In the

Supreme Court of the United States

THOMAS L. ANDREWS,

Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD CO., et al.,

Respondents.

No. 71-300

Washington, D. C.
March 22, 1972

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v.	:	No. 71-300
LOUISVILLE & NASHVILLE RAILROAD CO., et al., Respondents.	:	

Washington, D. C.,

Wednesday, March 22, 1972.

The above-entitled matter came on for argument at 10:53 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ANDREW W. ESTES, ESQ., 2150 National Bank of Georgia Building, Atlanta, Georgia 30303; for the Petitioner.

WILLIAM H. MAJOR, ESQ., Heyman and Sizemore, 310 Fulton Federal Building, Atlanta, Georgia 30303; for the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 71-300, Andrews against Louisville & Nashville Railroad Company and others.

Mr. Estes, you may proceed whenever you're ready.

ORAL ARGUMENT OF ANDREW W. ESTES, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ESTES: Mr. Chief Justice, and may it please the Court:

I represent Thomas L. Andrews, who used to be a railroad man.

One day Mr. Andrews had an automobile accident, having nothing to do with his employment, where he was injured, necessitating a medical furlough, which he was duly given. In due time he regained his health and attempted to return to work. When he got back and tried to go to work, he found that he was still on medical furlough and even with a doctor's certificate he was not permitted to work, and of course was not paid either.

The Railroad, of course, in its defensive pleadings, contended that he was neither fish nor fowl, that he was not employed and he was not discharged.

Mr. Andrews, in his complaint, originally in the State court and then removed to Federal District Court, contends that these acts and other acts amount to a common-law

wrongful discharge, which the State of Georgia recognizes as a common-law action.

What we have today really is a jurisdictional question, to determine whether or not courts have jurisdiction over a common-law wrongful discharge action arising out of a discharge of a union railroad employee; or whether the employee must -- and I use the term "exhaust" loosely for the moment -- exhaust his administrative remedies.

I think I can say there that we no longer have an exhaustion of administrative remedies, rather, it amounts to an election of administrative remedies.

The Court has undoubtedly noticed how brief the petitioner's brief is, because we have a very simple contention.

We rely primarily, almost solely, on the Moore v. Illinois Central Railway Company, decided by this Court in 1940. The rationale in that case, of course, was that a railroad union employee could elect either to pursue his administrative remedies or could sue in a court of law for a common-law wrongful discharge. But we rely squarely on that case. Mr. Moore was fired by the Illinois Central Railroad because he had the audacity to sue them on an FELA case.

Q Does he want reinstatement or what?

MR. ESTES: No, Your Honor, he does not; he wants to sue them for damages.

The Board could, if he made his election -- and I

don't call that exhaustion -- but if he made his election, the Board could reinstate him, grant him back pay, and give him his job. He doesn't want that, he wants to sue for damages.

This Court has said, by the way, on numerous occasions, and I will quote from the Slocum case: "A common law or statutory action for wrongful discharge differs from any remedy the Board has power to provide, and does not involve questions of future relations between the railroad and other employees."

Of course this general philosophy was stated very well by Mr. Justice Black in the Arguelles case, which I have cited not, by the way, as authority for this case but because of the language in that that I'd like to get to in a minute.

Q If it's taken, what would be the measure of damages in the lawsuit?

MR. ESTES: I think there would be several things, Mr. Justice Brennan. One, of course, would be the difference between wages that he would have made with the railroad and wages he has in the past, also prospectively, which --

Q And I gather the crux of the liability would be wrongful discharge; is that it?

MR. ESTES: That's right, Your Honor, under a common-law theory. Now, --

Q So that before the Board, I gather, the Board could award back pay, finding a wrongful discharge?

MR. ESTES: Yes.

Q But nothing in excess of back pay; is that it?

MR. ESTES: That's right.

Q Whereas you're asking damages which would be more than just back pay?

MR. ESTES: That's right. It would be prospective as well.

Q Yes.

MR. ESTES: Although I believe, in rare instances, the Board can -- I believe this now -- can award attorney's fees.

Q Has it done this?

MR. ESTES: I think in rare instances it has.

Q For attorney's fees, but not -- wages are limited to lost wages, period; are they not?

MR. ESTES: That's true, Mr. Justice Brennan.

Q Yes.

MR. ESTES: Plus reinstatement, he'd be working back with the railroad.

Q Yes. But in your lawsuit you'd be asking for damages -- well, would you specify them again?

MR. ESTES: Well, general damages being -- the measure of damages, of course you'd look to the contract, to see what his wages would have been had he been employed and what wages he has earned, the difference being the measure of damages.

That would be retrospective. And then prospective, of course, would be a jury question, to determine what his future damages might be.

Q Well, do you think that he could recover prospectively the difference between what he's making in another job and what he would have made with the railroad?

MR. ESTES: Mr. Justice White, I certainly do. I believe --

Q Even if the railroad said to him, Please come back, we'll reinstate you?

MR. ESTES: Yes, sir, Mr. Justice White, I believe that could be done.

Q You mean he has a choice of not working for the railroad but, nevertheless, collecting from them?

MR. ESTES: Georgia recognizes constructive service, where a man makes himself available for work;under his employment contract he can remain available and say, "I'm ready to work, and you have to pay me."

Now, of course, if there had been --

Q Well, I know, but the railroad says, "We'll be glad to put you back to work", and he says, "No, I want to keep the other job, but I want you to pay me the difference between my lower wages on the other job."

MR. ESTES: That's a difficult question. I'm not sure. It's decided by Georgia law.

Q Well, you can't -- if the railroad will put him back to work, and if the Adjustment Board would order reinstatement, but he says, "No, I don't want to be reinstated." I don't know how you can say you'd get any damages out of the railroad.

MR. ESTES: Mr. Justice White, I think that's a very difficult question. I think it's not answered by Georgia law.

Q Well, you'd say, anyway, it's a State law question, whatever it is.

MR. ESTES: But I would, nonetheless --

Q It's essentially a --

MR. ESTES: -- to that extent, I don't think the axe could cut both ways. I don't think he could --

Q No, but, Mr. Estes, you say, in any event, it's a State law question, isn't it?

MR. ESTES: Yes, sir. I'm certain it is.

Q So whatever measure of damages, respective of what might be the limitation if he followed the federal route through the Adjustment Board.

MR. ESTES: That's right. Well --

Q In the courtroom, if you're allowed to bring your action under State law, then, you could cover whatever the --

MR. ESTES: That's right, whatever the State law provides. And it may vary from State to State, as well.

Q Do you think that State law would govern what he could recover under a contract with the railroad?

MR. ESTES: Well, to start with, Mr. Justice White, I'm not sure that --

Q From a breach of the contract with the railroad?

MR. ESTES: I'm not sure that this is a breach of contract case, anyway. There's some question about that. The Georgia courts have had numerous, numerous cases on wrongful discharge. There has never been a holding that this is a matter in breach of contract.

Assuming that would for the moment; that's what Mr. Moore sued for, breach of contract.

Q Well, he has to claim a wrongful discharge?

MR. ESTES: Excuse me?

Q He has to claim a wrongful discharge, I take it?

MR. ESTES: Yes, Mr. Justice White, he does.

Q And wrongful under the collective bargaining contract with the railroad?

MR. ESTES: Yes, Mr. Justice White, it does.

But, nonetheless, I'm not sure that that makes it an action in contract; that is to say, an action ex contract --

Q Well, whether it is or not, what's the governing law for whether or not you've been wrongfully discharged under a collective bargaining contract with the railroad?

MR. ESTES: I think whether or not there was justification under the contract of --

Q Well, but is it Federal or State law?

MR. ESTES: I think that's State law, Your Honor. Under Transcontinental Airlines vs. Koppal, Transcontinental --

Q Have these questions been mooted in any other cases, do you know, Mr. Estes?

MR. ESTES: Been mooted in --?

Q There have been a lot of these discharge cases, haven't there?

MR. ESTES: Well, yes, Your Honor. There's one case that's very critical, in fact there are two cases I'd like to discuss in this connection. The first is Union Pacific Railroad Company vs. Price, I'll call that the Price case --

Q Is that the one I wrote?

MR. ESTES: I believe so. This is the case that really destroys your exhaustion of remedies and makes it an election of remedies, because here Mr. Price was fired, I think he also sued the railroad under an FELA action. They fired him because of it. He pursued his administrative remedy. The Adjustment Board found that he had been properly discharged; so he said, "Okay, I've exhausted my administrative remedies, I'll go to my court" -- and of course the holding in this Court in that case was that you can't relitigate the same issues.

So we can forget about exhaustion of administrative remedies, and I think we should, from now on, be discussing election of remedies. No case has really undermined the Moore decision, as the railroad contends, even the case of Walker vs. Southern Railway. That's a real bugaboo of a case, unfortunately, because it's had some rule misapplications. To start with, it's not a wrongful discharge type case, to begin with, and should not fit within the particular Moore exclusion and should not be applied to it.

What it really was was a computation of time case. Mr. Roy Walker also took sick leave. He gave the railroad notice that he was ill. The railroad contended that he had given it too late, within the 30 days required by the contract. Roy Walker contended he had given it in time. The question, really, there was not wrongful discharge, it was a case of whether he had given this notice in time or not. So it's a time computation case.

And this is --

Q You called this an election of remedies case?

MR. ESTES: I think it is now because of the Price case, Mr. Chief Justice.

Q And being an election of remedies case, do you still contend that you can collect damages for future unemployment if the railroad tenders the employment to him, as Mr. Justice White suggested?

MR. ESTES: I think that's --

Q Since he elected.

MR. ESTES: I think that's a question to be determined by Georgia law and by a jury, Your Honor.

I agree that --

Q By a jury? Or is that a legal question?

MR. ESTES: It may be a mixed question of law and fact, depending on whether or not the offer is believable. For instance, Mr. Andrews in this case may very well, and I will say he probably will, on the trial of the case show by evidence that his wrongful discharge was occasioned by things other than his illness, and that the illness was a mere charade, a mere sham, and that there are other reasons the railroad wants to dump him, and that the offer is not a real, genuine or bona fide offer, but is a way to mitigate damages.

Much as is the attack in an FELA case, where the railroad argues to the jury: Well, he's going to have this wonderful job, higher earnings and whatnot. They return a low verdict, and then he gets fired.

So I think it may be a mixed question of law and fact, and I think it could be properly submitted to a jury and predicated on State law.

Q I suppose the questions we've put to you address issues really not before us in this case; is that right?

MR. ESTES: No, Mr. Justice Brennan. As a matter of fact, I think these are key questions because of the collateral cases surrounding the original Moore decision, that have confused the situation so badly.

As I first stated, --

Q Yes, but if we were to overrule Moore --

MR. ESTES: If you would overrule Moore --

Q -- and that line of cases, that would mean you would have to go to the Adjustment Board, isn't that right?

MR. ESTES: Not only would Mr. Andrews have to go to the Adjustment Board, Mr. Justice Brennan, you would forever slam the courthouse door on any other claimants of this nature.

Q Well, as I recall it, the dissenters in Walker thought we should follow that question.

MR. ESTES: Yes, Mr. Justice Brennan, that was true with several notable exceptions. Of course the foundation of the Roy Walker case, it's our contention, is not really well laid. I think, as Mr. Justice Stewart and Mr. Justice White pointed out, you can't really make a jurisdictional determination on how well or fully some Railroad Adjustment Board is doing.

It would be patently discriminatory. What if some poor fellow up in New York, who has brought his, and they are way behind because they have a lot of claims; so --

Q Incidentally, what --

MR. ESTES: -- so he gets to sue the guy in Southern California, where they don't have many claims, where he has to go through the Board.

Q Well, what is -- as I remember, didn't you say something in Walker, sometimes it takes ten years to get through the Adjustment Board? Congress then enacted the statute to --

MR. ESTES: Speed up the --

Q -- speed up. Has that happened or not?

MR. ESTES: Yes, Mr. Justice Brennan, it has happened, about 50 percent of the collective proceedings.

Q It now takes five years, you mean?

MR. ESTES: Well, even less; say four years. And in some places one and a half years.

Now, they vary. But of course you can't have a variable jurisdiction throughout the country, depending on how the Board's doing.

Besides that, what if the Board slows down for five years now? Are they going to let some more Roy Walkers slip through? Well, I think they couldn't very well do that, either. That would be discriminatory.

It really shouldn't be predicated, though, on how well the Board is doing. It's a matter of jurisdiction.

Q Now, Mr. Estes, under the amended statute, unlike

the situation at the time Price was decided, isn't there now a judicial review of -- both ways. At the time Price was decided, we said there was judicial review under the then statutory scheme for the railroad but not for the employee, of an Adjustment Board decision; isn't that right?

MR. ESTES: That's right, Your Honor.

Q But now, under the new statute, there is judicial review, isn't there, both the employee as well as the railroad may have it?

MR. ESTES: Well, may it please the Court, I would take the position that your judicial review is not a review de novo. I may be mistaken, but I think that the findings of fact of the Board would outlaw the case.

Q But what we said in Price was that there was no judicial review at all.

MR. ESTES: Well --

Q On the part of -- available to the employee.

MR. ESTES: Perhaps you did, Mr. Justice Brennan, but it was my --

Q But now there is some, at least, whatever it may be.

MR. ESTES: -- it was my understanding that Mr. Price would not be permitted to relitigate issues already determined, and it would be petitioner's contention that would be basically the same as now, that a matter once decided would not be re-

litigated; a factual finding.

There's another interesting thing about the 1966 amendments, which I respectfully submit were totally overlooked by the Court in the Roy Walker case; which is that the 1966 amendments should be a clear designation of legislative intent in this regard. That is to say, sweeping changes were made, and some real positive things were done by the Legislature to speed up the remedies, and also to balance it out a little bit, too, I think.

But in all of the committee reports and in all of the legislative committee meetings, and the history of the legislature there, and in the legislation itself, there is not one single word, not one iota of change as to the scope and the jurisdiction of the Board, nor the limitation of the Federal or State courts in these matters.

Now, I don't know where you can get a much clearer mandate from the Legislature. They had their opportunity. It was a big crisis. It was a big issue. Something had to be done. They did some procedural things. And they do not touch the authority or the scope of the jurisdiction of the courts.

Q Isn't that an argument that in effect they meant that Moore should continue to be effective in situations where it might properly be applied?

MR. ESTES: That certainly is correct, Your Honor.

I think this is a perfect opportunity to end this legal battle, the chipping away and the pecking away at Moore, with the Koppal decision.

There is another area that we point out to the Court, which is the real distinguishing characteristic between what I call Moore type cases, that is to say a purely wrongful discharge case, and a Slocum type case, or Charley Maddox type case, that's Maddox vs. Republic Steel Company.

These are cases where someone -- and by the way, the Slocum type case, Mr. Slocum was the chairman of a railroad union, two unions were in dispute as to who had jurisdiction over a certain area of work. The railroad attempted to file in State court an action for declaratory judgment to make a determination, and of course they were required to go by the arbitration method.

And this was completely distinguished in the Slocum case from the Moore type case, where this is an ex-employee, it's not involving rights of other railroad employees, and he's suing the railroad just like they ran over his car at a grade crossing.

The Walker case is like the Slocum case. The Charley Maddox case was a case where Charley Maddox had been properly laid off, and was suing for severance pay under the contract.

Now, I said that I would come to the Arguelles case,

I want to mention that just very briefly, because I think that can straighten out also some very unfortunate language that came out of the Roy Walker case. And that was the language that the Court of Appeals in the instant case used, even though they conceded that all the law was on my side, nonetheless, their ruling against me was this: "the overruling axe is held so high that its fall is about as certain as the changing of the season", coming from Mr. Justice Black in that case.

Mr. Justice Black, in the Arguelles case, made a very strong, very fine statement, and I think it reflects the feeling of this Court, the thrust of this Court, in its perseverance and continued drive to maintain the courthouse doors open to the public, to the little man, where Mr. Justice Black -- and this was consideration, by the way, the Arguelles case was a seaman suing under a statutory right to elect. The Court says, in Arguelles, the Legislature clearly preserved his right to sue, in Section 301 the Legislature clearly has not taken it away. So that it would be highly presumptive for this Court or any court to remove a man's right to litigate a wrongful discharge, a common-law action,in a court without specific legislative action, and no clear reflection of any legislative intent toward that direction in any event.

Q Let's assume your client wanted reinstatement; could he get it in court?

MR. ESTES: Could he get a reinstatement in court?

Your Honor, I don't believe so. I think this --

Q Why not?

MR. ESTES: Well, I don't believe you can force someone to be employed somewhere. I don't believe the railroad could be enforced to make him -- well, he was an electrician, so I'd say that I don't believe you can force a railroad to let him put together their switchboxes. They may have to pay him, they may have to give him damages; but I don't believe they've got to employ him.

Q Well, doesn't the Adjustment Board sometimes give back pay and order reinstatement?

MR. ESTES: Yes, Your Honor, it does, I believe.

Q Can't you get the same kind of relief in court?

MR. ESTES: No, Your Honor, I think damages, general damages for a common-law wrong are totally --

Q Why?

MR. ESTES: -- different damages in nature and kind.

Q Why? Why couldn't the court order reinstatement if the Adjustment Board could?

MR ESTES: Well, perhaps the court could; I don't believe the railroad or Thomas L. Andrews want reinstatement. I think the evidence in the case --

Q That isn't my question. That isn't my question. Is there some legal barrier to the court giving reinstatement or not?

MR. ESTES: Well, Mr. Justice White, in all probability, a court could tell the railroad they either had to hire him or had to pay him.

Q You don't think the Adjustment Board has exclusive jurisdiction to order reinstatement?

MR. ESTES: No.

Q Is it your position that even if the Adjustment Board were to order reinstatement, the railroad would be free to say, "We just don't want this particular man working for us; we'll pay him the money, but we don't accept his services"?

MR. ESTES: That's never been litigated, to my knowledge, Mr. Justice Rehnquist, but that would be my position, yes. That you can't make the railroad put someone in their machine shop, monkeying around with their equipment, that they don't want.

Q And no court, of course, can order somebody to work for an employer --

MR. ESTES: That's right, Mr. Justice Stewart.

Q -- if he doesn't want to, even under contract; it's been tried.

MR. ESTES: Right.

If it please the Court, I would like to reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Estes.

Mr. Major.

ORAL ARGUMENT OF WILLIAM H. MAJOR, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. MAJOR: Mr. Chief Justice, and may it please the Court:

I somehow get the feeling that if you argue in favor of a court trial, that means you're for the working man; and if you argue in favor of administrative remedies, that that means you're for the railroad. And I don't think that's right, and I don't think it is reflected in the congressional history of this Act, and I don't think it is now the present thinking of labor and the railroads that that is correct.

I submit that the Railway Labor Act was an act sought by both the unions and the owners of the railroads. That in those days, in 1926, when the Act came into being, there was a feeling of voluntariness in the eyes of the Congress that they could simply prod one side and the other side by means of the Railway Labor Act and achieve the desired results. And that is what is done in the area of major disputes, those disputes arising out of anything in the contract, to start off with, that's where the union has a right to strike when the prodding doesn't work, or the railroad has the right to lock out. And that is on a voluntary basis.

On the other side of the coin, in minor disputes, where you have the interpretation or application of contracts, both the union and the railroad have been in favor of that

administrative remedy.

Now, I don't know how the case of Moore ever came to be, in view of the legislative history. Because if you look back in the 1934 amendments, which took place of course shortly after the passage of the Act, when they find that the minor dispute area wasn't working because of the fact that it was voluntary, the unions voluntarily appointing Board of Adjustment members, and the railroads voluntarily appointing their members; and neither side would do it. And they found that wasn't working. And both the unions and the railroads came back to the Congress and, in effect, said: It's not working and we've got to do something about the area of minor disputes.

Bear in mind, of course, that the word "minor" disputes is a word of art that the framers of the Act used, not because they thought the disputes were minor; but to distinguish them from strike issues, they used that word of art.

As a matter of fact, when the amendment was in the committee -- now, it was proposed by the Federal Coordinator of Transportation, an office no longer in existence; but he said the existence of mandatory Boards of Adjustment would create naturally - [inaudible] - interpretation and application of contracts.

MR. CHIEF JUSTICE BURGER: Mr. Major, you'll have to watch your notes and the microphone; you're making it a

little difficult to hear you.

MR. MAJOR: All right.

And in those committee hearings a man by the name of George M. Harrison, who probably has as many credentials as a union man can have, he was president of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express, and Station Employees, and appeared as chairman of the legislative committee of the Railway Labor Association. He said this, in substance:

He said, These areas of minor disputes that we are looking at in the form of a compulsory adjustment board, they may very well involve a man's seniority, a man's pay for amount of work done, his promotion rights. And then I quote him as saying, It may very well concern the separation of the employee from the service, whether or no he has been unjustly discharged.

So, as early as 1934, in the congressional hearings, the union representatives were talking about mandatory boards of adjustment to take care of the disputes between the railroads and the working man over matters of promotion, seniority, rates of pay, including discharge. And then this Court came along and decided Moore in spite of that legislative history.

Even more remarkable is the way in which Moore was decided. You understand, the Railway Labor Act, in exhaustion of administrative remedies, was an after-thought in

Moore. It wasn't even briefed by the winning side, as a matter of fact.

Moore came up on the then novel Erie question. Moore was in the State court, and there were statute of limitation questions involved, whether a one-year statute controlled, as Moore's contract was oral, or the six-year written contract with the union. And it got to this Court on the thinking that State law controlled.

As a matter of fact, later on, in amplifying Moore and distinguishing Moore, in the case of Koppal this Court held: you must exhaust your administrative remedies in your State, if your State requires the exhaustion of remedies; but you need not if your State does not require the exhaustion of remedies.

So you have Moore on the one hand, and Koppal on the other hand; one of them saying you had to go to the Adjustment Board, and the other one saying you didn't, depending on the accident of where you happened to be fired, as it were.

However, this Court, I think, has now fully and finally solved the question of whether State law or Federal law applies. I think, in the case of Textile Workers vs. Lincoln Mills, decided by this Court in 1957, and also the case of International Association of Machinists v. Central Airlines, this Court has once and forever solved the problem by saying that anything under the Railway Labor Act involving minor

disputes is controlled by federal law.

Therefore, when we say that this man who has been discharged doesn't have a remedy that's available to the little man, as it was expressed, it's contrary to the thinking of the union, to the thinking of the framers of the bill as it came through the Congress, and it's contrary, really, to the thinking of this Court.

It is true that --

Q He doesn't have a -- he has no power to go the Adjustment Board himself, does he?

MR. MAJOR: He does, indeed, Mr. Justice Douglas.

Q He has to go through his union?

MR. MAJOR: If my understanding of the Act is correct, he has an absolute right to go himself.

Now, where he may not be able to go himself is to a public law board.

Q No, but in terms of Section 3, Second, says that the request is to be either made by the representative of the craft or class of employees or by the carrier.

MR. MAJOR: It is my impression that the '66 amendment to the Act --

Q I'm reading the '66 amendment.

The only thing he has if his union presses the claim and loses, then he can appeal.

MR. MAJOR: Reading (j) of the section, it says:

"Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect." And I would assume that that means if a party can be heard in person, a "party" means an individual rather than the union, I would guess.

Q But as I read Section 3, Second, the amendment in 1966, it receives complaints only by unions or by carriers.

MR. MAJOR: Mr. Justice Douglas, if that is true, then my conception of the Railway Labor Act on minor disputes is erroneous, because it was my definite impression that not only could it be done but that it was being done daily, before the Adjustment Board.

Q I just wondered how a union -- a union normally would be the spokesman in a reinstatement, taking care of the interest of the employee in the future; but if the employee wants to put this thing behind him and get out of the business, and never go back and work again, then the union might not be a very good representative of him.

MR. MAJOR: That is always, of course, the possibility, Mr. Justice Douglas.

In that connection,of course, the criticism that this Court found of the whole situation, as assumed by Walker v. Southern Railroad, was one of delay and another of inequity. The delay that has been referred to, and which is referred to in that decision, is the delay of the Adjustment Board. The

first division, for instance, had a delay, at that time, of seven and a half years.

With that in mind, the Congress, in 1966, attempted to remedy the situation on the question of delay. And again it's right remarkable, in the committee hearings, just what happened.

In those committee hearings, there were, oh, days and days of hearings, and so there's all kind of material in there; but the remarkable testimony of Mr. Jesse Clark, who identified himself as president of the Brotherhood of Signalmen, on behalf of the Railway Labor Executives Association and its 22-member union group, testified thusly:

He said: If the objectives of speedy, fair, and simplified handling and settlement of contract claims and grievances in this industry are to be achieved, it would be done by reducing to a minimum rather than by expanding the role of the courts in this field.

And so there is a union man himself saying that we, the union men, are the ones that want, as well as the railroad men, some way to break this backlog. And so, in order to break the backlog, they changed the law, to provide now for what has been commonly known as public law boards.

A public law board is nothing more than the railroad appointing one man, the union appointing one man, and they meet together; and it can be done within 30 days. They meet

together and solve the dispute. If they can't solve the dispute, they ask the Mediation Board to appoint a neutral referee, who breaks the deadlock; and they solve it.

And their decision has the same force and effect as if the entire Board of Adjustment met and decided the matter.

Q What happens if both the Brotherhood and management, both decide that this man ought to be thrown out of his job?

MR. MAJOR: Well, he has a contract, Mr. Justice Marshall. The Brotherhood, I wouldn't think would have any more right to throw him out of the job than would the union, -- or the railroad have the right to throw him out of a job. He works under a collective bargaining agreement, of course.

Q What is worrying me about that is that there are some instances where a man is just -- he's not loved by anybody.

MR. MAJOR: Oh, you mean he gets double-crossed, as it were, by his own union; is that what you're referring to?

Well, I think that the answer to --

Q I imagine Congress just figured that would be the exception rather than the rule, I suppose?

MR. MAJOR: You know, there isn't a prohibition against him suing his own union.

Q That's right.

MR. MAJOR: Obviously. And, secondly, I don't think

that again there is any problem in that regard, because if he has a contract right, the Adjustment Board can give him just the same relief as the court can.

Q And the union can't violate the contract just to take care of a guy they don't like?

MR. MAJOR: I would not believe they could, Mr. Justice Marshall.

You know, what happened was, when they created these boards of adjustment, and we attached as a part of our brief a table of the Report of the National Mediation Board, which includes the report of the National Railroad Adjustment Board, and the division -- and these divisions are not geographical, they're by crafts, you'll understand -- the division that Mr. Andrews is in is substantially current. You will notice from the table that they have only taken in 69 new cases last year, and they disposed of -- pardon me, that's wrong; 162 cases, and they disposed of over 300 cases, and they're substantially current.

So there's no reason in the world that Mr. Andrews could not get a very speedy hearing before his division of the Adjustment Board.

Now, as to what he can get when he gets there. That obviously is one of the key questions. Can he get the same thing he can get in court?

Under the law of Georgia, it's highly dubious that a

man can go into court and sue for wrongful discharge while at the same time refusing to take back employment that's been proffered him by his employer, because of the fact that he must mitigate his damages. And the offer of his job back simply shows that he hasn't suffered any damages in the future.

So, therefore, the only thing that he can get is a money judgment for such amounts of actual lost wages as he has accrued.

Now, that's not true, necessarily, before the Adjustment Board. Before the Adjustment Board, he can get back pay, he can get seniority adjustments, he can get attorney's fees in some instances, and he can also get reinstated. And if they say he must go back to work, then the railroad must put him back to work, and the railroad doesn't have any choice. So it may be that he can get more than he can get in court.

I don't think it would be erroneous to say that perhaps he could get reinstated by a court action. But certainly a speedy remedy is readily available for him, to get just everything that he can get at the courthouse.

It's interesting to me that Moore has been perhaps explained, rationalized, accepted, it's had everything done to it but nobody has yet, either fully affirmed it or fully overruled it; it seems to be sort of an embarrassing stepchild sitting back there.

And we say that now, in view of the history of the

Act, there's no longer any reason for Moore to exist.

The fundamental reason, of course, that you have administrative hearings rather than court hearings in this area, in the railway labor area, is the fact that in addition to speed, that you get uniformity of decisions.

As it now stands, if you can sue on these contracts, these contracts are highly complex, in that they are part written and part custom of the trade, as it were.

Q Could I ask you: Assume a railroad worker has a grievance under the contract, and they try to settle it on the property and it isn't settled, and neither side takes it to the Adjustment Board. Isn't it the only way that it gets to the Adjustment Board is if somebody takes it there?

MR. MAJOR: Yes, sir. If they can't settle it themselves, and neither side cares enough about it to carry it forward, it dies.

Is that your question, Mr. Justice White?

Q Yes.

But what I really am asking: may the railroad and the worker together waive the Adjustment Board?

MR. MAJOR: The worker and the railroad together may enter into a settlement of the problem --

Q Yes, but they don't settle it. But the railroad says, "Look, we don't want to go to the Adjustment Board; you don't want to go to the Adjustment Board. Go to court; we'll

settle it in court."

MR. MAJOR: Well, your question, Mr. Justice White, then is broader than that. Your question is: May the parties, in a situation where --

Q That's right.

MR. MAJOR: -- administrative exhaustion of remedies is required, may they waive the exhaustion of administrative remedies?

Q Well, exhaustion of administrative remedies required -- all the Act says is that somebody can take it to the Board, and if somebody takes it to the Board, the other party has got to go there too.

MR. MAJOR: Mr. Justice White, I'm not sure -- I'm fielding your question, but let me express it this way:

I would seriously doubt that, under the Act as it presently stands and under your decisions, there's anything to litigate in the courthouse any more in connection with a railway labor case.

Now, whether you could say the parties waive the Act and decide to file a private lawsuit over here, I would think the court would question its own jurisdiction under those circumstances. I just don't see any concept of the Railway Labor Act being anything other than mandatory on both sides.

I suppose, of course, that you can do anything almost by agreement, and I suppose that you and I could litigate

in Florida, although neither one of us live there, unless the court asks us about it, you know, but, except for that --

Q Well, if the union refuses to go to the Board, as Mr. Justice Douglas was asking you, if the union refuses to go to the Board when the employer turns the grievance down, the worker can't go to court and he can't go to the Board; is that it?

MR. MAJOR: I am of the opinion that the individual himself can go to the Board, and is not dependent on his union taking him there.

Q That isn't what the statute says, and your brief says just the opposite.

MR. MAJOR: I was --

Q The employee representative can go.

MR. MAJOR: I thought that the public law boards were limited to the union, but I was always of the impression that the Board itself was open to an individual without his union representative. And that's my conception of the law.

Q I think there's more in these briefs, I read them some time ago, but there are statistics that show that there are several cases that have been filed by individuals.

MR. MAJOR: Yes, right. I'm sure the public law boards --

Q Well, your brief says the remedy -- that's the 1966 remedy -- would provide that either a carrier or employee

representative could request of the other the establishment of a special Board.

MR. MAJOR: Yes, that's a special Board. That's a so-called public law board.

Q Yes.

MR. MAJOR: But that's where one of them appoints one, and the other appoints another member.

Q Yes.

MR. MAJOR: That's this public law board, and Your Honor is eminently correct that that has to be done by the union representative. But to go to the Adjustment Board itself, I am under the definite impression that an individual can do it without his union going with him.

Q But isn't it the public law board that has speeded this thing up?

MR. MAJOR: The public law boards were exactly the thing created by the '66 amendment, for the purpose of speeding it up, and they have speeded it up.

Q So if the only way an individual union man can go is not to the public law board but to the Adjustment Board, as a whole, he might not get the benefit of the speedy treatment that was contemplated in 1966?

MR. MAJOR: We think exactly he will get the speedy treatment, because, by reference to the table in our brief, Your Honor will readily see that the Adjustment Boards don't

have the backlog of cases they had then. They are on a -- this man's division, for instance, is on less-than-a-year time schedule.

Now, the first division is where the backlog always was. It's not that current, but it looks like, from computing the figures, that by June of next year they will be on about a year-backlog basis.

And that's as quick as you can go to a court trial. As a matter of fact, this man has been in court for three years on this case, and he hasn't had a trial yet.

So, obviously, the public law boards are going to speed it up tremendously; but even if he has to go to the full Board, it's much faster than if he goes to the courthouse.

The uniformity of decision question that I was speaking about has to do with the fact that these Boards report their cases that they have, and they therefore have uniformity of decisions. Whereas if the worker must go to the courthouse for interpretation of his contract, the Federal Judge sitting there on the District level has a very awkward task before him, because in Atlanta, Georgia, for instance, the only place where the reports of the Adjustment Board are on file, as far as we know, is the office of our railroad. So, if a Federal Judge had one of these cases in Atlanta, trying to look for precedents, it would be almost impossible unless he wants to send his Clerk over to the railroad office.

Last, of course, is the question of expertise before the Boards. The average man doesn't get fired just willy-nilly. Of course, there are cases of that.

This man, for instance, is not fired. This man has been furloughed because of medical reasons. He's perfectly free to walk back in the railroad office tomorrow and say, "I demand my job." And they say, "Fine. Go to the doctor and if he passes you, you're back at work." That's what the union contract says. That's what the collective bargaining agreement says.

If the doctor doesn't pass him, then he's perfectly free, if he thinks he's been mistreated, of course, to go to the Adjustment Board.

So what I'm saying is that the question of expertise has something to do with it. For instance, the man that gets fired for breaking a coupling, the engineer, if he gets fired for breaking a coupling, that might sound to be a right stringent thing to do to him just for breaking a coupling. But what the railroad knows is that you don't get fired for breaking the first coupling, you get fired because you've broken a series of couplings. And it's symptomatic of the problem of your being a bad engineer, not the fact that you broke one coupling.

Or if he goes through a blow post and doesn't blow his whistle. You don't get fired for that the first time,

you get fired after accumulation of those kind of offenses. And when you speak about blow posts and derailers and hydraulic couplings, the average jurist doesn't know what you're talking about. It's something the members of the Board know, they deal with it every day.

Therefore, the worker gets a degree of expertise before these boards that he doesn't find at the courthouse.

In summary, therefore, we say that the problem that this Court looked at in the Walker decision has vanished because of the fact that Congress has amended the Act, and now a speedy remedy is available. The inequity that this Court looked at in the Walker case is gone now because of the fact that the Congress, in amending the Act in 1966, provided for an appeal by either side, instead of a de novo appeal, which only the railroad could take advantage of, as was previously the law.

Q What's the employee's appeal now under the '66 Act?

MR. MAJOR: Exactly the same as the railroad's is, if --

Q De novo?

MR. MAJOR: It's not de novo, Mr. Justice Brennan, it is limited to fraud or corruption, or a failure of the board to confine itself within the framework of the Act.

Q In other words, treating the Board pretty much as an arbitrator?

MR. MAJOR: Yes. Almost exactly, on the question of arbitration, yes, sir.

Q And is that true on both sides of the review, of the railroad review or the employee review?

MR. MAJOR: It's equal on both sides; the review is exactly the same now.

And so we, therefore, say that Moore has no reason to exist. It probably doesn't even need to be reversed or overruled, for reasons that new situations have taken place within the Act that give it a new date. But necessarily it means that Moore no longer is the law, and that the administrative remedy provided by Congress is the correct route for the employee to go.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Major.

Mr. Estes, do you have anything further?

REBUTTAL ARGUMENT OF ANDREW W. ESTES, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ESTES: Mr. Chief Justice, and may it please the Court: --

Q Before you begin, Mr. Estes, can an employee individually go to an Adjustment Board?

MR. ESTES: Your Honor, it is my understanding that he cannot; but he can sue his railroad for failure to do it. And I believe there is a Supreme Court case on that.

Q His union, you mean?

Q His union or the railroad?

MR. ESTES: I think the employee, once he's fired and one he's out in the cold, I believe he can sue the union for its failure to adequately represent him and join --

Q I know, but suppose he wants to go the Adjustment Board route; you mean he can't go unless the union will take his case to the Adjustment Board?

MR. ESTES: Mr. Justice Brennan, it's my impression that he cannot go, himself, representing himself, or through his counsel representing him. That's my impression; I'm no labor lawyer.

Q Well, if that's so, then what's this case all about? He has no administrative remedy, you're telling us.

MR. ESTES: What this case is all about, Your Honor, --

Q I know, but if he can't go with his grievance independently of his union, does he have any administrative remedy then?

MR. ESTES: May it please the Court, we've taken the position that he cannot.

Most particularly, in an interesting case, like the case at bar -- I hadn't intended to bring this out. There's no evidence, by the way, there's been no discovery in the case, it's almost a pure law question; a rare item. But opposing counsel has brought out that he could just go back and demand his job at any time. I will tell you, and state in my pledge,

that Mr. Andrews has gone back, he's gone back with three physician's certificates. He went to the chief surgeon for the railroad, who absolutely refused to examine him, even, and said: "Get out, we don't want you anyway. Get out of my office." And threw him out.

He is now neither fish nor fowl. He's not fired and he's not employed.

Q Is that in the record or is this --

MR. ESTES: There is no record, Judge, I'm awfully sorry. There's been no discovery.

Q Now, the problem that seems to divide you gentlemen somewhat, and I'm frank to say is confusing to me, is an important one; it's something very easy to find out. Will you each address yourselves to that in a supplemental memorandum and tell us what is the fact, what is the practice, and what is permitted; whether the employee may go to the Adjustment Board without the union, or whether he can't?

Because, as Justice Brennan has just suggested, that's rather crucial to decision in this case; if not dispositive.

MR. ESTES: It might be dispositive in one respect, may it please the Chief Justice, but in another respect I would say -- and the only way it could be dispositive, I think, would be in favor of the petitioner here.

But even finding the other way, I would certainly

urge the Court to find that the Moore doctrine is well supported in rationale, and has not been changed throughout the years. And that expression by Mr. Justice Black --

Q But we won't cross that bridge until we get your responses on this score.

MR. ESTES: Very well, Your Honor. I think that --

Q You may argue your point on it, if you wish, Mr. Estes, but that could be included in your supplemental memorandum.

MR. ESTES: I would like to go ahead with it, if I may.

Q Very well.

MR. ESTES: Justice Black expressed the view that the Labor-Management Relations Act should never be construed so as to require an individual employee, after he is out of a job, to submit a claim involving wages to grievance and arbitration proceedings or to surrender his right to sue his employer in court on the enforcement of his claim. Why?

Well, again, this is brought out by opposing counsel. The railroad and the union agree. Mr. Andrews doesn't agree. He's out in the cold. He doesn't have a job. He doesn't have a union. He's out. He wants to sue the railroad. They have wrongfully discharged him. He has an action for wrongful discharge, recognizable in the State courts. He's free to pursue it, because of the Moore decision, and really, when we

get right down to the final last word on the argument, it's our position that we're relying on the Moore doctrine. It's well founded, and it has never been changed, either by legislative or judicial act.

I present it to your attention.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Estes.

The case is submitted.

[Whereupon, at 11:39 o'clock, a.m., the case was submitted.]

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