Protection for Employees Adversely Affected by Railway Mergers: Norfolk & Western Railway Co. v. Nemitz

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When two railway carriers merge, there is a tendency toward contraction of existing lines or consolidation of closely competitive routes. Inherent in such post-merger activity is the potential for damaging the livelihoods of many railroad workers. Consequently, section 5(2)(f) of the Interstate Commerce Act (ICA) provides statutory protection for persons employed by merging railway carriers.[1] This protection is manifested when, as a part of its requisite merger approval, the Interstate Commerce Commission (ICC)[2] issues a protective order pursuant to section 5(2)(f). The protective order often provides future compensatory protection for employees who may suffer hardships after the consummation of the merger.

The issuance of such a protective order was a precipitating factor in the case of *Norfolk & Western Railway Co. v. Nemitz*, recently decided by the United States Supreme Court.[3] *Nemitz* presents an excellent vehicle for assessing the effectiveness of the protective aspects of the ICA.[4] This comment will analyze *Nemitz* and will discuss the impact of pro-

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1. 49 U.S.C. §§ 1 to 1542 (1970). Section 5(2)(f) provides:

> As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

For a discussion of the economics of railroad mergers, see Note, *Railroad Consolidation: A Diseconomic Panacea*, 56 IOWA L. REV. 362 (1970).

2. *See* Morton, *Carrier Consolidation*, 30 I.C.C. PRAC. J. 425 (1963).

3. 92 S. Ct. 185 (1971).

4. 49 U.S.C. § 5(2)(f) (1970).

tective orders on the capacity of labor and management to enter into voluntary agreements to protect adversely affected employees. Conversely, an examination will be made to ascertain whether such voluntary agreements, if propounded prior to a merger, will displace the statutory obligation of action imposed on the ICC by section 5(2)(f). Intertwined with the issue of statutory obligation is the determination of the validity of jurisdiction based upon the ICC's protective order, and the effect of the exhaustion of administrative remedies doctrine on the assumption of jurisdiction by the district court. Finally, the possibility that the exercise of jurisdiction by the courts to evaluate voluntary agreements may retard both the incidence and quality of free collective bargaining will be explored.

JURISDICTION

In 1961, application for approval of the merger between Norfolk and Western Railway Co. (N&W) and New York, Chicago, and St. Louis Railroad Co., and the purchase by N&W of the Sandusky Line of the Pennsylvania Railroad was filed with the ICC.[5] Prior to merger approval by the ICC, the N&W and the Brotherhood of Railroad Trainmen, a labor organization representing employees of the carriers involved, entered into an agreement designed to protect employees who might be adversely affected by the merger. Under the terms of the agreement, employees previously employed on the Sandusky Line were offered the option of continuing with the Pennsylvania Railroad or working for the N&W on the newly-purchased Sandusky Line. The agreement provided that employees electing Sandusky Line employment were to receive supplementary compensation[6] so that their post-merger earnings would be at least equal to their earnings for the 12 months immediately preceding the merger. The computation of these earnings emerged as the central issue in *Nemitz*.

After the issuance of the protective order by the ICC,[7] the N&W and the Brotherhood of Railroad Trainmen entered into an implementing agreement limiting supplementary compensation to excess earnings for the preceding 12 months from the Sandusky Line only.[8] This limitation

5. The Sandusky Line was particularly important to the Norfolk and Western (N&W) merger plans, for it represented the final north-south link in the N&W's consolidation of trackage acquired from the Nickel Plate and Pennsylvania Railroads. Helmetag, Jr., *Railroad Mergers*, 54 VA. L. REV. 1493, 1512 (1968).

6. Norfolk & W. Ry. v. Nemitz, 92 S. Ct. 185, 187 (1971).

7. The protective order had incorporated portions of the prior agreement including provisions dealing with compensation for adversely affected employees. Defendant carrier contended that, as to the employees, the Interstate Commerce Commission (ICC) failed to take any action in its protective order, citing certain portions of the ICC hearing which determined the feasibility of the merger. This contention was premised on the ICC's determination that no new conditions need be imposed in light of the satisfactory terms of the voluntary agreements.

8. The limitation of the earnings base to the Sandusky Line only was sig-

was to apply irrespective of any work the electing employee had done on other sections of the Toledo (Ohio) division, which included the Sandusky Line.[9] The union's rationale for agreeing to such an earnings base is unclear.

Plaintiffs sued defendant railway in the Federal District Court for the Northern District of Ohio, seeking to enjoin performance of the second voluntary agreement, and claiming damages in an amount equal to excess earnings for the previous 12 months on the entire Toledo district. Defendants moved to dismiss for lack of subject matter jurisdiction, but the motion was denied on the ground that an action to enforce an ICC order was appropriately brought in federal court.[10]

Contesting the jurisdiction of the district court, the defendant carrier argued that resolution of such a dispute is within the purview of the National Railroad Adjustment Board[11] pursuant to section 153 of the Railway Labor Act (RLA).[12] This argument is indicative of the conflict between the RLA and the ICA in the area of jurisdiction over labor disputes precipitated by carrier mergers.[13] Defendant urged that the general concepts enumerated in a non-merger case, *Elgin Joliet & Eastern Railway v. Burley*,[14] should apply. *Elgin* held that a minor dispute, involving interpretation of an existing agreement, had to be resolved through a two-tiered process, the first step being the utilization of union grievance procedures. If satisfactory results are not achieved through the union, employees must then attempt to persuade their union to submit the grievance to the Adjustment Board.[15]

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nificant because it was a seasonal line that only operated during the warmer months of the year. The aggrieved employees maintained that they were entitled to supplementary compensation computed upon an earnings base that included compensation earned during the 12 months for work on other lines during the off season.

9. Norfolk & W. Ry. v. Nemitz, 92 S. Ct. 185, 189 (1971).

10. Nemitz v. Norfolk & W. Ry., 287 F. Supp. 221, 230-31 (N.D. Ohio 1968). The jurisdictional provision relied upon by the court, 49 U.S.C. § 9 (1970), provides in part:

> Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may . . . bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction. . . .

11. The National Railroad Adjustment Board will be hereinafter referred to as the Adjustment Board.

12. 45 U.S.C. § 153(I)(i) (1970). The Act is codified at 45 U.S.C. §§ 151-188 (1970).

13. Exclusive primary jurisdiction over interpretation of agreements, derived from section 153(I)(i), was held to rest in the Adjustment Board to the exclusion of judicial jurisdiction in Slocum v. Delaware, L.&W.R.R., 339 U.S. 239 (1950); *accord*, Gunther v. San Diego & A.E. Ry., 382 U.S. 257 (1965).

14. 325 U.S. 711 (1945). *Elgin* indicates that Congress has differentiated between two classes of controversies resolvable under the RLA: major and minor disputes. Major disputes are related to the formation of collective agreements, and seek to formulate new or amended contracts, while minor disputes seek to apply or interpret an existing agreement. Defendant carrier was attempting to categorize the dispute as minor and thereby subject it to the terms of the RLA.

15. *See* Order of Ry. Conductors v. Southern Ry., 339 U.S. 255 (1950); *cf.*

Defendant's motion to dismiss rested on the contention that plaintiff's failure to exhaust the RLA remedies precluded acquisition of jurisdiction by the court.[16] This argument was further buttressed by the exclusive jurisdiction of the RLA in grievance resolutions. The Supreme Court verified this preeminence in *Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.*, in which the RLA was viewed as "a mandatory, exclusive, and comprehensive system for resolving grievance disputes."[17] This decision, however, did not involve a merger, thus limiting its persuasiveness in disputes arising out of railway mergers.

The theory defendant relied upon has been generally termed the doctrine of exhaustion of administrative remedies. The doctrine is directly opposed to the immediate jurisdictional right provided employees by section 9 of the ICA in that it requires that employees attempt to resolve their grievances at all administrative levels before they may bring suit. This bears on the jurisdiction issue insofar as jurisdiction may not properly be taken by the courts until enumerated administrative remedies have been attempted. Resolution of the conflict between the ICA and the RLA is therefore necessary to determine the ultimate effect that an ICC protective order will have upon this doctrine. If the ICA prevails over the RLA, the two-tiered procedure required by the RLA may be avoided, allowing immediate redress in the courts.

In addition to favoring the RLA in grievance resolutions, the Supreme Court has supported the use of the Adjustment Board rather than the courts for the resolution of minor disputes.[18] Accordingly, jurisdiction by the *Nemitz* court was improperly assumed unless ICA sections 5(2)(f) and 9 provide a statutory exception to the exclusive jurisdiction of the Adjustment Board.

Precedent for withholding jurisdiction from the Adjustment Board in railway merger cases can be found in *Chicago & Northwestern Railroad v. Brotherhood of Locomotive Engineers.*[19] *Northwestern* involved a direct confrontation between a proceeding required by the RLA and an ICC incorporation in its merger approval of portions of a union-management voluntary agreement. The *Northwestern* court found that the ICA took precedence over the RLA on two alternative grounds. First, congressional intent to grant jurisdiction over labor disputes to the ICC instead of to the Adjustment Board was manifested in the legislative history of section 5(11).[20] Alternatively, the court found the wording of ICA sec-

Eastern Airlines, Inc. v. Flight Eng'rs Int'l Ass'n, 340 F.2d 104 (5th Cir. 1965). *See also* Kroner, *Minor Disputes Under the Railway Labor Act: A Critical Appraisal*, 37 N.Y.U.L. REV. 41 (1962).

16. Brief for Defendant at 43, Nemitz v. Norfolk & W. Ry., 287 F. Supp. 221 (N.D. Ohio 1968).

17. 373 U.S. 33, 38 (1963).

18. *See* Gunther v. San Diego & A.E. Ry., 382 U.S. 257 (1965). *But see* Gibson v. Missouri Pac. R.R., 314 F. Supp. 1211 (E.D. Tex. 1970).

19. 202 F. Supp. 277 (S.D. Iowa 1962).

20. 49 U.S.C. § 5(11) (1970). Section 5 was initially proposed to facilitate

tion 5(11), which provides in part that "the authority conferred by this section shall be exclusive and plenary" to be indicative of the predominance of the ICA. That section further provides:

> [T]he provisions of this section . . . are relieved from the operation of the antitrust laws and of all other restraints, limitatains, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. . . .[21]

Carriers proceeding under the ICA are thus presumably unable to utilize the RLA since the ICA's pre-eminence is over all other federal laws, including the RLA.[22] It therefore appears that the district court was correct in holding that the failure to exhaust RLA procedures is not a bar to its assumption of jurisdiction. A further jurisdictional hurdle, however, was the problem of the source of the plaintiff's rights. If the rights did not arise as a result of ICC action pursuant to the ICA, but instead arose as a result of the private union-management agreement, the RLA remedies would apply rather than those of the ICA.[23]

Identification of the source of the plaintiffs' rights as either the voluntary agreement or the ICC order was a major issue. The defendants in *Nemitz* maintained that plaintiffs' rights flowed from the collective bargaining agreement despite the ICC's acts and argued that redress must be sought within the confines of the *Elgin* decision.[24] The ICC concurred in its amicus brief filed with the Supreme Court, stating: "The lower courts had no jurisdiction to entertain the present suit since the employees' rights stemmed from a private agreement and not a com-

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mergers of carriers but was nearly emasculated by the proposed Harrington Amendment. That amendment would have barred any merger if such transaction would have resulted in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees. This proposal's potential for preventing consolidations was noted and the measure was defeated, evidencing a congressional recognition of the importance of unhampered ICC power to evaluate proposed mergers. 86 CONG. REC. 10178-80 (1940).

21. 49 U.S.C. § 5(11) (1970). *See also* Beverly, *The Consideration of Antitrust Policy in Determination of Mergers and Consolidations of Railroads Under Section 5 of the Interstate Commerce Act,* 29 I.C.C. PRAC. J. 169 (1961) (the ICA is freed from the restraints of the Sherman Act).

22. If Congress had intended for the RLA to apply concurrently with the ICA, the ICA would specifically so provide. For example, the Emergency Railroad Transportation Act of 1933, ch. 9, § 10, 48 Stat. 211, 215, stated: "[N]othing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act." The absence of such a clause in the ICA is a strong indication that the ICA suspends the operation of the RLA.

23. If no action were taken by the ICC, no basis for judicial review would be preserved for utilization under 28 U.S.C. § 1336 (1970).

24. See text accompanying notes 14-15 *supra.*

mission order."[25]

On the other hand, if the incorporation of the voluntary agreement by the ICC was recognized as the basis of the plaintiffs' rights, the ICA would apply through its expression of plenary authority in section 5(11) and immediate utilization of the courts for redress would be appropriate. Using syllogistic reasoning, the district court adopted this approach. First, it stated that section 5(2)(f) requires that the merger be approved by the ICC to insure sufficient employee protection. Then it recognized that since approval would be conditioned upon the incorporation of the prior agreement, the plaintiffs' rights would emanate in effect from the merger approval by the ICC.[26]

The incorporation of the voluntary agreement in *Nemitz* indicates that it was clearly a case of mere ratification by the ICC.[27] Although no new rights were created by this incorporation, the district court held that the basis of plaintiff's rights was the protective order and assumed jurisdiction over the dispute.

In its holding, however, the court did not view this decision as a choice between alternative possibilities:

> This Court is unable to see what legal effect should be attached to the *source* of the conditions imposed by the Commission pursuant to the mandate of Section 5(2)(f). Whether the protective terms have their genesis in other merger cases, or prior agreements between the parties subject to the order of approval about to be entered by the Commission, should make no difference; the provisions set forth or incorporated by reference in the original I.C.C. order form the basis of the employees' rights.[28]

The court thus entirely rejected the idea that the source of the plaintiffs' rights should be determinative of the jurisdictional question.

The language of section 5(2)(f) supports the conclusion reached by the district court. Its first two sentences, uncompromising in tone, afford a basis for an analysis of the Commission's role in this area:

> As a condition of its approval . . . the Commission *shall require* a fair and equitable arrangement to protect the interests of railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during a period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment . . . .[29] [Emphasis added.]

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25. Brief for ICC as Amicus Curiae at 7, Norfolk & W. Ry. v. Nemitz, 92 S. Ct. 185 (1971).
26. Nemitz v. Norfolk & W. Ry., 287 F. Supp. 221, 229 (N.D. Ohio 1968).
27. *See* note 36 *infra.*
28. 287 F. Supp. at 229.
29. 49 U.S.C. § 5(2)(f) (1970).

In addition to the mandate apparent in the first sentence, the specific 4-year period of protection required by the second sentence further supports the conclusion that the ICC has a continuing obligation to act despite the presence of a voluntary agreement.[30] The 4-year proviso requires protection for that period as a minimum, but the Commission, in the interests of the statute's "fair and equitable arrangement,"[31] can require protective conditions beyond the 4-year minimum.[32] Implicit in this determination is the concept that the ICC must play an active role in providing protection for employees. Whether the ICC will utilize this option is difficult to ascertain,[33] but it clearly provides an avenue for a more active role by that agency.

Moreover, existing case law suggests that the Commission must actively provide or ensure rights for employees adversely affected by a merger.[34] It is not clear, however, whether such a mandate indicates that the Commission is the wellspring of the controverted rights. A logical distinction can be drawn between those situations in which the Commission actively participates in the establishment of protective measures and those in which the Commission merely ratifies a prior voluntary agreement. Where the Commission promulgates new or additional protective measures in fulfilling its statutory duty, immediate jurisdiction by the courts would seem to be appropriate since the rights sued upon undoubtedly derive from the Commission's order. On the other hand, when the Commission merely ratifies a prior agreement, the genesis of the rights could arguably be the voluntary collective bargaining agreement. In the latter instance, enforcement procedures for the agreement become an issue, the alternatives being judicial enforcement or the procedures of the RLA. Since a distinction between the two situations appears feasible, an analysis is necessary to determine whether the district court's refusal in *Nemitz* to recognize such a distinction was proper.

The primary advantage of requiring an exhaustion of remedies as a by-product of the distinction is that it will tend to decrease judicial participation, thereby lessening the burden on the courts. Moreover, the Supreme Court has opposed judicial preemption in the past: "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties."[35]

30. Defendants in *Nemitz* subsequently argued at the appellate level that the specific legislative standards were imposed merely to insure that the ICC could not add to job reductions in merger situations. Brief of Appellant at 21, Nemitz v. Norfolk & W. Ry., 436 F.2d 841 (6th Cir. 1971).

31. 49 U.S.C. § 5(2)(f) (1970).

32. Railway Labor Exec. Ass'n v. United States, 339 U.S. 142 (1949). *But cf.* Erie R.R., 312 I.C.C. 185 (1960) (4-year proviso required only compensation, not continued employment, for the 4-year period).

33. *See, e.g.*, note 71 *infra.*

34. *See* Brotherhood of Maintenance Employees v. United States, 366 U.S. 169 (1961); Clemens v. Central R.R., 264 F. Supp. 551 (E.D. Pa. 1967), *rev'd on other grounds*, 399 F.2d 825 (3d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969).

35. American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951); *accord,*

The recognition that the Commission was not actually the creator of the rights in dispute[36] would seemingly require that controversies involving those rights be resolved through the exhaustion of remedies process. Such a determination would lead to the conclusion that assumption of jurisdiction where there had been mere ratification by the Commission and no exhaustion of administrative remedies would be an overextension of judicial authority.[37]

Although superficially logical, determination of the propriety of jurisdiction on the basis of the source of plaintiffs' rights is disadvantageous. First, if a prior voluntary agreement provides rights for part of the employees and the ICC order enumerates rights for others,[38] different methods of redress would have to be utilized by the groups. Those covered by the voluntary agreement would be required to pursue redress through the labyrinth of the RLA, while parties protected by the ICC would be permitted to seek relief directly in district court. The latter group of employees would be able to seek rapid injunctive relief and damages under section 9 of the ICA, while the former category would be confined to the RLA's two-tiered requirement, with no possibility of judicial review.[39]

More importantly, such a distinction runs counter to the supremacy of the ICA established by section 5(11), which states that the authority of the ICC should be "exclusive and plenary."[40] The importance of the grant of authority to the ICC to oversee new work alignments lies in the fact that unions are not required to accept new work rules or conditions under the RLA,[41] while the ICC's power to prescribe post-merger

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American Dredging Co. v. Local 25, Operating Eng'rs, 338 F.2d 837 (3d Cir. 1964); Platt v. Illinois Cent. R.R., 305 F.2d 136 (5th Cir. 1962); *cf.* Gray v. New Mexico Military Institute, 249 F.2d 28 (10th Cir. 1957).

36. For example, the following excerpt from the ICC decision to accede to Norfolk's merger application indicates the marked inaction of the ICC in fulfilling its section 5(2)(f) obligation:

> In view of the agreements mentioned, *no conditions need be imposed* under any authority granted herein for the protection of those employees covered by such agreements. [Emphasis added.]

Norfolk & W. Ry. and New York, C. & St. L. Ry. Merger, 324 ICC 1, 90 (1964).

37. The Seventh Circuit, while not rendering a decision on section 5(2)(f), determined that an analogous decision by the ICC was insufficient to grant jurisdiction in Chicago & N.W. Ry. v. Toledo, P.&W.R.R., 324 F.2d 936, 938 (7th Cir. 1963): "We hold that although it was necessary to obtain Interstate Commerce Commission approval of the 1957 agreement, this is not sufficient to confer jurisdiction upon the District Court."

38. This was the case in *Nemitz*, where the ICC imposed protective conditions for employees not covered by the original voluntary agreement promulgated in 1962. 436 F.2d at 846.

39. *See* Reynolds v. Denver & R.G.W.R.R., 174 F.2d 673 (10th Cir. 1949); *accord*, Aiello v. Indiana Harbor Belt R.R., 43 L.R.R.M. 2163 (N.D. Ill. 1958); Futhey v. Atchison T.&S.F. Ry., 96 F. Supp. 864 (N.D. Ill. 1951).

40. 49 U.S.C. § 5(11) (1970). *See* text accompanying note 22 *supra*.

41. The Railway Labor Act provides that no changes in conditions may take place unless they have been mutually acted upon. 45 U.S.C. § 156 (1970). Unions may evade this action requirement, by refusing to submit to arbitration, since section 157 of the Act only provides for arbitration upon agreement of the parties.

labor conditions would override that union alternative in the ICA context, thereby precluding unions from forestalling potential mergers. The vesting of ultimate authority in the ICC to resolve such labor problems therefore both facilitates mergers and protects affected employees. To allow a reactivation of the RLA, whether for a fraction of the affected employees or for the entire group, would clearly be a violation of the provisions of section 5(11) of the ICA. Hence, it seems that the district court's decision to disregard a distinction based on the source of rights was a proper one.

EXHAUSTION OF REMEDIES

Defendant in *Nemitz* appealed to the Sixth Circuit which affirmed the district court ruling, voiding the implementing agreement.[42] The court of appeals concluded that an implementing agreement could vary the terms of protection proffered by the ICC order but that rights emanating from the order could not be abridged. Additionally, the court determined that jurisdiction was properly assumed by the district court and that the RLA was inapplicable.[43]

The inapplicability of the RLA does not, however, signal the demise of the exhaustion of administrative remedies doctrine because the court also indicated that parties continue to be free to provide administrative remedies by agreement.[44] If the ICC, before issuing a protective order, approves the remedies enumerated in the voluntary agreement, those remedies must be exhausted before the courts can properly assume jurisdiction. The ICC's *laissez-faire* approach to voluntary agreements[45] indicates that most reasonable provisos setting forth administrative remedies

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Cf. Vernon, *Business Combinations and Collective Bargaining Agreements*, 19 CATH. U.L. REV. 1 (1969), for a discussion of whether a successor corporation is bound by a pre-existing collective bargaining agreement. *But cf.* Fishwick, *Railroad Mergers: An Appraisal*, 35 I.C.C. PRAC. J. 957 (1968).

42. The previous jurisdictional discussion arose in the first district court decision. Nemitz v. Norfolk & W. Ry., 287 F. Supp. 221 (N.D. Ohio 1968). It involved a denial of motions to dismiss by both parties which, since they were accompanied by exhibits and affidavits, were treated as motions for summary judgment. *See* FED. R. CIV. P. 12(b). Subsequently, both parties again moved for summary judgment. Nemitz v. Norfolk & W. Ry., 309 F. Supp. 575 (N.D. Ohio 1969). It was from the latter opinion, which merely reasserted the correctness of the prior jurisdictional holding, that the appeal to the Sixth Circuit was taken.

43. Nemitz v. Norfolk & W. Ry., 436 F.2d 841 (6th Cir. 1971). The court of appeals, in affirming, agreed that the ICC faces a continuing obligation to protect employees despite the existence of any prior voluntary agreements. It also refused to delineate between groups of employees on the basis of the "source of rights" concept. The Supreme Court agreed that the ICC's duty to protect employees is not vitiated by a prior accord. In so doing, it accepted the jurisdictional conclusions of the lower courts. Norfolk & W. Ry. v. Nemitz, 92 S. Ct. 185 (1971).

44. 436 F.2d at 848-50. The court found it necessary to deal substantively with the voluntary agreement's arbitration clause which had been incorporated into the ICC protective order. The court's treatment clearly evidences the vitality of the requirement of fulfilling all administrative remedies incorporated into the protective order prior to acquisition of jurisdiction by the court.

45. *See* text accompanying note 71 *infra.*

are likely to be approved. Remedies might thereby be provided that would postpone assumption of jurisdiction by the court. This postponement results from the proscription of assumption of jurisdiction by the courts until all enumerated administrative remedies have been exhausted.

The breadth of this freedom to contract for administrative remedies is undefined. An extreme possibility would be a contractual provision which incorporated the terms of the RLA. Assuming that the ICC would incorporate such in its merger approval, it seems unlikely that it would be effective to delay federal jurisdiction for several reasons. First, it seems doubtful that the Adjustment Board would assent to the desires of the contracting parties and add to its already heavy workload.[46] Moreover, the recognition of such a remedy is completely antithetical to the supremacy of the ICA over the RLA which was emphasized in *Nemitz*.[47] Accordingly, it is submitted that such an attempt would not be effective to circumvent the principles delineated in *Nemitz*.

It does appear, however, that an arbitration provision may be effective to delay district court jurisdiction. The ICC's protective order involved in *Nemitz* incorporated a clause stating that grievances "may be referred" to arbitration.[48] The clause is only relevant in a union-management context since individual employees do not have the right to invoke arbitration. If the arbitration clause is incorporated, the arbitration procedures become a required remedy which employees must attempt through their union before they may utilize judicial redress. *Republic Steel Corp. v. Maddox*[49] noted that employees seeking redress must utilize the agreed-upon contract grievance procedure, seeking relief initially through their union. If the union pursues the employee's grievance, fails to reach agreement, and invokes arbitration, the employee may not attempt a judicial remedy until arbitration is complete.

If the union refuses to pursue the employee's grievance, construction of the word "may" in the arbitration clause assumes importance. Use of this phraseology requires a judicial determination of whether arbitration is a mandatory or permissive remedy. Under the permissive view, arbitration is not required unless the union or management invokes it. If it is invoked, however, it must be exhausted before seeking redress in the

46. *Cf.* Kroner, *supra* note 15.
47. *See* text accompanying note 22 *supra*.
48. 436 F.2d at 848.
49. 379 U.S. 650, 652 (1965). The Court stated that "unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf." *See also* Arnold v. Louisville & N.R.R., 180 F. Supp. 429 (N.D. Tenn. 1960), *aff'd sub nom.* Batts v. Louisville & N.R.R., 316 F.2d 22 (6th Cir. 1963), where the court similarly required that the agreed-upon procedure (mandatory arbitration) must be followed: "[E]ven if plaintiffs' rights should be regarded as being derived from the order of the Commission, and not from the Memorandum of Agreement, the court would lack jurisdiction, since plaintiffs have not exhausted the remedies of arbitration prescribed by the Commission itself." 180 F. Supp. at 435.

courts. If the union refuses to press the grievance to arbitration, the employee may be able to proceed directly into court since arbitration does not become a binding remedy for exhaustion purposes until invoked.[50]

Construing "may" as mandatory requires that arbitration be attempted in all cases before courts can properly assume jurisdiction over disputes.[51] If the controversy is not resolved at the arbitration level, resolution may be sought at the judicial level. The employee, however, may be precluded from arbitration. If the union refuses to submit his grievance to arbitration, the exhaustion of remedies doctrine will generally prevent the district court from assuming jurisdiction over the dispute[52] unless the union has acted arbitrarily, discriminatorily or in bad faith in making such refusal[53] or the pursuit of the contractual remedy would be a futile gesture.[54]

Hence, under the mandatory construction, the employee is precluded from a judicial remedy unless he is within one of these exceptions. This limitation is more illusory than real, however, since if the employee has grounds for invoking jurisdiction under section 9 of the ICA, he will probably be sufficiently aggrieved to fall within the exceptions. Moreover, under either the permissive or mandatory construction the results coalesce, since under either interpretation the employee will have a judicial remedy if his union is unjustly uncooperative. Additionally, an employee whose grievance is not processed by the union may seek relief by bringing suit against that organization for breach of a duty of fair representation.[55]

An arbitration clause will therefore be advantageous to management since it provides the benefit of having the union screen complaints. The Sixth Circuit in *Nemitz* has thus simultaneously acknowledged the requirements of the ICA and implicitly provided for its circumvention by the utilization of prior voluntary agreements. Unless the ICC alters its practice of outright acceptance of the terms of existing voluntary agreements, negotiators will continue to be able to exert a pervasive influence on the procedural requirements placed on employees desiring redress.

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50. 436 F.2d at 849.

51. *See* Bonnot v. Local 14, Cong. of Ind. Unions, 331 F.2d 355 (8th Cir. 1964), where "may" was held to be mandatory. *But cf.* Murphey, *Labor Law 1966-1967: Increased Original Jurisdiction,* 5 HOUS. L. REV. 296 (1967).

52. Reynolds v. Denver & R.G.W.R.R., 174 F.2d 673 (10th Cir. 1949). *See also* Kroner, *supra* note 15.

53. Vaca v. Sipes, 386 U.S. 171 (1967). The burden of proof, however, is on the employee to show bad faith on the part of the union. Williams v. Wheeling Steel Corp., 266 F. Supp. 651 (N.D. W. Va. 1967). A fortiori, it seems that the employee will also bear the burden in cases of arbitrariness or discrimination.

54. Glover v. St. Louis-San Fran. Ry., 393 U.S. 324, 330 (1969). *See also* Comment, *The Implications of* Vaca v. Sipes *on Employee Grievance Processing,* 17 BUFFALO L. REV. 165 (1967).

55. O'Mara v. Lackawanna R.R. Co., 407 F.2d 674 (2d Cir. 1969). *But cf.* Note, *The Duty of Fair Representation and Its Applicability When a Union Refuses to Process an Individual's Grievance,* 20 S.C. L. REV. 253 (1968).

The Sixth Circuit in *Nemitz* addressed itself directly to the problem of subsequent voluntary agreements. On this issue the court of appeals relied, as did the district court, on *Arnold v. Louisville & Nashville Railroad Co.*[56] Factually similar to *Nemitz*, *Arnold* involved a suit in district court by railroad employees seeking damages for breach of protective conditions allegedly flowing from an ICC order authorizing a merger. A subsequent agreement, intended to supplement the ICC order, was reached in accordance with the last sentence of section 5(2)(f) which provides in part: "Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."[57]

Arnold held that authorized representatives could reach a subsequent agreement which performed the function of "adopting, supplementing or implementing" the provisions of the protective order.[58] There the court reasoned that the agreement was valid under section 5(2)(f) and that the rights in question emanated from it, and therefore dismissed for lack of jurisdiction.[59] Thus recovery was possible only through the procedures outlined in the RLA for collective bargaining agreements.

Implicit in *Arnold* was the concept that, although parties are free to engage in subsequent agreements, those accords will be ineffectual if they lower the total level of protection afforded by the ICC in its protective order. Justification for the *Arnold* interpretation of the "notwithstanding" sentence of the statute was set forth in *Nemitz*. The *Nemitz* court rested its limitation of subsequent agreements on the second sentence of section 5(2)(f), which requires the ICC to ensure in its merger approval that employees will not be left in a worsened employment position by virtue of a merger.[60] It reasoned that the second sentence assumes priority over the last sentence despite the latter's initial phrase, "[n]otwithstanding any other provisions of this Act."[61] This statutory construction renders voluntary agreements subservient to the determination that employees shall not be left in a worse position and thus imposes an

56. 180 F. Supp. 429 (M.D. Tenn. 1960). *See* text accompanying note 43 *supra*.

57. 49 U.S.C. § 5(2)(f) (1970).

58. Arnold v. Louisville & N.R.R., 180 F. Supp. 429, 433 (M.D. Tenn. 1960).

59. *Id.* The agreement was determined to perform a supplementary function rendering it valid.

60. 49 U.S.C. § 5(2)(f) (1970). In the *Nemitz* factual situation, for example, the implementing agreement provided for supplementary compensation to Sandusky Line workers based upon previous Sandusky remuneration. This subsequent agreement severely detracted from the amount of compensation available to employees under the ICC determination. For example, "[p]laintiff Richard Nemitz received a total wage from the Pennsy in the 12 months preceding October 16, 1964, of $7,000 and after the merger he earned on the Sandusky Line in the 24 month period following October 16, 1964 an amount of $3,303.13." Nemitz v. Norfolk & W. Ry., 309 F. Supp. 575, 578 n.2 (N.D. Ohio 1969).

61. 309 F. Supp. at 578 n.2.

indirect restraint on subsequent voluntary agreements. This result appears not only to complement the overall protective policy of section 5(2)(f) toward adversely affected employees, but also to protect the exclusive status of the Commission under section 5(11).

The court of appeals in *Nemitz* relied on this interpretation to hold the agreement abrogating incorporated rights to be void and unenforceable.[62] Such a void agreement could not supercede the ICC protective order and, therefore, could not form the basis of the employees' rights. Finally, the court embellished the holding in *Arnold* by deciding that "[a]n agreement made pursuant to the last sentence of Section 5(2)(f) may vary the protections afforded by the I.C.C. order, but it may not substantially abrogate employees' rights grounded in an I.C.C. order."[63] *Nemitz* may thus be distinguished from *Arnold*, since *Nemitz* permits at least a slight lessening of the total protection, so long as the denigration is not "substantial."

This appellate court holding in *Nemitz* appears similar to the restrictive standard set forth by the district court:

> [A]n agreement may in changing the protective benefits lessen the protection as to certain classes of employees, without really altering the total level of protection. The courts should view such diminution of protective benefits with disfavor and such should only be permitted to stand if, when viewed in light of the entire scheme of protection as modified by the agreement in question, the diminution is benign.[64]

Neither the court of appeals nor the Supreme Court in *Nemitz* mentioned the district court's "benign test," however, leaving some doubt as to its vitality. The benign test may, however, have some utility as the measure of the nebulous standard of "substantial abrogation" set out by the court of appeals for determining the validity of subsequent agreements. Continued scrutiny into the substance of subsequent agreements will be required of the courts. This scrutiny should yield positive results insofar as parties to subsequent accords will be cognizant of judicial examinations to take place and should accordingly upgrade the quality of their agreements.

PRIOR VOLUNTARY AGREEMENTS

The Supreme Court agreed with the Sixth Circuit's decision regarding subsequent voluntary agreements,[65] and, in that regard, confined itself

62. 436 F.2d at 848.
63. *Id.*
64. 309 F. Supp. at 584 n.6.
65. The actual effect of the subsequent agreements on previously existing rights was still at issue at the Supreme Court level in *Nemitz*. Appellant carrier continued to urge that the rights were not abridged:

> Even when the compensation protection afforded by the agreements and protection of all earnings over the Toledo division . . . are compared, without considering other elements of protection, the protection provided

to a factual recitation intended to show that the implementing agreement had abrogated the standard of compensation provided in the Commission's protective order.[66] The Court found the subsequent agreement void by applying the "substantial abrogation" test propounded by the Sixth Circuit. The Court then concentrated on prior voluntary agreements and their effects. As with subsequent agreements, prior accords are sanctioned by the "notwithstanding" sentence of section 5(2)(f), which gives parties the capacity to enter into voluntary agreements.[67] The Court examined the general effect of prior voluntary agreements, as well as the specific question whether such agreements relieved the ICC of its statutory duty to provide protection.

Writing for the majority, Justice Douglas concluded that prior voluntary agreements do not remove the statutory obligation of action from the ICC.[68] Instead, the ICC must provide "mandatory protection",[69] created by its own volition or through adoption or approval of the terms of prior voluntary agreements. The Court did not, however, totally discount the importance of the "notwithstanding" sentence:

> The collective agreement then becomes a 'condition' of the Commission's 'approval' of the consolidation under the first sentence of § 5(2)(f) and its provisions are deemed by the Commission to be 'a fair and equitable arrangement to protect the interests' of the employees within the meaning of the first sentence. Thus the significance of the 'notwithstanding' proviso is that it provides the machinery for the terms of a pre-merger collective agreement and thus supplies the minimum measure of fairness required under the first sentence of § 5(2)(f).[70]

The Commission has consistently taken a position contrary to that adopted by the majority in *Nemitz*.[71] A determination that voluntary agreements were not "inconsistent with the public interest" was viewed by the ICC as sufficient to satisfy their statutory obligation.[72] Courts, although not ultimately bound by these administrative interpretations, should afford them substantial deference. Administrative bodies such as the ICC necessarily have a vast amount of expertise gained through daily exposure to agency problems. The judiciary, on the other hand, must

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by the agreements is preferable. While the formula fixed by the agreements provides less earnings during the four years immediately following the merger, it continues to offer protection beyond the four year statutory period for the full working life of the employee.

Brief for Appellant at 42, Norfolk & W. Ry. v. Nemitz, 92 S. Ct. 185 (1971).

66. Norfolk & W. Ry. v. Nemitz, 92 S. Ct. 185 (1971).

67. *See* text accompanying notes 62-63 *supra*.

68. Norfolk & W. Ry. v. Nemitz, 92 S. Ct. 185 (1971).

69. *Id.* at 188.

70. *Id.* at 189.

71. *See, e.g.*, Great N. Pac. & Burl. Lines, Merger, Great N. Ry., 331 I.C.C. 228 (1967); Pennsylvania Ry., Merger, New York Cent. Ry., 327 I.C.C. 475 (1966).

72. *See* Great N. Pac. & Burl. Lines, Merger, Great N. Ry., 331 I.C.C. 228, 230 (1967).

participate in the resolution of a broad variety of disputes. This wide-ranging responsibility necessarily precludes them from acquiring in-depth knowledge in a particular area.[73]

In this regard the Supreme Court, in *Unemployment Commission v. Aragon*, stated that administrative determinations need only pass a standard of reasonableness to be acceptable to the judiciary.[74] Despite *Aragon*, the *Nemitz* court found a continuing obligation on the ICC. This represents a determination that section 5(2)(f) imposes an exceedingly strong mandate for the Commission to act in the face of any prior agreement, regardless of its substance.

The dissent in *Nemitz* took the same general position as the ICC. There, Justice Blackmun relied on three major arguments and contended that the "notwithstanding" sentence was the controlling portion of section 5(2)(f). The first prong was based upon statutory construction: "This plain and unambiguous 'notwithstanding' language, obviously and necessarily directed to and affecting only the two preceding sentences, requires that an agreement entered into by the carrier and the collective bargaining representative be controlling."[75] The dissent further reasoned that the two preceding sentences of section 5(2)(f) were applicable only in the absence of a prior voluntary agreement. Thus the ICC would be required to act only where the parties had been unable to effect any voluntary agreement prior to merger application.

The second prong was based on the legislative history of the ICA's predecessor, the Transportation Act of 1940.[76] The "notwithstanding" sentence was added to that Act as a substitute for the Harrington Amendment,[77] and was intended to provide parties the right "to enter into agreements with railroads to take care of them in case of unemployment as a result of consolidations."[78] On the basis of these two interpretations, the dissent argued that the ICC was relieved of any obligation in the face of such agreements.[79] Granting parties the right to agree, however, does not a fortiori indicate that the resulting agreement will have the effect of abrogating the ICC's statutorily imposed obligation. The allowance of such an abrogation would have quite the opposite effect. First, to remove the ICC from the protection process would be in opposition to the overall protective policy of the ICA, since that Act's basic premise is to transplant the responsibility for employee protection from private agreements and entities to the ICC. By shifting this responsibility, the ICA

73. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.05 (1958).
74. 329 U.S. 143 (1946).
75. 92 S. Ct. at 190.
76. Transportation Act of 1940, 54 Stat. 898.
77. *See* note 20 *supra.*
78. 86 CONG. REC. 10178 (1940).
79. 92 S. Ct. at 191. *Contra,* Hummers, *Protection of Employees Affected by Railroad Consolidations,* 15 LAB. L.J. 736 (1964).

also accomplishes its second objective—facilitating mergers.

The dissent's last major contention was that the position of the majority would have a debilitating effect on free collective bargaining:

> The result reached by the Court appears . . . to require the ICC and the courts always to intrude upon collective bargaining, by reviewing the sufficiency of its substantive product, and thereby to discourage and to downgrade the collective bargaining process that has been so firmly established in this area and so steadfastly protected.[80]

This prediction appears to be valid in the area of subsequent voluntary agreements. Judicial review and interpretation of voluntarily formulated collective bargaining agreements may not always encourage more responsible negotiations. Indeed, excessive application of the jurisdictional concept employed in *Nemitz* may foster apathy among parties charged with the creation of such agreements.

The dissent's contention as to the effects of *Nemitz* on collective bargaining is questionable as to prior voluntary agreements, however, because it fails to account for the Commission's passive attitude toward such accords. When acting in the face of a prior agreement, the ICC has normally merely ratified the terms of the voluntary accord. Under this view, the ICC will accept most reasonable provisions found in prior voluntary agreements. Thus the *Nemitz* case, rather than dissuading collective bargaining in the area of prior voluntary agreements, will tend to encourage such accords since ICC sanctions will be forthcoming if the stipulations are reasonable.

The position of the dissent and of the Commission is likewise undesirable insofar as it may remove from the protective process an entity capable of providing protection. Although the Commission's actions may often resemble mere ratification, its capacity to act in the face of a voluntary agreement must be reserved to accommodate instances of illusory or inadequate voluntary agreements. Such a reservation will minimize the possibility of misrepresentation of voluntary protection and will entrench the Commission in its role as guarantor of employee protection.

CONCLUSION

As exemplified by *Nemitz*, subsequent voluntary agreements will be subject to increasingly greater judicial scrutiny. This approach will stifle the likelihood of collective bargaining to reach subsequent agreements, since such accords will be subject to stringent standards. This is not a novel collateral effect, however, for section 5(2)(f), through its direct mandate on the Commission and indirect restraints on voluntary agreements, has always provided the capability for more expansive judicial interpretations.

80. 92 S. Ct. at 192.

In contrast to its effect on subsequent agreements, *Nemitz* will tend to encourage collective bargaining in the formation of prior voluntary agreements. Parties wishing to ameliorate the requirement of action by the Commission may rely on that body to accept reasonable prior agreements with regularity. In *Nemitz*, for example, an arbitration clause was incorporated into the ICC protective order. The clause could have precluded the court's assumption of jurisdiction if the word "may" had been construed mandatorily instead of permissively.

Thus, parties desiring that administrative remedies be incorporated into the Commission's protective order should enumerate those remedies in a prior voluntary agreement. This would simultaneously preclude judicial preemption and preserve the position of the parties in the protection process. Unfortunately, the inclusion of voluntary remedies that must be exhausted before the courts obtain jurisdiction may provide the key to circumvention of *Nemitz'* far-reaching albeit appropriate jurisdictional step.