ENFORCEMENT OF RIGHTS UNDER COLLECTIVE BARGAINING AGREEMENTS

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MANY of the recent judicial opinions on labor matters involve issues concerning union recognition and the right to bargain collectively.[1] But a still larger and less explored field lies ahead, involving the administration of collective bargaining contracts after they are made. In industries in which collective bargaining is firmly established, the principal problem of both the management and the union is to eliminate disputes arising out of the interpretation and application of the contracts arrived at by collective bargaining. These disputes are called grievances. The name describes their nature and yet belies their importance.

Any personnel executive will tell you that the most important factor in maintaining a satisfactory morale among employees is to prevent the individual employee from feeling that an injustice has been done him. Such a feeling is a festering sore which increases in pain and spreads with the lack of attention. Now that employees have collective bargaining contracts, they are conscious, and jealous as well, of their rights thereunder. From the management's viewpoint the problem of grievances is or should be No. 1 on its industrial relations program.

Labor leaders will tell you that they must constantly watch minor supervisory employees and often the major executives in order to prevent violations of the contract. These violations would in time destroy the efficacy of the contract. The rights so dearly won may be easily dissipated. The closest contact that a union has with the individual member is through the handling of his grievance. This is a day-to-day matter and often is reflected in the amount of the individual's pay check. Prompt prosecution of a grievance by the union makes the aggrieved employee a loyal member and brings in new adherents.

The first thing, of course, is a plan for progressive steps of conference

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[1] N.L.R.B. v. Fansteel Metallurgical Corp., 59 S. Ct. 490 (1939) (sit down strike in effort to compel recognition of union); Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197 (1938) (competition between rival labor unions for recognition as bargaining agent); N.L.R.B. v. Columbian Enameling & Stamping Co., Inc., 59 S. Ct. 501 (1939) (question as to what constituted refusal to bargain with union); N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938) (strike in connection with negotiation of collective bargaining contract).

between the representatives of management and the union. But if negotiation fails to settle the matter satisfactorily, what then? It is with the "what then?" that we are concerned in this article.

I. THE NATURE OF THE RIGHTS INVOLVED

In considering the settlement of disputes under collective bargaining contracts, it is necessary to bear in mind the nature of the rights which are to be adjudicated. In this article, however, it is possible only to consider the general substantive aspects.

The contracts, often referred to as craft agreements, are between the employer and the union. The early rulings were that the individual employee could not secure relief from a breach of this agreement, but "these rulings have been left in the rear . . . . and the holdings now are . . . . that the rights secured by these contracts are the individual rights of the individual members of the union and may be enforced directly by the individual."[2] Under any of three theories[3] these rights of the individual are contractual rights and in their essential aspects are no different from the rights under any contract. The terms of the craft agreement are available to the non-union employee[4] as well as to the union member.

[2] Yazoo & M.V.R. Co. v. Sideboard, 161 Miss. 4, 13, 133 So. 669, 671 (1931). *Cf.* Langmade v. Olean Brewing Co., 137 App. Div. 355, 121 N.Y. Supp. 388 (1910) with Gulla v. Barton, 164 App. Div. 293, 149 N.Y. Supp. 952 (1914); and Hudson v. Cincinnati N.O. & T. Ry. Co., 152 Ky. 711, 154 S.W. 47 (1913), with Gregg v. Starks, 188 Ky. 834, 224 S.W. 459 (1920); Piercy v. Louisville & N. Ry. Co., 198 Ky. 477, 248 S.W. 1042 (1923); and *cf.* Snow Iron Works v. Chadwick, 227 Mass. 382, 116 N.E. 801 (1917) with Whiting Milk Co. v. Grondin, 282 Mass. 41, 184 N.E. 379 (1933).

[3] The earliest theory in point of time is that the craft agreement creates a custom or "rule of the industry" and until abrogated becomes a part of the contract of employment. Yazoo & M.V.R. Co. v. Webb, 64 F. (2d) 902 (C.C.A. 5th 1933); McCoy v. St. Joseph Belt Ry. Co., 229 Mo. App. 506, 77 S.W. (2d) 175 (1934); Rentschler v. Missouri Pacific R. Co., 126 Neb. 493, 498, 253 N.W. 694, 697 (1934); Whiting Milk Co. v. Grondin, 282 Mass. 41, 184 N.E. 379 (1933). The second theory regards the union as agent of the employees. Thus, the craft agreement becomes a direct contract between the employer and his employees. Gregg v. Starks, 188 Ky. 834, 224 S.W. 459 (1920); Piercy v. Louisville & N. Ry. Co., 198 Ky. 477, 248 S.W. 1042 (1923). The theory now most generally accepted regards the craft agreement as a third party beneficiary contract between the union and the employer for the benefit of the individual employees. Dierschow v. West Suburban Dairies Inc., 276 Ill. App. 355 (1934); H. Blum & Co. v. Landau, 23 Ohio App. 426, 155 N.E. 154 (1926); Gulla v. Barton, 164 App. Div. 293, 149 N.Y. Supp. 952 (1914); Yazoo & M.V.R. Co. v. Sideboard, 161 Miss. 4, 133 So. 669 (1913); Rentschler v. Missouri Pacific R. Co., 126 Neb. 493, 253 N.W. 694 (1934); Piercy v. Louisville & N. Ry. Co., 198 Ky. 477, 248 S.W. 1042 (1923); Gleason v. Thomas, 117 W.Va. 550, 186 S.E. 304 (1936); Grand Internat'l Brotherhood of Locomotive Engineers v. Mills, 43 Ariz. 379, 31 P. (2d) 971 (1934).

[4] Yazoo & M.V.R. Co. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931); Yazoo & M.V.R. Co. v. Webb, 64 F. (2d) 902 (C.C.A. 5th 1933); Gregg v. Starks, 188 Ky. 834, 224 S.W. 459 (1920).

On the expiration of the contract the union may negotiate a new one with different terms, or, if the right is reserved in the contract, may by joint agreement with the employer modify the provisions of the contract during the term. To this extent the rights of the individual employee may be changed. However, in the absence of actual change in the terms of the agreement, the union may not waive the rights under the agreement of any employee or group of employees.[5] This is no different from the restrictions placed on the original contracting parties to any third party beneficiary contract as regards the rights of the beneficiary under the contract.[6]

That the employment under the craft agreement is one at will, or that such agreement may be changed at some future time,[7] is no bar to relief. So long as the employee continues to work and the craft agreement is in effect, he is entitled to his rights under the contract.

Complaints under collective bargaining contracts generally concern disputes regarding seniority rights, reimbursement for overtime and wage increases for certain specified work. Wrongful discharge or discipline of an employee, contrary to the terms of the craft agreement, is another source of grievances. In essence the claim is one for the breach of contract.

II. THE REMEDIES AVAILABLE

Since continuity of employment is the desired objective of collective bargaining, the problem is to find a method of settling these disputes without interruption of work. But it is equally obvious that when negotiations fail the employee must have an effective method of redress for violations of his rights under the craft agreement. As all lawyers know, the practical value of a right is no greater than the available methods of enforcement.

[5] Yazoo & M.V.R. Co. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931); Yazoo & M.V.R. Co. v. Webb, 64 F. (2d) 902 (C.C.A. 5th 1933); Gregg v. Starks, 188 Ky. 834, 224 S.W. 459 (1920); Piercy v. Louisville & N. Ry. Co., 198 Ky. 477, 248 S.W. 459 (1923); Gleason v. Thomas, 117 W.Va. 550, 186 S.E. 304 (1936); Grand Internat'l Brotherhood of Locomotive Engineers v. Mills, 43 Ariz. 379, 31 P. (2d) 971 (1934); McCoy v. St. Joseph Belt Ry. Co., 229 Mo. App. 506, 77 S.W. (2d) 175 (1934). The effect of the holding of Evans v. Johnston (Ill. App. Ct., First Dist., Third Div., No. 39978, pending on petition for leave to appeal to Supreme Court) is contrary to the weight, if not the unanimity, of authority elsewhere, unless the case can be distinguished on the ground that it relied on authority to the union from a provision of the particular contract involved.

[6] Hartman v. Pistorius, 248 Ill. 568, 572, 94 N.E. 131, 133 (1911).

[7] McCoy v. St. Joseph Belt Ry. Co., 229 Mo. App. 506, 77 S.W. (2d) 175 (1934); Grand Internat'l Brotherhood of Locomotive Engineers v. Mills, 43 Ariz. 379, 31 P. (2d) 971 (1934); Truax v. Raich, 239 U.S. 33 (1915); McGlohn v. Gulf & S.I.R., 179 Miss. 396, 174 So. 250 (1937); Cross Mountain Coal Co. v. Ault, 157 Tenn. 461, 9 S.W. (2d) 692 (1928).

a) *Boards set up by agreement.*—Some agreements require the parties, on failure to reach a settlement, to submit their dispute to a neutral outsider, whose award is usually made final. Very often, however, provisions are made for submission of the dispute to a board, generally made up of an equal number of representatives of the employer and the union, with a stipulation requiring submission to a neutral third party issues on which the board is equally divided. The members of the board are for the most part laymen and not lawyers, chosen for their familarity with the industry and its labor problems. The decision of the board is often made final; sometimes it is merely advisory. Frequently the decisions of the board, especially those of the adjustment boards set up under the Railway Labor Act,[8] are printed in full and serve as guiding precedents for the board.[9]

Generally the bi-partisan composition of the board assures the individual employee that his rights will not be ignored. However, if the employee claims that his rights under the contract have been infringed by the joint action of the employer and the union, his cause is determined by a board made up entirely of his opponents. And far more precarious is the position of a complainant who is not a member of the union!

At this point it might be relevant to inquire to what extent the existence of these boards affects the individual employee's right to resort to the courts.[10] Generally, it would seem that the propriety of judicial relief at any particular stage of the controversy may depend upon the source of the board's authority and upon the extent to which the remedial provisions of the agreement are tied up with the right sought to be enforced. Thus if the board is set up by the craft agreement itself, prior recourse must be had to the board before instituting suit in the courts. This is on the theory that as the agreement creating the right sought to be enforced

[8] 48 Stat. 1193 (1934), 45 U.S.C.A. § 153, Second (Supp. 1938).

[9] *Cf.* the English practice under which the decisions of the Industrial Court are not binding upon the parties unless expressly so agreed at the time the particular dispute is submitted for adjudication, and, in order to prevent establishing precedent, no written opinion is rendered. See Report of the Comm'n on Industrial Relations in Great Britain (United States, Dept. of Labor, 1938).

[10] A distinction is to be made between a complaint which involves a violation of provisions of the craft agreement and one which involves an alleged violation by the union of its laws. We are here concerned with the former and not the latter. In the latter event the employee, if he is a member of the union, must first exhaust his remedies within the union. This is in accord with the general principle that the courts will not interfere with the internal working of a voluntary unincorporated association until the member has exhausted his remedies within the association. Engel v. Walsh, 258 Ill. 98, 105, 101 N.E. 222, 224 (1913); Henry v. Twichell, 286 Mass. 106, 117, 189 N.E. 593, 598 (1934). This does not apply to a non-union member as recourse within the tribunals is not available to him. Fairbanks v. McDonald, 219 Mass. 291, 298, 106 N.E. 1000, 1001 (1914).

also provides a remedy and as all provisions of the agreement are to be read together, the right is not only created by one provision of the agreement, but is also limited by the other provision for appeal. The provision for appeal to the board is part of the right itself.[11]

The result is otherwise if, as is the case with most of the agreements for the operating employees of the railroads, the method of appeal to the board is provided in an agreement other than the one governing wages and working conditions. As the right sought to be enforced does not arise under the document creating the method of appeal, the latter is not a part of the right itself. However, if the employee is a member of the union he is held to have contracted through the union to submit his disputes to the board and must do so before resorting to court.[12] But if he is not a member of the union, the employee is not required to submit to the board and may institute independent judicial proceedings.[13]

Often the right given under the craft agreement is a conditional one. For instance, it is sometimes provided in the collective bargaining agreement that if an employee is discharged, he shall, on his request, be given a hearing before certain representatives of the employer or before a board, and that if on such hearing the employee is sustained, he shall be reinstated and paid the wages lost. Unless he shows that his claim was sustained at such a hearing, the employee is not entitled to reinstatement.[14]

If the decisions of the board are final and binding, a serious problem is presented to the individual employee. These agreements do not provide for judicial review and in fact it is not seen how the parties by agreement could create such appeal if they wished. Consequently, if the individual employee is required to submit his dispute to the board, and if the provision for finality of the board's decision is effective, the employee would be deprived of a judicial review of his rights under the craft agreement. But the general rule in many, if not most, states is that as a matter of public policy parties to a contract cannot deprive a court of its jurisdiction over at least the legal aspects of a dispute by providing in advance that all disputes arising under the contract shall be submitted to arbitration on all phases of the dispute. For example, parties may provide for arbitra-

[11] Reed v. St. Louis S. W. R. Co., 95 S.W. (2d) 887 (Mo. App. 1936); St. Louis B. & M. Ry. Co. v. Booker, 5 S.W. (2d) 856 (Tex. Civ. App. 1936); Wyatt v. Kansas City Southern Ry. Co., 101 S.W. (2d) 1082 (Tex. Civ. App. 1937).

[12] Bell v. Western Ry. Co., 228 Ala. 328, 153 So. 434 (1934).

[13] Panhandle & S. F. Ry. Co. v. Curtis, 245 S.W. 781 (Tex. Civ. App. 1922); Youmans v. Charleston & W. C. Ry. Co., 175 S.C. 99, 178 S.E. 671 (1935).

[14] Cousins v. Pullman Co., 72 S.W. (2d) 356 (Tex. Civ. App. 1934); Harrison v. Pullman Co., 68 F. (2d) 826 (C.C.A. 8th 1934).

tion as to the amount of the loss under an insurance policy, but not as to the company's liability under such a policy.[15] The same rule has been applied to provisions for settling disputes under a craft agreement.[16] Under this rule some courts, though requiring exhaustion of the remedies provided in the contract, have held ineffective the provision that the decision so given was final and binding.[17]

It might be noticed in passing that the Railway Labor Act of 1934 provides that the railroad, and the union representing any class of employees, may set up a system of adjustment boards for the settlement of disputes arising under a collective agreement.[18] The finality of the award rendered by the board of adjustment has been sustained on the ground that the Act has changed the earlier public policy;[19] but some courts have apparently not accepted this view.[20]

b) Judicial relief.—Assuming that there is no provision for a board to settle disputes under the craft agreement, or that prior recourse to the board is not required, or, if required, has been satisfied and that subsequent judicial suit is consequently not precluded, there still remains the question of whether the courts will enforce the individual employee's rights under the craft agreement. On the assumption that all obstacles to resort to the court have been removed, we proceed to consider judicial relief.

If there has been an invasion of his rights under the contract between his employer and the union, the individual may sue in an action at law and recover damages from his employer.[21] If the union has participated in and induced this breach on the part of the employer, the former should also be liable in damages under the doctrine of *Lumley v. Gye*.[22]

Equitable relief is of importance when the individual employee's seniority is involved or when he has been discharged contrary to the provisions of a craft agreement which provides that discharge shall not be made without cause, or without hearing, or both. It is of very practical importance to the employee whether he must sue periodically for dam-

[15] Supreme Council of Order of Chosen Friends v. Forsinger, 125 Ind. 52, 25 N.E. 129 (1890); Niagara Fire Insurance Co. v. Bishop, 154 Ill. 9, 16, 39 N.E. 1102, 1104 (1894).

[16] Rentschler v. Missouri Pacific R. Co., 126 Neb. 493, 253 N.W. 694 (1934).

[17] Supreme Council of Order of Chosen Friends v. Forsinger, 125 Ind. 52, 25 N.E. 129 (1890).

[18] 48 Stat. 1193 (1934), 45 U.S.C.A. § 153, Second (Supp. 1938).

[19] Bell v. Western Ry., 228 Ala. 328, 153 So. 434 (1934).

[20] Rentschler v. Missouri Pacific R. Co., 126 Neb. 493, 253 N.W. 694 (1934).

[21] See cases cited in notes 5, 6, and 14 *supra*.

[22] 2 E. & B. 216 (1853).

ages or whether he can compel observance of his rights. The amount recoverable in a suit for damages by an individual employee might often be small as compared with the cost of litigation. The employer knows this, and, if the employee is always compelled to resort to an action at law, he can very often be deprived of his rights. On the other hand, a large number of interested employees may join in a suit for injunction or other equitable relief.

Two questions are presented in considering equitable relief. The first is whether the employee's right is one that equity will enforce; the second concerns the problem of enforcing personal service contracts.

Many of the earlier cases, by way of *dicta*, expressed doubt as to whether seniority was a property right which equity could enforce. The cases, other than those considered later under the question of personal service, denied relief because of failure to join necessary parties,[23] or because of failure to exhaust remedies within the union.[24] Some courts denied relief because the action taken was in accord with laws of the union and did not violate the craft agreement,[25] or because of technical errors in connection with the appeal.[26]

Aware that the legal concept of property rights has broadened with the changes in our economic and industrial system,[27] the courts have recognized that "the right to work . . . . is as much property as the more obvious forms of goods and merchandise, stocks and bonds"[28] and that "destroying the means of acquiring wealth is the same as destroying the wealth itself."[29] Consequently they have held that "the right to earn a livelihood . . . . should . . . . be entitled to protection" by a court of equity in the same manner as other property rights.[30]

Seniority represents in the highest degree the right to work. By seniority the oldest man in point of service (ability and fitness for the job being

[23] McMurray v. Brotherhood of Railroad Trainmen, 50 F. (2d) 968 (D.C. Pa. 1931).

[24] Burger v. McCarthy, 84 W.Va. 697, 100 S.E. 492 (1919); Shaup v. Grand Internat'l Brotherhood of Locomotive Engineers, 223 Ala. 202, 135 So. 327 (1931).

[25] Shaup v. Grand Internat'l Brotherhood of Locomotive Engineers, 223 Ala. 202, 135 So. 327 (1931); Donovan v. Travers, 285 Mass. 167, 188 N.E. 705 (1934); Aulich v. Craigmyle, 248 Ky. 676, 59 S.W. (2d) 560 (1933).

[26] Hunt v. Dunlap, 248 S.W. 760 (Tex. Civ. App. 1923).

[27] Grand Internat'l Brotherhood of Locomotive Engineers v. Mills, 43 Ariz. 379, 31 P. (2d) 971 (1934).

[28] Bogni v. Perotti, 224 Mass. 152, 154, 112 N.E. 853, 855 (1916).

[29] Grand Internat'l Brotherhood of Locomotive Engineers v. Mills, 43 Ariz. 379, 31 P. (2d) 971 (1934).

[30] Truax v. Raich, 239 U.S. 33, 38 (1915); Ledford v. Chicago M., St. P. & P. R. Co., 298 Ill. App. 298, 311–12 (1939).

sufficient) is given the choice of jobs, is the first promoted within the range of jobs subject to seniority, and is the last laid off. It proceeds so on down the line to the youngest in point of service. Seniority is more than merely the right to work; it is the best kind of unemployment insurance. It assures the man that the longer he works the more certain it is that he will retain his job at a wage greater than the small amount available as unemployment compensation. Seniority is no less a property right and entitled to equitable protection because it is subject to modification by changing the craft agreement by which it was created or because the employee is subject to discharge and is not required by the craft agreement to continue to work for the employer.[31]

Other bases of sustaining equity jurisdiction under the orthodox property doctrine have been suggested. One of the earlier cases, though expressing by *dictum* its doubt as to seniority being a vested property right, conceded that "such rights (seniority) are closely akin to one's 'calling,' and that an unlawful invasion or interference therewith would constitute a wrong of which the courts would take cognizance."[32] In Illinois, one's profession is a property right which is entitled to equitable protection.[33] In many respects seniority is a greater protection to the employee than a license is to the professional man. The latter prevents competition only from those not admitted to the profession. The former protects the employee not only against the man not within the seniority district but also from the younger men in the same district.

While the rights of A against B under a contract are customarily considered as personal and not property rights, the contract status between A and B as against an outsider, C, is the property of both A and B.[34] If C induces either A or B to breach the contract or otherwise interferes with the contractual relations of A and B, even though such action does not involve a breach of contract, as where an employment at will is terminated, the courts of equity will grant relief.[35] If the union induces the employer to take such action as will cause a breach by the employer of the individual employee's rights under the collective bargaining contract,

[31] See cases collected in note 7.

[32] Shaup v. Grand Internat'l Brotherhood of Locomotive Engineers, 223 Ala. 202, 135 So. 327 (1931).

[33] Kalman v. Walsh, 355 Ill. 341, 346, 189 N.E. 315, 317 (1934).

[34] Doremus v. Hennessy, 176 Ill. 608, 619 (1898); Sorenson v. Chevrolet Motor Co., 171 Minn. 260, 214 N.W. 754 (1927).

[35] Wilson v. Hey, 232 Ill. 389, 83 N.E. 928 (1908); Carpenter's Union v. Citizens' Committee, 333 Ill. 225, 164 N.E. 393 (1928); Doremus v. Hennessy, 176 Ill. 608 (1898); London Guarantee Co. v. Horn, 206 Ill. 493, 69 N.E. 526 (1903).

there has been an invasion by the union of the contract status between the employer and the employee. The injured employee is entitled to an injunction restraining the union from so inducing the employer. Seniority, therefore, is a right, call it property or what you please, of such a nature as equity will protect.[36]

In other cases equitable relief has been granted to the individual employee in his seniority because of the inadequacy of his legal remedy.[37] The men are arranged in order of their seniority, and this list is known as the seniority roster. If a number of men are displaced or misplaced on a seniority roster, it is later impossible to determine what job each of such men would have received but for the displacement or misplacement. No man can tell what jobs would have been open to him and which of these he would have selected until every man ahead of him on the roster has made his choice. Besides there are many elements other than the rate of pay which enter into an employee's choice. An important consideration is the hours of work, *i.e.*, whether a night or day or split shift, with the attendant factors of available hours of rest, pleasure, and association with friends. These are personal factors, and cannot be measured in terms of money damages. "The very fact that the contract itself provides rights of seniority where the pay is the same is evidence that such rights are considered as of sufficient value to demand protection," which only equity can give.[38]

Only three cases have been found which hold that equity will not grant relief for violations of seniority rights.[39] These cases rest on the ground that the contracts involve personal service and that the court will not decree performance of such a contract and will not interfere in the employer's business.

It is quite generally held that since an employer cannot specifically compel an employee to work for him, the courts will not compel the employer to rehire an employee who has been discharged in violation of his contract of employment. This rule is generally followed where the em-

[36] Nord v. Griffin, 86 F. (2d) 481 (C.C.A. 7th 1936) *cert. denied* 300 U.S. 673 (1937); Gleason v. Thomas, 117 W.Va. 550, 186 S.E. 304 (1936); Grand Internat'l Brotherhood of Locomotive Engineers v. Mills, 43 Ariz. 379, 31 P. (2d) 971 (1934); Crisler v. Crum, 115 Neb. 375, 213 N.W. 366 (1927); Piercy v. L. & N. Ry. Co., 198 Ky. 477, 248 S.W. 1042 (1923).

[37] Gregg v. Starks, 188 Ky. 834, 224 S.W. 459 (1920); Grand Internat'l Brotherhood of Locomotive Engineers v. Mills, 43 Ariz. 379, 31 P. (2d) 971 (1934); Nord v. Griffin, 86 F. (2d) 481 (C.C.A. 7th 1936) *cert. denied* 300 U.S. 673 (1937).

[38] Gregg v. Starks, 188 Ky. 834, 224 S.W. 459 (1920).

[39] Chambers v. Davis, 128 Miss. 613, 91 So. 346 (1922); Mosshamer v. Wabash Ry. Co., 221 Mich. 407, 191 N.W. 210 (1922); Ryan v. New York Central R. Co., 267 Mich. 202, 255 N.W. 365 (1934).

ployee has been actually discharged contrary to the provisions of a collective bargaining agreement.[40] But a distinctly different situation is presented where the employee has not been discharged, but continues in his employment. In such a case the employee merely demands the terms of the craft agreement be carried out so long as he is employed. This distinction has been observed not only by the courts in granting relief in seniority cases,[41] but also in other types of cases. For instance, while employees cannot be enjoined individually or collectively from ceasing to work or from striking, the union and its officials may be enjoined from calling a strike in violation of the trade agreement.[42] Outside persons may be prevented from interfering with the employer-employee relationship; and the employer may be enjoined from breaking his contract with the union.[43] This distinction was overlooked by the Michigan court and rejected by the majority of the court in the Mississippi case.[44] These cases, however, represent a decided minority, and courts have generally granted equitable relief in a proper case.[45]

Some recent cases have indicated a basis for equitable relief even in case of discharge. In California a musician's union successfully enjoined certain theaters from operating talking pictures without an orchestra contrary to the agreement with the union.[46] The court granted relief on the ground that an employer could enjoin a union from calling a strike in violation of its contract. The Texas Court of Civil Appeals, following the California decision, restrained the defendants from employing non-union labor contrary to a closed shop agreement with the plaintiff union.[47] Both of these cases emphasized that the very nature of collective bargaining contracts, by which the employer is not bound to hire and the employees are not bound to work, requires equitable relief. "While recognizing fully

[40] Beatty v. C. B. & Q. R. Co., 49 Wyo. 22, 52 P. (2d) 404 (1935).

[41] Gleason v. Thomas, 117 W.Va. 550, 186 S.E. 304 (1936); Grand Internat'l Brotherhood of Locomotive Engineers v. Mills, 43 Ariz. 379, 31 P. (2d) 971 (1934); see dissenting opinion in Chambers v. Davis, 128 Miss. 613, 91 So. 346 (1922); Ledford v. Chicago M. St. P. & P. R. Co., 298 Ill. App. 298, 308, 309 (1939).

[42] Preble v. Architectural Iron Workers' Union, 260 Ill. App. 435 (1931).

[43] Weber v. Nasser, 286 P. 1074 (Cal. App. 1930); Harper v. Local Union No. 520, 48 S.W. (2d) 1033 (Tex. Civ. App. 1932).

[44] See dissenting opinion in Chambers v. Davis, 128 Miss. 613, 91 So. 346 (1922).

[45] Weber v. Nasser, 286 P. 1074 (Cal. App. 1930); Grand Internat'l Brotherhood of Locomotive Engineers v. Mills, 43 Ariz. 379, 31 P. (2d) 971 (1934); Harper v. Local Union No. 520, 48 S.W. (2d) 1033 (Tex. Civ. App. 1932) (specifically approves Weber v. Nasser).

[46] Weber v. Nasser, 286 P. 1074 (Cal. App. 1930).

[47] Harper v. Local Union No. 520, 48 S.W. (2d) 1033 (Tex. Civ. App. 1932).

the general rules under which an injunction is denied to enforce a contract for personal service," the California court held "that the law keeps pace with the requirements of justice, and . . . . none of these principles are applicable to contracts of the character" of collective bargaining agreements "as the facts are so extraordinary as to require injunctive relief if a plaintiff is to have any protection in his contract rights. . . . ." On this analysis a similar result may be reached in Illinois since the Illinois court has held that a union will be enjoined from calling a strike in breach of its contract,[48] and that an employer's association will be restrained from seeking to have prospective employers refuse to hire union labor.[49]

Does it follow from the above discussion that an individual employee who has been discharged can enjoin the employer from putting anyone else in the position to which the plaintiff employee is entitled by seniority or otherwise? If so, the employer probably will rehire the plaintiff rather than leave the job vacant, just as the theater owners probably hired the orchestra rather than not show talking pictures or the employer in the Texas case hired union men rather than shut down his plant for lack of workmen.

Furthermore, will a court insist, as it did in *Lumley v. Wagner*[50] that there be an express agreement, or will the court imply an agreement not to place another in the position to which the plaintiff's seniority entitles him? In addition, since in suits to enjoin an employee from working for another in breach of his contract, evidence of uniqueness of the employee's services is required,[51] will a similar showing be required of an employee seeking to restrain an employer from placing another in such employee's position? As to the last query, it might be said that it may not be so difficult to make such a showing. Many employees have devoted their lives to a particular line of work and, as a result, have become highly proficient therein and are entirely unqualified to fill jobs in other lines of work which command a corresponding wage. This is true, for instance, of railroad operating employees such as engineers, firemen, conductors, and other trainmen. However, these questions have not as yet been answered by the courts but should be kept in mind in connection with the problem of equitable relief under collective agreements.

c) Legislative tribunal.—The trend in legislation has been to provide special tribunals to handle disputes arising out of the interpretation or ap-

[48] Preble v. Architectural Worker's Union, 260 Ill. App. 435 (1931).

[49] Carpenter's Union v. Citizens Committee, 333 Ill. 225, 164 N.E. 393 (1928).

[50] 1 De G. M. & G. 604 (1852); 5 Williston, Contracts §§ 1447–49 (rev. ed. 1937).

[51] 5 Williston, *op. cit. supra* note 50, at § 1450.

plication of craft agreements. In England it is the Industrial Court and in Sweden it is the Labor Court.[52] In this country the pioneering has been done with the railroads through the National Railroad Adjustment Board under the Railway Labor Act.[53] As the advance guard of further legislation it is important to consider the organization, powers and procedure of this board and also the constitutional requirements which must be satisfied in such a tribunal.

The National Railroad Adjustment Board is made up of eighteen members selected by the carriers and eighteen by the labor organizations. Each member is compensated by the party he is to represent. The board is divided into four divisions, each division handling disputes for certain classes of employees. Decisions of the Adjustment Board are by majority vote of all members of the division. In the event of a deadlock or inability to get a majority vote, the division selects or, if it cannot agree, the Mediation Board selects a third party as referee to sit with the division and make an award.

What was said previously of a non-union employee's opportunities before a board set up by agreement with equal employer and union representation applies nearly as well to the National Adjustment Board if the employee complains of the joint action of the carrier and the union. Although most if not all of the members are not representatives of the particular carrier or union involved, these men have all had or may have trouble with an individual opposing or asserting his individual rights against the union and the employer. This is a practical aspect although no showing could be made to sustain a legal objection.[54] In contrast the membership of the Swedish Industrial Court contains not only several neutral parties but also at least one member who is trained in law and experienced in judicial procedure.[55]

The act provides that the board "shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute." The board, however, at first held that where a complaint was filed by the union that a member's seniority entitled him to a certain job, the employee who was then occupying the job and who would be displaced if the petitioner succeeded was not entitled to notice. An award so rendered was promptly set aside by the court as violating due process.[56]

[52] Comm'n Report, note 9 *supra.*

[53] 48 Stat. 1189 (1934), 45 U.S.C.A. § 153, First, (a), (g), (h), (l), (n) (Supp. 1938).

[54] Cook v. Des Moines Union Ry. Co., 16 F. Supp. 810 (Iowa 1936).

[55] Comm'n Report, note 9 *supra.*

[56] Nord v. Griffin, 86 F. (2d) 481 (C.C.A. 7th 1936) *cert. denied* 300 U.S. 673 (1937).

The decisions of the board are final and binding on the parties, except that the railroad can secure judicial review by refusing to comply with the award. In such event the act provides that "any person for whose benefit such order was made" may file a petition in the United States district court to enforce the award. On such petition the same proceedings are had as in any civil suit, including the right to a jury,[57] except that the findings and order of the board are *prima facie* evidence of the facts therein stated. The district court is empowered under its rules governing actions at law to make such order and enter such judgment as is necessary to enforce or set aside the order of the board.[58]

No appeal is given the carrier on its own initiative. It must wait for a petition for enforcement of the award to be filed. This has brought forth criticism from management on the ground that the unions often refuse to file a petition to enforce and instead use the threat of a strike as the means of enforcing the board's award. In the meantime the management can do nothing to secure a judicial review, the pendency of which it is felt might have the practical effect of preventing a strike or threat of such action.

If the award is against the petitioning employee, he is afforded no judicial review by the act. This is equally true of the employee who is adversely affected by the Board's ruling in favor of a petitioning employee who claims that his seniority rights have been violated. The constitutional aspects of this problem are considered later.

The last sentence in the paragraph relating to enforcement of the award[59] reads:

> . . . . The district courts are empowered, under the rules of the court governing actions, to make such order and enter such judgements, by writ of *mandamus* or otherwise, as may be appropriate to enforce or set aside the order . . . . of the adjustment board.

This sentence would seem, and at least one court has so interpreted it, to refer only to the petition to enforce the award.[60] Even if this sentence could be interpreted as affording an additional remedy which might be used to set aside the award, the only two common law remedies to review the orders of boards are prohibition and certiorari. As the Conformity Act

[57] Cook v. Des Moines Union Ry. Co. 16 F. Supp. 810 (Iowa 1936).

[58] 48 Stat. 1191 (1934), 45 U.S.C.A. § 153, First, (p) (Supp. 1938). In contrast with the fact that the decisions of the Adjustment Board are only *prima facie* evidence as to that board's findings, the findings of the National Labor Relations Board as to the facts are conclusive if there is substantial evidence in the record to support them. 49 Stat. 453 (1935), 29 U.S.C.A. § 160 (e) (Supp. 1938).

[59] 48 Stat. 1191 (1934), 45 U.S.C.A. § 153, First, (p) (Supp. 1938).

[60] Lane v. Union Terminal Co. 12 F. Supp. 204 (Tex. 1935).

is superseded by the new Federal Rules of Civil Procedure,[61] the situation is presented in which the federal courts are no longer bound by the state procedure and yet they have no independent body of judicial precedent of their own on these common law remedies. Rule 81 abolishes the writ of mandamus and permits the "relief heretofore available by mandamus" to be obtained by a motion. This apparently does not change the scope of the relief or review. No provision is made in the rules as to the writs of prohibition or certiorari. Until there are decisions by the federal courts, it can only be assumed that these courts will follow the general common law rule as to the scope of review afforded by these common law remedies. In such a case none of the remedies of mandamus, prohibition or certiorari would afford review of the merits of the controversy, either as to the law or the facts.[62]

Unlike an award of the National Railroad Adjustment Board, a decision of the Labor Court of Sweden is final and binding without any appeal, while an award of the British Industrial Court is binding only if in the particular case the parties so agree in advance.[63] Sweden prohibits strikes and lockouts over disputes as to the interpretation of, or enforcement of, rights under collective agreements and requires their submission to the Labor Court. In contrast, in seeking to avoid interruption of interstate commerce arising from similar disputes, the Congress of the United States

[61] 48 Stat. 1064 (1934), 28 U.S.C.A. § 723b (Supp. 1938). The Federal Rules of Civil Procedure are found in 1938 Supplement to 28 U.S.C.A. following Section 723c and commencing at page 100.

[62] The writ of prohibition issues only to prevent a body from acting outside its jurisdiction and not to review the merits of the action of that body. People v. Circuit Court, 347 Ill. 34, 179 N.E. 441 (1931). In some states, such as Indiana, the common law writ of certiorari does not exist, *Ex parte* Sherwood, 41 Ind. App. 642, 647, 84 N.E. 783, 785 (1908), and where it exists, as in Illinois, it generally lies only (1) where the inferior body has exceeded its jurisdiction or (2) where such body has not proceeded according to law. The second ground means that the court has not followed the form of proceeding legally applicable in such a case and does not authorize a review on the basis that the rulings of the inferior body were erroneous. People v. Lindblom, 182 Ill. 241, 55 N.E. 358 (1899). In determining whether the inferior tribunal had jurisdiction the court will review the jurisdictional facts, the evidence of which must be preserved. Carroll v. Houston, 341 Ill. 531, 173 N.E. 657 (1930); Funkhouser v. Coffin, 301 Ill. 257, 133 N.E. 649 (1922). Because of certain statutory prerequisites to action by boards, the review of the question of jurisdiction may sometimes come very close to a review of the merits. For instance, if the statute permits the removal of a civil service employee only for cause, the existence of cause is a jurisdictional fact which must appear from the evidence preserved in the record. Funkhouser v. Coffin, 301 Ill. 257, 133 N.E. 649 (1922). But in the case of a dispute between an employee and his employer or between employees as to rights under collective bargaining agreements, the merits of such disputes involve no jurisdictional aspects by which a review of the merits can be secured through certiorari. That mandamus offers no relief see note 90 *infra*.

[63] Comm'n Report, note 9 *supra*.

has proceeded on the theory that such interruption can in large measure be eliminated by providing a tribunal to which the parties may resort, if they wish, without compelling them to do so. Submission remains voluntary. This was the underlying philosophy of the Transportation Act of 1920[64] and the Railway Labor Act of 1926,[65] and persists under its amended form of 1934;[66] Congress changed the personnel and form of and procedure before the Board and finally made the decisions of the board involving the interpretation and application of agreements binding and legally enforceable. But at all times Congress kept to its original purpose that the machinery of the act for the settlement of disputes should remain entirely voluntary.[67]

This is no better emphasized than in the provisions of subparagraph (i) of Section 3.[68] It provides that disputes involving grievances or interpretation or application of agreements "*shall* be handled in the usual manner" up through the highest operating officer of the carrier authorized to handle such matters, but that, if no adjustment is reached, "the dis-

[64] 41 Stat. 469 (1920), 45 U.S.C.A. §§ 131, 146 (1928), repealed 44 Stat. 587 (1926), 45 U.S.C.A. §§ 131–46 (Supp. 1938).

[65] 44 Stat. 577 (1926), 45 Mason's U.S. Code, § 146 (1926).

[66] 48 Stat. 1185 (1934), 45 U.S.C.A. §§ 151–64 (Supp. 1938).

[67] The provisions of the Transportation Act of 1920 relating to the effort of the employer and employees to negotiate contracts and settle disputes were a mere declaration of policy and did not state an obligation. The same was true with respect to the right of employees to organize. Submission of disputes was voluntary and the decisions of the Labor Board were not enforceable by legal process but instead depended upon public opinion for their effect. Pennsylvania R. Co. v. United States Railroad Board, 261 U.S. 72 (1923); Pennsylvania R. System, etc. Federation v. Pennsylvania R. Co., 267 U.S. 203 (1925). In 1926 the Transportation Act was repealed and the Railway Labor Act was passed. The Labor Board was abolished and provision made for adjustment boards to be set up by each carrier and its employees. The purpose of the act as disclosed by congressional debates, 67 Cong. Rec. 8810–11, 8815, 8881, 9044, 9051, 4504, 4523, 4569, 4651 (69th Cong. 1st Sess. 1926), and its wording discloses a studied effort to keep the submission of disputes voluntary, although provision is made for the enforcement of arbitration awards to which the parties have voluntarily submitted. The employees are given the right to organize and to select representatives without interference but no duty is placed on the employer to deal with such representatives. Texas & N. O. R. Co. v. Brotherhood of Ry. and Steamship Clerks, 281 U.S. 548 (1930). Similar assertions (78 Cong. Rec. 11713, 11715, 11814, 11253 (73d Cong. 2d Sess. 1934)) and provisions for voluntary submission of disputes characterize the 1934 amendment which provided for a National Adjustment Board because many railroads had not set up their own boards by agreement with their employees, and because deadlocks had resulted in such boards as had been created. The decision of the Adjustment Board was made binding and provision made for its enforcement in the district courts. The carrier was not only prohibited from interfering with the organization of its employees but also required to treat with the representatives selected by a majority of the employees of any craft or class. Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937).

[68] 48 Stat. 1189 (1934), 45 U.S.C.A. § 153, First, (i) (Supp. 1938).

putes *may* be referred" to the Adjustment Board by the parties or by either of them. In other words, while the parties are required to exhaust the methods of settlement by negotiation, they have the option either to submit the matter to the Adjustment Board, or to resort to the ordinary methods of strike or lockout.

With the Railway Labor Act before us as a concrete example, let us consider the constitutional limitations which must be observed in setting up special tribunals to hear and decide these legal labor questions.

So long as the demands of due process are met, a state may distribute its powers as it sees fit. In pursuance of this freedom it may, so far as concerns the federal Constitution, vest any board it wishes with judicial powers. As due process does not require the right of appeal, the state is not required to provide for judicial appeal from the decisions of such boards.[69] It is not possible to consider in this article the requirements of the various state constitutions.[70]

On the other hand, when Congress creates boards to hear disputes arising under industrial agreements, an entirely different situation is presented. Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law, or in equity, or admiralty."[71] As to such matters, however, Congress may provide for the determination of the facts by a board just as by a master in chancery, referee or commissioner so long as the proper judicial review of questions of law and jurisdictional questions of fact is retained.[72]

In this light what is the nature of the disputes which arise under craft agreements? They involve the contractual rights of the individual employees. The rights are in that sense no different from those of a party under any other contract. Consequently, there can be no doubt that when these rights are involved we have a "matter, which from its nature, is the subject of a suit at common law, or in equity."

These rights are not created by Congress but arise by private contract between the parties. Congress has merely provided a forum for their en-

[69] Reetz v. Michigan, 188 U.S. 505 (1903); Consolidated Rendering Co. v. Vermont, 207 U.S. 541 (1907).

[70] For a comprehensive statement of the methods of judicial review from various boards of each state, see Appendix to Report of the Committee on Administrative Agencies and Tribunals of the Section on Judicial Administration of the American Bar Association, 63 A.B.A. Rep. 623, 632 (1938).

[71] Den *ex dem.* Murray v. Hoboken Land & Improvement Co., 18 How. (U.S.) 272, 284 (1855).

[72] Crowell v. Benson, 285 U.S. 22, 48 (1932).

forcement.[73] Contrasting illustrations are the enforcement of rights given by the National Labor Relations Act[74] or even by that part of the Railway Labor Act which provides for the right to organize and bargain collectively.[75] The authority of Congress to set up boards to hear disputes involving violation of the craft agreement cannot rest on those cases which hold that where Congress has created a right it may, as part of the nature and extent of the right, provide for its enforcement and may make such method exclusive.[76]

Two other sources of Congressional power are the judicial power and the power over interstate commerce. Since the right sought to be enforced is created by private contract, the case does not arise under the laws of the United States. Only occasionally will there be diversity of citizenship. There is applicable none of the other classes of cases covered by the judicial power of the United States under Article 3, Section 2, Clause 1 of the federal Constitution. It is only in the class of cases covered by this provision that Congress may bestow jurisdiction on the federal courts under the judicial power.[77] Since Congress can give jurisdiction in matters cognizable at common law or in equity to boards only as a fact finding adjunct of the federal courts, the congressional authority to establish these boards under the judicial power is limited to the extent to which it could create original jurisdiction in the federal courts. There is, therefore, no source of authority for such boards under the judicial power.

The authority of Congress under the interstate commerce clause has been held to extend "to such regulations of the relations of rail carriers to their employees as are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders."[78] Within reasonable limits Congress may determine what is "reasonably calculated to prevent . . . . strikes." Within this limitation Congress has in the railroad industry and may in other interstate industries establish such tribunals as will facilitate the settlement of disputes under craft agree-

[73] Malone v. Gardner, 62 F. (2d) 15 (C.C.A. 4th 1932); Parrish v. Chesapeake & Ohio Ry. Co., 62 F. (2d) 20 (C.C.A. 4th 1932).

[74] 49 Stat. 453 (1935), 29 U.S.C.A. § 160 (Supp. 1938); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

[75] 48 Stat. 1186 (1934), 45 U.S.C.A. § 152 (Supp. 1938).

[76] See note 74 *supra*, and also Progressive Miners of America v. Peabody Coal Co., 75F. (2d) 460 (C.C.A. 7th 1935), aff'g Stanley v. Peabody Coal Co., 5 F. Supp. 612 (Ill. 1933).

[77] Hodgson and Thompson v. Bowerbank, 5 Cranch (U.S.) 303 (1809); Owings v. Norwood's Lessee, 5 Cranch (U.S.) 344 (1809).

[78] Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937).

ments thus promoting peaceful industrial relations and preventing interruption to commerce. The authority to establish these boards for the trial of rights arising under the craft agreements comes from, but only from, the interstate commerce clause and within the limitations stated above.

The next question which arises is: May Congress make the jurisdiction of such boards exclusive and remove the ordinary and otherwise existing judicial remedies at law or in equity?

Again it is necessary to distinguish those cases in which it is held that Congress in creating a right may prescribe the exclusive remedy for its enforcement. In such a case the right is one that arises under the laws of the United States.[79] Since it is a case "to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the federal courts. . . ."[80] Since Congress has no power over disputes under craft agreements under its judicial power, it has no right under that power to make the jurisdiction of these boards exclusive.

Once more we must turn to the interstate commerce clause. Here becomes important the Supreme Court's limitation of the authority of Congress over the relations of employers and their employees to that which is "reasonably calculated to prevent the interruption of interstate commerce by strikes. . . ." Making available a tribunal like the Adjustment Board may induce the parties to submit their disputes rather than to strike; but in order to prevent strikes it is not necessary to prevent the parties from resorting to their ordinary judicial remedies. The very submission of a dispute to court is as much a substitution of peaceful settlement for strife as submission to a tribunal set up by Congress. To prevent strikes it is not necessary to say: "If you have decided not to strike but to settle the dispute peacefully, you cannot do so in court but must go before the Adjustment Board."

The regulation found under the Interstate Commerce Act and the Shipping Act and the extent of Congress' power to make exclusive the jurisdiction of the commissions under those acts is to be distinguished from the regulation of employer-employee relations. Both of those acts aim at uniformity of rate, tariffs and practices of the carriers. The purpose of setting up an Adjustment Board under the Labor Act is to lessen strikes by providing a tribunal for settlement of disputes and not to secure a uniform interpretation of the craft agreements. Then too, there is no more need for that than there is in the case of an insurance company writing policies in many states. Such uniformity would be impossible. There

[79] U.S. Const. Art. III, § 2 (1).

[80] The Moses Taylor v. Hammons, 4 Wall. (U.S.) 411 (1866).

is a separate and different craft agreement between practically every employer and every class of employee. For example, in the railroad industry alone every railroad has a different contract with at least each of seven different classes of employees—engineers, firemen, conductors, brakemen and other trainmen, switchmen, clerks and mechanical tradesmen. There are more than 120 class one railroads in the United States. This accounts for 840 different craft agreements in the railroad industry alone.

The Interstate Commerce Act and the Shipping Act control and regulate the rates, tariffs and practices of the interstate carriers and steamship companies. In this sense the powers of the commissions under both acts are essentially administrative. The provision for suits by shippers is in connection with this regulation. Under the Railway Labor Act there is no attempt to control or regulate the terms of the agreements between the carriers and the unions concerning rates of pay and working conditions. The act merely seeks to present a tribunal to which may be submitted the disputes arising under the agreements after they are made.

It is submitted, therefore, that under, but only under, its authority over interstate commerce may Congress establish these boards for the adjudication of the contractual rights of the employees under craft agreements; that under this power Congress cannot exclude the ordinary remedies in the courts. Congress may establish these boards only as additional forums.

Since there must be judicial review of the orders of boards established by Congress to hear cases arising under craft agreements, the extent of this review is important. The famous and much discussed case of *Crowell v. Benson*[81] requires that the court ascertain *de novo* the jurisdictional facts. These would be that the employees involved in the dispute or at least the class of employees covered by the craft agreement were engaged in or sufficiently related to interstate commerce and that the relationship of employer and employee existed. The act involved in that case (Shipping Act) provided for judicial review of questions of law including the question of whether as a matter of law there was any evidence (not the weight of the evidence) to sustain the board's finding. By the court's emphasis on this latter provision in upholding the constitutionality of the act and in light of the decisions giving such review on bills in equity to enjoin the orders of the commissions under the Interstate Commerce Act and the Shipping Act,[82] it is safe to say that the courts must be afforded a review

[81] Crowell v. Benson, 285 U.S. 22 (1932).

[82] Interstate Commerce Comm'n v. L. & N. Ry. Co., 227 U.S. 88 (1913); Interstate Commerce Comm'n v. Union Pacific R. Co., 222 U.S. 541 (1912); Crowell v. Benson, 285 U.S. 22 (1932).

of questions of law, including the question as to whether there is any evidence to support the findings of fact.[83]

By way of summary, the minimum constitutional requirements for boards hearing disputes under craft agreements are that there must be afforded to all interested parties judicial review *de novo* of jurisdictional questions of fact and a review of questions of law, including the question of whether there is any evidence (not the weight of the evidence) to sustain the board's findings of fact.

How do the provisions of the Railway Labor Act relative to the National Adjustment Board meet these requirements? As to the railroad, ample constitutional guaranty of judicial review is afforded by the procedure on a petition to enforce the order. In fact as the findings of the board are only *prima facie* evidence, the review afforded goes far beyond the requirements. The employee who files the case before the board is not given judicial review of an unfavorable decision. If recourse to the courts were excluded and he were compelled to bring his case before the board, then the act would be unconstitutional as to him. On the other hand, if creation of the board has not excluded the ordinary judicial remedies so that the petitioning employee has the option of proceeding before the board or in court, he cannot complain. He has voluntarily waived his right to a judicial determination for one by the board alone.

An analogous situation is found under the Interstate Commerce Act. That act specifically provides that any person injured by a common carrier may have his choice of bringing suit against the carrier in the courts or by filing a complaint before the Commission. Resort to one excludes the other.[84] In connection with this provision of the act is to be read the judicial code in which provision is made for injured persons to enjoin an order of the Commission.[85] Under the provisions of these two acts, it has been held that if the Commission refuses relief to the shipper against the carrier, the shipper cannot have judicial review of the order, whereas if the Commission enters an order against the carrier, the latter can secure judicial review.[86] Thus the carrier, not having the choice of the tribunal before which the claim is prosecuted, has a right to judicial review of an

[83] In addition to the cases under the Interstate Commerce and Shipping Acts see Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 276 (1933), and the cases involving the Nat'l Labor Relations Act cited in note 1 *supra*. For a discussion of the power of courts to set aside administrative orders see address of Honorable Marvin B. Rosenberry, Chief Justice of the Wisconsin Supreme Court in 24 A.B.A.J. 279 (1938).

[84] 24 Stat. 382 (1887), 49 U.S.C.A. § 9 (1929).

[85] 38 Stat. 219 (1913), 28 U.S.C.A. § 41 (28) (1927).

[86] Standard Oil Co. v. United States, 283 U.S. 235 (1931).

adverse order of the Commission, but the shipper, having voluntarily chosen to prosecute his claim before the Commission instead of in court, cannot secure judicial review of the Commission's order.

It is quite apparent from the obvious use of the word "may" in reference to submission of disputes to the Adjustment Board and in light of the decisions under the former acts and congressional debate[87] that Congress has intended to and has left the choice open to the complaining employee whether to institute proceedings before the Board or in court. Under the rule of law that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also any grave doubts upon that score,[88] the Railway Labor Act must be construed as merely establishing an additional and optional remedy to that afforded by the courts.

A different situation is presented with the employee who does not file the complaint before the Board but is drawn into the case because the dispute involves his rights, as for instance rival claims to the same job in a dispute over seniority. He had no choice between the Board and the courts. Yet he has no opportunity to secure on his own initiative judicial review. As it is usually only a question of which of two or more employees is entitled to certain jobs, the railroad has no personal interest in the outcome; consequently it will not go to the expense and trouble of compelling a petition to enforce. As to such employees there are grave doubts as to the constitutionality of the act's provisions relative to the Adjustment Board. These can be easily remedied by provision for appeal.

There is no adequate judicial relief from orders of the Adjustment Board by means other than those afforded by statute. As previously discussed, the legal remedies of certiorari and prohibition do not afford review of the merits.[89] Neither does mandamus which is restricted to compelling the board to exercise the powers which it possesses but does not compel the exercise of these powers in any particular way.[90]

If the order is void, as for instance a constitutional right is violated, equity will intervene by injunction to prevent enforcement of the order. Such has been the case when the Adjustment Board failed to give notice and opportunity for hearing to an interested employee.[91] But this is en-

[87] Notes 67 and 68 *supra.*

[88] United States v. Jin Fuey Moy, 241 U.S. 394 (1916); Baender v. Barnett, 255 U.S. 224 (1921); Missouri Pacific Ry. Co. v. Boone, 270 U.S. 466 (1926).

[89] Notes 61 and 62 *supra.*

[90] People v. La Buy, 305 Ill. 11, 136 N.E. 870 (1922); Post v. Gary, 166 Ill. 143, 46 N.E. 745 (1897).

[91] Nord v. Griffin, 86 F. (2d) 481 (C.C.A. 7th 1936).

tirely different from reviewing the order on the basis of the merits of the controversy.

There is a vague *dictum* in one case[92] to which a certain distinguished text writer has called attention, as pointing to a possible review of the merits in equity.[93] There are statements by some other authors indicating that federal injunctive relief against federal administrative boards might afford a review of the merits.[94] But I have been unable to find any case which, in the absence of some statutory authority, has afforded such relief or given any theory upon which such relief could be sustained. The statement of the last author, which was only incidental, may have referred to injunctive relief against orders of the Interstate Commerce Commission. The cases permitting a review of the merits of an order of the Interstate Commerce Commission on a bill for an injunction are to be distinguished, however, as these are specifically authorized by the judicial code.[95] It is my conclusion, therefore, that in the present absence of statutory authority there can be no review in equity of the merits of a decision of the National Railroad Adjustment Board.

In conclusion, if in the development of collective bargaining it is seen fit to establish special tribunals for disputes arising under these agreements, it is constitutionally required and only fair to all concerned that adequate provision be made for judicial review as a matter of right by all parties involved. Experience under the National Labor Relations Act indicates that serious consideration should also be given to allowing the courts the same review of the findings of fact of an adjustment board as of the findings of a trial court. Careful thought should be given to establishing these tribunals with a personnel of neutral judges, some of whom might be non-legal experts in the industry and others lawyers. The impartiality and the calibre of the decisions would then be assured and distrust from the possible, even if remote, interest of the board members would be eliminated.

[92] American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).

[93] Freund, Administrative Powers over Persons and Property 346 (1938).

[94] 24 A.B.A.J. 274, 276 (1938).

[95] Note 85 *supra*.