

# Administrative Law - Jurisdiction of Courts in Railway Wrongful Discharges Cases Under Collective Bargaining Agreements

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damages. This was amended in 1949<sup>21</sup> to expressly exclude the coverage of timber trespass.

Thus the legislature indicated its disfavor toward lenient treatment of timber trespassers by the enactment of section 331.18 in 1873. The awareness on the part of the legislature in 1873 that bad faith is normally considered an element in the recovery of enhanced damages is expressly shown by the provision for an affidavit of mistake. By the abolishment of section 331.18, the amendment to 331.17, and the important change from the term "wilful" to "unlawful" in section 26.09 it can be logically concluded that the legislature intended that the rule of double damage should be applied to all cases of timber trespass, whether done wilfully or by mistake.

GEORGE RADLER

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**Administrative Law—Jurisdiction of Courts in Railway Wrongful Discharge Cases Under Collective Bargaining Agreements—** Plaintiff for many years was employed by the defendant railway company in its Wisconsin Law Department in the City of Milwaukee, Wisconsin, as a stenographer-typist and clerk. In August, 1947, the plaintiff was discharged allegedly in violation of a collective bargaining contract which was in force at that time between the defendant and the Brotherhood of Railway and Steamship, Freight Handlers, Express and Station Employees. An action was commenced in the District Court of the United States for the Eastern District of Wisconsin in which plaintiff, after alleging certain items of damage, demanded judgment for \$6,000.00 and for a decree reinstating her to her former position with her seniority, pension, vacation and pass rights unimpaired. The District Court conducted a hearing on the issues of (1) whether the plaintiff was covered by the contract or was expressly excluded and (2) whether the court has jurisdiction over the matter. The court concluded that the plaintiff's position "was excluded" by the contract and, second, that the matter was "not properly before this court, and should have been brought before the National Railroad Adjustment Board because it involves a grievance and dispute arising under a bargaining agreement." The District Court therefore dismissed the complaint on the merits. Plaintiff appealed to the United States Court of Appeals for the Seventh Circuit and filed a motion that oral argument limited to the question of the jurisdiction of the District Court be held in advance of a hearing on the merits, which motion was granted. Thus, the appeal presented the question of whether or not the District Court had jurisdiction to pass on a question of the interpretation of a collective bargaining agreement

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<sup>21</sup> Ch. 252, Wis. Session Laws (1949).

between a railroad and one of the brotherhoods when the validity of the contract was not in question. *Held*: It did not have such jurisdiction and therefore was in error in deciding the case on its merits. The District Court was directed to dismiss the complaint for lack of jurisdiction. *Walters v. Chicago and North Western Railway Company*, 216 F. 2d 332 (1954).

In treating of a question of this sort in the area of administrative law, it is necessary to distinguish between *primary jurisdiction* and questions of *exhaustion* and *ripeness*. *Exhaustion* and *ripeness* relate to the principles which determine whether a court has jurisdiction on appeal from an administrative board's decision while *primary jurisdiction* relates to the principles which determine whether the court or an administrative tribunal should make the initial decision.<sup>1</sup> The label *exhaustion* is sometimes used in decisions concerning *primary jurisdiction*. Thus, when the appellate court in the instant case refers to necessity for exhaustion, it evidently means that judicial jurisdiction is not *primary*. The question, then, is whether or not the district court had *primary jurisdiction*.

The Railway Labor Act<sup>2</sup> itself makes no explicit provision concerning common law jurisdiction of courts to interpret and apply collective bargaining agreements. So, whether an employee who is complaining against his employer railroad under such an agreement can initiate proceedings in either a state or federal court without having first applied to the National Railroad Adjustment Board depends upon the interpretation that is given to Section 153 (i) of the Railway Labor Act.

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach such an adjustment in this manner, the disputes *may* be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."<sup>3</sup> (Emphasis added)

The first significant case interpreting this provision was *Moore v. Illinois Central R. Co.*,<sup>4</sup> which serves as an ideal benchmark in probing the evolution of the law in this area.

<sup>1</sup> DAVIS, ADMINISTRATIVE LAW, §197, p. 664 (1951).

<sup>2</sup> 45 U.S.C.A. 151 *et. seq.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Moore v. Illinois Central R. Co.*, 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089 (1941).

This was an action by an employer against the Illinois Central to recover damages for wrongful discharge. In answering the contention of the railroad that the district court did not have jurisdiction and that the proper forum was the National Railroad Adjustment Board, the United States Supreme Court stated:

"But we find nothing in that Act [Railway Labor Act] which purports to 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 court."<sup>5</sup>

There followed the case of *Order of Railway Conductors v. Pitney*<sup>6</sup> in which the court stated that the courts *should* give the Adjustment Board the first opportunity for the interpretation of the contract. It should be noted that the case involved only a petition for an injunction and asked for no relief at law. However after this decision, the belief was not uncommon that the *Moore* case had been overruled, at least in principle. Indeed, the Court of Appeals for the Seventh Circuit that decided the instant case had so held in *Starke v. N.Y., Chi., & St. Louis Railroad Co.*<sup>7</sup>

The Court of Appeals relied heavily on the *Slocum*<sup>8</sup> case, the next significant decision in the area, to substantiate its position in the instant case. The Court said that the plaintiff's complaint brought her "clearly within the *Slocum* case rather than within the facts of the *Moore* case."<sup>9</sup>

However this does not decide the important question raised in 1951 by the *Newman* case.<sup>10</sup> Simply stated it is this:

Does the *Slocum* case operate to deprive the federal courts of jurisdiction in a case involving a decree of reinstatement or was its scope intended to be limited only to cases where the future relations between the railroad and its other employers would be affected?

The *Newman*<sup>11</sup> case left the question undecided. The facts of the *Slocum*<sup>12</sup> case and the action involved are clearly distinguishable from the instant case. *Slocum*<sup>13</sup> involved a dispute between two unions which had separate collective bargaining agreements with the employer railroad, each claiming for its members certain jobs with the

<sup>5</sup> *Ibid.*

<sup>6</sup> *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 65 S.Ct. 1566, 89 L.Ed. 1970 (1946).

<sup>7</sup> *Starke v. N.Y., Chi., & St. L. R. Co.*, 180 F.2d 569 (1950).

<sup>8</sup> *Slocum v. Delaware L. & W. R. Co.*, 339 U.S. 239, 244, 70 S.Ct. 577, 580 (1950).

<sup>9</sup> *Walters v. Chi. & N. W. R. Co.*, 216 F.2d 332 (1954).

<sup>10</sup> *Newman v. Baltimore & O. R. Co.*, 191 F.2d 560 (1951).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Supra*, n. 8.

<sup>13</sup> *Ibid.*

railroad. The railroad filed a declaratory judgment action in a state court naming both unions as defendants. The state court interpreted the agreements and entered a declaratory judgment which was affirmed by the New York Court of Appeals.<sup>14</sup> On appeal it was held by the U. S. Supreme Court that the jurisdiction of the Railway Adjustment Board was exclusive and the state court erred in interpreting the agreements.<sup>15</sup>

It is immediately apparent that the interpretation of the collective bargaining agreements by the state court affected future relations between the railroad and its other employees and therefore the interpretation should have been made by the Adjustment Board.

In the instant case, however, such future relations would not be affected, and thus, whether the *Slocum*<sup>16</sup> case should control is open to serious doubt.

The Court in the *Slocum* case expressly stated:

"Our holding here is not inconsistent with our holding in *Moore v. Ill. Cent. R. Co.*"

and moreover:

"A common law or statutory action for wrongful discharge differs from any remedy which the board has power to provide, and does not involve question of future relations between the railroads and its other employers."<sup>17</sup> (Emphasis added)

thus, implying that such a test might be applied to determine whether courts have jurisdiction.

And if in handling such a case the court must consider some provision of a collective bargaining agreement, many courts have held that its interpretation would, of course, have no binding effect on future interpretation by the board.<sup>18</sup>

In 1949 in the case of *Clay v. Callaway*<sup>19</sup> the U. S. Court of Appeals for the Fifth Circuit reversed the dismissal of a petition which had raised the question of the power of the court to decree restoration of Clay to his job and left it pending for trial. The trial, then, would necessarily involve an interpretation of the collective agreement between Clay and his employer, but the court seemed to indicate that the *Moore*<sup>20</sup> case allowed Clay to prosecute his *action for reinstatement* in the District Court.

*Newman*<sup>21</sup> cites the *Clay*<sup>22</sup> case and raises the question whether

<sup>14</sup> *Slocum v. Delaware, L. & W. R. Co.*, 299 N.Y. 496, 87 N.E.2d 532 (1949).

<sup>15</sup> *Supra*, n. 8.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Supra*, n. 4 and n. 8.

<sup>19</sup> *Clay v. Callaway*, 178 F.2d 758 (1949).

<sup>20</sup> *Supra*, n. 4.

<sup>21</sup> *Supra*, n. 10.

*Slocum*,<sup>23</sup> which was decided after *Clay*,<sup>24</sup> has proscribed all actions in equity or whether *Clay*<sup>25</sup> can be used as authority for the proposition that the district courts still have some original equity jurisdiction under the Act.

The instant case was obviously the ideal opportunity for a decision which would squarely meet the question. This writer feels that by merely citing *Slocum*<sup>26</sup> and arguing that the plaintiff's complaint was covered by the doctrine of that case and was not within the facts of *Moore*<sup>27</sup> the court did not adequately state the grounds for its decision.

The facts as well as the cause of action herein are clearly different from those in *Slocum*.<sup>28</sup> If the court intended to apply *Slocum* to proscribe all actions in equity in this area from the jurisdiction of the district courts, it would seem it should have said so instead of merely straddling between *Moore*<sup>29</sup> and *Slocum*.<sup>30</sup> The bench and bar would then have been better able to chart its future course in this area.

WILLIAM U. ZIEVERS

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Discovery—Scope of Adverse Examination of Attorney—Plaintiff commenced an action to recover for injuries sustained as a result of the alleged negligent operation of a bus in which she was a passenger. The defendant insurance company answered separately and set up a defense based on a condition of the insurance policy requiring notice of the accident within a reasonable time, and denied liability, alleging prejudice or damage as a result of the tardy notice. Two attorneys had been retained by the insurance company to conduct an investigation of the circumstances attending the accident. After the issue was joined, proceedings were taken by the plaintiff for an adverse examination of the two attorneys. At the same time, subpoenas were served upon them requiring them to bring enumerated reports and documents concerning their investigation. The trial court granted the motion of the defendant insurance company to suppress the adverse examinations upon the ground that the information sought to be elicited was within the attorney-client privilege. *Held*: Reversed. Where the fact of investigation conducted by an attorney for his client is a relevant issue raised by the pleadings, the attorney may be adversely examined before trial as the agent of his client at the time of

<sup>22</sup> *Supra*, n. 19.

<sup>23</sup> *Supra*, n. 8.

<sup>24</sup> *Supra*, n. 19.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Supra*, n. 8.

<sup>27</sup> *Supra*, n. 4.

<sup>28</sup> *Supra*, n. 8.

<sup>29</sup> *Supra*, n. 4.

<sup>30</sup> *Supra*, n. 8.