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COMMENT ON RECENT DECISIONS

ADMINISTRATIVE LAW—RAILWAY LABOR ACT—DECLARATORY JUDGMENT—[Federal].—The dispute arose under a collective agreement made between the carrier, plaintiff, and two labor unions, which represented the employees, defendants. The carrier rejected the claim of its employees that they were entitled to do certain switchwork and declined to agree to a joint submission of the controversy to the National Railway Adjustment Board. But, as permitted by the Act, the employees submitted the dispute, whereupon the carrier appeared in the proceedings and made a defense on the merits. The proceedings terminated with an award in favor of the employees. Plaintiff now seeks by declaratory judgment both a new adjudication of its rights under the original contract and a declaration that the Board's award and order are void. Lack of due process is claimed in the failure of the Act to provide for an appeal. *Held*: Whether or not identical with the original controversy, this suit is essentially one to review the Board's award, and, as such, it cannot be maintained, because the Act provides for an exclusive remedy. *Washington Terminal Co. v. Boswell*.¹

In spite of the conspicuous amount of litigation passed upon by the National Railway Adjustment Board, its awards have come before the courts very rarely.² This is the first holding by a court of appeals that the statutory enforcement procedure of the Board's awards is of an exclusive character³ and that, therefore, the court lacks jurisdiction to entertain a suit for a declaratory judgment sought by a carrier which has been unsuccessful before the Board.⁴

The rules concerning the availability of declaratory judgments as a method of securing judicial review of administrative determinations cannot be identified properly with those concerning injunction. Declaratory relief cannot be denied merely by application of the equitable doctrine that no

1. (App. D. C., 1941) 124 F. (2d) 235. One judge dissented.

2. Garrison, *The National Railway Adjustment Board, a unique Agency* (1937) 46 Yale L. J. 566, at pp. 591-2: out of 1,616 awards handed down by the Board up to July 30, 1936, only 1 had been challenged before the courts.

3. On the ground that the statutory enforcement suit excludes any other form of judicial review of the Board's awards, injunction has been denied to third parties: *R. R. Yardmasters of N. A., Inc. v. Pittsburgh & Lake Erie R. R. Co.* (D. C., N. D. Ohio, E. D. 1940) 39 F. Supp. 876. *Contra*, *Nord v. Griffin* (C. C. A. 7, 1936) 86 F. (2d) 481, cert. den. (1937) 300 U. S. 673; *Brand v. Pennsylvania R. R. Co.* (D. C., E. D. Pa., 1938) 22 F. Supp. 569 (injunctive relief granted to third parties not notified in the Board's proceedings); *Stephenson v. New Orleans & N. E. R. R. Co.* (1937) 180 Miss. 147, 177 So. 509 (award disregarded as a nullity, because the Board lacked jurisdiction over the parties).

4. The court further states that, even if it had jurisdiction, it would deny the declaratory relief as a matter of discretion. That this is the holding of the decision is affirmed in Note (1942) 51 Yale L. J. 666, at p. 668.

injunction lies when the statutory remedy is still open.⁵ Although there is some broad language in the cases which would support the assimilation of declaratory judgments and injunctions, so far as their pre-requisites are concerned,⁶ these cases are based on a statute which expressly declares the statutory remedy provided for to be exclusive.⁷ It is, therefore, proper to limit their authority to the particular situation involved.⁸

The very purpose of the declaratory judgment is supplemental,⁹ and only when the existing statutory method of review is exclusive are the courts deprived of jurisdiction to grant declaratory relief.¹⁰ When the statutory proceeding is not expressly declared to be exclusive, the availability of the declaratory judgment becomes a problem of statutory construction.¹¹ This issue is the main one involved in the principal case. It was urged in the dissent that the enforcement procedure provided for in the Railway Labor Act is not exclusive of the declaratory relief for the carrier, because the contrary construction of the statute would raise serious doubts as to its constitutionality and therefore must be avoided if possible.¹² But this argument is not in line with the authorities. Enforcement suits satisfy the requirements of due process,¹³ for until the action is brought the defendant cannot "suffer."¹⁴ Provisions similar to those making the Board's award

5. As to injunction, *Myers v. Bethlehem Shipbuilding Corp.* (1938) 303 U. S. 41. Where the statutory remedy has been denied, jurisdiction to issue an injunction has been recognized in *Utah Fuel Co. v. N. B. C. C.* (1939) 306 U. S. 56 (injunction denied on the merits). This decision was criticised by *McAllister, Statutory Roads to Review of Administrative Orders* (1940) Cal. L. Rev. 129, 159-162. Curiously enough this decision is cited by the dissenting judge in the principal case as though it would support the exclusive statutory remedy.

6. *Bradley Lumber Co. v. N. L. R. B.* (C. C. A. 5, 1936) 84 F. (2d) 97, cert. den. (1936) 299 U. S. 559; *Newport News Shipbuilding Co. v. Schaffler* (1938) 303 U. S. 54. On the authority of these cases, *McAllister, Statutory Roads to Review of Administrative Orders* (1940) Cal. L. Rev. 129, states, at p. 167, that the declaratory judgment "has been unavailing in the face of a statutory review procedure."

7. *National Labor Relations Act* (1935) 49 Stat. 455, 29 U. S. C. A. §160(e).

8. Moreover no allegation of irreparable injury is required as a pre-requisite for the exercise of declaratory jurisdiction: *Nashville, C. & St. L. R. Co. v. Wallace* (1933) 288 U. S. 249, 264.

9. §274 (d) of the Judicial Code, as amended 28 U. S. C. A. §400; *Rules of Civil Procedure*, Rule 57: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

10. *Borchard, Declaratory Judgments* (2d ed. 1941) 342; cf. *Gellhorn, Administrative Law—Cases and Comments* (1940) 799.

11. *Borchard*, op. cit. supra, note 10, at 65.

12. *Washington Terminal Co. v. Boswell* (App. D. C. 1941) 124 F. (2d) 235, 276.

13. *Dalton Machine Co. v. Virginia* (1915) 236 U. S. 699, 701; *Thomas v. Dennis* (D. C. W. D. Wash. N. D. 1934) 8 F. Supp. 501, 502; *McDermott v. Bradford* (D. C. W. D. Wash. S. D. 1935) 10 F. Supp. 661, 664 (injunction denied). But see *Hill v. Wallace* (1922) 259 U. S. 44.

14. *F. T. C. v. Claire Furnace Co.* (1926) 274 U. S. 160, 174; *F. T. C. v. Maynard Coal Co.* (1927) 22 F. (2d) 873.

prima facie evidence¹⁵ have been declared to establish a mere presumption and not to abridge the right of trial by jury.¹⁶

The court's interpretation of the Congressional intent to make the enforcement proceeding exclusive rests on the following factors: (a) provision for a detailed plan of review; (b) the "unusual and highly important advantages" given by it to the employees; and (c) the need to avoid the "race of diligence" to the courts between employees suing to enforce the Board's award and the carrier seeking a declaratory judgment of its rights.¹⁷ The court also refers to the rule of "primary jurisdiction" as lending support to its conclusion.¹⁸

But these arguments have been greatly weakened by the decision in *Moore v. Illinois Central Railroad Co.*,¹⁹ handed down by the Supreme Court after the principal case had been argued. The decision there held that the Railway Labor Act did not "take away from the Courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in it."²⁰ The carrier which knows of the availability of independent judicial proceedings will probably race to the courts for a declaratory adjudication of its contractual rights,²¹ in order to deprive the employee of whatever advantages the Board's procedure and the subsequent enforcement suit had provided for him. The "primary jurisdiction" rule,²² if it can be invoked properly at all in the present situation, is certainly deprived of its main purpose, because a wholly judicial procedure is alternative to the administrative process.

15. Railway Labor Act (1934) 48 Stat. 1185, 45 App. U. S. C. A. §153, First, (p).

16. Cf. Federal Trade Commission Act (1914) 38 Stat. 722, 15 U. S. C. A. §§49, 50; Packers' and Stockyards Act (1921) 42 Stat. 168, 7 U. S. C. A. §222, and Interstate Commerce Act (1906) 34 Stat. 590, as amended by (1910) 36 Stat. 554 and (1920) 41 Stat. 491, 49 U. S. C. A. §16(1, 2). See under the Interstate Commerce Act, *Meeker v. Lehigh Valley R. Co.* (1915) 236 U. S. 412; *Montrose Oil Refining Co. v. St. Louis-San Francisco R. R. Co.* (D. C. N. D. Tex. 1927) 25 F. (2d) 750, 754, aff'd (C. C. A. 5, 1928) 25 F. (2d) 755, cert. den. (1928) 277 U. S. 598. See under the Railway Labor Act, *Cook v. Des Moines Union R. R. Co.* (D. C. S. D. Iowa, C. D. 1936) 16 F. Supp. 810. But see Note (1942) 51 Yale L. J. 666, 671: "By analogy to arbitration law, it may be argued that parties voluntarily invoking the jurisdiction of the Adjustment Board waive their right to judicial review of the merits of awards."

17. *Washington Terminal v. Boswell* (App. D. C. 1941) 124 F. (2d) 235, 240-242.

18. *Id.* at 251.

19. (1941) 312 U. S. 630.

20. *Id.* at 634.

21. See *Adams v. N. Y. Chicago & St. Louis R. Co.* (C. C. A. 7, 1941) 121 F. (2d) 808.

22. This term is here used in a broad sense because it usually indicates an administrative stage which must proceed judicial action. See Note (1938) 51 Harv. L. Rev. 1251; McAllister, *supra* note 5, and Berger, *Exhaustion of administrative remedies* (1939) 48 Yale L. J. 981, at 995, who identifies, for practical purposes, the rules of primary jurisdiction and of the exhaustion of administrative remedies.

These considerations make the first ground of the decision—that the enforcement suit is exclusive and that therefore the court lacks jurisdiction to entertain a suit for declaratory relief—somewhat problematic. Yet the factors relied upon by the court seem to be a proper basis for denying declaratory judgment in the discretion reserved to the courts by the Declaratory Judgment Act, which represents the second ground of the present decision.

P. B. R.

CONSTITUTIONAL LAW—RIGHT OF COUNSEL—RIGHT TO EFFECTIVE COUNSEL—[United States].—The petitioner, an assistant United States Attorney, was indicted on a charge of conspiracy to defraud the government. At the beginning of the trial, the court suggested that the petitioner's attorney represent a co-defendant, Kretske, whose attorney had withdrawn from the case. When petitioner objected, the court withdrew its suggestion. However, petitioner's attorney, after consulting with Kretske, suggested that he be appointed to represent the latter. The trial court thereupon appointed him attorney for Kretske. Petitioner did not object during the trial which lasted a month. Fifteen weeks after the trial had ended, he appealed on the ground that the court's action without his approval had denied him the right to counsel guaranteed by the Sixth Amendment. The appeal was denied and the petitioner brought writ of certiorari to the Supreme Court. *Held*: sharing of counsel without express consent violated the Sixth Amendment. *Glasser v. United States*.¹

The importance of the right to counsel as shown by the historical development in the English common law and in American colonial history² insured its inclusion as a fundamental right guaranteed by the Bill of Rights.³

1. (1942) 62 S. Ct. 457, 86 L. Ed. 405. (Mr. Justice Frankfurter and Chief Justice Stone dissenting.)

2. In *Powell v. Alabama* (1932) 287 U. S. 45, 61, the majority opinion contains an interesting discussion of the development of the right to counsel in the American colonies, and cites the following authorities: Zephaniah Swift, *A System of the Law of Connecticut*, (1795-1796) Vol. II, Bk. 5, "Of Crimes and Punishments," c. XXIV, "Of Trials," 398-399; Del. Const. (1776) Art. 16, Ga. Const. (1793) Art. 3, §8, Md. Const. (1776) Art. 19, Mass. Const. (1780) Part I, Art. 12, N. H. Const. (1784) Part I, Art. 15, N. Y. Const. (1777) Art. 34, Pa. Const. (1776) Art. 9; North Carolina, Session Laws 1777, c. 115, §85 (North Carolina Rev. Laws, 1715-1796, Vol. 1, 316), South Carolina, Act of August 20, 1731, §XLIII Grimke, *South Carolina Public Laws*, (1682-1790), 130 (right to counsel assured in capital offenses), Va., Chap. VII §III, *Laws Of Va.*, 8th Geo. II, 4 Hening, *Stat. at L.*, 404 (petitioner in capital offenses allowed counsel on his petition to court), "An Act Declaratory of Certain Rights of the People of the State" s. 6 *Rev. Pub. Laws*, Rhode Island and Providence Plantations, (1798).

3. In *Powell v. Alabama* (1932) 287 U. S. 45, the Supreme Court seemingly placed the right to counsel, as it might arise in state cases, within the protection of the due process clause of the Fourteenth Amendment. This action was in accord with the practice of placing the "fundamental" rights contained in the first eight Amendments to the Constitution within the scope of the Fourteenth Amendment. However, in *Betts v. Brady* (June 1, 1942)