Michigan Law Review

Volume 42 | Issue 1

1943

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THE Fair Labor Standards Act[1] is one of several comprehensive federal enactments[2] regulating the relationship between employers and their employees in interstate commerce. These enactments have not followed a common pattern, nor have the means provided for their effective administration and enforcement been the same in each instance. Taken together, however, they establish our national labor policy.[3] The underlying theory of this policy is that employees do not stand upon an equal footing with organized management and are unable to exert, individually, sufficient bargaining power to prevent management from imposing upon them conditions of employment detrimental to their welfare and inimical to the public interest; and, therefore, that it is the function of government to redress this inequality by imposing certain minimum standards of conduct. Generally speaking, the effect of these standards is to restrict the employer's freedom of action and guarantee to the employees certain "fundamental" rights.[4]

* The opinions expressed herein are those of the author and are not intended to reflect the official attitude of the United States Department of Labor or the Wage and Hour Division of that Department.

Since this article was first written, the Circuit Court of Appeals for the Third Circuit has handed down an opinion which accords, the writer thinks, with the views here expressed. Bowe v. Judson C. Burns, Inc., (C.C.A. 3d, 1943) 6 W. H. REP. 449, discussed infra at note 36. It seems to be a fair conclusion from the opinion that the court would entertain a suit *by the administrator* for a mandatory injunction of wrongfully discharged employees by their employer and by their union. While denying such a mandatory injunction *by employees* under the act, it left open the question of injunction by employees outside the act.

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[1] Act of June 25, 1938, c. 676, 52 Stat. L. 1060, 29 U.S.C. (1940) § 201 et seq., hereinafter called "the act," or F.L.S.A.

[2] The historical development of such federal legislation is outlined in the opinion of the District Court in Brotherhood of Ry. & S.S. Clerks v. Texas & N.O.R.R., (D.C. Tex 1928) 24 F. (2d) 426 at 429.

[3] See ROSENFARB, THE NATIONAL LABOR POLICY 4-16 (1940).

[4] Cf. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 at 33, 57 S. Ct. 615 (1937). See the declaration of policy in § 1 of the National Labor Relations Act, 49 Stat. L. 449 (1935), 29 U.S.C. (1940), § 151, and § 2 of the Fair Labor Standards Act. See generally, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S. Ct. 578 (1937), where the Supreme Court accepts with approval the similar views expressed by the dissenting justice in Adkins v. Children's Hospital, 261 U.S. 525, 43 S. Ct. 394 (1923).

The Fair Labor Standards Act, popularly called the Wage-Hour Law, contributes to the effectuation of this national labor policy by restricting the limits within which employers and employees shall be free to bargain relative to the number of hours to be worked and the wages to be paid for those hours. Section 6 requires the payment of a minimum wage to all employees "engaged in [interstate] commerce or in the production of goods for [interstate] commerce"; and section 7 prohibits the employment of such employees for workweeks longer than forty hours, unless they are compensated for all employment in excess of forty hours at a rate not less than time and one-half the regular rates at which they are employed.[5] Failure to observe these wage and hour requirements is made unlawful by section 15(a)(2),[6] and the commission of any act declared by section 15 to be unlawful subjects the offender to the act's criminal and civil sanctions.[7] In addition to these two forms of public sanction, a private sanction also is prescribed in section 16(b) of the act and is available to any employee who has not been paid the required minimum wage and overtime compensation.[8]

[5] These restrictions Congress found to be essential in order to remove "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" engaged in interstate activities. F.L.S.A., § 2.

[6] The wage and hour provisions of the statute are administered and enforced by an administrator; the act's prohibition of "oppressive child labor" (§ 12) is administered and enforced by the Chief of the Children's Bureau of the Department of Labor; and goods produced in violation of the wage, hour, or child labor restrictions are banned from interstate commerce by § 15 (a) (1) of the act.

[7] Sec. 16(a) provides for "a fine of not more than $10,000" for the first willful violation of § 15, or "imprisonment for not more than six months, or both" for subsequent willful violations. Criminal proceedings are instituted and prosecuted by the Department of Justice.

Sec. 17 states: "The district courts of the United States and the United States courts of the territories and possessions shall have jurisdiction, for cause shown . . . to restrain violations of section 15. . . ." See, also, § 11(a) which states that "the Administrator shall bring all actions under section 17 . . . to restrain violation of this Act."

[8] Sec. 16(b) states: "Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." For a discussion of this section and several of the problems it presents, see the author's articles, "Jurisdiction of Employee Suits under the Fair Labor Standards Act," 39 MICH. L. REV. 419 (1941), and "Employee Remedy under the FLSA," 4 W. H. REP. 488 (1941).

From this cursory summation of the substantive provision of the statute and the sanctions available for their enforcement, it is readily apparent that the act creates both public and private substantive rights. Here, however, as with most labor enactments which materially alter the dominant position accorded the employer under the common law, a major problem has been that of protecting employees from retaliatory action by their employers whenever they attempt to assert the rights conferred upon them by these statutes. Federal labor laws frequently have anticipated such reprisal conduct and expressly prohibited it; but they generally do not state in so many words the kinds of relief that shall be available to or for employees affected by a disregard of their prohibitions.[9] The outstanding exception is, of course, the National Labor Relations Act,[10] whose prohibition against employee discharge or discrimination is implemented by the grant of authority to the National Labor Relations Board to order any person whom it finds has violated that prohibition "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."[11]

The Fair Labor Standards Act also proscribes employer reprisal conduct. Section 15(a)(3) of the act makes it unlawful for any person—

> ". . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."

Violations of these restrictions, like violations of the act's minimum wage and maximum hour provisions, subject the violator to the criminal penalties and to injunction proceedings by the administrator. In most cases the mere availability of these public sanctions is sufficiently convincing to act as a preventive; but there is always a fringe of recalcitrant employers and a probability that employees will be discharged notwith-

[9] Infra p. 39 et seq.

[10] 49 Stat. L. 449 (1935), 29 U.S.C. (1940), § 151 et seq. Sec. 8(4) of this act makes it an unfair labor practice for an employer to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony" under the act. "Section 8(4) of the [National Labor Relations] Act was designed precisely for the purpose of protecting an employee against reprisal for disclosing violations of the Act." Matter of Viking Pump Co., 13 N.L.R.B. 576 at 590 (1939), affd. National Labor Relations Board v. Viking Pump Co., (C.C.A. 8th, 1940) 113 F. (2d) 759, certiorari denied, 312 U.S. 680, 61 S. Ct. 449 (1941).

[11] N.L.R.A., § 10(c).

standing the severity of the act's penalties. The question arises, therefore, does the act leave both the public and the injured employee powerless to repair the damage in such cases? "Reinstatement," as Justice Frankfurter aptly observed in the *Phelps Dodge* case,[12] "is the conventional correction for discriminatory discharge." Yet, unlike its forerunner, the National Labor Relations Act, the Wage-Hour Law does not expressly provide for "the reinstatement of employees with or without back pay."[13] Certainly, the need for reinstatement was apparent in both instances; more so, perhaps, under the Wage-Hour Law, where the employee is much more likely to assert and seek to enforce his rights individually, than under the National Labor Relations Act, the primary aim of which was the encouragement of group action. If, then, reinstatement was conceived of in the one situation, either as retribution to the violating employer or reparation to the public and the affected employee, was it not also contemplated in the other?

I

CONGRESSIONAL INTENT

The answer to our inquiry, of course, entails a consideration of the "intent" of Congress—an "interpretation" or, perhaps, a "construction" of the statute[14]—since we propose to show that reinstatement is a permissible form of relief under the act notwithstanding the absence of express authorization to that effect. If, at the outset, it be said that we must "read" into the statute a provision that is not there or, as it is sometimes put, "legislate" where the act itself is silent, the reply is that in so doing we are adhering to the best "Anglo-American tradition of a court."[15] For it must be conceded at the beginning that Congress probably never thought of reinstatement. Certainly there is nothing in the legislative history of section 15(a)(3) that even faintly intimates that the subject was considered either in the committee hearings on the bill or the discussion of its provisions on the floor of the House or the Senate.[16]

[12] Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177 at 187, 61 S. Ct. 845 (1941).

[13] N.L.R.A., § 10(c).

[14] See Radin, "A Short Way with Statutes," 56 HARV. L. REV. 388 at 397 (1942).

[15] Id. at 396.

[16] The bill as originally introduced in the Senate [S. 2475, 75th Cong., 1st sess., § 27(d)] and the House [H.R. 7200, 75th Cong., 1st sess., § 27(d)] on May 24, 1937, and as passed by the Senate on July 31, 1937, was substantially the same as the present § 15(a) (3) of the act, except for the additional words "or because such employer believes that such employee has done or may do any of said acts." This addition was dropped and none of the subsequent drafts of the bill made any material changes in the remainder of this section.

In ascertaining this nonexistent collective "intent" of Congress, we shall endeavor to follow what Professor Radin[17] has characterized as "the way of strong and self-confident courts":

> "The first question the interpreter asks is: What is the purpose of the statute as a whole? . . .
>
> "Second: Is this statutory purpose one that the court feels is good? We need not trouble ourselves about the statement that the court must not legislate. Both the judicial and the executive branches participate in the legislative process. They cannot help doing so by the mere act of 'enforcing' or 'applying' laws or carrying out the legislative purpose. They may not rephrase the statute. They may not reject the purpose, even if they do not find it to be good. But they may—indeed, nothing can prevent their doing so—exercise a judgment on the value of the purpose, and make that judgment the basis of their enforcement of the law. . . .
>
> "Third: Is the implemental portion of the statute declared to be exclusive? If so, it is clear that those who framed the statute were uncertain about the value of its program and the court may not disregard that fact even if the court is quite certain. On the other hand, if no such exclusive use of statutory methods is prescribed, it is open to a disapproving court to find them exclusive.
>
> "I believe this is the way strong and self-confident courts—and we ought to have no other—do in fact deal with statutes. Since they are Anglo-American courts, they will not disregard precedent, but will use it as strong courts do, namely, to avoid doing specific injustice, and not merely to satisfy the requirement of logical consistency."[18]

In considering the application of these tests to the problem of reinstatement under the Fair Labor Standards Act, we need not trouble ourselves about the purpose of "the statute as a whole"; we know it to be the placing of certain mandatory obligations upon the employer (with the resultant creation of correlative rights in favor of his employees), found and declared by Congress to be essential to the elimination of "labor conditons detrimental to" workers in interstate

[17] Radin, "A Short Way with Statutes," 56 HARV. L. REV. 388 at 422 (1942).

[18] At page 423, Professor Radin continues: "In all this what room is there for the standard 'canons of interpretation,' for *eiusdem generis*, *expressio unius*, and the entire coterie or band of phrases and tags and shibboleths which are so wearisomely familiar? I should be tempted to deny that they have ever resolved an honest doubt, if a general negative were provable. Certainly it is hard to find an instance in which they did more than invest with the appropriate symbolic uniform a conclusion that should have been quite as respectable in the ordinary civilian clothes of sober common sense."

commerce and to the free flow of goods in commerce.[19] We know, also, the special purpose section 15(a)(3) was meant to fulfill, namely, protection to employees who assert the rights the statute confers, or who co-operate with the Wage and Hour Division and the act's administrator in the enforcement of these statutory restrictions.[20] That "this statutory purpose [is] one that the court feels is good" is, perhaps, best evidenced by the liberality courts generally have shown in extending the act's coverage provisions and restricting its exemptive sections—a judicial attitude calculated to embrace within that statutory purpose as many employees as the language of the act and its constitutional limitations will permit.[21] We come, then, to the application of Professor Radin's third test, namely, an examination of the "implemental portion" of the act, i.e., the civil sanctions in sections 16(b) and 17, to determine whether they are "exclusive."

It is immediately apparent that, unlike the National Labor Relations Act,[22] neither of the civil statutory methods for the enforcement of the Fair Labor Standards Act is expressly "declared to be exclusive"; nothing in their language purports to foreclose resort by the parties entitled to invoke their provisions to any other available remedies outside the act for accomplishing the statutory purpose. Still, in a sense, each of these sanctions is "declared to be exclusive"—exclusive as to the parties who are authorized to invoke its provisions. Thus, the equitable jurisdiction conferred on the federal district courts by section 17 of the act may be invoked only by the administrator;[23] and the right to sue at law for liquidated damages and attorney's fees,

[19] F.L.S.A., § 2.

[20] Query, does discharging an employee for circulating a petition among his fellow employees requesting authorization to file suit on their behalf for back wages under the Fair Labor Standards Act constitute an "unfair labor practice" under the National Labor Relations Act justifying reinstatement? See "NLRB Protection for Wage-Hour Complaints," 5 W. H. REP. 667 (1942), and Matter of Williamson-Dickie Mfg. Co., 35 N.L.R.B. 1220 at 1245 (1941).

[21] Kirschbaum Co. v. Walling, 316 U.S. 517, 62 S. Ct. 1116 (1942); Fleming v. Hawkeye Pearl Button Co., (C.C.A. 8th, 1940) 113 F. (2d) 52; Overstreet v. North Shore Corp., 318 U.S. 125, 63 S. Ct. 494 (1943). See also United States v. Darby, 312 U.S. 100 at 116-117, 61 S. Ct. 451 (1941), expressly overruling Hammer v. Dagenhart, 247 U.S. 251, 38 S. Ct. 529 (1918); and West Coast Hotel Co. v. Parrish, 300 U.S. 379 at 400, 57 S. Ct. 578 (1937), expressly overruling Adkins v. Children's Hospital, 261 U.S. 525, 43 S. Ct. 394 (1923).

[22] Sec. 10(a) of the N.L.R.A., empowering the board to prevent "unfair labor practices," provides that "This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

[23] See § 11(a) of the F.L.S.A., quoted supra, note 7. See also Bowe v. Judson C. Burns, Inc., (C.C.A. 3d, 1943) 6 W. H. REP. 449.

plus whatever is due and owing in back wages, is a right which section 16(b) of the statute reserves to employees—more specifically, to those employees affected by violations of the act's wage and hour provisions only.[24] The employees may not invoke the statutory remedy by injunction;[25] and neither the administrator nor an employee discharged in violation of section 15(a)(3) may avail himself of the special sanctions which section 16(b) of the act provides.[26] But does it follow from these "exclusive" aspects of the "implemental portion" of the act that all other remedies known to the law but not expressly recognized by the act are proscribed? Considering the known purpose of "the statute as a whole" and the evident purpose of section 15(a)(3),

[24] See § 16(b) of the F.L.S.A., quoted supra, note 8, and observe that only employers who violate the act's wage and hour provisions may be proceeded against by their employees under its terms.

[25] See note 7, supra, and the decisions under the similar injunction provision in the National Industrial Recovery Act. Harper v. Southern Coal & Coke Co., (C.C.A. 5th, 1934) 73 F. (2d) 792, and Progressive Miners of America v. Peabody Coal Co., (C.C.A. 7th, 1935) 75 F. (2d) 460. See also Harvey v. Florida Power & Light Co., (D.C. Fla. 1941) 1 W. H. CASES 441, 442, where District Judge Holland said: "I have fully considered also the matter of the prayer for a restraining order, and am of the opinion that that prayer is the proper subject matter of a suit by the administrator, but not by the plaintiffs." But cf. Martino v. Michigan Window Cleaning Co., (D.C. Mich., 1943) 6 W. H. REP. 187, where District Judge O'Brien granted a temporary injunction restraining violations of § 15(a) (3). The decision in Bowe v. Judson C. Burns, Inc., (D.C. Pa. 1942), 46 F. Supp. 745 is confusing; it is discussed infra, note 36. But see the circuit court's opinion, 6 W. H. REP. 449.

[26] Sec. 16 (b) in terms is available only where the act's wage or hours provisions have been violated. See supra, note 8.

But cf. Fleming v. Miller, (D.C. Minn. 1942) 47 F. Supp. 1004, pending on appeal to the Eighth Circuit, where, in an injunction suit by the administrator, the defendant consented but the court denied that it possessed the power to order the employer to make restitution of back wages to his underpaid employees. Stating that § 16(b) provided the "exclusive" method by which back wages could be obtained, the court held (p. 1008): "It is the general rule that if a statute creates a liability (or right) and gives a special remedy for the enforcement of that liability or right, that remedy is the exclusive one." That §§ 6 and 7 "create" liabilities is, of course, true, but § 16(b) "gives" a special remedy only in the sense that it gives the right to recover "an additional equal amount [i.e. double recovery] as liquidated damages" plus "a reasonable attorney's fee." See infra, note 32. Only in proceedings by employees under that section can these benefits be obtained. Bowe v. Judson C. Burns, Inc., (C.CA. 3d, 1943) 6 W. H. REP. 449, 450. But the ordering of employee restitution, i.e., simple back wages, as an incident to the statutory grant of power to the district courts to "restrain violations" of the act, accords with traditional equity power to grant incidental damages, and, manifestly, does not interfere with or prevent employees from resorting to the exclusive features of the § 16(b) remedy. See Abroe v. Lindsay Bros. Co., 211 Minn. 136, 300 N.W. 457 (1941), where recovery of the "additional equal amount" was permitted in a § 16(b) suit to an employee who previously had received restitution of back wages by the administrator's action under § 17.

and taking our cue from the court's liberal construction of the act, we think it unreasonable to assume from these limitations on the use of sections 16(b) and 17 that the statute contemplates that employees whose rights under section 15(a)(3) have been violated shall be remediless.

A. Failure To Provide an Employee Remedy for Discharge

The inclusion in the act of a provision regarding employee suits is itself an indication that the framers of the statute contemplated some form of employee reparation that would be available to the employees themselves for injuries to the rights the act confers upon them.[27] As we have seen, however, the statute does not provide a private remedy available to wrongfully discharged employees, and if casually considered this may be seized upon as confirmation of the view that no form of employee reparation was contemplated in such cases.

But the fact that a pre-existing remedy[28] for the enforcement of one class of private rights created by the act is implemented, while nothing is said regarding what, if any, remedies are available for the enforcement of the other class of private rights, would appear to prove nothing. Statutory rights frequently are created for which no remedy is provided in the statute itself;[29] and the silence of the legislature in

[27] That § 15(a) (3) does confer private rights upon affected employees as well as rights upon the public generally seems reasonably clear. The mandatory language it uses and the specific manner in which the restraints it imposes are stated support this view. Similar prohibitions in the Railway Labor Act of 1926 [44 Stat. L. 577, § 2 (3); 45 U.S.C. (1940), §§ 151, 152], were held to have created enforceable rights, although the statute provided no remedy whereby they might be enforced. Texas & N.O. R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548 at 569, 50 S. Ct. 427 (1930). The federal grand jury for the Eastern District of New York returned an indictment charging an employer and officers of a labor union with conspiracy to deprive certain employees of rights given to them by the F.L.S.A., contrary the Federal Civil Rights act, 18 U.S.C. (1940), § 51. The indictment alleged that the defendants had conspired to threaten with discharge several employees who had refused to waive their claims for back wages and had instituted or intended to institute suit under § 16(b); and, further, that the union officials, in conspiring with the employers, had refused to permit such employees to make part payments of arrearages in union dues unless the suits were dismissed and had threatened to bring about their discharge by certifying them to the employer as delinquent. Arguing that such conduct, if true, would be violative of "rights . . . secured" to the employees under the F.L.S.A., the court, in sustaining a demurer to the indictment, held that such rights were not of the character of rights guaranteed to citizens alone and intended to be protected by the Civil Rights Act. United States v. Berke Cake Co., (D. C. N. Y. 1943) 6 W. H. REP. 670. See also W. H. REP. 443 (1943).

[28] See infra, note 32.

[29] See supra, note 27. See also Cooksey v. Beaumont Mfg. Co., 194 S.C. 395, 9 S.E. (2d) 790 (1940).

this regard is not to be taken as a conclusive indication that such rights are not intended to be enforced. The determining factor in each instance is whether the violation has occasioned special injuries to the individual, different in nature from those which he suffers in common with the public generally.[30] If so, and if the purpose for which the statute conferred the right is one the courts regard as "good," then remedies outside the statute will be found for the enforcement of those rights.[31] And if, as it sometimes appears, these extrastatutory remedies are inadequate, e.g., not easily available or not conducive to the granting of complete relief, it is to be expected that the legislature itself has or will implement these remedies, if the courts either cannot or will not, in a manner calculated to remove their shortcomings. This, we think, is the case under the Fair Labor Standards Act and is the true explanation for the inclusion of section 16(b) in that act. It is, therefore, erroneous to say that that section "creates" or "gives" the "exclusive" means by which all employee reparations for injuries under the act must be obtained;[32] rather, it merely implements a pre-existing remedy without precluding resort by employees to any other remedies they may have.

It is not necessary for our purposes that we attempt here an exhaustive discussion of these other remedies outside the act available

[30] See Judge Cooley's discussion of this principle in Taylor v. Lake Shore & M.S. Ry., 45 Mich. 74, 7 N.W. 728 (1881); see generally 1 C.J.S. 996 (1936). That an employee who has been discharged in violation of the act's prohibitions does sustain special injuries is readily apparent, especially if we consider the economic conditions prevalent at the time of the statute's adoption and before the present war brought about an "employees' market;" such an employee not only loses his sole means of livelihood, but the fact that he was discharged for asserting rights not wholly acceptable to employers generally cloaks him with a stigma which impedes and frequently precludes any effort he might make to obtain comparable employment.

[31] As pointed out by Professor Radin, "A Short Way with Statutes," 56 HARV. L. REV. 388 at 413 (1942): "This argument *ex silentio* in ordinary life is normally treated as something of extremely slight probative force." Courts, however, do frequently rely upon it; but generally their reliance is restricted to cases where they are predisposed to the achievement of a certain conclusion. In other words, the desired conclusion is reached and then the *ex silentio* argument is drawn in to support it.

[32] Sec. 16 (b) confirms and implements the underpaid employee's remedy at law for damages, by (1) authorizing federal as well as state courts of competent jurisdiction to entertain such claims [see Crockett, "Jurisdiction of Employee Suits under the Fair Labor Standards Act," 39 MICH. L. REV. 419 (1941)]; (2) providing a convenient method by which full reparation might be calculated [see Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 62 S. Ct. 1216 (1942), rehearing denied, 317 U.S. 706, 63 S. Ct. 76 (1942)]; (3) permitting the prosecution in a single action of the claims of numerous "similarly situated" employees [see Crockett, "Employee Remedy under the FLSA," 4 W. H. REP. 488 at 490 (1941)]; (4) and authorizing an award of attorney's fees to those employees whose claims are finally held to have been meritorious.

to a wrongfully discharged employee; not only would such a discussion extend unduly the limits of this article, but it would detract from our central theme, namely, that reinstatement was contemplated in such cases and may be achieved within the framework of the statute itself. It hardly will be doubted, however, that such an employee has a right of action for damages.[33] But whether he may obtain affirmative relief in equity in the nature of reinstatement, or even preventative relief by means of an injunction in cases of threatened discharge or discrimination, is not so clear. While most of the older and leading cases[34] adhered to the view that equity will not specifically enforce a contract for personal services nor enjoin breaches of such contracts, there is a present-day judicial tendency to adopt a more realistic approach.[35] It is, however, still too early to gauge the full significance of this modern judicial trend and there have been no decisions on this score under the act.[36] Nevertheless, equity's traditional refusal to enjoin the commis-

[33] Like the act's wage and hour provisions [cf. Fleming v. Warshawsky & Co., (C.C.A. 7th, 1941) 123 F. (2d) 622], the prohibitions against discharge and discrimination cannot be waived; each of these statutory restrictions are to be "read into" every employment contract falling within the scope of the act and, as such, constitute a promise on the employer's part that, inter alia, he will not discharge the employee for any of the reasons set forth in § 15 (a) (3). See Northwestern Yeast Co. v. Broutin, (C.C.A. 6th, 1943) 133 F. (2d) 628. The breach of this promise, like the breach of the implied promise to pay compensation in accordance with the terms of the act, gives rise to a cause of action for damages, i.e., back pay; though the amount of the damages, in a contractual action—particularly an "employment-at-will-agreement," is likely to be nominal or small. It would seem also that the affected employee might elect to institute a "noncontract" action, predicating his claim upon the special injuries suffered by him as a result of the employer's violation of a statute designed for employees' special benefit. See the references mentioned supra, note 30, and compare Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 at 39, 36 S. Ct. 482 (1916).

[34] See annotation on injunction against discharge of employees, 44 A.L.R. 1443 (1926).

[35] See Weber v. Nasser, (Cal. App. 1930) 286 P. 1074, appeal dismissed on other grounds 210 Cal. 607, 292 P. 637 (1930); and cases noted in 1 CHAFEE AND SIMPSON, CASES ON EQUITY 419 (1934). In the Weber case, the court overruled a demurrer seeking specific performance of a union employment agreement. The union's complaint alleged that certain of its members had been discharged by their employers, the defendants, in violation of the agreement. See also Texas & N.O.R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548, 50 S. Ct. 419 (1930), discussed infra, note 74.

[36] The decision in Bowe v. Judson C. Burns, Inc., (D.C. Pa. 1942) 46 F. Supp. 745, is confusing because of what it does not say. This was an equity proceeding by discharged employees alleging a conspiracy between their union and their employer to induce plaintiffs to withdraw their action under § 16 (b) for back wages. Upon the plaintiffs' refusal, the union expelled them, thus forcing the employer to discharge them in accordance with the terms of the employer's contract with the union. Plaintiffs requested "an injunction" presumably to compel the union to revoke the expulsion and to require the employer to reinstate them. The complaint did not refer to § 17 of the act as the basis for the court's jurisdiction. The court granted the union's motion

sion of a criminal act, its reluctance to view a worker's interest in his job as a "property" right, and its insistence upon the "mutuality" of its remedies, might reasonably be expected to give way in the presence of the daily decrees of the courts ordering reinstatement under the National Labor Relations Act, and relying only upon their power to punish for contempt as a fully adequate means of assuring compliance with their mandate. The entire history of equity jurisprudence is one mammoth example of its ever-readiness to outdo the legislature in devising new remedies for what the chancellor regards as unwarranted but legally irremediable wrongs.

Certain practical considerations, too, suggest that reinstatement must be deemed to have been intended by Congress and that section 16(b) was not meant to be the "exclusive" method by which employee reparation for all classes of injuries was to be obtained. Suppose, for example, an employee institutes suit under section 16(b) and is discharged by his employer for thus resorting to the very remedy the act contemplates.[37] The injury to such an employee is twofold; he not only is damaged by

to dismiss the suit as to it for the reason that the union was not an "employer" within the meaning of the act. There is no indication of the nature of the company's defense. The jurisdictional point is left in doubt. Sec. 17 is referred to as authority for the federal district court's power "to enjoin violations of section 15," but § 11 (a), which requires that "the Administrator shall bring all actions under section 17," is not mentioned. This leaves the inference that employees may invoke the statutory injunction remedy and that had it been he company, rather than the union, who moved to dismiss, the motion would not have been granted.

In the decision on appeal, (C.C.A. 3rd, 1943) 6 W. H. REP. 449, handed down since this article was prepared, the dismissal was affirmed on other, and we think proper, grounds. The circuit court held that the district court was in error in concluding that § 15 (a) (3) of the act does not protect an employee against discriminatory action by a union as "any person" within the meaning of that section. "The decision will be sustained," the circuit court said, because "We think it is plain from this language [§§ 17 and 11 (a), supra, note 7] that the right of the Administrator to bring an action for injunctive relief is an exclusive right"; and "Since jurisdiction in the case at bar is based solely on the provisions of Section 17 of the Act, it follows that the order of the court below must be affirmed, though upon different grounds." The court thus leaves open the question whether the employees may obtain injunctive relief by "a mandatory injunction" outside the act. See notes 34 and 35, supra, and cases cited in Newman "The Closed Union and the Right to Work," 43 COL. L. REV. 42 at 45-49 (1943). But it did state that "such relief [reinstatement in the union, and therefore in employment] would be substantially the equivalent of relief based on Section 15 (3) *to be given by a district court on application of the Administrator under Section 11 (a).*" (Italics supplied.) See also on who may be liable for violations of § 15 (a) (3), Meek v. United States, (C.C.A. 6th, 1943) 6 W. H. REP. 636.

[37] An action seeking reinstatement of an employee discharged under these circumstances recently was filed by the administrator in the United States District Court for the Southern District of New York, Walling v. O'Grady, 6 W. H. REP. 371 (1943).

the employer's failure to pay the compensation required by sections 6 and 7 of the act, but he is damaged anew for attempting to repair the first injury. The damage flowing from the illegal discharge is likely to be much greater and more difficult of measurement than that occasioned by the employer's failure to pay the statutory compensation.[38] Yet, if the view be accepted that reparation is not available because such an employee is ineligible to proceed under the "exclusive" employee sanction afforded by section 16(b) of the act, obviously the employee, if unable to obtain reinstatement outside the act, is in a worse predicament than would have been the case had he not availed himself of the rights the statute confers. And even though pecuniary compensation is available in such cases,[39] this not only is poor solace, but, what is more important, "to limit the significance of discrimination [or discharge] merely to questions of monetary loss to workers" is to ignore the obvious purpose section 15(a)(3) was designed to achieve, and thus "thwart the central purpose of the Act."[40]

That some form of reparation must have been contemplated is even more apparent in the case of the employee who is subpoenaed, pursuant to the administrator's statutory authority,[41] and compelled to testify regarding his employer's wage and hour practices. To say that such an employee, when discharged by his employer for performing a duty *required* of the employee by the statute, may not be reinstated merely because the statute itself affords to him no means of obtaining such relief for himself is hardly conducive to that effective co-operation on his part in the enforcement of the act which the statute as a while, and section 15(a)(3) in particular, contemplates.

Finally, it might well be that in so far as employee reparation in cases involving violations of section 15(a)(3) were concerned, the framers of the act contemplated that the remedy for the private injury suffered by the discharged employee should be merged and effected by means of whatever reparation the statute provides for the injury to the general public. This undoubtedly was true under the National Labor

[38] See supra, note 30; see also Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 at 583-584, 62 S. Ct. 1216 (1942), where in discussing the validity of the double-damages provision in § 16 (b), the Court observed that, "The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages."

[39] Supra, note 33.

[40] Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177 at 193, 61 S. Ct. 845 (1941).

[41] Secs. 9 and 11 (a), F.L.S.A.

Relations Act.[42] And, if adequate protection for the public interest demanded reinstatement with back wages under that statute, it would seem to be mere cavil to argue that protection of the same public interest does not demand reinstatement in illegal discharge cases under the Wage and Hour Law.[43]

The conclusion to be drawn from the failure of Congress to provide a private remedy in section 15(a)(3) cases is, we think, quite clear. If the public sanction by injunction which section 17 of the act affords can be utilized to accomplish the reinstatement of illegally discharged employees, the absence of any provision in the act giving to such employees themselves a private remedy or implementing any remedy they may have outside the act, for the reparation of their special injuries, is without significance and affords no basis for the assumption that Congress did not "intend" that they, too, should have that complete reparation which can only come from their reinstatement.[44] This conclusion is reinforced when we consider the scope of the administrator's remedy under section 17 of the act.

[42] Sec. 15 (a) (3) of the F.L.S.A. appears to have been modeled in language and purpose (supra, note 10), after the antidiscrimination provisions in the N.L.R.A. While there is dictum to the effect that the provisions in that act do not confer private rights [Agwilines v. National Labor Relations Board, (C.C.A. 5th, 1936) 87 F. (2d) 146], the better view would seem to be that that act does confer private rights but the exclusive nature of the public remedy provided therein, a single proceeding by the board in which both the rights of the public and those of affected employees may be vindicated, precludes private litigation between employer and employees. Cf. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 60 S. Ct. 561 (1940); and Virginia Electric & Power Co. v. National Labor Relations Board, (U.S. 1943) 63 S. Ct. 1214 at 1220. Sec. 10 (a), N.L.R.A., authorizes the board "to prevent any person from engaging" in conduct prohibited by that act, and provides that "This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise."

[43] While we are not concerned herein with the question of back wages in the period between the illegal discharge and the offer of reinstatement, the reasoning which supports the conclusion that reinstatement was "intended" by Congress and may be ordered by the courts also supports the conclusion that such back wages may likewise be obtained.

[44] If we speculate as to the reasons for this difference in treatment between the contemplated statutory remedy for the redress of the private rights created by the wage and hour provisions of the act and those created by the statute's antidiscrimination section, several immediately occur: the adequacy of monetary relief in the former and its inadequacy in the latter class of cases; reluctance to tamper with the uncertain equitable remedies that might be available to the discharged employee; administrative expediency and the desire to protect employers from numerous claims easy to assert but difficult to prove or disprove; the drastic nature of the remedy by injunction; etc. But what seems to be the more logical reason is that a private remedy is unnecessary so long as the public remedy affords a sufficient means of accomplishing the desired result.

B. The Administrator's Remedy

The significance of the statutory grant (section 17) of jurisdiction to the district courts of the United States, "for cause shown," and at the suit of the administrator[45] "to restrain violations" of section 15(a)(3), is discussed more fully infra.[46] Obviously, however, this grant does provide a means of preventing *threatened* discharge or other discriminations, and thus protects employees as to whom the restraining arm of a chancellor is invoked *prior* to the illegal discharge. Can it be that the act contemplates protection to those *threatened* with discharge or subjected to other discriminatory treatment which has not become a *fait accompli* at the time suit is filed by the administrator,[47] but does not contemplate protection to those *actually* discharged?[48] Such a reading of the statute would "impute to Congress a desire for . . . drastic legal differentiation where policy justifies none,"[49] and make the efficacy of the restraints contained in section 15(a)(3) dependent upon both the speed with which the government is prepared to move and the existence of an initial martyr to the cause. Also, it is apparent that the effective enforcement of the act is affected more adversely by an actual than by a threatened discharge or discrimination; the silencing effect of the threat upon potential assertion of their rights by other employees ceases to be a matter of surmise when one of their number has been discharged; it becomes a fact.[50]

Considerations such as these support the view, we think, that Congress intended that employees affected by violations of section 15(a)(3) should be made whole as nearly as the purposes of the act demand and established principles of law will permit.

[45] Supra, note 25.

[46] Infra, pp. 44-46.

[47] The nationwide applicability of the act makes it a physical impossibility for the government to move with either the speed or frequency necessary to protect the jobs of the millions of employees entitled to the security of § 15 (a) (3). Cf. Fleming v. Tidewater Optical Co., (D.C. Va., 1940), 35 F. Supp. 1015 at 1017.

[48] See Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177 at 185-188, 61 S. Ct. 845 (1941), where a similar dilemma was posed by the majority in support of its conclusion that "reinstatement" may be ordered as to employees denied employment because of union activity.

[49] Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 at 394, 59 S. Ct. 516 (1939).

[50] Cf. Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 117 at 188, 61 S. Ct. 845 (1941): "To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed."

II

EXPRESS AUTHORIZATION UNNECESSARY

But even though the limitation upon the civil "implemental portion" of the act be thus explained so as to permit the inference that the framers of the statute contemplated reinstatement, there remains the question, why was not the procedural device of reinstatement expressly provided in the Fair Labor Standards Act as it was in the National Labor Relations Act? Or, to state it affirmatively, does the power conferred upon the courts under section 17 "to restrain," at the suit of the administrator, violations of section 15(a)(3) include authorization to order reinstatement? [51]

In omitting from the act any express provision regarding reinstatement or the manner in which employees affected by violations of section 15(a)(3) should be made whole, Congress followed an established practice; where the restriction against discharge or discrimination is mandatory and its enforcement, together with the sanctions to be imposed for its violation, is committed to a tribunal having inherent discretionary power to vary its judgment so as to effectuate the purposes of the statute (e.g., to grant reinstatement or other appropriate affrmative relief), an express grant of authorization to this effect is not necessary and is not made. Where, however, the enforcement of the statute's restriction and the determination of the sanction to be imposed for its violation is committed to a tribunal lacking such inherent discretionary power, express authorization is necessary. In other words, necessity

[51] ". . . Statutes still bristle with technical legal terms which are meaningless to the ordinary person. Further they have unfortunately borrowed from the older Roman statutes the habit of forcing as much as possible into a single contorted and complicated sentence. Although these facts do not offer too many difficulties to those to whom in fact the statute is primarily addressed, the administrators and the courts, they make it necessary even for these persons to recast the sentence into simpler language. . . .

". . . Consequently, the task of the court is first to determine the purpose of the statute and the extent that the discretion of the administrative officials or of the court is limited . . . by the means which the statute indicates for achieving its purpose. There must have been a reason for expressly setting forth these means. . . . That reason may have been . . . either the preventing of the sacrifice of other definite social or legal values in securing this one, or it may have merely been the expediting of the activity of courts and officials by making it clear when and how they must act, and how their acts are to be recorded.

". . . Are they [the implemental elements enumerated in the statute] purely procedural or are they caveats against injuries that may be inflicted by an unfettered discretion in the executors of the statute? . . . If the former . . . a considerable latitude is not merely permissible but highly desirable since here, as elsewhere, the achievement of a purpose is after all the main thing, and nothing ought to be allowed to impair or hinder it." Radin, "A Short Way with Statutes," 56 HARV. L. REV. 388 at 398, 399, 399-400 (1942).

demands it in the latter instance and the absence of necessity excuses it in the former. A review of prior federal enactments in which such anti-discrimination restrictions appear, or were contemplated because of the machinery set up by the statute, demonstrates the consistency with which Congress has adhered to this rule.

As we have stated,[52] federal statutory limitations upon the employer's prerogative to discharge or otherwise discriminate against employees are not new developments in our national labor policy; but express statutory authorization for the enforcement of such limitations by judicial process dates only from the ill-fated National Industrial Recovery Act of 1933. Section 7(a) of that act, guaranteeing employees the right to organize and bargain collectively, was a required provision in each approved code and the federal district courts were "invested with jurisdiction to prevent and restrain," at the suit of the district attorney, all violations of such codes.[53] Because of this, it was unnecessary to prescribe in that statute the appropriate relief the courts were authorized to grant in effectuating the purposes of the statutory prohibition. Although we are without the benefit of judicial decisions under the N.R.A. on this subject,[54] the fact that the agencies charged with the duty of enforcing the statutory restriction contained in that act regarded the grant of jurisdiction to the courts "to prevent and restrain" illegal discharges as embracing the power to order reinstatement in a proper case[55] is certainly persuasive.[56] For our purposes, it is sufficient to point out that in this first instance in which the implementing portion of a federal antidiscrimination statute expressly committed the initial enforcement of the restriction to the equity courts, Congress apparently

[52] Supra, p. 25 et seq.

[53] See 48 Stat. L. 196, § 3 (c) (1933); and the discussion in note 25, supra.

[54] Most of the N.I.R.A. cases are collected in the annotations in 92 A.L.R. 1464 (1934) and 95 A.L.R. 1391 (1935).

[55] See United States v. Weirton Steel Co., (D.C. Del. 1935) 10 F. Supp. 55 at 58, where the government's complaint, alleging discriminatory discharges, was dismissed on the ground that § 7 (a) of the N.R.A. was unconstitutional. The old National Labor Board, established under the N.R.A., interpreted § 7 (a) and the injunction provision in that statute as authority for ordering reinstatement. In the Matter of Tamaqua Underwear Co. and Amalgamated Clothing Workers of America, 1 N.L.R.B. (old) 10 (1934), for example, it ordered: "Enforcement. Unless within ten days from the date of decision the company has notified this Board that it has offered the aforesaid employees immediate reinstatement in their former positions with the same rights as previously enjoyed, the case will be referred to the Compliance Division of the National Recovery Administration and to other agencies of the Government for appropriate action."

[56] United States v. American Trucking Assns., 310 U.S. 534 at 549, 60 S. Ct. 1059 (1940); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 at 580-581, note 7, 62 S. Ct. 1216 (1942).

deemed it unnecessary expressly to authorize such courts to order reinstatement.

There have been three other instances in which Congress forbade discharge or discrimination against employees under conditions similar to those stated in section 15(a)(3) of the Wage and Hour Law; but only in one of them, the National Labor Relations Act, did it expressly authorize reinstatement. The others, the Erdman Act[57] and the Railway Labor Act of 1926[58] were essentially arbitration and mediation statutes administered by mediation boards possessing no enforcement powers.[59] The scope of the boards' awards, however, being solely a matter of agreement, the parties could, by prior agreement or subsequent ratification, authorize the boards to make awards requiring such affirmative action as reinstatement, change in wage or hours schedules, or restoration of seniority rights.[60] Under the terms of the arbitration statutes the conclusions reached by these boards, both as to the wrong and the appropriate remedy for the wrong, constituted findings of fact and, as such, were final in the absence of error of law, e.g., so long as they were within the terms of the parties' submission agreement. While the enforcement of the award by a "judgment" of the district court of the United States was expressly authorized, these courts were powerless to substitute their views as to the appropriate remedy for the views held by the boards. Hence, if the enforcement tribunal contemplated by the statute was a court of law, obviously an award filed therein calling for reinstatement or any other form of affirmative action could not be enforced in the absence of express statutory authoriza-

[57] 30 Stat. L. 424, §§ 7, 10 (1898).

[58] 44 Stat. L. 577, § 2 (3); see 45 U.S.C. (1940), §§ 151, 152.

[59] Violation of the restriction in the Erdman Act was made a criminal offense and the board's directive was enforceable by proceedings in equity; but the antidiscrimination section was declared unconstitutional in Adair v. United States, 208 U.S. 161, 28 S. Ct. 277 (1908). No sanctions whatever were contained in the Railway Labor Act of 1926; however, the amendatory enactment of 1934 made these restrictions enforceable by injunction at the suit of the government. The significance of this amendment is pointed out, infra, p. 42. The other arbitration and mediation statutes (Arbitration Act of 1888 [25 Stat. L. 501] and the Newlands Act of 1913 [38 Stat. L. 103]) need not be considered; neither contained restrictions against discharge or discrimination. The name was true of the Transportation Act of 1920 (41 Stat. L. 456 at 469). See Pennsylvania R.R. v. United States R.R. Labor Board, 261 U.S. 72 at 79, 43 S. Ct. 278 (1923); and Pennsylvania R.R. System & Allied Lines Federation v. Pennsylvania R.R., 267 U.S. 203 at 215, 45 S. Ct. 307 (1925).

[60] See Order of Sleeping Car Conductors v. Pullman Co., (D.C. Wis. 1942) 6 Labor Cases 61505; cf. Virginian Ry. Co. v. Chambers, (C.C.A. 4th, 1931) 46 F. (2d) 20. The history of labor unrest and the various congressional inquiries into its causes leave no doubt that Congress contemplated this possibility. See ROSENFARB, THE NATIONAL LABOR POLICY 1-12 (1940).

tion.[61] In the Erdman Act, Congress apparently anticipated this difficulty and provided that the award when filed should be enforced "in equity so far as the powers of a court of equity permit."[62] And since, as we shall see later, a court of equity has inherent power to order reinstatement, the failure to include in these arbitration and mediation statutes any express authority to this effect or any reference to any other affirmative action, accords with what, we submit, has been the consistent pattern of congressional enactments; namely, that specific authorization is stated only where otherwise it would not exist.

As applied to the Railway Labor Act of 1926, as amended, this view finds added support. In the amendatory enactment of 1934,[63] directing United States district attorneys *at the instance of employees* "to institute in the proper court and to prosecute . . . all necessary proceedings for the enforcement" of the statutory restraint against wrongful discharge and discrimination, Congress again refrained from specifying the type of affirmative action that could be required.[64] While the board was empowered in disputed cases to ascertain and certify the employee representatives with whom the employer was required by the

[61] Cf. Goldstein v. International Ladies' Garment Workers' Union, 328 Pa. 385, 196 A. 43 (1938); Virginian Ry. v. Chambers, (C.C.A. 4th, 1931), 46 F. (2d) 20.

[62] 30 Stat. L. 425-426 (1898). The Railway Labor Act of 1926 did not imply that a reference to a court of equity was contemplated, as in the Erdman Act. This omission, however, was immaterial for prior to the enactment of the 1926 statute a similar reference provision in the Newlands Act of 1913, 38 Stat. L. 103 has been authoritatively interpreted as referring to a court of equity. See Georgia & F. Ry. v. Brotherhood of Locomotive Engineers, (C.C.A. 5th, 1914) 217 F. 755 at 756, indicating that the settled practice, with reference to enforcement by federal courts of awards under federal arbitration statutes, is to regard as filed and enforceable on the equity side of the court all awards calling for affirmative action, while those for the payment of money are regarded as being filed on the law side. The elimination by the new federal rules of the old distinctions between law and equity have made the silence of the arbitration statutes in this respect purely academic.

[63] 48 Stat. L. 1186 (1934), 45 U.S.C. (1940) § 152 (10).

[64] Prior to the 1934 amendment, equitable relief, including reinstatement, had been granted at the suit of unions representing the affected employees in cases of violations of restraints imposed by that act; the courts proceed upon the principle that where a right is created without a remedy, equity will supply the remedy and require that to be done which in equity should be done. See the several opinions of the district court [24 F. (2d) 426; 25 F. (2d) 873; and 25 F. (2d) 876] in Texas & N.O. R.R. Co. v. Brotherhood of Railway Clerks, 281 U.S. 548 at 564, 50 S. Ct. 427 (1930), affirming (C.C.A. 5th, 1929) 33 F. (2d) 13. It is not clear whether the same procedure is open to employees suing under the statute as amended and without the assistance of the government. Cf. Virginian Ry. v. System Federation, No. 40, 300 U.S. 515, 57 S. Ct. 592 (1937), affirming (C.C.A. 4th, 1936) 84 F. (2d) 641; McNulty v. National Mediation Board, (D.C.N.Y. 1936) 18 F. Supp. 494; Railway Employees Co-op Assn. v. Atlanta B. & C. R.R., (D.C. Ga. 1938) 22 F Supp. 510. The general practice seems to be that the government appears as amicus curiae.

statute "to treat," it was not authorized to order the employer to bargain with those representatives. The reason for this absence of authorization to the board is quite clear; Congress, having provided for judicial enforcement of the board's conclusion, recognized, as the courts subsequently held,[65] that equity would not lack the authority to require such affirmative action and, therefore, that an express grant of such power was unnecessary.

It is not a far jump from compelling an employer to negotiate with his employees to compelling him to offer reinstatement to those illegally discharged; affirmative action on his part is required in both instances. If, then, the absence of express statutory authority to require the former is no deterrent to a court of equity, the absence of such express authority to require the latter should not deter, especially where both statutes confer upon such courts jurisdiction at the suit of governmental officials, "for the enforcement" of the statutory prohibition in the one instance and "to restrain violations of" such restrictions in the other.

The National Labor Relations Act, as has been stated, is the first and only instance in which express statutory authorization to order the reinstatement of illegally discharged employees is given. The grant of authority is made, however, not to the courts but to a board which otherwise would not possess such power. Unlike arbitration and mediation boards, whose jurisdiction generally depends upon the agreement of the parties, the Labor Board was created by the statute itself and could exercise only such powers as were conferred on it by that act. Its findings as to the nature of the remedy "that will effectuate the policies" of the act and the appropriateness of that remedy are findings of fact which, if supported by the evidence and within the scope of the board's statutory power, are binding upon the courts and the latter are powerless to enlarge or restrict the remedy so found.[66] Because of the statutory source of the board's jurisdiction, the inability of the parties to extend such jurisdiction by consent, and the severely limited power of judicial review the statute confers upon the courts, it obviously was necessary that Congress expressly authorize the board, in the first instance, not only to order "such affirmative action" as it deemed neces-

[65] Virginian Ry. v. System Federation, No. 40, 300 U.S. 515 at 545-546, 57 S. Ct. 592 (1937), affirming (C.C.A. 4th, 1936) 84 F. (2d) 641.

[66] Virginia Electric & Power Co. v. National Labor Relations Board, (U.S. 1943) 63 S. Ct. 1214 at 1218; National Labor Relations Board v. Link-Belt Co., 311 U.S. 584 at 600, 61 S. Ct. 358 (1941); Republic Steel Corp. v. National Labor Relations Board, 311 U.S. 7, 61 S. Ct. 77 (1941). See also Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177 at 192-196, 205 ff, 61 S. Ct. 845 (1941).

sary to effectuate the purposes of that act, but also to order the "reinstatement of employees with or without back pay"; otherwise the board probably could not direct and, hence, the courts could not effect, such reinstatement.[67]

The fundamental difference between the enforcement machinery provided in the Fair Labor Standards Act and that provided in prior federal enactments regulating the employer-employee relationship (N.R.A. excepted), is thus evident; there is a need for greater specificity where the initial, and possibly conclusive, determination of the remedy needed to effectuate the congressional purpose is committed to an agency having only such powers as are conferred upon it by statute. Where, however, the nature as well as the appropriateness of the remedy to be applied is left to the determination of a court possessing established equity powers, there is no need to spell out in so many words what that court may or may not do in carrying out the statutory mandate; it is sufficient merely to (1) establish the right and (2) remove any self-imposed restrictions upon the court's jurisdiction. These two requirements being satisfied, the court is free to follow its recognized and usual procedure in the enforcement of the statutory restriction. This, we think, is what Congress has done in section 17 of the Fair Labor Standards Act.

The prevailing view, as we have stated, is that a threatened discharge in violation of section 15(a)(3) probably will not be enjoined at the instance of the aggrieved employee.[68] *A fortiori*, reinstatement will not be ordered.[68a] A different situation is presented, however,

[67] The inference is a legitimate one that the framers of the statute may have considered the tendency of the courts to view with disapproval and subject to narrow confines any grant of such "judicial functions" to an administrative tribunal. Justice Frankfurter's majority opinion in Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177 at 187, 61 S. Ct. 845 (1941), however, contains a very strong intimation that, even in the absence of what he calls "the participial phrase" ("including reinstatement of employees"), the authority conferred upon the board "to take such affirmative action as will effectuate the policies of this Act," would carry with it the authority to order reinstatement since, "Reinstatement is the conventional correction for discriminatory discharges." That the board's "power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay," was recently affirmed again by the Supreme Court in Virginia Electric & Power Co. v. National Labor Relations Board, (U.S. 1943) 63 S. Ct. 1214 at 1218.

[68] Supra, p. 34, and notes 34 and 35. See also The Losmar, (D.C. Md. 1937) 20 F. Supp. 887 at 889.

[68a] Cf. Bowe v. Judson E. Burns, Inc., (C.C.A. 3d, 1943) 6 W. H. REP. 499, decided since this article was first written and discussed more fully at note 36, supra. But see note 35, supra.

where the suit in which reinstatement is requested is prosecuted by the administrator pursuant to express statutory authority conferred upon him to enforce and upon the courts to compel obedience to the statute's requirements.[68b] In such cases, the court is simply asked to exercise one of its traditional functions; i.e., require the employer specifically to perform the duty the statute enjoins upon him; and the "narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies" have no application.[69] Such equity shibboleths as the adequacy of the remedy at law, the absence of any "property" right, the criminal nature of the illegal act, and the lack of mutuality in the requested relief, might be availed by the courts to deny reinstatement in private controversies, but as applied to suits by the administrator under section 17 of the act, each of these self-imposed equitable restrictions loses its efficacy.

The statutory authorization of the remedy by injunction (section 17) is itself clear and convincing evidence of the inadequacy of the criminal sanction [section 16(a)] available to the government; and it likewise disposes of equity's reluctance to enjoin acts "criminal" in their nature. And, if indeed the absence of a "property" right "can be regarded as limiting the authority of the court to restrain the violation of an explicit provision of an act of Congress where an injunction would otherwise be the proper remedy," the opinions of both the Circuit Court of Appeals for the Fifth Circuit and the Supreme Court in the *Railway Clerks* case[70] indicate the ease with which such a condition may be held to be satisfied.

Nor does lack of "mutuality" of the remedy preclude such relief. The public interest in the effective enforcement of the act demands that those who aid in that enforcement be fully protected from the fear of losing their jobs; and that employers not be permitted to escape their obligations under the act by the simple expedient of discharging or discriminating against those of their employees who co-operate with

[68b] The court in the Bowe case supra, while denying reinstatement in their union at the suit of employees wrongfully expelled, implied that a mandatory injunction would be granted at the suit of the administrator.

[69] Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177 at 188, 61 S. Ct. 845 (1941).

[70] "The term 'property right' is broad enough to include . . . the right of an employee to money or other property exchanged, or to be exchanged, for his services." Texas & N.O.R.R. v. Brotherhood of Railway Clerks (C.C.A. 5th, 1929) 33 F. (2d) 13 at 17, affirmed 281 U.S. 548 at 571, 50 S. Ct. 427 (1930). The opinions of the district court are reported at 24 F. (2d) 426 and 25 F. (2d) 873, 876. The quotation in the text is from 281 U.S. at 571.

the government in uncovering past violations. Section 15(a)(3) is thus a recognition of the paramountcy of the public right to an uninterrupted and unintimidated source of information regarding compliance with the act, over the right of individual employers to be free to discharge their employees at will. The constitutionality of this section being undoubted,[71] the fact that its ultimate enforcement by reinstatement compels the employer to resume a relationship contrary to his will, while recognizing that the employee may not constitutionally be so compelled, becomes immaterial. There may be some basis for insisting that equitable remedies be equally available to employers and employees alike in private controversies; but there is no basis for the assertion that as between government and employers the remedies available to the one shall be equally available to the other.[72]

III

SUPREME COURT AUTHORITY FOR EQUITABLE REINSTATEMENT

Freed from these historical fetters, the thesis that federal district courts possess inherent power to order reinstatement at the instance of the administrator finds confirmation in at least three major decisions of the Supreme Court.[73] In the first of these, the *Railway Clerks* case,[74]

[71] Virginian Ry. v. System Federation No. 40, 300 U.S. 515, 57 S. Ct. 592 (1937); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615 (1937); and Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 187, 61 S. Ct. 845 (1941).

[72] Other examples of such permissible "one-sidedness" occur throughout the field of labor relations [cf. The National Labor Relations Act, and National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 at 46, 57 S. Ct. 615 (1937)] and in other fields calling for the exercise of the state's police power.

[73] Texas & N.O.R.R. v. Brotherhood of Railway Clerks, 281 U.S. 548, 50 S. Ct. 427 (1930); Virginian Ry. v. System Federation, No. 40, 300 U.S. 515, 57 S. Ct. 592 (1937); and Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 61 S. Ct. 845 (1941). See also National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, at 48-49, 57 S. Ct. 615 (1937).

[74] Texas & N.O.R.R. v. Brotherhood of Railway Clerks, 281 U.S. 548, 50 S. Ct. 427 (1930). The precise interpretation to be placed upon the Supreme Court's affirmance in the Railway Clerks case has occasioned some division of opinion. Cf. the opinions of Justice Frankfurter and Justice (now Chief Justice) Stone in Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177 at 187, 211-212, 61 S. Ct. 845 (1941). While the various opinions of the district court, when considered as a whole, strongly intimate that the court was asserting the power of equity to order reinstatement where necessary to effectuate the command of the statute, specific attention to the various orders of the court seems to sustain Justice (now Chief Justice) Stone's contention in the Phelps Dodge case, that the affirmance in the Railway Clerks case was merely recognition of equity's traditional power to order restoration of the status quo whenever *its decree* has been violated. The developments in the Railway Clerks case may be briefly summarized. Plaintiffs, alleging that their rights under the Railway

the Court, construing the Railway Labor Act of 1926, held untenable the company's contention that the total absence in that statute of any enforcement provisions for its antidiscrimination section precluded equitable reinstatement, and observed:[75]

> ". . . While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforcible in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded. . . . If Congress intended that the prohibition . . . should be enforced, the courts would encounter no difficulty in fulfilling its purpose, as the present suit demonstrates."

This theme was reiterated in the *Virginian Railway* case[76] where

Labor Act of 1926 [44 Stat. L. 577, § 2 (3), 45 U.S.C. (1940), § 152 guaranteeing employees the right to organize free from employer coercion, had been violated, filed their complaint (July 25, 1927) seeking an injunction against further violations. No discharges were alleged in the complaint. The temporary injunction granted by the district court "followed closely the language of the act." 24 F. (2d) 426 at 427; see also the terms of this order as quoted in the circuit court's opinion, 33 F. (2d) 13 at 15. The company violated this order by discharging certain employees and recognizing a company-dominated union. On petition for contempt, the court, finding that "both . . . the statute and . . . the injunction have been violated" [24 F. (2d) 426 at 431], directed that a "remedial order" be entered providing "for the restoration to their positions and privileges of the officers of the Brotherhood, and the restoration without loss of those of the employees whose discharge" was unlawful (p. 434). The Brotherhood itself was restored to the status it occupied as the employees' representative prior to June 1, 1927. The company's "motion to dissolve and vacate" the temporary injunction and the remedial order, for the reason that the alleged coercive action had not reached a climax by any actual discharges, and was, therefore, not a fait accompli when the injunction was issued was denied, the court pointing out that the statute imposed "a continuing obligation." 25 F. (2d) 876 at 877. The court also overruled the challenge to its power to order reinstatement, stating that "As to the restoration . . . this . . . was merely an act of restoration of status, commanded in order to wipe out the effects and results of disobedience . . . brought about through a deliberate violation *of the injunction order*. . . ." (Italics supplied.) The circuit court [33 F. (2d) 13 at 17] likewise interpreted the remedial order as merely "imposing conditions to the purging of the contempt." While there is thus some foundation for the minority view that the Supreme Court's affirmance of the restoration order in the Railway Clerks case constituted merely approval of a remedial order "imposing conditions to the purging of the contempt," nevertheless, the overall view of the factual situation, the defendant's contentions, the opinions of the trial court, and particularly its order restoring the Brotherhood to the status it occupied prior to the institution of the suit, clearly supports the view of the present Supreme Court majority (infra pp. 36-37), and represents authority for the exercise by equity of its inherent power to order such affirmative action as may be necessary to restore the status existing prior to the violation of a statutory command.

[75] 281 U.S. at 568. See also p. 569.

[76] Virginian Ry. v. System Federation No. 40, 300 U.S. 515, 57 S. Ct. 592 (1937).

Justice (now Chief Justice) Stone, after noting that "More is involved than the settlement of a private controversy without appreciable consequence to the public," held that under the Railway Labor Act of 1926, as amended (1934), the railroad was required "to treat" with the employee representatives certified by the board and that a directive of the board requiring such affirmative action was enforceable by the courts even though the statute conferred no express power upon the courts to this effect. The Court pointed out that:[77]

> "... Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

The inherent power of courts of equity to order the restoration to status of employees discharged or discriminated against *in violation of prior orders of the court* prohibiting such conduct is, of course, settled.[78] Certainly, equity is not more vigilant in eradicating the evils flowing from a violation of its judicial command than it is in erasing the results of violations of the legislature's command, the enforcement of which has been committed to its jurisdiction.[79] A quietus to any such view, if one is needed, is found in the opinion of the Supreme Court in the *Phelps-Dodge* case;[80] the majority there held that, although the language of the National Labor Relations Act did not in so many words preclude an employer from denying employment to an applicant because of his union activity nor authorize the board to order "reinstatement" for such an applicant, nevertheless, the tenor of the whole act, and of sections 8(3) and 10(c)[81] particularly, indicated that such dis-

[77] 300 U.S. at 552.

[78] See discussion of Railway Clerks case, supra, note 74.

[79] See also National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 at 48-49, 57 S. Ct. 615 (1937), where the Court, after pointing out that the National Labor Relations Act authorized reinstatement while "the requirement of restoration" in the Railway Clerks case was "a sanction imposed in the enforcement of a judicial decree," concluded that: "The fact that in the one case it was a judicial sanction, and in the other a legislative one, is not an essential difference in determining its propriety."

[80] Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177 at 185-188, 61 S. Ct. 845 (1941) (quotations from 313 U.S. at 188).

[81] Sec. 8(3) of the National Labor Relations Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Sec. 10(c) authorizes the board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this chapter."

crimination was proscribed. Therefore, concluded the majority, the board, in order "to enforce the legislative policy against discrimination," possessed "the right to restore to a man employment which was wrongfully denied him." Precedent for this conclusion was found by the majority in the *Railway Clerks* case,[82] which it interpreted as supporting the view that "Even without such a mandate[83] from Congress this Court compelled reinstatement to enforce the legislative policy against discrimination represented by the Railway Labor Act." And then, referring to the above quotation from the *Virginian Railway* case, the majority opinion goes on to warn us that "Attainment of a great national policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies."[84]

We have seen what this "great national policy" is and the manner in which its attainment is meant to be aided by the Fair Labor Standards Act, specifically section 15(a)(3) of that act. We know, too, that nothing in the statute itself militates against the view that the prohibitions in section 15(a)(3) are to be enforced, among other means, by reinstatement; on the contrary, it is readily apparent that reinstatement is calculated to suppress the mischief that section was designed to suppress by supplementing whatever remedies the discharged employee may have outside the act. Moreover, it has been demonstrated that, in conferring upon the federal district courts jurisdiction "to restrain" violations of section 15(a)(3) and omitting from the grant of jurisdiction any reference to reinstatement, Congress followed an established pattern, i.e., to include such specific authorization of reinstatement only in those instances where it otherwise would not exist. Remembering, then, that the vital force of equity has been its genius for moulding its relief to the exigencies of particular and novel situations and that the effect of section 17 of the act is to relieve those courts from their self-imposed restrictions attendant upon the granting of

[82] See discussion of this case, supra, note 74. While noting that in the Railway Clerks case the illegal discharges also violated the injunction of the court, the majority (313 U.S. at 188, note 6) makes the revealing comment that: "Surely, a court of equity has no greater inherent authority in this regard than was conveyed to the Board by the broad grant of all such remedial powers as will, from case to case, translate into actuality the policies of the Act." Quaere, if the majority opinion does not by inference hold the reverse of this statement to be true, i.e., that the inherent power of a court of equity is at least as broad as the grant of remedial powers conferred upon the Board?

[83] Section 10(c) of the National Labor Relations Act, quoted, supra, note 81.

[84] 313 U.S. at 188.

equitable relief in private litigation, it becomes clear from the opinions of the Supreme Court in the above three cases that federal district courts not only possess inherent power under section 17 of the act to compel the reinstatement of employees discharged in violation of section 15(a)(3),[85] but the failure to exercise such power where cause for its exercise has been shown may well be an abuse of discretion.[86]

[85] Cf. Ford Motor Co. v. National Labor Relations Board, 305 U.S. 364 at 373, 59 S. Ct. 301 (1938): "The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute . . . it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action."

[86] When viewed in its most restricted sense, a discharge is a single and completed act; yet *the subsequent refusal to reinstate* (which distinguishes a "discharge" from a "layoff") might reasonably be viewed as a "continuing act" of discrimination. As such, it is embraced in the act's general interdiction of discriminations "in any other manner." When considered in this light, it becomes manifest that equity is, by the letter of the statute itself, authorized "to restrain" employers from violating § 15(a) (3) of the act "by continuing" to discriminate against illegally discharged employees by refusing their requests for reinstatement.