A New Look at Rail Employee Merger Protection, Norfolk & Western R.R. v. Nemitz: An Assessment

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The livelihoods of employees of merging railroads are afforded special statutory protection in the Interstate Commerce Act. The author surveys the development of employee "protective conditions" and then assesses Norfolk & Western R.R. v. Nemitz, 404 U.S. 37 (1971), in which the Supreme Court recently expanded the scope of Interstate Commerce Commission responsibilities and the jurisdiction of the federal courts over employee grievances arising from railroad mergers. The article includes an extended analysis of the development of the exhaustion of remedies rule up to recent Supreme Court pronouncements. The author concludes that although the Court failed to face important exhaustion of remedies questions, the decision affords needed employee protection which is substantially more valuable than the costs of any possible resulting increase in government interference in collective bargaining and grievance procedures.

I. INTRODUCTION

MERGERS AND CONSOLIDATIONS, important in American enterprise since the 1920's, are commonplace today.¹ The phenomenon has been prevalent in the transportation industry, which has sought to eliminate costly duplication of facilities through a series of major consolidations. The resulting contraction of facilities has, however, posed substantial threats to the job security of thousands of railway employees.

These threats, inherent in mergers, have not gone unnoticed in Congress, which has enacted section 5 of the Interstate Commerce Act (ICA)² in an effort to protect threatened carrier


² 49 U.S.C. § 5(2) (1970). Non-transportation businesses are for the most part governed by antitrust laws enforced by the Department of Justice, Federal Trade Com-
employees. Under the ICA, approval of the Interstate Commerce Commission (ICC) is a prerequisite to the merger of two or more carriers. Railroad employees are afforded special protections in section 5(2)(f), which imposes affirmative protective duties on the ICC and makes the federal courts readily available to railroad employees. The nature of this protection has recently been clarified and strengthened in *Norfolk & Western R.R. v. Nemitz*, handed down by a sharply divided Supreme Court.

*Nemitz* squarely presented the Court with important questions of first impression respecting both the scope of the ICC's duties under the ICA to protect the interests of rail employees against the adverse effects of rail mergers, and the scope of federal court jurisdiction over actions by rail employees to enforce rights to merger protection. In *Nemitz*, the Court broadened the statutory duties of the ICC, expanded the enforcement range of federal court jurisdiction, and limited the powers of rail unions and carriers to alter statutory norms of protection provided in the ICA. The case presents an excellent framework for tracing the history and evaluating the effectiveness of one of the nation's most advanced systems for easing the impact of corporate consolidations on displaced employees.

After a brief review of the historical role of collective bargaining in the formation of employee merger protection and of the administrative and decisional history of section 5(2)(f), this article examines the *Nemitz* decision in some depth. It considers the practical implications of the Court's ruling, including its shortcomings in light of recent developments in the exhaustion of remedies rule. Finally, it attempts to assess the decision's importance within the framework of emerging federal labor law policy.

II. A BRIEF HISTORY OF COLLECTIVE BARGAINING AS A SOURCE OF RAIL EMPLOYEE MERGER PROTECTION

In the railroad industry, employee merger protection — generally called "protective conditions" — has historically been the product of both collective bargaining and legislation. The first direct

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3 The term "merger" is used in this article to describe various consolidations of railroad facilities including mergers, acquisitions, leases, and control agreements within the purview of the legislation which is the subject of this paper.

4 The full text of § 5(2)(f) is printed at note 14 infra.

Congressional enactment of rail employee merger protection was contained within the Emergency Railroad Transportation Act of 1933. That Act contemplated extensive railroad consolidations as a means of strengthening the depression-weakened financial condition of the railroad industry. It provided for a mandatory job freeze and compensation protection for all employees on railroad payrolls in May, 1933. During its three-year existence, however, the Act brought about little railroad consolidation and still less improvement in the condition of the railroad industry.

On February 1, 1936, after efforts to secure voluntary action had failed, the Federal Coordinator of Transportation announced that he would shortly order unification in twelve different railroad terminals. The proposed order aroused concern among both carriers and unions. Carriers threatened court action to challenge the Coordinator's authority; the unions sought legislation to prevent any reduction in railroad employment. Negotiations ensued after President Roosevelt urged both sides to settle their differences through collective bargaining, and on May 21, 1936, an agreement was signed in Washington, D.C. This agreement, generally known in the industry as the Washington Agreement, bound 85 percent of the railroads and 21 railroad labor organizations, and remains fundamental to virtually all railroad employee protective arrangements — those collectively agreed upon as well as those prescribed by the ICC.

The Washington Agreement provides that economic protection be furnished by the railroads to employees who may be displaced, dismissed, or transferred as a result of consolidations. Basically, an employee placed in a lower-paying job is entitled to receive a monthly "displacement allowance" to maintain his earnings at the level of his former position for five years following coordination. Employees who are temporarily or permanently deprived of employment are paid a "coordination allowance" equal to 60 percent of their average monthly compensation for the preceding 12 months of

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6 Act of June 16, 1933, ch. 91, 48 Stat. 211.
7 Id. § 7.
9 Id. at 244-45.
10 The Washington Agreement is described in Railway Labor Ass'n v. United States, 339 U.S. 142, 147 n.7 (1950), and is published in Hearings on H.R. 2531 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 76th Cong., 1st Sess., at 231-41 (1939) [hereinafter cited as 1939 Hearings].
service, for periods up to five years, depending upon the length of service. 12

When the condition of the railroad industry showed little sign of improving, President Roosevelt, in 1938, appointed a committee consisting of three railroad executives and three representatives of railway labor ["The Committee of Six"] to recommend legislation. In 1940, with approximately one-third of the country’s railroad mileage in bankruptcy, 13 Congress added section 5(2)(f) to the Interstate Commerce Act, 14 the present statutory foundation for protecting persons employed by merging railway carriers.

The first sentence of section 5(2)(f) provides that: "[a]s a condition of its approval [of a rail merger] . . . the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." The second sentence provides that the order of approval "shall include" certain minimum employee protective conditions — protection for at least four years against "being in a worse position with respect to their employment. . . ." The third and final sentence, which deals with the role of collective bargaining in solving merger related problems, states that "[n]otwithstanding any other provisions of this act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into” between the carrier and its employees’ representatives.

The first important test of the scope of the ICC’s duties and

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12 Id. See 1939 Hearings, supra note 10; Hummer, Jr., Projection of Employees Affected by Railroad Consolidations, 15 LAB. L.J. 736, 739 (1964).


[a]s 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.
powers under section 5(2)(f) came in New Orleans Union Passenger Terminal. In that case the ICC took the position that the second sentence of section 5(2)(f) prescribed a limitation of a "period of four years from the effective date of such order" on the first sentence requirement of "a fair and equitable arrangement to protect the interests of railroad employees affected." This interpretation would have limited protection to four years from the effective date of ICC approval, rather than four years from the time the employee became adversely affected. Since the practical problems of implementing mergers often delay the impact of consolidation on employees, the ICC's position would, in many cases, have shortened the period of protection to less than four years.

On appeal the Supreme Court disagreed with the ICC's interpretation and reversed New Orleans under the name Railway Labor Executives Ass'n v. United States. The Court held that:

[T]he Commission, while required to observe the provisions of the second sentence of § 5(2)(f) as a minimum protection for employees adversely affected, is not confined to the four-year protective period as a statutory maximum. The Commission has the power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years from the effective date of the order approving the consolidation.

Railway Labor Ass'n thus establishes a mandatory four-year duration of protection, and allows the ICC to impose protection in excess of four years where appropriate.

The next test of the ICC's responsibilities under section 5(2)(f) came in 1960 in Erie-Lackawanna Merger. In that case employees contended that the second sentence requirement of section 5(2)(f), dictating that employees were not to be "placed in a worse position with respect to their employment," required a "job freeze" — guaranteed employment for a period of four years from the date of adverse effect — rather than the past practice of awarding monetary compensation. The ICC rejected the employees' position on the ground that monetary compensation was sufficient to satisfy the requirements of the second sentence of section 5(2)(f). On appeal under the name Brotherhood of Maintenance of Way Employees v. United States, the Supreme Court sustained the ICC's position that
the retention of unnecessary positions was unwarranted and that monetary compensation was sufficient. The Court determined from the legislative history of the Transportation Act of 1940\(^2\) that a "job freeze" was not contemplated by Congress in the enactment of section 5(2)(f), and further observed that such an interpretation of the legislative history was reinforced and confirmed by subsequent events. The Court noted that since the statute's enactment, the Commission had consistently followed the practice of imposing compensatory protection in over 80 cases with full support of the rail unions.\(^2\)

Railway Labor Ass'n and Maintenance of Way were the only cases before Nemitz where the Court directly addressed itself to section 5(2)(f). And, while the ICC has decided other cases subsequent to Railway Labor Ass'n and Maintenance of Way, it is unclear from administrative practice whether the Commission ever viewed Railway Labor Ass'n or Maintenance of Way as applicable to mergers that involved prior protective agreements between carriers and unions. Since there were no pre-merger agreements in either case, the decisions could not define the scope of the ICC's duties where such agreements exist.

Pre-merger agreements have historically taken two forms: (1) stipulations between carriers and unions adopting ICC-developed protective conditions;\(^2\) and (2) collective agreements, generally patterned after the ICC's boilerplate conditions.\(^2\) A review of ICC merger orders, however, reflects Commission ambivalence towards its


\(^{22}\) 366 U.S. 169, 177 (1961). To meet the statutory requirements of section 5(2)(f), the ICC has used the Washington Agreement in developing a paradigm of protective conditions. The first such set of conditions was prescribed in Oklahoma Ry. Trustees Abandonment of Operation, 257 I.C.C. 177 (1944), and became known as the Oklahoma Conditions. The Washington Agreement was used as a pattern for the Oklahoma Conditions but the Commission recognized that the maximum Washington Agreement benefits — 60 percent of annual compensation for five years — was less than the statutory protection required by § 5(2)(f). The Oklahoma Conditions prescribed 100 percent protection; however, that protection was available only for a maximum period of four years. As discussed earlier, the Commission's "four year" policy was reversed by the Supreme Court in Railway Labor Ass'n. On remand, the ICC amended the Oklahoma Conditions in the second New Orleans Passenger Terminal Case, 282 I.C.C. 271 (1952), by combining the Washington Agreement with the Oklahoma Conditions to form a statutory minimum. The resulting conditions became known as the New Orleans Conditions, and it was these conditions which were upheld in Maintenance of Way. Since Maintenance of Way the ICC has, in cases where it has prescribed protective terms, with slight modification adhered to the New Orleans Conditions.

\(^{23}\) BROTHERHOOD OF RAILROAD TRAINMEN, supra note 11, at 150-52.

\(^{24}\) Id. at 150.
statutory duties where protective agreements have been reached. In some cases, the Commission has unequivocally imposed such conditions for the protection of the union members. In other cases, the Commission has adopted agreed-upon conditions for employees whose unions signed such agreements, even though it believed that different protection should be imposed for employees not covered by the agreements. In still other cases, the Commission has held that "as to employees covered by the aforementioned agreements, no conditions to our order are necessary," and has prescribed a set of conditions only for employees "not protected by the foregoing stipulations and agreements."

Past Commission practice would then seem to fall into three categories: (1) approval and adoption of prior agreements as part of its merger approval order; (2) approval of the terms of prior agreements without adopting such terms as part of its order; (3) mere recognition of prior agreements as relieving the Commission of any duty to prescribe protection without including such conditions in its order. Until Nemitz, it was unclear whether any or all of these practices reflected a proper exercise of ICC responsibilities under section 5(2)(f).

The question left unresolved can be briefly stated as follows: Does the Commission have a statutory duty to assure a minimal level of employee protection where protective agreements are reached prior to merger? While this question may seem to pose a rather narrow and technical problem of statutory construction, in reality it raises far-reaching and perplexing problems in rail merger protection. Must the ICC review the adequacy of protective agreements made pursuant to the last sentence of section 5(2)(f), and if so, must it incorporate such agreements as part of its approval order? Can ICC review of agreements be accomplished without doing violence to the strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements? By what standard should protective agreements be measured by the ICC and to what extent may protective agreements be altered through


collective bargaining subsequent to mergers? Conversely, if the ICC is relieved of statutory duties where protective agreements are executed, what law governs actions to enforce such agreements? If protective agreements are treated as standard Railway Labor Act (RLA) contracts, how is frustration of the manifest policies of the ICA to be avoided in the face of various restraints placed upon carriers and employees under the RLA? To what extent does the exhaustion of remedies doctrine limit employee access to federal court enforcement of merger rights? These and related questions, which at bottom pivot upon the interpretation of the "notwithstanding" sentence of section 5(2) (f), confronted the court in *Norfolk & Western Ry. v. Nemitz*.

III. THE NEMITZ DECISION

While *Nemitz* did not appear in the courts until 1968,29 the case had its origin four years earlier in the aftermath of one of the nation's largest rail consolidations.30 In 1964, as part of the transaction which merged the systems of the N & W and Nickel Plate Railroads,31 N & W acquired from the Pennsylvania Railroad the so-called Sandusky line, a seasonal line operating when Lake Erie was open to navigation.32 Shortly after its application for approval of the merger was filed with the ICC,33 N & W entered into an employee protection agreement with the Brotherhood of Railroad Trainmen (BRT), a labor organization representing employees of the carriers involved. This agreement was made pursuant to the third sentence of section 5(2) (f). Under its terms, 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 promised employees electing Sandusky line employment monthly supplementary compensation to the extent that their post-merger monthly earnings were less than their average earnings for the 12 months immediately preceding the merger.

31 Id.
32 Id.
33 The Sandusky line was pivotal to the merger plan since 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: The Accommodation of the Interstate Commerce Act and Antitrust Policies*, 54 Va. L. Rev. 1493, 1512 (1968).
In approving the merger, the ICC stated that the agreements respecting employee protection were "made pursuant to and in conformity with section 5(2)(f) of the Interstate Commerce Act for the protection of the covered employees," and made its order "subject to such agreements." After the merger went into effect, N & W claimed difficulty in obtaining pre-merger earnings records from Pennsylvania for work done beyond the Sandusky line and consequently it entered into a post-merger agreement with the BRT limiting supplementary compensation to the earnings level for the preceding 12 months from the Sandusky line only. This limitation drastically reduced monetary protection promised by the pre-merger agreement to those employees who, because the Sandusky line work was seasonal, had earned a large portion of their yearly income on other parts of their former employer's railroad system.

When the union, which had made the agreement with the carrier to reduce merger benefits, refused to process their claim against the railroad, the aggrieved employees brought a class action in the Federal District Court for the Northern District of Ohio seeking relief from the post-merger agreement and claiming as damages the amount unpaid under the terms of the pre-merger agreement. The defendant carrier, contending that the court lacked subject matter jurisdiction, moved for dismissal of the action. This motion was denied, however, on the ground that the court had jurisdiction to enforce an ICC order. Thereafter, the carrier, in support of a motion for summary judgment, advanced two additional arguments against federal court jurisdiction over the case: (1) since plaintiffs claimed that they were aggrieved by the subsequent agreement, the court had no jurisdiction over a dispute arising out of that agreement even if the prior agreement were deemed part of the Commission's order; and (2) the failure of the employees to exhaust administrative remedies under both the RLA and the agreement barred federal court intervention in the dispute. The carrier's motion was denied, but the court granted the cross-motion of the employees for summary judgment. The court held that the post-merger agreement was unenforceable because it abrogated the level of protection

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contained in the Commission-adopted prior agreement as required by section 5(2)(f), and, although the court had ruled in denying defendant's jurisdictional motion that the employees were not barred by any failure to exhaust administrative remedies,\(^3\) it nevertheless remanded the case to arbitration under the pre-merger agreement to determine damages.\(^4\)

The Sixth Circuit Court of Appeals essentially affirmed the district court's ruling but modified it by requiring that damages be determined by the lower court pursuant to sections 8 and 9 of the Interstate Commerce Act.\(^4\) The court agreed with the district court that the ICC faces a continuing obligation to assure a minimal statutory level of protection despite the existence of any prior voluntary agreements. In response to the carrier's contention that the existence of a protective agreement relieved the ICC of responsibility for employee merger protection the court stated that:

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\text{[t]he existence of a prior agreement does not allow the ICC to ignore its statutory duty. On the contrary, the ICC is required... to impose employee protective conditions whether derived from an agreement or independently formulated by the ICC... We find that the 1964 order by disclaiming the necessity for protective conditions, must be construed as meaning that such conditions need not be spelled out or elaborated in the 1964 order since they were sufficiently covered by the 1962 agreement, a construction which is consistent with the theory of incorporation as well as with the ICC's statutory duty.}\(^4\)
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The appellate court also agreed that the post-merger agreement was unenforceable in that "[a]n agreement made pursuant to the last sentence of section 5(2)(f) may vary the protections afforded by the ICC order, but it may not substantially abrogate employee's rights grounded by an ICC order."\(^4\) Finally, the court adopted the lower court's finding that the employees were not barred by any failure to exhaust administrative remedies.\(^4\)

When the case reached the Supreme Court, the ICC and the United States Solicitor General vigorously argued in an amicus brief

\[3\] The court noted that the employees had been frustrated by the union in their attempt to utilize union remedies and that the doctrine of exhaustion presupposes adequate remedies. It then concluded that the arbitration provision in the agreements was "permissive," and since neither the union nor the carrier had invoked arbitration, that the remedy was not required. 287 F. Supp. at 230.

\[4\] 309 F. Supp. at 585.

\[41\] Nemitz v. Norfolk & W. Ry., 456 F.2d 841, 850 (6th Cir. 1971).

\[42\] Id. at 846.

\[43\] Id. at 848.

\[44\] Id. at 848-50.
that the "notwithstanding" provision of section 5(2)(f) relieved the
Commission of any duty to review the adequacy of the protective
provisions contained in a pre-merger collective bargaining
agreement and that the employees, therefore, were not protected by
the ICC's merger-authorizing order. The Court rejected the ICC's
position on the prior voluntary agreements and affirmed the deci-
sion of the court of appeals.

Writing for the majority, Justice Douglas concluded that pre-
merger collective agreements do not remove the statutory obligation
of action from the ICC. On the contrary, the ICC must provide
protection for the interests of employees affected by railroad consoli-
dations whether that mandatory protection is "accorded by terms
provided by the Commission, or, as is more likely, by provisions of
a collective agreement which the Commission adopts or approves
as adequate for a minimum of four years (as required by the second
sentence) or longer (as allowed by the first sentence) if the Com-
mission so provides." As to the effect of the "notwithstanding"
clause on the ICC's statutory duties under section 5(2)(f), the
Court reasoned that:

When there is a collective agreement and the Commission, as
here, adopts or approves it, the "notwithstanding" sentence of §
5(2)(f) is not, as suggested, read out of the Act. The collective
agreement then becomes a "condition" of the Commission's "ap-
proval" 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).

On the surface at least the Court's reasoning seems to beg the
question, since, as the defendant carrier strenuously argued in its
brief urging reconsideration, the ICC explicitly took the position
that it did not "adopt" the pre-merger collective agreement as part
of its authorizing order. The dissent in Nemitz was less sparing of

41 The Court divided four to three, with Justices Brennan, Stewart, and Marshall
joining Justice Douglas. Justice Blackmun wrote the dissent and was joined by Chief
Justice Burger and Justice White.
42 Id. at 42.
43 Id. at 43.
44 Defendant's Petition for Rehearing at 8, Norfolk & W. R.R. v. Nemitz, 404 U.S.
37 (1971).
its reasons for agreeing with the government’s contention that there was no basis for federal court jurisdiction over the dispute. Joined by Chief Justice Burger and Justice White, Justice Blackmun scored the Court’s decision as a “sympathetically imposed judicial cure.” Justice Blackmun basically advanced three arguments against federal court jurisdiction. The first argument was based upon statutory construction: “This plain and unambiguous ‘notwithstanding’ language, obviously and necessarily directed to and affecting only the two preceeding sentences, requires that an agreement entered into by the carrier and the collective bargaining representative be controlling.” Thus, reasoned the dissent, the first two sentences of section 5(2)(f) should apply only in the absence of a prior voluntary agreement, and the ICC should be required to act only where the parties are unable to reach an agreement prior to merger.

Secondly, the dissent viewed the Court’s decision as contrary to the legislative intent behind section 5(2)(f). To Justice Blackmun, this legislative history evinced “a clear and positive intent on the part of the authors of this legislation to make appropriate provision for employee protection, but explicitly to withdraw Commission-dictated protection whenever the carrier and the union, before merger, voluntarily arrive at protective provisions satisfactory to them.” Finally, the dissent contended that the position of the majority would have an adverse effect on free collective bargaining.

IV. NEMITZ: AN ASSESSMENT

The reasoning of the dissenters may, superficially at least, seem more compelling than the somewhat conclusionary opinion of the Court. And though we might agree with Judge Magruder’s sympathetic dictum that superficial analysis in Supreme Court opinions reflects “the very necessities and pressures under which the Supreme Court has to do its work,” failure to adequately justify a decision tends to give rise to uncertainty about its wisdom and to skepticism about its value as precedent. This is particularly true during a peri-

\[\text{50} 404 \text{ U.S. at 45.}\]
\[\text{51 Id. at 46.}\]
\[\text{52 Id. at 48.}\]
\[\text{53 “The result reached by the Court appears to me to require the ICC and the courts always to intrude upon collective bargaining, by reviewing the sufficiency of its substantive product, and thereby to discourage and to downgrade the collective bargaining process that has been so firmly established in this area and so steadfastly protected.” Id. at 50.}\]
\[\text{54 Magruder, The Trials and Tribulations of an Intermediate Appellate Court, 49 Cornell L.Q. 1, 7-8 (1958).}\]
od in which the Court's philosophical balance is ostensibly shifting, as was the case in Nemitz. The remainder of this article attempts to do what those aware of the far-reaching implications of Nemitz may wish the Court had done. It undertakes to analyze in some depth the legislative history of section 5(2)(f) and to measure the effects of the Court's decision on the exercise of ICC responsibilities under that section and on the processes of collective bargaining, both at pre-merger and post-merger stages. Then, it takes an overview of the decision's impact on federal labor policy, with particular emphasis placed upon the exhaustion of administrative remedies question.

A. The Legislative History of Section 5(2)(f)

As indicated previously, the Washington Agreement of 1936 had little apparent effect in stimulating needed mergers. In early 1939, Congress began consideration of legislation, along the lines recommended by President Roosevelt's Committee of Six, which eventually led to the Transportation Act of 1940 and to section 5(2)(f) of the Interstate Commerce Act. The bill initially considered by the House Committee on Interstate and Foreign Commerce contained no provision for the protection of workers affected by rail consolidations. The Committee of Six, however, recommended a provision that would require the Commission to demand, "as a prerequisite of its approval, a fair and equitable arrangement to protect the interests" of affected employees. The bill introduced and passed in the Senate, contained the provision regarding a "fair and equitable arrangement" which the Committee of Six had recommended. The bill introduced in the House contained a similar provision, but Representative Vincent F. Harrington succeeded in amending the House bill to include a directive that the Commission approve no transaction "if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." The Conference Committee, however, eliminated both the Harrington amendment and the "fair and equitable" language.

55 See note 10 supra & accompanying text.
56 1939 Hearings, supra note 10.
57 Id. at 275.
58 84 Cong. Rec. 6158 (1939).
60 84 Cong. Rec. 9882 (1939).
voted to recommit with instructions to the House managers to re-
store the "fair and equitable" language and to insist on a revised
version of the Harrington amendment. The second conference re-
ported section 5(2)(f) in the final form in which it was enacted into
law. It retained the original language of the first sentence. In the
second sentence, however, the Committee included a substantial
change in the Harrington proposal. It limited ICC protection to the
four years following the effective date of the Commission's order of
approval. It provided also that in each case the protective period
was not to exceed the length of each employee's employment by a
carrier prior to the effective date of the Commission's order of
approval. The House also inserted the "notwithstanding" clause —
the last sentence of section 5(2)(f).

Significantly, the debate on the final version of section 5(2)(f)
ever focused directly on the relationship between the "notwith-
standing" clause of the third sentence and the first two sentences of
the section. Congressman Harrington, an advocate of compulsory
employee protection, described the third sentence as permitting "the
industry, through the processes of collective bargaining, to work out
its problems in a democratic manner."62 Congressman Clarence F.
Lea referred to the "notwithstanding" sentence as "a provision con-
firming the right of employees to enter into agreements with rail-
roads to take care of them in case of unemployment as a result of
consolidations."63

It seems difficult to discern in this legislative history, as did the
Nemitz dissenters, "a clear and positive intent" to relieve the Com-
mission of all duties to assure fair and equitable protective conditions
for railroad employees whenever carriers and unions, before merger,
"voluntarily arrive at protective provisions satisfactory to them."64
An equally plausible inference to be drawn from this legislative his-
tory is that Congress, by limiting the scope of the Harrington
amendment to four years of compulsory protection in the second
sentence, thereby intended to blunt the deterrent effect which that
amendment, like the similar proviso in the 1933 Emergency Act,65
would have had on railroad mergers. The modified Harrington
amendment thus strikes a balance between the extremes of compul-
sory lifetime protection against unemployment — a job freeze — as

62 86 Cong. Rec. 5871 (1940).
63 Id. at 10178.
65 Act of June 16, 1933, ch. 91, § 7, 48 Stat. 211.
provided in the precursor 1933 Act, and a total absence of any congressionally-mandated protection as proposed in the bill initially considered by the House Committee on Interstate or Foreign Commerce.66

In short, it seems fair to say that so far as the legislative history of section 5(2)(f) is concerned, the signposts of congressional intent respecting the effect of the "notwithstanding" sentence are at best unclear. It is the author's view that the probable intent of Congress, and the wisdom of the Nemitz decision, emerge only when the practical ramifications of mergers are considered in light of the policy objectives underlying the legislation in question.

B. The Practical Effects of Nemitz on Collective Bargaining as a Source of Employee Merger Protection

The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle.

Mr. Justice Cardozo67

The constellation of interests having a stake in labor disputes is not fixed. The relative weight to be accorded such interests, the nature of the protections which they require, and the relationships between them vary markedly from situation to situation. The parties affected by a collective bargaining agreement are employer, union, and many individual employees. Employee interests can be frustrated in several ways, as where there is a claim that some are being permitted to deprive others of work by doing jobs outside of their own classification, or where group interests conflict with the claims of individuals because some have divergent interests, because the demands of group organization and coherence clash with individual self-interest, or because union officialdom is unresponsive to the wishes of a numerical minority of the members. The law has had trouble with the tripartite relationships in the complicated and shifting context of the labor field.68 Part of that trouble has resulted from a tendency to substitute abstract analysis for the harder but necessary process of identifying and balancing interests, in the context of the language and purposes of relevant statutes. The principles determining legal rights and duties under a collective bargaining

66 See 1939 Hearings, supra note 10.
agreement dealing with the sensitive problem of merger protection should not be proclaimed *ex cathedra*; the principles should instead derive from knowledge of practical realities and be shaped to the needs of the institutions. A careful analysis of its thrust will reveal that the *Nemitz* decision accomplishes this end.

A proper assessment of the practical effects of *Nemitz* on collective bargaining as a means of solving merger-related problems requires asking appropriate questions at the outset. If the focus of inquiry is limited to determining whether ICC review of the product of pre-merger collective bargaining will in some cases affect that process, Justice Blackmun's negative view of the result reached in *Nemitz* may seem appropriate. If, however, the spotlight of inquiry is aimed at determining whether the degree of intrusion required by *Nemitz* is justified by the practical results of review, a different picture emerges. An initial distinction should be drawn between the legislative process of negotiating protective agreements, and the process of enforcing such agreements after merger approval.

1. *The Negotiation Stage.*— Pre-merger collective bargaining generally falls into two categories: that directed at hammering out a variety of terms and conditions designed to facilitate consolidation, and that dealing with the problem of providing merger protection for employees who will be adversely affected. The first category basically involves three problems: adjusting the work equities among the employees of the merged system;\(^6^9\) delineating the schedule of rules and working conditions which will apply to the merged system;\(^7^0\) and merging the pre-existing seniority rosters.\(^7^1\) Resolution of these problems is clearly necessary to assure the orderly transition to a consolidated operation. Leaving to the union the function of negotiating transitional rules and working conditions is manifestly in the interest of individual employees; they are the incidental beneficiaries of this function. While an individual may not concur with all that is agreed to by his union, terms and conditions arrived at will, generally, apply uniformly throughout the merged system. Employees most drastically affected by a consolidation will, if they are able to retain their jobs, share the benefits and burdens

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\(^6^9\) For a discussion of the provisions in this category in the *Nemitz* case, see 404 U.S. at 44 n.5.

\(^7^0\) Generally the parties of these agreements agree to adopt the schedule rules of the predominant carrier, modified or augmented where necessary to accommodate the problems of transition.

\(^7^1\) A typical example of provisions in this category were those involved in Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry., 314 F.2d 424 (8th Cir. 1963).
of agreed-upon rules and working conditions in similar measure with employees less severely affected by the merger. Moreover, any risk of subtle discrimination against politically vulnerable employees in the formation of transitional work rules is compensated for by assuring that employee merger protection remains effectively immunized from discriminatory action. An employee, for example, whose work opportunities are lessened because of discriminatory allocation of work equities on the merged system will be protected to the extent of his pre-merger earnings level against the effects of this discrimination. Thus there is no good reason for not leaving to the unreviewable processes of collective bargaining the task of establishing transitional rules and working conditions.

The matter of basic employee merger protection, however, poses quite a different problem. From the viewpoint of the individual employee, there are grave risks in giving his bargaining representative untrammeled control over the formation of protection against the adverse effects of consolidation. The employee whose job is to be eliminated by merger and who lacks sufficient seniority to hold work on the merged system has a peculiarly personal interest in obtaining merger protection which is different in kind from his interest in the outcome of negotiations respecting transitional work rules. An employee whose job is eliminated will obviously have little cause to worry about work rules, but considerable cause for concern about the protection he is to receive as a result of displacement. Moreover, the more drastic the effect of the merger on his employment the greater will such an employee's interests tend to diverge from those of the union. Consolidation may cause drastic realignment within

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72 There is a gray area between this category and the matter of establishing a formula for calculating basic merger benefits which has to do with defining the causes of post-merger wage reductions. The agreements in Nemitz, for example, excluded seasonal furlough or decline in revenue on the merged system as possible basis for entitlement to merger benefits. The problem is a tough one. On the one hand, it is arguably unfair to require carriers to protect employee wages against causes other than the merger. On the other hand, the protective purposes of the Act might be seriously undermined were employees always required to prove that post-merger earnings reductions were caused by the consolidation. In Nemitz, the district court, at least, indicated that future attempts to contractually except certain causes as a basis for merger benefits might not be sustained by the courts. Nemitz v. Norfolk & W. Ry., 309 F. Supp. 575, 583 (N.D. Ohio 1969).

73 Such was the case in Nemitz. The merger had split the employees' seniority district so that they were no longer able to hold work in other terminals when the winter freeze shut down operations at Sandusky, Ohio. The drastic impact which this had on employee earnings is discussed by the Supreme Court, 404 U.S. at 44.
the union's political structure, thereby weakening the political influence of the most vulnerable employees. Even if this does not occur, the out-of-work employee's influence is reduced because he is no longer part of the visible constituency to which the union's leadership is daily accountable. As a result, the union leadership may experience a not inconsiderable temptation to engage in "horse trading" in which basic financial protection for a displaced and politically weak employee minority might be relinquished for a concession by the carrier — for example, a rule change — which benefits the numerical majority of union members whose jobs are not threatened by consolidation.74

The Nemitz decision is aimed at preventing such compromises and implicitly limits the responsibilities of the ICC to assuring that a pre-merger protective agreement contains a minimum of four years of compensation protection as required by the second sentence of section 5(2)(f). Nothing in the holding suggests that the ICC has any duty beyond assuring that all employees caught up in mergers receive the statutory minimum of protection. The decision thus impliedly succeeds in drawing a rather neat and pragmatically sound distinction between agreement respecting basic merger protection and the negotiation of transitional rules and conditions necessary to implement consolidations. As to the latter, Nemitz impliedly recognizes that Commission review of these terms is neither necessary nor desirable. Moreover, since negotiations respecting basic merger protection will take place in a context which presupposes compliance with the congressionally-mandated minimum protection, there should be little likelihood that overt Commission interference with the processes of collective bargaining will be necessary. Collective bargaining is thereby left free to operate subject only to the limitation that its product meet the protective standards of section 5(2)(f).

2. The Enforcement Stage.— The ICA provides three remedies for violation of ICC orders: injunctive relief under section 16(12);75 damages under section 9;76 and attorney's fees and costs under section 8.77 From the employees' point of view, the result urged by the dissent in Nemitz would foreclose the enforcement

74 The employees in Nemitz alleged that they had been the victims of such discrimination, and the district court indicated its apparent agreement with these allegations. 287 F. Supp. at 231.
76 Id. § 9.
77 Id. § 8.
machinery of the ICA to employees whose rights to merger protection derived from third sentence collective agreements. The rationale of the Nemitz dissent is that these remedies should be available to employees protected by ICC-imposed merger conditions, but that employees whose protection derives from collective agreements should be relegated to the remedial procedures of the RLA or, where such remedy is provided, to arbitration under the contract. Arbitration as an alternative to judicial enforcement is considered below, after an assessment is made of the potential consequences of leaving enforcement to the procedures of the RLA.

a. The Railway Labor Act as a Possible Basis for Enforcing Employee Merger Protection.— The RLA provides specific treatment for collective bargaining problems of the railroad industry. The Act expresses a policy of freedom of organization and association for employees and provides a mechanism for the settlement of disputes.\textsuperscript{78} The Act is, however, administered in two significantly different ways by two separate boards. The National Railroad Adjustment Board (NRAB), the decisions of which are binding upon the parties and judicially enforceable, considers grievances growing out of interpretations or applications of existing labor-management agreements. Disputes in this category are referred to as “minor” disputes.\textsuperscript{79} The National Mediation Board (NMB) provides procedures for negotiation, conciliation, mediation, and voluntary arbitration in disputes growing out of collective agreement formation. The parties are required to submit to these procedures but are not bound by any determination unless they have elected to submit to arbitration.\textsuperscript{80} If the parties exhaust these procedures without having reached agreement, they are free to resort to self-help remedies, that is, unilateral imposition of proposed changes by the railroad or strike by the union.

i. Drawbacks of RLA Procedure.— Under the Blackmun rationale, actions by employees to enforce collectively established merger rights would presumably fall within the category of grievances to be handled under the minor dispute procedures of the RLA.\textsuperscript{81} There

\textsuperscript{79} For a good general discussion of the difference between “major” and “minor” disputes under the RLA see United Transportation Union, Local 63E v. Penn. Cent., 443 F.2d 131 (6th Cir. 1971).
are several reasons why the results of such a requirement might prove undesirable.

First, assuming that a displaced employee’s union would be willing to press his rights against the carrier — a problematical assumption at best\(^8\) — final determination by the NRAB might take several years.\(^8\) Such delay in many grievance cases affords the carrier the advantage of being able to submit a dispute and thereby for all practical purposes defeat the union’s demands. Delay in obtaining a final determination by the NRAB, however, is not without its advantages to unions and carriers in typical grievance cases. For one thing, it creates a strong incentive for compromising pending and backlogged grievances. For example, claims of types A and B may be honored by the carrier in return for concessions by the union as to types C and D. This "horse trading" spares both the union and the carrier the time and expense of carrying all grievances to the Board. It also compels both sides to evaluate continually both the relative merits and the priorities of pending claims. The end result is that generally only claims deemed important to the vital interests of unions and carriers reach the NRAB for decision. As previously pointed out, however, the inherent tendency to compromise in this protracted process — beneficial to the interests of a union as an organization and to the railroads — has potentially disastrous risks for merger-displaced employees. An employee whose job is eliminated and who is seriously distressed financially by a merger will find little comfort in the hope of eventual recovery of promised benefits several years hence. In the meantime, there would be a real risk that his claim will be watered down or bargained away in the give and take of the grievance process.

Second, the dual remedial systems which would follow from the Blackmun approach present the potential for unfairness. In many merger situations there are a number of employees who are not covered by prior voluntary agreements.\(^4\) As to these employees, the ICC has consistently imposed protective conditions in accordance with section 5(2)(f). It was not disputed in Nemitz that the rights of

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\(^8\) In Nemitz, for example, the employees endeavored unsuccessfully for nearly two years to have their union arbitrate their claims. These efforts are described in Appendix to record, vol. 1, at 131-50 Norfolk & W. R.R. v. Nemitz, 404 U.S. 37 (1971).

\(^8\) For a discussion of this and related problems in proceedings before the board, see Risher, The Railway Labor Act, 12 B.C. IND. & COM. L. REV. 51 (1970).

\(^4\) In Nemitz, for example, the ICC imposed protective conditions for employees not covered by the original voluntary agreement executed in 1962. 436 F.2d 846. See also the mergers cited notes 25-27 supra.
such employees derive directly from the ICC's approval order. The result urged by the dissent in *Nemitz*, therefore, would mean that in many merger situations different methods of enforcing merger rights would have to be utilized by these two groups. Those covered by the voluntary agreement would be required to pursue their remedy through the labyrinth of the RLA, while parties protected by the ICC order would be permitted to seek relief directly in federal court. The latter group of employees would be able to seek rapid injunctive relief and damages, as well as reasonable attorney's fees and costs. Employees whose benefits derived from the agreement would presumably be permitted to recover damages only, would probably not have their claim presented by an attorney, and would have no hope of having the result judicially reviewed. The unfairness of such a dual remedial scheme is obvious.

Moreover, as the Supreme Court noted in *Garner v. Teamsters Union*, "a multiplicity of tribunals and a diversity of procedures are quite apt to produce incompatible or conflicting adjudications as are different rules of substantive law." While the foregoing dictum expressed the desirability of preempting state power to establish substantive principles in conflict with the NLRA and the necessity for exclusive NLRB jurisdiction as might be required to accomplish this result, it has considerable relevance to the problem under discussion. Since the issue in enforcement cases will be frequently whether or not employees have received contractually promised merger benefits, a dual scheme of enforcement would, in some cases, confront the NRAB with the task of deciding substantive principles governing the level of employee merger protection. The *Nemitz* case furnishes an illustration. There, the carrier contended that the pre-merger agreement should be interpreted as limiting protection to the level of pre-merger earnings only on that portion of the Pennsylvania Railroad's system purchased by N & W. Since the merger split the employees' seniority district, this contention directly confronted the district court with a question of contract interpretation, the resolution of which drastically affected the level of merger benefits to which the employees were en-

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86 Id. § 8.
87 Risher, supra note 83.
90 Id. at 490-91.
91 404 U.S. at 43-44.
The district court interpreted the contract in light of the requirements of section 5(2)(f) and held that protection of the employees' entire pre-merger earnings level was required.\(^2\)

Had the problem of interpreting the prior voluntary agreement been left to the NRAB, by what standard would the Board have determined whether the carrier's restrictive interpretation of the prior voluntary agreement was correct? Would it have applied the standard of the first two sentences of section 5(2)(f) as interpreted by the courts\(^3\) or, since the "notwithstanding" proviso merely states that agreements pertaining to the protection of the interests of affected employees may be made between unions and carriers, would the Board be free to fashion its own substantive principles? In either event, how would it be possible to avoid the development of conflicting substantive principles — those developed by the NRAB and those resulting from judicial enforcement of ICC-ordered protection? The unfairness of permitting operation of parallel but unequal enforcement schemes would thus be aggravated by conflicting substantive adjudications.

\(\text{ii. The Question of Preemption Under ICA Section 5(11).—}\)

Section 5(11) of the ICA provides that "the authority conferred by this section shall be exclusive and plenary."\(^4\) In deciding the jurisdictional issues, the lower courts in Nemitz viewed section 5(11) as exempting the parties from the restraints of the RLA as a necessary corollary to the ICC's authority in mergers subject to its approval under section 5 of the ICA. The courts cited both the legislative history and decisions interpreting ICC powers under that section in support of this conclusion.\(^5\) The courts found the case of Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry.\(^6\) particularly persuasive. In that case the unions contended that the carrier was

\(^2\) 309 F. Supp. at 583.

\(^3\) See text accompanying notes 16-23 supra.


The authority conferred by this section shall be exclusive and plenary . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the anti-trust laws and of all other restraints, limitations, 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 . . .


required to follow the major dispute procedures of the RLA in adjusting seniority rights of employees affected by Commission-ordered consolidation of railroad yards. The carrier sued for declaratory judgment requiring the union to arbitrate the dispute under the terms of a pre-merger stipulation providing for arbitration in the event of controversy stemming from coordination efforts. This stipulation had been approved by the ICC in much the same language used in the merger out of which the Nemitz dispute arose. The Northwestern court held that jurisdiction existed under the ICA to enforce the arbitration clause which was adopted as part of the ICC's approval order, and that the railroad was relieved of the requirements of the RLA in adjusting seniority rights. The rationale for the court's ruling was adopted by the court of appeals in Nemitz:

[T]here must be exclusive and plenary authority in the I.C.C. to achieve the purposes of the Act. The authority vested in the I.C.C. to effectuate proposed mergers would be rendered ineffective if authority to adjust work realignments through fair compensation did not exist. Since, under the Railway Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the Railway Labor Act to situations such as that presented here, like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore, should not be applied.\textsuperscript{97}

Had the union's position in Northwestern prevailed, implementation of the consolidation might have been seriously hampered or even completely frustrated.\textsuperscript{98} In the Supreme Court, employees in Nemitz argued that pre-merger agreements on merger protection and provisions for arbitration are inseparable parts of pre-merger stipulations; that unless federal court jurisdiction exists to enforce both terms, the statutory objectives of conferring plenary authority in the ICC to approve mergers and of assuring employee protection would be seriously undermined.\textsuperscript{99} Despite these arguments and the lower court's adoption of the Northwestern reasoning, the Supreme Court's rationale in Nemitz contains no mention of section 5(11) or of ICA pre-emption of the RLA. The Court's silence in this regard may be explained by two considerations.

First, section 5(11) qualifies the "exclusive and plenary" grant of

\textsuperscript{97} 436 F.2d at 845.

\textsuperscript{98} For an excellent discussion of the deliberately protracted "major" dispute procedures of the RLA, see the Court's opinion in Brotherhood of Ry. Trainmen v. Jacksonville Terminal, 394 U.S. 369 (1969).

authority therein by the limiting proviso that such power exists to
the extent “necessary to enable [the parties] to carry into effect the
transaction so approved or provided for in accordance with the terms
and conditions, if any, imposed by the Commission. . . .” Since two
of the questions raised in Nemitz were whether the ICC imposed any
protective conditions in the first place, and further, whether federal
court jurisdiction under the ICA was necessary to carry the ICC’s
order into effect, the Supreme Court may have perceived that reliance
on section 5(11) would, in some degree at least, have required it to
take the questions before it.

Secondly, the Court may have been reluctant to couch its deci-
sion in terms of preemption for fear of opening a Pandora’s box. North-
western indicates that some agreements provide for arbitration as a
remedy for disputes. As noted above, pre-merger agreements
deal with transitional rules and conditions as well as merger protec-
tion.¹⁰⁰ Both Northwestern and Nemitz clearly focused on areas in
which ICA preemption is appropriate. It is doubtful, however, that
a similar conclusion is warranted so far as resolution of grievances
arising out of interpretations or applications of transitional work
rules is concerned. Opening the doors of federal courts to such
grievances would not only prove burdensome to the courts, but
would interfere as well with the ongoing efforts of rail unions and
management to solve workaday grievances within the industry. The
Court could, of course, have drawn a distinction between those mat-
ters necessarily within the preemptive scope of section 5(11) and
those matters which should be excluded — grievances arising out of
interpretations of transitional work rules, for example. In any
event, this distinction is probably implicit in the Nemitz rationale,
and it seems likely that courts will not hesitate to make it explicit
where they are asked to intervene in disputes which do not create
the risk of frustrating the fundamental purposes of the ICA.

This discussion has sought to determine whether, on balance, the
gains from broadening the scope of the ICC’s statutory responsibili-
ties and federal court jurisdiction in the area of rail merger protection
outweighs the disadvantages of limited interference with collective
bargaining and the grievance procedures of the Railway Labor Act.
The conclusion reached is that the gains considerably outweigh the
costs. Collective bargaining is left virtually free to function as a
means of solving merger related labor problems, limited only by the
minimal protective requirements of the ICA. The interests of dis-

¹⁰⁰ See text accompanying notes 72-74 supra.
Rail Employee Protection

placed and financially distressed rail employees in timely and full merger protection is thereby placed beyond the vagaries of internal union politics, the risks of compromise, and the delays inherent in the grievance procedures of the RLA.

b. Collective Agreements Reached Subsequent To Rail Mergers.—Nemitz also presented the courts with important questions of first impression concerning the extent to which agreements subsequent to mergers may alter or modify the level of ICC-ordered merger protection. Such subsequent agreements, generally referred to in the industry as “implementing agreements,” deal with a wide range of problems incident to effectuating consolidations. In some cases, problems unanticipated or overlooked during pre-merger negotiations are the subject of such agreements. On occasion they deal with problems deliberately deferred to post-merger stages. Unquestionably such agreements are necessary and courts have consistently treated grievances arising out of alleged misapplications of subsequent agreements as contract disputes which under federal law must be submitted to the NRAB or, where appropriate, to arbitration under the contract. Where such agreements, however, purported to lessen the level of ICC-ordered merger protection, the question is whether such agreements sufficiently contravene the protective objectives of the ICA to be held unenforceable. Numerous courts have had opportunities to address themselves to this question prior to Nemitz. The courts in these cases, however, simply assumed, sometimes gratuitously, that the subsequent agreement was in compliance with the statute and proceeded to consider whether this provision of the statute permitted the carrier and the union to change the ICC order. All of these cases held that it did.

As the district court pointed out, however, “the ability to entirely

101 In the merger involved in Nemitz, for example, the pre-merger agreement did not include a formula for making adjustments in merger benefits as a result of a “decline in the volume of traffic or revenues.” Subsequent to the merger an implementing agreement was executed providing for such a formula. See Appendix to record, vol. 1, at 85-89, Norfolk & W. R.R. v. Nemitz, 404 U.S 37 (1971). See also note 72 supra.


104 E.g., O'Mara v. Erie Lackawanna R.R., 407 F.2d 674, 677 (2d Cir. 1969).

rewrite the protective agreement does not necessarily imply the ability to lessen the Congressionally established minimum protection.” In Nemitz, the courts met the problem of post-merger contractual reduction of merger benefits head-on. On this issue the court of appeals relied, as did the district court, on Arnold v. Louisville & Nashville R.R. Arnold involved a suit by railroad employees seeking damages for breach of the protective provisions allegedly included in an ICC order authorizing a merger. Subsequent to merger the unions and management, pursuant to the “notwithstanding” proviso of section 5(2)(f), had reached an agreement intended to supplement the ICC order. The implementing agreement provided for a lump sum settlement formula, under the conditions imposed by the ICC, for employees whose jobs were eliminated by the merger. The discharged employees sued for enforcement of their lump sum benefits claiming, as did the plaintiffs in Nemitz, that jurisdiction existed to enforce an ICC order.

Arnold held that the parties could reach a subsequent agreement which accomplished the purpose of “adopting, supplementing, or implementing” the provisions of an ICC protective order. There the court found that the implementing agreement met this test; but since the plaintiffs’ rights emanated from the subsequent rather than the prior agreement, the court dismissed on the grounds that it lacked subject matter jurisdiction.

Although the employees’ claim was dismissed in Arnold, the case implicitly recognized that subsequent agreements dealing with merger protection may be scrutinized by courts to assure that they do not frustrate the protective policy under section 5(2)(f) toward adversely affected employees. In Nemitz, the district court adopted the Arnold dictum and held that a subsequent agreement “can alter, supplement, or vary the ICC order so long as it does not abridge the protection afforded by the statute or the ICC order.”

Regarding the permissible limits of variation from the statutory norm of protection, the court enunciated the following standard:

[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 diminu-

106 309 F. Supp. at 584.
109 180 F. Supp. at 433-34.
110 309 F. Supp. at 584.
tion 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.\footnote{Id. at 584 n.6.}

Both the court of appeals and the Supreme Court, with slight embellishment, adopted the \textit{Arnold} dictum by holding that “[\textit{a}n agreement made pursuant to the last sentence of section 5(2)(f) may vary the protections afforded by the ICC order, but it may not substantially abrogate employees’ rights grounded in an ICC order.”\footnote{Norfolk \& W.R.R. v. Nemitz, 404 U.S. 37, 44 (1971).} Neither court, however, mentioned the district court’s “benign test,” thus leaving some doubt as to its vitality. In any event, this test may prove helpful in applying the nebulous standard of “substantial abrogation” adopted by the higher courts.

It seems clear that the courts will continue to scrutinize the substance of subsequent agreements which purport to alter the level of employee merger protection. The result should be salutary. Potential judicial scrutiny should tend to make basic merger protection unavailable as a “bargaining chip” to either unions or management in their continuing collective efforts to solve labor problems in post-merger stages. Rather than downgrading collective bargaining,\footnote{See id. at 45-52 (Blackmun, J., dissenting).} this limited judicial supervision helps circumscribe the boundaries within which post-merger collective bargaining is to function while assuring that the protective purposes of the ICA are not nullified by the collective bargaining process.

C. \textit{Exhaustion of Remedies}

In response to problems in the administration of conflicting claims by unions and carriers, the ICC added to its protective conditions a provision for the settlement of such disputes.\footnote{This modification was made by the ICC in the New Orleans Conditions and included a provision respecting settlement of disputes. See note 22 supra.} The provision, which first appeared in 1962 in the \textit{Southern Control} case,\footnote{317 I.C.C. 557 (1962), aff’d on reconsideration, 317 I.C.C. 729 (1963).} was patterned after the Washington Agreement and provides that any dispute or controversy arising from protection offered by ICC-imposed merger conditions or from their interpretation, application, or enforcement, which cannot be settled within 30 days after a dispute arises, “may be referred” by either party to an arbitration com-
mittee for consideration and determination. Generally, collective agreements made pursuant to the third sentence of section 5(2)(f), whether reached prior or subsequent to mergers, have included an arbitration clause patterned after that contained in the Washington Agreement.

The "may be referred" language in arbitration provisions has given rise to conflicting judicial interpretations among the federal circuit courts. One line of authorities holds that under the "may" clause, arbitration is an optional remedy until such time as one of the parties to the contract invokes it, in which event the remedy becomes mandatory. At least one circuit has interpreted the "may" language more restrictively. In Bonnet v. Congress of Independent Unions Local 14, Judge Blackmun of the Eighth Circuit Court of Appeals held that "[t]he obvious purpose of the 'may' language is to give the aggrieved party the choice between arbitration and abandonment of its claim." Since individual employees do not have the right to invoke arbitration, the "may" language assumes crucial importance in the event the union refuses to pursue the employee's grievance. It was this situation which confronted the courts in Nemitz. There the union refused to take the employees' claims to arbitration as provided for in the pre-merger protective agreement. Citing the union's refusal to press the employees' claims, the carrier advanced a two-pronged argument against federal court jurisdiction over the case. The carrier urged the court to adopt, in the interest of promoting orderly administration of collective agreements, the Eighth Circuit's interpretation of the "may" clause: that the union's refusal to arbitrate barred the employees from pursuing their claims further. Secondly, the carrier argued that the Supreme Court's decision in Vaca v. Sipes dictates that the employees cannot sue a carrier in the face of union refusal to exhaust

118 Id. at 590.
117 See note 25 supra.
118 See note 103 supra.
120 331 F.2d 355 (8th Cir. 1964).
121 Id. at 359.
122 Id.
123 386 U.S. 171 (1967).
available grievance procedures, without a showing that the union had breached its duty of fair representation.

The railroad's contentions presented the courts with questions of broad significance within what is generally described as the exhaustion of remedies doctrine. In recent years this doctrine has been the focus of considerable attention in the Supreme Court. The resulting decisions have had a great influence on an important area of federal labor law which is often poorly understood by courts and practitioners alike. What follows is a sketch of the contours of both the rule and the major court-developed exceptions to its application. An attempt is made to assess the impact of recent Court decisions on the exhaustion rule and to examine Nemitz against the background of recent developments in federal labor law policy.

1. Exhaustion of Union Remedies: The Rule.—As a general rule, an employee seeking a remedy for alleged violations of a collective agreement is required to show that he has exhausted his remedies under the contract before seeking judicial intervention. This rule,124 which is analogous to the rule requiring exhaustion of administrative remedies as a condition precedent to resorting to the courts125 is premised on a need for practical machinery to resolve the myriad problems arising under a collective bargaining agreement. Adherence to the rule makes possible settlement of disputes by an expeditious, orderly and inexpensive procedure before persons intimately familiar with industry problems. Moreover, use of contract remedies tends to foster more harmonious employee-employer relations.126 Outside the RLA, the courts have uniformly barred access to judicial relief where an employee has not taken even the initial step of requesting the processing of his grievance. The Supreme Court, however, early carved out an important exception in cases arising under the RLA. In


125 For the most part, the courts treat the exhaustion of remedies questions in these two categories identically. While similar policy considerations generally underly both rules, courts have occasionally recognized differences in the procedures attending the two rules. See, e.g., Republic Steel v. Maddox, 379 U.S. 650, 657 n.14 (1965). But see Andrews v. Louisville & N. R.R., 406 U.S. 320 (1972). Andrews may have removed the last vestiges of distinction between the two rules in federal labor law. As used in this article, the phrase "exhaustion of remedies" refers to both rules.

The related, but somewhat different rule requiring exhaustion of internal union remedies before seeking judicial relief is discussed in text accompanying notes 144-52 infra.

126 For a good description of the objectives served by the rule, see Cone v. Union Oil Co., 129 Cal. App. 2d 558, 277 P. 2d 464 (2d Dist. Ct. App. 1954).
Moore v. Illinois Central R. R.,\textsuperscript{127} the Court held that a trainman was not required by the RLA to exhaust the administrative remedies accorded him by the Act before bringing suit for wrongful discharge under state law. Speaking for the Court, Mr. Justice Black based the decision on the use of permissive language in the Act — disputes "may be referred ... to the ... Adjustment Board."\textsuperscript{128} The Court's rationale is doubled edged. First, the Court concluded that Congress had intended the procedures for adjustment of "minor disputes" under the RLA\textsuperscript{129} to be optional, not compulsory, and that hence states should be free to agree on an alternative remedy for a discharged railroad employee based on local contract law. Second, the Court reasoned that application of the federal labor law exhaustion policies is not warranted when an employee chooses to end the employment relationship, since no further danger of industrial strife exists. The basic holding of Moore was reaffirmed and its state law aspects amplified in Transcontinental & Western Airlines v. Koppal.\textsuperscript{130} Koppal held that if state law requires an employee to exhaust administrative remedies provided for in his employment contract before suing in the state courts, a federal diversity court should enforce that requirement.\textsuperscript{131}

The Moore rule, however, was hardly ensconced in the pantheon of Supreme Court pronouncements before its immortality was in doubt. The first evidence of its pending demise came when the Court refused to apply the Moore rationale in cases under the RLA involving claims of employees, not for damages for wrongful discharge, but for "additional compensation" and for "reinstatement."\textsuperscript{132} In Walker v. Southern Ry.,\textsuperscript{133} the Court observed: "Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Railroad Board established under the Act."\textsuperscript{134} While Walker is distinguishable from Moore in that the employees there, rather than severing their employment and proceeding under state contract

\begin{itemize}
\item \textsuperscript{127} 312 U.S. 630 (1941).
\item \textsuperscript{128} Id. at 635.
\item \textsuperscript{129} See text accompanying note 79 supra.
\item \textsuperscript{130} 345 U.S. 653 (1953).
\item \textsuperscript{131} Id. at 661.
\item \textsuperscript{133} 385 U.S. 196 (1966).
\item \textsuperscript{134} Id. at 198.
\end{itemize}
law, chose to base their claims on the collective agreements, subsequent decisions did little to stem the erosion of Moore. In *International Ass'n of Machinists v. Central Airlines*, the Court said an agreement required under section 204 of the RLA was "like the Labor Management Relations Act Sec. 301 contract . . . a federal contract and . . . therefore governed and enforceable by federal law, in the federal courts." In *Republic Steel Corp. v. Maddox*, the Court not only refused to extend Moore to save state court actions for breach of contract under section 301 of the LMRA, but also strongly intimated that its rule might well not survive even in RLA cases. The Court, however, was not presented with a clear opportunity to overrule Moore until the October 1971 term of court. In *Andrews v. Louisville & N. R.R.*, a railroad employee brought a suit in a Georgia state court seeking damages, as had the employee in Moore, for alleged wrongful discharge by the railroad. The Supreme Court rejected the Moore distinction between election to sever the employment relationship and sue under state law, and election to proceed under the RLA on the basis of misapplication of the collective agreement. "[T]he only source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitles [the employee] to damages, is the collective bargaining agreement between the employer and the union." In laying Moore to rest the court observed: "[T]he notion that the grievance and arbitration procedures provided for in minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law." With Andrews the Court thus made it plain that in any case where an employee sues on a collective agreement governed by federal law, the failure to at least attempt use of available ad-

136 Id. at 692.
138 Id. at 657 n.14.
139 406 U.S. 320 (1972).
140 Id. at 324.
141 Id. at 322.
142 The leading case establishing the extent to which suits on collective bargaining agreements are governed by federal law is *Textile Workers of America v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957). *Lincoln Mills* established the rule that § 301 of the Labor Management Relations Act requires the judiciary to develop a federal substantive law of collective bargaining agreements derived from the provisions and policies of the National Labor Relations Act (NLRA), general legal principles, and other appropriate sources. As the cases discussed in this article indicate, the *Lincoln Mills* rationale has
ministrative remedies or contract grievance procedures will bar judicial intervention in the dispute.

A tougher question, however, is presented where an employee has presented his grievance to a union which has refused to press it further or has failed to handle it to his complete satisfaction. Cases involving union unwillingness to press a grievant’s claim confront the courts with the task of reconciling two sometimes antagonistic policy considerations. On the one hand, to allow each individual employee to overrule the governing body of a union by compelling it to press the grievance, would create a condition of disorder and instability which would be disastrous to labor as well as industry. Similarly, to bestow upon individual employees the unqualified alternative of seeking judicial relief would defeat the related objectives of lessening the burden on the courts and of promoting the likelihood of uniform interpretations and applications of the contract within the industry. On the other hand, however, the courts have recognized that strict application of the exhaustion requirement would frequently result in hardship, oppression, and injustice. This recognition has prompted the courts to make exceptions which have substantially qualified the exhaustion rule. An understanding of these exceptions is necessary for an understanding of the rule.

2. Exhaustion of Union Remedies: Exceptions.— For purposes of discussion, it is helpful to break the cases dealing with exceptions to the exhaustion rule into two broad categories. First, there are cases in which the employee, for one reason or another, has failed to exhaust internal union remedies in his efforts to get the union to pursue his claim through available grievance procedures. This category of cases brings into play the rule, analogous to the exhaustion of administrative remedies doctrine, that a union member may not invoke the aid of the courts until all appeals within the union have been exhausted. While this rule applies most often to an employee who is seeking judicial relief against union-imposed discipline — an area outside the scope of this article — it is sometimes invoked by the courts in cases where an employee is frustrated by the union’s appellate process in his efforts to prevail upon the union to press his claim against the employer.\(^\text{143}\) The second cate-

\(^{143}\) For an interesting illustration of how the courts tend to blur the distinction between the exhaustion of remedies rule and the somewhat different problem of requiring exhaustion of internal union remedies, compare the discussion of the Court in Glover v. St. Louis-San Francisco Ry., 393 U.S. 324, 329-31 (1969) with that of the circuit court in Nemitz v. Norfolk & W. Ry., 456 F.2d 841, 848 (6th Cir. 1971).
category of exceptions involves cases in which the employee has exhaus-
ted his internal union remedies and the union has either refused
to press his grievance or has for some reason, chosen to abandon,
compromise or otherwise dispose of the claim in a manner unsatisfac-
tory to the grievant. The following is a brief attempt to delineate
the exceptions within these two broad categories.

Where an employee has failed to exhaust internal union reme-
dies, the courts have fashioned several well established exceptions
to the exhaustion rule. First, even though an appeal is immediately
available, a court will not require a member to perform the futile
gesture of filing such an appeal when it is clear that it will be de-
nied. Thus, in Glover v. St. Louis-San Francisco Ry.,\textsuperscript{144} where black
railway carmen sought judicial relief from racial discrimination by
the carrier and union in the matter of promotions and the railroad
sought dismissal because, among other reasons, the carmen had
failed to exhaust their remedies under the union constitution, the
Supreme Court declared that it would be futile for the black carmen
to seek relief from those against whom their complaint was made.\textsuperscript{145}
Similarly, exhaustion of appeals has been excused where the persons
hearing the appeal are the very officers against whom the members' complaints are
directed.\textsuperscript{140}

The usefulness of this exception will often hinge upon the will-
ingness of the courts to recognize the realities of union politics.
Where appellate procedures of a union are but successive links in a
single political chain of control, to avoid injustice the courts should
be willing to probe underlying realities before denying an employee
access to judicial relief.

Second, most unions provide for at least two steps in the ap-
pellate procedure, including appeals to the international executive
board.\textsuperscript{147} Courts have recognized, in a variety of cases, that if

\textsuperscript{144} 393 U.S. 324 (1969).

\textsuperscript{145} Id. at 329-31.

\textsuperscript{140} Not all courts, however, have been willing to accord official recognition to the
realities of union politics. In the extreme case of Hall v. Morrin, 293 S.W. 435 (Mo.
App. 1927), a member of the International Association of Bridge and Structural Iron
Workers was charged with slandering the international officers, and found guilty by a
tribunal consisting of President Morrin and another officer. The court held that he
must take his appeal to the executive board which consisted of Morrin and eight mem-
bers he had appointed. While Morrin presented a case factually dissimilar from the
cases in this article, the case is cited by way of suggesting the importance, at least in
some cases, of distinguishing between the rule requiring exhaustion of union remedies
and that requiring exhaustion of administrative remedies.

\textsuperscript{147} The Union procedures in Nemitz are described in Appendix to record vol. 1,
exhaustion of union appeals would create too great a delay, an employee may have immediate access to the courts.\footnote{Note, Protection for Employees Adversely Affected by Railway Mergers: Norfolk & Western Railway Co. v. Nemitz, 13 ARIZ. L. REV. 703, 712-15 (1971).} While the cases differ on what constitutes unreasonable delay, the better reasoned cases have attempted to measure the reasonableness of delay by the hardship involved.\footnote{Compare the reasoning and results reached in Painters Local 57 v. Boyd, 245 Ala. 227, 16 So. 2d 705 (1944) with those in Snay v. Lovely, 276 Mass. 159, 176 N.E. 791 (1931).} Here again the fairest results have come in cases where the courts have given official recognition to the internal workings of unions.

Third, it is well established that in actions against unions for alleged wrongful conduct, a member who seeks damages rather than reinstatement, or whose property rights are involved, need not exhaust his internal union remedies.\footnote{Detroy v. American Guild of Variety Artists, 286 F.2d 75, 79 (2d Cir. 1961); Local 65, Amalgamated S.M.W.I.A. v. Nalty, 7 F.2d 100, 101 (6th Cir. 1925).} By the same token, if the complained-of union proceedings are void — for example, where the union official who conducted the proceeding had no jurisdiction over the matter — the disciplined member need not exhaust his internal appeals.\footnote{See Simmons v. Textile Workers Local 713, 350 F.2d 1012 (4th Cir. 1965).}

While these three exceptions to the rule have generally been applied in union discipline cases, they are useful to the present discussion for two reasons. First, the courts have tended to blur the distinction between exceptions to the rule under discussion and the exhaustion of administrative remedies rule.\footnote{See note 143 supra.} This tendency has probably resulted in large measure from the fact that cases arising under both rules present the courts with the problem of protecting employees against abuses in procedures over which they often have little, if any, control. Second, as will be presently pointed out, the whole area of exceptions to the administrative remedies rule has, at least in federal labor law cases, been thrown into a state of flux by recent Supreme Court pronouncements. These utterances, while apparently restricting the scope of employee protection against abuses of the grievance system in some areas, have also given clear indication that the Court recognizes a need for continued development of protection in other areas. It, therefore, seems likely that the courts and practitioners will find the rationale of many decisions in this category of exceptions useful in working out the boundaries of employee protection under federal labor law.
A more difficult problem is presented where the union has failed to dispose of a claim to the satisfaction of the grievant, than where an employee's failure to exhaust his internal union remedies is raised as a defense. In the latter cases, courts have had little difficulty in perceiving, as the Supreme Court did in *Glover v. St. Louis-San Francisco Ry.*, that a rule designed to obviate the need for judicial intervention in union affairs should not be applied so as to shield the employer from the consequences of alleged misapplication of a collective agreement. In the former cases, however, the courts are confronted with the problem of protecting the interests of individual employees without doing violence to the integrity of the contract or administrative grievance procedures. Much of the trouble in this area has resulted from a failure to evolve an intelligible theory upon which to base objective discussion of the values and policies involved and to fashion standards to be applied.

In searching for workable limitations and exceptions to the exhaustion of remedies requirement, the courts have evolved two basic approaches. The first approach has been to develop protection for the individual through evolution and implementation of the union's fiduciary duty of fair representation. A second approach has been to fashion exceptions, often analogous to those developed to excuse exhaustion of internal union remedies, under which an employee may be excused from failure to exhaust his administrative remedies.

In the landmark case of *Steele v. Louisville & Nashville R.R.*, Chief Justice Stone held that the statutory bargaining representative has a duty "to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." The case arose under the RLA but later decisions established that the NLRA imposes a similar obligation. Although *Steele* involved racial discrimination, the duty of equal representation has been extended to prevent other forms of discriminatory conduct.

It is the view of the author, however, that the vitality of fair representation suits as a source of individual employee protection has been seriously eroded by the much discussed case of *Vaca v. Sipes*.

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154 323 U.S. 192 (1944).
155 Id. at 203.
156 See Syres v. Oil Workers Local 23, 350 U.S. 892, rev'd per curiam, 223 F.2d 739 (5th Cir. 1955).
157 See Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945).
In *Vaca*, an employee successfully sued his union for monetary damages in a state court alleging that the union had breached its duty of fair representation. The union had commenced processing an employee's claim that he had been wrongfully discharged for medical reasons. However, after the fourth of five possible steps in the grievance procedure, the union obtained medical information which caused it to conclude that there was insufficient medical evidence to warrant pressing the employee's claim to the final step. In reversing the judgment of the Georgia Supreme Court, the Court declared that more was required than a showing that the underlying grievance was meritorious, and that in the situation presented in *Vaca*, an employee is precluded from bringing a judicial action against either the union or the employer in the absence of a showing that the union's refusal to take the matter to arbitration was arbitrary, discriminatory, or in bad faith. The Court also held that the lower court judgment could not stand: since the employer had not been joined as a defendant, and the employee's claim was for wrongful breach of the collective bargaining agreement, there was no reason to exempt the employer from contractual damages or to impose the hardship of paying damages on the union.

*Vaca* has produced its progeny. For instance, in *De Arroyo v. Sindicata De Trabajadores Packing*, the First Circuit Court of Appeals considered whether employees can sue their employer for breach of contract despite their union's refusal to exhaust a grievance procedure which gave the union control of the procedure and permitted it to abandon a grievance without exhausting that procedure. The Court held that an employee cannot properly sue his employer in the face of a union refusal to exhaust a grievance procedure, absent an arbitrary refusal. The Fifth Circuit Court of Appeals reached the same result in *Boone v. Armstrong Cork Company*.

It is submitted that *Vaca*, for several reasons, raises serious questions concerning the future misuse of grievance machinery by unions and misapplication of collective agreements by employers. First, the rationale of the decision seems to assign a greater value to protecting the union's "discretion to supervise the grievance machinery" than it does to protecting the interests of employees against abuses of that same machinery. Assuming that overburdened courts will con-

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159 *Id.* at 190.
160 *Id.* at 195-96.
162 384 F.2d 285 (5th Cir. 1967).
tinue to welcome justifications for narrowing rather than broadening the scope of their jurisdiction, it is likely that the courts will continue to view Vaca as persuasive authority for dismissing many employee suits on the ground that an employee is barred by union failure to exhaust available grievance procedures. Secondly, even in the strongest cases, the Vaca rationale places an extremely heavy burden of proof on the employee seeking to establish a breach of the union's duty. Requiring the employee to go beyond a showing that his claim is meritorious and to prove arbitrariness, discrimination, or bad faith — standards which are at best nebulous and difficult to demonstrate objectively — will often prove an impossible task for the aggrieved employee. Moreover, since the gist of the employee's grievance will be that the employer breached the collective agreement, the employee's difficulties of proof will be compounded by the fact that it will generally be in the interest of the employer to side with the union.

While Vaca may arguably have diminished the usefulness of fair representation suits as a basis of employee protection against union abuses of grievance machinery, the Court in that case clearly recognized that in some cases exceptions to the exhaustion rule are necessary to protect the interests of employees. The Vaca Court outlined at least one situation in which an employee could sue despite his failure to fully exhaust contractual remedies, namely, where the employer's conduct amounts to a repudiation of the contractual procedures. In a later case the Court described another exception: "where the effort to proceed formally with contractual or administrative remedies would be wholly futile." As previously noted, these Supreme Court rulings have contributed to a developing body of federal court exceptions to the exhaustion of remedies requirement.

163 Regarding contract grievance procedures the Court observed:
[B]ecause these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures.
386 U.S. 171, 185 (1967).

164 Id.


166 See text accompanying notes 144-52 supra. Some courts have suggested that the exceptions have successfully swallowed the exhaustion of remedies rule. See, e.g., Detroy v. American Guild of Variety Artists, 286 F.2d 75 (2d Cir. 1961). See also Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 YALE L.J.
In sum, while the Supreme Court has recognized that potential abuses of grievance machinery require development of effective counterfoils to strict application of the exhaustion of remedies rule, it has also indicated that the contours of such protection will have to be worked out on a case-by-case basis. It was against this background that the courts in Nemitz confronted the exhaustion issue.

3. The Nemitz Response.— The pre-merger protective agreement in Nemitz included a clause stating that grievances “may be referred” to arbitration.167 The employees had taken every possible step, including an appeal to the national executive board of their union, in an unsuccessful effort to have the union proceed to arbitration with their claims. The lower courts, on alternative grounds, ruled in favor of the employees on the exhaustion issue. First, they found that the employees had fulfilled all possible requirements for exhaustion of remedies by pursuing every available avenue in an attempt to have arbitration invoked.168 Second, the courts adopted the interpretation of the “may” clause which holds that arbitration is not required unless union or management invokes it, and, since neither had invoked arbitration, it was not required.

In the Supreme Court, the railroad renewed its contention that the employees’ failure to exhaust should bar federal court jurisdiction over the case.169 However, in affirming the judgment of the court of appeals, the Court failed to address itself to the exhaustion problem. The Supreme Court’s failure in this regard is disappointing for at least two reasons. Nemitz presented the Court with a clear opportunity to resolve the conflict among the circuits on the interpretation of the standard “may” language in arbitration clauses.170 Resolving this conflict would have removed a source of uncertainty which is likely to remain troublesome both to contracting parties and to the courts. More importantly, perhaps, the Court’s election to not confront the exhaustion issue leaves unresolved a number of perplexing problems which frequently arise in mergers.

First, as a prerequisite to judicial enforcement of their rights, must employees exhaust their internal union remedies in an effort to

167 436 F.2d 841, 848 (6th Cir. 1971).
168 Id. at 848.
170 See notes 119-21 supra & accompanying text.
get their union to arbitrate? In Nemitz nearly two years had elapsed by the time the employees had exhausted all internal union appeals.\textsuperscript{171} Thus the courts were presented with a factually easy case. By implying, however, that the exhaustion of internal union remedies rule applies to employee actions to enforce merger rights,\textsuperscript{172} Nemitz also suggests the related question of whether, and under what circumstances, adversely affected employees will be excused from compliance with this rule. Should not financially distressed employees, for example, be excused from strict compliance with the rule in cases where the delays attending exhaustion of union appellate procedures will frustrate the protective purposes of the ICA? On the other hand, where the employee’s grievance grows out of an alleged misapplication of a transitional work rule, are not different considerations of policy involved?

Second, where, as in Nemitz, there is evidence that a merger has seriously weakened the position of a group of employees within their own union,\textsuperscript{173} or that the union is unwilling to press the employees’ claims because of indifference, discrimination, or unwillingness to suffer the expense, should not the courts look past the exhaustion rule to the special risks to employee interests created by the disruptive effects of mergers? In other words, should situations such as that presented in Nemitz be treated by the courts as “just another” exhaustion of remedies problem, or should the courts attempt to identify the special interests and problems involved in such cases, and to fashion appropriate concepts for dealing with them?

Third, would the result have been different in Nemitz if the union, rather than refusing to arbitrate, had proceeded to arbitration but had either abandoned the claim prior to completing arbitration, or had compromised the claims in a manner unsatisfactory to the employees? Under such circumstances, would the Vaca rule have prevented the employees, however meritorious their claim, from maintaining their suit, absent a showing that the union’s conduct was arbitrary, discriminatory, or in bad faith? If so, would Vaca

\textsuperscript{171} See note 82 supra.

\textsuperscript{172} The district court noted, for example, that the employees had “reached a dead end street in their attempts to utilize internal union remedies.” 287 F. Supp. at 230. Similarly, the Supreme Court in Glover, discussed at note 144 supra, implied that this rule applied to the situation of the black carmen. 393 U.S. at 329. There, of course, the Court went on to hold that requiring exhaustion of either union, contract, or administrative remedies would be futile so far as the carmen were concerned. More to the point of our discussion, however, is that the opinion in Glover evinces a lack of recognition on the part of the Court of any distinction between the requirements of the rules governing exhaustion of these three avenues of redress.

\textsuperscript{173} 287 F. Supp. at 230.
require the employees to join the union and employer as defendants; and, assuming the employees did so successfully, is the possibility of requiring a union to pay such a judgment from funds made up, partly at least, from dues collected from aggrieved employees compatible with the policy objectives of either the ICA or the RLA?

Fourth, do the foregoing problems and considerations in the area of employee merger protection indicate the need for developing remedies beyond those considered in Nemitz? Should, for example, individual employees be permitted, in some cases, to invoke arbitration in the face of union refusal to do so, or to compel their union through injunction to process their claim? Would not such alternatives, in some cases — where court docket congestion requires several years delay before hearing, for example — be preferable to judicial enforcement?

The foregoing observations are intended to be merely suggestive of questions which the Nemitz decision leaves unresolved. In the final analysis, the failure of the courts in Nemitz to deal more effectively with the exhaustion of remedies questions is probably the result of neglect by the courts — notably the Supreme Court — to formulate intelligible theories from which to rationalize both the applications of the exhaustion rule and its limitations. This failure has strewn the exhaustion area with examples of decision making at two extremes. At one extreme are decisions placed upon narrow grounds of interpretation or procedural irregularities which frequently obscure the real reason for granting protection. At the other extreme, are obviously result-oriented decisions, commendably long on perception of injustice and lamentably short on reasons for curing it.

V. CONCLUSION

Not through misguided action, but rather through a continuation of neglect, the Supreme Court in Nemitz has failed to remedy confusing uncertainties in the exhaustion area which will continue to foster piecemeal and unenlightening lower court decisions at the expense of cohesive federal labor policy. The actions the Court did take, however, are sound and are firmly based on the practical

\[174\] The courts might work out a rationale whereby the employees would be permitted to recover, in addition to damages, costs and attorneys fees. While this procedure might hasten payment of claims to financially distressed employees at the time they most need protection, it would also have the disadvantage of inviting conflicting adjudications.
needs of the railroad industry rather than on the uncertain signposts of an ambiguous legislative history. In broadening the scope of the ICC's statutory responsibilities as well as the federal courts' jurisdiction in rail merger protection, the Court has substantially furthered the job security of rail employees, while limiting the processes of collective bargaining only by the minimal protective requirements of the ICA. The gains produced in Nemitz thus substantially outweigh any possible cost of a limited governmental interference into bargaining and grievance procedures.