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National Mediation Board—Judicial Review—Order to Induce Arbitration

On 31 October, 1968, National Airlines (Company), and the International Association of Machinists (IAM), exchanged notices of the changes each desired in the existing collective bargaining agreement.[1] Over the next forty days the parties engaged in eight days of actual negotiations which resulted in an impasse. On 23 December, 1968, the National Mediation Board (NMB) accepted the parties, application for mediation. After the IAM, on two occasions in January, 1969, had requested immediate assignment of a mediator by the NMB, one was assigned on 5 March. Separate meetings with the Company and the IAM were held, but then a new mediator was appointed on 24 March. Joint mediation commenced on 10 April (four months after the application for mediation), and deadlocked on 30 June.[2] However, two months before the deadlock the IAM filed an action in the United States District Court for the District of Columbia seeking a declaration that the mediation efforts had been unsuccessful and requesting an injunction directing the NMB to induce arbitration. The district court addressed interrogatories to the NMB to determine whether or not mediation would prove unsuccessful.[3] Though the interrogatories were answered, the NMB refused the following: (1) To identify the issues as to which progress had or had not been made; (2) to say when settlement might be reached; and (3) to state how much longer it expected mediation to continue before it would conclude that mediation had failed. The district court granted summary judgment to the IAM.[4] *Held, reversed*: Although in rare and unusual cases the court can overturn the Mediation Board's judgment by termination of the mediation process, the district court had before it objective facts sufficient to support the Mediation Board in refusing to proffer arbitration and determining to

[1] There were 162 issues in dispute, paramount of which was the Union's demand that all defined work be performed solely by employees within the class represented by the Union.

[2] 48 meetings were held resulting in 179 hours of negotiation. Only 65 issues out of 162 were resolved.

[3] The interrogatories are as follows:

1. Have efforts to bring about an amicable settlement between IAM and National Airlines through mediation been unsuccessful?

2. If your answer to question 1 is no, state with particularity the basis for your opinion that efforts to secure settlement through mediation (a) have not been unsuccessful and (b) have not been exhausted.

3. Has any progress been made toward reaching agreement?

4. If your answer to question 3 is yes, (a) identify each issue as to which progress toward settlement has been made and state what the progress has been, (b) identify each issue as to which no progress has been made, and (c) state your opinion as to when settlement can be expected to be reached based on the current rate of progress.

5. State what period of time you expect to elapse before you can conclude that efforts to bring about a settlement through mediation have failed, and that the National Mediation Board should at once endeavor to induce the parties to submit their controversy to arbitration.

[4] International Association of Machinists and Aerospace Workers, AFL-CIO v. National Mediation Board, and National Airlines, Inc., 71 LRRM 3161 (1969), —— F.Supp.—— (D.D.C., 1969).

continue mediation. *International Association of Machinists and Aerospace Workers, AFL-CIO v. National Mediation Board, and National Airlines, Inc.*, 425 F.2d 527 (D.C. Cir. 1970).

I. The Railway Labor Act

The controversy in the instant case is governed by the Railway Labor Act (RLA),[5] and its settlement is provided therein.[6] The Supreme Court stated in *Jacksonville Terminal*[7] that the heart of the RLA is the duty it imposed upon management and labor "to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce. . . ."[8] To keep that heart beating, the RLA further provides that either party to a dispute may invoke the services of the NMB to settle a dispute previously unsettled by the parties themselves.[9] Once the services of the NMB are invoked, the NMB must use its best efforts, through the mediation process, to bring the parties to an agreement.[10] "If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said [National Mediation] Board shall at once endeavor as its final required action . . . to induce the parties to submit their controversy to arbitration. . . ."[11] The foregoing scheme prevents self-help by either party to the dispute until the mediation procedures of the RLA have been exhausted.

The Supreme Court further stated, in *Jacksonville Terminal*,[12] that nowhere does the RLA specify what is to take place once the statutory procedures are exhausted without yielding a resolution to the dispute. The practical result is that, until mediation is concluded, the union is precluded from exercising the economic lever of a strike; therefore, the dispute can become bogged in the mire of the mediation procedures of the RLA. Moreover, the mediation procedure can be successful only if the NMB "uses its best efforts"[13] to bring the parties to an agreement. If the NMB, in violation of its statutory duty under the RLA, does not use its best efforts to bring about an agreement or to proffer arbitration, an apparent remedy for the union is judicial review.

II. Judicial Review

Judicial review to determine whether the NMB has used its best efforts to settle a dispute has not been sought by a union prior to the instant case. Therefore, a look at various other types of actions of the NMB and NLRB which were or were not held reviewable is necessary to understand the decision in the instant case.

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[5] Railway Labor Act, 45 U.S.C. § 151 *et. seq.* (1954).
[6] *Id.* at §§ 154, 155.
[7] Brotherhood of RR Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, (1969), *reh den* 394 U.S. 1024 (1969).
[8] Railway Labor Act, § 152, First; 45 U.S.C. § 152 (1954).
[9] Id. at § 155, First; 45 U.S.C. § 155 (1954).
[10] *Id.*
[11] *Id.*
[12] 394 U.S. 369 (1969); *cf.* Elgin, J. & E. R. Co. v. Burly, 325 U.S. 711, 725 (1945).
[13] Railway Labor Act, § 155, First; 45 U.S.C. § 155 (1954).

There has been a general refusal by the courts to review NMB action in representation disputes. In *Switchmen's Union*,[14] a case arising under the RLA, the Supreme Court would not allow review of an NMB certification of a collective bargaining representative. The dispute involved a question of statutory construction—whether the RLA permitted the division of crafts or classes of a single carrier into smaller bargaining units. The Court refused to consider the merits of the claim, holding that it was for the NMB, not the courts, to resolve such questions.[15] The Court noted that where Congress "has not expressly authorized judicial review,[16] then "this Court has often refused to furnish [judicial review] even where questions of law might be involved."[17] It concluded that "the intent seems plain — the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law."[18]

A similar refusal to review NMB action concerning a representation dispute is found in the "*ABNE*"[19] case. There the Supreme Court stated:

> . . . [T]he [NMB] performed its statutory duty to conduct an investigation and designate the craft or class in which the election should be held and it did so in a manner satisfying any possible constitutional requirements that might exist. Its determination, therefore, is not subject to judicial review . . . the fair and equitable manner in which the [NMB] has discharged its difficult function is attested by the admirable results it has attained.[20]

Likewise, in *Brotherhood of Railway, Airline and Steamship Clerks*,[21] a case based on the same dispute as in *ABNE*, the Court, in refusing to review NMB action, stated the "[National Mediation] Board's action must be so plainly beyond the bounds of the [Railway Labor] Act, or . . . so clearly in defiance of it, as to warrant the immediate intervention of an equity court."[22]

Since the NLRB, like the NMB, is an administrative agency, it is appropriate at this point to consider judicial review of certain actions taken by the NLRB. There is precedent for review of NLRB action where an order of the NLRB has violated a provision of the National Labor Relations Act (NLRA).[23] In *Leedom v. Kyne*[24] the Supreme Court held that a district court had jurisdiction of an action brought to set aside an order of the NLRB which did not comply with a provision of the NLRA. But the Court was careful to note that "this suit is not one to review, in the sense of that term as used in the [National Labor Relations] Act, a decision of the

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[14] Switchmen's Union v. NMB, 320 U.S. 297 (1943).
[15] Quoting from NMB v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650 (1965).
[16] 320 U.S. 297, 301 (1943).
[17] *Id.* at 303.
[18] *Id.* at 305.
[19] *See* note 15.
[20] *Id.* at 668.
[21] 402 F.2d 196 (D.D.C., 1968).
[22] *Id.* at 205; *see also* Local 130, International Union of Electrical, Radio and Machine Workers v. McCulloch, 345 F.2d 90, 95 (D.D.C., 1965).
[23] National Labor Relations Act, 29 U.S.C. § 151 *et. seq.* (1965).
[24] 358 U.S. 184 (1958).

[National Labor Relations] Board made within its jurisdiction. Rather it is one to strike down an order of the [NLRB] made in excess of its delegated powers and contrary to a specific prohibition of the [NLRA]."[25] Thus, *Kyne* involved a narrow exception to the jurisdiction bar principle because the NLRB deprived certain employees of a right assured them by Congress in the NLRA. "Surely, in these circumstances, a federal district court has jurisdiction of an original suit to prevent deprivation of a right so given."[26]

Since the NLRB and NMB are both administrative agencies, their conduct is further governed by the provisions of the Administrative Procedure Act (APA).[27] There is precedent for review of NLRB action which was in contravention of the APA. In *Deering Milliken v. Johnson*,[28] the court, making an exception to the jurisdictional bar principle based on the APA, stated:

> In section 6 [Now § 555(b)] of the APA it is specifically provided: ". . . every agency shall proceed with reasonable dispatch to conclude any matter presented to it. . . ." This is no precatory declaration. It is an enforceable command, made expressly so by section 10(e) [now §706] of the APA which provides that the court ". . . shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency actions, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ."[29]

Thus, the court decided that a federal court, upon a proper complaint, has affirmative jurisdiction to compel administrative action wronfully withheld in violation of some statutory duty to act.[30] Jurisdiction exists for the protection of those statutory rights which Congress intended to be judicially enforceable,[31] and for which no other adequate remedy exists.[32] Congressional intent is clear that agency action must be concluded with reasonable dispatch.[33] Further, section 10(e) [now §706] of the APA is an affirmative statutory declaration that the requirement that the agency shall proceed with reasonable dispatch to conclude any matter presented to it gives rise to legally enforceable rights of the parties to the proceedings.[34] Section 6 [now §555] also requires that an agency shall not deny relief or fail to conclude a case by mere inaction, or proceed in a dilatory fashion to the injury of the party concerned.[35] The *Milliken* court concluded that "the

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[25] 380 U.S. 650, 659 (1965); *cf.* Leedom v. Kyne, 358 U.S. 184, 188 (1958).

[26] 358 U.S. 184, 189 (1958). The limited nature of this holding was reemphasized in Boire v. Greyhound Corp., 376 U.S. 473 (1964), where the Court referred to the narrow limits and painstakingly delineated procedural boundaries of Kyne.

[27] Administrative Procedure Act, 5 U.S.C. § 500 *et. seq.* (1967).

[28] F.2d 856 at 860 (4th Cir., 1961). Note that the new 555(b) substituted "with due regard for the convenience and necessity of the parties or their representatives and within a reasonable time," for "with reasonable dispatch," and "except that due regard shall be had for the convenience and necessity of the parties or their representatives."

[29] *Id.* at 860-61.

[30] *Id.* at 862. *See also* Panama Canal Co. v. Grade Lines, Inc., 356 U.S. 309, 318 (1958).

[31] *Id.* at 862. *Cf.* Leedom v. Kyne, 358 U.S. 184 (1958); *see also*, Stark v. Wickard, 321 U.S. 288 (1944).

[32] *See* Leedom v. Kyne; Stark v. Wickard; Switchmen's Union v. NMB, *supra*, note 31.

[33] APA, Legislative History, 5 Doc. No. 248, 79th Cong., 2nd Sess., 204-205.

[34] *Id.*

[35] *Id.* at 263-264.

courts have the right and the duty to enforce the [Administrative Procedure] Act's requirement that the [NLRB] proceed with reasonable expedition."[36]

The *Milliken* controversy, which involved a dispute under the NLRA, was within the jurisdiction of the district court by virtue of the APA because the NLRA provided no adequate remedy for enforcement of the requirement that agency action (here, action of the NLRB) be concluded with reasonable dispatch. Since the RLA, like the NLRA, falls within the ambit of the APA, then, *arguendo*, a dispute under the RLA will be within the jurisdiction of the district court where the RLA provides no adequate remedy for enforcement of the requirement that agency action (here, action of the NMB, be concluded with reasonable dispatch. In fact, the RLA *does not* provide an adequate remedy if the NMB takes a dispute and then "in effect denies relief of fails to conclude a case by mere inaction, or proceeds in a dilatory fashion to the injury of the parties involved."[37] The *Milliken* court was aware that "[s]hould the [NLRB] neglect to act for years to come, the plaintiff could not seek an end to the delay through a proceeding under . . . the NLRA. Enforcement of the right to have the proceeding brought to a conclusion with reasonable dispatch required the availability of a remedy. . . ."[38] That remedy "is not one to 'review' a decision of the [NLRB] made in the exercise of its jurisdiction. It is, instead, an action to prohibit [NLRB] violation of a prohibition of the APA."[39]

Whether there has to be a final agency action before a district court can take jurisdiction was answered in the negative in *Milliken*. The court stated that "[t]he 'final agency action' made reviewable under . . . the APA need not necessarily be read as synonymous with a final order of the [NLRB] granting or denying in whole or in part the relief sought. . . ."[40] Finality, in reference to agency action, is not an inflexible principle.[41] Congressional intent is that a "final action" under the APA includes an effective agency action for which there is no adequate remedy in any court.[42] The *Milliken* court construed "final action" as used in the APA to mean continuing delay which causes a party to suffer a legal wrong for which there is no other adequate remedy.[43]

III. IAM v. NMB

In the case at bar the Court of Appeals for the District of Columbia

[36] 295 F.2d 856, 863-64 (4th Cir., 1961).
[37] *Id.* at 863.
[38] *Id.* at 864.
[39] *Id.* at 865.
[40] *Id.*
[41] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 156 (1951). (Frankfurter, concurring).
[42] APA, Legisative History, 5 Doc. No. 248, 79th Cong., 2nd Sess., 213, 277.
[43] *See* Local 542, International Union of Operating Engineers v. NLRB, 328 F.2d 850, 854 (3rd Cir., 1964). "There are other cases in which the Supreme Court has sustained the jurisdiction of the district courts to entertain appropriate suits for relief against action where the statutory review proceeding was absent or inadequate. Stark v. Wickard, 321 U.S. 288 (1944); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902)."

Circuit reversed a decision in a federal district court[44] which took jurisdiction to inquire into the reasons why the NMB had not discontinued mediation and proffered arbitration. The issue resolved by the court of appeals was "whether the general and presumptive jurisdiction of a court to consider whether an agency's action has been unlawfully withheld or delayed has been negatived in the case of the National Mediation Board by reason of a special legislative intent, arising out of the agency's special nature, responsibilities and requirements."[45] The court held jurisdiction has been so negated.

The court was primarily concerned that judicial inquiry into the reasoning process of the NMB concerning maintenance of mediation would tend to destroy the general mediation process.[46] It reasoned that since the mediation process involves the continuing possibility of settlement, it is for the NMB, for reasons perhaps known only to the Board, to judge whether or not mediation should continue. A fear was expressed that "any candid response to inquiry as to reasons [for continuing mediation], whether put by party or court, might well require a revelation that, once made, would change the position and status of the Board irretrievably, and in a way that violates legislative intent."[47]

The court found that in the instant fact situation the district court could well have supposed that the NMB was correct in refusing to proffer arbitration and determining to continue with mediation. The time that had already been expended was not considered excessive in view of the large number of issues (162), 40% of which had already been resolved during 48 meetings which consummed 179 hours of negotiation. Even the fact that the likelihood of success was marginal was found not to negative the good faith and validity of the NMB's effort. The court concluded that "the Board's process may draw on legislative procedures to the point that the parties deem them almost interminable."[48]

IV. Conclusion

Throughout this analysis, it has been necessary to consider general principles of judicial review as applied to actions of the NMB and NLRB. Where review is based on whether agency action is being unlawfully withheld, or is arbitrary, capricious or an abuse of discretion, the same principles apply to both the NMB and NLRB. But, as pointed out in *Milliken*:

[44] *See* note 4. The district court was of the view that there had been sufficient indication that the mediation efforts may be unsuccessful and that the Mediation Board should no longer proceed without acquainting the court in prompt fashion and in detail as to the reasons why it may feel mediation will be successful, if that is its view. The court then entered its judgment ordering the Board to discontinue its attempt to bring about a settlement of the controversy and to proffer arbitration. This order was mainly based on the refusal of the Board to supply information explaining the need for continued mediation. The court then concluded it had jurisdiction to compel the Board to act where there exists a clear violation of the statutory provision requiring the Board to proffer arbitration when mediation efforts are exhausted.

[45] 38 LW 2432 (2-10-70).

[46] *Id.*

[47] *Id.*

[48] *Id.*

> There are no absolute standards by which it may be determined whether a proceeding is being advanced with reasonable dispatch. What is reasonable can be decided only in the light of the nature of the proceedings and the general and specific problems of the agency in discharging its functions and duties . . . What is required is some balance between the interest of the [Board], of the union and of the employer. It should be recognized, on the one hand, that the court should not interfere with any reasonable exercises of the [Board's] discretion in controlling the progress of the proceedings . . . On the other hand, adequate protection of the employer's [or employee's] rights should be afforded.[49]

The court of appeals in the instant case made no attempt to balance the interests of the Board, the union and the employer. Rather, the scales were heavily tipped in favor of the Board. The court relied on the recent Supreme Court case *Detroit and Toledo Shore Line Railroad v. Transportation Union*,[50] in which Justice Black, speaking for the majority, stated:

> A final and crucial aspect of the [Railway Labor] Act was the power given to the parties and to representatives of the parties to make the exhaustion of the Act's remedies *an almost interminable process* [Emphasis added.] . . . [T]he procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute.[51]

The court, couching the issue in terms of the special nature of the NMB, placed action (and inaction) of the NMB in a class by itself. Thus, the general and presumptive jurisdiction of a court to consider whether an agency's action has been unlawfully withheld or delayed can be negated, even if the NMB is arbitrary, capricious, or abuses its discretion. Surely this was not the intent of Congress in creating the mediation sections of the RLA.

Yet the court, in its concluding paragraph, backtracked from the hard line they seemed to take. "In the rare and unusual case where the complaint, as supported by objective facts, requires overturning the Mediation Board's judgment notwithstanding the vigorous presumption of validity, *the court has jurisdiction to require termination of the mediation process* [Emphasis added.]."[52] Thus, even though the court did not feel the facts here warranted judicial intervention, the door has been left slightly ajar. A court can take jurisdiction, but only upon a proper showing that Board action has been unlawfully withheld, or that Board conduct has been arbitrary, capricious or an abuse of discretion.

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[49] 295 F.2d 856 at 867-68 (4th Cir., 1961).

[50] 396 U.S. 142 (1969). The case involved a dispute as to working assignments not covered in the collective bargaining agreement. After the parties invoked the services of the NMB, and while the Board proceedings were pending, the employer announced the creation of the disputed work assignments. *Held*: The status quo to be maintained while the procedures of the Act are being exhausted consists of the actual, objective working conditions out of which the dispute arose.

[51] *Id.* at 4035, 396 U.S. 149 (1969).

[52] 38 LW 3432 (2-10-70).