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LABOR LAW-RAILWAY LABOR ACT-EFFECT OF CREATION OF NATIONAL RAILROAD ADJUSTMENT BOARD ON JURISDICTION OF COURTS

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LABOR LAW—RAILWAY LABOR ACT—EFFECT OF CREATION OF NATIONAL RAILROAD ADJUSTMENT BOARD ON JURISDICTION OF COURTS—The 1934 amendments to the Railway Labor Act[1] (R.L.A.) created the National Railroad Adjustment Board (N.R.A.B.) to hear and decide disputes involving employee grievances and controversies over application and interpretation of agreements, as distinguished from disputes concerning making of collective agreements. Discussing disputes, over which the N.R.A.B. has jurisdiction, Justice Rutledge has stated,

> "[These disputes presuppose] the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement. . . ."[2]

[1] 48 Stat. L. 1185 (1934), 45 U.S.C. §§151 et seq. (1946).
[2] Elgin, Joliet & Eastern Ry. Co. v. Burley, 325 U.S. 711 at 723, 65 S.Ct. 1283 (1945).

The extent to which courts have jurisdiction of these same disputes is one of the still unsolved problems arising under the R.L.A. It is here proposed to review the decisions on this question, and also the decisions determining the jurisdiction of courts in matters previously submitted to the N.R.A.B.

A. Alternative Resort

The R.L.A. section defining the jurisdiction of the N.R.A.B. is phrased permissively.[3] Whether this permits the claim to be presented to the courts in the first instance, by-passing the N.R.A.B., involves two questions: (1) whether the court has jurisdiction; and (2) whether the court, although having jurisdiction, will refuse to hear the case because it can be presented to the N.R.A.B. For convenience, the cases on each question will be considered separately.

1. Jurisdiction

The effect of the R.L.A. on the jurisdiction of courts was an issue presented to the Supreme Court in *Moore v. Illinois Central R. Co.*,[4] decided in 1941. This was an action for damages for dismissal in violation of the collective agreement, a type of dispute of which the courts had jurisdiction prior to the R.L.A. The Court held the act did not make administrative proceedings a prerequisite to court action.

It would appear, however, that establishment of the N.R.A.B. has decreased the jurisdiction of the federal courts insofar as granting injunctive relief is concerned, because section 8 of the Norris-LaGuardia Act prohibits the granting of an injunction to a party who has ". . . failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."[5] In *Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western R. Co.*,[6] the carrier and the union were unable to agree on a contract after long negotiations, and the National Mediation Board had unsuccessfully attempted to mediate the dispute. As the carrier had refused arbitration, the Court held that the requirements of section 8 had not been met, and that an injunction was im-

[3] 48 Stat. L. 1185, §3(i) (1934), 45 U.S.C., §153(i) (1946): "The disputes between . . . employees and . . . carriers growing out of grievances or out of the interpretations or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner . . . but, failing to reach an adjustment in this manner, the disputes may be referred by . . . either party to the . . . Adjustment Board. . . ."

[4] 312 U.S. 630, 61 S.Ct. 754 (1941).

[5] 47 Stat. L. 72, §8 (1932), 29 U.S.C. (1946) §108. "The term 'labor dispute' includes any controversy concerning terms or conditions of employment. . . ." 47 Stat. L. 70, §13(c) (1932), 29 U.S.C. (1946) §113(c).

[6] 321 U.S. 50, 64 S.Ct. 413 (1944).

properly granted the carrier. If arbitration of a dispute over the terms of a proposed contract is a prerequisite to an injunction, it would seem that submission to the N.R.A.B. of disputes within its cognizance would also be necessary.

Three companion cases, decided in 1943, are important in determining the availability of judicial recourse under the R.L.A.[7] They involved jurisdictional disputes between collective bargaining agents. Although it was contended that the act conferred jurisdiction of such disputes on the courts, the Supreme Court disagreed, stating in one case,

> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals."[8]

The Court has found that the R.L.A. bestows additional jurisdiction on the courts only when the act confers a right which will be lost unless the courts have authority to grant relief.[9] This indicates that concurrent jurisdiction with the N.R.A.B. does not extend beyond the cases cognizable in the courts prior to the R.L.A., except where the act

[7] Switchmen's Union v. Natl. Mediation Bd., 320 U.S. 297, 64 S.Ct. 95 (1943) (seeking review of the board's determination of the proper "craft or class" for the selection of the bargaining representative); Genl. Committee of Adjustment v. Mo.-Kan.-Tex. R. Co., 320 U.S. 323, 64 S.Ct. 146 (1943) (seeking decisions on which of two competing unions had jurisdiction under the R.L.A. over "emergency engineers"); Genl. Committee of Adjustment v. Southern Pacific Co., 320 U.S. 338, 64 S.Ct. 142 (1943) (seeking determination of which union had jurisdiction under the R.L.A. to represent certain employees in presentation of grievances before the carrier).

[8] Genl. Committee of Adjustment v. Mo.-Kan.-Tex. R. Co., 320 U.S. 323 at 337, 64 S.Ct. 146 (1943). Cf. Brotherhood of R.R. Trainmen v. Tex. & Pac. Ry. Co., (C.C.A. 5th, 1947) 159 F. (2d) 822, where the carriers sought a judgment declaring the authority of the union to contract for alteration of an existing agreement, alleging a dispute within the union. The court found no justiciable controversy.

[9] Virginian Ry. Co. v. System Federation, 300 U.S. 515, 57 S.Ct. 592 (1937) (no other sanction available to enforce the right to bargain collectively). In Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 65 S.Ct. 226 (1944), the union discriminated against Negroes, who were ineligible for membership, in contracting with the carrier. The Court found a statutory duty not to discriminate against non-members. There being no other remedy, since the N.R.A.B. refused complaints of employees against unions, the Court held it had jurisdiction. The same facts, except that diversity of citizenship was lacking, were present in Tunstall v. Brotherhood, 323 U.S. 210, 65 S.Ct. 235 (1944). The Court held a federal right was derived from the duty imposed on the collective agent by the R.L.A. See also Order of Ry. Conductors v. Swan, 329 U.S. 520, 67 S.Ct. 405 (1947) where the two divisions of the N.R.A.B. which might have had jurisdiction over yardmasters were deadlocked on the issue. The Court held it could remove this jurisdictional frustration on the administrative level and declared that yardmasters were under the fourth division. Followed in Crowell v. Palmer, 134 Conn. 502, 58 A. (2d) 729 (1948) (union discriminating against non-members).

expressly so provides. In accord with this position, are the decisions holding that in actions based on collective agreements the requirements of diversity of citizenship and jurisdictional amount must still be met; although the R.L.A. is an act regulating commerce, authorizing the contracts and the N.R.A.B. proceedings thereon, such actions are not suits arising under the R.L.A.[10]

2. *Requirement of Prior Resort to the N.R.A.B.*

In the *Moore* case,[11] an action for wrongful dismissal, the Court held that the R.L.A. did not make administrative proceedings a prerequisite to a court action. Although reliance was placed on the permissive language of section 3, first (i),[12] there was little discussion of the issue. This rule has been applied in suits against the carrier for wrongful dismissal,[13] for overtime pay,[14] for penalty damages for breach of a collective agreement,[15] and in suits asserting seniority rights under the collective contract.[16]

In 1946 the Supreme Court limited the doctrine of the *Moore* case, in *Order of Railway Conductors v. Pitney*.[17] This was an action commenced by the O.R.C. in the bankruptcy court to have the court instruct its trustees and enjoin them from carrying out a contract made with another union. The plaintiff union asserted that members of the

[10] Schwartz v. South Buffalo R., (D.C. N.Y. 1942) 44 F. Supp. 447; Southern Ry. Co. v. Order of Ry. Conductors, (D.C. S.C. 1945) 63 F. Supp. 306; Strawser v. Reading Co., (D.C. Pa. 1948) 80 F. Supp. 455. Cf. Tunstall v. Brotherhood, 323 U.S. 210, 65 S.Ct. 235 (1944), note 9, supra.

[11] Moore v. Illinois Central R. Co., 312 U.S. 630, 61 S.Ct. 754 (1941).

[12] "The disputes . . . may be referred . . . by either party to the . . . Adjustment Board . . . ." 48 Stat. L. 1185, §3(i) (1934), 45 U.S.C. §153(i) (1946).

[13] Federal: Castle v. Elgin, Joliet & Eastern Ry. Co., (D.C. Ill. 1948) 15 C.C.H. LAB. CAS. ¶ 64,650; Kelly v. Nashville, Chattanooga & St. Louis Ry., (D.C. Tenn. 1948) 15 C.C.H. LAB. CAS. ¶ 64,746 (see note 47, infra); Beeler v. Chicago, R.I. & P. Ry. Co., (C.C.A. 10th, 1948) 169 F. (2d) 557. State: Edelstein v. Duluth, Missabe & Iron Range Ry. Co., 225 Minn. 508, 31 N.W. (2d) 465 (1948).

[14] Texas & New Orleans R. Co. v. McCombs, 143 Tex. 257, 183 S.W. (2d) 716 (1944).

[15] Elgin, Joliet & Eastern Ry. Co. v. Burley, 325 U.S. 711, 65 S.Ct. 1283 (1945), rehearing, 327 U.S. 661, 66 S.Ct. 721 (1946).

[16] Federal: Adams v. N.Y., Chi. & St. Louis R. Co., (C.C.A. 7th, 1941) 121 F. (2d) 808. Contra, United States ex rel. Deavers v. Mo.-Kan.-Tex. R. Co., (C.C.A. 5th, 1949) 16 C.C.H. LAB. CAS. ¶ 64,918, holding that the court could determine seniority rights, as against the carrier, only because the Selective Service Act cut across the R.L.A., but that this determination was not binding on the N.R.A.B. as against other employees. State: Evans v. Louisville & Nashville R. Co., 191 Ga. 395, 12 S.E. (2d) 611 (1940); cf. Tharp v. Louisville & N. R. Co., 307 Ky. 322, 210 S.W. (2d) 954 (1948), where the court refused a mandatory injunction on the ground that this extraordinary remedy was not available when administrative remedies exist, and declined to pass on the lower court's finding that, under the R.L.A., it had jurisdiction of suits asserting seniority rights.

[17] 326 U.S. 561, 66 S.Ct. 322 (1946).

O.R.C. were entitled to certain jobs under their contract with the carrier and would be displaced by enforcement of the other contract. Although finding that the trustees could properly be instructed, the Court held that the injunction was improperly issued insofar as it purported to determine the rights of the unions under their respective contracts to the three jurisdictional dispute cases[18] and the labor injunction case,[19] stating that those decisions indicated the R.L.A. "intended to leave a minimum responsibility to the courts."[20] Pointing out that the case involved more than a mere construction of a document, that it concerned two contracts, custom, usage, and intricate technical facts, the Court held that its equitable discretion should be exercised to give the N.R.A.B. first opportunity to pass on the issue. Proceedings were ordered stayed to allow application to the N.R.A.B. for interpretation of the agreements.

Although the *Moore* case was not referred to in the *Pitney* case, the decision delivered two months later in *Elgin, Joliet & Eastern Ry. Co. v. Burley*[21] seems to indicate that the Court had no intention of overruling it. In the *Burley* case, suit was brought by employees for penalty damages for violation of the starting time provisions of the collective contract. Only the individual claims were involved, since the carrier and the union had agreed on the starting time for future operations. The issue was whether the employees were bound by an adverse award in N.R.A.B. proceedings prosecuted by the union. The Court held that this would require a grant of actual authority to the union from the employees and remanded the case for a finding on this question. Neither the *Moore* nor the *Pitney* case was mentioned, nor was there any indication that the employees must first present their claims to the N.R.A.B.

The decisions discussing the *Pitney* case are not agreed on its scope. The appellate division of New York found that it was merely a decision on the dual capacity of the court,[22] and affirmed a judgment on the

[18] Note 7, supra.

[19] Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western R. Co., 321 U.S. 50, 64 S.Ct. 413 (1944).

[20] 326 U.S. 561 at 566, 66 S.Ct. 322 (1946).

[21] 327 U.S. 661, 66 S.Ct. 721 (1946), on rehearing, affirming, 325 U.S. 711, 65 S.Ct. 1283 (1945).

[22] ". . . [T]he court might act in two distinct capacities. First, it might do so in the capacity of a 'judicial body' in the possession of the business, or a carrier within the meaning of §1 of the Railway Labor Act. . . .

"Finally, to settle the dispute the reorganization court would have to act in the further capacity of a tribunal empowered to grant the equitable relief sought. . . ." Order of Railway Conductors v. Pitney, 326 U.S. 561 at 565, 66 S.Ct. 322 (1946).

merits in a suit identical to the *Pitney* case except that it was commenced by the carrier seeking a declaratory judgment.[23] The South Carolina court indicated that complexity of issues is the controlling factor in determining when prior resort to the N.R.A.B. must be made; the court assumed jurisdiction of a declaratory judgment action seeking construction of a single contract in a dispute between one union and a carrier.[24]

Some federal courts have considered the *Pitney* decision as applicable to jurisdictional disputes between unions, but these decisions all involved asserted conflicting contract rights against the carrier and requests for injunctive relief.[25] These federal decisions, therefore, do not extend beyond the facts of the *Pitney* case.

There has been disagreement among the federal courts, however, as to the meaning of the *Pitney* case. In *Hunter v. Atchison, Topeka & Santa Fe R. Co.*,[26] the Seventh Circuit Court of Appeals was asked to enjoin enforcement of an award which would permanently displace the complainants, Negro porters, from their jobs. The Brotherhood of Railroad Trainmen, representing a different "craft or class" of employees, claimed the jobs under its contract with the carrier and received an award in N.R.A.B. proceedings of which the complainants had had no notice. The court held that the award was void for want of due process and that it wrongfully deprived the complainants of their property interest in the jobs. The *Pitney* case was distinguished on the ground that a labor dispute was not involved, and that the court was not adjudicating the rights of the parties but merely declaring the board's order to be void, leaving the parties free to follow any appropriate procedure to determine their rights.[27]

In Order of Railroad Telegraphers v. New Orleans, Texas & Mexico R. Co.,[28] the Eighth Circuit Court of Appeals was presented with the same problem, except that the complaining union had been denied leave to intervene in the N.R.A.B. proceedings. The court applied the *Pitney* case and refused to enjoin enforcement of the award, presenting

[23] Delaware, Lackawanna & Western R. Co. v. Slocum, 274 App. Div. 950, 83 N.Y.S. (2d) 513 (1948). Prior to the Pitney case, this court held it had jurisdiction of the dispute, relying on the Moore decision; 269 App. Div. 467, 57 N.Y.S. (2d) 65 (1945).

[24] Southern Ry. Co. v. Order of Railway Conductors, 210 S.C. 121, 41 S.E. (2d) 774 (1947).

[25] Order of Railroad Telegraphers v. New Orleans, Tex. & Mex. Ry. Co., (C.C.A. 8th, 1946) 156 F. (2d) 1; Mo.-Kan.-Tex. R. Co. v. Randolph, (C.C.A. 8th, 1947) 164 F. (2d) 4; Hampton v. Thompson, (C.C.A. 5th, 1948) 171 F. (2d) 535.

[26] (C.C.A. 7th, 1948) 171 F. (2d) 594.

[27] The labor injunction case, Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western R. Co., 321 U.S. 50, 64 S.Ct. 413 (1944), was distinguished on the same ground.

[28] (C.C.A. 8th, 1946) 156 F. (2d) 1.

two answers to the due process argument: (1) the complainant had no right to intervene in the N.R.A.B. proceedings, since the N.R.A.B. did not have power to decide jurisdictional disputes between unions; apparently, the court thus declared that the award did not determine the rights of the complainant; (2) until the complainant's contract was interpreted by the N.R.A.B., in a proceeding against the carrier, the court would not know whether the complainant had any rights which would be violated by the displacement of its members by the award.[29]

As the *Pitney* case does not clearly define the extent to which the Supreme Court will apply the doctrine of prior resort (that administrative remedies must be exhausted before resort to the courts), reference to other fields in which the doctrine was developed may be helpful. The Interstate Commerce Act gave to the railroads' customers the right to recover from the railroads damages for violations of the act, and gave them the option of making complaint to the commission or suing in the district courts.[30] One writer, in an informative article considering the development of the doctrine of prior resort in this field, concludes that the cases which must be presented to the commission for decision are those involving its quasi-legislative, rule-making power. If the case involves purely judicial determinations, it may be presented to the courts.[31] Other writers suggest that the doctrine is also applied to take advantage of the expert determinations which administrative agencies can make.[32] Although the N.R.A.B. has only quasi-judicial powers, some of its decisions have almost the effect of rulings determining the future operation of the carrier respecting the matters decided. If, in such cases, and in those demanding technical knowledge, it were required that the matter be first presented to the N.R.A.B., the practice would be brought in harmony with that in analogous fields. This would reserve to the courts cases involving no more than adjudication of individual claims in which technical contract questions are not involved. It is submitted that, in view of the approach taken by the Supreme Court in the three jurisdictional dispute cases,[33] this may be the proper scope of the *Pitney* decision.

The doctrine of prior resort is essentially a doctrine of judicial self-

[29] Relied on as authority in Hampton v. Thompson, (C.C.A. 5th, 1948) 171 F. (2d) 535, which also held that resort to the N.R.A.B. was not excused merely because the complaining union was composed of Negroes and the labor members of the N.R.A.B. were selected by unions which denied membership to Negroes.

[30] 24 Stat. L. 379, 382, §§8, 9 (1887), 49 U.S.C. (1946) §§8, 9.

[31] McAllister, "Statutory Roads to Review of Federal Administrative Orders," 28 CALIF. L. REV. 129 at 143-151 (1940).

[32] Berger, "Exhaustion of Administrative Remedies," 48 YALE L. J. 981 (1939); 51 HARV. L. REV. 1251 at 1261 (1938).

[33] Note 7, supra.

restraint which attempts to achieve the legislative policies by leaving certain matters to administrative agencies. Two objectives of the R.L.A. are uninterrupted commerce and prompt settlement of grievances.[34] The N.R.A.B. has a large backlog of cases, chiefly attributable to the first division.[35] This prevents prompt settlement of disputes, not only threatening,[36] but recently resulting in a strike interrupting commerce.[37] This situation may well operate as a deterrent to full application of the doctrine of prior resort in R.L.A. cases.

B. Effect of Resort to the N.R.A.B.

The courts have had considerable difficulty in determining the scope of their power when an award, other than one for money, has been rendered by the N.R.A.B.[38] Two sections of the R.L.A. are pertinent: (1) section 3, first (m), declaring the effect of an award;[39] (2)section 3, first (p), providing for enforcement of an award against the carrier.[40]

[34] 48 Stat. L. 1185, §2 (1934), 45 U.S.C. §152 (1946).

[35] Of 2590 cases before the N.R.A.B. which were open at the end of the fiscal year of 1947, 2321 were in the first division. During this same period, 702 cases were decided by the first division. 13TH ANN. REP. OF NATL. MEDIATION BD., for the Fiscal Year Ended June 30, 1947, p.57, table 15 (1948).

[36] "Employee organizations, dissatisfied with long delays, have resorted to other techniques in securing settlements. Some of the organizations have withdrawn cases pending before the Division and have declined to submit new cases, preferring to achieve settlements by direct negotiations. When such negotiations fail, strikes are sometimes threatened . . . In such cases the Mediation Board . . . proffers mediation service. . . . Of particular importance to the Mediation Board is the fact that time spent on mediation cases of this kind is at the expense of regular mediation cases. The rise in the number of pending cases on the Board's docket during the past year is largely due to the necessity of using a considerable amount of mediator time in efforts to settle disputes that properly should be referred to the First Division." 13TH ANN. REP. OF NATL. MEDIATION BD., for Fiscal Year Ended June 30, 1947, p.5 (1948).

[37] The strike of the operating brotherhoods against the Wabash Railroad, begun on March 15, 1949, was called because of inability to reach an agreement on accumulated grievances. N.Y. HERALD-TRIBUNE 42:2 (March 16, 1949).

[38] See the following cases, holding that under section 3, first (m) and (p), notes 39 and 40, infra, the entire dispute may be reexamined. Cook v. Des Moines Union Ry., (D.C. Iowa 1936) 16 F. Supp. 810; Swift v. Chicago, North Western Ry. Co., (D.C. Iowa 1944) 8 C.C.H. LAB. CAS. ¶62,030; Southern Pacific Co. v. Joint Council Dining Car Employees, (C.C.A. 9th, 1947) 13 C.C.H. LAB. CAS. ¶64, 175.

[39] 48 Stat. L. 1185 §3 (m) (1934), 45 U.S.C. §153 (m) (1946): ". . . the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."

[40] Id. §3(b), §153(b): "If a carrier does not comply with an order of . . . the Adjustment Board . . . the petitioner . . . may file in the District Court . . . a petition setting forth . . . the causes for which he claims relief . . . . Such suit . . . shall proceed in all respects as other civil suits, except that . . . the findings and order of the . . . Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs . . . . If the petitioner shall prevail he shall be allowed a reasonable attorney's fee . . . . The district courts are empowered . . . to enforce or set aside the order of the . . . Adjustment Board."

Only two such judicial decisions were found involving awards in favor of the employee.[41] One was *Dahlberg v. Pittsburgh & Lake Erie R. Co.*,[42] a suit to enforce the award which protected the employee's seniority rights. The court held that subsection (p) contemplated review on the merits, despite the provision in subsection (m) that the award was "final and binding"; finding the award erroneous, the court set it aside. The other case, *Washington Terminal Co. v. Boswell*,[43] was a declaratory judgment action brought by the carrier to have the dispute redecided and the award set aside. The court held that the action could not be brought until the two year period for enforcement of the award had expired, since this action would deprive the employees of the advantages given them in a suit for enforcement.

The only cases found involving an award in favor of the carrier, and against the employee, are those in which the award was pleaded as a defense to an independent court action asserting the same claim. Only one such case has reached the Supreme Court, namely, *Elgin, Joliet & Eastern R. Co. v. Burley*.[44] The claim was for penalty damages for past violations of the starting time agreement, and an unsuccessful N.R.A.B. proceeding had been prosecuted by the union. The Court disposed of the case by finding that the R.L.A. did not give the union statutory authority to represent the employee in the presentation of already vested claims. It was held that the lower court must first decide whether the union had been given such authority by the employee, before the question of finality of the award should be decided. Four justices dissented, on the ground that under the R.L.A. the union had such authority and that finality of the award was the issue before the Court. Referring to comparable provisions governing reparations orders by the Interstate Commerce Commission,[45] they believed that the same treatment should be accorded awards of the N.R.A.B., and that this award against the employee, not being for money, barred redress in the courts. Other courts, though having diffi-

[41] "Theoretically, the railroads do not need to comply with an award until an action is brought in court to enforce the award. The theory does not accord with the fact however. Of about 5,000 awards that the Board has made to date, not more than a half dozen enforcement proceedings in court have been brought, and yet the great preponderance of the awards have been complied with." Atty. Genl.'s Committee on Admin. Proc. Ry. Lab. Monograph 17, p. 13 (1940); JONES, NATIONAL RAILROAD ADJUSTMENT BOARD 233 (1941).

[42] (C.C.A. 3d, 1943) 138 F. (2d) 121.

[43] (App. D.C. 1941) 124 F. (2d) 235, affd. by equally divided court, 319 U.S. 732, 63 S.Ct. 1430 (1943).

[44] 327 U.S. 661, 66 S.Ct. 721 (1946), on rehearing, affg. 325 U.S. 711, 65 S.Ct. 1283 (1945).

[45] 34 Stat. L. 584, §5 (1906), 49 U.S.C. §16(1) (2) (1946).

culty with the question, have held in every case found, that the adverse award precludes an independent court action.[46]

Only one case was found in which the court action was commenced after submission of the claim to the N.R.A.B., but prior to the rendering of an award. The court held the R.L.A. clearly contemplated that this election of remedies precluded recourse to the court.[47]

Thus it may be said that while the effect of creation of the N.R.A.B. on the jurisdiction of the courts over disputes which may be or have been submitted to the board is not completely settled, the cases indicate a tendency toward administrative finality. Although the judicial self-restraint exhibited by the courts may be limited by practical considerations, such as the backlog of cases pending before the N.R.A.B., this tendency seems to be in accord with the trend of Supreme Court decisions in other fields.

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[46] Austin v. Southern Pacific Co., 50 Cal. App. (2d) 292, 123 P.(2d) 39 (1942); Berryman v. Pullman Co., (D.C. Mo. 1942) 48 F. Supp. 542; Hargis v. Wabash R. Co., (C.C.A. 7th, 1947) 163 F.(2d) 608; Williams v. Atchison, Topeka & Santa Fe Ry. Co., 356 Mo. 967, 204 S.W.(2d) 693 (1947); Ramsey v. Chesapeake & Ohio R., (D.C. Ohio 1948) 75 F. Supp. 740; Hicks v. Thompson, (Tex. Civ. App. 1948) 207 S.W.(2d) 1000.

[47] Kelly v. Nashville, Chattanooga & St. Louis Ry., (D.C. Tenn. 1948) 75 F. Supp. 737. Summary judgment was withdrawn, however, on showing that submission to the N.R.A.B. was subsequent to commencing the court action and that the N.R.A.B. had declined to hear the case on this ground. (D.C. Tenn. 1948) 15 C.C.H. LAB. CAS. ¶64, 746.