Adjusting the Adjustment Board: Jurisdictional and Judicial Review Amendments to Section 3 of the Railway Labor Act

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NOTE

ADJUSTING THE ADJUSTMENT BOARD: JURISDICTIONAL AND JUDICIAL REVIEW AMENDMENTS TO SECTION 3 OF THE RAILWAY LABOR ACT

When in 1934 Congress was deliberating upon amendments to the Railway Labor Act,\(^1\) even the most resolute proponent of a National Railroad Adjustment Board conceded that to create such a board would be "an experiment."\(^2\) The experiment was tried, but Congress did not pause to assess its results for more than thirty years; when it finally did so, it concluded almost unanimously\(^3\) that parts of the experiment had "failed."\(^4\) Consequently, in the summer of 1966 there was enacted Public Law 89-456,\(^5\) which makes two significant changes in the Railway Labor Act. First, it provides for the settlement of grievances at the local level when either party so desires; the purpose of this provision is to lessen the NRAB's burdensome backlog. Second, it prohibits judicial review of the merits of decisions of the NRAB or of local grievance machinery. The necessity, the probable effectiveness, and the constitutionality of this new legislation are the subject of this note.

I. BACKGROUND: THE ADJUSTMENT SYSTEM

Labor disputes on the railroads are of two types. The first type, called a "major dispute,"\(^6\) arises from the difficulties of a carrier and union in negotiating a new collective bargaining agreement. The second type, called a "minor dispute,"\(^7\) is a controversy over the interpretation,

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7. "Minor disputes" is a shorthand term used in the industry for the statutory phrase "disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." Railway Labor Act § 3 First (i), as amended, 48 Stat. 1191 (1934), 45 U.S.C. § 153 First (i) (1964). For a judicial discussion of the difference between major and minor disputes see Hilbert v. Pennsylvania R.R., 290 F.2d 581 (7th Cir. 1961).
construction, or application of an existing agreement. The latter is the type with which this note is concerned. Even before the enactment of the new legislation, a variety of methods was available for the resolution of minor disputes.

The National Railroad Adjustment Board

In the absence of any agreement to the contrary between the parties, the proper forum for the adjustment of minor disputes on the railroads is the appropriate division (according to the type of employee involved) of the National Railroad Adjustment Board in Chicago. The NRAB is a bipartisan tribunal; each of its four divisions is composed of representatives of the national unions and of railroad management in equal number, and each member of the Board receives his salary from the interests he represents, rather than from the government.

NRAB procedures are relatively simple. When a dispute arises that the parties cannot settle by the processes provided in the collective bargaining agreement, either the carrier or the employee may submit the dispute to the Board. (In practice, the carriers seldom submit disputes, and most disputes submitted by employees are submitted by the union in the employee's behalf.) If after considering the case the Board is unable to reach a decision because of disagreement between its management and union factions, a neutral person, called a "referee," is appointed either by the Board or, if the Board is unable to agree upon a neutral person, by the National Mediation Board in Washington, D.C. When a decision is finally reached it is called an "award"; an award in

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8. Railway Labor Act § 205, added by 49 Stat. 1190 (1936), 45 U.S.C. § 185 (1964), provides for the establishment of a National Air Transport Adjustment Board "when, in the judgment of the National Mediation Board, it shall be necessary." The NMB has not yet exercised its power to establish such a board. See 31 NMB ANN. REP. 46 (1965).


13. In Elgin, J. & E. Ry. v. Burley, 325 U.S. 710 (1945), modified on rehearing, 327 U.S. 661 (1946), the Supreme Court held that an adverse NRAB decision was not binding upon an employee who had not sufficiently authorized his union to prosecute his claim before the NRAB. In regard to the problem where the union is opposed to the claim of an employee or where the employee is not a member of the union, see Lazar, "Individual" and "Outside Union" Grievances Before the National Railroad Adjustment Board First Division, 15 LAB. L.J. 231 (1964); Ferro v. Railway Express Agency, 296 F.2d 847 (2d Cir. 1961).

favor of the employee results in an "order" directing the carrier to comply with the award, and an award in favor of the carrier results in an "order" to the employee stating that his claim has been denied.¹⁵

If a carrier refuses to comply with an award and order of the Board, the employee may sue for enforcement in a United States district court. If he is unsuccessful, costs are paid by the United States; if he prevails, the judgment in his favor includes an allowance for attorney's fees.¹⁰

There is no procedure by which a carrier may enforce an award in its favor.¹⁷

A much-controverted point is whether the creation of the NRAB by Congress has deprived the employee of the right to bring common-law actions in the state and federal courts based on breach of the employment contract.¹⁸ In 1941 the Supreme Court held in Moore v. Illinois Central Railway.


   In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

There does not appear to be any practical difference between an award and an order. The sole case involving an attempt to enforce an award without the accompanying order, Smith v. Texas & N.O.R.R., 32 F. Supp. 1013 (W.D. La. 1940), was dismissed on other grounds. The courts have extended the requirement of a time limit to non-money as well as money awards. Railroad Yardmasters v. Indiana Harbor Belt R.R., 166 F.2d 326 (7th Cir. 1948); Knudsen v. Chicago & N.W. Ry., 106 F. Supp. 48 (N.D. Ill. 1952). Note that before the 1966 amendment "orders" were directed only to the carrier. This was consistent with the idea that the carrier could easily obtain compliance with an award in its favor. See note 17 infra. The new language apparently is designed to harmonize with the new versions of subsections (p) (note 118 infra) and (q) (note 117 infra), which provide for enforcement, review, etc., in terms of both "awards" and "orders."


17. "Provision for judicial enforcement of awards against employees was thought to be unnecessary since grievances are usually asserted by employees challenging some action by the carrier, and if the grievance is not sustained by the Board, the award merely dismisses the claim and requires no affirmative action by the employee." Union Pac. R.R. v. Price, 360 U.S. 601, 611 n.10 (1959). "It was felt . . . that the carrier had the power in its hands to enforce the awards of the Board against the individual." Hearings on H.R. 7650 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 63 (1934). It should be noted, however, that when a union calls a strike over an issue already decided adversely to it by the NRAB, the courts will enjoin the strike. See note 88 infra and accompanying text. The injunction in such a case might be viewed as "enforcement" of the Board's award.

that a discharged employee could bring a diversity action for damages in a federal court without first seeking a determination of the merits of the claim from the NRAB. The language of Moore was interpreted by many courts to mean that the courts and the NRAB had concurrent jurisdiction of all minor disputes. But in 1950 the Supreme Court in Slocum v. Delaware, Lackawanna & W.R.R. limited Moore to its facts. The rule of the Slocum case is that the state and federal courts have subject-matter jurisdiction only over common-law wrongful discharge cases where the employee seeks damages rather than reinstatement or other relief; in all other cases the NRAB has "exclusive jurisdiction." In a later case the Court, emphasizing that wrongful discharge is not a federal claim under the Railway Labor Act, held that even a discharged employee must first seek relief from the NRAB if state law requires the exhaustion of administrative remedies before bringing suit. With certain exceptions, the rule distinguishing wrongful discharge

the Jurisdiction of the Courts, 8 LAB. L.J. 9 (1957); Comment, Railroad Labor Disputes and the National Railroad Adjustment Board, 18 U. Chi. L. Rev. 303 (1951).

19. 312 U.S. 630 (1941).  
20. See, e.g., Adams v. New York, C. & St. L. Ry., 121 F.2d 808, 810 (7th Cir. 1941), in which the court, on the authority of Moore, reversed the dismissal of an action brought by employees seeking a declaratory judgment of their seniority rights, saying "[W]e can definitely state that the employees' action may be brought, at their election, either in a court, or settled by the administrative remedies provided by said Act." Even before Moore, it had been assumed that Congress in creating the NRAB did not intend "to limit the previously existing jurisdiction of the court, but rather to extend that jurisdiction to cases to which it had not been previously applied." Nord v. Griffin, 86 F.2d 481, 484 (7th Cir. 1936) (dictum).

22. Part of the reasoning advanced in support of the Slocum holding was that decision of all cases by the NRAB would result in uniformity. Accordingly, the Court distinguished the situation of a discharged employee because "such a case does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision in a collective bargaining agreement, its interpretation would have of course no binding effect on future interpretations by the Board." Slocum v. Delaware, L. & W.R.R., supra note 21, at 244.


25. One of the exceptions has arisen where the dispute involves racial or other hostile discrimination. See, e.g., Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Rumbaugh v. Wininfred R.R., 331 F.2d 530 (4th Cir. 1964) (extensive discussion); Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191 (8th Cir. 1963); Britton v. Atlantic Coast Line R.R., 303 F.2d 274 (5th Cir. 1962); Central of Ga. Ry. v. Jones, 229 F.2d 648 (5th Cir. 1956); Hampton v. Thompson, 171 F.2d 535 (5th Cir. 1949). In general, the NRAB has no jurisdiction to hear disputes between employee and union, as opposed to disputes between employee and carrier. Rumbaugh v. Wininfred R.R., supra. Also, the employee may by-pass the Board when his claim involves questions of law outside the collective bargaining agreement, such as the statutory rights of a returning service-man. Accardi v. Pennsylvania R.R., 383 U.S. 225 (1966) (by implication); McKinney v. Missouri-Kan.-Tex. R.R. 357 U.S. 265 (1958); see also Manning v. American Airlines, 329 F.2d 32 (2d Cir. 1964).
from other cases has remained for some time. Recently, however, the Court in Republic Steel Corp. v. Maddox refused to apply Moore to allow a discharged employee to bring a state action to enforce rights under other labor legislation. The language of Maddox indicates that the demise of Moore, and the consequent denial of primary access to the courts in all minor railroad labor disputes, is at hand.

Supplemental Boards

Each division of the NRAB has the power to establish one or more subordinate boards to hear disputes within the division’s jurisdiction. The statute defines such boards as “regional adjustment boards,” but they are usually called “supplemental boards” and their jurisdiction is not defined in regional terms; for example, a board created by the First Division currently has jurisdiction of firemen’s cases only. Such a board has “the same authority to conduct hearings, make findings upon disputes, and adopt the same procedure as the division of the Adjustment Board establishing it.”

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29. According to the dissent of Mr. Justice Black, “the Court recognizes the relevance of Moore and Transcontinental & W. Air, Inc. v. Koppal, 345 U.S. 653 (1953) and, while declining expressly to overrule them in this case, has raised the overruling axe so high that its falling is just about as certain as the changing of the seasons.” Republic Steel Corp. v. Maddox, 379 U.S. 650, 667 (1965). Even the majority conceded that “a major underpinning for the continued validity of the Moore case in the field of the Railway Labor Act . . . has been removed.” Id. at 655. See also id. at 657 n.14. This was authority enough for the Fourth Circuit, which recently refused to follow Moore in a Railway Labor Act case, saying that although the Supreme Court in Maddox did not overrule Moore, “the ratio decidendi embraces the instant controversy.” Walker v. Southern Ry., 354 F.2d 950 (4th Cir. 1965), cert. granted, 384 U.S. 926 (1966).


System, Group, Regional, and Special Adjustment Boards

If a carrier and union wish to avoid the jurisdiction of the National Railroad Adjustment Board, they may do so by agreeing to the establishment of what is usually called a "special" board to decide disputes arising locally. An agreement creating a special board commonly specifies a docket of disputes to be decided and, unless the agreement is amended, the special board ceases to exist when its docket of disputes is exhausted.33

Presumably the statutory authority for special boards is Railway Labor Act Section 3 Second,34 which provides:

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees . . . from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the [National Railroad] Adjustment Board . . .

Insofar as the last sentence above means that a "system, group, or regional" board should have a permanent existence until terminated, the usual "special" board with a limited life-span is not, at least theoretically, based upon the statute but solely upon the power of the parties to make agreements.35

In airline minor disputes, which are not within the jurisdiction of the NRAB, system, group, and regional boards are the principal agencies of adjustment. The statute not only permits their establishment, but also imposes a duty upon the parties to reach an agreement creating

33. Samples of agreements setting up special boards may be found in an appendix to Hearings Before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., ser. 14, at 141-49 (1965) [hereinafter cited as 1965 House Hearings].

34. As amended, 48 Stat. 1193 (1934).

35. Adding to the confusion is the fact that agreements establishing "special" boards usually refer to them by that name, rather than the name given in § 153 Second, but declare that the board is established under the authority of that subsection. See the sample agreements cited note 33 supra. Whether the origin of the board is statutory or nonstatutory would probably be significant only where one party tried to terminate the board upon ninety days' notice and the agreement provided otherwise. See Dwellingham v. Thompson, 91 F. Supp. 787 (E.D. Mo. 1950), aff'd sub nom. Rolfes v. Dwellingham, 198 F.2d 391 (8th Cir. 1952).
them. The airline boards are, surprisingly, usually referred to by their statutory name.

For both railroad special boards and airline system boards the National Mediation Board, although not directed to do so by the statute, appoints neutral referees to resolve deadlocks in the same manner that they are appointed for the National Railroad Adjustment Board.

Arbitration

The 1934 legislation which created the NRAB did not repeal the provisions of the 1926 act with respect to arbitration. The complex and rigidly-prescribed arbitration procedure is employed mainly to resolve major disputes.

II. Public Law 456 AND THE DUTY TO AGREE

Despite the variety of methods by which minor disputes can be adjusted, most of railroad grievance work has been done by the National Railroad Adjustment Board. By 1966, when Congress looked into the matter, the Board was inundated by a burdensome backlog of unadjusted cases. The First Division was more than seven years behind in its

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In view of the clearly stated purposes of the Act and of its history, reflecting as it does a steady congressional intent to move toward a reliable and effective system for the settlement of grievances, we believe Congress intended no hiatus in the statutory scheme when it postponed the establishment of a National Air Transport Adjustment Board and instead provided for compulsory system, group, or regional boards. Although the system boards were expected to be temporary arrangements, we cannot believe that Congress intended an interim period of confusion and chaos or meant to leave the establishment of the Boards to the whim of the parties. Indeed, it intended the statutory command to be legally enforceable in the courts and the boards to be organized and operated consistent with the purposes of the Act.

37. 31 NMB ANN. REP. 46 (1965).
40. The crowded state of the NRAB's dockets is shown in the following table compiled from 31 NMB ANN. REP. 76-77 (1965).

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>1965</th>
<th>1964</th>
<th>1963</th>
<th>1962</th>
<th>1961</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>First Division</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New cases docketed</td>
<td>564</td>
<td>738</td>
<td>809</td>
<td>687</td>
<td>823</td>
</tr>
<tr>
<td>Cases decided</td>
<td>220</td>
<td>140</td>
<td>143</td>
<td>194</td>
<td>443</td>
</tr>
<tr>
<td>Cases withdrawn</td>
<td>350</td>
<td>383</td>
<td>111</td>
<td>183</td>
<td>556</td>
</tr>
<tr>
<td>Backlog at end of year</td>
<td>4,056</td>
<td>4,062</td>
<td>3,793</td>
<td>3,238</td>
<td>2,928</td>
</tr>
<tr>
<td><strong>Second Division</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New cases docketed</td>
<td>205</td>
<td>198</td>
<td>217</td>
<td>287</td>
<td>216</td>
</tr>
<tr>
<td>Cases decided</td>
<td>184</td>
<td>268</td>
<td>218</td>
<td>178</td>
<td>278</td>
</tr>
</tbody>
</table>
In hearings before House and Senate subcommittees, the railroads and the brotherhoods each presented voluminous documentation to show that the other was to blame for the grievance logjam. The very contrariety of their respective assertions, however, exemplified the basic cause of the crisis. None of the procedures that might have provided an "escape valve" for the NRAB overflow could operate without some kind of agreement, and management and union, even where the alternative was years of delay, were too frequently unable to agree. The members of the NRAB did not agree to the establishment of additional supplemental boards. Railroads and local unions did not agree to the establishment of special boards. Neither party accepted previous NRAB decisions as precedent, and issues which had been decided many times were constantly recurring in cases submitted to the Board; one witness estimated that eighty-five percent of the First Division backlog consisted of such cases. The carrier and union members of the Board were seldom able to agree upon an award, thus necessitating use of the time-

<table>
<thead>
<tr>
<th>Cases withdrawn</th>
<th>5</th>
<th>15</th>
<th>23</th>
<th>18</th>
<th>15</th>
</tr>
</thead>
<tbody>
<tr>
<td>Backlog at end of year</td>
<td>286</td>
<td>270</td>
<td>355</td>
<td>379</td>
<td>288</td>
</tr>
</tbody>
</table>

**Third Division**

| New cases docketed | 693 | 715 | 779 | 773 | 783 |
| Cases decided | 851 | 897 | 786 | 544 | 359 |
| Cases withdrawn | 176 | 219 | 126 | 144 | 127 |
| Backlog at end of year | 1,871 | 2,197 | 2,598 | 2,731 | 2,646 |

**Fourth Division**

| New cases docketed | 109 | 80  | 96  | 126 | 98  |
| Cases decided | 80  | 90  | 97  | 91  | 46  |
| Cases withdrawn | 28  | 23  | 48  | 38  | 35  |
| Backlog at end of year | 32  | 31  | 64  | 113 | 106 |

43. In the fiscal year 1965, special boards of adjustment disposed of 2565 disputes which would otherwise have been submitted to the National Railroad Adjustment Board, but this did not significantly reduce the NRAB backlog. 31 NMB Ann. Rep. 45 (1965).  
45. *1965 House Hearings 34.*  
46. The notorious inability of the members of the NRAB to come to agreement on awards is reflected in the following table compiled from 31 NMB Ann. Rep. 76-77 (1965).
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consuming process of appointing a referee. Since referees are chosen only after the Board has deadlocked, most cases were considered twice, and the *ad hoc* nature of the referee's appointment aggravated the stare decisis problem. Lack of rapport in these areas was the cause of the NRAB backlog.

Obviously the problem would not have been alleviated by the creation of additional consensual alternatives to the NRAB. The railroads proposed that the National Mediation Board, which is composed not of partisans but of presidential appointees, be empowered to create supplemental adjustment boards whether or not the NRAB consented. Congress, however, adopted the method proposed by the brotherhoods.

<table>
<thead>
<tr>
<th>Second Division</th>
<th>Decided with referee</th>
<th>182</th>
<th>267</th>
<th>213</th>
<th>165</th>
<th>270</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Decided without referee</td>
<td>2</td>
<td>1</td>
<td>5</td>
<td>13</td>
<td>8</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Third Division</th>
<th>Decided with referee</th>
<th>832</th>
<th>893</th>
<th>768</th>
<th>534</th>
<th>342</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Decided without referee</td>
<td>19</td>
<td>4</td>
<td>18</td>
<td>10</td>
<td>17</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Fourth Division</th>
<th>Decided with referee</th>
<th>79</th>
<th>83</th>
<th>91</th>
<th>73</th>
<th>33</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Decided without referee</td>
<td>1</td>
<td>7</td>
<td>6</td>
<td>8</td>
<td>13</td>
</tr>
</tbody>
</table>

Partisanship on the Board is so intense that if only one member wishes to vote in favor of the side he represents, the other four members of his faction defer to his determination, and thus every vote is either 5-5 or 10-0 (except in the case of the Fourth Division, which has only six members). 1965 *House Hearings* 212. E. T. Horsley, a carrier member of the First Division, summarized the situation by telling Congress that "the 'advocate' character of all members is clearly distinguishable from any semblance of 'judgeship' in our roles." *Id.* at 171.

47. The carriers' proposals are set forth in *Hearing on H.R. 706 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 89th Cong., 2d Sess.* 130-31 (1966) [hereinafter cited as *1966 Senate Hearing*].

48. *Pub. L. No. 456, 89th Cong., 2d Sess. § 1* (June 20, 1966), U.S. CODE CONG. & AN. NEWS 1525. The language quoted here is cited as "§ 1" not because it is so designated in the statute, but because it includes all the language preceding the part designated as "§ 2." Section 1 adds the following language to Railway Labor Act § 3 Second, as amended, 48 Stat. 1193 (1934), 45 U.S.C. § 153 Second (1964):

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request
der the new provision, minor disputes which have not been submitted to the NRAB or which have been on the NRAB docket for more than twelve months may be submitted locally to a new version of the "special" board created by what might be characterized as a "unilateral agreement."

If the union wishes to set up a special board (the carrier may also initiate a special board, but for illustrative purposes the union is presumed to be the initiating party), it need only serve notice upon the railroad, and the latter "shall join in an agreement" establishing such a board. If the railroad "fails to agree," by failing to appoint a person to serve as its member of the special board, the National Mediation Board must appoint "an individual associated in interest" with the railroad to deal with the union in the railroad's behalf in working out the terms of the agreement. If these two fail to agree upon such matters as the particular disputes to be decided, etc., and are also unable to agree upon a person to break the deadlock, the NMB must make another appointment—a neutral man in this instance—and the neutral man, in effect, draws up the "agreement" between the union and the carrier or the person associated in interest with the carrier. After the special board has been established, the neutral man drops out of the picture, and the members of the special

for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States District Courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.
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board—i.e., the union representative on one side and the railroad’s designee or the person associated in interest with the railroad on the other—at last get down to the business of hearing the disputes specified in the “agreement.” If the special board so constituted is unable to agree upon the disposition of a dispute, a second neutral man is appointed in the same manner as the first. It is significant that the second neutral man is not appointed \textit{ad hoc} for each dispute, as are NRAB referees, but is appointed to decide any “dispute or group of disputes.” This language does not require that all the deadlocked disputes before a particular special board be resolved by the same person, but this has been the usual practice.\footnote{49 See 31 NMB \textit{Ann. Rep.} 65-67 (1965).}

The unique and critical part of this process is the formation of the “agreement,” particularly where a first neutral man is necessary. In customary railway labor terminology, he must decide a “major dispute” between the parties, since he is not interpreting an existing contract but helping the parties to create a new one. Unfortunately, the statute does not make clear whether the first neutral man is empowered to exclude particular disputes from the jurisdiction of the special board. The statute provides that “the cases which may be considered by the special board shall be defined in the agreement establishing it” and that the first neutral man “determines all matters not previously agreed upon . . . with respect to the establishment and jurisdiction of the board.” From this language it appears that if the union were to request the establishment of a special board to decide a number of disputes, the neutral man might compromise the contentions of the union and the carrier by creating a special board to decide only some of them. This practice would produce only delay—the problem sought to be eliminated by the statutory amendment—and would result in the proliferation of special boards, since nothing in the statute prevents the union from later requesting the establishment of a second special board to decide the disputes excluded from the first special board. The statute should be construed to prevent the first neutral man from excluding any disputes proposed by the party requesting the establishment of the special board. A possible exception to this rule is pointed out in the legislative history:

The cases which may be considered by any special board will, of course, be defined in the agreement establishing the board. Some concern was expressed during the hearings by witnesses representing the carriers that the mechanism established by the bill could be used by one union for the purpose of raiding the membership of another. The committee feels that there is no cause
for apprehension on this score, since all persons involved are expected to use this legislation in good faith and in accordance with its purpose and intent. This means that neither a union or a carrier can properly demand the establishment of a special board with jurisdiction so broad as to invade the jurisdiction of another union as heretofore customarily respected in the establishment of special boards by voluntary agreement; should any party do so the party upon whom the demand is made would be expected to refuse to agree to such jurisdiction. Such refusal would then force a jurisdictional determination by a neutral designated as provided in the bill. The neutral, in turn, would be expected to determine the jurisdiction of the board so as not to invade the established jurisdiction of another union.50

Although the committee was quite properly concerned with the problem of raiding membership, the authority of the first neutral man to exclude requested disputes should be limited to these special situations. In ordinary grievances, where there is no question of the standing of the requesting union to represent the employees involved, the neutral man should not seek compromise but should promote the expeditious adjustment of disputes by including all the disputes in the special board's jurisdiction.

Some problems may also be encountered in the selection of the "individual associated in interest" to stand in the shoes of a party who "fails to agree." The National Mediation Board has a long list of available arbitrators who are purportedly "neutral" men, but it may be difficult to find anyone who is clearly partisan and willing to serve in behalf of the protesting party. Another problem might arise in the compensation of this person. He becomes a member of the special board and as such is entitled to compensation from the party with whom he is associated in interest. The latter, of course, has already evidenced, by his failure to name a member of the board, a strong desire to have nothing to do with the board and might not be willing to pay the appointee associated in interest very well, if at all. Since the statute does not give the National Mediation Board the authority to fix the salary to be paid to its appointee by the person he is to represent, the board might never begin to function for want of an individual to serve in this position. One way to solve this would be for the person appointed to agree with the opposing party to fix his own salary as part of the "agreement" setting up the special board, but this would be a high-handed maneuver to say the least.

and would probably not be enforceable as between the party who has failed to agree and the person representing him. Further, the statute does not make clear whether the party who has failed to agree may at some later time change his mind, unseat the person associated in interest with him, and appoint his own nominee to the board. Fortunately, these difficulties should not often arise, since even the most obstinate party will usually prefer to select his own board member rather than have the National Mediation Board do it for him. Indeed, since the establishment of a special board by one means or another is inevitable once one party has demanded it, it would probably have been better for the statute to have imposed a duty upon the non-requesting party to name a board member, thus avoiding all the problems involved with respect to the "individual associated in interest."

The most interesting feature of P.L. 456 is not, however, the intricacies of its unusual and untried procedures, but rather the uniqueness of its overall approach. Certainly, no one could contend that under the statute carriers and unions will be negotiating "agreements" to set up special boards. Indeed, the amendments were found to be necessary to cure the ills occasioned by the absence of agreement. What Congress has really done is extend its policy of compulsory arbitration—long embodied only in the NRAB—down to the local level. Yet, although to speak in terms of an "agreement" is unsound analytically, the psychology of labor relations is often such that an occasional legal fiction is necessary to make it appear—at least superficially—that all is amity and accord; in the case of special boards under P.L. 456, Congress has concluded that an agreement by any other name would not smell as sweet. Most importantly, the establishment of special boards in this manner is well calculated to accomplish the statute's objective of reducing the NRAB workload. Although the Board had not yet felt the effect of the new legislation by the end of the summer, there is general agreement that the present backlog will be significantly reduced within a short time.51

III. PUBLIC LAW 456 AND JUDICIAL REVIEW

The Prior Law

In the thirty-two years between the creation of the NRAB and the 1966 legislation, the courts in dealing with the question of judicial review of the merits52 of NRAB awards were faced with legislative provisions
so vague and ambiguous that almost every decision violated at least some part of the statutory language. Upon the assumption that a page of history is better than the complete absence of logic, it is necessary to review the existing law in some detail in order to understand why Congress concluded that a change was necessary, and in order to determine whether the means adopted will achieve the desired results.

Prior to 1966 the statute contained no procedures for direct review of NRAB awards. The courts construed this omission as a prohibition, and any proceeding instituted to review an award, to set it aside, to enjoin the carrier from putting it into effect, or to obtain a declaratory judgment of its correctness, was dismissed. However, the question of review was often raised collaterally in two types of suits brought by employees. The first type was an action brought upon the underlying controversy by an employee who had already been unsuccessful before the Board, and the question with respect to "review" was whether the adverse NRAB award barred the action. The second type was an action brought by an employee under subsection (p) of the act to enforce an award in his favor, and the question was whether the court was permitted by the language of subsection (p) to consider the merits of the underlying claim before directing that the award be enforced.

Suits brought notwithstanding an adverse award: When it was thought that jurisdiction over all minor disputes was vested concurrently in the courts and the Board, a suit by an employee whose claim had been

plication of Railway Labor Act § 3 First (j), as amended, 48 Stat. 1191 (1934), 45 U.S.C. § 153 First (j) (1964), which requires that the Board "shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes. . . ." Frequently the NRAB renders an award in favor of a claimant union without giving notice to the employees of another union who are affected by the award; such awards are void. See, e.g., Brotherhood of R.R. Trainmen v. Templeton, 181 F.2d 527 (8th Cir.), cert. denied, 340 U.S. 823 (1950); Hunter v. Atchison, T. & S.F. Ry., 171 F.2d 594 (7th Cir. 1948); but cf. Whitehouse v. Illinois Cent. R.R., 349 U.S. 866 (1955) (dictum). The Supreme Court has never considered these problems but will probably do so this Term; see Order of R.R. Telegraphers v. Union Pac. R.R., 349 F.2d 408 (10th Cir. 1965), cert. granted sub nom. Transportation-Communication Workers Union v. Union Pac. R.R., 383 U.S. 905 (1966). See Kroner, supra note 44, at 50-57.


54. See notes 18-20 supra and accompanying text.
denied by the Board could easily be dismissed by pointing out that the employee in selecting the NRAB as his original forum was bound by his "election of remedies." However, as the Supreme Court expanded the ambit of the Board's exclusive primary jurisdiction, the election-of-remedies rationale was rendered inapplicable in many cases, and other reasoning was employed to support the holding that the suit could not be maintained. The biggest obstacle to the employee's action was the provision of subsection (m) that "the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." In addition, the lower federal courts, despite a caveat from the Supreme Court, interpreted Slocum's rule of "exclusive juris-


56. See notes 21-29 supra and accompanying text.

57. The text of this subsection, Railway Labor Act § 3 First (m), as amended, 48 Stat. 1191 (1934), was as follows prior to the 1966 amendment:
The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board shall interpret the award in the light of the dispute. The reason for the "money award" exception has been obscured by the passage of time. When asked about the "final and binding" language, Mr. Joseph B. Eastman, the man responsible for the drafting of the 1934 amendments, told Congress that it was taken from the 1926 version of the act. Hearings on H.R. 7650 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 58 (1934). Railway Labor Act § 3 First (e), 44 Stat. 579 (1926), provided that any voluntary agreement establishing a local adjustment board "shall stipulate that decisions of adjustment boards shall be final and binding upon both parties to the dispute; and it shall be the duty of both parties to abide by such decisions." Mr. Eastman's statement consequently does not explain the money award exception. Perhaps the draftsmen thought it was necessary to preserve the act's constitutionality in the face of contemporary Supreme Court decisions which held that due process required judicial review in some situations. See, e.g., Crowell v. Benson, 285 U.S. 22 (1932); see Schwartz, Does the Ghost of Crowell v. Benson Still Walk?, 98 U. Pa. L. Rev. 163 (1949). It may also be speculated that the exception was caused by an effort to accommodate subsection (m) with subsection (p). See note 73 infra.


59. The Slocum majority had cautioned that the Court in that case was not "called upon to decide any question concerning judicial proceedings to review board action or
diction" to mean not only that an employee must resort first to the NRAB, but also that the courts were without jurisdiction of minor disputes even after a decision by the Board.  

Not until 1959 did the Supreme Court consider such a case. In Union Pacific R.R. v. Price, a former railroad employee, having unsuccessfully sought reinstatement from the NRAB, brought a suit against the railroad for wrongful discharge. The district court held that the adverse NRAB award barred the action and granted summary judgment in favor of the railroad. Although impliedly conceding that the award would not bar the action if it were not decided upon the merits, the Supreme Court affirmed the judgment of the district court. The majority opinion of Mr. Justice Brennan rested upon three grounds. First, the award was not a "money award" and was therefore "final and binding" under subsection (m): "Respondent does not argue that a 'money award' is anything other than an award directing the payment of money. Indeed, it would distort the English language to interpret that term as including a refusal to award a money payment." Second, the Court looked to the legislative history of 1934 and found certain passages upon which it relied to support its decision. Third, since the case was ad-

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62. The Supreme Court disagreed with the finding of the court of appeals, which had reversed the district court's judgment on the ground that the Board's denial of the claim was based only upon the Board's finding that the carrier had properly observed the procedures specified in the collective bargaining agreement, rather than upon the merits of the issue of wrongful discharge. Price v. Union Pac. R.R., 235 F.2d 663 (9th Cir. 1956).
64. Mr. Justice Douglas, in dissent, would have no part of this reasoning:
An award of no damages is, as I see it, as much a "money award" as an award of 6 cents. The words "money award" are merely descriptive of the nature of the claim, setting that class apart from other suits which involve, for example, a declaration of seniority rights.

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65. The Court relied on the statements of a union president who remarked that "[W]e are willing to take our chances with this national board because we believe, out of our experience, that the national board is the best and most efficient method of getting a determination of these many controversies. . . ." Hearings on S. 3266 Before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 33 (1934). But it appears from the context of his remarks that he was merely speaking of the advantages of a national board over a system of local boards. The Court also pointed to the testimony of Mr. Joseph B. Eastman, Federal Coordinator of Transportation, Hearings on H.R.
mittedly one which could have been brought in court initially under the Moore rule the Court employed the familiar “election of remedies” rationale, pointing out that the plaintiff had previously chosen the NRAB as the forum to determine the wrongfulness of his discharge, and was “seeking to relitigate in the courts the same issue.”

The presence of the election-of-remedies reasoning in Price left open the question whether the same result would be reached in the case of an employee who had had no election of remedies because his claim fell within the “exclusive jurisdiction” rule of Slocum. In Pennsylvania R.R. v. Day, a companion case to Price, the Court sidestepped the issue. Day involved a claim for back wages brought by a retired employee—clearly a claim which could not have been brought in court before submission to the NRAB. The claim of the plaintiff in Day had not been so submitted, but the Board had denied identical claims brought by other employees. The district court dismissed the plaintiff’s case upon the theory that the Board’s interpretation of the contractual provision in question was “final and binding” even upon the plaintiff, who had not been a party to any proceedings before the Board. Viewed this way, the case stands for the denial of judicial review even where the employee has made no election of remedies. The Supreme Court affirmed the dismissal of the complaint, but, because the individual claim of the plaintiff had not been submitted to the NRAB, analyzed the case as involving only the question of NRAB original jurisdiction and regarded as the most important issue whether the fact of the plaintiff’s retirement took the case outside the Slocum rule. This view of the case enabled the Court to avoid the question whether the seventh amendment forbids the denial of both primary

7650 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 59 (1934), who emphasized that awards are made final and binding by the terms of this act, and as I understand it, the labor organizations, none of them, are objecting to that provision. They have their day in court and they have their members on the adjustment board, and if an agreement cannot be reached between the parties representing both sides on the adjustment board, then a neutral man steps in and renders the decision, and they will be required to accept that decision when made, with respect to these minor matters.

But here, too, the Court may have disregarded the context. The topic being discussed was the possibility of strikes over minor disputes, and thus it is at least arguable that the quoted passage means that a union must accept an award rather than go on strike, not that the union must accept the award without appealing to the courts.

65. The Court phrased its holding in terms of the election of remedies: “We therefore hold that the respondent’s submission to the Board of his grievances as to the validity of his discharge precludes him from seeking damages in the instant common-law action.” Union Pac. R.R. v. Price, 360 U.S. 601, 617 (1959).

66. Id. at 609 n.8.


and appellate access to the courts in minor railway labor disputes. That the *Day* case does not squarely hold that review may be denied in all such disputes has not, however, discouraged the lower federal courts from relying on it for that proposition.

In brief, the law before the 1966 legislation was, with one exception which is now insignificant, that an adverse NRAB award if properly rendered and decided upon the merits precluded any judicial remedy for the employee against the railroad.

**Review in enforcement suits—the Dahlberg rule:** Until late in 1965, a quite different rule was applied when the railroad, rather than the employee, sought judicial review of an adverse award. When an employee brings suit in a district court to enforce an award against a carrier who refuses to comply with it voluntarily, he must proceed under subsection 3 First (p) of the act. Before amendment in 1966, that subsection contained language which apparently directed the courts to determine the

69. The constitutional issue is discussed in notes 144-48 *infra* and accompanying text.


71. In *Cook v. Thompson*, 150 F. Supp. 650 (W.D. Tex. 1957), the carrier, who had submitted the dispute to the NRAB, successfully moved for a stay of the employee's wrongful discharge suit. The Board found for the carrier, and the court dismissed the complaint upon the ground that the Board's award was final and binding upon the employee. *Cook v. Missouri Pac. R.R.*, 161 F. Supp. 538 (W.D. Tex. 1958). The court of appeals reversed, holding that where the employee has a claim which may be brought in court under *Moore* and has not himself submitted the dispute to the Board, the railroad may not prevent judicial consideration of the merits by obtaining an award from the NRAB. *Cook v. Missouri Pac. R.R.*, 263 F.2d 954 (5th Cir.). *cert. denied*, 361 U.S. 866 (1959). The opposite result was reached in *Sjaastad v. Great No. Ry.*, 158 F. Supp. 760 (D.N.D. 1958). See also *Rose v. Great No. Ry.*, 268 F.2d 674 (8th Cir. 1959). If it is true that the Supreme Court will soon overrule *Moore*, as speculated in note 29 *supra*, the issue presented in the *Cook* and *Sjaastad* cases will be rendered moot.

72. The text of Railway Labor Act § 3 First (p), as amended, 48 Stat. 1192 (1934), before amendment in 1966, was as follows:

If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division 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 in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.
merits of the grievance upon which the award had been rendered before enforcing the award. Under subsection (p) the employee seeking enforcement was required to plead not only the award, but also the underlying "causes for which he claims relief"; the case was to "proceed in all respects as other civil suits"; there was to be a "trial" at which the Board’s findings were merely "prima facie evidence" of the facts; and the court was empowered to "enforce or set aside the award." These provisions, which made no distinction between money awards and non-money awards, were in sharp conflict with the provision of subsection (m) that "the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award." Blame for this conflict must be placed upon the draftsmen of the 1934 amendments, who pieced together the NRAB provisions with fragments of other legislation. Subsection (p) appears to have been slavishly copied from the Interstate Commerce Act without regard to how it might operate in its new context.73

To the courts fell the task of resolving the conflict. Although a true in pari materia construction might have resulted in a rule that the language of subsection (p) provided for review only when a money

73. Compare the text of Railway Labor Act § 3 First (p), as amended, 48 Stat. 1192 (1934), set forth note 72 supra, with the following text of Interstate Commerce Act § 16(2), as amended, 36 Stat. 554 (1910), as it appeared in 1934 (italics added):

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the circuit in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth the causes for which he claims damages, and the order of the commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

Although the 1934 draftsmen are to be commended for such niceties as striking "like" in favor of "as," it is unfortunate that they did not perceive the difficulties in transplanting this language. The section quoted above applied only to money claims; non-money claims were to be enforced under Interstate Commerce Act § 16(11), as amended, 36 Stat. 555 (1910). In 1934 the words italicized above were omitted from subsection (p) in order to provide one method of enforcing both types of awards; yet the "money award" exception was added to subsection (m) (see note 57 supra) in such a way that it appears that whoever drafted subsection (m) was trying to harmonize it with a proposed version of subsection (p) containing the italicized language. At this late date, protracted speculation as to what actually transpired is merely academic with respect to the substantive effect of this carelessness, but there is a lesson to be learned here by one who might be tempted to use short-cut drafting techniques.
award was sought to be enforced, the district courts and courts of appeals unanimously held that the enforcement suit was a trial de novo not only of money awards but of non-money awards as well. This construction necessitated some interesting exercises in semantics by courts who tried to explain how a non-money award could be both "final and binding" and yet subject to de novo review. For example, in the leading case, Dahlberg v. Pittsburgh & Lake Erie R.R., which denied enforce-

74. This argument was put forth by Mr. Justice Goldberg in Brotherhood of Locomotive Engineers v. Louisville & N.R.R., 373 U.S. 33, 43 n.1 (1963) (dissenting opinion). He reasoned that since subsection (o) (see note 15 supra) provided that money awards, but not non-money awards, must have a time limit, then the opening language of subsection (p) (see note 72 supra), viz., "If a carrier does not comply with an order . . . within the time limit in such order . . .," led to the conclusion that "subsection (p) is confined in its application to money claims." The trouble with this reasoning is that the opening clause conditions all of subsection (p), and the absurd result of such a minute analysis of this loose language would have been not only that non-money awards would not be subject to de novo review, but also that they would not be able to be enforced at all.

75. In Brotherhood of Way Employees v. Missouri-Kan.-Tex. R.R., 248 F. Supp. 243, 245 (E.D. Mo. 1965), the court said that "the suit to enforce is a trial de novo, which means a complete, new trial, with no limitation as to the evidence which may be brought in by the defendant. . . . The suit to enforce is much more than a mere review of the Board's award. It is a new hearing, a trial de novo." Theoretically, at least, enforcement suits were to be something less than de novo trials because of the statutory provision that the NRAB award was "prima facie evidence." Various degrees of persuasiveness were accorded to awards under this rule. See, e.g., Russ v. Southern Ry., 334 F.2d 224 (6th Cir. 1964) (shifts burden of proof to defendant carrier), cert. denied, 379 U.S. 991 (1965); Crist v. Public Belt R.R. Comm'n, 93 F. Supp. 103, 105 ("entitled to respect"); Swift v. Chicago & N.W.R.R., 84 F. Supp. 116 (S.D. Iowa 1944) (comparable to expert testimony); Hanks v. Delaware & H.R.R., 63 F. Supp. 161, 164 (N.D.N.Y. 1945) ("great weight"). An instruction to the jury which praised the Board's expertise in the field of railway labor was held to have been properly refused in Callan v. Great No. Ry., 299 F.2d 908 (9th Cir. 1961).


78. 138 F.2d 121 (3d Cir. 1943).
ment of an award granting the plaintiffs higher seniority but no money damages, the court found "final and binding" to have a very elastic meaning:

Obviously the expression "final and binding" has its limitations. Even the appellants [the employees seeking enforcement] concede that the award is neither so final that it may not be set aside by the Court if the Board acted beyond its statutory authority nor so binding that the carrier can be compelled to obey it without the aid of the Court in enforcement proceedings. We think that the general plan of the statute clearly discloses an intention to use the words in the sense that the award is the definitive act of a mediative agency, binding until and unless it is set aside in the manner prescribed, and that it was intended that the Court should exercise broader powers than merely directing coercive process to issue if satisfied that the proceeding was authorized by law.  

Other courts found equally dubious reasoning to reach the same result.

Employees and their unions had reason to be discontent with the Dahlberg rule. Because enforcement suits are always brought by employees, the rule always operated in favor of the railroad, which could refuse to comply with any award and dare the union to submit to the perils and delays of a de novo trial. On the other hand, any court action by the employee upon an award against him was barred by the rule of Price and Day. The brotherhoods were displeased with this state of af-

79. Id. at 122. Opinions such as this may have prompted Mr. Justice Frankfurter to his well-known dictum: "One need not italicize 'final' to make final mean final," Estep v. United States, 327 U.S. 114, 136 (1946) (concurring opinion).

80. In Brotherhood of Ry. & S.S. Clerks v. Atlantic Coast Line R.R., 253 F.2d 753 (4th Cir. 1958), the court observed that Railway Labor Act § 8(l), 44 Stat. 585 (1926), provided that arbitration awards shall be "final and conclusive" and reasoned that the fact that "an entirely different provision" was made in the case of the NRAB "shows clearly that Congress did not intend Board orders to have the effect of arbitration awards." Of course, the opposite result would violate subsection (p) just as the Dahlberg rule conflicts with subsection (m); and the arguments advanced in favor of Dahlberg in Jones v. Central of Ga. Ry., 331 F.2d 649, 652 (5th Cir. 1964), are therefore compelling:

If absolute finality was intended, it is difficult to understand how the courts could proceed in all respects as in other civil suits. Finality does not comport with the provision that the finding should be only prima facie evidence of the facts stated. If such were the case, no "if" would be attached to the right of the petitioner to finally prevail; and the court would not have the choice to enforce or set aside the order of the Board.

81. See note 17 supra.

fairs. One of the arguments made by the plaintiff in *Price* was that whatever might be the technical subtleties of the statutory language, the act should be construed to make review equally available to both sides. The Court rejected this argument, remarking that "the disparity in judicial review of Adjustment Board orders, if it can be said to be unfair at all, was explicitly created by Congress, and it is for Congress to say whether it ought to be removed," 83 the three dissenting Justices 84 took issue with this proposition.

Another development made the *Dahlberg* rule even more unpalatable to the unions. Their reluctance to submit awards to delay and de novo review had often led them to seek methods of enforcement outside the procedures in subsection (p). 85 For some time it was thought that the use of economic pressure was a proper nonstatutory method of enforcement. 86 But recently, in *Denver & Rio Grande Western R.R. v. Brotherhood of Railroad Trainmen*, 87 it was held that a strike with this objective will be enjoined. The court's theory was that since industrial peace and

84. Namely, Justices Douglas, Black, and Warren. Mr. Justice Douglas found the disparity of review to be an unjustifiable discrimination in violation of the Due Process Clause of the Fifth Amendment. It is not the usual practice in this country to permit one party to a lawsuit two chances to prevail, while the other has only one, nor to permit one party but not the other to get a jury determination of his case. Union Pac. R.R. v. Price, *supra* note 83, at 621 (dissenting opinion). Mr. Justice Black also took issue with the "glaring inequality of treatment between workers and railroads," Pennsylvania R.R. v. Day, 360 U.S. 548, 559 (1959) (dissenting opinion), and added: It surely would not be easy to uphold the constitutionality of a procedure which takes away from both parties their ancient common-law right to a trial by court and jury. It should be impossible to uphold it when, as here, the procedure grants both parties an administrative hearing and then gives one of them a second chance before a judge and jury while denying it to the other. *Id.* at 561.
85. A unique and effective non-statutory means of enforcement was found by the disappointed employees in *In re Chicago Great Western R.R., 17 F. Supp. 932* (N.D. Ill. 1937). The court had advised trustees in bankruptcy for the railroad not to pay a group of NRAB awards until they had been enforced according to the provisions of subsection (p). The final outcome was related on the floor of the Senate:

Mr. President, on Thursday of last week the senior Senator from Idaho introduced a resolution directing the Committee of Interstate Commerce to inquire into the refusal of the trustees of the Chicago Great Western Railroad to pay certain awards made by the National Railroad Adjustment Board. . . . I am glad to report that since the Senator from Idaho introduced his resolution, the trustees . . . have agreed to pay the awards in full, thus ending the unfortunate controversy. . . . [T]he unions very properly, in my judgment, refused to become parties to long and expensive litigation. . . .

In my judgment, they paid it only because of the fact that an investigation of the whole matter would be taken up by the committee on Interstate Commerce.

81 CONG. REC. 2959 (1937) (remarks of Senator Wheeler).
the uninterrupted flow of commerce are the ends sought to be achieved by the Railway Labor Act, the provision in subsection (p) for judicial enforcement of awards impliedly precludes economic self-help as a method of obtaining compliance. The decision is also based on the general rule that strikes over minor disputes are improper at any stage of the adjustment process.\textsuperscript{88} The true significance of \textit{Denver}, however, was that in holding that all awards must be enforced under subsection (p), it guaranteed the carrier's right to judicial review of any award which it wished to contest.

\textit{The Gunther case}: The Dahlberg rule never had the imprimatur of the Supreme Court. The Court had acknowledged in \textit{Price} that a "disparity in judicial review" existed,\textsuperscript{89} but a later dictum had questioned the rule.\textsuperscript{90} Finally, in late 1965 the Court abruptly overturned the Dahlberg rule in \textit{Gunther v. San Diego & Arizona Eastern Ry.}\textsuperscript{91} Gunther, a 71-year-old locomotive engineer, was discharged by the railroad because of his failing health. The NRAB determined that the collective bargaining agreement did not permit the carrier to be the sole judge of Gunther's fitness for his job, and ordered the appointment of a panel of physicians to examine him. In accordance with their findings, the Board rendered an award ordering that Gunther be reinstated and paid for the time he had lost. The carrier refused to comply with the award, and Gunther brought an enforcement suit under subsection (p). The district court denied enforcement on the grounds that (1) the collective bargaining agreement did not limit the railroad's common-law discretion to discharge employees for medical reasons and (2) the NRAB lacked authority to


\textsuperscript{89} See note 83 supra.

\textsuperscript{90} In Brotherhood of Locomotive Engineers v. Louisville & N.R.R., 373 U.S. 33, 40-41 (1963), the Court, in holding that a strike called by a union in support of its interpretation of the amount of money due under an ambiguous award in the union's favor was properly enjoined, observed that "we do not deal here with nonmoney awards, which are made 'final and binding' by § 3 First (m). . . . This, then, is clearly a controversy concerning a 'money award' as to which decisions of the Adjustment Board are not final and binding." The dictum had no effect on the courts of appeals, who adhered to the Dahlberg rule to the bitter end. See, \textit{e.g.}, Brotherhood of R.R. Trainmen v. Louisville & N.R.R., 334 F.2d 79, 82 (5th Cir.) ("certainly not a clear mandate for change"), \textit{cert. denied}, 379 U.S. 934 (1964).

\textsuperscript{91} 382 U.S. 257 (1965).
impanel a board of physicians. The Supreme Court reversed, rejecting both these contentions and going further. In a unanimous opinion written by Mr. Justice Black the Court held that since the NRAB's decision was not "wholly baseless and completely without reason,"\(^{92}\) the district court could not substitute its judgment for that of the Board on the question whether the railroad had an absolute right under the collective bargaining agreement to discharge an employee for failing health:

The basic grievance here—that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of his health—has been finally, completely, and irrevocably settled by the Adjustment Board's decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court.\(^{93}\)

Although Gunther eliminated judicial review of the merits of all awards, the Court apparently felt that some effect must be given to the exception for money awards. Consequently, it assumed without discussion that the money award exception was intended to make reviewable the amount of money awarded, rather than the merits of an award directing the payment of money. The Court remanded Gunther's suit to the district court with instructions to enforce that part of the award reinstating Gunther (by then 82 years of age) as a locomotive engineer and to hold a trial de novo on the issue of damages.

There are many defects in the Gunther opinion. First, the Court did not appear to understand the Dahlberg rule when it stated that the district court had reviewed the merits "merely because one part of the Board's order contained a money award";\(^{94}\) the district court, following Dahlberg, would have held a trial de novo whether or not a money award had been made. Second, the Court did not discuss Dahlberg and the many cases which followed it,\(^{95}\) or even accord them the dignity of a casual citation; thirty years of existing law was completely ignored. Third, the Court abruptly overturned the existing law even though legislation to amend the law was pending in Congress. Fourth, the Court did not consider the language of subsection (p), the basis of the Dahlberg rule. This last omission is particularly regrettable since shortly after Gunther, the Court had occasion to consider the nearly identical language of Section 16(2)

\(^{92}\) Id. at 261.
\(^{93}\) Id. at 264.
\(^{94}\) Id. at 263.
\(^{95}\) Cases cited note 77 supra.
of the Interstate Commerce Act, the ancestor of subsection (p), and found that ICC orders sought to be enforced under section 16(2) were "fully reviewable."

The lower courts had little experience in applying the Gunther case before the enactment of P.L. 456. Although the Court in Gunther apparently intended to leave a "loophole" for review of awards which are "wholly baseless and completely without reason," recent cases indicate that this standard dictates enforcement of awards even where the court disapproves of them in the strongest terms. On the other hand, the courts' power to review the amount of a money award includes the power to reduce it to nominal damages, which provides an opportunity to

96. 36 Stat. 554 (1910), as amended, 49 U.S.C. § 16(2) (1964). The current version is as set forth in note 73 supra, except that "district" has been substituted for "Circuit," "complaint" for "petition," and "plaintiff" for "petitioner."

97. See note 73 supra.


100. In Edwards v. St Louis-S.F.R.R., 361 F.2d 946 (7th Cir. 1966), the NRAB found that a carrier had not violated a provision of the collective bargaining agreement which stated that an employee sought to be discharged "shall be permitted to examine all witnesses and papers pertaining to the case" when it refused to permit the employee to confront his accuser, a passenger who had claimed that he had not given her a receipt for a five dollar fare. The NRAB held that the provision applied only to witnesses who were employed by or subject to the control of the carrier. The court made the following remarks about the merits of the award:

What is particularly offensive is that the carrier not only elected to accept the charge of its hitherto unknown customer and reject the denial of its long-standing employee, but that it imposed the harshest of all available sanctions under circumstances which made it extremely difficult, if not impossible, for the accused to test the credibility of his accuser. Indeed, it is hard to imagine a situation in which a carrier could act with greater distrust of a veteran employee or greater disdain for the conventional notions of fair play and still meet its obligations under grievance procedures prescribed by a collective bargaining agreement.

Id. at 952. Nevertheless, the court held the award unreviewable because it was not, as required by Gunther, "wholly baseless and completely without reason." Swygert, J., dissented, saying that the courts could set aside an award found to be, as he found this one to be, "arbitrary, capricious, and unreasonable." Id. at 958. In interesting contrast is Barrett v. Manufacturers Ry., 254 F. Supp. 376, 379 (E.D. Mo. 1966), which takes a skeptical view of Gunther and says that an award may be set aside if not "reasonably supported by the evidence and . . . grounded upon a correct interpretation of the law." The award was enforced. See also Kemp v. Atchison, T. & S.F. Ry., 368 F.2d 722 (5th Cir. 1966).

101. In Brotherhood of R.R. Signalmen v. Southern Ry., 254 F. Supp. 564 (M.D.N.C. 1966), the carrier had employed outsiders to do signal installation work. The Signalmen sued to enforce an NRAB award of fourteen dollars in favor of two employees who, according to the contract, were among those employees having the exclusive right to perform the work. The court reduced the damages to one dollar (plus a twenty-five dollar attorney's fee) upon the ground that the two employees, who had worked a full day on the day in question, had suffered no monetary loss. Accord,
evade the *Gunther* rule of unreviewability. Yet a recent case¹⁰² reversed the determination of a district court that a money award for lost time should be reduced by the employee's earnings in other jobs while wrongfully held out of service by the railroad. In holding, without explanation, that the *amount* of a money award may be changed only if "wholly baseless and completely without reason," this case appears to have misapplied the *Gunther* rule.

**Review of system and special boards:** The awards of system boards and special boards are generally unreviewable. Agreements establishing such boards usually provide that their awards are "final and binding" (without the money award exception),¹⁰³ and the authority for enforcement is the general jurisdictional statutes¹⁰⁴ rather than subsection (p) with its troublesome language.¹⁰⁵ The courts are more willing to interpret "final and binding" to mean "unreviewable" where the language is that of the parties instead of the statute,¹⁰⁶ even though the Supreme Court has said that, at least in the case of airline system boards, the statute imposes a duty upon the parties to include such language in the system board agreement.¹⁰⁷

**The 1966 Amendment: Congressional Approval of Judicial Legislation**

The new statutory provisions on NRAB review were introduced into Congress before the *Gunther* decision but enacted after it. In the hearings in the House before *Gunther*, even the carriers conceded that de novo review was unnecessary and that limited review should be equally available,¹⁰⁸ and the unions insisted upon complete unreviewability for both sides.¹⁰⁹ The decision in *Gunther* supported the unions' contention, and


103. See 1966 Senate Hearing 64-65; 1965 House Hearings 141-49.
106. E.g., Arnold v. United Air Lines, 296 F.2d 191 (7th Cir. 1961); Woolley v. Eastern Air Lines, 250 F.2d 86 (5th Cir. 1957); Majors v. Thompson, 235 F.2d 449 (5th Cir. 1956).
107. International Ass'n of Machinists v. Central Airlines, 372 U.S. 682, 694 (1963) (dictum) (emphasis in original): There may be, for example, any number of provisions with regard to the finality of an award that would satisfy the requirements of [Railway Labor Act § 204, added by 49 Stat. 1189 (1936), 45 U.S.C. § 184 (1964)] but we are quite sure that *some* such provision is requisite to a § 204 contract and that the federal law would look with favor upon contractual provisions affording *some* degree of finality to system board awards. . . .
108. See, e.g., 1965 House Hearings 249.
109. *Id.* at 261.
they relied upon it in the later Senate hearing.

What finally emerged from this debate is a statute which provides for the first time a procedure for judicial review and which—paradoxically—limits review to cases in which either party wishes to have an award set aside "for failure of the division to comply with the requirements of this Act [i.e., the entire Railway Labor Act], for failure of the order to conform, or confine itself, to matters within the division's jurisdiction, or for fraud or corruption by a member of the division making the order."110

It does not appear that the statute makes any significant changes in the law as it stood after the Gunther decision. Of the grounds for review specified in the statute, the first clause, requiring compliance with the act, will permit the courts to continue to enforce such requirements as notice to third parties.111 The second clause, containing the phrase "the division's jurisdiction" may mean the "jurisdiction" of one division as opposed to that of another; or the phrase may refer to the subject-matter jurisdiction of the NRAB as a whole, which is defined as "disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."112 The latter construction is preferable in that it would permit the courts to review matters not required to be submitted to the NRAB (such as the statutory rights of a returning serviceman)113 but which have been determined by the Board as issues in a dispute otherwise within its jurisdiction. Review should be available in such a case, particularly if the party seeking review is not the party who elected to submit the dispute to the Board.

The statute provides that there shall be no other grounds for review, and thus by its express terms cuts off all review of the merits. In this respect it appears on its face to go beyond the dictum in Gunther that the courts might set aside an award that is "wholly baseless and completely without reason." Congress, however, was as unwilling as the Supreme Court to assume that there could never be a situation in which review would be appropriate. The Senate Labor Subcommittee said in its report:

The committee gave consideration to a proposal that the bill be amended to include as a ground for setting aside an award "arbitrariness or capriciousness" on the part of the

111. See note 52 supra.
113. See note 25 supra.
Board. The committee declined to adopt such an amendment out of concern that such a provision might be regarded as an invitation to the courts to treat any award with which the court disagreed as being arbitrary or capricious. This was done on the assumption that a Federal court would have the power to decline to enforce an award which was actually and indisputedly [sic] without foundation in reason or fact, and the committee intends that, under this bill, the courts will have that power.114

This passage is itself an "invitation to the courts" to review awards, although the language of the statute is—at long last—clear and unambiguous. Without belaboring the distinction between "wholly baseless and completely without reason" and "actually and indisputedly without foundation in reason or fact,"115 it may be said that the review provisions of P.L. 456 do no more than (1) restate the law developed by the courts from 1934 to 1965 and (2) bring "money awards" within the same rules.

Although the statute at last spells out the substantive grounds for review, its technical difficulties have not been entirely eliminated. The "disparity of review" arose not because Congress so intended in 1934, but because the technicalities of the statutory language permitted the question of review to be raised only collaterally, and in two very different types of cases,116 rather than directly. Mindful of this mistake, the draftsmen in 1966 have provided that either party may file a petition for review in a district court.117 However, even under the new language of sub-

115. As to whether either of these is a practical standard, see note 100 supra.
116. See text following note 53 supra.
(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of the award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.
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section (p),\textsuperscript{118} review is still available to the carrier in an employee's enforcement suit. Consequently, even though the grounds for review are the same in both proceedings, some procedural difficulties may develop. If an award is rendered in favor of an employee and the carrier refuses to comply, the employee must seek to enforce it under subsection (p) as before. The railroad, if it feels that the award should not be enforced because it is reviewable under the new grounds for review, can seek to have the award set aside in the enforcement proceedings, but it may prefer to litigate the matter by bringing its own petition for review and avoid the possibility of paying the employee's attorney's fees under subsection (p). Consequently, a troublesome situation may arise when the railroad files a petition for review and the employee simultaneously files an enforcement suit in the same court or in a different court.\textsuperscript{119} The new law's substantive restrictions on review will minimize the number of awards as to which district judges can differ in their views on reviewability. Nevertheless, this opportunity for forum-shopping should have been eliminated by making the petition for review the only way to obtain review on any grounds, with enforcement available as a matter of right if the carrier's petition for review has not been sustained or if the carrier has not filed a petition for review within a certain time.

Another problem of construction arises where the Board has denied an employee's claim. In filing a petition for review, the employee wants more than a mere "setting aside" of the award; he wants the relief sought unsuccessfully before the Board. Although the court has "jurisdiction" to "remand the proceeding to the Board," it does not appear on the face

\textsuperscript{118} Subsection (m), set forth in note 57 supra, is amended by striking out the phrase "except insofar as they shall contain a money award." Subsection (p), set forth in note 71 supra, is amended by substituting "shall be conclusive upon the parties" for "shall be prima facie evidence of the facts therein stated" and by adding the following language at the end:

\textit{Provided, however,} That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the division's jurisdiction, or for fraud or corruption by a member of the division making the order.


\textsuperscript{119} Subsection (q) provides that the petition for review may be filed "in any United States district court in which a petition under paragraph (p) could be filed." Subsection (p), set forth in note 72 supra, provides for employees' enforcement proceedings in "the district in which he [the employee] resides or in which is located the principal operating office of the carrier, or through which the carrier operates." Only the employee could bring an action under subsection (p) and the broad venue provision was for his benefit. On the other hand, either party may file a petition for review under subsection (q), and the incorporation by reference of subsection (p)'s venue provisions may produce unwanted results in that the language clearly requires an individual employee or his union to contest petitions for review in any district in which the railroad operates.
of the statute that the court may make any final disposition of the matter. Since one of the main purposes of the statute is to prevent unnecessary delay in deciding minor disputes, a district court which has had all the facts before it in a review proceeding should be empowered to make a final disposition of the controversy.

The Rationale of Unreviewability

Of the few administrative agencies whose decisions are unreviewable, most deal with relations between the government and citizens. Of the agencies concerned with controversies between private parties, only in the case of the NRAB have the courts and Congress made review of the merits completely unavailable.120

The most striking feature of the law of NRAB reviewability is the absence from the court decisions of the traditional distinction between "questions of law" and "questions of fact."121 The great majority122 of NRAB awards turn on the construction of a contract, which is commonly regarded as a question of law123 and as such subject to close judicial scrutiny. The Supreme Court has not hesitated to set aside contractual interpretations by other administrative agencies.124 Two factors account for the courts' failure to apply the law-fact distinction in NRAB judicial review cases. First, to apply it would frustrate the primary congressional purpose125 in creating the NRAB, which was to provide an agency

120. The following discussion assumes that the question of judicial review is a neutral one, i.e., that if review is equally available to carrier and union the advantages of any particular rule of judicial review accrue equally to both sides. However, it is clear from the legislative history of P.L. 456 that the unions opposed judicial review for either side and that the carriers, although conceding the inequities of the "disparity of review," were in favor of eliminating it by extending the right of de novo review to the employee. See, e.g., 1966 Senate Hearing 25-29, 124-32; 1965 House Hearings 248-61. Inssofar as this implies that the Board is more favorable to labor than the courts, P.L. 456 did not result from a congressional determination of some fine points of administrative law but from a political choice.

121. See generally 4 DAVIS, ADMINISTRATIVE LAW § 30.02 (1958).


123. See 3 CORBIN, CONTRACTS § 554 (1960) to the effect that the construction of a contract, although analytically a "question of fact" in that it involves determining the intent of the parties, is ordinarily regarded as a "question of law" because it is determined by the court rather than by the jury.


125. Professor Jaffe takes the position that the question of judicial review is essentially one of purpose, i.e., whether, in the light of the objectives sought to be realized in a particular administrative scheme, Congress would have intended the question sought to be reviewed to be committed to a court or administrator. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 569-75 (1965); Jaffe, Judicial Review: Question of Law, 69 HARV. L. REV. 239, 261 (1955). For a reply, see 4 DAVIS, ADMINISTRATIVE LAW § 30.07 (1958). Applied to the NRAB situation, the Jaffe approach would call for the denial of review in all situations involving contract interpretation unless there is present some extraneous issue not within the objectives sought to be achieved by congressional creation of the Board.
to decide "disputes growing out of . . . the interpretation or application of agreements." 128 Second, it has been stated that the basis of the law-fact distinction is the comparative competence of courts in deciding questions of law and of agencies in deciding questions of fact; 127 if it is true that "insofar as the questions of law involve interpretation of the parties' contracts, the Board is probably a good deal more competent to decide the questions well," 128 the reason for the distinction disappears. The courts have been receptive to the second argument and have deferred to the Board's expertise to such an extent that the law-fact dichotomy has been forsaken and the concept of administrative expertise has become the cornerstone of the rule of complete NRAB unreviewability. The Supreme Court has been particularly liberal in its estimate of the Board's expertise: because "provisions in collective bargaining agreements are of a specialized, technical nature calling for specialized, technical knowledge in ascertaining their meaning and application," 129 the Court has chosen to leave undisturbed the decisions of a tribunal which is "peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world" 130 and whose members are "in daily contact with workers and employers" 130 and know "the industry's language, customs, and practices." 130

The fault with the administrative expertise rationale is that the conflicts inherent in the Board's bipartisan composition often prevent expertise from coming to the fore. The Board often decides cases by compromise rather than upon the merits, and the rights of the parties in a case may be sacrificed as the opposing factions on the Board try to maintain a balance between awards favoring carriers and those favoring unions. 133 The frequency of deadlocks 134 and the lack of uniformity and stare decisis 135 in NRAB decisions evidence this. Unfortunately the ex-

127. See LANDIS, THE ADMINISTRATIVE PROCESS 123-55 (1938). Professor Davis asserts that the law-fact distinction has become merely a means of stating results already reached by analysis of the relative expertness of the court or the agency to decide a particular question. "The Supreme Court commonly holds that because of such practical considerations as the expertness of an agency or its staff, a question of what decision to make on undisputed or established facts is a question of fact and not a question of law." 4 DAVIS, ADMINISTRATIVE LAW § 30.03 (1958) (emphasis in original).
131. Ibid.
132. Ibid.
134. See note 46 supra and accompanying text.
135. See note 44 supra and accompanying text.
pertise on the Board is more often the expertise of the politician or the advocate than that of the impartial administrator.

A better justification of NRAB unreviewability can be found outside the Railway Labor Act. To an ever-increasing extent, disputes of the type with which the NRAB is concerned are being settled in other industries by private arbitration.\(^{136}\) The *Steelworkers Trilogy*\(^{137}\) has made it clear that national labor policy favors arbitration, and that judicial review of an arbitrator's award is severely limited. It was strongly urged upon Congress\(^{138}\) that the same rule should obtain in the case of the NRAB.

In many respects the analogy is compelling. The similarity between the types of cases decided by the NRAB in the railroad industry and by private arbitrators elsewhere is so marked that it has often been urged that the NRAB be abolished and that private arbitration take its place.\(^{139}\) The same advantages are gained from the denial of NRAB review as are gained from the denial of review of arbitration: elimination of delay, relief of the burden upon the courts, low cost, and the psychological benefits of allowing labor and management to settle their own troubles\(^{140}-at\)


138. Among the many union spokesmen who made this point was a representative of the Railway Labor Executives Association who remarked:

[T]he limited judicial function provided for in the bill is in accordance with that generally prevailing with respect to arbitration awards, and that is what the Railroad Adjustment Board is: it is in [sic] arbitration board.

1966 Senate Hearing 25.

139. [T]here seems little reason for the public to subsidize grievance arbitration on the railroads. It may be noted that the airlines, whose operations fall generally within the provisions of the Railway Labor Act, have been encouraged under the Act to develop their own grievance machinery and have done so. There is no good reason why the railroads and their unions should not also be required to set up machinery of their own making. If experience in other industries is any guide, this would lead to a swifter and more responsive grievance procedure. It would thereby serve the public interest and place the burden for their own affairs on the parties.

140. But see the remarks of Mr. Justice Reed in *Slocum v. Delaware, L. & W.R.R.*, 339 U.S. 239, 253 (1950) (dissenting opinion):

Our duty as a court does not extend to a determination of the wisdom of putting a solution of industry problems into the hands of industry agencies so far as the Constitution will permit. Some may deem it desirable to weld various industries or professions into self-governing forms completely free from judicial intervention. This desire may spring from a conviction that
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least in cases of the interpretation of existing agreements where there are involved no questions of national labor policy—without interference from the courts. Nevertheless, it is ill-considered to assert, as did the House Commerce Committee, that “since the NRAB is an arbitration tribunal, in the committee’s opinion all of the awards rendered by the Board should be complied with.” The analytical foundation of the unreviewability of arbitration has been that the parties have agreed to be bound by the award and that the arbitrator “is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept.” The NRAB, however, is such a tribunal; its function is not the type of arbitration involved in the Steelworkers Trilogy but compulsory arbitration. This point was made before Congress by the carriers, but without success.

Since Congress has expressed its clear intent to remove all minor dis-

experience and training in highly specialized fields give the members of a group that understanding and capacity which will enable them to govern their internal affairs better than would courts dealing with the generality of human relations and only occasionally with these specialized controversies. . . . [But] there is too much interrelation and interdependence between such groups and the rest of the population.

141. But even in minor disputes there may be issues of public policy. “The nature of the Adjustment Board system has continued to advance the cause of craft unions and to penalize the railroads so that action on improved technology has had to be deferred.” Shils, Industrial Unrest in the Nation’s Rail Industry, 15 LAB. L.J. 81, 97 (1964).

142. H.R. REP. No. 1114, 89th Cong., 2d Sess. 15 (1966). “[B]ecause the National Railroad Adjustment Board has been characterized as an arbitration tribunal by the courts, the grounds for review should be limited to those grounds commonly provided for review of arbitration awards.” S. REP. No. 1201, 89th Cong., 2d Sess. 3 (1966). The judicial characterization referred to is the Supreme Court’s statement that “there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field. Our reading of the Act is therefore confirmed, not rebutted, by the legislative history.” Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 39 (1957). When the 89th Congress must rely on the 1957 Supreme Court’s interpretation of what the 73d Congress had in mind concerning the NRAB, the ascendancy of circular reasoning is at hand. The Court’s remark has often been misapplied. Seen in the context of the Chicago River holding, it means that “arbitration” by the NRAB is “compulsory” in the sense that a strike is not a permissible alternative to the adjustment system. Some, however, have found support for unreviewability in the magic phrase “compulsory arbitration.” See, e.g., the remarks of the President of the Brotherhood of Railroad Signalmen at 1965 House Hearings 261: “The carriers’ proposal to make all awards of the Adjustment Board subject to a complete judicial review de novo on the merits is the complete opposite of a system of final and binding compulsory arbitration.” That arbitration is compulsory is, however, an argument in favor of judicial review, rather than against it; this point is made in the text at notes 143–44 infra.


144. “The governmental character of the Adjustment Board requires that its awards be subjected to different, more demanding standards of judicial review than those of arbitrating bodies that act under private agreements.” 1966 Senate Hearing 125 (memorandum submitted by National Railway Labor Conference).
putes from the courts even in the absence of prior agreement of the par-
ties, the question arises whether the seventh amendment forbids such
action. *Price* and *Day* are commonly cited as authority that it does not,
and although the majority in those cases did not discuss the issue, the
general tenor of the opinions indicates that any seventh amendment ob-
jections to the NRAB system have been rejected. Even more significant
is the *Gunther* opinion, in which the three Justices who dissented in *Price*
and *Day* on seventh amendment grounds—Warren, Black, and Douglas—
joined the unanimous Court, with Justice Black writing the opinion.

It appears clear that the Court, if faced with the necessity of spe-
cifically deciding the seventh amendment issue, would find the NRAB
review provisions constitutional. The seventh amendment guarantees
trial by jury only so far as that right “existed under the English common
law when the amendment was adopted.” Although the common law
recognized various suits upon a contract of employment, the types of
cases decided by the Board are not within the constitutional definition of
“suits at common law.” Unions, collective bargaining, seniority, juris-
dictional disputes, strikes, and indeed, even railroads, were unknown in
1791. The difference between railway labor minor disputes and the cases
contemplated by the seventh amendment is one of kind rather than of de-
gree. The Supreme Court has found modern labor controversies so dif-
ferent from ordinary litigation as to be exempt from the common-law
aversion to private arbitration; it would not be too great an extension
to recognize that such controversies were completely unknown to the
jurisprudence of the eighteenth century.

146. See notes 67-69 supra and accompanying text.
148. See Comment, Railroad Labor Disputes and the National Railroad Adjustment
149. A collective bargaining agreement “calls into being a new common law—the
common law of a particular industry or a particular plant.” United Steelworkers v.