding minority union representation, a careful construction of that language also suggests a third interpretation more consistent with Professor Summers' caveats. In construing the RLA, Burley recognizes several principles which, molded together, present a scheme for distributing the representation right between the majority union and the individual minority union member as a function of the nature of the claim presented by the employee.

First, the Burley Court recognized that the RLA "vests exclusive authority to negotiate and to conclude agreements concerning major disputes" in the majority union.230 "This . . . authority," the Burley Court determined, "includes representation of the employees . . . in the stage of conference [at the company level]."231 An employee, therefore, cannot seek modification of a collective bargaining contract, or creation of a new one, by negotiating either individually or through a minority union with the employer. Collective bargaining is the ex-

227. Landers, 108 S. Ct. at 1443-44.
230. Burley, 325 U.S. at 728 (emphasis added); see also Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944); J. I. Case Co. v. NLRB, 321 U.S. 332, 335-37 (1944).
exclusive domain of the majority union, which must observe the "duty of fair representation" identified in *Steele v. Louisville & Nash. R.R.*.232

Where an employee's claim arises from interpretation of a collective agreement and it pertains primarily to rights in the past, the claim will be classified as a "minor dispute."233 The *Burley* holding partially defined the representation rights of individual employees in minor disputes. The Court recognized that in minor disputes, unlike in major disputes, the individual is entitled to participate in the dispute resolution process. It observed that the RLA grants to the individual employee the rights "to share in the negotiations [concerning a minor dispute], to be heard before the Board [NRAB], to have notice, and to bring the enforcement suit."234 The Court concluded that these rights cannot be realized by the individual if the majority union has the absolute statutory authority to foreclose individual employees' claims altogether through exclusive representative status in minor disputes.235 *Burley*, therefore, indicates that the RLA denies any individual or minority union participation at any stage of major disputes but grants the individual the right to share, to some extent, in dispute negotiations at the company level.

The second *Burley* principle adaptable to a scheme for parcelling representation rights between the minority union employee and the majority union is *Burley's* suggestion that it is patently unfair to impose majority union exclusive representation on an individual employee when the employee and the exclusive agent, in a grievance matter, seek disparate results from the dispute resolution process.236 This *Burley* observation invites a dispute resolution mechanism which, once a "minor dispute" is established, avoids this unfair result by granting minority union representation at least wherever majority union and individual employee interests material to the grievance conflict.

The third principle which can be drawn from *Burley* as a tool in constructing a comprehensive representation scheme for minor disputes at the company level is that there are instances in which "the dispute concerns all members alike, and settlement hangs exclusively

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232. 323 U.S. 192 (1944). *Steele* postulated that, in the context of collective bargaining, the statutory authority given to the majority union carries a concurrent responsibility to represent each employee in the unit on a non-discriminatory basis. *Id.* at 204. For a discussion of *Steele's* impact on the 1951 RLA amendments, see *supra* notes 76-79 and accompanying text.


234. *Id.* at 736 (emphasis added).

235. *Id.*

236. *Id.*
upon a single common issue or cause of dispute arising from the terms of a collective [bargaining] agreement." As the Burley Court asserted in a footnote on this point, "[t]o give the collective agent power to make the agreement, but exclude it from any voice whatever in its interpretation would go far toward destroying its uniform application." A satisfactory procedure must permit, to the extent that interpretation of the governing collective bargaining agreement is an issue, the exclusive agent to actively participate in the settlement in order to preserve the agreement's uniform interpretation and application.

In summary, Burley presents at least three principles relevant to the minority union representation right at the company level: (1) a minority union employee is limited to exclusive majority union representation in major disputes; this limitation does not apply as a general rule to minor disputes; (2) a conflict of interests between the employee and the majority union may make compulsory majority union representation unfair; (3) finally, while a minor dispute may be "individual" in nature, its resolution may affect the majority union by its prospective impact on other employees' future claims. The following section employs these principles as the basis of a proposed minor dispute representation scheme embodying the spirit and letter of the RLA.

V. A PROPOSED ALTERNATIVE INTERPRETATION OF INDIVIDUAL EMPLOYEES' MINORITY UNION REPRESENTATION RIGHTS AT THE COMPANY LEVEL UNDER THE RLA

A. A Three-Step Test for Establishing the Respective Representation Rights of the Minority Union Employee and the Majority Union: An Application of the Burley Principles

The three principles espoused in Burley, which this note suggests are relevant to grievance resolution at the company level, invite a three-step test which can be applied to a dispute in determining the respective representation rights of the minority union employee and the majority union in resolving that dispute. The test is comprised

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237. Id. at 737.
238. Id. at 737 n.35.
239. The diagram (see infra Figure 1) illustrates the proposed three-step test for determining the respective representation rights of the minority union employee and the majority union in resolving disputes under the Railway Labor Act.

This test is derived from the Burley decision's general description of the statutory (RLA) and equitable foundation of the relationship between the individual employee and
EMPLOYEE'S RIGHT TO MINORITY REPRESENTATION

1. MAJOR OR MINOR DISPUTE?

   MAJOR DISPUTE

   NO MINORITY UNION REPRESENTATION

   MINOR DISPUTE

   DO COLLECTIVE AND INDIVIDUAL/ MINORITY INTERESTS CONFLICT?

   COLLECTIVE AND INDIVIDUAL INTERESTS CONFLICT

   EMPLOYEE(S) ENTITLED TO MINORITY UNION REPRESENTATION

   COLLECTIVE AND INDIVIDUAL INTERESTS COINCIDE

   NO MINORITY UNION REPRESENTATION; SOME INDIVIDUAL PARTICIPATION PERMITTED

2. DOES ISSUE OF CONFORMITY WITH COLLECTIVE BARGAINING AGREEMENT ARISE?

   CONFORMITY WITH AGREEMENT IS AN ISSUE

   COLLECTIVE AGENT MAY PARTICIPATE ON EQUAL FOOTING WITH INDIVIDUAL AND EMPLOYER ON ISSUE OF CONFORMITY ONLY; CAN BE PARTY TO "DEADLOCK"

   CONFORMITY WITH AGREEMENT IS NOT AN ISSUE

   COLLECTIVE AGENT MAY ATTEND AND BE HEARD BUT DOES NOT HAVE DETERMINATIVE ROLE IN FINAL RESOLUTION; CANNOT BE PARTY TO "DEADLOCK"

Figure 1
of three sequential inquiries aimed at ascertaining the interests of the parties involved and permitting representation on the basis of the nature of the interests at stake in each dispute.

The first inquiry is whether the dispute is a major or minor dispute. If the grievance constitutes a major dispute, Burley strongly suggests, and this scheme proposes, that the minority union employee's right to minority union representation is foreclosed.\(^{240}\) If the grievance presents a minor dispute, the minority union employee's representation rights are determined in the second and third steps.

The second question is whether the minority union employee and the majority union concur on the disposition to be sought from the dispute resolution process. If the employee and the majority union agree on the desired result, the majority union will serve as the employee's exclusive representative and the employee is not entitled to minority union representation at the company level. Even where the employee is limited to majority union representation, he or she retains the right to participate individually. When the interests of the employee and the majority union conflict, however, and they seek disparate results, the likelihood of prejudice identified in Burley dictates that the employee's rights are only adequately protected by permitting minority union representation.\(^{241}\)

The third and final inquiry is whether the dispute involves determination of the parties' conformity with the governing collective bargaining agreement. Even when the employee is entitled to minority union representation, if the dispute involves an issue of the parties' (employer, majority union, or employee) conformity with the collective bargaining agreement, the majority union's interest in uniform application of the agreement requires that it be entitled to participate as an equal third party—with the employer and the employee—in resolving the dispute. Where conformity is not in question, however, the majority union's participation is limited to the right to be present and

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\(^{240}\) For a discussion of the first step in the proposed analysis, see infra notes 243-68 and accompanying text.

\(^{241}\) For a discussion of the second step in the proposed analysis, see infra notes 269-80 and accompanying text.
to be heard. The following discussion describes each step in greater detail.

1. Does the Minority Union Member's Claim Constitute a "Major" or a "Minor" Dispute?

It is settled law that all rights of an individual to a minority union representative or individual participation in a labor dispute are foreclosed where it is determined that the dispute is "major." Before an employee can claim a right to minority union representation, therefore, it must be established that the claim presents a minor dispute. The classification of a dispute as "major" or "minor" determines the nature of the procedures to be used in its resolution. The different procedures triggered by the two types of disputes, in turn, provide the parties with different rights. While representation is among the rights affected by the classification, federal cases have also addressed the distinction between types of disputes in order to determine juris-

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242. For a discussion of the third step in the proposed analysis, see infra notes 281-98 and accompanying text.

243. For an illustration of this determination's implications and position in the proposed scheme, see supra note 239, step 1, and accompanying text. The focus of this note is the representation rights of minority union employees in minor disputes. As a result, the core of its analysis lies in determination of representation entitlements after the classification of disputes as either "major" or "minor" has been made. While the discussion which follows regarding differentiation between major and minor disputes is not an exhaustive review of pertinent judicial decisions, the issue is addressed as significant because it remains very relevant to an employee who desires to process a grievance which bears characteristics of both types of disputes. In such an instance, before a dispute can be channeled into the appropriate dispute resolution mechanism, the majority union and individual employee must resolve the threshold question of classification. For a discussion of practical considerations in executing this threshold determination, see infra notes 244-68 and accompanying text.

244. Railway Labor Executives Ass'n v. Norfolk and W. Ry., 833 F.2d 700, 703-04 (7th Cir. 1987). When the dispute is major, the RLA provides that the parties "must attempt to resolve it through negotiation, mediation and possible presidential intervention." Id. at 704 (citing Railroad Trainmen v. Terminal Co., 394 U.S. 369, 378, reh'g denied, 394 U.S. 1024 (1969)). "If a dispute is minor, the parties first must attempt to resolve their dispute through negotiation. If negotiation fails, however, the parties must submit their minor dispute to the National Railway Adjustment Board for resolution." Id. (citing National Ry. Labor Conference v. International Ass'n of Machinists and Aerospace Workers, 830 F.2d 741, 745 (7th Cir. 1987)). The NRAB exercises exclusive jurisdiction over minor disputes. Id. (citing Andrews v. Louisville and N. R.R., 406 U.S. 320, 322 (1972) (citation omitted)).

245. Id. at 703-04. When the parties fail to resolve a major dispute, the union is entitled to strike. National Ry. Labor Conference v. International Ass'n of Machinists and Aerospace Workers, 830 F.2d 741, 745 (7th Cir. 1987). Employees cannot strike in response to a minor dispute. Chicago and N. W. Transp. Co. v. International Bhd. of Electrical Workers, Local Union No. 214, 829 F.2d 1424, 1428 (7th Cir. 1987); Brotherhood of R.R. Signalmen v. Burlington N. R.R., 829 F.2d 617, 619 (7th Cir. 1987).
diction over disputes246 and availability to a union of state tort law causes of action against an employer.247 Considering this issue in contexts not involving representation rights is useful in providing a clearer definition of when an employee can enjoy minority union representation.

Although the distinction between major and minor disputes is critical in applying the RLA, courts and commentators agree that the dividing line is vague.248 Generally, courts follow Burley and differentiate disputes by identifying a minor dispute as "a dispute over interpretation of an existing contract" and a major dispute as "an attempt to create a contract or change the terms of a contract."249 At least one court has recognized, however, that while the Burley differentiation may have been an adequate standard when unions were organizing for the first time, its usefulness diminished as unions and railroads renegotiated existing agreements.250 After Burley, courts have frequently faced the difficult factual question of whether in engaging in questionable conduct, railroads "changed the conditions of work," suggesting a major dispute, or "infringed upon a right guaranteed the union under the agreement," suggesting a minor dispute.251 In response to this dilemma, the courts refined the Burley distinction to give greater definition to the dividing line between the two classes of disputes.

Some courts have focused on the dichotomy between statutory

246. Railway Labor Executives Ass'n, 833 F.2d at 703. Norfolk and Western Railway (N & W) implemented urinalysis drug screening in all of its routine employee medical examinations. The unions charged in federal district court that the screening program constituted an "unlawful unilateral change in the employees' 'working conditions' in violation of . . . the Railway Labor Act." Id. The unions claimed that the district court had jurisdiction in this instance because it involved a "major dispute." On N & W's motion for summary judgment, the district court determined that the dispute was minor and within the exclusive jurisdiction of the NRAB. The court of appeals affirmed. Id.

247. Leu v. Norfolk and W. Ry., 820 F.2d 825, 830 (7th Cir. 1987). In Leu, former employees sued Norfolk and Western Ry. claiming that the railroad engaged in fraud and conversion in not paying the employees' medical expenses. The court of appeals affirmed the district court's dismissal of the state law claims for lack of subject matter jurisdiction and held that the employer's duty to pay medical bills was to be determined from the terms of the collective bargaining agreement and, therefore, gave rise to a minor dispute. The RLA's minor dispute resolution mechanism preempts any state law claims. Id. at 827-30.


249. Railway Labor Executives Ass'n, 833 F.2d at 704 (citing Chicago and N. W. Transp. Co. v. International Bhd. of Electrical Workers, Local Union No. 214, 829 F.2d 1424, 1427 (7th Cir. 1987) and Burley, 325 U.S. at 723).

250. Local 553 v. Eastern Air Lines, 695 F.2d 668, 673 (2d Cir. 1982).

251. Id.
rights and rights arising out of a collective bargaining agreement. In *International Ass'n of Machinists and Aerospace Workers v. Alaska Airlines*, the Ninth Circuit Court of Appeals held that "[m]ajor disputes concern statutory rights, such as the right to form collective bargaining agreements or to seek to secure new rights and incorporate them into future agreements" while minor disputes "concern the interpretation or application of collective bargaining agreements."

Other courts have turned almost exclusively to the contents of the collective bargaining agreement to determine the classification of a dispute. Under this approach, the court considers whether "the dispute can be resolved by reference to an existing collective [bargaining] agreement." When it can clearly be so resolved, it is a minor dispute. When the determination cannot be easily made, the court considers "the [railroad's] claims of contractual justification" for its challenged activity. If the employer's claims are "frivolous" or "obviously insubstantial," the dispute is major. In contrast, "a dispute is minor [when the collective bargaining agreement] is 'reasonably susceptible' to the carrier's interpretation."

In scrutinizing collective bargaining agreements to assess whether they are material to a dispute, courts have found that some written agreements do not contain all relevant working conditions. As a result, the court cannot render a decision, classifying a dispute as either major or minor, based solely on the express language of the agreement. As the Court of Appeals for the Seventh Circuit observed in *Labor Executives Association v. Norfolk and Western Railway*, however, "it is common practice [in the railroad industry] to omit from written agreements nonessential practices that are acceptable to

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253. *Id.* at 1039-40 (citing *International Ass'n of Machinists v. Aloha Airlines*, 776 F.2d 812, 815 (9th Cir. 1985)).
255. *Id.*
256. *Atchison, T., and S. F. Ry. v. United Transp. Union*, 734 F.2d 317, 321 (7th Cir. 1984). Cases of this nature reveal a pattern in which the employer seeks characterization of the dispute as a "minor dispute" primarily to avoid work stoppages and challenges in the courts. The unions and employees, on the other hand, frequently seek a finding that the dispute is major, permitting their resort to self-help measure such as strikes. *Local 553, 695 F.2d at 675; Railway Labor Executives Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700, 705 (7th Cir. 1987).
both parties.”260 In such instances, courts infer that the collective agreement includes “the specific terms set forth in the written agreement and any well established practices that constitute a ‘course of dealing’ between the carrier and employees.”261 In considering the employer's assertions that the agreement justifies its challenged activity or forbearance, the court must rely not only on the written language of the agreement but on those terms which can be inferred from “course of dealing.” At least one court has stretched the scope of inferred provisions of the agreement from which minor disputes can arise to include an “incident of the employment relationship.”262

In Detroit and Toledo Shore Line Railroad v. United Transportation Union,263 the Supreme Court identified yet another means of distinguishing major and minor disputes. The Court, as interpreted by the Second Circuit Court of Appeals in Local 553 v. Eastern Air Lines,264 looked to “the extent of the disruption caused by the carrier’s action; in a literal sense, it looked to see whether the dispute was major.”265 The Local 553 court observed that this manner of regarding disputes is consistent with Burley. Citing Burley, the Local 553 court noted that Congress intended the major dispute process to apply to “‘the large issues about which strikes ordinarily arise,’ while the compulsory arbitration” mechanisms were established for minor disputes “‘[b]ecause of their comparatively minor character and the general improbability of their causing interruption of peaceful relations and of traffic.’”266 This contour of the major and minor dispute dichotomy promotes the presumption adopted in Brotherhood of Locomotive Engineers v. Atchison, T. & S. F. Ry. Co.267 In that case, the Seventh Circuit Court of Appeals reasoned that because “a major dispute can escalate into a strike,” when there is doubt as to whether a dispute is major or minor, a court will find the dispute to be minor.268

260. Id. at 705.
261. Id. (citing Detroit and Toledo Shore Line R.R., 396 U.S. at 153-55). The Sixth Circuit Court of Appeals, however, noted that the past practices between employees and employer may have minimal impact on the characterization of the dispute as major or minor, particularly where it is used to contradict the contents of the written agreement. Brotherhood Ry. Carmen v. Norfolk & W. Ry., 745 F.2d 370, 376-78 (6th Cir. 1984).
264. 695 F.2d 668, 674 (2d Cir. 1983).
265. Id. at 674 (citing Detroit and Toledo Shore Line, 396 U.S. at 143-51).
266. Id. (quoting Burley, 325 U.S. at 723-24).
267. 768 F.2d 914 (7th Cir. 1985).
268. Id. at 920.
2. Determining Representation Rights in Minor Disputes: Do the Individual Employee and the Majority Union Seek the Same Result or Do Their Interests Conflict?\(^{269}\)

As suggested in *Burley*, minor disputes which involve employee grievances or disciplinary matters are reasonably divisible into two categories. The first category consists of claims which the collective bargaining agent supports and for which it will seek a disposition consonant with individual employees' objectives regardless of their minority union affiliations. The other category encompasses grievances toward which the collective agent is hostile and in which it cannot support the individual employee. This latter category also includes those grievances about which the majority union harbors reservations or retains an uncommitted stance.\(^{270}\) The relationship between individual and collective interests in these two general categories is sufficiently different to justify maintaining a difference of representation rights in each category.

In the first instance, where a majority union supports the minority union employee's grievance, permitting the majority union to serve as the employee's representative, in spite of the employee's objections, is justified because there is a negligible impact on the employee's ability to realize the desired objective. It must be recognized, nevertheless, that the individual may prefer another representative for several reasons. There may be a general distrust of the union or apprehension that the union's efforts will be faint. The employee may strongly dislike the collective agent or merely prefer that the minority union receive the credit when the claim is resolved. These reasons, however, do not overcome the interests of the majority in having the collective agent actively manage the claim when the collective agent agrees with the merits of the claim. In addition, it is more efficient to allow the collective agent, who is more familiar with the governing agreement, to handle the dispute.

To deny the collective agent a role as representative in minor disputes at the personal whim of an individual is likely to "undermine the prestige" of the majority union.\(^{271}\) By regular prosecution of grievances, the majority union continuously "demonstrate[s] its effective-

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269. For an illustration of this determination's implications and position in the proposed scheme, see *supra* note 239, step 2, and accompanying text.

270. Summers, *supra* note 195, at 399; see also *Burley*, 325 U.S. at 736.

ness as guardian of the employee's interests." Successful settlement of disputes permits the union to "build[ ] bonds of loyalty" with the employees it benefits and to preserve the confidence of its members. The participation of another representative less familiar with grievance procedures under the governing collective bargaining agreement may increase the administrative burdens and costs to all the parties involved. Employer apprehension about antagonizing a majority union as it deals with a minority representative for the affected craft may even cause an unfavorable result for the employee. Total subjugation of the majority union to the desires of the individual may weaken the authority of the collective agent in major disputes and, in turn, deprive all employees of a collective voice.

Balancing the interests involved suggests that the collective agent and individual employee are best served by requiring the employee to submit the grievance to the collective agent for representation through the entirety of company-level proceedings when the agent and employee agree on the desired result. The individual's reservations about the adequacy of the representation can be appeased by observing the employee's statutory right to be present at hearings and to personally contribute to them.

While Steele v. Louisville & N. R.R. established the "duty of fair representation" in the handling of major disputes, the Court, in Conley v. Gibson, extended the doctrine to minor disputes. The Court held that even when the exclusive collective agent has satisfied its fair representation duty in the creation of the collective bargaining contract, the contract may not be "administered in such a way, with the active or tacit consent of the [majority] union, as to be flagrantly discriminatory against some members of the bargaining unit." Together, the duty of fair representation and the requirement that the individual and the majority union concur on the desired dispute resolution provide individual employees with considerable assurance that their grievances will be pursued by the exclusive agent with fervor when the exclusive agent represents them.

As the Burley Court noted, however, there are factual instances in which the interests of an individual and those of a majority union con-

272. Id. at 391.
273. Id.
275. 323 U.S. 192 (1944). For a discussion of Steele, see supra notes 193-95 and accompanying text.
277. Id. at 46.
flict, such as when the union favors an employee other than the griev­
ant in a seniority claim. Even the fair representation doctrine cannot
assure the employee of a wholeheartedly supportive representative
under these circumstances. The disfavored employee's seniority claim
is probably destined for failure at the outset.

When a collective agent is opposed to an employee's grievance, is
not committed to the employee's cause, or favors competing griev­
ances submitted by other employees, adhering to a rule requiring ma­
jority union representation is tantamount to no representation. A
collective agent may disbelieve an employee's statement of facts, disa­
gree with the employee's interpretation of the collective bargaining
agreement, or may be personally or politically opposed to the griev­
ant. Under any of these factual circumstances, the union either
does not seek the same result or the employee cannot be assured of
having a fervent representative. In these cases, only allowing the
grievant to choose a representative can preserve a semblance of fair­
ness in the process.

The collective bargaining agreement, however, must always be
observed to the extent that it lays out the procedural mechanism
through which the grievance must pass. If the majority union decides
early in the process that it does not concur with the individual's con­
tentions, that is the point at which the employee's entitlement to mi­
nority union representation arises. The minority union, however,
must proceed through all the steps delineated in the collective bargain­
ing agreement up through the last appeals stage at the company level.
Preserving the integrity of the process, even as representatives vary,
"simplifies the administrative work of management; provides the max­
imum opportunity for settlement; and helps insure that the substantive
terms of the settlements will be uniform."

3. To What Extent Can the Exclusive Agent Participate in
the Minor Dispute Resolution Process to Protect Its
Own Interests and Those of the Majority as
a Collective Unit?

Where it is determined that the employee is entitled to minority

278. Summers, supra note 195, at 399.

279. For a discussion of the practical considerations in determining congruity or in­
congruity between the individual employee's interests and those of the majority union, see
infra subsection 2, "Implementation Considerations."

280. Summers, supra note 195, at 399-400.

281. For an illustration of this determination's implications and position in the
proposed scheme, see supra note 239, step 3, and accompanying text.
union representation, the question to be posed is whether the majority union, nonetheless, retains a right to participate in resolving the claim. In the aforementioned seniority claim, for example, the majority union may favor the appointment of employees other than the claimant. The collective unit may be impacted prospectively in future claims by resolution of the current dispute. Even though under the proposed scheme the employee would be entitled to minority union representation because the collective and individual interests are inconsistent, the majority union’s interest in the outcome of each grievance adjustment cannot be ignored. A satisfactory procedure in minor disputes impacting the majority must address the interests of three parties: the individual, the employer, and the collective agent.

Although NLRA section 159(a) does not recognize an employee’s right to minority union representation in the adjustment of grievances unless contemplated in the collective bargaining agreement, the provision expressly recognizes the employee’s individual

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282. Determination of one employee's seniority status in a grievance hearing may affect the seniority status of other employees adversely. Without representation in the proceedings, these other employees would only be able to assert their objections and concerns in a subsequent proceeding and, possibly, with a lesser chance of achieving a satisfactory result.

283. Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945), adhered to, 327 U.S. 661 (1946), recognized that despite the individual nature of a grievance claim between an employee and the employer, the majority union cannot be excluded from participation in its resolution:

To leave [grievance] settlements ... ultimately to the several choices of the members, each according to his own desire without regard to the effect upon the collective interest, would mean that each affected worker would have the right to choose his own terms and to determine the meaning and effect of the collective agreement for himself ... To give the collective agent power to make the agreement, but exclude it from any voice ... in its interpretation would go far toward destroying its uniform application.

Burley, 325 U.S. at 737 n.35.

284. NLRA § 159(a) provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.


285. A significant difference between the RLA and the NLRA is that while at least some minority union representation is permitted under the RLA, the NLRA generally
standing to present grievances and to have them adjusted. It also acknowledges and protects the majority union's interest in resolving

precludes presentation of grievances "through any labor organization other than the exclusive representative." Hughes Tool Co., 56 N.L.R.B. 981, 982 (1944), enforced as modified, 147 F.2d 69 (5th Cir. 1945). The NLRA permits an employee to enlist a minority union to present a grievance only with the consent of both the employer and the collective agent. Douds v. Local 1250, Retail Wholesale, Dept. Store Union, 173 F.2d 764, 769 (2d Cir. 1949). On its face, the current interpretation of the NLRA bears a strong resemblance to the RLA interpretation adopted by the Supreme Court in *Landers*, which relies entirely on the governing collective bargaining agreement to determine whether an employee may enjoy any minority union representation in minor disputes.

While the two statutes share a common concern for the ability of an individual to bring grievances before an employer without influence or coercion by the exclusive agent, they are fundamentally different on the question of minority unions and the degree of protection extended to the exclusive agent. The eras and the conditions from which each statute arose explain their differences. Arouca, Perritt, *Transportation Labor Regulation: Is the Railway Labor Act or the National Labor Relations Act the Better Statutory Vehicle?*, 36 LAB. L.J. 145, 147 (1985). Dennis Arouca and Professor Henry Perritt find that "[t]he RLA was intended to be a very loose legal framework within which most controversies would be adjusted voluntarily." Id. "The NLRA," in contrast, "was intended to be a much tighter and more detailed set of obligations that would be explicated and applied by legal institutions." Id.

Congress enacted the RLA as drafted and proposed by railroads and the unions. It codified practices born out of economic conditions and traditions prevalent in 1926. Id. at 149. As Justice Brennan indicated in his dissenting opinion in *Chicago & N.W. Ry. v. United Transp. Union*: The intent of Congress was "not to write a lot of statute law for the courts to enforce . . . . We expect that most of the provisions of this bill are to be enforced by the power of persuasion, either exercised by the parties themselves or by the Government board of mediation representing the public interest." 402 U.S. 570, 590 (1971) (Brennan, J., dissenting) (quoting *Hearings on Railroad Labor Disputes before House Committee on Interstate and Foreign Commerce*, H.R. REP. 7180, 68th Cong., 1st Sess., 65, 66 (1926)).

Congress enacted the NLRA, on the other hand, in 1935, a time when labor relied on legislation rather than economic and political persuasion to gain a footing in its dealings with industry. D. Arouca, *supra*, at 148-50. The NLRA legislation focused on promoting collective bargaining and strengthening the selected collective agent. Id.

Arouca and Perritt suggest that the RLA is tailored after the British "abstentionist" labor model practiced in Britain at the time of the RLA's enactment. Id. at 147. Under the British model, "[t]he problem of union recognition . . . was . . . left to the parties to resolve—the law did nothing to make it incumbent on any employer to bargain with a union or any union to bargain with an employer." Id. at 148. The result, they indicate, was that "multiunionism," the absence of an exclusive agent, became prevalent. Id. If the British model even slightly influenced the RLA's development, a statutory interpretation of the RLA accepting a limited minority union role in grievance dispute resolution appears more consistent with the statute's spirit than one which gives complete dominion to the collective agent.

While the courts have determined that the NLRA requires consent of both the employer and the collective agent before a minority union can engage in grievance matters, commentators have observed that the core difference between the NLRA and the RLA is the degree of exclusivity of representation rights afforded under each to the collective agent. It would seem anomalous, therefore, to interpret the RLA as identical to the NLRA on the issue of minority union representation.
grievances.\textsuperscript{286} In these respects, the NLRA is analogous to the RLA. Although the NLRA lacks detail in laying out the respective roles of employees, majority union, and employer, the RLA brings even less specificity to this subject. The NLRA guarantees the collective agent a role in the grievance process even when the agent is not representing the grievant. The scope of that role, however, is unclear. While the NLRA speaks of the majority union’s right to “an opportunity to be present,”\textsuperscript{287} at least one commentator has suggested that language be interpreted to provide for a more meaningful role.\textsuperscript{288}

Bernard Dunau suggests that, under the NLRA and the RLA, the exclusive agent has a right to be heard in all grievance proceedings and that the exclusive agent should be able to intervene if the collective bargaining agreement’s integrity or uniform application is threatened.\textsuperscript{289} He proposes a three-party adjustment procedure within which all three parties retain equal shares in decision-making to the extent that the grievance involves the question of “consistency with the agreement.”\textsuperscript{290} If the grievance does not involve conformity with the collective agreement, or if there is no question of agreement interpretation, or the outstanding issue is merely one of a factual determination, only the employer and the employee must agree in order to reach a final resolution.\textsuperscript{291} Likewise, where conformity with the collective agreement is not an issue, a deadlock can be the result only if the employer and the employee cannot agree. The exclusive agent’s concurrence is not essential to resolve a dispute. Dunau would place the burden of determining whether consistency with the collective agreement is threatened upon the exclusive agent itself.\textsuperscript{292} The possi-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{287} NLRA, 29 U.S.C. § 159(a) (1982). For text of § 159(a) see \textit{supra} note 284.
\item \textsuperscript{288} Dunau, \textit{supra} note 286, at 746-47.
\item \textsuperscript{289} \textit{Id.} at 747.
\item \textsuperscript{290} \textit{Id.} at 748.
\item \textsuperscript{291} \textit{Id.}
\item \textsuperscript{292} \textit{Id.} at 747. Professor Dunau notes:
\end{itemize}
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The necessity for this conclusion is apparent from a consideration of the reason for and the scope of intervention. On its face the right of intervention is bottomed on the need to maintain the integrity and uniformity of the agreement, for the protection of which the representative’s participation in conference without more is insufficient. To be meaningful, intervention must enlarge on the already existing right to be heard, but to prevent displacement of the employee’s power of decision, it must encompass less than exclusive authority to settle the grievance on the employee’s behalf. The middle ground is to grant the representative and the employee an equal voice in determining the question of conformity. On this basis, although the right to intervene adheres as soon as the issue of conformity is raised, disposition of a grievance, insofar as the requirement of con-
\end{itemize}
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bility of a tripartite deadlock between employer, employee, and majority union where the claim involves conformity with the collective bargaining agreement, or a bipartite deadlock between employer and employee where the collective bargaining agreement is not an issue, underscores the need for an effective grievance adjustment process established by collective bargaining agreement. Incorporating neutral arbitration as a final stage precludes the deadlocks which might arise.293

The third step of the proposed representation scheme parallels Dunau's model. The major difference is the proposal's recognition of minority union representation where Dunau merely recognizes individual employee participation. Disputes, in which an employee is entitled to minority union representation as a result of determinations in the previous two steps in the analysis, are further divisible into two groups in this third and final step.294 The first group consists of those disputes in which conformity of the parties (employee and employer) with the terms of the collective bargaining agreement is an issue. The other group encompasses disputes in which conformity with the collective bargaining agreement is not an issue.

Where conformity with the agreement arises,295 the majority union has a strong interest in the agreement's uniform application and, therefore, should be entitled to actively participate in company-level negotiations as the third of three equal parties, all of whom must agree in a proposed resolution for the dispute to reach settlement. This tripartite procedure ensures that dispute resolution in the case of a minority union employee will be consistent with the rights and benefits of majority union employees.

In contrast, there may be no question of conformity with the collective bargaining agreement. Such is the case when the dispute involves application of well-settled interpretations of the agreement's pertinent provisions and the issues lie primarily in determination of facts. As Dunau suggests,296 the dispute arises primarily in the em-

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293. Id. at 749.
294. For an illustration of the steps in the proposed representation scheme, see supra note 239.
295. Conformity with the agreement is likely to arise where the employee and employer disagree on interpretation of the collective bargaining agreement. As a party to the collective bargaining agreement, the majority union has a substantial interest in participation in negotiations which will result in a settled interpretation.
296. Dunau, supra note 286, at 740-51.
ployer-employee relationship. The majority union’s interest, which is limited to the union’s status as a party of the collective bargaining agreement, does not rise to a level justifying the majority union’s full participation in the dispute resolution process. The proposed scheme adopts Dunau’s premise by excluding the majority union to the extent that dispute resolution in these cases requires agreement only between the employer and employee or the employee’s minority union representative. The majority union, however, is not eliminated entirely. It retains the right to be present and witness the proceedings as well as to voice its concerns and recommendations. The employer and employee, nonetheless, may reject any majority union arguments as long as conformity with the agreement is not involved. If at any point in the proceedings interpretation of the agreement is necessary, the majority union’s status in the proceedings rises such that the majority union becomes an equal deciding participant as to the “conformity” question.

The RLA encourages employers, employees, and exclusive agents to reach mutually satisfactory resolutions. RLA section 152, First imposes the duty on “all carriers, their officers, agents, and employees to . . . settle all disputes.” 297 Where it appears, therefore, that the majority union and the employer are acting in collusion to deny the employee and the minority union representative a satisfactory settlement, the provisions of section 152, First may give the minority union employee a cause of action in federal court. 298

B. Implementation Considerations

Parcelling the right of representation at the company level based on the nature of the interests of the parties involved raises implementation issues. The proposed scheme, however, is not impractical. An individual employee initiates a claim by submitting details of the grievance to the majority union, including mention of his or her choice of representation. The collective agent considers the facts and develops its own, albeit informal, assessment of the merits of the claim. Driven

297. 45 U.S.C. § 152, First (1982). RLA section 152, First provides: It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, 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.

298. See id.
by the fair representation doctrine, the majority union bears a responsibility to reach a good faith decision concerning its ability to assume the representation role without any conflict of interest.299 The union's concession that it disapproves of a grievant's claim, combined with an employee's desire to be represented by the minority union, should justify terminating the relationship between the employee and the majority union as a potential representative in that particular grievance. Forcing a continued relationship between the minority union employee and an unsympathetic collective agent disrupts the balance between collective and individual interests mandated by the RLA.

C. Consistency with the Letter of the RLA

While this representation scheme strikes the delicate balance between the multiple interests contemplated by the spirit of the RLA, it also satisfies the express statutory language of the statute. Section 152, Second requires that all disputes be "considered, and, if possible, decided ... between representatives ... interested in the dispute."300 A malleable approach of allocating the representation right between the majority and minority unions, as a function of the specific interests at stake for the employee and the exclusive agent in each dispute, guarantees that representatives participating in the resolution process share the interests of the parties whom they represent.

The proposed representation scheme is also consistent with the language of section 152, Third, which bars interference with an employee's choice of representation.301 Interpreting the RLA to permit minority union representation in minor disputes when a collective agent does not wholeheartedly support the employee's claim prevents the employer and the majority union from systematically forcing an individual to accept the unsympathetic majority union's representation. When the quality of representation rests on the discretion of an aloof collective agent, the individual cannot be assured of meaningful and fervent representation. Finally, the duty of fair representation inherent in the RLA is observed by precluding majority union representation in instances where conflicts of interest exist between the individual and the majority union.

The RLA's union shop provisions also suggest a congressional...

299. A decision by the exclusive agent to profess concurrence with the employee with an undisclosed intent to compromise the employee's objectives in negotiations with the employer may constitute a violation of the duty of fair representation. See generally Steele v. Louisville & N. R.R., 323 U.S. 192 (1944).


intent to recognize limited minority union representation roles at the company level. Section 152, Eleventh(a) requires employees to join a union, but membership in any nationally recognized and certified labor union satisfies the requirement.\(^{302}\) It appears that Congress sought to compensate the employee for the unusually rigid membership requirements by granting somewhat expanded minority union representation rights. Refusing to recognize minority union representation rights at the company level denies the employee any tangible benefit of choosing, as section 152, Eleventh(c) allows, membership in a minority union.\(^{303}\) Although the employee receives the benefit of minority union representation in final proceedings before the NRAB, denying minority union representation earlier in the process reduces company level procedures to meaningless administrative steps toward an NRAB hearing or a court proceeding. Since the essence of the statute is the maximization of effective negotiations between employees and railroads, the early stages of negotiations must remain productive.

**CONCLUSION**

The landmark Railway Labor Act case of *Elgin, Joliet & Eastern Railway Co. v. Burley*\(^{304}\) adjudicated the exclusive representation issue in the context of proceedings before the NRAB.\(^{305}\) It identified generic principles of individual employee rights vis-à-vis the unions which are applicable to analogous company-level hearings. Implementing a mechanism which allows minority union employees, based on the incongruity of their claims with the interests of the collective agent, to be represented by their own union at a grievance hearing while permitting a majority union to be present and to participate actively, proportionately with the degree to which the fate of the majority is involved, would be consistent with *Burley* and with the letter and spirit of the RLA. All concerned would have a voice.

The recent Supreme Court decision in *Landers v. National Railroad Passengers Corp.*\(^{306}\) deviates from the equitable principles of RLA interpretation expounded in *Burley*. *Landers* denies minority union representation to an employee in company-level grievance or discipli-


\(^{303}\) 45 U.S.C. § 152, Eleventh(c) (1982). For text of § 152, Eleventh(c), see *supra* note 73.

\(^{304}\) 325 U.S. 711, 738 (1945), adhered to, 327 U.S. 661 (1946).

\(^{305}\) *Id.* at 738.

Landers focuses on protection of the majority union's exclusive representative status, citing selective RLA provisions and policy considerations. The Court relied on the availability of such representation at later stages of the grievance process to protect the employee treated inequitably at the company level. Landers expressly rejects the view espoused in Taylor v. Missouri Pacific Railroad Co. by the Fifth Circuit Court of Appeals. The Taylor court found that the RLA grants an individual the authority to present any individual claim to his or her employer through a minority union. To categorically deny, however, either an individual employee, as Landers does, or the majority, as Taylor would, the right of representation at a company-level hearing, denigrates the proceeding such that it becomes a meaningless step toward a proceeding before the NRAB or a court where the parties' rights are truly observed. Both approaches diminish the value of negotiations and run afoul of one of the foundations of the RLA, the requirement that "[a]ll disputes between a carrier or carriers and its or their employees shall be considered, and if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." 

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307. Id. at 1442.
308. Id. at 1442-44.