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LABOR LAW AND LEGISLATION

FIRST EDITION

BY

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PREFACE

The resolve to gather these materials on labor and its legal status was motivated largely by the intensity of interest current in the subject. That this focus of attention will prove of more than transitory importance seems assured by the fact that the American labor movement has now attained a marked degree of maturity and has adjusted its position in the face of recent statutory developments in both federal and state areas. That labor is a force of no mean proportions in the political and economic arena can readily be appreciated by any student of current events. The national election of 1948 has again served to emphasize this proposition and to point to the unwisdom of those who would minimize the impact of labor on the ultimate determination of national policy.

It is the central objective of the forthcoming textual and case materials to present something of a coherent picture of labor law and legislation in its present social setting as conditioned by landmarks of the historical past. In view of the rapidly shifting changes in statutory labor law in the federal and state areas, the reader may feel that our objective is almost insuperable. The writer would contest the validity of this proposition under the theory that the apparent changes are mere surface ripples, that the stronger current is that which flows beneath, and that the touchstone in the comprehension of labor law and legislation will become manifest only in so far as the components of the underlying current are recognized and understood.

Six major legislative enactments are subjected to scrutiny in this volume: The Sherman Act, the Clayton Act, the Federal Anti-Injunction Act, the Railway Labor Act, the Fair Labor Standards Act, and the National Labor Relations Act, including the amendment thereto in 1947, with revisions contemplated by the 1949 Congress.

The rules of the Sherman and Clayton Acts as applied to labor have been crystallized for a decade. No essential change has been made in the Railway Labor Act since 1934. The only important change in the Fair Labor Standards Act since 1938 is the forthcoming raising of the statutory minimum wage to accord with prevailing price levels. The Federal Anti-Injunction Act was crystallized in its application between 1932 and 1947. The only change which Congress probably will make in 1949 affecting this legislation will be by virtue of restoring in some measure its pre-1947 applicability.

It is only with the National Labor Relations Act that some difficulty will be encountered, but even here the difficulties are more apparent than real. Notwithstanding the commitment of the Administration to modification or repeal of the 1947 Amendment to the National Labor Relations Act, the following should be recalled:

(1) The 1947 Amendment, as to a substantial number of its provisions, was merely a re-enactment of the 1935 Wagner Act; thus the bulk of judicial decisions between 1935 and 1947 remain applicable.

(2) The changes in the remaining category, though important, should not be unduly magnified. Many of the newly introduced modifications represented either a statutory codification of previous common-law rules observed in the federal courts, as in the case of secondary boycotts and damage suits, or they represented provisions that will, in the main, be re-enacted by the 1949 Congress in the public interest, witness the National Emergency Strike provisions of the 1947 amendment which have repeatedly been employed by the executive arm of the government.

One can hardly read intensively the subject matter of labor relations and labor law without acquiring a tinge of bias in favor either of management, labor, or the public. It has been the author's central purpose to guard against this danger and to present uncolored and objective material in the ensuing pages. As a guidepost, the case method of presentation has been emphasized as against a purely textual portrayal. What seems important is not what the writer may believe the courts have decided, but rather, what they themselves have said and done, and what they are likely to do based upon the familiar rule of precedent. The compass of a work such as this could have been somewhat reduced by an exclusively textual treatment, but substitution of opinion, with its possible inaccuracy and loss of proportion, would be the result. Further than this, a large part of understanding in the field of labor law is not so much a matter of cold rules of law as it is the statement of the rule within its factual framework. Apart from this factual setting, rules of law mean little or nothing to the student or jurist. Nowhere are shades of reasoning more important than in the study of law. That these shades cannot be even superficially captured unless the case method of instruction is employed is recognized by the great majority of leading law schools, which place primary reliance upon it.

Text matter has been included largely for the purpose of providing transition areas and to clarify issues left unresolved by the court's statement. For the most part is has been possible to unearth cases incorporating a full development of background material as well as the determination of issues involved. In the teaching of these materials, attention is directed to the question material provided at the end of each case or section. Whether formal answers to the questions are to be required or not, the student will find that his analysis will be facilitated by reference to them as the case is analyzed. The preparation of written digests by the student will also furnish a more adequate background for discussion.

In order to maintain clear emphasis upon major considerations, matters of pure detail and minor importance have been omitted in the process of digesting the included materials. From the standpoint of material and case organization, the reader will find that some cases may raise more than one issue. Where this is true, the case is catalogued under its appropriate major issue, with footnotes calling attention to corollary and related matters. It is hoped that this will serve to minimize confusion, and, at the same time, give each decision the fullest treatment.

The author wishes to make special acknowledgment for the invaluable and unstinting contribution of his faculty associate, Mr. Kenneth K. Henning, who has acted so much in the role of a collaborator as to make his omission as a coauthor seem a dereliction. The preparation of the materials on the Fair Labor Standards Act is largely his original effort.

That the labor problem is and will remain one of the central issues on the national scene is implicit in the statement of Elton Mayo who, in the preface to *Management and the Worker*, expresses forcefully the urgent need for understanding in this field: "It is in this area that leadership is most required, a leadership that has nothing to do with political 'isms' or eloquent speeches. What is wanted is knowledge, a type of knowledge that has escaped us in two hundred years of prosperous development. How to substitute human responsibility for futile strife and hatreds—this is one of the most important researches of our time."

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CHAPTER 1

INTRODUCTION

SECTION 1. THE PROBLEM

In its powers of adaptive change, law is perhaps slower than other institutions of social control. Because of this tardiness, it becomes a social force tempering the mold of change with the conservatism that legal procedure and delayed deliberation require. However, of the many areas of law governing the conduct of human affairs in all its complex aspects, that small segment of law which embraces the relations of capital and labor is perhaps the most dynamic and the most responsive to changing social and economic forces. Another peculiar characteristic of the field of labor law and legislation is the fact that it is largely derivative, an admixture of established fields of law such as contract, tort, equity, constitutional, administrative, and even criminal.

Notwithstanding the sensitivity of labor law in its process of adjustment to the unending needs of a competitive economic system, or the fact that its rules do not lend themselves to definite cataloguing, it will be well to remember that any area of law is essentially effect and not cause. Labor law, too, cannot be subjected to meaningful scrutiny apart from its cause—the social setting in which particular rules of law arise, are modified, or are rescinded. The legal controls contemporaneously cast about labor become coherent only in this broader view. Thus, at the outset, two broad questions are presented. First, what are the sources of current American labor law? Second, what early doctrines and historical landmarks have influenced the course that labor law and legislation has subsequently taken? In a work of this compass, however, it should be apparent that little more than a survey treatment can be accorded to the questions raised above if focus is to be maintained upon our central thesis.

SECTION 2. SOURCES OF LABOR LAW

We have previously alluded to the fact that labor law is a heterogeneous mass which slices through and draws upon other established fields for much of its procedure and substance. Cases subsequently presented for analysis in Chapter 2 will make clearer the nature of these sources. When, for example, a labor union enters into a collective agreement with an employer, that agreement becomes subject

to the law of contract as to its validity and construction. If it is breached by one of the parties, the law of evidence is resorted to in proving the agreement and its breach, while the law of damages determines the compensation to be rendered the aggrieved party. In the course of the breach of a contract, assuming that a trespass to person or property has been committed as an incident of strike or picketing activity, the rules peculiar to tort law are brought into play. If an injunction is requested, the law of equity is invoked. In defense of picketing activity, the labor union may attempt to hold itself blameless under rules of agency or may seek to show that it was merely exercising rights guaranteed by the Constitution under the First, Fifth, or Fourteenth Amendments. This will serve to illustrate the complexity of our first source, namely, the rules of law drawn from other fields.

A second major source of American labor law is found in our heritage from the English as to their common law and their statutory enactments. The influence of English courts in the formulation of early doctrines is left for fuller treatment under that heading in the next chapter. Cases that are there included reveal the parallel treatment accorded labor both in England and in America.

A third source of our labor law, the most important of any, can be found in the Federal Constitution. Legislation such as the National Labor Relations Act, the Fair Labor Standards Act, and the Railway Labor Act, to mention a few, has been enacted by Congress under the delegated powers in the Constitution, principally under the commerce power. Not only is the Constitution important because it is the source of all Congressional authority, but also, in the labor area, because certain rights that it guarantees federal citizens, such as freedom of speech and press, have also been the nexus of extended litigation involving permissible strike, picket, and boycott activity by labor unions. The following sections of the Constitution are reprinted below because they embrace the principal powers and rights mentioned above and are repeatedly referred to in many of the cases included in this series.

1. Article I. Section 8. "The Congress shall have the Power. . . . To regulate commerce with foreign Nations, and among the several States, and with Indian Tribes. . . ."
2. First Amendment. "Congress shall make no law respecting an establishment of religion, or prohibiting the free-exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

3. Fifth Amendment. "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."
4. Fourteenth Amendment. ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The federal government has only a limited police power, that is, power to burden property and contract rights in the interest of the general welfare. It has only such police power as is required to effectuate its express and implied powers under the Constitution. The bulk of police power thus resides in the sovereign states, never having been delegated by them to the national government. States, under their police power, have enacted legislation covering workmen's compensation, minimum wages, and general laws touching upon the safety, health, or morals of its constituents. Some of the cases herein included treat of the thorny problem facing the Supreme Court when it is called upon to decide a conflict between the state's reserved police power and the constitutional rights of due process and equal protection of laws guaranteed to federal citizens by the Fifth and Fourteenth Amendments.

State constitutions are another source of labor law. They are of prime importance at present because of the vast body of state labor legislation that is subjected to scrutiny in the state courts. It should be noted, however, that, in case of ultimate conflict between the state constitution and the Federal Constitution, the latter prevails; but, as a point of initial inquiry, in cases of first impression in the state courts, the state constitution is controlling.

Next worthy of inclusion are the legislative enactments of federal and state bodies. Federal laws such as the National Labor Relations Act, the Fair Labor Standards Act, and the Federal Anti-Injunction Act find their counterparts in state enactments such as the "little" Wagner Acts, anti-injunction acts, and laws governing the limits of permissible strike, picket, and boycott activity. The last of these became extremely popular among those state bodies which, by way of reaction, believed that the National Labor Relations Act was being unfairly administered in favor of labor by the National Labor Relations Board.

Court decisions, or case law, contribute an important segment to the law of this field. As to some statutes, such as the National Labor Relations Act, only the federal courts have complete jurisdiction; while, as to others, notably the Fair Labor Standards Act, state

courts have jurisdiction concurrent with the federal. On the other hand, if jurisdictonal requirements are met, such as diversity of citizenship or presentment of a federal question, the federal courts may be a forum concurrent with those of the state, even as to the interpretation of a state legislative enactment or the application of a state common law rule. Court decisions, or case law, are roughly synonymous with the term "common law." In a more accurate sense, however, a common law rule is one developed by a court decision in the absence of a statute governing the issue.

Final contribution to the mass of labor law comes from a relatively new source, namely, administrative law. Thousands of rules and decisions are promulgated annually by such agencies as the National Labor Relations Board and the Wage and Hour Administrator of the Fair Labor Standards Act. A good example on the state side is the Wisconsin Employment Relations Board, which interprets and carries out the provisions of Wisconsin's little Wagner Act. These are quasi-legislative and judicial agencies set up to administer those labor laws that require continuing surveillance and interpretation. The courts have been divested of some of their powers in this area because a purely judicial body, being relatively inexpert and slow in decision, does not lend itself to the expeditious settlement of emergency labor controversies; hence legislatures have more and more delegated interpretative and policing powers to administrative agencies. The courts, nevertheless, have not been completely divested of their control over the administrators. They still exercise the right of review as to matters of law passed upon by the agency; however, matters of fact that are decided by the agency below, if supported by evidence, are generally not disturbed by the courts. The amended National Labor Relations Act provides that the validity of a factual determination by the National Labor Relations Board depends upon whether it is supported, not by some evidence, as under the Wagner Act, but by substantial evidence. Thus the powers of evidentiary review by the federal courts have seemingly been expanded by the amendment of 1947, although the National Labor Relations Act does not provide for a trial *de novo* in the courts.

Secondary sources of labor law, which we mention only in passing, include arbitration decisions and legislative reports, hearings, and debates. The latter are referred to by the courts and administrative agencies only in connection with the interpretation or application of enactments that are unclear or indefinite in their statement. Where the legislative intent is not manifest, the court can search the

legislative proceedings in connection with the statute to determine what the intent was. With this cursory review of source materials, we now turn to a consideration of early doctrines in labor law.

Questions on the Chapter

1. Explain the statement that the field of labor law is derivative in character.
2. What are the sources of American labor law?
3. Render a statement of the commerce power of Congress as given in Article I, Sec. 8, of the Federal Constitution.
4. If a federal law impairs a citizen's right to due process of law, it may be attacked under the Fifth Amendment. Under what amendment may state laws be similarly contested?
5. Does the national government possess any "police powers"?
6. Define the police power of the national government.
7. In case of conflict between a state constitution and the Federal Constitution, which will prevail?
8. Explain the role of administrative law as a source of labor law.
9. What right of review can a court exercise over the rulings of an administrative agency?
10. What change in evidence requirements was introduced by the National Labor Relations Act of 1947?
11. List the secondary sources of labor law.

CHAPTER 2

EARLY DOCTRINES

SECTION 3. ENGLISH BACKGROUND

Because of the inarticulate position of the slave in the Egyptian and Roman civilizations, these periods posed no urgent labor problem as such. The slave was a mere chattel subject to purchase, usage, and sale at the will of the privileged overlord. Since the slave possessed no rights, no legal remedies were developed. For our purposes, an extended treatment of slave labor forms is largely superfluous.

Much the same can be said of the serf's status under the feudal system of the Middle Ages; however, in comparison to the social and legal position of the slave, we can begin to detect the emergence of limited rights. "The serf occupied a position in rural society which it is difficult for us to understand. He was not a slave . . . because he was free to work for himself at least part of the time; he could not be sold to another master; and he could not be deprived of the right to cultivate land for his own benefit. He was not a hired man, for he received no wages. And he was not a tenant farmer, inasmuch as he was attached to the soil . . . unless he succeeded in running away or in purchasing complete freedom, in which case he would cease to be a serf and would become a freeman." [1]

Feudalism as a social system in England did not disintegrate rapidly nor for any single reason. Four major causes, concurrently operating, served to weaken, and eventually to destroy, this planned and ordered society based upon the tenure system of land holding and centering about the manor as the economic, political, and military unit.

1. The Crusades, ending in the thirteenth century, which decimated the ruling caste from which the feudal leaders were drawn.
2. The sweeping of western Europe by the bubonic plague, which caused an acute labor shortage.
3. The defection of the serfs and villeins from the manors to the towns and cities.
4. The reopening of international trade routes to the East, with its consequent emphasis upon commerce rather than land as a source of wealth.

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[1] Hayes, *A Political and Cultural History of Modern Europe* (New York: Macmillan, 1936), I, 49.

A true system of labor jurisprudence thus followed the disintegration of Feudalism, for it then became necessary to develop new rules of law to govern labor relationships.

Mercantilism, extending roughly from the years 1350 to 1776, superseded Feudalism. Its philosophy centered about the objective of securing a favorable balance of foreign trade. As the student will recall, this was to be attained by securing foreign trade monopolies, supported by an expanded merchant fleet and strengthened agriculture and manufacture. English mercantilism represents a rather illuminating corollary with present day societies based upon minute governmental regulation of production and distribution factors, for it too was predicated upon the same foundation. It is to this era that we must turn to trace the source of such modern economic forms as the trade union and the employer association. These are but modified outgrowths of the craft and merchant guilds that early saw the economic advantage arising from monopolistic competition and collective action.

SECTION 4. EARLY ENGLISH STATUTES

One of the major effects of the Black Death, the growth of urban centers, the freeing of serfs, and the infusion of life into international commercial channels was the creation of an acute labor shortage, which, given free expression in a price and profit economy, caused the price of labor to ricochet upward. Alarmed at this turn of events, the landed gentry and the merchants, who were now dependent upon hired laborers and who alone were represented in Parliament, secured the passage of restrictive labor legislation and the assistance of the judiciary in counteracting the all too favorable position of labor.

The earliest restrictive labor legislation is found in 1351 in the Statute of Laborers (25 Edw. 3, St. 1), in which a broad, national attempt was made to reduce labor's bargaining power by requiring able-bodied persons to work, by fixing the price of labor, by controlling the freedom of labor to contract, and by providing criminal punishment for the violation of its mandates.

Over two hundred years later, Parliament issued in 1562 a superseding Statute of Laborers (5 Eliz. C. 4), which was perhaps more embracive than the Act of 1351 had been. It defined the elements inhering in the master and servant relationship, established rules limiting the mobility of labor to stop the exodus of labor from rural to urban centers, outlined product quality and price standards to control craft and merchant guilds, and fixed by law the price of labor.

Governing the commercial activity of this mercantile era, we find the permissible labor contract delineated by the statute and common law, and the area of governmental regulation extended also over manufacture and merchandising. Both Statutes of Laborers incorporated limits to permissible employer activity as it touched his labor and marketing relations. Business combinations of this period, more properly termed merchant and craft guilds, engaged in considerable self-imposed regulation, in the interest of promoting monopoly and of maintaining prices, quality, and output standards. The merchant and craft guilds were, however, basically concerned with the problem of limiting outside competition.

Trade unions, as distinguished from labor or industrial unions, found their inception in the decline of the guild system, which was accelerated by the Industrial Revolution of the 18th Century. With the substitution of capital equipment for labor, necessitated by the technological advancement of the Revolution, many journeymen found themselves unable to enter the master ranks because their finances were inadequate to the heavier fixed and working capital requirements. As a corollary, many erstwhile masters were forced back into the journeyman ranks for the same reason. An amalgamation of these two disenfranchised groups culminated in the formation of the earliest true trade unions, which were utilized to nullify the monopolistic bargaining advantage of the fewer remaining masters, who were banded together in powerful employer groups and, by now, could be classified as manufacturers rather than artisans. It was these early trade unions that were made the subject of the mercantile period's labor law.

SECTION 5. THE CRIMINAL CONSPIRACY DOCTRINE

Concurrent with statutory control, the English common law developed what is known as the doctrine of *criminal conspiracy*, which made unlawful concerted action by workers in making demands upon merchant or manufacturer. The case of the King against the Journeymen-Taylors of Cambridge, decided in England in 1721, illustrates the criminal conspiracy idea applied to labor under statute and common law. (See page 9.) There it was held that, while the action against the combination of tailors might not lie because the prosecutor's indictment did not bring the action within the prohibition of the criminal conspiracy statute of 1720 (7 Geo. 1, C. 13), yet the conviction of the defendant tailors would stand because a labor combination was a criminal conspiracy at common law and could be

punished independent of whether the procedural requirements of the statute were met.

Following the text of the Journeymen-Taylors of Cambridge case is printed the case of the Journeymen Cordwainers, decided in New York in 1809 and reported by Yates, a court reporter, who summarized the gist of the case in longhand, since shorthand verbatim reporting was then unknown to court reporting. The latter case shows the influence of our heritage of English common law, which, almost a century later, led us to hold labor combinations to be violative of the criminal law of New York state. The common law doctrine of criminal conspiracy is not presently followed, except in the modified form of the Sherman Act of 1890, which outlaws as criminal certain conspiracies in restraint of trade. Consideration of the present status of the criminal conspiracy doctrine is deferred for subsequent detailed consideration under the heading of criminal syndicalism and the antitrust laws.

THE KING v. JOURNEYMEN-TAYLORS OF CAMBRIDGE

Kings Bench, 1721. 8 Mod. 10, 88 Eng. Reports 9

One Wise, and several other journeymen taylors, of or in the town of Cambridge, were indicted for a conspiracy amongst themselves to raise their wages; and were found guilty.

It was moved in *arrest of judgment*, upon several errors in the record. . . .

Thirdly, no crime appears upon the face of this indictment, for it only charges them with a conspiracy and refusal to work at so much *per diem*, whereas they are not obliged to work at all by the day, but by the year, by Eliz. C. 4.

It was answered, that the refusal to work was not the crime, but the conspiracy to raise the wages.

THE COURT. The indictment, it is true, sets forth, that the defendants refused to work under the wages which they demanded; but although these might be more than is directed by the statute, yet it is not for the refusing to work, but for conspiring, that they are indicted, and a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them to do, if they had not conspired to do it, as appears in the case of *The Tubwomen* v. *The Brewers of London*. . . .

Fifthly, this indictment ought to conclude *contra formam statuti*; for by the late statute 7 Geo. 1, C. 13, journeymen-taylors are prohibited to enter into any contract or agreement for advancing their

wages, & c. And the statute of 2 & 3 Edw. 6, C. 15, makes such persons criminal.

It was answered, that the omission in not concluding this indictment *contra formam statuti* is not material, because it is for a *conspiracy*, which is an offense at common law. It is true, the indictment sets forth, that the defendants refused to work under such rates, which were more than enjoined by the statute, for that is only two shillings a-day; but yet these words will not bring the offense, for which the defendants are indicted, to be within that statute, because it is not the denial to work except for more wages than is allowed by the statute, but it is for a *conspiracy* to raise their wages, for which these defendants are indicted. It is true, it does not appear by the record that the wages demanded were excessive; but that is not material, because it may be given in evidence.

THE COURT. This indictment need not conclude *contra formam statuti*, because it is for a conspiracy, which is an offense at common law.

So the judgment was confirmed by the whole Court *quod capiantur*.

Case Questions

1. Is this a civil or a criminal case?
2. What did the court deem illegal action by the tailors?
3. Why was it immaterial that the indictmert did not conclude against the Statutes of George and Edward?

(CASE OF THE JOURNEYMEN CORDWAINERS)

PEOPLE OF STATE OF NEW YORK v. JAMES MELVIN

1809, 7 N.Y. Common Law Reports 153, 1 Yates Sel. Cas. 114

Reported from a longhand brief of the case written by the court reporter, Yates.

The First Count states that the defendants, being workmen and journeymen in the art, mystery and manual occupation of cordwainers, Oct. 18, 1809, & c., unlawfully, perniciously and deceitfully designing and intending to form and unite themselves into an unlawful club and combination, and to make and ordain unlawful by-laws, rules and orders among themselves, and thereby to govern themselves and other workmen in the said art, and unlawfully and unjustly to extort great sums of money by means thereof, on the day and year aforesaid, with force and arms, at, & c., together with divers other workmen and journeymen in the same art, & c. (whose names to the jurors are yet unknown), did unlawfully assemble and meet together,

and being so, & c., did then and there, unjustly and corruptly conspire, combine, confederate and agree together, that none of them, the said conspirators, after the said 18th October, would work for any master or person, whatsoever, in the said art, mystery and occupation, who should employ any workman or journeyman, or other person in the said art, not being a member of said club or combination, after notice given, & c., to discharge such workman. . . .

The charge of the Court:

He observed there were two points of view in which the offense of a conspiracy might be considered; the one where there existed a combination to do an act, unlawful in itself, to the prejudice of other persons; the other where the act done, or the object of it, was not unlawful, but unlawful means were used to accomplish it. As to the first, there could be no doubt that a combination to do an unlawful act was a conspiracy. The second depended on the common principle that the goodness of the end would not justify improper means to obtain it. If, therefore, in the present case the defendants had confederated either to do an unlawful act to the injury of others, or to make use of unlawful means to obtain their ends, they would be liable to the charge of a conspiracy. He observed that the court did not mean to say, nor did the facts in the case require them to decide, whether an agreement not to work, except for certain wages, would amount to this offense without any unlawful means taken to enforce it. . . .

The injury produced by unlawful combinations might affect any person or number of persons, as in the present case the master workmen or the fellow journeymen of the defendants, or any other individuals. It appeared in evidence that the society of journeymen, of which the defendants were members, had established a constitution, or certain rules for its government, to which the defendants had assented, and which they had endeavored to enforce. These rules were made to operate on all the members of the Society, on others of their trade who were not members, and through them on the master workmen, and all were coerced to submit, or else the members of the Society which comprehended the best workmen in the City, were to stop the work of their employers. One of the regulations even required that every person of their trade whom they thought worthy of notice, should become a member of the Society, and of course become subject to its rules, and in case of neglect or refusal, it imposed fines on the person guilty of disobedience. When the Society determined on any measure, it found no difficulty in

carrying it into execution. If its ordinary functions failed, it enforced obedience by decreeing what was called a strike against a particular shop that had transgressed, or a general turnout against all the shops in the City; terms which had been explained by the witnesses, and were sufficiently understood. These steps were generally decisive, and compelled submission to all concerned.

Whatever might be the motives of the defendants, or their object, the means thus employed were arbitrary and unlawful, and their having been directed against several individuals in the present case, it was brought in the opinion of the court, within one of the descriptions of the offense which has been given.

The jury retired and shortly after returned a verdict against the defendants.

The sentence was then passed by His Honor, the Mayor, who observed to the defendants that the novelty of the case, and the general conduct of their body, composed of members useful in the community, inclined the court to believe that they had erred from a mistake of the law and from supposing that they had rights upon which to found their proceedings. . . .

They were fined each one dollar, with the costs.

Case Questions

1. What did the journeymen attempt to do? Is this in the nature of the modern closed shop?
2. Discuss the criminal conspiracy doctrine as to its double aspects of ends and means.
3. What methods were employed by the journeymen to secure their ends?

SECTION 6. THE CIVIL CONSPIRACY DOCTRINE

With the approach of the 19th Century, heralding the advent of the Industrial Revolution, we find strong and powerful forces at work to overthrow the restrictive legislation that was hamstringing business and labor. The reaction was crystallized by the publication of Adam Smith's *Wealth of Nations* (1776) in which the new *laissez-faire* doctrine was epitomized. Contending that the least regulation is the best regulation, and that the public interest would best be served by resort to economic, rather than statute, law in matters of supply, demand, and price, Smith found popular favor with the articulate public. Acceptance of his doctrine, at least as applied to nonlabor groups, became the guiding rule of laissez-faire capitalism, ushered in in 1776.

As applied to labor, however, governmental control appeared to remain as the most desirable alternative. In 1799 and 1800, Parliament passed the Combination Acts (39 Geo. 3, C. 81 and 40 Geo. 3, C. 106), which made ". . . void . . . all contracts . . . entered into by or between . . . workmen for obtaining an advance of wages . . . for lessening or altering . . . usual hours or time of working, or for decreasing the quantity of work, or for preventing or hindering any person or persons from employing whomsoever he . . . think proper to employ in his business. . . ." The Act also made it a criminal offense to picket or boycott an employer or to refuse to work with a nonunion workman. In 1875, the Conspiracy and Protection Act (38 and 39 Vict., C. 86) removed labor union action from the ban of criminal conspiracy and broadened greatly the allowable limits of peaceful picketing. The result of this act was the invalidation of most of the adverse English labor legislation of the preceding century.

This liberality on the English labor scene, however, was obscured by the *Quinn* v. *Leathem* case (1901, A.C. 495), reprinted below, in which the Court, conceding the outlawry of the *criminal* conspiracy doctrine by the Act of 1875, nevertheless found the union liable under its newly created *civil* conspiracy doctrine, which, when combined with the ruling in the *Taff Vale Railway Company* case (1901, A.C. 426) holding unions liable as an entity for members' torts, confronted labor with another hurdle to surmount. The reasoning of the Court is presented in the text of Lord Shand's opinion. While the civil conspiracy idea no longer has acceptation as such, the quarrel is merely one over the name to be given a course of conduct. The activities of the defendants in the Quinn case might at present be considered unlawful under the secondary boycott theory.

QUINN v. LEATHEM

House of Lords, 1901. A.C. 495

The respondent brought an action in Ireland against five defendants, Craig, Davey, Quinn (the appellant), Dornan, and Shaw, alleging causes of action that are summarized in the judgment of Lord Brampton. At the trial before Fitzgibbon, L. J., and a special jury at Belfast in July, 1896, evidence was given for the plaintiff to the following effect. Craig was president, Quinn treasurer, and Davey secretary of a trade union registered as the Belfast Journeymen Butchers and Assistants' Association. By rule 11 of the association it was the duty of all members to assist their fellow unionists to obtain employment in preference to nonsociety men.

The plaintiff, a flesher at Lisburn for more than twenty years, in July, 1895, was employing Dickie and other assistants who were not members of the union. At a meeting of the association at which Craig, Quinn, Dornan, and Shaw were present, and which the plaintiff attended by Davey's invitation, the plaintiff offered to pay all fines, debts, and demands against his men and asked to have them admitted to the society. This was refused, and a resolution was passed that the plaintiff's assistants should be called out. Craig told the plaintiff that his meat would be stopped at Munce's if he did not comply with their wishes. Munce, a butcher, had been getting about £30 worth weekly of meat from the plaintiff for twenty years. . . .

In September Davey wrote to the plaintiff that, if he continued to employ nonunion labour, the society would be obliged to adopt extreme measures. After some negotiations with Munce, Davey wrote to him that, having failed to make a satisfactory arrangement with the plaintiff, they had no other alternative but to instruct Munce's employees to cease work immediately the plaintiff's beef arrived. On September 20 Munce sent a telegram to the plaintiff, "Unless you arrange with society you need not send any beef this week as men are ordered to quit work," and Munce ceased to deal with the plaintiff. The plaintiff said that in consequence of this he was put to great loss, a quantity of fine meat having been killed for Munce.

The jury found for the plaintiff, with £250 damages. [Quinn took this appeal to the House of Lords.]

LORD SHAND. My Lords, after the able and full opinions of the learned judges of the Court of Appeal in Ireland holding that the verdict and judgment for the plaintiff ought to stand, the grounds of my opinion that the judgment ought to be affirmed and the appeal dismissed may be shortly stated. I refrain from any detailed reference to the numerous cases cited in the argument. These have been considered and discussed by the judges of the Court of Appeal, and I concur in the reasoning of the majority of their Lordships, and they have been already dealt with in my judgment in the case of *Allen* v. *Flood.* (1898, A.C. 1.)

In that case I expressed my opinion that while combination of different persons in pursuit of a trade object was lawful, although resulting in such injury to others as may be caused by legitmate competition in labour, yet that combination for such object, but in pursuit merely of a malicious purpose to injure another, would be clearly unlawful; and, having considered the arguments in this case, my opinion has only been confirmed.

This being clearly so, the question now raised is really whether, in consequence of the decision of this House in the case of *Allen* v. *Flood*, and of the grounds on which that case was decided, it is now the law that where the acts complained of are in pursuance of a combination or conspiracy to injure or ruin another, and not to advance the parties' own trade interests, and injury has resulted, no action will lie, or, to put the question in a popular form, whether the decision in *Allen* v. *Flood* has made boycotting lawful.

It may be true that in certain cases the object of inflicting injury, and success in that object, requires combination or conspiracy with others in order to be effectual. That was not so in all of the cases enumerated by Lord Bowen; but no question on that point arises in the circumstances of this particular case, for according to the evidence and the verdict of the jury the defendants by combined action wrongfully and maliciously induced a number of persons to refrain from dealing with the plaintiff. That is sufficient for the decision of the case, although, in my opinion, it is further proved that they succeeded in inducing a servant and a customer of the plaintiff to break existing contracts with him. On the whole, it seems to me clear that the defendants were guilty of unlawful acts, unless the judgment in the case of *Allen* v. *Flood* has introduced a change which has rendered such acts lawful.

As to the vital distinction between *Allen* v. *Flood* and the present case, it may be stated in a single sentence. In *Allen* v. *Flood* the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors, whereas in the present case, while it is clear there was combination, the purpose of the defendants was "to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests. . . ."

The ground of judgment of the majority of the House, however varied in expression by their Lordships, was, as it appears to me, that Allen in what he said and did was only exercising the right of himself and his fellow workmen as competitors in the labour market, and the effect of injury thus caused to others from such competition, which was legitimate, was not a legal wrong.

It is only necessary to add that the defendants here have no such defence as legitimate trade competition. Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts

as unjustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff, with the result of causing serious injury to him, and that the case of *Allen* v. *Flood*, as a case of legitimate competition in the labour market, is essentially different, and gives no ground for the defendant's argument.

I concur with your Lordships in holding that there is not sufficient ground for disturbing the verdict on the question of damages, and in holding that the special provision of the 3rd section of the Conspiracy Act of 1875 has no application to the circumstances of this case.

Order appealed from affirmed and appeal dismissed with costs. Lords' Journals, August 5, 1901.

Case Questions

1. State the operative facts of the parent case.
2. Does your statement of fact show the presence of a secondary boycott against the plaintiff?
3. At the time of this case, were secondary boycotts called civil conspiracies?
4. What distinction did the court make in reconciling the *Quinn* and *Allen* cases?
5. Are you satisfied that the distinction is based on sound reasoning?

SECTION 7. THE CONTRACTUAL INTERFERENCE DOCTRINE

A third doctrine limiting the permissible activities of labor combinations is that of tortious interference with contractual or work relationships. In a legal sense. the dectrine may be confusing, as the right arises in contract while the remedy is pursued in tort. The remaining cases in this section illustrate its application and present status. The theory that interference with a contract relation was an actionable tort arose first in the case of *Lumley* v. *Gye*, an English decision of 1853 (page 17). The reader may note that a labor union is not involved in this decision, although the rule developed found acceptation in labor cases arising at a later date both in England and America. On their own facts, both *Lumley* v. *Gye* and the *South Wales* decision (pages 18-19) remain as soundly reasoned law. An interesting parallel may be struck between the *South Wales* decision and the frequent skirmishes of our own United Mine Workers with the courts as revealed by the Supreme Court's opinion in *United States* v. *United Mine Workers* on page 183 of this volume.

LUMLEY v. GYE

Queen's Bench, 1853. 2 El. & Bl. 216

The 1st count of the declaration stated that plaintiff was lessee and manager of the Queen's Theatre, for performing operas for gain to him; and that he had contracted and agreed with Johanna Wagner to perform in the theatre for a certain time, with a condition amongst others, that she should not sing nor use her talents elsewhere during the term without plaintiff's consent in writing: Yet defendant, knowing the premises, and maliciously intending to injure plaintiff as lessee and manager of the theatre, whilst the agreement with Wagner was in force, and before the expiration of the term, enticed and procured Wagner to refuse to perform; by means of which enticement and procurement of defendant, Wagner wrongfully refused to perform, and did not perform during the term. . . .

ERLE, J. The question raised upon this demurrer is, whether an action will lie by the proprietor of a theatre against a person who maliciously procures an entire abandonment of a contract to perform exclusively at that theatre for a certain time; whereby damage was sustained? And it seems to me that it will. The authorities are numerous and uniform, that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present; for there, the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract, by putting an end to the relation of employer and employed; and the present case is the same. . . .

With respect to the objection that the contracting party had not begun the performance of the contract, I do not think it a tenable ground of defence. The procurement of the breach of the contract may be equally injurious, whether the service has begun or not, and in my judgment ought to be equally actionable, as the relation of employer and employed is constituted by the contract alone, and no act of service is necessary thereto. The result is that there ought to be, in my opinion, judgment for the plaintiff.

Per Curiam. There will be no rule. Rule refused.

Case Questions

1. What facts gave rise to the plaintiff's cause of action?
2. What is the issue of the case?
3. Was the tort any less actionable because Johanna Wagner had not entered upon performance of the contract?
4. Does the *Lumley* rule represent valid law at present?

SOUTH WALES MINERS' FEDERATION v. GLAMORGAN COAL COMPANY, LIMITED

House of Lords, 1905. A.C. 239

The Glamorgan Coal Company, Limited, and seventy-three other plaintiffs, owners of collieries in South Wales, brought this action against the South Wales Miners' Federation, its trustees and officers, and several members of its executive council, claiming damages for wrongfully and maliciously procuring and inducing workmen in the collieries to break their contracts of service with the plaintiffs, and alternatively for wrongfully and maliciously conspiring to do so. . . . Briefly the case was as follows. The federation (which was registered as a trade union) was formed (*inter alia*) to consider trade and wages, to protect the workmen and regulate the relation between them and employers, and to call conferences. The wages were paid upon a sliding scale agreement, rising and falling with the price of coal. In November, 1900, the council of the federation, fearing that the action of merchants and middlemen would reduce the price of coal and consequently the rate of wages, resolved to order a "stop day" on November 9, and informed the workmen. This order was obeyed by over 100,000 men, who took a holiday and thereby broke their contracts of service. Four other like holidays were later taken. . . . The learned judge gave judgment for the defendants. This decision was reversed by the Court of Appeal, . . . and defendants now appeal.

LORD MACNAGHTEN. My Lords, I agree in the motion which my noble and learned friend the Lord Chancellor proposes, and I also agree with him in thinking that the question before your Lordships lies in a very narrow compass.

It is not disputed now—it never was disputed seriously—that the union known as the South Wales Miners' Federation, acting by its executive, induced and procured a vast body of workmen, members of the union, who were at the time in the employment of the plaintiffs, to break their contracts of service, and thus the federation acting by its executive knowingly and intentionally inflicted pecuniary loss on the plaintiffs. It is not disputed that the federation committed an actionable wrong. It is no defence to say that there was no malice or ill-will against the masters on the part of the federation or on the part of the workmen at any of the collieries thrown out of work by the action of the federation. It is settled now that malice is not the gist of such an action as that which the plaintiffs

have instituted. Still less is it a defence to say that if the masters had only known their own interest they would have welcomed the interference of the federation.

It was argued—and that was the only argument—that although the thing done was prima facie an actionable wrong, it was justifiable under the circumstances. That there may be justification for that which in itself is an actionable wrong I do not for a moment doubt. And I do not think it would be difficult to give instances putting aside altogether cases complicated by the introduction of moral considerations. But what is the alleged justification in the present case? It was said that the council—the executive of the federation—had a duty cast upon them to protect the interest of the members of the union, and that they could not be made legally responsible for the consequences of their action if they acted honestly in good faith and without any sinister or indirect motive. The case was argued with equal candor and ability. But it seems to me that the argument may be disposed of by two simple questions. How was the duty created? What in fact was the alleged duty? The alleged duty was created by the members of the union themselves, who elected or appointed the officials of the union to guide and direct their action; and then it was contended that the body to whom the members of the union have thus committed their individual freedom of action are not responsible for what they do if they act according to their honest judgment in furtherance of what they consider to be the interest of their constituents. It seems to me that if that plea were admitted there would be an end to all responsibility. It would be idle to sue the workmen, the individual wrong-doers, even if it were practicable to do so. Their counsellors and protectors, the real authors of the mischief, would be safe from legal proceedings. The only other question is, What is the alleged duty set up by the federation? I do not think it can be better described than it was by Mr. Lush. It comes to this—it is the duty on all proper occasions, of which the federation or their officials are to be the sole judges, to counsel and procure a breach of duty.

I agree with Romer and Stirling, L. JJ., and I think the appeal must be dismissed.

Case Questions

1. Why did the Federation call upon the miners to take a holiday?
2. Was lack of malice on the defendants' part a recognized defense?
3. What agency question did the court decide against the Federation leaders?

SECTION 7. THE CONTRACTUAL INTERFERENCE DOCTRINE (Continued)

The influence of the *Lumley* and the *South Wales* cases upon the courts in America is revealed by the *Vegelahn* and the *Hitchman* decisions, which are overruled classics in American labor law. The reader's attention is directed to the dissenting opinion in the *Vegelahn* case of Justice Holmes, then on the Massachusetts bench, in so far as it reveals the anticipatory vision of this great jurist.

Brimelow v. *Casson*, a 1924 English Chancery decision, shows this jurisdiction successfully struggling to reach a just result in the face of an established rule of law. By way of exception, this court held that the doctrine was inapplicable if the interference was socially justifiable. In America, likewise, an even more pronounced cleavage with the rule was begun by the New York courts in the *Interborough* and the *Exchange Bakery* decisions, wherein the doctrine was completely abrogated as being inequitable, without consideration, and against public policy.

At present, yellow-dog contracts (contracts containing the provision that employees will not join a union without surrendering their employment) are outlawed by Section 2 (5) of the Railway Labor Act of 1934, 45 U.S.C. 151, Section 3 of the Federal Anti-Injunction Act of 1932, 29 U.S.C. 101, and are impliedly outlawed by Section 8 (a) of the Labor Management Relations Act of 1947. The present rule is that interference with a contractual or work relationship by a labor union is permissible as long as the purpose is proper and the means employed to effectuate the end are peaceful and within permissible bounds. The cases collected in the remainder of this volume deal largely with legislative and court determinations that give meaning and form to the general rule stated above.

VEGELAHN v. GUNTNER

Supreme Judicial Court of Massachusetts, 1896. 167 Mass. 92, 44 N.E. 1077

ALLEN, J. The principal question in this case is whether the defendants should be enjoined against maintaining the patrol. The report shows that, following upon a strike of the plaintiff's workmen, the defendants conspired to prevent him from getting workmen and thereby to prevent him from carrying on his business, unless and until he should adopt a certain schedule of prices. The means adopted were persuasion and social pressure, threats of personal injury or

unlawful harm conveyed to persons employed or seeking employment, and a patrol of two men in front of the plaintiff's factory, maintained from half past 6 in the morning till half past 5 in the afternoon, on one of the busiest streets of Boston. The number of men was greater at times, and at times showed some little disposition to stop at the plaintiff's door. The patrol proper at times went further than simple advice not obtruded beyond the point where the other person was willing to listen; and it was found that the patrol would probably be continued if not enjoined. There was also some evidence of persuasion to break existing contracts. The patrol was maintained as one of the means of carrying out the defendants' plan, and it was used in combination with social pressure, threats of personal injury or unlawful harm, and persuasion to break existing contracts. It was thus one means of intimidation, indirectly to the plaintiff, and directly to persons actually employed, or seeking to be employed, by the plaintiff, and of rendering such employment unpleasant or intolerable to such persons.

Such an act is an unlawful interference with the rights both of the employer and of the employed. An employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon, and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the constitution itself. . . .

The defendants contend that these acts were justifiable, because they were only seeking to secure better wages for themselves, by compelling the plaintiff to accept their schedule of wages. This motive or purpose does not justify maintaining a patrol in front of the plaintiff's premises, as a means of carrying out their conspiracy. A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby. But a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition, and is unlawful. . . .

Nor does the fact that the defendants' acts might subject them to an indictment prevent a court of equity from issuing an injunction. It is true that, ordinarily, a court of equity will decline to issue an injunction to restrain the commission of a crime; but a continuing injury to property or business may be enjoined, although it may also be punishable as a nuisance or other crime. . . .

A question is also presented whether the court should enjoin such interference with persons in the employment of the plaintiff who are not bound by contract to remain with him, or with persons who are not under any existing contract, but who are seeking or intending to enter into his employment. A conspiracy to interfere with the plaintiff's business by means of threats and intimidation, and by maintaining a patrol in front of his premises, in order to prevent persons who are in his employment from continuing therein, is unlawful, even though such persons are not bound by contract to enter into or continue in his employment; and the injunction should not be so limited as to relate only to persons who are bound by existing contracts. We therefore think that the injunction should be in the form originally issued. So ordered.

HOLMES, J. (dissenting). . . . One of the eternal conflicts out of which life is made up is that between the efforts of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. . . .

If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control. I can remember when many thought that, apart from violence or breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion today. I feel pretty confident that they equally will abandon the idea that an organized refusal by workmen of social intercourse with a man who shall enter their antagonist's employ is unlawful, if it is disassociated from any threat of violence, and is made for the sole object of prevailing, if possible, in a contest with their employer about the rate of wages. The fact that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist does not necessarily make it unlawful, any more than when a great house

lowers the price of goods for the purpose and with the effect of driving a smaller antagonist from the business. . . .

Case Questions

1. Was the picketing peaceful or tainted with violence?
2. Will an equity court ordinarily enjoin the commission of a crime?
3. What was the scope of the court's injunction?
4. In his classic dissent, how does Justice Holmes justify the infliction of injury by a labor organization?

HITCHMAN COAL & COKE CO. v. MITCHELL

Supreme Court of the United States, 1917. 245 U.S. 229, 38 Sup. Ct. 65

PITNEY, J. This was a suit in equity, commenced October 24, 1907, in the United States Circuit (afterwards District) Court for the Northern District of West Virginia, by the Hitchman Coal & Coke Company, a corporation organized under the laws of the state of West Virginia, against certain citizens of the state of Ohio, sued individually and also as officers of the United Mine Workers of America. Other non-citizens of plaintiff's state were named as defendants but not served with process. . . .

Plaintiff owns about 5,000 acres of coal lands situate at or near Benwood, in Marshall county, West Virginia, and within what is known as the "Panhandle District" of that state, and operates a coal mine thereon employing between 200 and 300 men, and having an annual output, in and before 1907, of about 300,000 tons. At the time of the filing of the bill, and for a considerable time before and ever since, it operated its mine "non-union," under an agreement with its men to the effect that the mine should be run on a non-union basis, that the employees should not become connected with the union while employed by plaintiff, and that if they joined it their employment with plaintiff should cease. . . .

. . . The general object of the bill was to obtain an injunction to restrain defendants from interfering with the relations existing between plaintiff and its employees in order to compel plaintiff to "unionize" the mine. . . .

. . . On April 15, 1906, defendant Zelenka, vice-president of the subdistrict, visited the mine, called a meeting of the miners, and addressed them in a foreign tongue, as a result of which they went on strike the next day, and the mine was shut down until the 12th of

June, when it resumed as a "non-union" mine, so far as relations with the U.M.W.A. were concerned.

During this strike plaintiff was subjected to heavy losses and extraordinary expenses with respect to its business, of the same kind that had befallen it during the previous strikes.

About the 1st of June a self-appointed committee of employees called upon plaintiff's president, stated in substance that they could not remain longer on strike because they were not receiving benefits from the union, and asked upon what terms they could return to work. They were told that they could come back, but not as members of the United Mine Workers of America; that thenceforward the mine would be run non-union, and the company would deal with each man individually. They assented to this, and returned to work on a non-union basis. Mr. Pickett, the mine superintendent, had charge of employing the men, then and afterwards, and to each one who applied for employment he explained the conditions which were that while the company paid the wages demanded by the union and as much as anybody else, the mine was run non-union and would continue so to run; that the company would not recognize the United Mine Workers of America; that if any man wanted to become a member of that union he was at liberty to do so; but he could not be a member of it and remain in the employ of the Hitchman Company; that if he worked for the company he would have to work as a non-union man. To this each man employed gave his assent, understanding that while he worked for the company he must keep out of the union.

Since January, 1908 (after the commencement of the suit), in addition to having this verbal understanding, each man has been required to sign an employment card expressing in substance the same terms. This has neither enlarged nor diminished plaintiff's rights, the agreement not being such as is required by law to be in writing. Under this arrangement as to the terms of employment, plaintiff operated its mine from June 12, 1906, until the commencement of the suit in the fall of the following year.

During the same period a precisely similar method of employment obtained, at the Glendale mine, a property consisting of about 200 acres of coal land adjoining the Hitchman property on the south, and operated by a company having the same stockholders and the same management as the Hitchman; the office of the Glendale mine being at the Hitchman Coal & Coke Company's office. Another mine in the Panhandle, known as Richland, a few miles north of the Hitchman, likewise was run "non-union."

In fact, all coal mines in the Panhandle and elsewhere in West Virginia, except in a small district known as the Kanawha field, were run "non-union" while the entire industry in Ohio, Indiana, and Illinois was operated on the "closed-shop" basis, so that no man could hold a job about the mines unless he was a member of the United Mine Workers of America. Pennsylvania occupied a middle ground, only a part of it being under the jurisdiction of the union. Other states need not be particularly mentioned.

The unorganized condition of the mines in the Panhandle and some other districts was recognized as a serious interference with the purposes of the union in the Central Competitive Field, particularly as it tended to keep the cost of production low, and, through competition with coal produced in the organized field, rendered it more difficult for the operators there to maintain prices high enough to induce them to grant certain concessions demanded by the Union. . . .

What are the legal consequences of the facts that have been detailed?

That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing non-membership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experience of strikes and other interferences while attempting to "run union" were a sufficient explanation of its resolve to run "non-union," if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of "collective bargaining" it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the employment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and that this is part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power. *Adair* v. *United States,* 208 U.S. 161, 174, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764; *Coppage* v. *Kansas,* 236 U.S. 1, 14, 35 Sup. Ct. 240, 59 L. Ed. 441,

L.R.A. 1915C, 960. In the present case, needless to say, *there is no act of legislation to which defendants may resort for justification.*

Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employees, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. That the employment was at will, and terminable by either party at any time, is of no consequence. . . .

We return to the matters set up by way of justification or excuse for defendants' interference with the situation existing at plaintiff's mine.

The case involves no question of the rights of employees. Defendants have no agency for plaintiff's employees, nor do they assert any disagreement or grievance in their behalf. In fact, there is none; but if there were, defendants could not, without agency, set up any rights that employees might have. The right of the latter to strike would not give to defendants the right to instigate a strike. The difference is fundamental.

It is suggested as a ground of criticism that plaintiff endeavored to secure a closed non-union mine through individual agreements with its employees, as if this furnished some sort of excuse for the employment of coercive measures to secure a closed union shop through a collective agreement with the union. It is a sufficient answer, in law, to repeat that plaintiff had a legal and constitutional right to exclude union men from its employ. But it may be worth while to say, in addition: First, that there was no middle ground open to plaintiff; no option to have an "open shop" employing union men and non-union men indifferently; it was the union that insisted upon closed-shop agreements, requiring even carpenters employed about a mine to be members of the union, and making the employment of any non-union man a ground for a strike; and secondly, plaintiff was in the reasonable exercise of its rights in excluding all union men from its employ, having learned, from a previous experience, that unless this were done union organizers might gain access to its mine in the guise of laborers.

Defendants set up, by way of justification or excuse, the right of workingmen to form unions, and to enlarge their membership by inviting other workingmen to join. The right is freely conceded, provided the objects of the union be proper and legitimate, which we assume to be true, in a general sense, with respect to the union here in question. *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 439,

31 Sup. Ct. 492, 55 L. Ed. 797, 34 L.R.A. (N.S.) 874. The cardinal error of defendants' position lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others. *Brennan* v. *United Hatters*, 73 N.J. Law, 729, 749, 65 Atl. 165, 9 L.R.A. (N.S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698. . . .

In any aspect of the matter, it cannot be said that defendants were pursuing their object by lawful means. The question of their intentions—of their bona fides—cannot be ignored. It enters into the question of malice. As Bowen, L. J., justly said, in the *Mogul Steamship Case*, 23 Q.B. Div. 613:

> "Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse."

Another fundamental error in defendants' position consists in the assumption that all measures that may be resorted to are lawful if they are "peaceable"—that is, if they stop short of physical violence, or coercion through fear of it. In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employees constitutes such a violation. *Flaccus* v. *Smith*, 199 Pa. 123, 48 Atl. 894, 54 L.R.A. 640, 85 Am. St. Rep. 779; *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (1905), A.C. 239, 244, 250, 253; *Jonas Glass Co.* v. *Glass Bottle Blowers' Association*, 77 N.J. Eq. 219, 223, 79 Atl. 262, 41 L.R.A. (N.S.) 445. . . .

Upon all the facts, we are constrained to hold that the purpose entertained by defendants to bring about a strike at plaintiff's mine in order to compel plaintiff, through fear of financial loss, to consent to the unionization of the mine as the lesser evil, was an unlawful purpose, and that the methods resorted to by Hughes——the inducing of employees to unite with the union in an effort to subvert the system of employment at the mine by concerted breaches of the contracts of employment known to be in force there, not to mention misrepresentation, deceptive statements, and threats of pecuniary loss communicated by Hughes to the men—were unlawful and malicious

methods, and not to be justified as a fair exercise of the right to increase the membership of the union. . . .

That the damage resulting from a strike would be irremediable at law is too plain for discussion.

As against the answering defendants, plaintiff's right to an injunction is clear; as to the others named as defendants, but not served with process, the decree is erroneous, as already stated. . . .

The decree of the Circuit Court of Appeals is reversed, and the decree of the District Court is modified as above stated. . . .

Case Questions

1. What agreement did the Hitchman Company ask its employees to abide by?
2. At the time of this case, what states were mining coal on a closed-shop basis?
3. What is a closed shop?
4. What rule was promulgated in the *Adair* case, page 25?
5. Were the organizing efforts of the U.M.W. peaceful? Was this a good defense?
6. Did the court concede that workers had the right to form and join labor organizations?
7. Did the court uphold the yellow-dog contract?

BRIMELOW v. CASSON

1924. 1 CH. 302

RUSSELL, J. . . . My task here is to decide whether, in the circumstances of this case, justification existed for the acts done. The plaintiff is carrying on a business which involves the employment for wage of persons engaged in the theatrical calling, a calling in which numberless persons of both sexes are engaged in different classes of work throughout the country. The unions, or associations, formed for the purpose of representing and advancing the interests of those persons in connection with their different classes of work, and the interests of the calling as a whole, have ascertained by experience, and no one could doubt the fact, that it is essential for the safeguarding of those interests that there should be no sweating by employers. They have found by experience that the payment of less than a living wage to chorus girls frequently drives them to supplement their insufficient earnings by indulging in misconduct for gain, thus ruining themselves in morals and bringing discredit to the theatrical calling. . . . They find that the plaintiff is paying to his chorus girls wages

on which no girl could with decency, feed, clothe, and lodge herself, wages far below the minimum fixed by the Actors' Association. They have had previous experience of the plaintiff, and they cause fresh inquiries to be made, with the result that they are satisfied that many, if not all, the results anticipated by them to flow from such underpayment are present in the plaintiff's company. They desire in the interest of the theatrical calling and the members thereof to stop such underpayment with its evil consequences. The only way they can do so is by inducing the proprietors of theaters not to allow persons like the plaintiff the use of their theaters, either by *breaking contracts* already made or by refusing to enter into contracts. . . . But have they in law justification for those acts? As has been pointed out, no general rule can be laid down as a general guide in such cases, but I confess that if justification does not exist here I can hardly conceive of the case in which it would be present. . . .

The result is that the action is dismissed with costs.

Case Questions

1. Detail the controlling facts of this case.
2. How did the union enforce its wage demand?
3. Does the decision indicate a qualification of the contractual interference doctrine, a reshaping of the rule to secure a socially desirable result?

EXCHANGE BAKERY & RESTAURANT, INC. v. RIFKIN

Court of Appeals of New York, 1927. 245 N.Y. 260, 157 N.E. 130

ANDREWS, J. A workman may leave his work for any cause whatever. He need make no defense, give no explanations. Whether in good or bad faith, whether with malice, or without, no one can question his action. What one man may do, two may do or a dozen, so long as they act independently. If, however, any action taken is concerted; if it is planned to produce some result, it is subject to control. As always, what is done, if legal, must be to effect some lawful result by lawful means, but both a result and a means lawful in the case of an individual may be unlawful if the joint action of a number.

A combination to strike or to picket an employer's factory to the end of coercing him to commit a crime, or to pay a stale or disputed claim, would be unlawful in itself, although, for an individual, his intent in leaving work does not make wrongful the act otherwise lawful. His wrong, if wrong there be, would consist of some threat, of something beyond the mere termination of his contract with his em-

ployer. Likewise a combination to effect many other results would be wrongful. Among them would be one to strike or picket a factory where the intent to injure rests solely on malice or ill will. Another's business may not be so injured or ruined. It may be attacked only to attain some purpose in the eye of the law thought sufficient to justify the harm that may be done to others.

The purpose of a labor union to improve the conditions under which its members do their work; to increase their wages; to assist them in other ways, may justify what would otherwise be a wrong. So would an effort to increase its numbers and to unionize an entire trade or business. It may be as interested in the wages of those not members, or in the conditions under which they work, as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages; all, by the principle of collective bargaining. Economic organization today is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory, but generally. That they may prevail, it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor. And it may adopt either method separately. Picketing without a strike is no more unlawful than a strike without picketing. Both are based upon a lawful purpose. Resulting injury is incidental and must be endured.

Even if the end sought is lawful, the means used must be also. "Picketing" connotes no evil. It may not be accompanied, however, by violence, trespass, threats, or intimidation, express or implied. No crowds may be collected on or near the employer's property. The free entrance of strangers, customers, or employees may not be impeded. There may be no threats—no statements, oral or written, false in fact, tending to injure the employer's business. We here make no attempt to enumerate all the acts that might make picketing illegal. Doubtless, there are others. When the situation in a particular case comes to be reviewed by the courts, there will be no difficulty in drawing the line between acts permissible and acts forbidden.

We have been speaking in terms of the workman. We might equally have spoken in terms of the employer. The rule that applies to the one also applies to the other. The latter may hire and discharge men when and where he chooses and for any reason. But, again, any combination must be for lawful ends secured by lawful means. If believed to be for their interests, employers may agree to employ non-union men only. By proper persuasion they may induce union men

to resign from their unions. They may not, however, because of mere malice or ill will, combine to limit the opportunities of any one to obtain employment. The means adopted must be lawful. No violence or intimidation, no threats, no trespass, no harmful false statements, no means that would be improper, were the workman the actor.

In writing as we have done, we have in mind cases where the strike, the picketing, or the lockout is made use of by associates in the same trade or business; where the end sought, therefore, directly affects those, masters or men, engaged therein. We do not consider so-called sympathetic strikes, boycotts, or lockouts where interest is more remote. Questions that may arise under such circumstances are not before us. Neither do we consider strikes or lockouts not connected with labor disputes, but designed to enforce political action.

Where the end or the means are unlawful and the damage has already been done, the remedy is given by a criminal prosecution or by a recovery of damages at law. Equity is to be invoked only to give protection for the future. To prevent repeated violations, threatened or probable, of the complainant's property rights, an injunction may be granted. This is no novel assumption of jurisdiction. For many years, while leaving to the law redress for single or isolated wrongs to property rights, where there is danger of their repetition, the chancellor has used this weapon to protect the innocent. The theoretical basis of this power has been said to be the avoidance of a multiplicity of actions. Whatever the basis, however, the power is undoubted. It has been exercised in many ways. Repeated trespasses have been prevented; the continued pollution of streams; the maintenance of nuisances; the misuse of a trade-name. Other instances might be cited. The rule is not different where behind the facts presented to the court lies a labor dispute. Freedom to conduct a business, freedom to engage in labor, each is like a property right. Threatened and unjustified interference with either will be prevented. But the basis of permissible action by the court is the probability of such interference in the future, a conclusion only to be reached through proof contained in the record. Unless the need for protection appears, equity should decline jurisdiction.

In the case before us findings of fact were made by the Special Term, resulting in a judgment for the defendants. Most of such findings were reversed by the Appellate Division. As a substitute new findings were made by that court and a sweeping injunction was granted to the plaintiff. It therefore becomes our duty to review these findings and to determine ourselves whether they are sustained by the weight of the evidence. Civil Practice Act, section 589.

In 1918 the plaintiff corporation was formed. From the first its intention was to employ only nonunion waitresses in its restaurant. Always, with one exception, an applicant for employment was questioned as to her membership in any union and only those who denied such a connection were engaged. No contract as to this matter was then made, but the applicant was hired at the rate of $8 per week for full time, or $5 for half time. This hiring was at will and might be ended at any time by either party. *Cuppy* v. *Stollwerck Bros.*, 216 N.Y. 591, 111 N.E. 249. Thereafter the waitresses were asked repeatedly if they had joined a union. They always denied it. If it had been discovered that their denials were untrue, they would have been at once discharged. Also after beginning work each waitress signed a paper stating that it was the understanding that she was not a member of any union, pledging herself not to join one or if she did to withdraw from her employment. She further promised to make no efforts to unionize the restaurant, and says that she will attempt to adjust by individual bargaining any dispute that may arise. This paper was not a contract. It was merely a promise based upon no consideration on the part of the plaintiff. From 14 to 16 waitresses were employed, and, so far as appears, the conditions of their work was satisfactory to them.

The three defendants are members of a waiters' union. Its schedule of wages is $15 a week for full time and $10 for half time. Apparently at their instigation 4 waitresses joined the union after employment was obtained. They had not been members on the date when they were originally engaged. The fact that they had done so was not known to the plaintiff. Efforts were also made to induce other employees to take the same course. At the same time the plaintiff was asked to unionize its restaurant, but it refused.

The Appellate Division has based its decision in part upon the theory that the defendants wrongfully attempted to persuade the plaintiff's employees to break this alleged contract. Even had it been a valid subsisting contract, however, it should be noticed that, whatever rule we may finally adopt, there is as yet no precedent in this court for the conclusion that a union may not persuade its members or others to end contracts of employment where the final intent lying behind the attempt is to extend its influence. In *Lamb* v. *S. Cheney & Son* (227 N.Y. 418, 125 N.E. 817) we said that where a specific contract of employment for a definite time exists another may not intentionally, without just cause or excuse, interfere therewith. In *Posner Co.* v. *Jackson* (223 N.Y. 325, 119 N.E. 573), an employee,

having made an express contract to perform specific, unique, and extraordinary services for a fixed period, was induced to break it by a rival manufacturer. She might herself have been enjoined from violating her negative covenants. So he who persuaded her to do so might be held in damages. Finally, in *Reed Co.* v. *Whiteman* (238 N.Y. 545, 144 N.E. 885), it was sought to use these cases as authority to support an injunction against a labor union which was persuading employees who were engaged under a written contract from week to week, to strike. In that case, however, there was a finding, binding upon us, to the effect that the action of the union was "with the intent and purpose solely of preventing plaintiff from doing any business and of ruining plaintiff in its business, and bringing disorder into plaintiff's business." Contract or no contract, such an act, induced solely by malice, was wrongful. Here, however, we do not need to decide whether, where the object of the act is to aid in a labor dispute, there is just cause or excuse for such interference with existing contracts, and, if not, how specific the contract must be, nor how substantial the term of employment contained therein, to permit equity to intervene. Nor need we discuss the correlative question as to how far contracts made by unions with their members, providing that they are to work only in union shops, are to be protected.

On April 22, 1925, some of the defendants representing the union entered the plaintiff's restaurant as ordinary customers. They did this, however, with the preconceived design of causing a strike by blowing a whistle at a time inconvenient to the plaintiff when many patrons were present. In so acting they were clearly trespassers, and, if such trespasses were to be continued in the future, they might be enjoined. It was an isolated wrong, however, and adequate compensation might be recovered in an action at law. When the strike was declared the four waitresses who had joined the union at once stopped work and left the premises. In so doing one of them threatened an officer of the plaintiff and she interfered with the access of a patron of the restaurant. A crowd collected, but was soon dispersed. Again, we have an isolated instance of intimidation occurring at the outset of the strike. Thereafter there was picketing, which consisted of two women walking in the street close to the curb, but near the premises, having placards 10x16 inches in size pinned to their dresses and bearing the legend:

"Waitresses Strike Picket. Waiters Union Local No. 1. Affiliated with the American Federation of Labor and the United Hebrew Trades."

There was no violence; no intimidation; no obstruction of entrances to the premises; no collection of crowds. This course of conduct continued for four days until it was ended by a temporary injunction.

Under such a state of facts the defendants have been enjoined from "patrolling the side-walk and street in front of and near the plaintiff's premises, from approaching, accosting, threatening, assaulting, or intimidating any person desiring to enter the premises, from blockading the entrance thereto, from collecting crowds, from exhibiting any signs or notices in the vicinity, from suggesting a boycott, and from coercing or intimidating any person seeking to enter the employment of the plaintiff." In this we think the Appellate Division has erred.

As we have indicated, the action of those defendants who entered the restaurant when the strike was called was a trespass. There is, however, no indication that such acts will be repeated. There was no contract between the plaintiff and its waitresses in regard to the union with which the defendants can be said to have interfered. There is nothing untruthful in the placards carried by the pickets, even assuming that the word "strike" is to be confined to cases where some of those who have become employees of the plaintiff have left its employment to obtain relief in a labor dispute. Such was the case here. Three of these four waitresses were employed by the plaintiff long before they became members of the union. Their reply to inquiries then made was entirely truthful. To the fourth, no questions were put. If they subsequently joined the union, they might have been discharged; but until they were discharged they remained in the plaintiff's employment. Except on the one occasion the picketing was entirely lawful and for a lawful object, although the plaintiff's business might be injured thereby. It is said that the strike was not properly called because of the neglect of some preliminaries which the union rules required in such a case, and that the four waitresses referred to were not properly members of the union because their dues had not been paid. This is a question as to which the plaintiff is not interested.

It is quite true that, where unlawful picketing has been continued, where violence and intimidation have been used, and where misstatements as to the employer's business have been distributed, a broad injunction prohibiting all picketing may be granted. The course of conduct of the strikers has been such as to indicate the danger of injury to property if any picketing whatever is allowed. Such is not

this case. Nor should a court of equity intervene where there is no evidence that wrongs have been committed or threatened on the theory that the defendant is not harmed by the prohibition of such unlawful acts.

The judgment of the Appellate Division should be reversed, and that of the Special Term affirmed, with costs in this court and in the Appellate Division.

SUPPLEMENTAL CASE DIGEST—CONTRACTUAL INTERFERENCE

INTERBOROUGH RAPID TRANSIT COMPANY V. GREEN. Supreme Court, New York County, 1928; 131 Misc. 682, 227 N.Y.S. 258. The Company entered into individual contracts with its employees specifying that the workers refrain from joining any union other than the one sponsored by the Company. An injunction restraining the defendant outside union from breaching the company contracts was refused on the ground that the agreement was inequitable and therefore unenforceable.

Case Questions

1. If a specific course of conduct is individually lawful, does it follow that the same conduct, when collectively engaged in, must also be lawful?
2. What does the case have to say as to strike and picket activity actuated wholly by malice and ill will? (See in this connection *Hunt* v. *Crumboch*, under the Anti-Trust caption.)
3. List the legitimate purposes of a labor organization as detailed by Justice Andrews.
4. What picket line conduct may be enjoined?
5. What rights does Andrews indicate an employer has in his labor relation?
6. Discuss the statement: Equity is to be invoked only to give protection for the future.
7. Did the Court of Appeals sustain the injunction issued by the lower court?
8. Why was the yellow-dog contract held unenforceable in the parent situation?

Questions on the Chapter

1. Distinguish between the legal status of the slave and of the serf.
2. What factors weakened the feudal economy? Discuss fully.
3. Discuss the philosophy and method of Mercantilism.

4. What were the Mercantilistic counterparts of the modern trade union and employers' association?
5. Discuss the provisions of the Statutes of Laborers. Were they confined to labor?
6. What three early common-law doctrines were applied to labor organizations?
7. What is the modern outgrowth of the criminal conspiracy doctrine?
8. What was the holding in the Taff-Vale Railway decision?
9. Discuss the rights and remedies aspect of the contractual interference doctrine.
10. What is the present status of the so-called yellow-dog contract, as well as of the yellow-dog injunction employed in the Hitchman decision?

CHAPTER 3

STRUCTURE AND PURPOSE OF LABOR COMBINATIONS

SECTION 8. EVOLUTIONARY CHANGES IN PURPOSE

Viewing American labor combinations from an historical standpoint will reveal much of interest as to their ever-changing methods and objectives. The influence of English law upon American labor law has been previously traced; but this presents only a partial picture, since the social and economic forces at work here and abroad were not altogether parallel.

Local Unionism, 1792-1827. American labor history can be summarily divided into four basic periods, each possessing its own characteristics. The first is that of Local Unionism, beginning with the formation of the Philadelphia shoemakers into a craft unit in 1792 and extending to 1827, the beginning of the period of Early Federation. The shoemakers' group lasted about twelve years, making up for its small size by its extreme energy. It conducted the first organized strike against a wage reduction, and was ordered to disband in 1805, as it was conducting its second strike, by the courts, which found it to be a conspiracy in restraint of trade. The printers, carpenters, and shipwrights likewise banded together during this period, but these did not approach the vitriolic union activity engaged in by the cobblers.

Labor combinations of this period were organized along craft lines, were relatively weak in effectuating their demands, did not engage in collective bargaining in the modern sense, and concerned themselves more with uplift matters, little attention being paid to basic questions of wages, hours, and working conditions. The conception of a free and open market, ingrained in the English common law and incorporated in our own, served to make the judiciary hostile to the monopolistic character of concerted labor action. Thus most labor action in the holdings of the law fell into the illegal category.

Early Federation, 1827-1886. The second major labor era found its inception in the year 1827 with the combination of Philadelphia unions into a city national, the Mechanics' Union of Trade Associations. Purely local unionism was being supplanted, then, by citywide nationals, as labor in Baltimore, New York, and Boston followed the

lead of Philadelphia. Politically the period was one of reaction against moneyed interests, and in 1828 Andrew Jackson was swept into the presidency on a wave of Populism. Workers along the North Atlantic seaboard engaged in extended political activity as an incident of union strength, forming the Workingmen's Party, America's first labor-sponsored political group. This party had in its platform such matters as free public education, tax reform, the abolition of debt imprisonment, monopoly regulation, and other related reforms.

The panic of 1837 intervened, however, forcing dissolution of most city nationals and driving the balance underground. Until 1850, the only favorable result for labor was the decision of the Massachusetts Supreme Court in the famous case of *Commonwealth* v. *Hunt* in 1842, reprinted in this chapter. This decision legalized the strike as a union weapon and sounded the death knell of the criminal conspiracy doctrine treated in the previous chapter. Prosperity in the decade of the 1850's gave heart to the labor movement, with the result that, by 1866, some thirty-two nationals had been revived or newly formed, including the typographers, blacksmiths, stonecutters, and building trades workers. The year 1866 is of special importance in that the first successful attempt was made to bring all labor together into one nationwide unit, the National Labor Union, under the leadership of W. H. Sylvis. Its ill-fated predecessor, the National Trade Union of 1834, had died in the throes of the 1837 lean years. The National Labor Union was, however, not a militant labor organization, being conducted along political and idealistic lines, emphasizing greenbackism, the eight-hour day, and cooperative production. This organization disbanded after six years, one of the major reasons lying in the distate that the trade unions had in the parent for its emphasis on political issues.

The demise of the National Labor Union witnessed the rise of the Knights of Labor, begun by the Philadelphia tailors as a secret society in 1869. The difficult situation of labor after the Civil War, accompanied by the fact that the Knights freely admitted skilled and unskilled labor into its local assemblies, make it one of the most spectacular unions in American history. Estimates as to its peak strength vary from slightly less than one to more than four million men, its secret character making a definite figure impossible. The Knights of Labor had blended economic and political objectives and sought to draw all workers, regardless of race, color, creed, sex, political affiliation, or skill status. Only bankers, liquor dealers, and employers were refused membership. While it conducted a successful strike in 1885

against the Jay Gould railroad interests, its decline is traceable to ineffective leadership, lack of solidarity between craft and industrial workers, excessive emphasis on purely political and social questions, and charged participation in the Chicago Haymarket debacle of 1886. The Knights of Labor remains significant as being the forerunner of modern industrial, as distinguished from craft, labor organizations. It should not, however, be confused with pure industrial unionism, for the Knights preserved the identity of craft units in all areas except the local assembly.

Modern Craft Federation, 1886-1935. Believing that they were the pawns of unskilled labor in the ranks of the Knights of Labor, the craft units gradually withdrew from that combination and, by 1886, had formed a national unit of their own, the American Federation of Labor. For the first twenty years, the Federation retained it pure craft status, but then a major change in policy permitted the inclusion of the United Mine Workers and Ladies Garment Workers Union, which were and remain industrial unions. The regularity with which the Mine Workers withdraw from the parent indicates quite forcefully that craft and industrial workers do not, as yet, recognize any common bond of mutual help and economic interest. The American Federation, during its formative years, wisely kept its guns trained upon economic objectives such as shorter hours, higher wages, and improved safety and work conditions, maintaining secondary emphasis upon such national questions as child labor legislation, restriction of immigration, and protective tariffs.

It should be noted, however, that contemporary restrictive labor legislation, notably the amended National Labor Relations Act of 1947, has caused all major labor groups to engage in extended and concerted political activity in order to secure more favorable legislative treatment in state and federal areas. On the whole, the political aspect of modern unionism is being directed at those matters having a direct bearing on the stability and continued survival of the labor movement. It thus cannot be viewed as being in the category of the dispersive tactics that weakened earlier labor organizations.

The period of Modern Federation witnessed many changes in labor law, notably in the legislative area, including the Sherman Anti-Trust Act, the Clayton Act, the Federal Anti-Injunction Act, the Railway Labor Act, and the National Labor Relations Act. The last four pieces of legislation have done much to nullify the historical antilabor attitude of the judiciary; in fact, the present strength of

labor is ascribed by many authorities to the positive, prolabor legislative sponsoring of labor under the New Deal by the federal government. We leave the above enactments to fuller treatment under subsequent appropriate headings and turn briefly to the final period of American labor history.

Industrial Unionism, 1935-. The predominant feature of this last period rests with the tremendous impetus given industrial unionism by the Congress of Industrial Organizations working under protection of the National Labor Relations Act of 1935. As was previously stated, the American Federation of Labor, through reluctantly permitting the inclusion of unskilled industrial workers in its ranks, continue to maintain focus upon its craft organization, treating the former as something of a poor relation. As industrial workers were included, they were made part and parcel of related craft units and were not set up organizationally as separate and autonomous bodies. With the passage of the Wagner Act of 1935, some labor leaders in the American Federation of Labor hierarchy saw the possibility of making vast inroads in the as yet fertile and unorganized mass production areas, such as steel, petroleum, merchandising, and automobiles. Upon the refusal of American Federation of Labor leadership to embark upon a pressurized organizing campaign among production workers, a schism developed, culminating in the eventual formation of the Congress of Industrial Organizations in November of 1935.

This new labor body met with such marked success in organizing campaigns in the steel, rubber, automotive, electrical and other industries that, by 1947, the Bureau of Labor Statistics reported a C.I.O. membership of over six million, closely rivalling the seven million constituents of the A. F. of L. The latter group was able to increase its strength in the face of this competition only because it rectified the earlier mistake of not permitting autonomous industrial units to be included in its fold. At this writing, the two mammoths of labor have not returned to unified control, principally because of jealousy and distrust between the rival leaders and basic differences in ideological approach.

Throughout the entire breadth of American labor history, no period has been more fruitful in enabling labor to grow and consolidate its gains. A receptive public attitude born in the depression of the thirties, federal legislative sponsorship of the idea of collective bargaining under the National Labor Relations Act of 1935, aggressive labor leadership, favorable economic conditions, a liberal Supreme Court, and neutralization of the federal judiciary by the

Federal Anti-Injunction Act have been major factors in permitting this phenomenal growth in labor's power. The trend of governmental and public favor, however, seems to have changed recently. Whether this trend will significantly weaken the labor movement in the years to come remains in the pale of the future, beyond predictability because of the interaction of the thousand variables that enter into the history of labor.

Questions on Section 8

1. Discuss labor combinations of the Local Union Period as to organization and matters that concerned them.
2. What period of American labor history gave rise to the first labor-sponsored political group?
3. List the demands of the Workingmen's Party platform.
4. Why are we justified in naming the second period of labor history that of Early Federation?
5. Discuss the Knights of Labor. Why were they significant, other than for reason of size?
6. List the major pieces of labor legislation enacted during the period of Modern Federation.
7. Distinguish an industrial from a craft union.
8. Do craft and industrial workers find much in common?
9. Discuss legislative sponsorship of labor during the period of Industrial Unionism.

SECTION 9. LEGALITY OF COMBINATION

The central purpose of Chapter 2 was to outline the various statutory enactments and common-law doctrines in England and America that were directed at the outlawry of labor organization formation and activity. The concept of a free and open market, however, was gradually narrowed in the 19th century, as applied to both capital and labor. In the face of permissible monopolistic competitive practices by large-scale employer groups, more liberal juristic agencies began to concede to labor a correlative right to combine for the purpose of securing to itself a more equitable distribution of the gains of economic progress.

The landmark American decision in this transition period covering the basic legality of labor combination, when utilized for proper purposes, is *Commonwealth* v. *Hunt,* reprinted immediately below. Since the rendition of this decision, the right of American labor to organize has not been seriously questioned by either the courts or legislatures.

COMMONWEALTH v. HUNT

Supreme Court of Massachusetts, 1842. 4 Metcalf 111, 38 Am. Dec. 346

SHAW, C. J. . . . The general rule of the common law is that it is a criminal and indictable offense for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual. This rule of law may be equally in force as a rule of the common law, in England and in this commonwealth; and yet it must depend upon the local laws of each country to determine whether the purpose to be accomplished by the combination, or the concerted means of accomplishing it, be unlawful or criminal in the respective countries. . . . Without attempting to review and reconcile all the cases, we are of opinion, that as a general description, though perhaps not a precise and accurate definition, a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.

The first count set forth that the defendants, with divers others unknown, on the day and at the place named being workmen and journeymen in the art and occupation of bootmakers, unlawfully, perniciously, and deceitfully designing and intending to continue, keep up, form and unite themselves into an unlawful club, society, and combination, and make unlawful by-laws, rules, and orders among themselves, and thereby govern themselves and other workmen in the said art, and unlawfully and unjustly to extort great sums of money by means thereof, did unlawfully assemble and meet together, and being so assembled, did unjustly and corruptly conspire, combine, confederate, and agree together that none of them should thereafter work for any master or person whatsoever, in the said art, mystery, and occupation, who should employ any workman or journeyman, or other person in the said art, who was not a member of said club, society, or combination, after notice given him to discharge such workman from the employ of such master; to the great damage and oppression, etc. . . .

Stripped, then, of these introductory recitals and alleged injurious consequences, and of the qualifying epithets attached to the facts, the averment is this: that the defendants and others formed themselves into a society, and agreed not to work for any person, who should employ any journeyman or other person, not a member of such society, after notice given him to discharge such workman.

The manifest intent of the association is to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged. Such an association might be used to afford each other assistance in times of poverty, sickness, and distress; or to raise their intellectual, moral, and social condition; or to make improvement in their art; or for other proper purposes. Or the association might be designed for purposes of oppression and injustice. But in order to charge all those who become members of an association with the guilt of a criminal conspiracy, it must be averred and proved that the actual, if not the avowed object of the association, was criminal. An association may be formed, the declared objects of which are innocent and laudable, and yet they may have secret articles, or an agreement communicated only to the members, by which they are banded together for purposes injurious to the peace of society or the rights of its members. Such would undoubtedly be a criminal conspiracy, on proof of the fact, however meritorious and praiseworthy the declared objects might be. The law is not to be hoodwinked by colorable pretenses. It looks at truth and reality, through whatever disguise it may assume. But to make such an association, ostensibly innocent, the subject of prosecution as a criminal conspiracy, the secret agreement which makes it so, is to be averred and proved as the gist of the offense. But when an association is formed for purposes actually innocent, and afterward its powers are abused by those who have the control and management of it, to purposes of oppression and injustice, it will be criminal in those who thus misuse it, or give consent thereto, but not in the other members of the association. In this case, no such secret agreement, varying the objects of the association from those avowed, is set forth in this count of the indictment.

Nor can we perceive that the objects of this association, whatever they may have been, were to be attained by criminal means. The means which they proposed to employ, as averred in this count, and which, as we are not to presume, were established by the proof, were, that they would not work for a person, who, after due notice, should employ a journeyman not a member of their society. Supposing the object of the association to be laudable and lawful, or at least not unlawful, are these means criminal? The case supposes that these persons are not bound by contract, but free to work for whom they

please, or not to work, if they so prefer. In this state of things, we can not perceive that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests. One way to test this is to consider the effect of such an agreement, where the object of the association is acknowledged on all hands to be a laudable one. Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop in which any one used it, or not to work for an employer who should, after notice, employ a journeyman who habitually used it. The consequences might be the same. A workman who should still persist in the use of ardent spirit, would find it more difficult to get employment; a master employing such an one might, at times, experience inconvenience in his work, in losing the services of a skillful but intemperate workman. Still it seems to us, that as the object would be lawful, and the means not unlawful, such an agreement could not be pronounced a criminal conspiracy. . . .

We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public-spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy. . . .

Several other exceptions were taken, and have been argued; but this decision on the main question has rendered it unnecessary to consider them.

Case Questions

1. What was the "manifest intent" of the labor organization in the parent case?
2. How does the court define a criminal conspiracy?
3. State the rule of law developed by the court.

SECTION 10. PSEUDO-LABOR ORGANIZATIONS

Ascertainment of whether a particular association of individuals is a bona fide labor organization can oftentimes be a determinative issue in a civil or a criminal action, as is illustrated by the two decisions in this section. The law may treat as lawful certain acts by a labor organization which, when committed by nonlabor groups, would be unlawful. The *Distributors Division* and *Gassman* cases, printed in this section, are in point, for the Donnelly Anti-Trust law of New York is inapplicable to labor unions that can qualify as such. In the federal area, because of the Clayton Act, the Sherman Anti-Trust Act usually does not apply to labor unions.

Conversely, certain acts or practices are made unlawful if committed by labor organizations, but immunity is granted if they are engaged in by nonlabor persons or associations, as for example the union unfair labor practices prohibited by Sec. 8 (b) of the National Labor Relations Act of 1947. Other examples could be given to emphasize the definitive importance of the term "labor organization," but the above will suffice.

The following two cases are of further significance, for they distinguish labor organizations from nonlabor associations. The National Labor Relations Act of 1947 defines, for jurisdictional and immunity purposes, a labor organization in Sec. 2 (5). This section is reprinted at the end of the *Gassman* decision.

PEOPLE v. DISTRIBUTORS DIVISION, SMOKED FISH WORKERS UNION, LOCAL NO. 20377

Supreme Court, Special Term, New York County, 1938.
169 Misc. 255, 7 N.Y.S. (2d) 185

PECORA, J. The attorney general seeks a permanent injunction to restrain the defendants from (1) intimidating and coercing manufacturers or producers of "smoked fish" into selling that product solely to members of the defendant Distributors Division, Smoked Fish Workers Union, Local No. 20377 (hereinafter called "Distributors Division"); (2) from coercing and compelling retail storekeepers, who sell said product, to purchase their supply solely from members of the "Distributors Division"; and (3) from picketing and threatening to picket the places of business of such producers and retailers who failed to comply with the demands of the "Distributors Division."

The action is thus one to restrain an illegal combination alleged to be operating in violation of Article 22, Section 340, of the General Business Law (known as the Donnelly Anti-Trust Law). Section 340, in substance, declares to be void and illegal combinations whereby monopolies in the manufacture, production, transportation, marketing or sale of products or services are created; or whereby free competition is restrained or prevented.

Subdivisions 2 and 3 of section 340, however, provide for certain exceptions to the operation of this statute. They read as follows: "2. The provisions of this article shall not apply to cooperative associations, corporate or otherwise, of farmers, gardeners, or dairymen, including live stock farmers and fruit growers, *nor to bona fide labor unions.*" (Italics mine.) "3. The labor of human beings shall not be deemed or held to be a commodity or article of commerce as such terms are used in this section and nothing herein contained shall be deemed to prohibit or restrict the right of workingmen to combine in unions, organizations and associations, not organized for the purpose of profit."

The evidence, however, convinces me that the Distributors Division is not a bona fide union of laborers or workingmen, but merely an aggregation that has taken on the guise and nomenclature of a union in order to obtain an immunity to carry on its activities as an illegal combination to restrain trade and create a monopoly. It was established that the membership of the Distributors Division consisted of merchants engaged in the business of buying and selling smoked fish. In fact, prior to the organization of the "Distributors Division" in January 1937, much of its membership was banded together in an association of jobbers known as the "Smoked Fish Distributors Association of Greater New York." . . .

"The term 'labor organization' means any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining, or of dealing with employers concerning grievances, terms, or conditions of employment, or of other mutual aid or protection and which is not a company union as defined herein."

Labor unions are organizations of employees. Employees are those who are compensated for their labor or services by wages, and are not paid by profits. Although both the laborer and the entrepreneur may toil equally, the economic and social difference between them lies in the method of compensation and return for their toil. One is paid a wage or salary; while the other must look to prospective profits for his remuneration. The Distributors Division is a

typical jobbers association. It is not interested in the classical purposes of a labor union, namely: furthering the interest of the worker with respect to higher wages, improved labor conditions, bettering hours of labor, etc. Its interests lay solely in striving to obtain more retail trade or customers for its members so as to increase their profits.

In attempting to accomplish this end, the defendants tried to compel retail storekeepers to buy their smoked fish only from members of the Distributors Division, although there are a large number of other distributors throughout the city of New York. The methods of coercion employed included threats and intimidation and the placing of pickets in front of retail stores whose owners refused to comply with the demands of the Distributors Division. The signs carried by such pickets mentioned the fact that these stores did not purchase their smoked fish from members of Distributors Division, Smoked Fish Workers Union, Local No. 20377. Threats to picket were also made to manufacturers or producers if they sold their products to any but members of the Distributors Division. The public was misled thereby into believing that there was a labor controversy, when in fact none existed.

If the Distributors Division succeeded in compelling retailers to purchase only from, and manufacturers to sell only to, its members, the result would inevitably be a monopoly with all its familiar attendant evils. The evidence leads reasonably to that conclusion. There was testimony by certain retailers that they paid higher prices to members of the Distributors Division, from whom they had been compelled to buy, than they did to other non-member distributors.

As stated before, the Distributors Division is not a bona fide labor union and has none of the attributes of such an organization. Traditionally a court of equity will look beyond the mere form, to discover the substance. Particularly is this applicable here, where an organization has garbed itself in the robes of union immunity, in order to further its illegal purposes. In so disguising itself, such an organization not only injures its competitors, but also tends to discredit the sound cause of union labor. The public is bound to pay the cost of such monopolies, and it will point its accusing finger at this organization which styles itself a "Division" of a labor union. Organized labor must be vigilant that it be not made a catspaw for any such schemes.

Let it here be noted that the evidence affirmatively shows that the parent organization—the American Federation of Labor—did not

assent to the engrafting of the Distributors Division upon its local, nor was it even consulted about it. The federation was undoubtedly ignorant of the unworthy plan.

Upon the whole case it appears that the injunction prayed for should be granted. Submit findings of fact and conclusions of law.[1]

Case Questions

1. Discuss the provisions of the Donnelly Act under which this action is brought by the attorney general.
2. Give the definition of a labor organization as stated in the case.
3. Why was not the Distributors Division deemed a bona fide labor group?
4. Was the A. F. of L. aware of the existence of the Distributors Division?

PEOPLE v. GASSMAN

Court of General Sessions, New York County, 1943. 45 N.Y.S. (2d) 709

GOLDSTEIN, J. The defendants make two motions: 1. To inspect the grand jury minutes. 2. To dismiss the indictment. The indictment, which names 14 defendants, contains 73 counts, charging violation of the Donnelly Act. (Sec. 340, General Business Law), conspiracy to commit extortion and blackmail, 16 counts charging extortion and 55 counts charging blackmail. The dismissal of the indictment is sought on the grounds: 1. That the evidence submitted to the grand jury is insufficient in law to charge the defendants with the commission of any crime, and 2. That the acts charged against the defendants as constituting crimes, were acts committed by the defendants as officials and members of a bona fide labor union and, as such, were not subject to the action by the grand jury. . . .

The indictment is predicated on the theory that Local No. 324 of the Amalgamated Clothing Workers of America is not a bona-fide labor union in that it is an organization of entrepreneurs and not employees. The grand jury minutes and the moving papers disclose the following: In 1937 the Amalgamated Clothing Workers of America began unionizing the laundry industry by organizing all workers, including agent drivers, sometimes referred to as independent drivers, into one unit, which was chartered as the "United Laundry Workers' Union, Local No. 300, of Amalgamated Clothing Workers of America." In 1938 the membership of Local No. 300, having grown to over 25,000—too large for administrative purposes—was split up into ten local unions. Local No. 324 (the only one involved

[1] See also Sec. 16.2, "Unprotected Labor Disputes," p. 117.

in the indictment) was one of the ten. Local No. 300, before it was subdivided (into ten locals) was a bona-fide union and as such was entitled to the exemption of the Donnelly Act. Obviously the subdivisions, made necessary for better administration, have not changed the bona fides of the situation. The membership of Local No. 324 consists, in the main, of agent-drivers whose function it is to collect soiled laundry, convey it to a power steam laundry for processing and to return the finished laundry to the customer. For his work the agent-driver receives as commission a percentage of the price paid by the customer for the finished work.

A history of the laundry industry shows that prior to 1930 there were practically no so-called "agent-drivers." When the depression occurred in the early 1930's some employers in the laundry industry, as well as in other industries such as milk, bakery and coal, sought to reduce operating expenses by doing away with minimum guaranteed salaries and eliminating the payment of Workmen's Compensation Insurance and Vehicle Public Liability Insurance premiums. The method adopted was to convert employee-drivers receiving a fixed salary into agent-drivers to be paid on a commission basis. At the time of the change some of the "agent-drivers" acquired their collection and delivery trucks from their employers on a small payment or altogether on credit. In other cases laundry owners helped finance the purchase of trucks by agent-drivers. In many instances it was the laundry owner who insisted upon the new relationship. The work performed by the agent-driver is substantially the same as that performed by a route driver. Economically, the agent-driver competes with the driver employee of the laundry. His net earnings approximate the salary paid to the employee-driver. The standard forms of collective bargaining agreement in use between Local No. 324, the Laundry Workers' Joint Board, the Amalgamated Clothing Workers of America and the employer laundries denominate the agents or independent drivers as "employees" and the laundries as "employers."

Ownership of the truck by the agent-driver is not a decisive factor in determining his status as employee or entrepreneur. His position is analogous to an employee traveling salesman who works on a commission basis, uses his own automobile in soliciting business, pays for his own insurance coverage, does not punch a time clock and who is paid for the business he brings in regardless of the number of hours he works. Nor is the agent-driver's status as an entrepreneur established by his being licensed by the City of New York. The city

also licenses taxicab drivers, barbers and masseurs who work for others. . . .

. . . Section 340, subdivision 2, of the General Business Law (Donnelly Act) provides that the provisions of the act shall not apply to the activities of bona-fide labor unions. The Donnelly Act is not to be so narrowly construed as to nullify the purpose of the Legislature and to render futile the immunities provided in the Act.

The Legislature, by granting exemption to labor unions from the provisions of the Donnelly Act, clearly indicated that its purpose was to restrain monopolies which are wholly beyond the scope of labor union objectives.

The exemption under the Donnelly Act extends not only directly to the labor unions but to all those in contractual relations with such purposes. *American Fur Mfrs. Ass'n* v. *Associated Fur Coat & Trimming Mfrs., Inc.*, 161 Misc. 246, 291 N.Y.S. 610, affirmed, 251 App. Div. 708, 296 N.Y.S. 1000. . . . If persons, genuinely integrated in a particular industry by the character of their work and whose activities are coordinated with those of a labor union in attaining legitimate labor objectives were, by reason of those activities, to become subject to criminal prosecution then the exemption expressed in the Donnelly Act would be illusory and meaningless. The courts have recognized the right of labor unions to organize agent-drivers. *Bernstein* v. *Madison Baking Co., Sup.*, 38 N.Y.S. 2d 811, affirmed, 266 App. Div. 839, 43 N.Y.S. 2d Sup., 25 N.Y.S. 2d 548, 549. Conduct which the courts have held to be proper in civil litigation cannot in good conscience be made the basis for criminal prosecution.

The attorney-general urges that a dismissal of the indictment in the instant case would open the door to illegal activities on the part of unscrupulous groups acting under the guise of labor unions. The two cases relied upon by the attorney-general—*People* v. *Distributors Division, Smoked Fish Workers Union, Local No. 20377*, 169 Misc. 255, 7 N.Y.S. 2d 185 and *People* v. *Masiello*, 177 Misc. 608, 31 N.Y.S. 2d 512—are readily distinguishable from the case at bar. The courts can and do distinguish between legitimate labor unions and attempts on the part of groups of independent business men to effect monopolies and otherwise illegally restrain trade under the cloak of labor union activity. . . .

The moving papers and the grand jury minutes clearly established that the Amalgamated Clothing Workers of America is a labor union with a membership of about 300,000 workers engaged in the manufacturing, processing and servicing of clothing and related items of

wearing apparel. Local No. 324, which is involved in this prosecution, was duly chartered by the parent body, the Amalgamated Clothing Workers of America. Its affairs are administered like any other of the local unions affiliated with Amalgamated Clothing Workers of America. The accounts and finances of the local union are audited periodically by the auditors of the parent body. The local union pays a per capita tax and also turns over a portion of the initiation fee to the parent body. The officers of the local union receive salaries of $50 and less a week in addition to their expense accounts. All the facts in the case lead to the irresistible conclusion that Local No. 324 is a legitimate organization and not a "racket" as charged by the attorney-general. The grand jury minutes fail to disclose that Local No. 324 was created for a criminal purpose or that any of the defendants' acts, upon which the indictment is based, were performed with criminal intent. The 16 counts charging blackmail and the 55 counts charging extortion involve the collection or attempted collection of union dues. There is no claim that the dues were used for personal gain as distinguished from union activities. The collection of dues, whether by a labor union, or an association or entrepreneurs cannot be blackmail or extortion. The felonious intent necessary to sustain a conviction for these crimes is wholly lacking.

On the facts presented and on the law, it would be the duty of the trial judge to dismiss the indictment and direct a verdict of acquittal. For the reasons indicated both motions are granted. Settle order on notice.[2]

Case Questions

1. Outline the history of the laundry industry given in the case.
2. Did the court deem ownership of the trucks by the agent drivers as indicating they were independent contractors?
3. How does the court distinguish this from the Distributors Division decision? Do you agree?
4. Are company unions permitted under the National Labor Relations Act? What section is involved?

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[2] Affirmed in 51 N.Y.S. 2d 173, 268 App. Div. 377, 1944. The National Labor Relations Act of 1947 defines, in Sec. 2 (5), a labor organization as follows: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists, in whole or in part, for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." The same Act outlaws company dominated unions, placing them in the category of pseudo-labor organizations, by virtue of Sec. 8 (a) (2), which makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ."

SECTION 11. CRIMINAL SYNDICALISM

The crime of criminal syndicalism is defined in the famous case of *De Jonge* v. *Oregon,* reprinted in this section, and hence will not be reiterated here. This decision is included because, both historically and currently, certain labor leaders were or are brought before judicial tribunals on the charge that they, and the labor organizations which they represent, are tainted with the advocacy of violence, anarchy, and governmental unheaval, and hence are amenable to criminal prosecution.

In point on this matter, we may note Professor Hoxie's classification of labor organizations into five groups:

(a) *Business unions.* These concern themselves with basic issues such as wages, hours, and working conditions. The American Federation of Labor is representative of this group.

(b) *Uplift unions.* These have broad social objectives, such as elimination of child labor, public education, elimination of night work for women, and workmen's compensation. Representative was the National Labor Union of 1866 and the Knights of Labor of 1869.

(c) *Dependent unions,* or unions company fostered or dominated. This type has been outlawed by the National Labor Relations Act of 1935 and as amended. (See Sec. 63.2 of this volume.)

(d) *Predatory unions,* or those falling into the racketeering category. They were found operating principally in the building trades and motion picture industries. A primary motive was the shakedown of the employer or the public. (See Sec. 12 of this volume.)

(e) *Revolutionary unions.* Unions organized along industrial lines rather than craft lines have more often skirted the crimson fringe of political action because of their inherently weaker bargaining position. The Industrial Workers of the World, formed in 1905 to give expression to class struggle, were perhaps the most representative of labor unions in this category.[1] Criticism is currently being levied from some sources that the C.I.O. is, at some of its leadership points, colored with revolutionary doctrine.

The criminal syndicalism laws enacted by some of the several states, principally in the West, where the I.W.W. had its strongest hold among migratory workers, were directed at this revolutionary form of unionism. Critics of these laws charge that they are, at times of inflamed public censure, indiscriminately directed against essentially peaceful and legitimate labor groups and activities. At any rate, the approach of the Supreme Court on this question is found in the *De Jonge* and *Stromberg* decisions reprinted below.

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[1] For a summary discussion of the I.W.W., see Millis and Montgomery, *Organized Labor*, McGraw-Hill, New York, 1945, pp. 118-120.

DE JONGE v. STATE OF OREGON

Supreme Court of the United States, 1937. 299 U.S. 353, 57 Sup.Ct. 255

HUGHES, C. J. Appellant, Dirk De Jonge, was indicted in Multnomah County, Or., for violation of the Criminal Syndicalism Law of that State. The act defines "criminal syndicalism" as "the doctrine which advocates crime, physical violence, sabotage, or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution." With this preliminary definition the act proceeds to describe a number of offenses, embracing the teaching of criminal syndicalism, the printing or distribution of books, pamphlets, etc., advocating that doctrine, the organization of a society or assemblage which advocates it, and presiding at or assisting in conducting a meeting of such an organization, society or group. The prohibited acts are made felonies, punishable by imprisonment for not less than one year nor more than ten years, or by a fine of not more than $1,000, or by both.

We are concerned with but one of the described offenses and with the validity of the statute in this particular application. The charge is that appellant assisted in the conduct of a meeting which was called under the auspices of the Communist Party, an organization advocating criminal syndicalism. The defense was that the meeting was public and orderly and was held for a lawful purpose; that, while it was held under the auspices of the Communist Party, neither criminal syndicalism nor any unlawful conduct was taught or advocated at the meeting either by appellant or by others. Appellant moved for a direction of acquittal, contending that the statute as applied to him, for merely assisting at a meeting called by the Communist Party at which nothing unlawful was done or advocated, violated the due process clause of the Fourteenth Amendment of the Constitution of the United States.

This contention was overruled. Appellant was found guilty as charged and was sentenced to imprisonment for seven years. The judgment was affirmed by the Supreme Court of the State which considered the constitutional question and sustained the statute as thus applied. 152 Or. 315, 51 P.(2d) 674. The case comes here on appeal. . . .

The stipulation, after setting forth the charging part of the indictment, recites in substance the following: That on July 27, 1934, there was held in Portland a meeting which had been advertised by handbills issued by the Portland section of the Communist Party; that the number of persons in attendance was variously estimated at

from 150 to 300; that some of those present, who were members of the Communist Party, estimated that not to exceed 10 to 15 per cent of those in attendance were such members; that the meeting was open to the public without charge and no questions were asked of those entering, with respect to their relation to the Communist Party; that the notice of the meeting advertised it as a protest against illegal raids on workers' halls and homes and against the shooting of striking longshoremen by Portland police; that the chairman stated that it was a meeting held by the Communist Party; that the first speaker dwelt on the activities of the Young Communist League; that the defendant De Jonge, the second speaker, was a member of the Communist Party and went to the meeting to speak in its name; that in his talk he protested against conditions in the county jail, the action of city police in relation to the maritime strike then in progress in Portland, and numerous other matters; that he discussed the reason for the raids on the Communist headquarters and workers' hall and offices; that he told the workers that these attacks were due to efforts on the part of the steamship companies and stevedoring companies to break the maritime longshoremen's and seamen's strike. . . .

The broad reach of the statute as thus applied is plain. While defendant was a member of the Communist Party, that membership was not necessary to conviction on such a charge. A like fate might have attended any speaker, although not a member who "assisted in the conduct" of the meeting. However innocuous the object of the meeting, however lawful the subjects and tenor of the addresses, however reasonable and timely the discussion, all those assisting in the conduct of the meeting would be subject to imprisonment as felons if the meeting were held by the Communist Party. This manifest result was brought out sharply at this bar by the concessions which the Attorney General made, and could not avoid, in the light of the decision of the state court.

Thus, if the Communist Party had called a public meeting in Portland to discuss the tariff, or the foreign policy of the government, or taxation, or relief, or candidacies for the offices of President, members of Congress, Governor, or state legislators, every speaker who assisted in the conduct of the meeting would be equally guilty with the defendant in this case, upon the charge as here defined and sustained. The list of illustrations might be indefinitely extended to every variety of meetings under the auspices of the Communist Party although held for the discussion of political issues or to adopt pro-

tests and pass resolutions of an entirely innocent and proper character.

While the States are entitled to protect themselves from the abuse of the privileges of our institutions through an attempted substitution of force and violence in the place of peaceful political action in order to effect revolutionary changes in the government, none of our decisions go to the length of sustaining such a curtailment of the right of free speech and assembly as the Oregon statute demands in its present application. In *Gitlow* v. *People of State of New York,* 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138, under the New York statute defining criminal anarchy, the defendant was found to be responsible for a "manifesto" advocating the overthrow of the government by violence and unlawful means. *Id.,* 268 U.S. 652, at pages 656, 662, 663, 45 S. Ct. 625, 628, 69 L. Ed. 1138. In *Whitney* v. *People of State of California,* 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095, under the California statute relating to the criminal syndicalism, the defendant was found guilty of willfully and deliberately assisting in the forming of an organization for the purpose of carrying on a revolutionary class struggle by criminal methods. The defendant was convicted of participation in what amounted to a conspiracy to commit serious crimes. *Id.,* 274 U.S. 357, at pages 363, 364, 367, 379, 47 S. Ct. 641, 644, 645, 649, 71 L. Ed. 1095. The case of *Burns* v. *United States,* 274 U.S. 328, 47 S. Ct. 650, 71 L. Ed. 1077, involved a similar ruling under the California statute as extended to the Yosemite National Park. *Id.,* 274 U.S. 328, at pages 330, 331, 47 S. Ct. 650, 651, 71 L. Ed. 1077. On the other hand, in *Fiske* v. *Kansas,* 274 U.S. 380, 47 S. Ct. 655, 71 L. Ed. 1108, the criminal syndicalism act of that State was held to have been applied unconstitutionally and the judgment of conviction was reversed, where it was not shown that unlawful methods had been advocated. *Id.,* 274 U.S. 380, at page 387, 47 S. Ct. 655, 657, 71 L. Ed. 1108. See, also, *Stromberg* v. *People of State of California,* 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117, 73 A.L.R. 1484.

Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. . . . The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. As this Court said in *United States* v. *Cruikshank,* 92 U.S. 542, 552, 23 L. Ed. 588: "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to

petition for a redress of grievances." The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. . . .

These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their Legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free

speech and to take part in a peaceable assembly having a lawful purpose, although called by that party. The defendant was none the less entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. That was of the essence of his guaranteed personal liberty.

We hold that the Oregon statute as applied to the particular charge as defined by the state court is repugnant to the due process clause of the Fourteenth Amendment. The judgment of conviction is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

SUPPLEMENTAL CASE DIGEST—CRIMINAL SYNDICALISM

STROMBERG V. PEOPLE OF STATE OF CALIFORNIA. Supreme Court of the United States, 1931; 283 U.S. 359, 51 Sup. Ct. 532. The appellant was convicted on the first count of an indictment which charged that he did . . . feloniously display a red flag and banner in a public place and in a meeting place as a sign . . . of opposition to organized government and as an invitation to anarchistic action. . . . A California statute held this to be a felony. *Reversed.* "The maintenance of the opportunity for free political discussion to the end that the government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." (HUGHES, C. J.)

Case Questions

1. Define criminal syndicalism.
2. What defense was made to the charge of crime?
3. What were the purposes of the meeting called by the Communist Party?
4. Did the court consider these purposes lawful?
5. What are the leading cases on criminal syndicalism?
6. What three "fundamental rights" are guaranteed by the due process clause of the Fourteenth Amendment?
7. Are the above rights subject to qualifications?
8. Did Oregon overstep its police power under its statute in this situation?
9. In the Stromberg case digest, what did the indictment charge? Was it sustained?

SECTION 12. ANTI-RACKETEERING ACT

The original Anti-Racketeering Act, enacted in 1934, was redrawn and re-enacted by Congress in 1946, 60 Stat. 420. Both laws interdicted interference with interstate commerce by robbery or extortion, either by way of direct action or by way of conspiracy to obstruct commerce. Violation of the Act is punishable by imprisonment up to twenty years and/or a fine of $10,000. The terms "robbery" and "extortion" are given the usual criminal law definitions.

In the *Nick* decision of 1941, the Supreme Court upheld the constitutionality of the 1934 Act and sustained the conviction of the defendants. A similar result was reached by the Circuit Court of Appeals in the *Compagna* case of 1944. The case of *U.S.* v. *Local 807* has been included because of its finely spun reasoning on a difficult set of facts. The re-enactment of the Act in 1946 is believed to have been occasioned by the *Local 807* decision. Congress omitted the language of Sec. 2 (a) of the original Act in 1946, and thus expressed disapproval of the majority view in that case, which was based on the exemption contained in Sec. 2 (a). It is probable that the defendants in *Local 807* would have stood convicted except for the above section, which no longer is contained in the Act.

NICK v. UNITED STATES

Circuit Court of Appeals, Eighth Circuit, 1941. 122 Fed. (2d) 660

STONE, C. J. Appellants were jointly indicted on twelve counts, the first eleven of which were laid under the Anti-Racketeering Act, 48 Stat. 979, 18 U.S.C.A. Sec. 420a-420e, and the twelfth count being under the Sherman Anti-Trust Act, 26 Stat. 209, 15 U.S.C.A. 1. Verdict of not guilty was returned on the twelfth count and of guilty on each of the other eleven counts. The respective sentences were five years imprisonment upon each count concurrently and a fine of $10,000 upon the first count. From such judgments and sentences this appeal is brought.

Appellants were labor officials in control of a local union of operators of moving picture machines in the St. Louis area (composed of St. Louis County and the City of St. Louis). This area was so completely unionized as to dominate operation therein. About one-fourth of the picture houses in the area were owned by the St. Louis Amusement Company and the Fanchon and Marco Service Corporation. The remainder were separately owned by persons who controlled one or more theatres and are spoken of as "independent exhibitors." The independent exhibitors were organized into an

association, known as "Motion Picture Theatre Owners of St. Louis, Eastern Missouri and Southern Illinois," which acted for owners in matters of common interest through a committee. This committee acted in arranging contracts with the union covering wages and working conditions. Such contracts were made annually for terms beginning September first. The Co-operative Sound Service Supply Company was a corporation organized and controlled by appellant Weston and in which appellant Nick was later interested. This "Co-op" furnished inspection service and maintenance services for sound equipment used in connection with exhibition of moving pictures. . . .

The essential averments of count one are as follows. The motion picture industry is made up of the production, distribution and exhibition of moving picture films and accompanying sound effects. The production is almost entirely in California and not at all in Missouri. Producers have contractual arrangement with "exchanges" (usually subsidiary corporations) for the distribution of their films. These exchanges have contracts with the exhibitors (motion picture theatre owners) in their respective territories for the use (exhibition) of certain films. The films so contracted for are shipped from California to the exchange which delivers them to the exhibitor. After the films have been exhibited in a theatre, they are returned to the exchange which sends them to other exhibitors or, after final use, they are stored or reduced to their constituent chemical elements to be again made into raw films for future picture production. The ownership of the films does not change from the producers.

The value of the films as physical property is inconsequential. The value is in the use for public exhibition purposes. If exhibition be prevented in a locality, the shipment of films thereto would cease. The distribution "exchanges" located in St. Louis supply exhibitors in Missouri, Illinois, Kentucky, Iowa and Arkansas with films shipped to the exchanges from outside these States.

During the time here involved, appellant Nick was vice-president of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada—an unincorporated labor organization. Appellant Weston was business manager of the Moving Picture and Projecting Machine Operators Protective Union, Local No. 143 (located at St. Louis), of the above International Alliance.

From on or about July 1, 1936, appellants conspired to acquire control of the above Local and to use such control "to obtain the

payment of money and other valuable considerations (not the payment of wages) from exhibitors of motion picture films in the St. Louis area by the use of, attempt to use, and threat to use force, violence, and coercion . . . in violation of" the above Act—such payment of money being "for their personal use and profit." The plan of conspiracy was to "make excessive, arbitrary, unreasonable, ruinous, and bogus demands for wage increases of operators employed by exhibitors in the St. Louis area, well knowing and intending said demands to be" such "and not with any purpose, intent or object of securing such increases for the said operators but for the purpose and intent and with the object of coercing the said exhibitors to pay money and other valuable considerations to the defendants for their personal use and profit." . . .

Denial of Free Speech. The argument as to denial of free speech is that the Act would punish organized labor and its leaders by making it a crime for them to communicate their wage demands to employers. This contention is unsound.

In so far as here pertinent, the Act makes it a felony to obtain, attempt to obtain, or to conspire to obtain or attempt to obtain "money," "property," or "other valuable considerations" by use of, attempt to use, or threat of force, violence or coercion.

Wages, even though obtained by the means condemned in the Act, are excepted from the statute. Not only is this exception expressed but it is emphasized by being twice stated. In section 2(a) of the Act, 48 Stat. 980, 18 U.S.C.A. Sec. 420a (a) is the language "not including, however, the payment of wages by a bona-fide employer to a bona-fide employee." Again in section 3(b) of the Act, 48 Stat. 980, 18 U.S.C.A. Sec. 420b(b) it states that "The terms 'property,' 'money,' or 'valuable considerations' used herein (in section 420a of title) shall not be deemed to include wages paid by a bona-fide employer to a bona-fide employee."

Individuals may obtain power in labor organizations which is capable of use to obtain unwilling payments from employers through bringing about or threatening to bring about violence or through coercion. So long as that power is used *solely* to obtain more wages, such exercise of power is expressly excluded from the Act. It is only when such power is misused to obtain personal benefits for such individuals and not for the membership that the Act applies. The Act covers no action by a labor leader honestly acting for the membership of his organization. It does cover the compulsory payment of graft to a labor leader for his own individual enrichment. Thus con-

strued, the Act is clearly as protective to labor organizations and their membership as it is to employers. The payment of graft to a labor leader is, clearly, the purchase of his loyalty to his organization. The result is betrayal of his organization. Labor is likely to suffer more through such a sellout than the employer who, willingly or unwillingly, pays the bribe. By punishing the traitorous leader who uses his power for his personal enrichment at the expense of his organization, the Act truly is at least as protective of employees at it is of employers. The Act makes such betrayal hazardous.

The Tenth Amendment. The argument as to the Tenth Amendment is that this Act undertakes to invade State jurisdiction and deal with domestic violence—in short, is an attempt to exercise the police power reserved to the State under the Amendment. Clearly this is not true. The Act is an exercise of police power but it is based upon the protection of interstate commerce. If it comes within the commerce clause of the Constitution it is not open to this objection. If it does not come within the commerce clause it would be invalid whether it involved an exercise of police power or not. That the Act is within the commerce clause seems clear under *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601, 604-606, 59 S. Ct. 668, 83 L. Ed. 1014. . . .

. . . The only purpose for shipping these picture films in interstate commerce is to have them licensed or leased for exhibition purposes. If exhibitors are prevented or seriously obstructed in exhibiting the films, they will not buy them. If exhibitors will not buy the films, they will not be shipped in interstate commerce. In effect upon interstate commerce, there is no difference between preventing the films entering interstate commerce and in preventing them being used at the points to which they may be shipped—in either case, the films will not be shipped because of the obstruction. . . .

The position of appellants in regard to their claim that the verdict is inconsistent is based on the situation that the verdict was guilty upon the first eleven counts for violation of the "Anti-Racketeering Act" while it was not guilty on the twelfth count for violation of the Sherman Act. . . .

The interference with interstate commerce punishable under the "Anti-Racketeering Act" is entirely different from that covered by the Sherman Act. The Acts are directed at different evils. This count twelve charged (as it must have) a conspiracy to control interstate commerce in films. The other counts charged extortion made effective through control over a local labor union. Testimony which

would have sustained the twelfth count might utterly fail as to the eleven counts and vice versa. There is no inconsistency in the verdict. . . .

Upon the whole case our conclusion is that there is no error and that the judgments should be, and are, affirmed.

Case Questions

1. Who were the defendants?
2. What plan of extortion did they follow?
3. What contention did the defendants make as to freedom of speech?
4. The Anti-Racketeering Act makes it a crime to coerce the payment of money or property. What important exception does the Act make?
5. How did the defense endeavor to use the Tenth Amendment?
6. On what grounds was it argued that the verdict was inconsistent?

UNITED STATES v. LOCAL 807 OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Supreme Court of the United States, 1942. 315 U.S. 521, 62 Sup. Ct. 642

BYRNES, J. This case comes here on cross-petition for certiorari to review a judgment of the Circuit Court of Appeals reversing the conviction of Local 807 and 26 individuals on charges of conspiracy to violate Secs. 2 (a), 2 (b) and 2 (c) of the Anti-Racketeering Act of June 18, 1934. The Government asks that the judgments of conviction be reinstated. In their cross-petition the defendants seek dismissal of the indictment. We do not regard this as a correct disposition of the case. Since the correctness of the views concerning the meaning of the statute on which the trial court submitted the case to the jury goes to the root of the convictions and their reversal by the Circuit Court of Appeals, we shall confine our consideration of these cases to that issue. Consequently, we are concerned only with whether the defendants were tried in a manner consistent with the proper meaning and scope of the pertinent provisions of Sec. 2 of the Act, which provide:

"Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

"(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

"(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

"(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b). . . ."

The proof at the trial showed that the defendant Local 807 includes in its membership nearly all the motor truck drivers and helpers in the city of New York, and that during the period covered by the indictment defendants Campbell and Furey held office in the Local as delegates in charge of the west side of Manhattan and the other defendants were members. Large quantities of the merchandise which goes into the city from neighboring states are transported in "over-the-road" trucks, which are usually manned by drivers and helpers who reside in the localities from which the shipments are made and who are consequently not members of Local 807. Prior to the events covered by this indictment, it appears to have been customary for these out-of-state drivers to make deliveries to the warehouses of consignees in New York and then to pick up other merchandise from New York shippers for delivery on the return trip to consignees in the surrounding states.

There was sufficient evidence to warrant a finding that the defendants conspired to use and did use violence and threats to obtain from the owners of these "over-the-road" trucks $9.42 for each large truck and $8.41 for each small truck entering the city. These amounts were the regular union rates for a day's work of driving and unloading. There was proof that in some cases the out-of-state driver was compelled to drive the truck to a point close to the city limits and there to turn it over to one or more of the defendants. These defendants would then drive the truck to its destination, do the unloading, pick up the merchandise for the return trip and surrender the truck to the out-of-state driver at the point where they had taken it over. In other cases, according to the testimony, the money was demanded and obtained, but the owners or drivers rejected the offers of the defendants to do or help with the driving or unloading. And in several cases the jury could have found that the defendants either failed to offer to work, or refused to work for the money when asked to do so. . . .

The question in the case concerns that portion of Sec. 2 (a) which excepts from punishment any person who "obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, . . . the payment of wages by a bona-fide em-

ployer to a bona-fide employee." The Circuit Court of Appeals reversed because it believed that the trial court had failed to instruct the jury properly with respect to this exception. . . .

It may be true that professional rackets have sometimes assumed the guise of labor unions, and, as the Circuit Court of Appeals observed, that they may have "covered their practices by the pretence that the tribute collected was pay for services rendered." And it may also be true that labor organizations of good repute and honest purpose can be misdirected and become agencies of blackmail. Nevertheless, Congress plainly attempted to distinguish militant labor activity from the other and to afford it ample protection. With this legislative purpose uppermost in mind, we return to test the three theories of interpretation of Sec. 2(a) to which we have referred.

We hold that the exemption is not restricted to a defendant who has attained the status of an employee prior to the time at which he obtains or attempts or conspires to obtain the money. In the first place, we agree with the observation of the court below that "practically always the crux of a labor dispute is who shall get the job, and what the terms shall be. . . ." To exclude this entire class of disputes from the protection of the exception would be unjustifiably to thwart the purpose of Congress as we understand it. In the second place, the structure and language of Sec. 2(a) itself is persuasive against so narrow an interpretation. It does not except "*a bona-fide employee* who obtains or attempts to obtain the payment of wages from a bona-fide employer." Rather, it excepts "*any person* who . . . obtains or attempts to obtain . . . the payment of wages from a bona-fide employer to a bona-fide employee." Certainly, an outsider who "attempts" unsuccessfully by violent means to achieve the status of an employee and to secure wages for services falls within the exception. And where, as here, the offense charged is conspiracy to violate the section, the defendants are entitled to immunity if their objective is to become bona fide employees and to obtain wages in that capacity, even though they may fail of their purpose.

The Government contends, as we have said, that the test is "whether, under all the circumstances, it appears that the money has been paid for labor or for protection." If the defendants do not offer to work, or if they refuse to work, or if their offer to work is rejected by the owners, the Government argues that any payment made to them must be for protection rather than for services. And even if the defendants actually perform some work, it is said, this circumstance should be regarded as relevant but not controlling in

etermining "the one crucial issue in every case such as this—namely, 'hether the money was paid for labor or for protection."

We take this to mean that the intent of the owners in making the ayment is to be regarded as controlling. We cannot agree. The tate of mind of the truck owners cannot be decisive of the guilt of ıese defendants. On the contrary, their guilt is determined by 'hether or not their purpose and objective was to obtain "the payıent of wages by a bona-fide employer to a bona-fide employee." . . .

. . . But it is always an open question whether the employers' apitulation to the demands of the union is prompted by a desire to btain services or to avoid further injury or both. To make a fine or rison sentence for the union and its members contingent upon a nding by the jury that one motive or the other dominated the emloyers' decision would be a distortion of the legislative purpose. . . .

. . . The Circuit Court has referred to the "stand-by" orchestra evice, by which a union local requires that its members be substiuted for visiting musicians, or, if the producer or conductor insists pon using his own musicians, that the members of the local be paid he sums which they would have earned had they performed. That imilar devices are employed in other trades is well known. It is dmitted here that the stand-by musician has a "job" even though e renders no actual service. There can be no question that he emands the payment of money regardless of the management's 'illingness to accept his labor. If, as it is agreed, the musician would scape punishment under this Act even though he obtained his stand-by job" by force or threats, it is certainly difficult to see how . teamster could be punished for engaging in the same practice. . . .

. . . Since the instructions denied, and the misleading instrucions actually given, go to what is indeed the heart of the case, we ıold the convictions cannot stand and that the judgment of the Cirıuit Court of Appeals must be *affirmed.*

STONE, C. J. (dissenting). . . . I can only conclude that such onduct accompanied by such a purpose constitutes a violation of the tatute even though the defendants stood ready to unload the trucks n the event that they were hired to do so. Unless the language of he statute is to be disregarded, one who has rejected the proffered ervice and pays money only in order to purchase immunity from 'iolence is not a bona fide employer and is not paying the extorted noney as wages. The character of what the drivers or owners did ınd intended to do—pay money to avoid a beating—was not altered ›y the willingness of the payee to accept as wages for services ren-

dered what he in fact intentionally exacted from the driver or owner as the purchase price of immunity from assault, and what he intended so to exact whether the proffered services were accepted or not. It is no answer to say that the guilt of a defendant is personal and cannot be made to depend upon the acts and intention of another. Such an answer if valid would render common law robbery an innocent pastime. For there can be no robbery unless the purpose of the victim in handing over the money is to avoid force. Precisely as under the present statute, the robber's use of force and its intended effect on the victim are essential elements of the crime, both of which the prosecutor must prove. Under this statute when both are present the crime is complete, irrespective of other motives which may actuate the offender, if he is also aware, as we must take it the jury found, that the money is not in fact paid as wages by a bona fide employer. It is a contradiction in terms to say that the payment of money forcibly extorted by a payee who is in any case a lawbreaker, and paid only to secure immunity from violence, without establishment of an employment relationship or the rendering of services, is a good faith payment or receipt of wages. . . .

Case Questions

1. What practice of Local 807 ran them afoul of the law?
2. What defense did Local 807 interpose?
3. Discuss the statement "the state of mind of the truck owners cannot be decisive of the guilt of these defendants."
4. Do any other labor groups resort to "featherbedding" practices?
5. Discuss Chief Justice Stone's dissenting statement, "It is no answer to say that the guilt of a defendant is personal and cannot be made to depend upon the acts and intention of another."
6. Do you ascribe to the majority or minority opinion?

UNITED STATES v. COMPAGNA

Circuit Court of Appeals, Second Circuit, 1944. 146 Fed. (2d) 524
(Certiorari [1] denied, 324 U.S. 867, 65 Sup. Ct. 912)

L. HAND, C. J. Compagna and six others have appealed from convictions for violation of subdivision (d) of 420a, Title 18, U.S. C.A.: a conspiracy to extort money from producers and exhibitors of moving pictures during the years 1935 to 1940. They rely upon some twenty assignments of error, of which the first and the most impor-

[1] *Certiorari.* A writ issued by an upper court to a lower court ordering the record of a case to be sent up for review.

tant is that there was not enough evidence to support the verdict. Since the case against Kaufman is somewhat different from that against the rest, we will reserve consideration of his appeal until we have disposed of those of the others. . . .

To an intelligent understanding of the appeal, it is necessary to give an outline of the general venture in which the accused were involved, as the jury might have found it from the testimony. . . .

The first step was to elect Browne president of the union, Chicago local of stage hands and moving picture machine operators, in which they succeeded. Circella and Bioff were then given offices in the union as personal representatives of Browne, as president, and both drew salaries. Early in 1935 all had been arranged, and Bioff and Browne, who were to be the spearheads, began to blackmail exhibitors of moving pictures in Chicago. So far as appears, they did not expressly threaten violence, but confined themselves to a pretence of union activity; that is, they threatened to call strikes against their victims unless they were plentifully paid. Among their earliest victims was an exhibitor in Chicago, one Barger, who operated a small theatre, and whom Bioff forced to share equally with him all Barger's profits. Later, by the same pressure, Bioff imposed upon this unfortunate man as employees: first, Maritote, and later, D'Andrea, neither of whom rendered any services whatever, but who were paid $175 a week and later, $200. By the autumn of 1935 the enterprise had apparently become so profitable that Bioff extended it to New York. One Basson was the local agent of the New York local, and had undertaken negotiations for a wage increase with some large exhibitors in that city, with the threat of a strike as a sanction; but Bioff, speaking for Browne, without whose consent no strike was regular, intervened and upon the payment of $150,000 from the exhibitors collectively, refused to permit the strike.

Until the beginning of 1936, the collections had all been from exhibitors, either in Chicago or New York, but early in that year the group decided to include producers, who, as is well known, produce films for the most part in California. It had been the custom of the industry to have an annual meeting each year in New York between representatives of the various unions in the industry and of the producers; and in 1936 Bioff went to this meeting and met Schenck, a representative of a large producer. Bioff threatened to close up the theatres of exhibitors throughout the country unless Schenck could raise a very large sum from the producers generally. After some higgling, the two finally agreed upon a schedule, or tariff, by which

e larger producers were each to pay annually $50,000; and the ıaller, $25,000. The group found the threat of a strike against the ɛatres more effective a sanction than a strike against the producers ɛmselves; for, by stopping the outlets they could entirely paralyze ɛ production of films. The arrangement so concluded lasted almost til the indictment was filed on March 18, 1943, and resulted in the lection of over $600,000, in addition to nearly $500,000 collected ɔm exhibitors. . . .

It is apparent that such a conspiracy was within the statute, pro- led that the threats used to extort the money were "coercion," as ined in subdivision (a) of 420a; and provided further that the .ortion was "in connection with" an act "affecting" interstate nmerce. To take up the second point first, it was enough proof of ɛ effect of their acts upon interstate commerce, that the group ınd it more effective, when they were blackmailing the producers, threaten them with a strike against the theatres. Nothing could re completely illustrate the unity of the whole industry; all its ɛts were like those of a single elastic member in which an impact ɔn one part is instantly transmitted everywhere. Moreover, not y would the producers feel the check upon the interstate move- nts of their films when the exhibitors were tied up; but since many the exhibitors did business on a small margin, and must have a ıstant supply of films to keep going at all, a very short cessation that supply at the sources might destroy them, and end them for- ɛr as outlets. If these were the facts, the business was interstate matter of law, and the question should not have been submitted the jury; and since nobody contested the facts, but only their legal ɛct, it was unnecessary for the judge to say anything on the issue. ning back now to the first of the questions we just put, the ac- ed "coerced" exhibitors and producers, if it was "coercion" to eaten them with strikes. The statute does not, indeed, make it a me to force a rise in wages by such a threat; the twice expressed eption that it shall not apply to the payment of wages would alone ɔve that, as indeed would the general purpose to be drawn from whole. But if the accused at bar were not concerned in any wage pute, but threatened to call strikes, not in the interest of the work- n, but to feather their own nests, they "coerced" their victims hin the meaning of the section. The judge should have left to the y nothing more than he did. . . .

There remains only one question, as to the method of dealing with ich my brothers and I are not in entire accord, though we agree

in the result. During the trial the prosecution called a number of exhibitors or producers who testified that Bioff threatened to call strikes in their theatres or film studios, if they would not comply with his demands. As we have already said, he did not threaten them with violence, but the judge allowed the prosecutor to ask whether, when they paid the blackmail, they had been moved by fear of violence; and in a number of instances they said that they had. Moreover, they were further allowed to say what their fears had been: i. e., that during other strikes there had been stoppages of film machines in the middle of a performance; stink bombs had been set off in the theatres; members of the audience and recalcitrant exhibitors had been assaulted. Against all this testimony the accused vigorously protested at the time, and they particularly press its admission upon us now as error. . . .

But, although I think that it was an error to admit the testimony, I do not believe that it requires us to reverse the convictions. It might have done so, if the victims had based their fears upon what the accused had done in the past; but the testimony did not in this way covertly convey to the jury an accusation of earlier and independent crimes. Indeed, it did not appear that any of the accused on trial had ever called a strike in the past. (Kaufman may have, but not in Chicago, where these victims did business.) The victims' fears originated from acquaintance with the general disorders and violence which had accompanied other strikes. As such, it was part of what everybody knows, and I cannot see how it could have prejudiced the accused with the jury. Indeed it was entirely proper for the jury to infer that the accused expected to play upon precisely such fears, when Bioff threatened to call strikes.

We are satisfied that the accused had an impartial trial, and that no honest jury could have failed to convict them. The crime struck at the heart of civilized society; its very possibility is a stain upon our jurisprudence. The convictions are affirmed. . . .

Case Questions

1. How did defendants build their organization?
2. What threat did the defendants employ to secure payments from the producers?
3. What testimony was admitted in error? Was it prejudicial?
4. Is there anything about the monopolistic character of the movie industry which makes it a fertile field for racketeering, or do you agree with Justice Hand that "the crime struck at the heart of civilized society"?

SECTION 13. MACHINE DISPLACEMENT

Union policy, in the interest of protecting the vested rights of its members to their jobs, rather uniformly dictates against the displacement of its members through technological advancement. The success that unions enjoy in resisting machine displacement depends upon their strength and their willingness to employ that strength against the employer. We are concerned with the legality of this objective, and we find the courts in disagreement. Though *Opera on Tour* represents the view of the state courts, the U. S. Supreme Court has taken a contrary position on facts limited to the applicability of the Sherman Act.

The Supreme Court in 1941, on authority of *U.S.* v. *Hutcheson,* 321 U.S. 219, printed in Sec. 55, upheld the union in a Sherman Act prosecution in the case of *U.S.* v. *International Hod Carriers,* 313 U.S. 539. In the *Hod Carrier's* case, the union resisted the introduction, on construction jobs, of mechanical concrete truck mixers, which threatened to displace some of their constituents. The Supreme Court sustained the union's demurrer to the indictment. It thus appears that the Supreme Court would legalize the labor policy of resisting machine displacement under the theory that the Clayton Act and the Norris-LaGuardia Anti-Injunction Act have operated to immunize such conduct. This remains the rule in the federal if not in the state courts.[1]

OPERA ON TOUR, INC. v. WEBER

Court of Appeals of New York, 1941. 285 N.Y. 348, 34 N.E. (2d) 349

FINCH, J. The question presented for decision is far reaching and of vital importance to the best interests of unions of employees, of employers and of the general public. The only issue is whether the leaders of the defendant unions were engaged in promoting a lawful labor objective when the Musicians' Union induced the Stagehands' Union to join in a combination to destroy an enterprise solely because of the use of machinery in the production of music in place of the employment of live musicians. . . .

After a trial at Special Term, it was found upon sufficient evidence that plaintiff was engaged in the business of rendering performances of grand opera with an orchestral accompaniment of music mechanically reproduced from records instead of by an orchestra of

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[1] For an exhaustive treatment of union policies, see Slichter, *Union Policies and Industrial Management,* Brookings Institution, Washington, D. C., 1941.

live musicians. The purpose was to make grand opera available in those cities and towns of the United States which could not afford otherwise this form of entertainment because of the prohibitive cost of transporting a grand opera orchestra. Each of the two defendants is a labor union.

It was found that the members of the defendant unions had no other grievance of any kind, nor did there exist any controversy except this demand to discard machinery, between plaintiff and the defendant unions. The defendant Musicians' Union threatened to and did put plaintiff out of business solely because of the use of recorded music. The defendant Musicians' Union induced the defendant Stagehands' Union to order its members to cease rendering any service to plaintiff, which order had to be obeyed by the members of the defendant Stagehands' Union since over ninety-five per cent of the theatres and auditoria in the United States are closed shop, and without membership in the defendant Stagehands' Union the latter find it practically impossible to obtain employment. . . .

. . . As a result of this conspiracy between the two defendant unions, plaintiff was unable to fulfill its bookings and its contracts which had already been made and was prevented from entering into further engagements for the presentation of opera, and in consequence thereof this entire enterprise was forced to come to a complete stop. It was likewise found at Special Term that there was no labor dispute or controversy between the defendant unions and plaintiff, or between any member of those unions and plaintiff, and that the case did not involve or grow out of a labor dispute between plaintiff and these defendants, the only contention being the demand and refusal to cast out machinery.

An injunction was thereupon granted restraining defendants from interfering directly or indirectly with the business of plaintiff, and from ordering and coercing any person or persons to cease performing service for plaintiff, and from ordering and coercing employees of plaintiff to leave the employ of plaintiff, on the ground that plaintiff uses records or transcribed or mechanically reproduced music in connection with its performances, and from entering into a conspiracy with any group or organization having as its object the destruction of the business of plaintiff for the aforesaid reason, namely, to prevent the rendition of any services to plaintiff, on the ground that plaintiff uses music reproduced by machinery in connection with its performances.

Does this demand of these defendant unions, that plaintiff discard machinery in the interest of the immediate employment of a few

individuals, constitute a lawful labor objective? If the acts of these unions have any reasonable connection with wages, hours of employment, health, safety, the right of collective bargaining, or any other condition of employment or for the protection from labor abuses, then the acts are justified. . . . If on the other hand the labor objective here sought is illegal and not a lawful labor objective, since it has no reasonable connection with wages, hours, health, safety, the right of collective bargaining, or any other condition of employment or for the protection of labor from abuses, then there is no immunity for injury inflicted by a labor union. For such activities labor is not free from legal responsibility.

". . . Prima facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law . . . requires a justification if the defendant is to escape. . . ." Mr. Justice Holmes in *Aikens* v. *Wisconsin,* 195 U.S. 194, 204, 25 S. Ct. 3, 5, 49 L. Ed. 154.

The self-interest of labor, like the self-interest of any other body, receives immunity only for those objectives which have a legitimate and reasonable relation to lawful benefits which the union is seeking. When the labor objectives are illegal, the courts must control, otherwise there are bodies within our midst which are free from the provisions of the Penal Law. When doubt arises whether the contemplated objective is within the legal sphere, or without and so illegal, it is for the courts to determine. In *Exchange Bakery & Restaurant, Inc.* v. *Rifkin,* 245 N.Y. 260, 262, 157 N.E. 130, 132, we said: "If, however, any action taken is concerted; if it is planned to produce some result, it is subject to control. As always, what is done, if legal, must be to effect some lawful result by lawful means. . . ." By way of illustration, the courts condemn the combined effort of employees to coerce an employer to pay a stale or disputed claim, even though it might be to the self-interest of the striking employees. *Dorchy* v. *Kansas,* 272 U.S. 306, 47 S. Ct. 86, 71 L. Ed. 248. So a conspiracy is illegal involving extortion or to force the employer to commit a crime; or one where the intent to injure rests solely on malice or ill will. Or if those engaged in police duty or in the armed forces should conspire in the face of an emergency or otherwise to coerce others to cease maintaining law and order or defense. A secondary boycott has always been held to be an illegal labor objective. *Auburn Draying Co.* v. *Wardell,* 227 N.Y. 1, 11, 124 N.E. 97, 6 A.L.R. 901. Harm done to another or to the public may be countenanced only if the purpose, in the eye of the law, is sufficient to justify such harm.

So in *Scavenger Service Corporation* v. *Courtney*, 7 Cir., 85 F. (2d) 825, a labor union joined an employers' association to prevent plaintiff from price cutting in performing scavenger service in the city of Chicago. This labor objective was held unlawful.

To make impossible the continuance of a business and thus to prevent the employment of a full complement of actors, singers and stagehands merely because a machine is not discarded and in place thereof live musicians employed, is not a lawful labor objective. In *Hopkins* v. *Oxley Stave Co.*, 8 Cir., 83 F. 912, the labor objective sought was to abandon certain machines for hooping barrels which materially lessened the cost of making the same. The introduction of the machine actually resulted in the dismissal of certain employees, and the court held the labor objective unlawful.

In *Haverhill Strand Theatre* v. *Gillen*, 229 Mass. 413, 118 N.E. 671, L.R.A. 1918C 813, Ann. Cas. 1918D, 650, the owner of a motion picture theatre used an organ played by hand during the presentation of its pictures. A union sought to compel the use of an orchestra of five pieces. The Supreme Court of Massachusetts held that defendants were guilty of an unlawful labor objective.

For a union to insist that machinery be discarded in order that manual labor may take its place and thus secure additional opportunity of employment is not a lawful labor objective. In essence the case at bar is the same as if a labor union should demand of a printing plant that all machinery for typesetting be discarded because it would furnish more employment if the typesetting were done by hand. We have held that the attempt of a union to coerce the owner of a small business, who was running the same without an employee, to make employment for an employee, was an unlawful objective and that this did not involve a labor dispute. *Thompson* v. *Boekhout*, 273 N.Y. 390, 7 N.E.(2d) 674. . . .

Since the endeavor to prevent the use of a mechanical device bears no reasonable relation to wages, hours of employment, health, safety, the right of collective bargaining or any other condition of employment or for the protection of labor from abuses, there is no labor dispute within either the letter or the spirit of the Civil Practice Act. Civil Practice Act, Sec. 876-a, subd. 10; . . .

A majority of the Appellate Division sought to limit the effect of the question herein decided by stating that they were passing solely on the right of the defendants to stop work in protest against the use of mechanical music. As we have pointed out earlier in this decision, the right to strike is not involved in this case. Also the

right to strike does not prevent the issuance of an injunction against a continuance of the unlawful labor objectives sought herein by the defendant unions. The leaders of a labor union cannot make an illegal objective legal merely by the use of a legal method (the strike) to obtain that objective. . . .

It follows that the judgment of the Appellate Division should be reversed and that of the Special Term affirmed, without costs.

Case Questions

1. State the issue of the parent case.
2. Does the fact situation indicate sympathetic strike activity?
3. When may harm be intentionally inflicted without liability?
4. What was the union objective in the Dorchy case? the Scavenger case? the Hopkins case? the Haverhill case? the Thompson case? Were the objectives lawful?
5. Why does the question of whether a bona fide labor dispute exists arise in this case?

SECTION 14. FEATHERBED PRACTICES

Featherbedding is simply the receiving of compensation for services that are not required, tendered, or performed. Two decisions on this subject are included. The *Lafayette* case represents the common law view on this question. The *Petrillo* case covers a stiffening of the common-law rule by making featherbedding in the broadcasting industry a federal crime, punishable by imprisonment and fine. The Supreme Court here held that the statute was not unconstitutional on its face. The footnote at the end of this section explains the effect of the Labor Management Relations Act on featherbed practices.

LAFAYETTE DRAMATIC PRODUCTIONS, INC. v. FERENTZ

Supreme Court of Michigan, 1943. 305 Mich. 193, 9 N.W. (2d) 57

STARR, J. There is no dispute as to the material facts. The testimony adduced by plaintiff stands undisputed. Plaintiff corporation was organized in April, 1941, for the purpose of rehabilitating and operating the Shubert Lafayette theater. . . .

. . . It proposed to produce dramas and comedies, and its manager testified that for the production of such attractions it did not

require musicians. Plaintiff had entered into a contract with defendant stage hands' union and had employed stage hands and others who were members of such union. The record indicates that there was no dispute regarding wages or working conditions between plaintiff and defendant stage hands' union or its members employed by plaintiff. . . .

By threatening to prevent the opening and operation of the theater, defendant unions sought to compel plaintiff to sign a contract for the employment of musicians which it did not need or desire to employ and could not afford. Defendants' only objective was to compel the employment of such musicians. The question is, was this a lawful labor objective?

It is plain that defendants' demand that plaintiff employ musicians had no reasonable connection with any dispute or controversy relating to wages, working conditions, hours of work, health, safety, the right of collective bargaining or the protection of labor from abuses. The situation did not involve any dispute between plaintiff and members of defendant musicians' union or between plaintiff and members of defendant stage hands' union regarding wages, working conditions or regarding other legitimate controversial labor matters. The situation involved only the question of the right of the defendant unions to combine their efforts for the purpose of compelling plaintiff either to employ an orchestra it did not need or want or to submit to a strike of its employees, which would have prevented the opening and operation of its theater. If the object sought to be obtained by defendants was not a lawful labor objective, the court would be justified in exercising control of their acts. Furthermore, it is for the court to determine whether or not the labor objective was lawful.

In the case of *Haverhill Strand Theater, Inc.*, v. *Gillen*, 229 Mass. 413, 118 N.E. 671, L.R.A. 1918C, p. 813, Ann. Cas. 1918D, 650, the plaintiff, who operated a moving picture and vaudeville theater, employed one musician who played an organ in the theater. The defendants were officers and members of a labor union of musicians. The union of musicians adopted an arbitrary rule under which plaintiff was required to employ an orchestra of five musicians. Defendants notified plaintiff that they intended to enforce such rule, and plaintiff filed bill in equity to enjoin such enforcement. In sustaining an injunction against enforcement of the rule the court said in part, pages 418-421 of 229 Mass., page 673 of 118 N.E., L.R.A. 1918C, 813, Ann. Cas. 1918D, 650:

"It is manifest that such a rule is an interference with a plaintiff's right to that free flow of labor to which every member of the community is entitled for the purpose of carrying on the business in which he or it has chosen to embark. . . . In the case at bar the purpose of the defendants' combination is to force the plaintiff to make work for them when he does not wish to have that work done and when that work will result in a pecuniary loss for him. The question is whether a combination by a union for the purpose of getting work for the members of it in this indirect way is a justifiable interference with the plaintiff's right to a free flow of labor. . . .

"A majority of the court are of opinion that a minimum rule fixing the number of musicians to be employed in the several theaters specified in it is an interference with the right of the owners of those theaters to a free flow of labor which is not justified by the purpose for which it is made."

In the case of *Thompson* v. *Boekhout,* 273 N.Y. 390, 7 N.E. 2d 674, 675, the court granted an injunction restraining defendants from picketing because plaintiff had decided to operate his theater without help. In a per curiam opinion the court said: "Where the owner of a small business seeks to avoid 'labor disputes' as defined in the statute, by running his business without any employees, an attempt to induce or coerce him to hire an employee or employees, upon terms and conditions satisfactory to persons associated in such attempted inducement or coercion, is not a 'labor dispute' within the letter or spirit of the statutory definition."

In the present case defendants' objective was to compel plaintiff to employ musicians which it did not need or desire. Such objective invaded plaintiff's right to conduct its business without unjust interference and its right to the free flow of labor. In the case of *Opera on Tour, Inc.,* v. *Weber, supra,* the musicians' union induced the stage hands' union to join in a combination to force plaintiff either to employ musicians or to discontinue its theatrical business. In the present case defendant musicians' union induced defendant stage hands' union to join in a combination to force plaintiff either to employ musicians or to discontinue its theater. We are satisfied that defendants' purpose was to accomplish an unlawful labor objective.

In effect, defendants argue that the stage hands' union and the musicians' union had the right to strike and to do peaceful picketing. We do not deny them that right in the accomplishment of a legitimate labor objective. However, we do deny them the right to combine for the purpose of using such lawful methods to obtain an unlawful labor objective.

Defendants contend, and the trial court held, that the present case involved a labor dispute within the meaning of Act No. 176, Pub. Acts 1939 . . . being an act to create a board for the mediation of labor disputes. By such contention defendants apparently sought to bring the matter under the jurisdiction of the State Labor mediation board. Relying upon *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323, 58 S. Ct. 578, 82 L. Ed. 872, the trial court held that a "labor dispute or controversy" was involved in the present case. The question in the Lauf case was whether or not the factual situation presented constituted a labor dispute within the terms of Wisconsin Statutes 1937, Sec. 103.62 (3). In defining the term "labor dispute" such statutory provision was much more comprehensive than the corresponding provision of our State statute cited above, in that it also provided "or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the proximate relation of employer and employee." The Lauf case is not determinative of the question before us. We are convinced that the present case does not involve a labor dispute within the meaning of our State statute. Furthermore, defendants may not claim that a bona fide labor dispute is involved when the object they sought to accomplish was an unlawful labor objective. . . .

In *Scavenger Service Corp.* v. *Courtney, supra,* where the employees' union and the employers' association combined to prevent the complainant from entering into the scavenger business, it was held that the unlawful end made the means also unlawful. The court there said, page 833 of 85 F. 2d: "The conspiracy was one to ruin appellant's business. Therefore the means adopted were unlawful. The actionable character of the means may be and often is determined by the use to which they are put. If, therefore, individuals conspired to commit the wrongful act of ruining appellant's business, the means, even though of themselves innocent, were actionable. Aside from whether the picketing was peaceful . . . it was unlawful when its object was as here disclosed."

. . . We are convinced that under the facts and circumstances shown by the record plaintiff's manager was induced by duress, coercion and business compulsion to sign the contract in question. Plaintiff acted with due diligence in beginning the present suit, and such contract should be set aside and vacated. . . .

The decree of the trial court is reversed. A decree may be entered in this Court declaring the contract in question to be null and void. Plaintiff shall recover its costs.

Case Questions

1. What was the union objective?
2. May lawful union weapons, such as the strike and picket, be employed to further an illegal objective?
3. On what grounds did the court invalidate the contract that the plaintiff had entered into?
4. Did the court find a labor dispute to exist?

UNITED STATES v. PETRILLO

Supreme Court of the United States, 1947. 332 U.S. 1, 67 Sup. Ct. 1538

BLACK, J. The District Court dismissed a criminal information filed against the respondent, James C. Petrillo, on the ground that the statute on which the information was founded was unconstitutional. 68 F. Supp. 845. . . . The information charged a violation of the Communications Act of 1934, 48 Stat. 1064, as amended by an Act of April 16, 1946, 60 Stat. 89, 47 U.S.C.A. 506. The specific provisions of the Amendment charged to have been violated read:

"Sec. 506. (a) It shall be unlawful . . . to coerce . . . a licensee—

"(1) to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services. . . .

"(d) Whoever willfully violates any provision of subsection (a) or (b) of this section shall, upon conviction thereof, be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or both."

. . . The information further charged that the respondent, Petrillo, "wilfully, by the use of force, intimidation, duress and by the use of other means, did attempt to coerce, compel and constrain said licensee to employ and agree to employ, in connection with the conduct of its radio broadcasting business, three additional persons not needed by said licensee to perform actual services. . . ."

The coercion was allegedly accomplished in the following manner:

"(1) By directing and causing three musicians, members of the Chicago Federation of Musicians, theretofore employed by the said licensee in connection with the conduct of its broadcasting business, to discontinue their employment with said licensee;

"(2) By directing and causing said three employees and other persons, members of the Chicago Federation of Musicians, not to accept employment by said licensee; and

"(3) By placing and causing to be placed a person as a picket in front of the place of business of said licensee."

The only challenge to the information was a motion to dismiss on the ground that the Act on which the information was based (a) abridges freedom of speech in contravention of the First Amendment; (b) is repugnant to the Fifth Amendment because it defines a crime in terms that are excessively vague, and denies equal protection of the law and liberty of contract; (c) imposes involuntary servitude in violation of the Thirteenth Amendment. The District Court dismissed the information, holding that the 1946 Amendment on which it was based violates the First, Fifth, and Thirteenth Amendments. . . .

First. One holding of the District Court was that, as contended here, the statute is repugnant to the due process clause of the Fifth Amendment because its words, "number of employees needed by such licensee," are so vague, indefinite and uncertain that "persons of ordinary intelligence cannot in advance tell whether a certain action or course of action would be within its prohibition. . . ."

We could not sustain this provision of the Act if we agreed with the contention that persons of ordinary intelligence would be unable to know when their compulsive actions would force a person against his will to hire employees he did not need. . . . But we do not agree. Of course, as respondent points out, there are many factors that might be considered in determining how many employees are needed on a job. But the same thing may be said about most questions which must be submitted to a fact-finding tribunal in order to enforce statutes. Certainly, an employer's statements as to the number of employees "needed" is not conclusive as to that question. It, like the alleged wilfullness of a defendant, must be decided in the light of all the evidence.

Clearer and more precise language might have been framed by Congress to express what it meant by "number of employees needed." But none occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose. The argument really seems to be that it is impossible for a jury or court ever to determine how many employees a business needs, and that, therefore, no statutory language could meet the problem Congress had in mind. If this argument should be accepted, the result would be that no legislature could make it an offense for a person to compel another to hire employees, no matter how unnecessary they were, and however desirable a legislature might consider suppression of the practice to be.

The Constitution presents no such insuperable obstacle to legislation. We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . . The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices. The Constitution requires no more.

Second. It is contended that the statute denies equal protection of the laws to radio-broadcasting employees as a class, and, for this reason, violates the due process clause of the Fifth Amendment. This contention, raised by the motion to dismiss, and sustained by the District Court as a ground for holding the statute unconstitutional as written, is properly before us, and we reach this equal protection ground, for the same reason that we decided the question of whether the section was unconstitutionally vague and indefinite.

In support of this contention it is first argued that if Congress concluded that employment by broadcasting companies of unneeded workers was detrimental to interstate commerce, in order to be consistent, it should have provided for the punishment of employers, as well as employees, who violate that policy. Secondly, it is argued, the Act violates due process because it singles out broadcasting employees for regulation while leaving other classes of employees free to engage in the very practices forbidden to radio workers. But it is not within our province to say that because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power. Consequently, if Congress believes that there are employee practices in the radio industry which injuriously affect interstate commerce, and directs its prohibitions against those practices, we could not set aside its legislation even if we were persuaded that employer practices also required regulation. . . . Here Congress aimed its law directly against one practice—compelling a broadcasting company to hire unneeded workers. There is nothing novel about laws to prohibit some persons from compelling other persons to act

contrary to their desires. Whatever may be the limits of the power of Congress that do not apply equally to all classes, groups, and persons, see *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584, 57 Sup. Ct. 883, 889, 81 L. Ed. 1279, 109 A.L.R. 1293, we are satisfied that Congress has not transgressed those limits in the provisions of this statute which are here attacked.

Third. Respondent contends here, and the District Court has held, that the statute abridges freedom of speech by making peaceful picketing a crime. It is important to note that the statute does not mention picketing, peaceful or violent. The proposed application of the statute to picketing, therefore, does not derive from any specific prohibition written into the statute against peaceful picketing. Rather it comes from the information's charge that respondent attempted to compel the licensee to hire unneeded employees by placing "a picket in front of (his) place of business. . . ." Yet the respondent's motion to dismiss was made only on the ground that the statute, as written, contravenes the First Amendment. In ruling on this motion, the District Court assumed that because "there was no charge of violence . . . the placing of a picket must be regarded . . . as peaceful picketing." From this assumption, it concluded that "the application (of the statute) here sought to be made violates the First Amendment by its restriction upon freedom of speech by peaceful picketing." Thus, rather than holding the statute as written to be an unconstitutional violation of the First Amendment, the District Court ruled on the statute as it was proposed to be applied by the information as it then read.

We consider it inappropriate to reach the merits of this constitutional question now. . . .

. . . Consequently, we refrain from considering any constitutional questions except those concerning the Act as written. We do not decide whether the allegations of the information, whatever shape they might eventually take, would constitute an application of the statute in such manner as to contravene the First Amendment. We only pass on the statute on its face; it is not in conflict with the First Amendment.

Fourth. The District Court held, and it is argued here, that the statute, as sought to be applied in the information, violates the Thirteenth Amendment which prohibits slavery and involuntary servitude. This contention is also rooted in that part of the information which particularizes the means by which respondent attempted to compel action by the licensee, i. e., by causing three musicians to

discontinue, and three musicians not to accept, employment. The argument is that employees have a constitutional right to leave employment singly, see *Pollock* v. *Williams*, 322 U.S. 4, 17, 18, 64 Sup. Ct. 792, 800, 88 L. Ed. 1095, or in concert, and consequently that respondent cannot be guilty of a crime for directing or causing them to do so. For the reasons given with reference to the picketing specification, therefore, we consider the Thirteenth Amendment question only with reference to the statute on its face. Thus considered, it plainly does not violate the Thirteenth Amendment. Whether some possible attempted application of it to particular persons in particular sets of circumstances would violate the Thirteenth Amendment is a question we shall not pass upon until it is appropriately presented.

Reversed and remanded.[1]

Case Questions

1. Upon what grounds do the defendants urge unconstitutionality of th Act?
2. What does the court conclude as to each of the above grounds?
3. As to the First and Thirteenth Amendments, does the court leave ope the constitutional question?
4. What is the status of featherbedding under the National Labor Rela tions Act?

[1] Featherbed practices by unions are unfair union labor practices under S 8 (b) (6), and may be enjoined by the National Labor Relations Board un Section 10 (j) of the National Labor Relations Act of 1947. No crimi penalty is attached. The employer may not secure an injunction in his o right, but must clear through the Board. Section 8 (b) (6) provides, "It sh be an unfair labor practice for a labor organization or its agents to cause attempt to cause an employer to pay or deliver or agree to pay or deliver a money or other thing of value, in the nature of an exaction, for services wh are not performed or not to be performed."

CHAPTER 4

THE LABOR INJUNCTION

SECTION 15. INTERPRETATION OF THE CLAYTON ACT

Understanding of the statutory and case materials in this chapter requires a preliminary statement about the injunctive process. An injunction may be defined as a mandatory or prohibitory writ issued by a court of equity, alternately known as a court of chancery. It is one of the extraordinary remedies within the inherent powers of courts of equity, and it was provided to give relief to an aggrieved party in those cases where the remedy of money damages at law was inadequate. Courts of law are limited in remedial power to the giving of money damages; they may not issue injunctions. Nor may a court of equity generally give the remedy of damages, unless it does so as an incident of equitable relief.

The injunction is used primarily as a device to protect property or property rights by preventing injury thereto as the result of continued trespass or nuisance. An injunctive writ is *prohibitory* if it orders the defendant to refrain from specified conduct; it is *mandatory* if it requires performance of an affirmative act. A single injunction, however, may have both prohibitory and mandatory aspects at the same time, as when a union is concurrently ordered to refrain from violence in picketing and to bargain in good faith with the employer. In a further sense, an injunction may be *preliminary* or *final.* The former enjoins commission of the disputed acts during the time of suit and while the case is being adjudicated on its merits. The latter is issued after a hearing on the merits, or the preliminary injunction is made final by court order.

We have stated that the injunction is used generally to protect against the unlawful invasion of property or property rights. As applied to trespasses by labor, the employer found the injunction a keen and effective tool for the following reasons:

1. Speed of action was secured, since affidavit proof was admitted to issue a preliminary restraining order.
2. Delay between issuance of the preliminary and the final injunction was often so prolonged as to ensure defeat of the strikers or picketers, notwithstanding eventual victory of the union in securing dissolution of the restraining order.

3. The employer had a choice of tribunal to which he would direct his plea and could select an antilabor forum.
4. Lack of a jury trial in equity reduced labor's chances of winning an injunction case.
5. Blanket and obscure language in the wording of some injunctions intimidated unionists because of their inability to separate legal from illegal acts, as well as their inability to determine exactly what conduct was permissible and what was forbidden.

The case of *In re Debs*,[1] decided in 1895, 158 U.S. 164, popularized the usage of the injunction in labor cases in America. Over the ensuing years, labor carried on a relentless running battle to secure a narrowing of judicial injunctive power in labor cases. The first fruit of this agitation was the Clayton Anti-Trust Act of 1914 (38 Stat. 730). Congress here sought to substantially re-enact the Sherman Anti-Trust Act of 1890 (26 Stat. 209), but, at the same time, to withdraw the applicability of that Act to labor combinations and to divest the courts of their wide injunctive powers in labor dispute cases. Sec. 6 provided "That the labor of a human being is not a commodity or article of commerce . . . nor shall such (labor) organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

Sec. 20 imposes a statutory restriction on injunctive relief by providing that no injunction would issue in a labor dispute between employers and employees unless irreparable injury to property or property rights was threatened for which the law remedy of damages was inadequate. Narrow interpretations of the Clayton Act emasculated the edicts of Secs. 6 and 20 as is shown by the *Duplex* v. *Deering*[2] and the *American Steel Foundries*[3] decisions of 1921. The courts found a path around the Act by making the exception the rule under various theories, among them that the Act did not change pre-existing law, did not apply in boycott cases, did not protect "outsiders" such as union organizers, did not apply where the union objective was recognition, did not apply where yellow dog contracts were in effect, and finally, did not protect strikers since they were no longer employees.

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[1] *In re Debs* is reprinted in Chapter 5, Section 25, page 172.
[2] *Duplex* v. *Deering* is reprinted in Chapter 8, Section 52, page 359.
[3] A digest of the *American Steel Foundries* decision is given in this section on page 102.

The injunction device to counteract labor militancy was even more popular after passage of the Clayton Act, since an employer could now bring the action in a federal court as a party plaintiff, whereas, under the Sherman Act, only the government had that power. Disappointed by the Supreme Court's adverse construction of the Clayton Act in the *Duplex* and *American Steel Foundries* cases, labor intensified its political pressure in both state and federal areas, securing, in 1932, passage of the Federal Anti-Injunction Act (Norris-LaGuardia Act), 47 Stat. 70. This legislation effectively divested the federal courts of their equity power to issue injunctions at the behest of private parties in those situations where a bona fide labor dispute was in existence. The jurisdictional requirements set out in Section 7 furnished an almost insurmountable barrier to injunctive action when coupled with Section 13, which very broadly defined the term "labor dispute" as to include controversies without regard to whether the proximate relation of employer and employee was extant.

The case of *Truax* v. *Corrigan* [4] cast considerable doubt upon the constitutionality of proposed anti-injunction legislation, but these doubts were favorably resolved for labor by the Supreme Court in the 1937 case of *Senn* v. *Tile Layers Protective Union*,[5] 301 U.S. 468.

Employers were thus placed in a difficult position, the legislative and judicial tenor having taken a complete turnabout. They turned for assistance to the state courts, only to find that here, too, many states had barred the door with anti-injunction legislation patterned after the Norris-LaGuardia Act. With the enactment of the Labor Management Relations Act of 1947, reflecting the ever-changing public temper, the immunities afforded labor from injunctive interdiction by the Anti-Injunction Act have been substantially narrowed by Sec. 10 (1), which provides that, as to strike and boycott activity outlawed by Sec. 8 (b) (4), the National Labor Relations Board may secure a federal court injunction against unions without inhibition of the Federal Anti-Injunction Act. The reader should observe that the employer is not granted this remedy, being limited to his right to sue for damages under Sections 301 and 303 of the Labor Management Relations Act of 1947, unless he can satisfy the jurisdictional requirements of Sec. 7 of the Anti-Injunction Act.

Immediately after this textual material is found the text of the Clayton Act's labor provisions and two Supreme Court decisions con-

[4] *Truax* v. *Corrigan* is reprinted in this section on page 87.
[5] *Senn* v. *Tile Layers Protective Union* is reprinted in Chapter 6, Section 43, page 282.

struing them. The reader should pay special note to Sec. 20, for, contrary to popular belief, this section does not completely immunize labor organizations from the injunction as an employer weapon. The immunity is qualified as revealed by the words "unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application. . . ." Relying on this sentence of Section 20, the Supreme Court, in the *Truax* v. *Corrigan* and *American Steel Foundries* decisions, found that the Clayton Act did not materially change pre-existing law as to the issuance of injunctions in those cases where strike and picket activity was unlawful in object or method.

The dissenting opinion of Justice Brandeis is included along with the majority finding because of its accurate background material on the history and applicability of the injunction, as well as for his incisive reasoning in connection with the restaurant owner's contention, upheld by the majority opinion, that the Arizona Anti-Injunction Act contravened his rights under the due process clause of the Fourteenth Amendment.

The three sections of the Clayton Act of 1914 that have application to labor controversies are as follows:

Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Sec. 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such

property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violative of any law of the United States.

TRUAX v. CORRIGAN

Supreme Court of the United States, 1921. 257 U.S. 312, 42 Sup. Ct. 124

TAFT, C. J. The plaintiffs in error, who were plaintiffs below, and will be so called, own, maintain, and operate, on Main Street, in the City of Bisbee, Arizona, a restaurant, known as the "English Kitchen." The defendants are cooks and waiters formerly in the employ of the plaintiffs, together with the labor union and the trades assembly of which they were members. All parties are residents of the State of Arizona.

The complaint set out the following case:

In April, 1916, a dispute arose between the plaintiffs and the defendants' union concerning the terms and conditions of employment of the members of the union. The plaintiffs refused to yield to the terms of the union, which thereupon ordered a strike of those of its members who were in plaintiffs' employ. To force compliance with the demands of the union, the defendants and others unknown to the plaintiffs entered into a conspiracy and boycott to injure plaintiffs in their restaurant and restaurant business, by inducing plaintiffs' customers and others theretofore well and favorably disposed, to cease to patronize or trade with the plaintiffs. The method of inducing was set out at length and included picketing, displaying banners, advertising the strike, denouncing plaintiffs as "unfair" to

the union and appealing to customers to stay away from the "English Kitchen," and the circulation of handbills containing abusive and libelous charges against plaintiffs, their employees and their patrons, and intimations of injury to future patrons. Copies of the handbills were set forth in exhibits made part of the complaint.

In consequence of defendants' acts, many customers were induced to cease from patronizing plaintiffs, and their daily receipts, which had been in excess of the sum of $156, were reduced to $75. The complaint averred that if the acts were continued, the business would be entirely destroyed, and that the plaintiffs would suffer great and irreparable injury; that for the plaintiffs to seek to recover damages would involve a multiplicity of suits; that all the defendants were insolvent, and would be unable to respond in damages for any injury resulting from their acts and the plaintiffs were therefore without any adequate remedy at law.

The complaint further averred that the defendants were relying for immunity on Paragraph 1464 of the Revised Statutes of Arizona, 1913, which is in part as follows:

"No restraining order or injunction shall be granted by any court of this state, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful means so to do; . . ."

The plaintiffs alleged that this paragraph if it made lawful defendants' acts contravened the Fourteenth Amendment to the Con-

stitution of the United States by depriving plaintiffs of their property without due process of law, and by denying to plaintiffs the equal protection of the law, and was, therefore, void and of no effect. Upon the case thus stated the plaintiffs asked a temporary, and a permanent, injunction.

The defendants filed a demurrer, on two grounds: First, that the complaint did not state facts sufficient to constitute a cause of action, in that the property rights asserted therein were not, under Paragraph 1464, Revised Statutes of Arizona, 1913, of such character that their irreparable injury might be enjoined, and secondly, that upon its face the complaint showed a want of equity.

The Superior Court for Cochise County sustained the demurrer and dismissed the complaint, and this judgment was affirmed by the Supreme Court of Arizona. . . .

The effect of this ruling is that, under the statute, loss may be inflicted upon the plaintiffs' property and business by "picketing" in any form if violence be not used, and that, because no violence was shown or claimed, the campaign carried on, as described in the complaint and exhibits, did not unlawfully invade complainants' rights. . . .

The result of this campaign was to reduce the business of the plaintiffs from more than $55,000 a year to one of $12,000.

Plaintiffs' business is a property right (*Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 465, 41 Sup. Ct. 172, 65 L. Ed. 349) and free access for employees, owner and customers to his place of business is incident to such right. Intentional injury caused to either right or both by a conspiracy is a tort. Concert of action is a conspiracy if its object is unlawful or if the means used are unlawful. *Pettibone* v. *United States*, 148 U.S. 197, 203, 13 Sup. Ct. 542, 37 L. Ed. 419; *Duplex Printing Press Co.* v. *Deering, supra.* Intention to inflict the loss and the actual loss caused are clear. The real question here is, were the means used illegal? The above recital of what the defendants did can leave no doubt of that. The libelous attacks upon the plaintiffs, their business, their employees, and their customers, and the abusive epithets applied to them were palpable wrongs. They were uttered in aid of the plan to induce plaintiffs' customers and would-be customers to refrain from patronizing the plaintiffs. The patrolling of defendants immediately in front of the restaurant on the main street and within five feet of plaintiffs' premises continuously during business hours, with the banners announcing plaintiffs' unfairness; the attendance by the picketers at the

entrance to the restaurant and their insistent and loud appeals all day long, the constant circulation by them of the libels and epithets applied to employees, plaintiffs and customers, and the threats of injurious consequences to future customers, all linked together in a campaign, were an unlawful annoyance and a hurtful nuisance in respect of the free access to the plaintiffs' place of business. It was not lawful persuasion or inducing. It was not a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage. It was compelling every customer or would-be customer to run the gauntlet of most uncomfortable publicity, aggressive and annoying importunity, libelous attacks and fear of injurious consequences, illegally inflicted, to his reputation and standing in the community. No wonder that a business of $50,000 was reduced to only one-fourth of its former extent. Violence could not have been more effective. It was moral coercion by illegal annoyance and obstruction and it thus was plainly a conspiracy. . . .

A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process and can not be held valid under the Fourteenth Amendment. . . .

It is argued that, while the right to conduct a lawful business is property, the conditions surrounding that business, such as regulations of the State for maintaining peace, good order, and protection against disorder, are matters in which no person has a vested right. The conclusion to which this inevitably leads in this case is that the State may withdraw all protection to a property right by civil or criminal action for its wrongful injury if the injury is not caused by violence. This doctrine is supposed to find support in the case of *New York Central R. R. Co.* v. *White*, 243 U.S. 188, 198, 37 Sup. Ct. 247, 61 L. Ed. 667, L.R.A. 1917D, 1, Ann. Cas. 1917D, 629, and cases there cited. These cases, all of them, relate to the liabilities of employers to employees growing out of the relation of employment for injuries received in the course of employment. They concern legislation as to the incidents of that relation. They affirm the power of the State to vary the rules of the common law as to the fellow servant doctrine, assumption of risk, and negligence, in that relation. They hold that employers have no vested right in those rules of the common law. The broad distinction between one's right to protection against a direct injury to one's fundamental property right by another who has no special relation to him, and one's liability to

another with whom he establishes a voluntary relation under a statute is manifest upon its statement. It is true that no one has a vested right to any particular rule of the common law, but it is also true that the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy (the injunction), is wholly at variance with those principles. . . .

It is urged that in holding Paragraph 1464 invalid, we are in effect holding invalid section 20 of the Clayton Act. Of course, we are not doing so. In the first place, the equality clause of the Fourteenth Amendment does not apply to congressional but only to state action. In the second place, section 20 of the Clayton Act never has been construed or applied as the Supreme Court of Arizona has construed and applied Paragraph 1464 in this case.

We have but recently considered the clauses of section 20 of the Clayton Act, sometimes erroneously called the "picketing" clauses. *American Steel Foundries* v. *Tri-City Central Trades Council, ante* (257 U.S. 184, 42 Sup. Ct. 72, 66 L. Ed. 189, 27 A.L.R. 360). They forbid an injunction in labor controversies prohibiting any person "from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do."

We held that under these clauses picketing was unlawful, and that it might be enjoined as such, and that peaceful picketing was a contradiction in terms which the statute sedulously avoided, but that, subject to the primary right of the employer and his employees and would-be employees to free access to his premises without obstruction by violence, intimidation, annoyance, importunity or dogging, it was lawful for ex-employees on a strike and their fellows in a labor union to have a single representative at each entrance to the plant of the employer to announce the strike and peaceably to persuade the employees and would-be employees to join them in it. We held that these clauses were merely declaratory of what had always been the law and the best practice in equity, and we thus applied them. The construction put upon the same words by the Arizona Supreme Court

makes these clauses of Paragraph 1464 as far from those of section 20 of the Clayton Act in meaning as if they were in wholly different language.

We conclude that the demurrer in this case should have been overruled, the defendants required to answer, and that if the evidence sustained the averments of the complaint, an injunction should issue as prayed. . . .

The judgment of the Supreme Court of Arizona is reversed and the case remanded for further proceedings not inconsistent with this opinion.

BRANDEIS, J. (dissenting). The first legislature of the State of Arizona adopted in 1913 a Civil Code. By Title 6, C. III, it sets forth conditions and circumstances under which the courts of the State may or may not grant injunctions. Paragraph 1464 contains, among other things, a prohibition against interfering by injunction between employers and employees, in any case growing out of a dispute concerning terms or conditions of employment, unless interposition by injunction is necessary to protect property from injury through violence. Its main purpose was doubtless to prohibit the courts from enjoining peaceful picketing and the boycott. With the wisdom of the statute we have no concern. Whether Arizona in enacting this statute transgressed limitations imposed upon the power of the States by the Fourteenth Amendment is the question presented for decision.

The employer has, of course, a legal right to carry on his business for profit; and incidentally the subsidiary rights to secure and retain customers, to fix such prices for his product as he deems proper, and to buy merchandise and labor at such prices as he chooses to pay. This right to carry on business—be it called liberty or property—has value; and, he who interferes with the right without cause renders himself liable. But for cause the right may be interfered with and even destroyed. Such cause exists when, in the pursuit of an equal right to further their several interests, his competitors make inroads upon his trade, or when suppliers of merchandise or of labor make inroads upon his profits. What methods and means are permissible in this struggle of contending forces is determined in part by decisions of the courts, in part by acts of the legislatures. The rules governing the contest necessarily change from time to time. For conditions change; and furthermore, the rules evolved, being merely experiments in government, must be discarded when they prove to be failures.

Practically every change in the law governing the relation of employer and employee must abridge, in some respect, the liberty or

property of one of the parties—if liberty and property be measured by the standard of the law theretofore prevailing. If such changes are made by acts of the legislature, we call the modification an exercise of the police power. And, although the change may involve interference with existing liberty or property of individuals, the statute will not be declared a violation of the due process clause, unless the court finds that the interference is arbitrary or unreasonable or that, considered as a means, the measure has no real or substantial relation of cause to a permissible end. . . . The questions submitted are whether this statutory prohibition of the remedy by injunction is in itself arbitrary and so unreasonable as to deprive the employer of liberty or property without due process of law;—and whether limitation of this prohibition to controversies involving employment denies him equal protection of the laws.

Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed. Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread and has been reached after deliberation. What, at any particular time, is the paramount public need is, necessarily, largely a matter of judgment. Hence, in passing upon the validity of a law challenged as being unreasonable, aid may be derived from the experience of other countries and of the several States of our Union in which the common law and its conceptions of liberty and of property prevail. The history of the rules governing contests between employer and employed in the several English-speaking countries illustrates both the susceptibility of such rules to change and the variety of contemporary opinion as to what rules will best serve the public interest. The divergence of opinion in this difficult field of governmental action should admonish us not to declare a rule arbitrary and unreasonable merely because we are convinced that it is fraught with danger to the public weal, and thus to close the door to experiment within the law.

In England a workingman struggling to improve his condition, even when acting singly, was confronted until 1813, with laws limiting the amount of wages which he might demand. Until 1824 he was punishable as a criminal if he combined with his fellow workmen to raise wages or shorten hours or to affect the business in any way, even if there was no resort to a strike. Until 1871 members of a union who joined in persuading employees to leave work were liable criminally, although the employees were not under contract and the persuasion was both peaceful and unattended by picketing. Until 1871 threatening a strike, whatever the cause, was also a criminal act. Not until 1875 was the right of workers to combine in order to attain their ends conceded fully. In that year Parliament declared that workmen combining in furtherance of a trade dispute should not be indictable for criminal conspiracy unless the act if done by one person would be indictable as a crime. After that statute a combination of workmen to effect the ordinary objects of a strike was no longer a criminal offense. But picketing, though peaceful, in aid of a strike, remained illegal; and likewise the boycott. Not until 1906 was the ban on peaceful picketing and the bringing of pressure upon an employer by means of a secondary strike or a boycott removed. In 1906, also, the act of inducing workers to break their contract of employment (previously held an actionable wrong) was expressly declared legal. In England improvement of the condition of workingmen and their emancipation appear to have been deemed recently the paramount public need.

In the British Dominions the rules governing the struggle between employer and employed were likewise subjected to many modifications; but the trend of social experiment took a direction very different from that followed in the mother country. Instead of enabling the worker to pursue such methods as he might deem effective in the contest, statutes were enacted in some of the Dominions which forbade the boycott, peaceful picketing, and even the simple strike and the lockout; use of the injunction to enforce compliance with these prohibitions was expressly sanctioned; and violation of the statute was also made punishable by criminal proceedings. These prohibitions were the concomitants of prescribed industrial arbitration through administrative tribunals by which the right of both employer and employee to liberty and property were seriously abridged in the public interest. Australia and New Zealand made compulsory both arbitration and compliance with the award. Canada limited the compulsion to a postponement of the right to strike until the dispute

should have been officially investigated and reported upon. In these Dominions the uninterrupted pursuit of industry and the prevention of the arbitrary use of power appear to be deemed the paramount public needs.

In the United States the rules of the common law governing the struggle between employer and employee have likewise been subjected to modifications. These have been made mainly through judicial decisions. The legal right of workingmen to combine and to strike in order to secure for themselves higher wages, shorter hours and better working conditions received early general recognition. But there developed great diversity of opinion as to the means by which, and also as to the persons through whom, and upon whom pressure might permissibly be exerted in order to induce the employer to yield to the demands of the workingmen. Courts were required, in the absence of legislation, to determine what the public welfare demanded;—whether it would not be best subserved by leaving the contestants free to resort to any means not involving a breach of the peace or injury to tangible property; whether it was consistent with the public interest that the contestants should be permitted to invoke the aid of others not directly interested in the matter in controversy; and to what extent incidental injury to persons not parties to the controversy should be held justifiable.

The earliest reported American decision on peaceful picketing appears to have been rendered in 1888, the earliest on boycotting in 1886. By no great majority the prevailing judicial opinion in America declares the boycott as commonly practiced an illegal means (see *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A.L.R. 196), while it inclines towards the legality of peaceful picketing. See *American Steel Foundries* v. *Tri-City Central Trades Council, ante* (257 U.S. 184, 42 S. Ct. —, 66 L. Ed. 189, 27 A.L.R. 360). But in some of the States, notably New York, both peaceful picketing and the boycott are declared permissible. Judges, being thus called upon to exercise a quasi-legislative function and weigh relative social values, naturally differed in their conclusions on such questions.

In England, observance of the rules of the contest has been enforced by the courts almost wholly through the criminal law or through actions at law for compensation. An injunction was granted in a labor dispute as early as 1868. But in England resort to the injunction has not been frequent and it has played no appreciable part there in the conflict between capital and labor. In America the injunction did not secure recognition as a possible remedy until 1888.

When a few years later its use became extensive and conspicuous, the controversy over the remedy overshadowed in bitterness the question of the relative substantive rights of the parties. In the storms of protest against this use many thoughtful lawyers joined. The equitable remedy, although applied in accordance with established practice, involved incidents which, it was asserted, endangered the personal liberty of wage-earners. The acts enjoined were frequently, perhaps usually, acts which were already crimes at common law or had been made so by statutes. The issues in litigation arising out of trade disputes related largely to questions of fact. But in equity issues of fact as of law were tried by a single judge, sitting without a jury. Charges of violating an injunction were often heard on affidavits merely, without the opportunity of confronting or cross-examining witnesses. Men found guilty of contempt were committed in the judge's discretion, without either a statutory limit upon the length of the imprisonment, or the opportunity of effective review on appeal, or the right to release on bail pending possible revisory proceedings. The effect of the proceeding upon the individual was substantially the same as if he had been successfully prosecuted for a crime; but he was denied, in the course of the equity proceedings, those rights which by the Constitution are commonly secured to persons charged with a crime.

It was asserted that in these proceedings an alleged danger to property, always incidental and at times insignificant, was often laid hold of to enable the penalties of the criminal law to be enforced expeditiously without that protection to the liberty of the individual which the Bill of Rights was designed to afford; that through such proceedings a single judge often usurped the functions not only of the jury but of the police department; that, in prescribing the conditions under which strikes were permissible and how they might be carried out, he usurped also the powers of the legislature; and that incidentally he abridged the constitutional rights of individuals to free speech, to a free press and to peaceful assembly.

It was urged that the real motive in seeking the injunction was not ordinarily to prevent property from being injured nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men. In other words, that, under the guise of protecting property rights, the employer was seeking sovereign power. And many disinterested men, solicitous only for the public welfare, believed that the law of property was not appropriate for dealing with the forces beneath social unrest; that

in this vast struggle it was unwise to throw the power of the State on one side or the other according to principles deduced from that law; that the problem of the control and conduct of industry demanded a solution of its own; and that, pending the ascertainment of new principles to govern industry, it was wiser for the State not to interfere in industrial struggles by the issuance of an injunction.

After the constitutionality and the propriety of the use of the injunction in labor disputes was established judicially, those who opposed the practice sought the aid of Congress and of state legislatures. The bills introduced varied in character and in scope. Many dealt merely with rights; and, of these, some declared, in effect, that no act done in furtherance of a labor dispute by a combination of workingmen should be held illegal, unless it would have been so if done by a single individual; while others purported to legalize specific practices, like boycotting or picketing. Other bills dealt merely with the remedy; and of these, some undertook practically to abolish the use of the injunction in labor disputes, while some merely limited its use either by prohibiting its issue under certain conditions or by denying power to restrain certain acts. Some bills undertook to modify both rights and remedies. These legislative proposals occupied the attention of Congress during every session but one in the twenty years between 1894 and 1914. Reports recommending such legislation were repeatedly made by the Judiciary Committee of the House or that of the Senate; and at some sessions by both. Prior to 1914, legislation of this character had at several sessions passed the House; and in that year Congress passed and the President approved the Clayton Act, Sec. 20 of which is substantially the same as Paragraph 1464 of the Arizona Civil Code. Act of October 15, 1914, C. 323, 38 Stat. 730, 738, 29 U.S.C.A. Sec. 52.

Such was the diversity of view concerning peaceful picketing and the boycott expressed in judicial decisions and legislation in English-speaking countries when in 1913, the new State of Arizona, in establishing its judicial system, limited the use of the injunction and when in 1918 its Supreme Court was called upon to declare for the first time the law of Arizona on these subjects. The case of *Truax* v. *Bisbee Local No. 380, Cooks' & Waiters' Union*, 19 Ariz. 379, 171 P. 121, presented facts identical with those of the case at bar. In that case the Supreme Court made its decision on four controverted points of law. In the first place, it held that the officials of the union were not outsiders with no justification for their acts (19 Ariz. 379, 390). In the second place, rejecting the view held by the federal

courts and the majority of the state courts on the illegality of the boycott, it specifically accepted the law of New York, Montana and California, citing the decisions of those States (19 Ariz. 379, 388, 390). In the third place, it rejected the law of New Jersey, Minnesota and Pennsylvania that it is illegal to circularize an employer's customers, and again adopted the rule declared in the decisions of the courts of New York, Montana, California and Connecticut (19 Ariz. 379, 389). In deciding these three points the Supreme Court of Arizona made a choice between well-established precedents laid down on either side by some of the strongest courts in the country. Can this court say that thereby it deprived the plaintiff of his property without due process of law?

The fourth question requiring decision was whether peaceful picketing should be deemed legal. Here, too, each of the opposing views had the support of decisions of strong courts. If the Arizona court had decided that by the common law of the State the defendants might peacefully picket the plaintiffs, its decision, like those of the courts of Ohio, Minnesota, Montana, New York, Oklahoma and New Hampshire, would surely not have been open to objection under the Federal Constitution; for this court has recently held that peaceful picketing is not unlawful. *American Steel Foundries* v. *Tri-City Central Trades Council, supra.* The Supreme Court of Arizona found it unnecessary to determine what was the common law of the State on that subject, because it construed Paragraph 1464 of the Civil Code as declaring peaceful picketing to be legal. In the case at bar, commenting on the earlier case, the court said: "The statute adopts the view of a number of courts which have held 'picketing,' if peaceably carried on for a lawful purpose, to be no violation of any legal right of the party whose place of business is 'picketed,' and whether as a fact the picketing is carried on by peaceful means, as against the other view, taken by the federal courts and many of the state courts, that picketing is *per se* unlawful." Shortly before that decision the Criminal Court of Appeals of Oklahoma had placed a similar construction upon a statute of that State, declaring that "the doctrine (that picketing is not *per se* unlawful) represents the trend of legal thought of modern times, and is specifically reflected in the statute above construed." *Ex parte Sweitzer*, 13 Okl. Cr. 154, 160, 162 P. 1134. . . . A State, which despite the Fourteenth Amendment possesses the power to impose on employers without fault unlimited liability for injuries suffered by employees, and to limit the freedom of contract of some employers and not of others, surely does not lack

the power to select for its citizens that one of conflicting views on boycotting by peaceful picketing which its legislature and highest court consider will best meet its conditions and secure the public welfare.

The Supreme Court of Arizona, having held as a rule of substantive law that the boycott as here practiced was legal at common law; and that the picketing was peaceful and, hence, legal under the statute (whether or not it was legal at common law), necessarily denied the injunction, since, in its opinion, the defendants had committed no legal wrong and were threatening none. But even if this court should hold that an employer has a constitutional right to be free from interference by such a boycott or that the picketing practiced was not in fact peaceful, it does not follow that Arizona would lack the power to refuse to protect that right by injunction. *For it is clear that the refusal of an equitable remedy for a tort is not necessarily a denial of due process of law.* And it seems to be equally clear that such refusal is not necessarily arbitrary and unreasonable when applied to incidents of the relation of employer and employee. The considerations which show that the refusal is not arbitrary or unreasonable show likewise that such refusal does not necessarily constitute a denial of equal protection of the laws merely because some, or even the same, property rights which are excluded by this statute from protection by injunction, receive such protection under other circumstances or between persons standing in different relations. The acknowledged legislative discretion exerted in classification, so frequently applied in defining rights, extends equally to the grant of remedies. It is for the legislature to say—within the broad limits of the discretion which it possesses—whether or not the remedy for a wrong shall be both criminal and civil and whether or not it shall be both at law and in equity. [Author's italics.]

A State is free since the adoption of the Fourteenth Amendment, as it was before, not only to determine what system of law shall prevail in it, but, also, by what processes legal rights may be asserted, and in what courts they may be enforced. *Missouri* v. *Lewis*, 101 U.S. 22, 31, 25 L. Ed. 989; *Iowa Central Ry. Co.* v. *Iowa*, 160 U.S. 389, 16 Sup. Ct. 344, 40 L. Ed. 467. As a State may adopt or reject trial by jury, *Walker* v. *Sauvinet*, 92 U.S. 90, 23 L. Ed. 678; or adopting it may retain or discard its customary incidents, *Hayes* v. *Missouri*, 120 U.S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578; *Brown* v. *New Jersey*, 175 U.S. 172, 20 Sup. Ct. 77, 44 L. Ed. 119; *Maxwell* v. *Dow*, 176 U.S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; as a State may

grant or withhold review of a decision by appeal, *Reetz* v. *Michigan*, 188 U.S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563; so it may determine for itself, from time to time, whether the protection which it affords to property rights through its courts shall be given by means of the preventive remedy or exclusively by an action at law for compensation.

Nor is a State obliged to protect all property rights by injunction merely because it protects some, even if the attending circumstances are in some respects similar. The restraining power of equity might conceivably be applied to every intended violation of a legal right. On grounds of expediency its application is commonly denied in cases where there is a remedy at law which is deemed legally adequate. This occurs whenever a dominant public interest is deemed to require that the preventive remedy, otherwise available for the protection of private rights, be refused and the injured party left to such remedy as courts of law may afford. Thus, courts ordinarily refuse, perhaps in the interest of free speech, to restrain actionable libels. *Boston Diatite Co.* v. *Florence Mfg. Co.*, 114 Mass. 69, 19 Am. Rep. 310; *Prudential Insurance Co.* v. *Knott*, L.R. 10 Ch. App. 142. In the interest of personal liberty they ordinarily refuse to enforce specifically, by mandatory injunction or otherwise, obligations involving personal service. *Arthur* v. *Oakes*, 63 F. 310, 138, 11 C.C.A. 209, 25 L.R.A. 414; *Davis* v. *Foreman* (1894), 3 Ch. 654, 657; *Gossard* v. *Crosby*, 132 Iowa 155, 163, 164, 109 N.W. 483, 6 L.R.A., N.S., 1115. In the desire to preserve the separation of governmental powers they have declined to protect by injunction mere political rights, *Giles* v. *Harris*, 189 U.S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909; and have refused to interfere with the operations of the police department. *Davis* v. *American Society for the Prevention of Cruelty to Animals*, 75 N.Y. 362; *Delaney* v. *Flood*, 183 N.Y. 323, 76 N.E. 209, 2 L.R.A., N.S., 678, 111 Am. St. Rev. 759, 5 Ann. Cas. 480; compare *Bisbee* v. *Arizona Insurance Agency*, 14 Ariz. 313, 127 P. 722. Instances are numerous where protection to property by way of injunction has been refused solely on the ground that serious public inconvenience would result from restraining the act complained of. Such, for example, was the case where a neighboring land owner sought to restrain a smelter from polluting the air, but that relief, if granted, would have necessitated shutting down the plant and this would have destroyed the business and impaired the means of livelihood of a large community. There are also numerous instances where the circumstances would, according to general equity practice, have justified the issue of an injunction, but it was refused solely because the right sought to be enforced was created by statute, and the courts, apply-

ing a familiar rule, held that the remedy provided by the statute was exclusive.

Such limitations upon the use of the injunction for the protection of private rights have ordinarily been imposed in the interest of the public by the court acting in the exercise of its broad discretion. But, in some instances, the denial of the preventive remedy because of a public interest deemed paramount, has been expressly commanded by statute. Thus, the courts of the United States have been prohibited from staying proceedings in any court of a State, Judicial Code, Sec. 265, 28 U.S.C.A. Sec. 371; and also from enjoining the illegal assessment and collection of taxes. Revised Statutes, Sec. 3224; *Snyder* v. *Marks*, 109 U.S. 189, 3 Sup. Ct. 157, 27 L. Ed. 901; *Dodge* v. *Osborn*, 240 U.S. 118, 36 Sup. Ct. 275, 60 L. Ed. 557. What Congress can do in curtailing the equity power of the federal courts, state legislatures may do in curtailing equity powers of the state court; unless prevented by the constitution of the State. In other words States are free since the adoption of the Fourteenth Amendment as they were before, either to expand or to contract their equity jurisdiction. The denial of the more adequate equitable remedy for private wrongs is in essence an exercise of the police power, by which, in the interest of the public and in order to preserve the liberty and the property of the great majority of the citizens of a State, rights of property and the liberty of the individual must be remoulded, from time to time, to meet the changing needs of society.

For these reasons, as well as for others stated by Mr. Justice Holmes and Mr. Justice Pitney, in which I concur, the judgment of the Supreme Court of Arizona should, in my opinion, be affirmed:—first, because in permitting damage to be inflicted by means of boycott and peaceful picketing Arizona did not deprive the plaintiffs of property without due process of law or deny them equal protection of the laws; and secondly, because, if Arizona was constitutionally prohibited from adopting this rule of substantive law, it was still free to restrict the extraordinary remedies of equity where it considered their exercise to be detrimental to the public welfare, since such restriction was not a denial to the employer either of due process of law or of equal protection of the laws.

SUPPLEMENTAL CASE DIGEST—THE CLAYTON ACT

AMERICAN STEEL FOUNDRIES v. TRI-CITY CENTRAL TRADES COUNCIL. Supreme Court of the United States, 1921; 257 U.S. 184. The

Central Trades Council, a labor organization composed of 37 craft units, invoked a strike for higher wages and for recognition against the American Steel Foundries. Picketing of the plant, though essentially orderly, was marked by a few cases of assaults upon nonstrikers seeking employment. An injunction was issued against the union restraining all picketing activity by the union. This appeal was taken to determine the applicability and effect of the labor clauses of the Clayton Act, 38 Stat. 738, especially Sec. 20 thereof, in divesting the courts of their injunctive powers in labor disputes. As finally ordered by the court, picketing activity was restricted to one representative at each point of ingress or egress in the plant. Chief Justice Taft, speaking for the court, laid down the following interpretation.

"The first question in the case is whether section 20 of the Clayton Act of 1914 is to be applied to this case.

"It has been determined by this court that the irreparable injury to property or to a property right, in the first paragraph of section 20, includes injury to the business of an employer, and that the second paragraph applies only in cases growing out of a dispute concerning terms or conditions of employment, between an employer and employee, between employers and employees, or between employees, or between persons employed and persons seeking employment, and not to such dispute between an employer and persons who are neither ex-employees nor seeking employment. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A.L.R. 196. Only two of the defendants, Cook and Churchill, who left at the time of the strike, can invoke in their behalf section 20. We must, therefore, first consider the propriety of the decree as against them, and then as against the other defendants.

"The prohibitions of section 20, material here, are those which forbid an injunction against, first, recommending, advising or persuading others by peaceful means to cease employment and labor; second, attending at any place where such person or persons may lawfully be for the purpose of peacefully obtaining or communicating information, or peacefully persuading any person to work or to abstain from working; third, peaceably assembling in a lawful manner and for lawful purposes. This court has already called attention in the *Duplex* case to the emphasis upon the words 'peaceable' and 'lawful' in this section. 254 U.S. 443, 473, 41 S. Ct. 172, 65 L. Ed. 349, 16 A.L.R. 196. It is clear that Congress wished to forbid the use by the federal courts of their equity arm to prevent peaceable persuasion by employees, discharged or expectant, in promotion of their side of the dispute, and to secure them against judicial restraint

in obtaining or communicating information in any place where they might lawfully be. This introduces no new principle into the equity jurisprudence of those courts. It is merely declaratory of what was the best practice always. Congress thought it wise to stabilize this rule of action and render it uniform.

"The object and problem of Congress in section 20, and indeed of courts of equity before its enactment, was to reconcile the rights of the employer in his business and in the access of his employees to his place of business and egress therefrom without intimidation or obstruction, on the one hand, and the right of the employees, recent or expectant, to use peaceable and lawful means to induce present employees and would-be employees to join their ranks, on the other. If in their attempts at persuasion or communication with those whom they would enlist with them, those of the labor side adopt methods which however lawful in their announced purpose inevitably lead to intimidation and obstruction, then it is the court's duty, which the terms of section 20 do not modify, so to limit what the propagandists do as to time, manner and place as shall prevent infractions of the law and violations of the right of the employees, and of the employer for whom they wish to work.

"How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free and his employer has a right to have him free."

Case Questions

1. What acts by the union is the plaintiff in error seeking to enjoin?
2. What statutory defense is made by the defendant union?
3. Did the union win in the lower court?
4. On what theory was the Arizona anti-injunction statute held unconstitutional?
5. Does the majority opinion consider the term "peaceful picketing" as a contradiction in terms?

6. According to Justice Brandeis' dissenting opinion:
   (a) Under what power did Arizona pass the act in question?
   (b) Why does Brandeis develop the law of labor relations in other countries?
   (c) Is the boycott illegal under the majority view in America? What states hold it legal?
   (d) What remedies in labor contests are employed in England? Was resort to the injunction frequent?
   (e) What reasons are given to bolster the statement that the injunction in America "endangered the personal liberty of wage earners"?
   (f) What was the Arizona law respecting outsiders, boycotts, circularization of customers, peaceful picketing?
   (g) Do you agree with Brandeis that it is not a denial of due process to refuse to protect a right by injunction, as long as other remedies, e.g. damages and the criminal law, provide remedies? What did Chief Justice Taft hold on this point?
   (h) What state rights are listed by Brandeis as not having been destroyed by the Fourteenth Amendment?
7. In the *American Steel Foundries* case:
   (a) Upon what theory did the union base its appeal?
   (b) How does the court reason around the prohibition of Section 20 of the Clayton Act?
   (c) Would the Supreme Court's decision have been the same if the picketing were unmarked by violence?

SECTION 16. THE NORRIS-LAGUARDIA ACT

In response to labor pressure, Congress in 1932 passed the Federal Anti-Injunction Act, otherwise known for its principal sponsors. The Act reflects legislative disapproval of Supreme Court construction of the Clayton Act, which largely nullified the Congressional intent that was manifested, but not too explicitly stated, in Sections 6 and 20. The text of the Federal Anti-Injunction Act, printed immediately following, merits analysis as to those provisions that throw substantial safeguards around legitimate union activity, in protecting the same from private injunctive process in the Federal courts. In the subsequent treatment of these materials, it is important to recall that many states enacted anti-injunction statutes patterned after the federal law, thus placing the employer in a somewhat difficult position in all forums.

Analysis of the principal provisions of the Norris-LaGuardia Act follows:

(a) Section 1 divests federal courts of injunctive powers in cases growing out of a labor dispute, except as provided by Sec. 7.

(b) Section 2 states that the policy of the Act is to foster labor's right to form labor organizations without interference by the employer.

(c) Section 3 outlaws yellow dog contracts.

(d) Section 4 reiterates the worker's right to strike, assemble and peacefully picket, and identifies nine specific situations protected from injunctive process.

(e) Section 6 lays down a very stringent rule of agency liability, requiring, before liability for unlawful acts of others may attach to an officer or agent of any organization, in a labor dispute case, that there be proof of actual participation, actual authorization, or ratification after actual knowledge of the commission of unlawful acts. Application of this section is illustrated in the case of *United Brotherhood of Carpenters & Joiners* v. *United States*, reprinted in Section 54 of Chapter 8, page 407.

(f) Section 7 provides that the complainant in a labor dispute case will be denied relief unless he can prove, in open court, under adverse cross examination, a case incorporating the following elements:

  (1) Unlawful acts have been threatened or committed.
  (2) Injury to property will follow therefrom.
  (3) Injury to complainant will be greater than injury to defendant unless the unlawful acts are enjoined.
  (4) Complainant has no adequate remedy at law.
  (5) Police are unable or unwilling to furnish adequate protection to complainant's property.

(g) Section 8 adds the further jurisdictional requirement that complainant must come in with clean hands, having made reasonable efforts to negotiate the differences existing.

(h) Section 9 requires the injunction to enjoin only specific acts complained of, eliminating the omnibus type of injunction.
(i) Section 10 provides for expeditious appeal.
(j) Section 11 allows a jury trial in contempt cases not committed in the court's presence or near thereto.
(k) Section 13 (c) provides a broad definition of a labor dispute and that the disputants need not "stand in the proximate relation of employer and employee."

Sections 16.1 and 16.2 of this volume, which next follow, reveal the law in action as to application of the Anti-Injunction Act in specific fact situations. The *Coryell* and *New Negro* decisions in Section 16.1 (pages 111 and 113) develop the concept of a labor dispute protected by the Act. That all labor disputes are not immune from employer injunctive action is exemplified by the *Columbia River, Union Premier, Converse,* and *Bakery Sales Drivers* decisions in Section 16.2 (pages 117, 119, 122, and 125). In these cases the employer met the jurisdictional requirements of Section 7 of the Act. A variety of factual situations are included to give the reader the feel of the courts as they search out the answer to whether the labor dispute in question is one exempted by the Act and whether the complainant has complied with Section 7 of the Anti-Injunction Act.

The text of the Norris-LaGuardia Act of March 23, 1932, C. 90, 47 Stat. 70, is given below:

Sec. 1. That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representa-

tives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

Sec. 3. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Sec. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act.

Sec. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary

injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Sec. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligations imposed by law which is involved in a labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.[1]

Sec. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

Sec. 10. Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the circuit court of appeals for its review. Upon the filing of such record in the circuit court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

Sec. 11. In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided,* That this right shall not apply to contempts com-

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[1] The effect of Sec. 8 is fully treated in Sec. 78 of this volume, "Injunctions Under the Railway Labor Act."

mitted in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

Sec. 12. The defendant in any proceeding for contempt of court may file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

Sec. 13. When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Sec. 14. If any provision of this Act or the application thereof to any person or circumstances is held unconstitutional or otherwise invalid, the remaining provisions of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

Sec. 15. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

SECTION 16.1. PROTECTED LABOR DISPUTES

L. L. CORYELL & SON v. PETROLEUM WORKERS UNION

United States District Court, D. Minnesota, 1936. 19 Fed. Supp. 749

BELL, D. J. This is an action in equity for an injunction restraining the defendants from picketing the plaintiffs' place of business at 2250 University Avenue, St. Paul, Minnesota. There is a diversity of citizenship, and the requisite jurisdictional amount is involved.

The plaintiffs are citizens of the state of Nebraska and are engaged as copartners in marketing petroleum products at retail and wholesale in territory covering fourteen or more states with their principal place of business at Lincoln, Nebraska. They own and operate a gasoline filling station and bulk plant at the above-mentioned address in St. Paul, Minnesota.

The defendants are petroleum workers' unions, officers and agents thereof, and for a period of six weeks were engaged in picketing the plaintiffs' said place of business. Plaintiffs allege that about June 28, 1936, the defendants entered into a malicious combination and conspiracy to destroy plaintiffs' business in St. Paul by violence and unlawful conduct on the plaintiffs' premises, and continuously since that date have subjected the plaintiffs and their employees to coercion and intimidation by picketing and by signs and placards bearing false, misleading, and fraudulent matter; that the defendants have threatened, intimidated, and annoyed the customers of the plaintiffs. . . .

Plaintiffs further allege that none of the defendants is employed by the plaintiffs; that wages paid by plaintiffs to their employees and working conditions and hours are satisfactory to their employees; that said employees are ready, willing, and anxious to continue in the service of the plaintiffs; that the plaintiffs have not influenced or interfered with its employees in exercising their choice and judgment as to joining labor unions or organizations; and that their employees are paid substantially union wages.

Plaintiffs further allege that there is in existence no labor dispute between the plaintiffs and the defendants. . . .

On this petition the court issued a temporary restraining order and a rule on the defendants to show cause why an injunction *pendente lite* should not be granted.

The defendant unions and a number of the individual defendants entered a special appearance and moved for an order dissolving the temporary restraining order, vacating the rule to show cause, and a denial of plaintiffs' application for an injunction *pendente lite*, on

the ground that the court is without jurisdiction, because the bill of complaint did not allege facts showing compliance with the Norris-LaGuardia Act. . . .

Obviously, there is a great variance in the statements contained in the affidavits as to what occurred in connection with the picketing of the plaintiffs' place of business and as to who was responsible for it. . . .

It has been held that an employer of nonunion labor is not entitled to injunctive relief against a labor union for picketing in an effort to unionize the laborers of the plaintiff where no fraud or violence was used. *Levering & Garrigues Company* v. *Morrin* (C.C.A.), 71 F. (2d) 284; *Cinderella Theater Company* v. *Sign Writers' Local Union* (D.C.), 6 F. Supp. 164. . . .

It is unnecessary to analyze these cases because sufficient facts are admitted, or are evident, to show that a labor dispute as defined by the Norris-LaGuardia Act is involved in this case. On June 15, 1936, the employees Davis and Scringer joined the union. On June 23 the union made a demand for higher wages and shorter hours, and on June 27, they were discharged. On July 1st a demand for reinstatement was made on the plaintiffs. There was a refusal and picketing was commenced. These facts did not appear in the bill of complaint, but they are fully established by the affidavits and statements of counsel. It has been explained that the letter of the union to the plaintiffs demanding higher wages and shorter hours was not known to counsel for plaintiffs at the time the bill of complaint was drafted and filed. Clearly, there is a controversy between the plaintiffs and their employees amounting to a labor dispute which brings this case within the provisions of the Norris-LaGuardia Act and leaves this court without jurisdiction.

The temporary restraining order should be dissolved; the rule to show cause should be vacated; and the application for an injunction *pendente lite* should be denied.

Case Questions

1. What action on the union's part gave rise to plaintiff's complaint?
2. State the rule of law cited in the Levering case.
3. State the facts and decision in the parent case.

NEW NEGRO ALLIANCE v. SANITARY GROCERY CO.

Supreme Court of the United States, 1938. 303 U.S. 552, 58 Sup. Ct. 703

ROBERTS, J. The matter in controversy is whether the case made by the pleadings involves or grows out of a labor dispute within the meaning of section 13 of the Norris-LaGuardia Act. . . .

The following facts alleged in the bill are admitted by the answer. Respondent, a Delaware corporation, operates 255 retail grocery, meat, and vegetable stores, a warehouse and a bakery in the District of Columbia and employs both white and colored persons. April 3, 1936, it opened a new store at 1936 Eleventh Street, N.W., installing personnel having an acquaintance with the trade in the vicinity. Petitioner, The New Negro Alliance, is a corporation composed of colored persons, organized for the mutual improvement of its members and the promotion of civic, educational, benevolent, and charitable enterprises. The individual petitioners are officers of the corporation. The relation of employer and employees does not exist between the respondent and the petitioners or any of them. The petitioners are not engaged in any business competitive with that of the respondent, and the officers, members, or representatives of the Alliance are not engaged in the same business or occupation as the respondent or its employes.

As to other matters of fact, the state of the pleadings may be briefly summarized. The bill asserts: the petitioners have made arbitrary and summary demands upon the respondent that it engage and employ colored persons in managerial and sales positions in the new store and in various other stores; it is essential to the conduct of the business that respondent employ experienced persons in its stores and compliance with the arbitrary demands of defendants would involve the discharge of white employes and their replacement with colored; it is imperative that respondent be free in the selection and control of persons employed by it without interference by the petitioners or others; petitioners have written respondent letters threatening boycott and ruination of its business and notices that by means of announcements, meetings and advertising the petitioners will circulate statements that respondent is unfair to colored people and to the colored race and, contrary to fact, that respondent does not employ colored persons; respondent has not acceded to these demands. The answer admits the respondent has not acceded to the petitioners' demands, but denies the other allegations and states that the Alliance and its agents have requested only that respondent, in the regular course of personnel changes in its retail stores, give

employment to Negroes as clerks, particularly in stores patronized largely by colored people; that the petitioners have not requested the discharge of white employes nor sought action which would involve their discharge. It denies the making of the threats described and alleges the only representations threatened by the Alliance or its authorized agents are true representations that named stores of the respondent do not employ Negroes as sales persons and that the petitioners have threatened no more than the use of lawful and peaceable persuasion of members of the community to withhold patronage from particular stores after the respondent's refusal to acknowledge petitioner's requests that it adopt a policy of employing Negro clerks in such stores in the regular course of personnel changes.

The bill further alleges that the petitioners and their authorized representatives "have unlawfully conspired with each other to picket, patrol, boycott, and ruin the Plaintiff's business in said stores, and particularly in the store located at 1936 Eleventh Street, Northwest" and, "in an effort to fulfill their threats of coercion and intimidation, actually have caused the said store to be picketed or patrolled during hours of business of the plaintiff, by their members, representatives, officers, agents, servants, and employees"; the pickets carrying large placards charging respondent with being unfair to Negroes and reading: "Do your Part! Buy Where You Can Work! No Negroes Employed Here!" for the purpose of intimidating and coercing prospective customers from entering the respondent's store until the respondent accedes to the petitioners' demands. . . .

The trial judge was of the view that the laws relating to labor disputes had no application to the case. He entered a decree enjoining the petitioners and their agents and employes from picketing or patrolling any of the respondent's stores, boycotting or urging others to boycott respondent; restraining them, whether by inducements, threats, intimidation or actual or threatened physical force from hindering any person entering respondent's places of business, from destroying or damaging or threatening to destroy or damage respondent's property and from aiding or abetting others in doing any of the prohibited things. The Court of Appeals thought that the dispute was not a labor dispute within the Norris-LaGuardia Act because it did not involve terms and conditions of employment such as wages, hours, unionization or betterment of working conditions, and that the trial court, therefore, had jurisdiction to issue the injunction. We think the conclusion that the dispute was not a labor dispute within the meaning of the Act, because it did not involve

terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions is erroneous.

Subsection (a) of Sec. 13 provides: "A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; . . . or when the case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined)." Subsection (b) characterizes a person or association as participating or interested in a labor dispute "if relief is sought against him or it and if he or it . . . has a direct or indirect interest therein, . . ." Subsection (c) defines the term "labor dispute" as including "any controversy concerning terms or conditions of employment, . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." These definitions plainly embrace the controversy which gave rise to the instant suit and classify it as one arising out of a dispute defined as a labor dispute. They leave no doubt that The New Negro Alliance and the individual petitioners are, in contemplation of the Act, persons interested in the dispute.

In quoting the clauses of Sec. 13 we have omitted those that deal with disputes between employers and employes and disputes between associations of persons engaged in a particular trade or craft, and employers in the same industry. It is to be noted, however, that the inclusion in the definitions of such disputes, and the persons interested in them, serves to emphasize the fact that the quoted portions were intended to embrace controversies other than those between employers and employes; between labor unions seeking to represent employes and employers; and between persons seeking employment and employers.

The Act does not concern itself with the background or the motives of the dispute. The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation. There is no justification in the apparent purposes or the express terms of the Act for limit-

ing its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment based upon differences of race or color.

The purpose and policy of the Act respecting the jurisdiction of the federal courts is set forth in Secs. 4 and 7. The former deprives those courts of jurisdiction to issue an injunction against, inter alia, giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; against assembling peaceably to act or to organize to act in promotion of interests in a labor dispute; against advising or notifying any person of an intention to do any of the acts specified; against agreeing with other persons to do any of the acts specified. Section 7 deprives the courts of jurisdiction to issue an injunction in any case involving or growing out of a labor dispute, except after hearing sworn testimony in open court in support of the allegations of the complaint, and upon findings of fact to the effect (a) that unlawful acts have been threatened and will be committed unless restrained, or have been committed and will be continued, unless restrained, and then only against the person or persons, association or organization making the threat or permitting the unlawful act or authorizing or ratifying it; (b) that substantial and irreparable injury to complainant's property will follow; (c) that, as to each item of relief granted, greater injury will be inflicted upon the complainant by denial of the relief than will be inflicted on the defendant by granting it; (d) that complainant has no adequate remedy at law, and (e) that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

The legislative history of the Act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that Act. It was intended that peaceful and orderly dissemination of information by those defined as persons interested in a labor dispute concerning "terms and conditions of employment" in an industry or a plant or a place of business should be lawful; that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment and peacefully to persuade others to concur in their views respect-

ing an employer's practices. The District Court erred in not complying with the provisions of the Act.

The decree must be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion. *Reversed.*

Case Questions

1. Is The New Negro Alliance a labor union?
2. How did the Alliance intend to enforce its demands?
3. On what grounds did the lower court issue its injunction?
4. Did the Supreme Court believe that the members of the Alliance were "persons" interested in a labor dispute?
5. An injunction under Section 7 of the Norris-LaGuardia Act may issue if certain jurisdictional requirements are met. List them.
6. What was the decision of the court?

SECTION 16.2. UNPROTECTED LABOR DISPUTES

COLUMBIA RIVER PACKERS ASSOCIATION, INC. v. HINTON

Supreme Court of the United States, 1942. 315 U.S. 143, 62 Sup. Ct. 520

BLACK, J. The petitioner filed a bill for an injunction charging that the respondents attempted to monopolize the fish industry in Oregon, Washington, and Alaska, in violation of the Sherman Act. 26 Stat. 209. The Norris-LaGuardia Act declares that no federal court shall, except under certain specified circumstances, have jurisdiction to issue an injunction in any case which involves or grows out of a "labor dispute." The jurisdictional requirements were not present here. But the District Court held that, since this case did not involve or grow out of a "labor dispute," these requirements were irrelevant; and, finding that the respondents had violated the Sherman Act to the injury of the petitioner, issued the injunction sought. 34 F. Supp. 970. The Circuit Court of Appeals reversed, holding that a "labor dispute" was involved and that the District Court was therefore without jurisdiction to enjoin. 117 F. 2d 310. To review this question, we granted certiorari. 314 U.S. 600.

The petitioner has plants for processing and canning fish in Oregon, Washington, and Alaska. It distributes its products in interstate and foreign commerce. Its supply of fish chiefly depends upon its ability to purchase from independent fishermen. The dispute here arose from a controversy about the terms and conditions under which the respondents would sell fish to the petitioner.

The respondents are the Pacific Coast Fishermen's Union, its officers and members, and two individuals who, like the petitioner, process and sell fish. Although affiliated with the C.I.O., the Union is primarily a fishermen's association, composed of fishermen, who conduct their operations in the Pacific Ocean and navigable streams in Washington and Oregon, and some of their employees. The fishermen own or lease fishing boats, ranging in value from $100 to $15,000, and carry on their business as independent entrepreneurs, uncontrolled by the petitioner or other processors.

The Union acts as a collective bargaining agency in the sale of fish caught by its members. Its constitution and by-laws provide that "Union members shall not deliver catches outside of Union agreements," and in its contracts of sale it requires an agreement by the buyer not to purchase fish from nonmembers of the Union. The Union's demand that the petitioner assent to such an agreement precipitated the present controversy. Upon the petitioner's refusal, the Union induced its members to refrain from selling fish to the petitioner, and since the Union's control of the fish supply is extensive, the petitioner was unable to obtain the fish it needed to carry on its business.

We think that the court below was in error in holding this controversy a "labor dispute" within the meaning of the Norris-LaGuardia Act. That a dispute among businessmen over the terms of a contract for the sale of fish is something different from a "controversy concerning terms or conditions of employment or concerning the association . . . of persons . . . seeking to arrange terms or conditions of employment" calls for no extended discussion. This definition and the stated public policy of the Act—aid to "the individual unorganized worker . . . commonly helpless . . . to obtain acceptable terms and conditions of employment" and protection of the worker "from the interference, restraint, or coercion of employers of labor"—make it clear that the attention of Congress was focused upon disputes affecting the employer-employee relationship, and that the Act was not intended to have application to disputes over the sale of commodities.

We recognize that by the terms of the statute there may be a "labor dispute" where the disputants do not stand in the proximate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a "labor dispute" may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing. Our decisions in *New Negro Alliance* v. *Grocery*

Co., 303 U.S. 552, and *Milk Wagon Drivers' Union* v. *Lake Valley Co.*, 311 U.S. 91, give no support to the respondents' contrary contention, for in both cases the employer-employee relationship was the matrix of the controversy.

The controversy here is altogether between fish sellers and fish buyers. The sellers are not employees of the petitioners or of any other employer, nor do they seek to be. On the contrary, their desire is to continue to operate as independent businessmen, free from such controls as an employer might exercise. That some of the fishermen have a small number of employees of their own, who are also members of the Union, does not alter the situation. For, the dispute here, relating solely to the sale of fish, does not place in controversy the wages or hours, or other terms and conditions of employment, of these employees.

We are asked to consider other contentions pressed by the respondents, which it is said would support the reversal below. But the Circuit Court neither canvassed nor passed upon these contentions. It will be free to do so upon remand.

Reversed.

Case Questions

1. What activity is the petitioner engaged in?
2. Who are the respondents? Are they independent contractors or are they controlled, as employees, by the petitioner?
3. What was the agreement that the union induced buyers to sign?
4. Was there a labor dispute in this situation? Why or why not?

UNION PREMIER FOOD STORES, INC. v. RETAIL FOOD CLERKS AND MANAGERS UNION

Circuit Court of Appeals, Third Circuit, 1938. 98 Fed. (2d) 821

DAVIS, C. J. The question upon which the decision in this case depends is whether or not there was a "labor dispute" to which the plaintiffs were a party.

The plaintiffs are now and for many years have been engaged in buying, selling and shipping merchandise in interstate commerce. . . .

For quite a while during the early part of this year the defendant unions tried to induce the plaintiffs' employees to join their unions, but they, of their own accord and without any influence or interference whatever on the part of the plaintiffs, refused to join. However, the defendants notified plaintiffs that they represented a majority of their employees.

Upon the refusal of plaintiffs' employees to join defendant unions, defendants placed professional, hired pickets (none of whom had in

any way been connected with the plaintiffs) around their stores and warehouses, carrying signs which falsely stated that plaintiffs were unfair to organized labor and that their employees were on strike. The pickets, by surrounding plaintiffs' stores and warehouses, prevented customers from entering them, prevented trucks from loading and unloading, from taking merchandise to and from their stores and warehouses and from receiving merchandise for plaintiffs or from delivering merchandise to them.

The United Retail and Wholesale Employees of America, hereinafter called United, affiliated with the Committee for Industrial Organization (hereinafter referred to as the C.I.O.), observed what was going on and notified plaintiffs that it represented more than a majority of their employees and that under the provisions of the Wagner Act, it was entitled to represent their employees as their sole bargaining agent and that any agreement which they entered into with any other union would be illegal, void and punishable under the provisions of that Act. The situation was that both the affiliates of the American Federation of Labor on the one side and United, affiliated with the C.I.O., on the other side, claimed the right to represent plaintiffs' employees as their sole, collective bargaining agent. Thereupon plaintiffs suggested to both the defendants and United that they try to organize and unionize their employees in any way that they could; that both sides would have entire freedom to distribute literature to them, talk to and persuade them; that at the end of the campaign period of four days in which to organize and unionize them, an election be held to select their bargaining agents and plaintiffs would sign a contract with whichever union obtained a majority of the votes at the election. United agreed, but the defendants, although claiming to represent a majority of the employees, refused and declared that they would not withdraw their picket line unless and until plaintiffs entered into a "union agreement" with them. Plaintiffs thereupon, in order to stop the picketing, which was destroying their business, agreed to enter into a contract with the defendants and began negotiations accordingly. The pickets were thereupon withdrawn.

United vigorously protested against the proposed agreement with the defendants and filed a complaint on April 8, 1938, against plaintiffs with the National Labor Relations Board, hereinafter called the Board, charging them with unfair labor practices as defined in subsections (1) (2) (3) and (5) of section 8 of the Wagner Act, 29 U.S.C.A. Sec. 158 (1-3, 5).

The Board notified the plaintiffs of these charges and asked if they cared to make a statement of their "side of the matter."

A preliminary hearing was held on April 19, 1938, at the office of the Board, 1432 Bankers Securities Building, Philadelphia, Pennsylvania. At that hearing Leo Fee, Esq., a hearer for the Board, suggested that the defendant unions, United and the plaintiffs agree that an election be held to determine which of the unions was entitled to represent plaintiffs' employees for the purpose of collective bargaining which was really the only question at issue. This suggestion was accepted by the plaintiffs and United but was rejected by the defendant unions. Both sides, the defendant unions and United, claiming as members a majority of plaintiffs' employees, asserted the right to be their sole collective bargaining representative. This question had to be determined by the Board and could not be determined, under the facts in this case, by the plaintiffs. . . .

More than fifty per cent of the merchandise handled by plaintiffs is perishable. The continuance of the picket line would have destroyed plaintiffs' business within a few days for they could not, while the picket line was maintained, move even perishable merchandise to or from the railroad stations or their warehouses. Plaintiffs tried hard to settle the contest between the defendant unions and United, but without success. They saw no way to escape the destruction of their business and financial ruin except through injunctive relief. Accordingly they filed in the District Court a bill in which they prayed that defendants be enjoined and restrained until final hearing. . . .

The fundamental question here, as stated above, is whether or not under the facts of this case there was a labor dispute involving the plaintiffs within the meaning of the Wagner Act. Of course there was a "labor dispute" or the Board could not have taken jurisdiction and proceeded to determine the question in issue, but the dispute was and is entirely between the unions. The plaintiffs are not disputing with anyone. . . .

The only controversy in this case concerns the right to represent plaintiffs' employees as collective bargaining agent and that is a real controversy, but it is between the affiliates of the C.I.O. and of the American Federation of Labor. This controversy in money means a gain of about $50,000 in dues to the one which wins, but the plaintiffs are not concerned as to which one that may be. The plaintiffs are standing by while the disputants wage their contest, and are ready, willing and anxious to obey the Board, bargain collectively with the victor and comply with the provisions of the Act when the Board certifies to them the collective bargaining agent.

However sympathetic we may be—on the one hand with labor, to see that its interests are legally and fully protected in respect to proper representation and collective bargaining, or in any other respect affecting its employment; and on the other hand, with capital, to see that it receives a square deal in an honest, fair and impartial administration of the Wagner Act—yet we can not construe the facts of this case to constitute a "labor dispute" involving the plaintiffs when there is no such dispute.

The unions are the "disputants" and as to this dispute they do not now stand in "proximate" or other relation to the plaintiffs or their employees within the meaning of the Wagner Act. Congress meant to help both capital and labor by the passage of this Act and when the Board has taken jurisdiction and is determining the only question in dispute between the unions, it did not intend to destroy the great business of any employer who stands willing and ready to obey any and all provisions of the Act as soon as told by the Board what to do. . . .

Since there was no "labor dispute" in this case in which plaintiffs were involved, the District Court was not bound by the provisions of the Norris-LaGuardia Act, 29 U.S.C.A. Sec. 101 et seq., but had power to grant the restraining order and we think it wisely exercised that power. . . .

The petition for a *supersedeas* is denied pending action by the Board.

Case Questions

1. State the controlling facts of this case.
2. Does your statement indicate the presence of a jurisdictional dispute?
3. How did the National Labor Relations Board propose to settle the conflict?
4. Did the plaintiffs show the probability of irreparable injury if an injunction failed to issue?
5. Did the court agree that there existed a labor dispute?
6. Was it a labor dispute protected from injunctive stoppage by the Anti-Injunction Act?

CONVERSE v. HIGHWAY CONSTRUCTION CO. OF OHIO

Circuit Court of Appeals, Sixth Circuit, 1939. 107 Fed. (2d) 127

HAMILTON, C. J. Debtor-appellee, on May 11, 1936, filed its petition pursuant to the provisions of section 77B of the Bankruptcy Act, 11 U.S.C.A. Sec. 207, which on the same day was approved and it was continued in possession of its property, with authority to operate

its business with all of the powers of a trustee appointed pursuant to the provisions of the Act.

The court, by an *ex parte* order, enjoined and restrained all persons from interfering with the property, assets or effects in the possession of or owned by the debtor and from interfering with it in the conduct of its business "or to interfere in any manner with the exclusive jurisdiction of this Court over the debtor and its property." . . .

The injunctive order here complained of had no relation to a labor dispute at the time of its entry. It was the usual one entered in bankruptcy cases under section 77B for the protection and preservation of the bankruptcy estate pending the proceedings. A review of the facts shows that the contempt charges did not grow out of a labor dispute, as defined under Section 13 of the Act (29 U.S.C.A. Sec. 113, 47 Stat. 73). . . .

The facts found by the Special Master and concurred in by the court show that the Cleveland Truckers Association is a corporation organized under the laws of Ohio and the Pavers Exchange is also an Ohio non-profit corporation, and its members are paving contractors doing business in the County of Cuyahoga, Ohio; that the International Union of Operating Engineers is an unincorporated labor organization and had three locals or subordinate bodies with their headquarters in the City of Cleveland, Ohio, and that the appellant, Frank P. Converse, is its international representative, and appellant, Bernard Hagesfeld, is the vice-president and business agent of the locals. . . . At the time the debtor, who was not a member of the Pavers Exchange or the Truckers' Association, filed its petition for reorganization, it was constructing a highway in Cuyahoga County under contract with the State Highway Commission and shortly thereafter became a sub-contractor of the Howitz Company for the construction of a street in the City of Cleveland. It was also a bidder at a public letting for another section of the highway in Cuyahoga County.

Appellant, Frank P. Converse, instructed debtor's officers that they must not file a bid with the Highway Department on this letting as he intended that another contractor belonging to the Pavers Exchange should have the contract. . . .

After the debtor's petition was filed and approved, appellant Converse insisted it must become a member of the Pavers Exchange, the constitution and by-laws of which provided that upon a majority vote of its members an assessment could be made of two percent of the gross sum each of its members received upon public contracts to be used for the payment of salaries, wages or other expenses to

promote additional campaigns or for lobbying purposes. The record shows, however, this assessment was never made.

Regardless of the instructions of Converse, the debtor bid on the public construction contracts, refused to heed his request to join the Pavers Exchange and declined to employ superintendents, foremen and timekeepers of his union or to require its employees occupying those positions to join the union. Following this, appellants, acting jointly and severally, so interfered with the conduct of the debtor's business by placing pickets in large numbers about its equipment, thus preventing its employees from operating it, that its work was discontinued until the order of citation herein was issued.

A labor dispute, as used in the Norris-LaGuardia Act, comprehends "disputes growing out of labor relations and implies the existence of relation of employer and employee." *United Electric Coal Companies* v. *Rice*, 7 Cir., 80 F. 2d 1. In the case at bar there was no real controversy between the debtor and its employees concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment. Stripped of excuses, appellants were by interference and coercion attempting to compel the debtor to become a member of a contractors' association in Cuyahoga County, Ohio, the primary purpose of which was to destroy competition in the highway construction business in that county. Wages and working conditions were incidental. The refusal of the debtor to accede to the unauthorized and unwarranted demands of appellants can be in no sense termed a labor dispute as defined in section 13 (c) of the Norris-LaGuardia Act. Application of that Act to the case at bar would be a distortion of its purpose not intended by Congress. *Scavenger Service Corporation* v. *Courtney*, 7 Cir., 85 F. 2d 825.

It is well-settled law that whoever unlawfully interferes with property in the possession of a court is guilty of contempt and it is equally settled that whoever unlawfully interferes with officers and agents of the court in the full and complete possession and management of property is guilty of contempt. It is of no consequence whether the interference results in actual violence or only in intimidation or threats. *Ex parte Tyler, Petitioner*, 149 U.S. 164, 191, 13 Sup. Ct. 785, 37 L. Ed. 689.

The evidence in the case is somewhat contradictory but is sufficient to support the lower court's finding that the contemptuous acts of appellant were established clearly and convincingly. . . .

The decree of the District Court is affirmed.

Case Questions

1. What was the Pavers Exchange? What was its purpose?
2. Who was Frank P. Converse? Why did Converse desire the debtor company to join the Paver's Exchange?
3. Did the court find a true labor dispute in existence? Do you agree?

BAKERY SALES DRIVERS LOCAL UNION NO. 33 v. WAGSHAL

Supreme Court of the United States, 1948. 68 Sup. Ct. 630, 333 U.S. 437

FRANKFURTER, J. This is an action brought in a United States District Court to enjoin interference with a business, and the question is whether the complaint subjects that court to the limitations imposed by the Norris-LaGuardia Act upon its equity jurisdiction.

This is the substance of the complaint. Respondent owns a delicatessen store which sells food and serves meals. She obtained bread for the delicatessen store from Hinkle's bakery. Deliveries were made by a driver, an employee of Hinkle and a member of Local Union No. 33, one of the petitioners. The driver delivered the bread at noon, which inconvenienced the respondent, since the checking of deliveries at that hour interfered with the serving of lunches. Respondent "required" the driver to bring the bread at another hour. Shortly thereafter, Hinkle informed the respondent that it would no longer furnish her with bakery products. And so, respondent made arrangements with another bakery, which delivered at a more convenient hour.

Three weeks later, the petitioner Andre, president of the union, visited the delicatessen store and stated that the respondent owed the driver approximately $150 and requested immediate payment. Respondent replied that she had never had dealings with the driver, but had paid Hinkle directly by check, and would pay the bill in due course. Andre replied that the payment would have to be made to the driver in full; furthermore, that if the respondent did not cease carrying a certain non-union article of food he noticed on display, delivery of bread, milk, and other products necessary to the respondent's business would be cut off. Shortly thereafter the respondent sent a check to Hinkle for the balance of her bill. It was returned by the union, with a letter signed by Andre asserting that the payment was owed to its member, the driver, and could not be accepted.

The following day, the bakery which had been serving respondent after Hinkle had stopped doing so, ceased to deal with her, explaining that the union had threatened otherwise "to pull out all its drivers." Through an effective boycott, the union kept the respondent from obtaining bread from other bakeries or retail stores. The delicatessen store was also picketed.

The complaint prayed for temporary and permanent injunctions against the boycott and other interference with respondent's business, the payment of damages, and the usual catch-all relief. Petitioners moved to dismiss the action on the ground that the controversy as set forth in the complaint involved a "labor dispute" under the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. Secs. 101 *et seq.* Respondent filed an "answer to motion to dismiss," attached to which were affidavits, including one of Benjamin Wagshal, manager of the delicatessen store, elaborating the incidents narrated in the complaint. Among other matters set forth, he stated that payment for bread purchased from Hinkle had always been made by check sent directly to Hinkle and was never made to a driver, and that neither the union nor any of its drivers had ever previously questioned this practice; that Andre had asserted by mail and at the delicatessen store that the check which the respondent had sent to Hinkle was $12.22 short of the amount owed; and that the non-union item on sale to which Andre had objected was not a subject of controversy but merely an excuse for Andre's attempt on his visit to the delicatessen store, to enforce his demands concerning the bill, and that in any event its sale had been discontinued.

The District Court granted an injunction *pendente lite*, restraining the petitioners from interfering with respondent's business or preventing sale and delivery of bakery products to the respondent, by boycott and picketing. At the same time, it denied the petitioners' motion to dismiss. Petitioners filed a notice of appeal to the Court of Appeals for the District of Columbia, and respondents moved to dismiss the appeal.

If this case does not involve a "labor dispute" under the Norris-LaGuardia Act, an appeal as of right could not be had in the Court of Appeals for the District of Columbia. 31 Stat. 1189, 1225, as amended, D.C. Code (1940), Sec. 17-101. However, Sec. 10 of the Norris-LaGuardia Act, 47 Stat. 70, 72, 29 U.S.C. Sec. 110, provides for immediate review of an order granting or denying "any temporary injunction in a case involving or growing out of a labor dispute. . . ." The Court of Appeals, one justice dissenting, held that this was not such a case, and dismissed the appeal. 161 F. (2d) 380.

Because of asserted conflict between this decision and prior decisions of this Court on the scope of "labor dispute" within the meaning of the Norris-LaGuardia Act, we granted *certiorari*. 332 U.S. —.

A preliminary claim must be met, that the case has become moot. The short answer to the argument that the Labor Management Relations Act of 1947, P.L. 101, 80th Cong., 1st Sess., Sec. 10 (h), has removed the limitations of the Norris-LaGuardia Act upon the power to issue injunctions against what are known as secondary boycotts, is that the law has been changed only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party. The claim of mootness is also based on an affidavit stating that after dismissal of the appeal by the Court of Appeals, the union lifted its boycott. Since the record does not show that a stay of the injunction was granted pending action in this Court, we must assume that the union's action is merely obedience to the judgment now here for review. We therefore turn to the merits.

The petitioners attach significance to three incidents for their claim that a "labor dispute" is here involved.

1. The controversy over the hour of delivery. The petitioners claim that this was a dispute "concerning terms or conditions of (the driver's) employment," thereby raising a labor dispute, "whether or not the disputants stand in the proximate relation of employer or employee." Sec. 13 (c) of the Norris-LaGuardia Act. But the respondent had nothing to do with the working conditions of Hinkle's employees, individually or collectively. Her only desire was to have the bread come at an hour suitable for her business, and she had no interest in what arrangements Hinkle made to satisfy that desire rather than run the risk of losing her trade. . . . To hold that under such circumstances a failure of two businessmen to come to terms created a labor dispute merely because what one of them sought might have affected the work of a particular employee of the other, would be to turn almost every controversy between sellers and buyers over price, quantity, quality, delivery, payment, credit, or any other business transaction into a "labor dispute." Cf. *Columbia River Packers Assn.* v. *Hinton*, 315 U.S. 143. . . .

2. The controversy over the bill. The petitioners regard both the question whether payment was to be made to the driver rather than to Hinkle, and the disagreement over the disputed sum of $12.22, as a matter concerning the driver's wages, and therefore a condition of his employment. But, on the allegations now here, respondent had nothing to do with the payment of the driver's wages. The

delicatessen store was Hinkle's customer. On the basis of the allegations to be considered, the driver would receive his pay whether or not respondent paid her bill. It is immaterial that the driver may have been the conduit for payment—as drivers who deliver packages normally are. The same is true as to the disputed item of $12.22. The mere fact that it is a labor union representative rather than a bill collector who, with or without the creditor's consent, seeks to obtain payment of an obligation, does not transmute a business controversy into a Norris-LaGuardia "labor dispute." Cf. *Dorchy* v. *Kansas*, 272 U.S. 306, 311.

3. The non-union item on sale in the delicatessen store. Sale by a merchant of non-union commodities is, no doubt, a traditional source of labor dispute within the scope of the Norris-LaGuardia Act. While the complaint does not indicate the history of this matter after Andre's visit, the affidavit attached to the "answer to dismiss" sets forth that it was not a bona fide bone of contention, but a mere pretext, and, further, that the respondent thereafter withdrew the item from sale. While the conclusion of the incident giving rise to a controversy may not necessarily terminate a labor dispute (Cf. *Hunt* v. *Crumboch*, 325 U.S. 821), what is before us leaves no doubt that the subsequent boycott was addressed only to the question of payment of the bill. Petitioners suggest that since no injunction may issue in a case growing out of a labor dispute, except upon oral testimony, determination whether there is a labor dispute should not rest on affidavits. But in this case the affidavits were merely a gloss on the complaint and as such constituted an informal amendment. They serve here as allegations, not proof.

This case was decided on a motion to dismiss. All that has been determined is that, on the basis of the respondent's claims, which the petitioners chose not to controvert, the Norris-LaGuardia Act does not apply. . . .

Affirmed.

Case Questions

1. Why did the union boycott the respondent delicatessen owner?
2. Do the Norris-LaGuardia Act restrictions on the issuance of an injunction still apply when such injunction is sought by a private party?
3. Do they apply when sought by the National Labor Relations Board?
4. What is a moot issue?
5. Explain why each of the three incidents in this case did not involve a protected labor dispute, leaving the injunction against the union in full effect.

SECTION 17. INJUNCTIONS UNDER THE NATIONAL LABOR RELATIONS ACT OF 1947

The National Labor Relations Act of 1947 narrows the beneficial aspects of the Federal Anti-Injunction Act as applied to labor. While private complainants must continue to satisfy the jurisdictional requirements of the Injunction Act precedent to securing a federal court injunction, the public power is under no such disability. The Supreme Court decision in *United States* v. *United Mine Workers of America*,[1] 67 Sup. Ct. 677, decided in 1947, held that the Federal Anti-Injunction Act was inapplicable to an injunction suit entertained in the public interest by the federal government in its sovereign capacity. Congress expressed its accord of this decision by incorporating in the National Labor Relations Act of 1947 Secs. 206, 207, and 208, which give the Attorney General the power to secure an injunction, limited as to time, in the event of threatened or actual national emergency strikes. (See Section 27, "National Emergency Strikes," in Section 27, page 183.)

Congress went even further than this decision in its amendment to the National Labor Relations Act. Sec. 10 (h) lifts the National Labor Relations Board from under the limitations imposed by the Federal Anti-Injunction Act. The Board now has the power to seek temporary restraining orders or injunctions when the following acts are committed:

(1) Employer unfair labor practices detailed in Sec. 8 (a) (1), (2), (3), (4), and (5) are subject to temporary restraining order or injunction as specified in Secs. 10 (e), 10 (f), or 10 (j). The restraining order in Secs. 10 (e) or 10 (f) are secured by the Board after it has entered its order and is seeking enforcement in the federal courts, or the aggrieved party is seeking judicial review of the order. In the interim, the court may issue the restraining order at the behest of the Board. The restraining order of Sec. 10 (j) is issued at the instigation of the Board upon issuance of a complaint, but prior to the entering of its order in disposition of the case.

(2) Union unfair labor practices detailed in Sec. 8 (b) (1), (2), (3), (4), (5), and (6) are subject to temporary restraining order or injunction upon Board application as specified in Secs. 10 (e), 10 (f), 10 (j), or 10 (l). Section 10 (l) applies only to union unfair labor practices committed under Sec. 8 (b) (4) (A), (B), (C), or (D), namely, the unlawful strikes and boycotts specified therein. It is obligatory that the Board apply for a restraining

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[1] *United States* v. *United Mine Workers of America* is reprinted in Section 27 of Chapter 5, page 183.

order as to 8 (b) (4) violations if its investigation reveals the probable truth of the charge made.

(3) Jurisdictional disputes under Sec. 8 (b) (4) (D) are amenable to injunction under Sec. 10 (l) as indicated above. In addition, the Board is empowered by Sec. 10 (k) to determine the dispute, employing the injunction process only as long as the dispute exists.

In the *Le Baron* decision, reprinted below, the court is faced with an application of the Board, pending the Board's decision, for a restraining order under Sec. 10 (l) because of an ostensible violation of Sec. 8 (b) (4) (A) by a labor organization. The union is resisting issuance of the injunction on the ground that Secs. 8 (b) (4) (A) and 10 (l) are unconstitutional and that peaceful picketing cannot be restrained. The answer of the court is had in its decision.

The *Amazon* case, reprinted on page 136, decides the question of whether the National Labor Relations Board has exclusive jurisdiction to secure injunctions to restrain unfair labor practices under the National Labor Relations Act or whether private persons may secure injunctions thereunder.

It is probable that the 1949 Congress will either narrow or extinguish the power of the National Labor Relations Board to seek injunctions against union unfair labor practices. If this is done, it will restore to private labor disputes the unmodified applicability of Secs. 16, 16.1 and 16.2 of this volume, as the stringent requirements of the Federal Anti-Injunction Act will have to be met by the employer precedent to his securing an injunction.

The writer believes it unlikely that the Federal Government's power to secure injunctions in national emergency labor disputes will be significantly impaired by any forthcoming legislation.

LEBARON v. PRINTING SPECIALTIES AND PAPER CONVERTERS UNION

United States District Court, Southern District of California, 1948.
75 Fed. Supp. 678

MCCORMICK, D. J. Sealright Pacific Ltd., manufacturers of paper milk bottle caps and closures and sanitary food containers (hereinafter called Sealright), under the authority of Section 10 (b) of the Labor Management Relations Act, 1947 (hereinafter referred to as the Act), filed with the National Labor Relations Board (hereinafter called the Board), a charge that Printing Specialties and Paper Con-

verters Union, Local 388, A.F.L. (hereinafter called the Union), had engaged in "unfair labor practices" within the meaning of Section 8 (b), subsection 4 (A) of the Act, affecting commerce within the terms of Section 2 (6) and (7) of the Act. . . .

In line with the expressed Congressional purpose and policy of the amendment to the National Labor Relations Act as legislatively declared in Section 1 (b) of the Act and conformable to the rewritten findings stated in the Act (Title 29, Section 151, U.S.C.A.), and as required by the terms of Section 10 (l) thereof, the accredited Regional Director, upon his supplementary factual ascertainment on behalf of the Board, petitions this Court for appropriate injunctive relief against the Union and its above named officer pending final adjudication of the charge of Sealright against the Union.

In his verified petition the investigating Regional Director specifies as the basis and reason for his belief that injunctive process of this Court is necessary as an aid and cooperative instrumentality to the Board during its consideration, and until its decision in the matter of Sealright's charge of unfair labor practices by the Union, the following factual situation concomitant to the dispute between Sealright and the Union:

"(a) Sealright Pacific Ltd. is a corporation organized under and existing by virtue of the laws of the State of California. Its principal office and place of business is located at 1577 Rio Vista Avenue, Los Angeles, California, where it is engaged in the manufacture, sale and distribution of paper food containers and milk bottle caps. In the course and conduct of its business, it purchases and causes to be transported to its Los Angeles plant from points outside the State of California, paper, steel, shipping cases, etc., all valued at an excess of $1,000,000.00 annually. Its finished products comprising milk bottle caps, milk bottle closures and food containers, are valued at an excess of $1,000,000.00 annually and more than 50 per cent of such products are shipped outside the State of California.

(b) Los Angeles Seattle Motor Express, Inc. (hereinafter called L.A. Seattle), 1147 Staunton Avenue, Los Angeles, is a common carrier operating motor trucks between Los Angeles and points in the Pacific Northwest. It has carried Sealright's products for a number of years.

(c) On November 13, 1947, respondent Walter J. Turner (vice-president) of Local 388, advised L.A. Seattle that if it continued to handle Sealright's products, L.A. Seattle would be picketed by Local 388.

(d) On about November 14, 1947, representatives of Local 388 followed two trucks loaded with Sealright's products to the L.A. Seattle terminal where by forming a picket line around the two trucks containing the products of Sealright and telling the employees that the trucks contained "hot cargo" and not to "handle it," they induced and encouraged the employees of L.A. Seattle, by orders, force, threats, or promises of benefits, not to transport or handle the goods of Sealright. After November 14, 1947, as a result of the above conduct of Local 388 the employees of L.A. Seattle refused to transport or handle the goods of Sealright. Local 388 engaged in the foregoing conduct to force or require L.A. Seattle to cease handling or transporting the products of Sealright.

(e) West Coast Terminals Co. (hereinafter called West Coast), is a public wharfinger with its docks and wharves located on Pier A, Berths 2 and 3, Terminal Island, Long Beach (2), California. On or prior to November 17, 1947, West Coast received from Panama Pacific Lines Vessel S. S. Green Bay Victory, a consignment of rolls of paper destined for Sealright's Los Angeles plant.

(f) On November 17, 1947, while employees of West Coast were engaged in loading the rolls of paper onto freight cars consigned to Sealright in Los Angeles, a group of pickets representing Local 388 appeared at the docks of West Coast and, by forming a picket line around the freight cars being loaded with the rolls of paper for Sealright, induced and encouraged the employees of West Coast, by orders, force, threats, or promises of benefits, not to handle or work on the paper consigned to Sealright. Since November 17, 1947, as a result of the above conduct of Local 388 and continued picketing by Local 388 of the docks of West Coast, the employees of West Coast have refused to handle or work on the goods consigned to Sealright. Local 388 engaged in the foregoing conduct in order to force or require West Coast to cease handling or transporting the products of Sealright. . . .

Upon motion of George H. O'Brien, Esq., one of the accredited attorneys of the Board, an order to show cause has been issued directed to the Union and to Mr. Walter J. Turner, an officer thereof, requiring the showing of cause herein by them why, pending final adjudication by the Board with respect to the matter of the accused unfair labor practices, they should not be enjoined and restrained from continuing such activities.

Both respondents duly appeared on the return day of the order to show cause and through their attorneys, Messrs. Gilbert, Todd and

Shapiro, they interposed a motion to dismiss the Board's petition for injunction upon jurisdictional grounds that the invoked sections 8 (b), (4), (A) and 10 (l) are violative of Amendments I, V and XIII of the Constitution of the United States. . . .

Therefore it seems clear that the specific injunctive processes expressly conferred upon this Court by Section 10 (l) of the Act become operable upon the credible petition of the administrative agency as provided in the Act, unless some constitutional limitation supervenes to forestall the restrictive restraint which the Act provides for the situation before us in this matter. . . .

Before turning to the very delicate constitutional issue that is involved under the established concrete factual situation before the Court, attention should be given to the significant and broad change in legislative policy that is definitely declared and clearly expressed by Congress relative to the use of injunctive processes available in the District Court to ameliorate the public interests in the Federal Area of labor disputes. Not only is it stated in Subsection (h) of Section 10 of the [Labor Management Relations] Act that the equitable jurisdiction of Federal courts is no longer to be circumscribed by limitations specified in the Act approved March 23, 1932, 29 U.S.C.A., Section 101 et seq. (Norris-LaGuardia Act), but Subsection (l) of Section 10 further amplifies the National policy of utilizing appropriate judicial injunctive methods in the specific activities that are made unlawful in Section 8 (b), (4), (A) of the Act as incorporated in the new restraint processes now applicable in labor disputes pursuant to the limitations in Section 10 (l) of Labor Management Relations Act, 1947, this Court should grant an appropriate injunction auxiliary to the proceedings in the Board and until the labor dispute pending before the Board is finally adjudicated by the Board.

The substantive provisions of the Act that are here challenged as constitutionally assailable read thus:

"It shall be unfair labor practice for a labor organization or its agents—to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise

dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person." Sec. 8(b)(4).

We find no support whatever, under the record before us or within the provisions of the Act that are involved in this matter, for a finding or conclusion that the Thirteenth Amendment has been transgressed.

We are not here considering a criminal statute or parts of an act which relate to outlawed activities characterized as crimes.

The measure involved pertains solely to activities classified in the law as torts, or in other words, wrongs of a civil nature, and the inherent and statutory rights of employees, as such are preserved by saving provisions in the Act, which read thus:

"Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

The provisions of the Act under scrutiny are products of legislation that clearly under the Constitution is within the power of Congress to enact. *Labor Board* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1, 46. They are regulatory statutes directed at the control of acts and practices of labor organizations and their agents in the field of interstate commerce that to Congress seemed contrary to the public interest and inimical to general welfare.

The words employed by the legislative body to reach the evil contemplated are clear and precise. It is only coercive and compulsive conduct that is proscribed, and even measured by the stricter rule which applies to criminal statutes, Section 8 (b), (4), (A), is not unconstitutionally vague or indefinite. See *United States* v. *Petrillo*, 332 U.S. 1.

But it is contended that the provisions of the Act upon which the Regional Director, on behalf of the Board, seeks injunctive relief from this Court infringe the freedom of speech and assembly guaranteed to all by the due process clause of the Fifth Amendment and by the First Amendment to the Constitution. We think such contention untenable in the situation before us. . . .

We think it indisputable that if the factual situation disclosed by the Regional Director is considered realistically it will be manifest that an object of the picket line at "L.A. Seattle Terminal" and at the harbor in Long Beach, California, was coercion, and the type of coercion that is attended with serious repercussions and dire consequences upon the interests of the two strangers to the labor dispute between Sealright and the Union. Cf. *Bakery Drivers Local* v. *Wohl*, 315 U.S. 769.

The picketing activities, which prompted the representatives of the Board to petition the Court for injunctive relief, can in truth hardly be said to have been motivated by "dissemination of information concerning the facts of a labor dispute." A candid and forthright appraisal of the picketing activities in question classifies them as a form of forcible technique that has been held to be subject to restrictive regulation by the State in the public interest on any reasonable basis. *Carpenters Union* v. *Ritter's Cafe*, 315 U.S. 722. And in the exclusive Federal field of protecting the interests of the public in interstate commerce against forcible obstruction to the free flow of such commerce, Congress has, we think, in Section 8 (b), (4), (A), kept within the permissive restrictions on free speech and assembly that have been approved by the Supreme Court in comparable legislation. See *Thornhill* v. *Alabama*, 310 U.S. 88 at 105.

The observation of Mr. Justice Douglas in the concurring opinion in *Bakery Drivers Local* v. *Wohl*, *supra*, delineates the evils of "the secondary boycott" which has met disapproval by the Supreme Court in *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443. The learned Justice in the cited recent labor case aptly stated:

"Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."

We find that the provisions of the Labor Management Relations Act, of 1947, here under attack are valid Congressional legislation and are not unconstitutional.

The respondents' motion to dismiss the petition for temporary injunction is denied *in toto*. . . .

Case Questions

1. Describe the secondary picketing activity engaged in by Local 388. Against whom was it directed? Is this an unfair practice under Sec. 8 (b) (4)?

2. Did the peaceful character of the picketing remove it from the injunctive powers granted the N.L.R.B. in Section 10 (l) of the Labor Management Relations Act?

3. What is "hot cargo"?

AMAZON COTTON MILL CO. v. TEXTILE WORKERS UNION OF AMERICA

Circuit Court of Appeals, Fourth Circuit, 1948. 167 Fed. (2d) 183

PARKER, C. J. This is an appeal in a suit instituted by a labor union against an employer in which it was alleged that the latter had been guilty of an unfair labor practice in refusing to bargain with the union as the representative of the employees, that a strike of the employees had resulted and that they had sustained damage from loss of employment due to the strike. The relief asked was an injunction requiring the employer to bargain with the union and an award of damages. The employer moved to dismiss the suit on the ground that the court was without jurisdiction to grant relief and that, in any event, no claim was stated upon which relief would be justified. The National Labor Relations Board, before which the union had filed a complaint charging the employer with unfair labor practices in refusing to bargain, was allowed to intervene and file a motion to dismiss on the ground that under the law it had exclusive jurisdiction of the matters in controversy. The motions to dismiss were denied and an interlocutory injunction was issued requiring the employer to bargain with the union. Both the employer and the Board have appealed to this Court.

The facts may be briefly stated. The union, the Textile Workers Union of America, was certified by the Board in 1943 as the bargaining representative of the employees of the Amazon Cotton Mill Company of Thomasville, North Carolina, and negotiated a wage agreement with that company, which was renewed from time to time and extended until February 28, 1947. In the month preceding the expiration of this agreement, negotiations were conducted looking to its extension and modification; but the union contends that these were not conducted in good faith by the employer. A strike was called on March 3rd and the mill was closed down. Negotiations looking to a settlement of the strike were without result and a complaint charging the employer with unfair labor practices was filed with the

Board in March 1947 and is still pending before it. In September 1947 the employer refused to conduct further negotiations with the union, contending that it no longer represented a majority of the employees. In October it began to operate its mill on a part time basis and secured an injunction from a state court restraining the local union of plaintiff and a large number of employees represented by it from interfering with operations. The union thereupon instituted this suit; and the District Judge, finding that the employer had refused to bargain in good faith, entered the orders from which appeal is taken.

We think it clear that the District Court had no jurisdiction of the case. Unless the Labor Management Relations Act of 1947 has had the effect of clothing each of the more than two hundred District Judges of the country with the powers over unfair labor practices vested in the National Labor Relations Board, and in addition the effect of virtually repealing the provisions of the Norris-LaGuardia Act limiting the use of injunctions in labor cases, the injunction granted by the lower court cannot be sustained. We do not think that the Labor Management Relations Act was intended to have or does have that effect.

Prior to the passage of the Norris-LaGuardia Act of March 23, 1932, 47 Stat. 70, 29 U.S.C.A. 101 *et seq.*, the use of injunctions in labor disputes had been the subject of much bitter controversy; and the purpose and effect of that legislation was to deprive the Federal courts of jurisdiction to interfere by injunction with labor disputes except in a very limited class of cases. The jurisdiction of the courts over labor disputes was still further limited by the National Labor Relations Act of July 5, 1935, 49 Stat. 449, 29 U.S.C.A. 151 *et seq.*, which guaranteed the right of collective bargaining to employees engaged in industry affecting interstate commerce, defined unfair labor practices on the part of employers and set up the National Labor Relations Board to supervise collective bargaining and protect employees in the exercise of rights guaranteed by the Act from unfair labor practices on the part of their employers. It is perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of that Act was "to establish a single paramount administrative or quasi-judicial authority in connection with the development of Federal American law regarding collective bargaining"; that the only rights made enforceable by the Act were those determined by the National Labor Relations Board to exist under the facts of each case; and that the

Federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined. . . .

There is nothing in either the text or the history of the Labor Management Relations Act to indicate any departure from this salutary approach to the matter of conferring jurisdiction on the courts in labor controversies. Title I makes amendments to the National Labor Relations Act, some of which define unfair labor practices on the part of labor organizations; but there is no indication of any intention to change the method by which unfair labor practices were dealt with under the Act or to vest the District Courts with jurisdiction as to these matters, except to the limited extent that such jurisdiction was expressly conferred. Under Section 10 (j) of the Act, the District Courts are expressly given jurisdiction to grant injunction upon application of the Board after the latter has issued a complaint charging an unfair labor practice; under Section 10 (l) they are given jurisdiction to issue injunctions upon application of an officer or regional attorney of the Board in certain cases involving jurisdictional strikes and secondary boycotts; under Section 208 they are authorized to issue injunctions notwithstanding the provisions of the Norris-LaGuardia Act in certain cases involving strikes and lockouts affecting interstate commerce and imperiling the national health and safety, but only upon petition of the Attorney General following a report of a board of inquiry and direction by the President; and under Section 303 they are given jurisdiction of suits for damages arising out of jurisdictional strikes and boycotts. In no other cases does the Act confer jurisdiction upon the District Courts to deal with unfair labor practices; and it is hardly reasonable to suppose that Congress intended the District Courts to have general power to grant injunctive relief, at the suit of either unions or employers, with respect to any unfair labor practice that might exist, while limiting with such meticulous care the cases in which those courts might grant injunctive relief upon petition of the Labor Board or the Attorney General acting under the direction of the President. *Expressio unius est exclusio alterius.*[2]

It is argued that, since Section 10 (a) of the National Labor Relations Act provided that the power of the Board to prevent persons from engaging in unfair labor practices should be exclusive, and since this provision was omitted from Section 10 (a) of the Labor Management Relations Act, it was intended that persons aggrieved

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[2] Expression of the one is the exclusion of the other.

by unfair labor practices should have the option to appeal either to the Board or to the courts for protection. As pointed out above, however, a remedy in the courts not expressly given is not to be inferred; and especially is this true where Congress has worked out elaborate administrative machinery for dealing with the whole field of labor relationships, a matter requiring specialized skill and experience, and has provided for the handling of unfair labor practices by an administrative agency equipped for the task. The change in the statute upon which reliance is placed was clearly intended, not to vest the courts with general jurisdiction over unfair labor practices, but to recognize the jurisdiction vested in the courts by Section 10, subsections (j) and (l), Section 208, and Section 303, to which we have heretofore made reference, as well as the power in the Board, conferred by the proviso in Section 10 (a) to cede jurisdiction to state agencies in certain cases. This is not only the clear meaning of the statute when its language is considered in the light of existing law, but it is also the meaning given it by the Conference Committee of the House and Senate (see H.R. No. 510, June 3, 1947). . . .

Contention is made that jurisdiction is vested in the District Court by Section 301 (b) of the Act providing that a labor organization may sue or be sued in the courts of the United States "as an entity and in behalf of the employees whom it represents"; but the purpose and effect of this provision was manifestly to make clear the capacity of labor organizations to come or be brought into court as parties [cf. *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 4 Cir., 148 F. (2d) 403], not to enlarge the class of cases of which the District Courts were given jurisdiction. The difference between such a provision and one conferring jurisdiction is well illustrated by comparison of 301 (b) of the Act with 301 (a), the latter of which confers on the District Courts jurisdiction of suits between employers and labor organizations for violation of contracts. Another provision conferring jurisdiction on the District Courts is Section 303 (b) of the Act, which authorizes them to entertain suits for damages on account of the strikes and boycotts made unlawful by Section 303 (a). There would, of course, have been no reason for the enactment of either Section 301 (a) or Section 303 (b), if the effect of Section 301 (b) was to vest in the Federal courts general jurisdiction of suits by or against labor unions. . . .

A consideration of the effect and consequences of an interpretation of the Act which would give District Courts coordinate jurisdiction with the Board to redress unfair labor practices, as well as

a consideration of its reason and spirit, and the history of its enactment, therefore, support what we regard as the reasonable interpretation of its language when considered alone, viz., that it was not intended to vest and does not vest jurisdiction in the District Courts in cases of this sort.

We do not mean to say that unusual cases may not arise where courts of equity could be called upon to protect the rights of parties created by the Act. . . . What we have here, however, is not an unusual case calling for the exercise of extraordinary jurisdiction, but an ordinary unfair labor practice case involving alleged refusal to bargain. For such a case, the plaintiff has been provided an adequate administrative remedy before the Labor Board; and certainly the extraordinary powers of a court of equity may not be invoked until this administrative remedy has been exhausted. . . .

For the same reason that plaintiff may not maintain the suit for injunction to restrain the unfair labor practice, it may not maintain the action to recover damages on account thereof. Recompense of lost wages on account of an unfair labor practice is a matter for the Labor Board. . . . The decree appealed from will accordingly be reversed with direction to the lower court that the case be dismissed.

Case Questions

1. Why did the union seek a mandatory injunction?
2. State briefly the facts of the case.
3. Do the federal courts have any jurisdictional rights under the Labor Management Relations Act? Detail them.
4. Do the federal courts have the general right to issue injunctions as to unfair labor practices without precedent Board application therefor? Why is this so?
5. The union cites Sec. 301 (b) of the Act as vesting jurisdiction in the federal courts. Answer this argument.
6. Does the court permit the union to sue for money damages occasioned by the strike?

CHAPTER 5

LAWFUL AND UNLAWFUL STRIKE ACTIVITY

SECTION 18. STRIKES IN GENERAL

Types of Strikes. The strike is perhaps the most potent weapon possessed by labor to force its demands upon an employer. Its usual concomitant is the establishment of a picket line. Sometimes the boycott is simultaneously employed against an especially resistant employer. However, we may have a strike without either picket or boycott activity by the workers involved. Consideration of the latter two weapons is reserved for the next two chapters.

The strike may generally be defined as a temporary and concerted withdrawal of workers from an employer's service to enforce their demands, the workers retaining a contingent interest in their jobs. The degree to which workers retain a vested or contingent interest in the positions they leave will depend largely upon the purpose of the strike, the means employed to effectuate the strike, and the success of the employer in securing *effective* replacements. Interpretations of the courts under the National Labor Relations Act have clarified, to some extent at least, the status of workers engaging in the various forms of strikes. The determination of a striker's status becomes important with respect to deciding questions of reinstatement of workers, awarding of back pay, and granting of permission to the men to participate in representation elections. These issues are introduced by the *Firth* case, reprinted in Section 20 on page 153.

While the general definition has been given, it would be well to distinguish the several forms of strike activity. The *primary* strike involves a withdrawal of a single employer's workers who seek a direct and immediate benefit to themselves. The *secondary* strike involves a withdrawal of *another* employer's workers who thereby exert pressure on their own employer in the expectation that he will, in turn, bring pressure upon an employer with whom the union has a dispute. Thus the unionized workers of X Company withdraw to force X to bring pressure upon the Y Company, with whom the union has an unsettled dispute. The *secondary* strike has sympathetic elements, but is distinguishable from a *sympathetic* strike in the following particulars. To fall in the secondary rather than the sympathetic category, the strike in question must be conducted for the direct benefit of the union involved. If the strike is for the direct

benefit of some *other* union, and if the strikers secure only an *incidental* benefit therefrom, then we have a sympathetic or sympathy strike. The secondary and sympathetic strikes involve boycott elements that bring them into serious conflict with Section 8(b) of the National Labor Relations Act of 1947, at least in those cases lacking facts that would enable application of the unity of interest doctrine, a detailed treatment of which is made in Sec. 49 of Chapter 7.

The *general* strike involves work cessation by most, if not all, workers in a particular industry, such as coal or steel; or most, if not all, workers in a particular city. In its widest and most serious application, the workers of an entire nation are involved. European countries have seen more rashes of national general strikes than have we in America. That this has been true may be traced to the broad economic and political character which this strike form assumes. Strongly entrenched and unified labor combinations find in the general strike an efficacious tool for the assertion of strength in protest against adverse industry-wide conditions of employment or antilabor legislation. This trepidation of the general strike was manifested by Congress by its inclusion in the amended National Labor Relations Act of 1947, Sections 206-210 on National Emergency Strikes. With American labor combinations having assumed mammoth proportions, the usage of the general strike weapon is made more imminent.

The *sitdown* strike covers a cessation of work by laborers without the incident of withdrawal from the plant. The men remain at their work stations, but their machines and tools remain idle. The *slowdown* is a variant of the sitdown, there being no withdrawal from the work station; however, the cessation of work is only partial. The slowdown is an aggravated form of soldiering, and brings pressure by embarrassing production schedules in mass-production industries particularly. The *partial* strike is likewise explicable in the light of its name. Only part of the workers leave their work stations. This technique has been employed successfully in several large-scale merchandising firms. The union selects a vulnerable department or departments and strikes only in those areas. For example, to embarrass a wholesaling organization, the union need call out only the receiving and shipping department workers. No merchandise can enter and none can leave, especially if outside unions give sympathetic aid by respecting picket lines established at the receiving and shipping docks. The bulk of union members continue working and draw their pay, that is, if the employer does not lock them out. The union strike

fund is indefinitely full for the maintenance of the partial strikers. The employer finds his warehousing floors glutted, his customers disgruntled and canceling orders, his payroll expense continuing, and his revenues dwindling to a trickle. Thus the partial strike is directed at the throat of the bottle in the interest of conservation of union and worker resources.

The *wildcat* strike is one for which the parent union disclaims responsibility. Presumably, or in fact, it is unauthorized and generally is in breach of a collective agreement. Forces lying dormant, in a seething state, may spontaneously flare into flame in retaliation against dilatory action by management with respect to the handling of unredressed employee grievances, or for other reasons not directly in issue. The union, for example, may not effectively represent the desires of the workmen, in which case they fully or partially strike on their own volition to force redress of grievances.

The National Labor Relations Board lumps all the above strike variants into three broad groupings. The first may be termed the *economic* strike; the second, the *employer unfair labor practice* strike; and the third, the *union unfair labor practice* strike. The economic strike is one concerned with material or nonmaterial demands concerning improvement as to hours of work, wages, and working conditions. The employer unfair labor practice strike involves retaliation against unfair employer practices, more fully developed in Chapter 9. These unfair practices include the denial to workers of the right to bargain collectively, discrimination against union members, and other proscribed interferences with legitimate collective activity. The third type of strike that has been recognized by the Board under the National Labor Relations Act is the union unfair labor practice strike. This would encompass those strikes that are made illegitimate by Sec. 8 (b) (4) of the Act.

The reader should bear in mind, as to strike, picket, and boycott activity, two questions: Is the *purpose* of the activity legitimate? If lawful, are the *means* used to effectuate that purpose or end permitted? A concurrently affirmative answer is required to absolve the activity from legal restraint or prohibition. A final word. Strikes are not lightly entered into by labor combinations as a means of achieving a desired result. The impact of wage loss upon constituents may well prove disastrous to even a strong union in the event of an ill-advised and prolonged work stoppage. So too with the employer desirous of continuing in business. The result is a temperate employment of the strike or lockout weapons. Both parties will appraise

carefully their forces before entering this type of affray. Other means of dispute settlement are generally found. Only where power is evenly balanced on both sides and the issues sufficiently serious will a strike ensue. Otherwise one or the other party will accede to, or recede from, demands that are made.

Work Stoppages During 1947.[1] Nineteen forty-seven was a year of sizable strike activity in a period of high employment in which industrial production exceeded all peace-time records. Strike idleness in 1947 was far less than in the record year of 1946, and also less than in 1945, but it was greater than in any of the other years since 1919. Approximately 3,700 stoppages occurred in 1947 in which 2,170,000 workers were involved. Idleness in establishments directly affected by these disputes amounted to 34,600,000 man-days—about .4 of 1 per cent of the estimated worktime in the nation's industry.

The average strike in 1947 continued from 3 to 4 weeks. About half the year's stoppages involved less than 100 workers each. By contrast, 15 stoppages, involving 10,000 or more workers each, included 1,030,000 workers or 47 per cent of the total participants in all stoppages. Idleness resulting from these large disputes amounted to over 17,000,000 man-days, or about half the year's total.

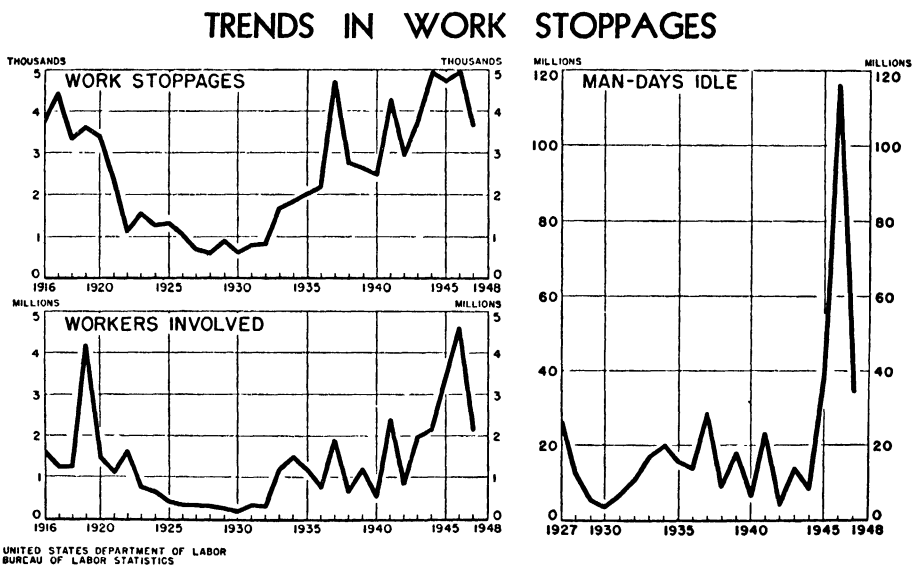
The general impact of work stoppages on production in 1947 was much less severe than in 1946. In only three cases—telephone, coal mining, and shipbuilding—were large portions of major industries affected. In the telephone stoppage, partial service was maintained in most areas by supervisory workers and dial systems; the coal stoppage was too brief to cause widespread shortages; and the prolonged shipbuilding strike came at a time when the industry was not pressed for production.

Wage disputes were the most important single cause of strikes during the year, as workers sought to restore their purchasing power, which had been diminished by rising prices. Problems of union recognition or representation for collective bargaining purposes were second only to wage issues in importance. At times, both wage and union security issues were intertwined with organized labor's expressed dissatisfaction with proposed or enacted Federal and state legislation regulating or prohibiting certain trade-union practices.

The second postwar year (1947) was in many respects not unlike the second year (1920) following World War I. In both years, labor-

[1] By Don Q. Crowther and Ann J. Herlihy of the Bureau of Labor Statistics. Analysis taken from *Monthly Labor Review*, May 1948, pp. 479-487.

management relations became less turbulent, with fewer stoppages and a drop in the number of large strikes. In each postwar period, workers were concerned with rising prices and the future security and stability of their unions. After World War I, however, collective bargaining centered largely in a narrow group of industries such as mining, construction, printing, transportation, and some branches of textiles and apparel, with a peak union membership of approximately 5,000,000. Labor-management relations in 1947, on the other hand, rested on a much broader base, with written agreements prevailing to a substantial degree throughout most of the American economy and a trade-union membership estimated at slightly over 15,000,000.



Trend of Stoppages in 1947. Legislatures in forty-five states met in the early months of 1947. Many of these considered measures that unions regarded as hostile. As a result "protest stoppages" occurred from time to time. The largest was a 1-day suspension of work on April 21 by approximately 100,000 A. F. of L. and C.I.O. members against proposed anti-closed-shop legislation pending in the Iowa Legislature.

On June 23, the Congress overrode the President's veto and passed the Labor Management Relations Act of 1947. Enactment of this much-discussed legislation touched off widespread protest walk-outs of bituminous coal miners in various sections of the country. Vacations for the coal miners were scheduled to begin June 27 and continue through July 7, but over 200,000 miners were idle a few

days before, and a greater number remained away from the pits after the vacation period. Meanwhile, on June 30, the Federal Government returned to private operation the country's coal mines, which had been seized in May, 1946. At the end of the vacation period on July 7, contracts between the United Mine Workers of America (A. F. of L.) and the private operators had not been finally agreed upon. Practically the entire industry and some 340,000 miners were idle for a few additional days until contracts were signed and ratified. The new agreements provided for an increase in the industry's contribution to the union welfare fund from 5 to 10 cents on each ton of coal produced, a daily wage increase of $1.20, and a reduction in the portal-to-portal workday from 9 hours to 8 hours. An important inclusion in the contract was a clause providing that miners would furnish their services "during such time as such persons are willing and able to work." This provision was secured by the union as a possible safeguard against legal actions that might arise under the new Labor Management Relations Act penalizing unauthorized work stoppages.

The first significant stoppage over the application of some important provisions of the Labor Management Relations Act occurred in November. This controversy, involving over 1,500 printers employed by six Chicago newspapers, stemmed from a policy adopted by the International Typographical Union (A. F. of L.) at its August, 1947, convention. In part, this policy was:

> While there should not be, and will not be, any attempt on the part of the international or subordinate unions to violate any valid provisions of this law, or of any law, Federal or state, yet there should be, and will be, earnest endeavors on the part of these unions to avoid any condition that will result in their being penalized by these laws and to avoid the sacrifice of rights and prerogatives which may be lost by the signing of contracts as heretofore.

Under this union policy, the Chicago printers (as well as those in some ten to fifteen other cities) sought through strike action to continue their traditional practice of maintaining "uniform shop conditions of a basic character and proper apprentice training regulations." These objectives, the I.T.U. stated, were to be preserved through the posting of "conditions of employment" in printing establishments for the guidance of members. The employers and their printing-trades associations, on the other hand, insisted that application of the I.T.U.'s policy, particularly regarding retention of the closed shop, was contrary to the provisions of the Labor Management Relations Act and could not be accepted. At the year's end, the Chi-

cago stoppage was still in effect and various legal aspects of the entire controversy were being considered by the National Labor Relations Board and the courts.

Except for the issues raised by the I.T.U. in the printing industry, stoppages in the late months of 1947 were, for the most part, not unlike those of any normal period. In terms of new strikes, activity had begun to wane by midsummer, with month-by-month declines to the year's low point in December. During this period, most unions followed a policy of "watchful waiting" to determine the effect of the Labor Management Relations Act upon their activities and sought to avoid legal entanglements that might result from ill-advised strike action. Some unions, either prior to the enactment of the law in June or before August 22, when the ban on negotiation of closed-shop provisions became completely effective, had extended or renegotiated union security clauses in their contracts.

Various reasons were ascribed for the decline in strike activity in the late months of 1947. Some interpreted the decline as a vindication of the principles incorporated in the new law; others believed that the real test of the law's application would come upon the expiration of the large number of significant labor-management contracts that had been negotiated prior to the enactment of the law. Records of the Bureau of Labor Statistics over a 20-year period show that strike activity has declined in the late months of nearly every year to a low point in December. Only once (1940) has the number of work stoppages beginning in the last four months exceeded the average monthly rate for the year. The drop in the closing months of 1947, however, was somewhat greater than usual. Between August 22 (the fully effective date of the Labor Management Relations Act) and December 31, a total of 781 new stoppages occurred, involving approximately 250,000 workers and resulting in 5,900,000 man-days of idleness.

Major Issues Involved. Wages were important issues in 61 per cent of the stoppages in 1947 as workers sought higher pay to offset rapidly rising prices. These stoppages involved over 75 per cent of all workers and accounted for nearly 88 per cent of the year's total idleness [see table on page 148].

Some stoppages focused attention upon a section in the Labor Management Relations Act that provided that unions could be sued in the Federal courts for damages resulting from work stoppages in violation of their contracts. Protection against such suits was an important issue in the large coal stoppage and also in a July strike

Major issues involved in work stoppages in 1947

Major issues	Work stoppages beginning in 1947				Man-days idle during 1947 (all stoppages)	
	Number	Percent of total	Workers involved		Number	Percent of total
			Number	Percent of total		
All issues	3,693	100.0	2,170,000	100 0	34,600,000	100.0
Wages and hours	1,707	46.3	805,000	37.2	15,200,000	43.9
Wage increase	1,295	35.2	605,000	27.9	12,600,000	36.6
Wage decrease	19	.5	5,540	.3	45,100	.1
Wage increase, hour decrease	59	1.6	35,600	1 6	573,000	1.7
Other	334	9.0	159,000	7.4	1,900,000	5.5
Union organization, wages, and hours	559	15 1	840,000	38.8	15,200,000	43.9
Recognition, wages and/or hours	288	7.8	35,600	1.6	1,040,000	3.0
Strengthening bargaining position, wages and/or hours	83	2.2	743,000	34.3	12,800,000	37.3
Closed or union shop, wages and/or hours	176	4 8	44,500	2 1	1,110,000	3.2
Discrimination, wages and/or hours	8	.2	1,290	.1	72,200	.2
Other	4	.1	15,400	.7	83,800	.2
Union organization	543	14.7	91,000	4.2	1,790,000	5.1
Recognition	366	9.9	41,700	1.9	941,000	2.6
Strengthening bargaining position	25	.7	11,300	.5	342,000	1.0
Closed or union shop	74	2.0	13,300	.6	231,000	.7
Discrimination	46	1.2	7,620	.4	159,000	.5
Other	32	.9	17,000	.8	117,000	.3
Other working conditions	695	18.8	387,000	17.8	1,580,000	4 6
Job security	349	9.5	99,500	4.6	599,000	1.8
Shop conditions and policies	275	7.4	124,000	5.7	528,000	1 5
Work load	38	1.0	14,500	.7	63,500	.2
Other	33	.9	148,000	6.8	385,000	1.1
Interunion or intraunion matters	159	4.3	32,000	1.5	845,000	2 4
Sympathy	39	1.1	18,100	.9	85,500	.2
Union rivalry or factionalism	55	1.5	4,470	.2	101,000	.3
Jurisdiction	62	1.6	9,160	.4	658,000	1.9
Union regulations	1	(1)	20	(1)	60	(1)
Other	2	.1	200	(1)	340	(1)
Not reported	30	.8	11,600	.5	34,100	.1

[1] Less than a tenth of 1 percent.

at the Murray Corp. of America in Detroit involving the United Automobile Workers (C.I.O.). Settlement of the coal controversy included a stipulation that miners would furnish their services "during such time as such persons are willing and able to work." The Murray automobile workers secured an agreement that neither the union nor its officers or members should be liable for damages resulting from unauthorized stoppages. In return, the local union agreed not to authorize any strike or picketing unless sanctioned by the international union and until 45 days after filing a grievance claim. Another stoppage of nearly 3,000 workers occurred in October when dock foremen or "walking bosses" demanded that the Waterfront

Employers' Association of Southern California recognize the International Longshoremen's and Warehousemen's Union (C.I.O.) as their bargaining agent. The employers refused and closed down all stevedoring operations, claiming that the Labor Management Relations Act relieved them of the necessity of bargaining with supervisory employees. The issue was subsequently submitted to arbitration.

About 1 out of every 7 stoppages was due primarily to union organization matters—recognition, closed or union shop, discrimination, etc.—and accounted for about 5 per cent of the year's idleness. Disputes over other working conditions, which caused about 19 per cent of the stoppages, were usually settled rather quickly and accounted for less than 5 per cent of the year's idleness.

Jurisdictional, union rivalry, and sympathy strikes accounted for 4.3 per cent of all stoppages and less than 2½ per cent of the total strike idleness. The jurisdictional dispute in Hollywood movie studios between the Conference of Studio Unions (made up primarily of A. F. of L. craft unions) and the International Alliance of Theatrical Stage Employees (A. F. of L.) was the most prolonged dispute in this group. The stoppage began in September, 1946, and continued throughout 1947 despite efforts by the A. F. of L., the National Labor Relations Board, and a congressional committee to resolve the difficulties. Toward the end of 1947 some of the craft unions affiliated with the Conference of Studio Unions voted to permit striking mem-

Work stoppages in 1947, by affiliations of unions involved

Affiliation of union	Stoppages beginning in 1947				Man-days idle during 1947 (all stoppages)	
	Number	Percent of total	Workers involved			
			Number	Percent of total	Number	Percent of total
Total	3,693	100.0	2,170,000	100 0	34,600,000	100 0
American Federation of Labor	2,137	57.9	968,000	44 6	10,000,000	29 0
Congress of Industrial Organizations	1,200	32 5	568,000	26 2	11,900,000	34.3
Independent unions	212	5.7	487,000	22. 5	11,700,000	33.9
Rival unions (different affiliations)	54	1.5	4,430	.2	101,000	.3
Cooperating unions (different affiliations)	20	.5	130,000	6 0	831,000	2.4
Single-firm unions	5	.1	1,380	.1	12,700	(1)
No unions involved	65	1.8	7,970	.4	33,100	.1

[1] Less than a tenth of 1 percent.

bers to seek work in the studios or elsewhere. Members of the Brotherhood of Carpenters and Joiners (A. F. of L.) and International Association of Machinists (Ind.), however, reportedly voted against such action.

Unions Involved. Stoppages by independent unions—those not affiliated with the two large federations, A. F. of L. and C.I.O.—accounted for 5.7 per cent of the year's total (see table on page 149). Due primarily to the telephone controversy, however, stoppages in the unaffiliated group of unions involved 22.5 per cent of all workers and accounted for 33.9 per cent of the idleness recorded in 1947.

As between affiliates of the A. F. of L. and the C.I.O., the year's record shows that 57.9 per cent of all stoppages involved A. F. of L. labor organizations, but accounted for only 44.6 per cent of all the workers involved and 29 per cent of the total idle time. C.I.O. unions, which engaged in 32.5 per cent of all stoppages, accounted for 26.2 per cent of all the workers involved and 34.3 per cent of the idleness.

Questions on Section 18

1. Define a strike.
2. Why does it become important to determine a striker's status?
3. Distinguish the various types of strikes.
4. What is the principal usage of the general strike?
5. Why are partial strikes embarrassing to employers?
6. What three strike categories are recognized by the National Labor Relations Board?
7. When will a strike ensue? Is it lightly entered into?

SECTION 19. THE STRIKE DEFINED

The *Point Reyes* decision in this section investigates the definition of a strike in a technical situation fully explained in the text of the case. Special attention should be paid to the definition of the term by the National Labor Relations Act, since it is broader than the common law context, including slowdowns and stoppages "by reason of the expiration of a collective bargaining agreement." Congress evidently had in mind unions such as the Typographers and Mine Workers when it appended the quoted portion to the definition.

THE POINT REYES

Circuit Court of Appeals, Fifth Circuit, 1940. 110 Fed. (2d) 608

HOLMES, C. J. Appellants, twenty-four members of the crew of the S. S. Point Reyes, present for review a decree dismissing a libel brought by them to recover on a rider attached to shipping articles executed to cover a voyage made by them on appellees' boat. The rider provided: "In the event this vessel enters any Gulf port where a maritime strike is in effect each member of the crew shall be paid fifty and 00/100 ($50.00) dollars in addition to all wages and overtime due them less proper deductions up to the time the crew leaves the vessel."

The articles contemplated a voyage from San Francisco to New Orleans and return. When the vessel reached New Orleans, a Gulf port, appellants noticed, and were challenged by, armed pickets on the dock, although they were not molested by them, and were advised by the local president of the union to which they belonged that a maritime strike existed in the port. Upon these facts, and without any further investigation, they concluded that a strike was in effect, and demanded their earned wages and the bonus provided by the rider. The master denied the existence of the strike, paying the wages but refusing to pay the bonus. The sole question necessary for decision is whether or not any maritime strike existed in the port of New Orleans on the date in question.

It was shown shown that, prior to 1923, practically all steamship companies operating in the port of New Orleans had contracts with the International Longshoremen's Association. In that year, all of the companies except two declined to renew the contracts, and began to employ independent longshoremen. In 1931, these last two refused to renew theirs, and thereafter used independent workers. On September 30, 1935, the International Longshoremen's Association, which had had no contracts with either shipping interests or stevedores for

approximately four years, called a strike in an effort to induce membership in, and contracts with, its organization. Men were employed to picket the harbor and assault or terrorize the independent workers on the dock. Despite the fact that these tactics caused some disturbances for a few days, no steamship company was deprived of the services of its regular employees, shipping was not disturbed or delayed, and there was no shortage of regular labor. At the time the Point Reyes docked at New Orleans on December 26, 1935, the interference was negligible.

It is clear from the facts stated that the action of the International Longshoremen's Association did not involve workers of a common employer acting in concert to induce the employer to accede to their demands, nor did it involve a concerted cessation of employment; it was rather an attempt of hirelings of the union to coerce the making of contracts in contemplation of employment to be created.

Webster's unabridged dictionary defines a strike as follows: "Act of quitting work; specifically, such an act done by mutual understanding by a body of workmen as a means of enforcing compliance with demands made on their employer; a stopping of work by workmen in order to obtain or resist a change in conditions of employment." Black's *Law Dictionary* defines it: "The act of a body of workmen, employed by the same master, in stopping work altogether at a prearranged time and refusing to continue until . . . some . . . concession is granted to them by the employer."

In every other definition that we have found, the word strike contains two essential ingredients: There must be the relation of employer and employee, and there must be a quitting of work. . . . Under the facts in this case, it is manifest that neither of these essential requirements was met. The fact that the union chose to call its action a strike could not make it such, and could not alter the relations of the parties. Appellants are not entitled to recover, and the decree is affirmed.[1]

Case Questions

1. What provision was in the rider to the shipping articles?
2. Why was it held no strike existed in the port of New Orleans?
3. How does Black define a strike?

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[1] Sec. 501 (2) of Amended National Labor Relations Act states that "the term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow down or other concerted interruption of operations by employees."

SECTION 20. THE ECONOMIC SYMPATHY STRIKE

The common law has not looked with too much favor upon the sympathetic strike. It has been generally considered unlawful under the theory that the strikers lack a community of interest with the group they are trying to assist, or that the benefits to be secured by the sympathy strikers are so remote or indirect as not to justify the infliction of harm on the employer or the public.

The *Firth* case in this section involves sympathetic elements, but the court finds the strike not illegal for the reason that the strikers' attempt to maintain the security of their union was a legitimate labor objective, as it provided sufficient direct benefit to the members involved. It is classified also as an economic strike, which preserves the striker's interest in his job so long as the employer does not secure replacements.

FIRTH CARPET CO. v. NATIONAL LABOR RELATIONS BOARD

Circuit Court of Appeals, Second Circuit, 1942. 129 Fed. (2d) 633

CLARK, C. J. The Firth Carpet Company has petitioned for review of an N.L.R.B. order requiring it to reinstate seven employees with back pay and to cease and desist discouraging membership in the Textile Workers Union of America or otherwise interfering with rights guaranteed by the National Labor Relations Act, 29 U.S.C.A. Sec. 151 et seq. . . .

Second. The Reinstatements. On May 9, 1939, the foreman of the shipping department at petitioner's Firthcliffe plant ordered three employees, members of the Textile Workers, to stop the work they were doing and to aid other workers engaged in another capacity in the same department. These three feared that if they left their jobs non-union carpenters would be brought in temporarily to do their work, and that eventually the carpenters might get the jobs permanently. Accordingly, they demurred, and the shop chairman joined in and insisted on a guaranty that if the three left their jobs to do another one, no one would be brought in, and that if work piled up the three could work overtime. The foreman took the matter up with the main office and reported back that no guaranty could be given. Thereupon the three employees refused to do the job they were ordered to do and the foreman told them to go. After they left, the shop chairman and six other employees of the shipping department walked out in sympathy. All ten of these were union men and, except for one non-union man, comprised the whole shipping department. . . .

The Board, one member dissenting, found that the three who refused to work were discharged on May 9, but that the other seven were discharged on May 10, when they received their checks. The refusal to reinstate the three was held valid because they had refused to work, but the refusal to reinstate the seven was found to be solely because they had struck, and therefore, a violation of Sec. 8 (3), 29 U.S.C.A. Sec. 158 (3).

The first point raised by petitioner is that the record does not support a finding that the seven were not reinstated because of the strike. The other grounds stated in the May 24th letter must be relied upon according to petitioner. The Board maintains, however, that on different occasions petitioner has conceded that the walkout was the sole reason for the refusal to reinstate, and citations from the brief before the Board, before us, and the petition for review are relied upon. Be that as it may, we think the Board can be sustained on the record without recourse to any concessions. The superintendent testified, not without some backing and filling, that he considered the sympathy strike the "main reason" for the discharge. . . .

The second point raised is that even assuming that the refusals to rehire were prompted by the strike, they were not unlawful discriminations by petitioner. For this view two cases are relied upon. *N.L.R.B.* v. *Condenser Corp.*, 3 Cir., 128 F. 2d 67; *Hazel-Atlas Glass Co.* v. *N.L.R.B.*, 4 Cir., 127 F. 2d 109. Both of these are cases involving so-called "illegal" strikes. In the Condenser case, the court said an employer need not reinstate employees who were discharged for standing idle at their machines even after the foreman promised to take up their demands at the end of the day. And in the Hazel-Atlas case, the court upheld an employer who refused to reinstate a foreman who would not operate machines after the operators had struck in contravention of a no-strike clause in their union contract. Whether or not we should have characterized these particular strikes as "illegal," we can accept these cases as inapposite here. By no stretch of the imagination can the striking seven be considered as having walked out "illegally." Petitioner attempts to equate "illegal" with "unjustified." But this is not only a gross shift in meaning; it does not meet the issue, because we can hardly say the walkout of the seven, or the attitude of the other three not reinstated by the Board, was unjustified. All had a fear that their jobs were likely to be taken over by non-union men. In their minds it was a justified grievance; this makes it a "legal" strike preserved by Section 13 of the Act, 29 U.S.C.A. Sec. 163.

Finally, petitioner makes the point that, where employees strike for a reason other than that the employer engaged in unfair labor practices, they need not be reinstated if, in the meantime, new employees have been hired to take their places. *N.L.R.B.* v. *Mackay Radio & Teleg. Co.*, 304 U.S. 333, 345, 58 S. Ct. 904, 82 L. Ed. 1381. Here, however, no replacements were made. Petitioner transferred some employees from other departments in a makeshift arrangement and then eventually hired some new people in other departments. It is apparently only an afterthought to maintain that the refusal to take the men back was because they had been replaced. To rely on the Mackay case it would have been necessary to convince the Board that the reason for refusal to rehire was that the jobs had been immediately filled. The May 24th letter clearly shows that no such reason existed.

Some point is made of a difficulty in upholding the Board's order as to the seven when the Board found in favor of petitioner as to the other three. Mere inconsistency of itself is of no interest to us; the Board conceivably may have been wrong about the three. In any event, whether or not the discharge of the three was justified, the refusal to reinstate the seven because they had struck in sympathy could be discriminatory. The Board so found and there is substantial evidence to support the finding. . . .

The petition to review is denied and the Board's request for an order of enforcement is granted.

Case Questions

1. State the facts leading to the dispute.
2. How did the Board rule? Did the court agree?
3. What did the court hold in the *Condenser* case?
4. What effect does replacement have upon the status of economic strikers?

SECTION 21. STALE CLAIM STRIKE

The *Dorchy, Silkworth,* and *Hornstein* cases in this section are authority for the proposition that a strike, or the threat of a strike, to force an employer to part with value because of a stale or an unwarranted claim are unlawful objectives and border on racketeering. They are but symptomatic of the many ways in which the law has qualified the right to strike, as will become apparent from the forthcoming materials.

DORCHY v. KANSAS

Supreme Court of the United States, 1926. 272 U.S. 306, 47 Sup. Ct. 86

BRANDEIS, J. Section 17 of the Court of Industrial Relations Act, Laws of Kansas, 1920, Special Session, C. 29, while reserving to the individual employee the right to quit his employment at any time, makes it unlawful to conspire "to induce others to quit their employment for the purpose and with the intent to hinder, delay, limit or suspend the operation of" mining. Section 19 makes it a felony for an officer of a labor union wilfully to use the power or influence incident to his office to induce another person to violate any provision of the Act. Dorchy was prosecuted criminally for violating Sec. 19. The jury found him guilty through inducing a violation of Sec. 17; the trial court sentenced him to fine and imprisonment; and its judgment was affirmed by the Supreme Court of the State, *Kansas* v. *Howat,* 112 Kan. 235. Dorchy duly claimed in both state courts that Sec. 19 as applied was void because it prohibits strikes; and that to do so is a denial of the liberty guaranteed by the Fourteenth Amendment. Because this claim was denied the case is here under Sec. 237 of the Judicial Code as amended. . . .

Some years prior to February 3, 1921, the George H. Mackie Fuel Company had operated a coal mine in Kansas. Its employees were members of District No. 14, United Mine Workers of America. On that day, Howat, as president, and Dorchy, as vice-president of the union, purporting to act under direction of its executive board, called a strike. So far as appears, there was no trade dispute. There had been no controversy between the company and the union over wages, hours or conditions of labor; over discipline or the discharge of an employee; concerning the observance of rules; or over the employment of non-union labor. Nor was the strike ordered as a sympathetic one in aid of others engaged in any such controversy. The order was made and the strike was called to compel the company to pay a claim of one Mishmash for $180. The men were told this; and

they were instructed not to return to work until they should be duly advised that the claim had been paid. The strike order asserted that the claim had "been settled by the Joint Board of Miners and Operators but (that) the company refuses . . . to pay Brother Mishmash any part of the money that is due him." There was, however, no evidence that the claim had been submitted to arbitration, nor of any contract requiring that it should be. The claim was disputed. It had been pending nearly two years. So far as appears, Mishmash was not in the company's employ at the time of the strike order. The men went out in obedience to the strike order; and they did not return to work until after the claim was paid, pursuant to an order of the Court of Industrial Relations. While the men were out on strike this criminal proceeding was begun. . . .

The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. In the absence of a valid agreement to the contrary, each party to a disputed claim may insist that it be determined only by a court. Compare *Guaranty Trust Co.* v. *Green Cove R. R.*, 139 U.S. 137, 143; *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109. To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise. Compare *People* v. *Barondess*, 16 N.Y. Supp. 436; 133 N.Y. 649. And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike. Compare *Aikens* v. *Wisconsin*, 195 U.S. 194, 204-205.

Affirmed.

SUPPLEMENTAL CASE DIGESTS—STALE CLAIM STRIKE

SILKWORTH V. LOCAL NO. 575 OF AMERICAN FEDERATION OF LABOR, Supreme Court of Michigan, 1944; 309 Mich. 746, 16 N.W. 2d 145. Plaintiffs, a partnership engaged in the business of selling gasoline and fuel oil to dealers and consumers, sought and obtained injunctive relief from defendants' picketing where it was shown that the defendants' objective was to compel plaintiffs to put their drivers

in defendant union by paying their initiation fees, regardless of whether or not the drivers wished to join. This was held not to be lawful labor objective. Defendants were denied the lawful means of peaceful picketing to accomplish such an unlawful purpose. For an interesting case involving extortion in the glaziers' union, see *People* v. *Curran,* 310 Ill. 441, 121 N.E. 637.

HORNSTEIN V. PARAMOUNT PICTURES, INC., Court of Appeals of New York, 1944, 55 N.E. 2d 740. The defendants, officers and directors of Paramount Pictures, Inc., had paid certain sums of money from the corporate treasury to labor union officials, under the threats of the payees that in the contrary event they would call a strike of the employees of the Corporation. Action was brought by the stockholders to compel these officers and directors to repay the sums to the treasury. ". . . There is not the slightest evidence that this duly appointed representative of a labor organization was or even pretended to be under any legal duty to cause a strike. He did not ask for pay to influence him in the performance of any duty, real or pretended. He simply threatened to do unlawful injury to Paramount, and other similar companies, by calling a strike or strikes he was under no duty to call, and the only part his position as a representative of a labor organization played in the matter was that it constituted such a source of power as to give meaning to his threat and thereby induce consent to the giving of the money he demanded. . . . Such a threat is a felony . . . and such a payment is deemed to be so far involuntary as to raise an obligation to make restitution thereof. . . . It is well settled that a criminal statute should narrowly be construed, that acts otherwise innocent and lawful do not become crimes, unless there is a clear and positive expression of the legislative intent to make them criminal. . . . In that view, we are not ready to impute to section 380 of the Penal Law the meaning that one who is victimized by an extortion of the kind in question should on that account suffer loss of his liberty or property." *Affirmed.* (*Per Curiam.*)

Case Questions

1. State the facts of the *Dorchy* case, including the provision of the Kansas law in question.
2. What is a stale claim?
3. State the rule of law in the *Silkworth* case digest.
4. State the rule of the *Hornstein* case.

SECTION 22. STRIKE FOR UNION SECURITY

The *Colonial Press* case in this section represents the Massachusetts view as to the legality of union security objectives. The great majority of states permit unions to engage in collective pressure tactics to obtain union security arrangements and recognize them as legitimate labor objectives. Some states have outlawed the closed shop, but permit milder forms of compulsory unionism.

The National Labor Relations Act of 1947 permits union shop and maintenance of membership agreements, subject to the requirements of Sec. 8(a), (3). It also permits the check-off, or collection of union dues by the employer, if the employee agrees thereto in writing as specified in Sec. 302 (c) (5). Sec. 14 (b) permits the states to outlaw all forms of compulsory unionism if they so desire, but no state is empowered to legalize the closed shop. It is very probable that Congress in 1949 will amend the 1947 Act to broaden the powers of labor organizations in respect to compulsory unionism demands.

COLONIAL PRESS v. ELLIS

Massachusetts Supreme Judicial Court, 1947. 74 N.E. (2d) 1

WILKINS, J. The plaintiff, a printer and distributor of books in Clinton, brings this bill in equity against certain individuals, who are officers and members either of a labor union known as the Clinton Printing Pressmen and Assistants Union, Local 265, or of a parent union known as the International Printing Pressmen and Assistants Union of North America. By the bill, which alleges the existence of an unlawful strike, the plaintiff seeks an injunction against picketing and against interference with its business. . . .

The present purpose of the strike is to secure the retention in a contract, which is to be negotiated between the plaintiff and the local union, of a maintenance of union membership provision. As contained in their previous contract, which has been terminated, the most important part of this provision was that, subject to a fifteen day "escape period," "All employees who, on February 14, 1945, are members of the union in good standing in accordance with its constitution and by-laws and all employees who become members after that date, shall as a condition of employment maintain their membership in good standing for the duration of the collective agreement in which this provision is incorporated, or until further order of the (National War Labor) Board." The provision had been inserted in

the previous contract at the direction of the National War Labor Board. The judge ruled that the strike is "for an illegal purpose within the law of the Commonwealth," and made the findings prerequisite to issuing an injunction in a case growing out of a labor dispute, as provided in G. L. (Ter. Ed.) C. 214, Sec. 9A, as inserted by St. 1935, C. 407, Sec. 4. The final decree permanently enjoined the defendants from proceeding with or encouraging the groups about the entrances to the plaintiff's place of business "including the railroad crossing over Water Street"; from interfering with the entering or departure of the plaintiff's officers and employees into or from the plaintiff's place of business; from interfering with the plaintiff's business; and from carrying on a strike for the purpose of compelling the plaintiff to make a contract containing a maintenance of union membership provision.

It is well settled in this Commonwealth, as the defendants concede, that a strike for a closed shop is a strike for an illegal purpose. *Reynolds* v. *Davis*, 198 Mass. 294. . . . It is also settled that in order to justify the infliction of intentional injury and to escape the liability which follows from the ordinarily tortious quality of such an act, the right of their own which the defendants claim to exercise must bear a direct, and not a merely remote or secondary, relation to their own lawful advantage. *Plant* v. *Woods*, 176 Mass. 492, 502. . . .

The first question to be decided is whether a strike for a maintenance of union membership agreement falls within the unlawful category. . . .

The provision is explained in decisions of the Board. It requires only that an employee who is a member when the contract becomes effective and at the expiration of the escape period, or who thereafter voluntarily joins the union, shall remain a member in good standing. It does not create a closed shop, because it does not require that only union members be employed. It does not create a union shop, because it does not require the employees who have been hired, to join the union. It does not create a preferential union shop, because it does not require that preference in hiring be given to union members. No employee, old or new, is obliged to join the union to keep his job. If in the union, a member has the duration of the escape period to get out but still keep his job. If not in the union, the worker is free to stay out and keep his job. . . .

It is obvious that the provision for maintenance of union membership is in substance a means to provide union security. As such, it falls within the principles frequently enunciated with respect to

the closed shop. A strike for its inclusion in an agreement with an employer is designed to afford augmented strength to the union in a potential future controversy. It cannot be upheld as a lawful strike objective under our decisions. The right of their own which the defendants claim to exercise bears merely a remote or secondary, and not a direct, relation to their own lawful advantage. The fact that union membership is not compulsory is only a difference in the degree of security.

The next question for our determination is whether, notwithstanding the unlawful purpose of the strike, the defendants may picket the plaintiff's plant at the entrances and at the "railroad crossing," under the guise of the right of free speech guaranteed under the Constitution of the United States. The judge found that the union placed a picket line around the plaintiff's plant, and also at a railroad crossing where a highway crosses the railroad at grade, about a mile or mile and one-half from the plant, and over which a spur track ran to the plant, as well as to other manufacturing establishments; that during the first week there were more pickets than were necessary for purely peaceful picketing; that they marched in a circle outside the gates of the plant, sometimes as close together as two feet, and by their words and action intimidated to some extent those who desired to enter or leave the premises; that thereafter the number of pickets was reduced, and the picketing has been of an orderly and peaceful nature; that there have been some instances where employees of the plaintiff and others doing business with it have been subjected to violence and attack; but that it was not shown that these acts were instigated by the union.

The facts which the judge found pursuant to G. L. (Ter. Ed.) C. 214, Sec. 9A, as inserted by St. 1935, C. 407, Sec. 4, are that by reason of the combination of persons, members of the union, intentionally endeavoring to injure the business of the plaintiff, there have been unlawful acts committed which will be continued unless restrained; that there has been substantial and irreparable injury to the plaintiff's business; that there has been injury to the plaintiff's property which is greater than that to the defendants; that the denial of relief would inflict greater injury upon the plaintiff than granting it would on the defendants; that the plaintiff has no adequate remedy at law; that the public officers charged with the duty to protect the plaintiff's property are unable to furnish adequate protection, in that the injury to the plaintiff's property has been caused not by any acts of the defendants which are violations of the

criminal law, but rather by acts which are unlawful from the point of view of the civil law of the Commonwealth; that the plaintiff has not failed to comply with any obligation imposed upon it by law; and that the plaintiff has made every reasonable effort to settle the dispute by negotiation and "with the aid of available governmental machinery."

The defendants rely upon certain of the more recent cases in the Supreme Court of the United States. . . . We do not understand, however, that that court has held that picketing in support of an unlawful objective cannot be enjoined. See *Carpenters & Joiners Union of America, Local No. 213* v. *Ritter's Cafe*, 315 U.S. 722, 727-728; *Bakery & Pastry Drivers & Helpers, Local 802 of the International Brotherhood of Teamsters* v. *Wohl*, 315 U.S. 769, 775. . . . Until there is an unequivocal pronouncement to that effect we adhere to the view of the law laid down in our own decisions. . . . *Decree affirmed with costs.*[1]

Case Questions

1. State the purpose of the strike, detailing the disputed provision.
2. What is the issue of the case?
3. Distinguish the terms *closed shop, union shop, preferential union shop,* and *maintenance of membership.*
4. Why did the court hold a maintenance of membership strike to be unlawful?
5. Is all peaceful picketing prohibited in Massachusetts?
6. How does the court reconcile its decision with recent pronouncements of the Supreme Court?
7. Does this decision represent the minority view on the question of maintenance of membership?
8. Explain the status of union security arrangements under the National Labor Relations Act of 1947.

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[1] The National Labor Relations Act of 1947 provides in Sec. 14 (b): "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by State or Territorial law." Thus, while the National Labor Relations Act permits union security to the extent defined by Sec. 8 (a) (3), it leaves to the discretion of the several states whether they will countenance any form of union security agreement. Complete outlawry of union security agreements is therefore permissible by the states. The states cannot, on the other hand, as a matter of public or other policy, permit the closed shop as to employees in interstate commerce, for this would violate the prohibition of Sec. 8 (a) (3) above. At this writing, the majority of states permit union security arrangements. States forbidding them are tabulated in the chapter on State Regulation of Labor Unions.

SECTION 23. SITDOWN STRIKE

The depression of the thirties witnessed the rise of a new strike weapon, born of the fear which workers had during this era that, if they engaged in a normal walkout, they would be readily replaced by the employer because of the glutted labor market. The leading pronouncement on the legal status of sitdown strikes is the *Fansteel* decision, which is digested in the body of the *Holland* case below.

HOLLAND v. MINNEHOMA OIL & GAS CO.

Supreme Court of Oklahoma, 1939. 184 Okla. 640, 89 P. (2d) 764

DANNER, J. This case involves a one-man sitdown strike. Though we have carefully noted all the facts of the case, a detailed statement thereof is unnecessary. In material substance the following is the situation. The defendant, a laborer in the oil fields, was unable to agree with his employer, the plaintiff, or with the plaintiff's operating agent, as to the terms of his employment. He thereupon took physical possession of a producing oil well, by removing certain essential wires in the engine equipment and sitting upon the clutch lever so that others could not resume the operation of the well. He stated that no one other than himself would be allowed to operate the well, and that it would take a court order to remove him. Accordingly, the plaintiff brought the present injunction action for the purpose of removing him and to enjoin him from interfering with the peaceable operation of the well. The trial judge held for the plaintiff, and defendant appeals.

The defendant asserts that in view of the fact that the case involves a dispute between an employer and employee, the trial court was without jurisdiction to issue an injunction, and cites Section 10878, O.S. 1931, 40 Okla. St. Ann. Sec. 166. In substance that section provides that no agreement between two or more persons concerning an act in furtherance of any trade dispute shall be deemed criminal if such act committed by one person would not be a crime, and forbids issuance of any restraining order or injunction with relation thereto. The section further provides that nothing therein shall be construed to authorize force or violence.

The defendant fails to assert or explain any theory by which the statute may be held applicable to this case. The mere fact that an employer and an employee are involved in the case does not forbid the issuance of an injunction, in the absence of conditions prescribed

by the statute. The section itself reveals several reasons why it is not in point, but it is only necessary to observe the provision that nothing in the section shall be construed to authorize force or violence. Giving the statute the construction apparently asked by the defendant would be the authorization of at least force, if not violence, for clearly enough the defendant forcibly took or retained possession of his employer's property, without the slightest legal right. The section itself plainly prescribes that it shall not be so construed as to authorize the conduct of which defendant was guilty. The contention of the defendant in respect to this section of our statute, and the reasoning applicable thereto, are virtually the same as will be treated in the next proposition, concerning the status of sitdown strikers under the National Labor Relations Act.

The defendant next contends that he was justified in this seizing his employer's property, by virtue of the National Labor Relations Act, 29 U.S.C.A. Sec. 151 et seq. The defendant contends that when the occurrences involved herein took place, a complaint was pending by the plaintiff's employees before the National Labor Relations Board and, further, that by the terms of the proposed contract of employment between him and plaintiff he would have been denied the benefits of the aforesaid Act of Congress. We do not agree that the evidence supports the conclusions which defendant has drawn, but, for facility of reasoning, let us assume that the employer had violated the provisions of the National Labor Relations Act. Would it follow that defendant was thereby entitled forcibly to seize and retain possession of his employer's property, and that the employer was compelled to submit thereto? Certainly not.

The Supreme Court of the United States has recently spoken very emphatically and decisively upon this question. The case of *Fansteel Metallurgical Corporation* v. *National Labor Relations Board,* 7 Cir., 98 F. 2d 375, was appealed to the Supreme Court and decided in *National Labor Relations Board* v. *Fansteel Metallurgical Corporation,* 59 S. Ct. 490, 306 U.S. 240. *In that case certain employees were dissatisfied with an admitted violation of the aforesaid Act by the employer.* In order to force the employer to the terms desired by the employees they staged a sitdown strike in two of the employer's "key buildings," so that the employer had to shut down the factory. The employer discharged the employees, and also obtained an injunction requiring them to surrender the premises. If the employer was entitled to discharge the employees it naturally would follow that he would be entitled to the injunction. The following is from the opin-

ion of the Supreme Court of the United States on the question of the employer's right to discharge, under those circumstances:

"Nor is it questioned that the seizure and retention of respondent's property were unlawful. It was a high-handed proceeding without shadow of legal right. It became the subject of denunciation by the state court under the state law, resulting in fines and jail sentences for defiance of the court's order to vacate and in a final decree for respondent as the complainant in the injunction suit.

"This conduct on the part of the employees manifestly gave good cause for their discharge unless the National Labor Relation Act abrogates the right of the employer to refuse to retain in his employ those who illegally take and hold possession of his property. . . .

"For the unfair labor practices of respondent the Act provided a remedy. Interference in the summer and fall of 1936 with the right of self-organization could at once have been the subject of complaint to the Board. The same remedy was available to the employees when collective bargaining was refused on February 17, 1937. But reprehensible as was that conduct of the respondent, there is no ground for saying that it made respondent an outlaw or deprived it of its legal right to the property. The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant. We may put on one side the contested questions as to the circumstances and extent of injury to the plant and its contents in the efforts of the men to resist eviction. The seizure and holdings of the buildings was itself a wrong apart from any acts of sabotage. But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its goods, or the despoiling of its property or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society.

"As respondent's unfair labor practices afforded no excuse for the seizure and holding of its buildings, respondent had its normal rights of redress. . . .

"This was not the exercise of 'the right to strike' to which the Act referred. It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful. It was an illegal seizure of the buildings in order to prevent their use by the

employer in a lawful manner and this by acts of force and violence to compel the employer to submit. When the employees resorted to that sort of compulsion, they took a position outside the protection of the statute and accepted the risk of the termination of their employment upon the grounds aside from the exercise of the legal rights which the statute was designed to conserve."

It is therefore clear that the National Labor Relations Act, 29 U.S.C.A. Sec. 151 et seq., did not justify the defendant in taking physical possession of the employer's property and withholding same from said employer. This disposes of the defendant's second proposition.

The judgment is affirmed.

Case Questions

1. What did defendant do in this case?
2. How does defendant justify his action?
3. Why did the court hold inapplicable the anti-injunction statute of Oklahoma?
4. What defense is asserted under the National Labor Relations Act?
5. How does the court answer this latter argument?
6. State the facts and rule of the *Fansteel* case.

SECTION 24. SEA STRIKE

The *Rees* case in this section develops the proposition that the same rules of strike law are not applicable to seamen as are applied to shore workers, especially when the former are on the high seas. This decision was selected because the seamen involved, though aboard ship, were neither on the high seas nor were they at safe anchor. As such, the court was faced with a difficult determination.

REES v. UNITED STATES

Circuit Court of Appeals, Fourth Circuit, 1938. 95 Fed. (2d) 784

NORTHCOTT, C. J. . . . The defendants were unlicensed members of the crew of the steamship Algic, a freight vessel owned by the United States Maritime Commission, an agency of the United States government, being operated for the Commission by the American Republics Line, under a temporary agreement in conformity with Section 707 (c) of the Merchant Marine Act of 1936, Title 46, U.S.C.A. Sec. 1197(c). On July 16, 1937, at Jacksonville, Fla., shipping articles were signed for a full complement of officers and crew, numbering 38 and including the defendants, for a voyage to South American ports and return, the voyage not to exceed 12 months in duration. The vessel, in command of Captain Joseph A. Gainard, sailed two days later and reached the port of Montevideo, Uruguay, homeward bound, on September 10, 1937, about 6:45 a. m. The Algic was anchored in the harbor, using two anchors, about three-quarters of a mile from the dock, between the inner and outer breakwaters. The purpose of her call at Montevideo was to load a miscellaneous cargo, which had to be done from lighters, the work of loading being done by stevedores, who had been arranged for by the local agent of the ship. The only work to be done by the crew of the vessel, with regard to the loading of the cargo, was to furnish steam from the engineering department to give power in the operation of the winches and other machinery used in lifting the freight from the lighters and placing it in the holds of the ship. The crew had no part in the actual handling of the freight, and while cargo is being loaded in port the crew are assigned certain duties, such as painting, cleaning, chipping, etc. These orders for the day beginning at 8 o'clock a. m. were given to the crew by the officers through the boatswain, as was the usual custom.

About 7 o'clock a. m. the stevedores went on board and proceeded to load cargo. Members of the crew learned that a stevedores' strike

was in progress in the port and saw a number of natives, presumably striking stevedores, encircling the Algic in launches, shouting and making menacing gestures at the crew and the stevedores on the dock.

Shortly after 8 o'clock a. m. the crew called a meeting, at which all the defendants were present, and after a discussion concluded that the stevedores working on the vessel were strike breakers and decided, by a unanimous vote, to notify the officers of the ship that they would not work with or assist the stevedores on the ship and selected two delegates, defendant Rees, of the deck department, and one Lampkin of the engine department, to notify the officers of their decision. It was also decided at the meeting that the steam would be turned off, if necessary, in order to stop the work of the stevedores. . . .

During the morning it became necessary to shift the anchorage and one of the engineers turned the steam on so that could be done. The anchors were changed by the chief officer assisted by the third mate.

About 5 o'clock p. m. the captain and the Consul having returned to the ship, the captain assembled the crew in the presence of the other officers and the Consul, and informed them that he had communicated with the Maritime Commission and had been directed to put such men as refused to obey his lawful orders in irons. Each member of the crew was then asked if he would obey the orders of the captain and work with the stevedores, and they all agreed to do so. The next day the cargo was loaded by the same stevedores who started the work the first day, a delay of 24 hours having been occasioned by the events detailed. . . .

The statute which the defendants were charged with violating is Title 18, U.S.C.A. Sec. 483, Criminal Code, Sec. 292, which reads as follows: "Inciting revolt or mutiny on shipboard. Whoever, being of the crew of a vessel of the United States, on the high seas, or on any waters within the admiralty and maritime jurisdiction of the United States, endeavors to make a revolt or mutiny on board such vessel, or combines, conspires, or confederates with any other person on board to make such revolt or mutiny, or solicits, incites, or stirs up any other of the crew to disobey or resist the lawful orders of the master or other officer of such vessel, or to refuse or neglect their proper duty on board thereof, or to betray their proper trust, or assembles with others in a tumultuous and mutinous manner, or makes a riot on board thereof, or unlawfully confines the master or

other commanding officer thereof, shall be fined not more than $1,000, or imprisoned not more than five years or both." . . .

As to the fourth question, whether the crew of which the defendants were members, had, under the circumstances, a lawful right to strike, we are confronted with the fact that what happened was more than a strike in the commonly accepted meaning of that word. Refusal to work might constitute a strike on shore but the shutting off of the steam constituted an assumption of authority over the ship and its cargo. Had a sudden storm come up, and it was shown that this was liable to happen in that harbor, the delay, necessary in turning the steam back on, might have resulted disastrously.

That seamen on a vessel, signed on for a voyage, work under different conditions from workers on shore and must, of necessity, be governed by different rules, with regard to their right to strike, cannot be controverted. The laws of the United States concerning seamen, their rights and their treatment, are more liberal and more favorable to the seamen than the laws of any other country. Great care has been taken by Congress to safeguard their rights and protect them from injustice. They are given every opportunity to secure redress for any grievance they may have on their return from a voyage, and the consular officers of the United States are required by law to give them every protection. The number of seamen required to constitute a crew for a vessel of a certain class and the number of hours they may be required to work are fixed by statute. The articles required to be signed specify the standard of food to be given them on a voyage and severe penalties are imposed for their benefit when there is any withholding of their wages. They are insured against dismissal during the course of a voyage. These safeguards have not been thrown around workers ashore.

In view of the almost paternal attitude adopted toward them by the government it seems not only right and proper, but absolutely necessary, that seamen in their turn be required to render, while on a voyage, unquestioned obedience to the lawful orders of their superior officers, otherwise travel by sea would be made unsafe, uncertain, and impracticable. There must be some supreme authority in command of a ship on a foreign voyage. Away from the home country no immediate resort can be had to the authorities or the courts of the home government. The captain is obviously the proper person to vest with this supreme authority and as was said by Joseph P. Kennedy, then chairman of the United States Maritime Commission, in submitting an Economic Survey of the American Merchant Marine

to Congress in November, 1937: "Shippers and travelers realize that disorderly vessels are likely to be unsafe vessels. Safety at sea is based upon order and discipline as much as, if not more than, the quality of equipment. 'Personnel is to material,' said the great Nelson, 'as three is to one.' The man with a rifle makes the army; good forecastle hands make the ship. The sea is no place for divided authority. When a man puts foot on the deck of a ship he becomes part of a disciplined organism subject to the navigation laws of the United States. Seamen must recognize that the nature of their calling, which gives them a unique status under the law, also imposes upon them obligations not common to shore occupations." . . .

It is contended on behalf of the defendants that the National Labor Relations Act, 49 Stat. 449, Title 29, U.S.C.A. Sec. 151, in which the right of workers to strike is recognized, applies to seamen on a voyage. While this act may govern workers on vessels in some respects, as was held in *Black Diamond S.S. Corporation* v. *National Labor Relations Board*, 94 F. 2d 875, decided by the Circuit Court of Appeals for the Second Circuit on February 14, 1938, there is nothing in the act to indicate that Congress intended to disregard the fact that working conditions of seamen differ from those affecting workers ashore, or that Congress intended to repeal the act upon which the indictment in this case is based. It is of interest in this connection that, in the year following the enactment of the National Labor Relations Act, Congress passed the Maritime Commission Act which deals particularly with wages and working conditions of American seamen. 46 U.S.C.A. Sec. 1131.

When articles are signed by a crew for a voyage, all bargaining, individual or collective, is ended for the duration of the voyage. A contract is made, binding both owner and seaman, that is lawful, if the articles comply with the statutes, and should be lived up to scrupulously.

The laws of the United States require seamen to sign articles promising, during the voyage signed for, obedience to all lawful commands of their superior officers, and it certainly cannot be successfully maintained that there exists a right to strike in violation of the law. . . .

The defendants contend that the crew of a vessel which is moored to a dock or is at anchor in a safe harbor have the right to strike and that the Mutiny Act, 18 U.S.C.A. Sec. 483, has no application to seamen in such a situation. But that question is not presented for decision in this case. As we have already pointed out, the Algic was

not in fact moored to the dock or at anchor in a safe harbor, but was in such a position that the obedience of the crew to the orders of the master was essential to her safety. In such a case, the same rule is applicable as though the vessel were at sea, as this court decided in *Hamilton* v. *United States*, 4 Cir., 268 F. 15.

The defendants, under the circumstances shown by the evidence, had no right to strike, and the trial judge was right in so instructing the jury. . . .

The contention of the defense that the action of the crew in notifying the officers that they would not work was merely a protest against working with strike breakers, and not a refusal to obey orders, was left to the jury under a plain instruction from the court that if the contention of the defendants was believed, a verdict of not guilty should be returned. The jury by its verdict of guilty rejected this theory.

The conduct of the judge throughout the trial and his charge to the jury were eminently fair to the accused. There was no error in the trial, and the judgment of the court below is affirmed.[1]

Affirmed.

Case Questions

1. Is this a criminal or a civil action?
2. At the time of the strike, where was the vessel located? Was this a good defense?
3. Did defendants have a labor dispute with the owners of the vessel, or did they stop work in sympathy?
4. Did the court consider the action of the engineers a strike, or was it mutiny?
5. What safeguards has the law cast around seamen?
6. Did the court hold the National Labor Relations Act applicable to seamen?
7. When do collective bargaining rights terminate for seamen?

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[1] In accord with the principal case is *Southern Steamship Co.* v. *N.L.R.B.*, Supreme Court of the U. S., 1942, 316 U.S. 31, 62 Sup. Ct. 886.

SECTION 25. STRIKE INVOLVING THE MAILS

Though *In re Debs* was handed down over fifty years ago, it is still a celebrated decision (1) on the inherent powers of chancery courts to issue injunctions and (2) the federal power to eliminate obstructions to the free passage of the mails. The *Debs* decision, which is reprinted in this section, made ever more popular the usage of the injunction to quell labor pressure and aroused no end of consternation in the ranks of labor. The effect of the *Debs* ruling upon labor was finally localized with the passage of the Anti-Injunction Act of 1932. (See Section 16 of Chapter 4, page 105.)

IN RE DEBS, PETITIONER

Supreme Court of the United States, 1895. 158 U.S. 564, 15 Sup. Ct. 900

The issue for decision by the court was clearly stated by Mr. Lyman Trumbull, attorney for Eugene Debs and other convicted union officers. It is therefore quoted here prior to Justice Brewer's decision.

MR. LYMAN TRUMBULL. The bill states that the prisoners are officers and members of an organization known as the American Railway Union; that in May, 1894, a dispute arose between the Pullman Palace Car Company and its employees which resulted in the employees leaving the service of the company; that the prisoners, officers of the American Railway Union combining together, and with others unknown, with the purpose to compel an adjustment of the said differences and dispute between said Pullman Co. and its employees, caused it to be given out through the newspapers of Chicago, generally, that the American Railway Union would at once create a boycott against the cars manufactured by said Pullman Palace Co., and that in order to make said boycott effective, the members of the American Railway Union who were some of them employed as trainmen or switchmen, or otherwise, in the service of the railroads mentioned, which railroads or some of them are accustomed to haul the sleeping cars manufactured by the Pullman Palace Car Co., would be directed to refuse to perform their usual duties for said railroad companies and receivers in case said railroad companies thereafter attempted to haul Pullman sleeping cars.

Such is the gist of the bill. All that is subsequently alleged as to what was done by the prisoners, was for the purpose of compelling an adjustment of the difference between the Pullman Company and its employees. To accomplish this, the American Railway Union called upon its members to quit work for the companies which had persisted in hauling the Pullman cars. Was there anything unlawful in this? . . .

The boycott of the Pullman sleepers was, as the bill shows, not to obstruct commerce, but for an entirely different purpose.

It was not unlawful for the American Railway Union to call off the members of the organization, although it might incidentally affect the operation of the railroads. Refusing to work for a railroad company is no crime, and though such action may incidentally delay the mails or interfere with interstate commerce, it being a lawful act, and not done for that purpose, is no offence. . . .

BREWER, J. The case presented by the bill is this: The United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are presented: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty? . . .

As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of Congress to prescribe by legislation that any interference with these matters shall be offences against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to give the answer. By article 3, section 2, clause 3, of the Federal Constitution, it is provided: "The trial of all crimes except in cases of impeachment shall be by jury; and such trial shall be held in the State where the said crime shall have been committed." If all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offences had in such a community would be doomed in advance to failure. And if the certainty of such failure

was known, and the national government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single State.

But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result. . . . As a rule, injunctions are denied to those who have adequate remedy at law. Where the choice is between the ordinary and the extraordinary processes of law, and the former is sufficient, the rule will not permit the use of the latter. In some cases of nuisance and in some cases of trespass, the law permits an individual to abate the one and prevent the other by force, because such permission is necessary to the complete protection of property and person. When the choice is between redress or prevention of injury by force and by peaceful process, the law is well pleased if the individual will consent to waive his right to the use of force and await its action. Therefore, as between force and the extraordinary writ of injunction, the rule will permit the latter.

So, in the case before us, the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention. Indeed, it is more to the praise than to the blame of the government, that, instead of de-

termining for itself questions of right and wrong on the part of these petitioners and their associates and enforcing that determination by the club of the policeman and the bayonet of the soldier, it submitted all those questions to the peaceful determination of judicial tribunals, and invoked their consideration and judgment as to the measure of its rights and powers and the correlative obligations of those against whom it made complaint. And it is equally to the credit of the latter that the judgment of those tribunals was by the great body of them respected, and the troubles which threatened so much disaster terminated.

Neither can it be doubted that the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property, and that the government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill. *Searight* v. *Stokes*, 3 How. 151, 169. . . .

It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control. . . .

It surely cannot be seriously contended that the court has jurisdiction to enjoin the obstruction of a highway by one person, but that its jurisdiction ceases when the obstruction is by a hundred persons. It may be true, as suggested, that in the excitement of passion a mob will pay little heed to processes issued from the courts, and it may be, as said by counsel in argument, that it would savor somewhat of the puerile and ridiculous to have read a writ of injunc-

tion to Lee's army during the late civil war. It is doubtless true that *inter arma leges silent,* and in the throes of rebellion or revolution the processes of civil courts are of little avail, for the power of the courts rests on the general support of the people and their recognition of the fact that peaceful remedies are the true resort for the correction of wrongs. But does not counsel's argument imply too much? Is it to be assumed that these defendants were conducting a rebellion or inaugurating a revolution, and that they and their associates were thus placing themselves beyond the reach of the civil process of the courts? We find in the opinion of the Circuit Court a quotation from the testimony given by one of the defendants before the United States Strike Commission, which is sufficient answer to this suggestion:

"As soon as the employees found that we were arrested, and taken from the scene of action, they became demoralized, and that ended the strike. It was not the soldiers that ended the strike. It was not the old brotherhoods that ended the strike. It was simply the United States courts that ended the strike. Our men were in a position that never would have been shaken, under any circumstances, if we had been permitted to remain upon the field among them. Once we were taken from the scene of action, and restrained from sending telegrams or issuing orders or answering questions, then the minions of the corporations would be put to work.

". . . Our headquarters were temporarily demoralized and abandoned, and we could not answer any messages. The men went back to work, and the ranks were broken, and the strike was broken up . . . not by the army, and not by any other power, but simply and solely by the action of the United States courts in restraining us from discharging our duties as officers and representatives of our employees."

Whatever any single individual may have thought or planned, the great body of those who were engaged in these transactions contemplated neither rebellion nor revolution, and when in the due order of legal proceedings the question of right and wrong was submitted to the courts, and by them decided, they unhesitatingly yielded to their decisions. The outcome, by the very testimony of the defendants, attests the wisdom of the course pursued by the government, and that it was well not to oppose force simply by force, but to invoke the jurisdiction and judgment of those tribunals to whom by the Constitution and in accordance with the settled conviction of all citizens is committed the determination of questions of right and wrong between individuals, masses, and States.

It must be borne in mind that this bill was not simply to enjoin a mob and mob violence. It was not a bill to command a keeping of the peace; much less was its purport to restrain the defendants from abandoning whatever employment they were engaged in. The right of any laborer, or any number of laborers, to quit work was not challenged. The scope and purpose of the bill was only to restrain forcible obstructions of the highways along which interstate commerce travels and the mails are carried. And the facts set forth at length are only those facts which tended to show that the defendants were engaged in such obstructions.

A most earnest and eloquent appeal was made to us in eulogy of the heroic spirit of those who threw up their employment, and gave up their means of earning a livelihood, not in defence of their own rights, but in sympathy for and to assist others whom they believed to be wronged. We yield to none in our admiration of any act of heroism or self-sacrifice, but we may be permitted to add that it is a lesson which cannot be learned too soon or too thoroughly that under this government of and by the people the means of redress of all wrongs are through the courts and at the ballot-box, and that no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the cooperation of a mob, with its accompanying acts of violence.

We have given to this case the most careful and anxious attention, for we realize that it touches closely questions of supreme importance to the people of this country. Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or

restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defence to a prosecution for any criminal offences committed in the course of such violation; that the complaint filed in this case clearly showed an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mail—an obstruction not only temporarily existing, but threatening to continue; that under such complaint the Circuit Court had power to issue its process of injunction; that it having been issued and served on these defendants, the Circuit Court had authority to inquire whether its orders had been disobeyed, and when it found that they had been, then to proceed under Section 725, Revised Statutes, which grants power "to punish, by fine or imprisonment, . . . disobedience, . . . by any party . . . or other person, to any lawful writ, process, order, rule, decree or command," and enter the order of punishment complained of; and, finally, that, the Circuit Court having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on *habeas corpus* in this or any other court. . . .

The petition for a writ of *habeas corpus* is *denied.*

Case Questions

1. State the case as presented by Mr. Lyman Trumbull, attorney for the defense.
2. What questions does Justice Brewer raise in the opening paragraph of his decision?
3. Can the United States punish criminally an unlawful obstruction of interstate commerce or the mails?
4. Justice Brewer states a weakness in the criminal law, and explains his position. Do you agree with the soundness of his reasoning?
5. Does Justice Brewer believe the injunction to be an appropriate remedy under the facts of this case?
6. The defense asserted that the United States has no property right in the mails and therefore equity, which protects only property rights, has no injunctive jurisdiction. How does the court reply?
7. Is it the province of government to interfere in matters of private controversy?
8. State the conclusions summed up in the last paragraph of the case.

SECTION 26. STRIKE INVOLVING INTERSTATE COMMERCE

Is a strike illegal, in the absence of statute or emergency character, because it is one that hampers interstate commerce? This contention was made in the affirmative by the Great Northern Railway during a series of railroad strikes in the twenties. The answer of the court is given below, surrounded by a discussion of the labor injunction that is not without some humor. Judge Bourquin, in 1922, foretells accurately the possibility of greater public intervention in economic affairs in his classic statement, "Society has not progressed to insure work, or to recognize a substantial interest in a job had, though perhaps the spirit of the times, if not their necessity, even as the Clayton Act, tends in the direction of the latter at least."

GREAT NORTHERN RY. CO. v. LOCAL GREAT FALLS LODGE OF INTERNATIONAL ASS'N OF MACHINISTS, NO. 287

United States District Court, D. Montana, 1922. 283 Fed. 557

BOURQUIN, D. J. This is a hearing upon the interstate railway corporation plaintiff's application to restrain, pending suit, alleged activities of the labor union defendants. No restraining order issued, and a situation fraught with possibilities of grave irreparable injury requires prompt decision. . . .

The parties are in the throes of the nation-wide railway strike of July 1, 1922. To plaintiff's charge that defendants, in their refusal to abide by the federal Labor Board's wage scale, "strike against the United States," defendants counter that the associated railroads, in their analogous refusals in respect to some of the board's orders, first and likewise strike. . . .

The strike hampers and threatens to incidentally stop plaintiff's interstate transportation. This is not unlawful, and warrants no injunction, so long as but an unintended consequence of lawful exercise of defendants' rights. Although in conflict in some particulars, the evidence is clear and undisputed in sufficient others to disclose that plaintiff's efforts to continue train service are virtually nullified by threats, force, and intimidation inflicted upon such employees as it secures.

These evil acts include excessive masses or groups on or too near plaintiff's premises, libelous epithets and names, unpeaceful domiciliary visits, undue restraint, deportation, and threats of bodily in-

jury, in part executed, and which are committed by men singly and in concert, at various times and places. Plaintiff alleges all this is in execution of a conspiracy entered into by defendants to coerce plaintiff from applying the wage scale aforesaid, and defendants deny the charge. It is admitted by plaintiff that the national organizations, with jurisdiction over defendants, command the use of none but lawful methods, and it is asserted by defendants they obey, but cannot restrain their members, if disposed to disobey. This assertion is supported by the evidence and accepted as true for the purpose of this proceeding. . . .

. . . If in the emergency defendants cannot restrain their members, it is the duty of the court in law enforcement to do so, therein serving the best interests of defendants no less than those of plaintiff, nor overlooking those of the third party aforesaid.

All voluntary associations, including labor unions, for acts of their members are responsible to some extent on the theory of agency. Acts not authorized may be ratified, expressly or by implication. It is not always enough to repudiate the acts, for, unless the members are disciplined sufficiently to prevent repetition, the inference that the associations approve, even as they profit by the acts, may be inevitable, despite the most solemn disavowal of them. The associations can preserve their integrity against impairment by rebellious members, for they have power to control, and even expel, the latter, if necessary. In present circumstances, suits are brought against the association by name, and thus against all the members. . . .

It is emphasized that the principles applicable to injunctions are the same in controversies between employers and employees as in any others. Injunctions go only in cases of urgent necessity, made to appear by competent, material, credible, and preponderating evidence, to guard against injuries, not merely feared by the applicant, but reasonably to be apprehended, and likely to be irreparable. They are extraordinary remedies, granted with great caution, and in the exercise of sound judicial discretion. That the applicant is annoyed, threatened, and injured will never justify a court to grant him an injunction, unless these trespasses are so great that they threaten him with irreparable injury, within the settled meaning of that term in equity.

Experience warns against injunctions upon only affidavits to vital issues, and that may surprise defendants. The evidence that may well warrant an emergency restraining order, until hearing can be had upon the application for an injunction, may fall short to justify

the latter. As no one is to be subjected to injunction merely because it will not injure him (though an unwarranted injunction is an indignity, and always injurious), before he is enjoined a sufficient case must be legally made out against him.

In strikes, employers too often with little cause are quick to seek injunctions and their intimidating advantages, and courts too often likewise grant them. The consequence is a disposition to view the courts as partisans of the employers, and the judicial writs of injunction as weapons against employees however lawfully they be proceeding. And it is of this Pandora's box of obvious evils to society that the Clayton Act is designed to somewhat close the lid.

These controversies inevitably present provocative situations, and may involve fugitive encounters and disorders, for which neither party may be solely responsible. Often trivial, they do not threaten irreparable injury, and so do not warrant interposition by a court of equity, but can be adequately remedied by appeal to local authority. It may be, as contended, that near election time local administrations are disposed to neglect duty in the premises and to "play politics." But for that matter national administrations are likewise. It is of the price, as of the vice, of democracies. Nevertheless, injunctions go only in the circumstances aforesaid, and not merely to bridge gaps of administrative dereliction.

The right of employees, of men, to work (of which so much is heard during strikes, and so little other times), is but incidental, and aids plaintiff none. However much that right be infringed, plaintiff cannot complain, save to the extent that it is part of unlawful methods inflicting irreparable injury to plaintiff's property rights. The right itself is not absolute, but qualified—the right to sell labor if a buyer be found, to solicit a job (and often hopelessly and unavailingly), and to work if and as long as the buyer or job giver consents and no longer. Society has not yet progressed to insure work, or to recognize a substantial interest in a job had, though perhaps the spirit of the times, if not their necessity, even as the Clayton Act, tends in the direction of the latter at least.

In respect to the contention that the Anti-Trust Act (Comp. St. Secs. 8820-8823, 8827-8830), in connection with Section 16 of the Clayton Act (Comp. St. Sec. 8835 o), warrants injunction against even peaceful persuasion of employees to cease work, *if the result otherwise is interruption of plaintiff's interstate transportation, it is unmaintainable.* The interruption, an unintended consequence of lawful exercise of a right sanctioned by the law before and since the

acts aforesaid, sanctioned by Section 20 of the latter act aforesaid, is *damnum absque injuria,*[1] and not within said acts, so far as injunctive relief is concerned.

In the matter of defendants' request that the order enjoin plaintiff from maintaining more guards than pickets where the latter are stationed, if and when it is made to appear that guards in any number are infringing upon defendants' rights, a corrective can be applied. The order in respect to the number of defendants' agents or pickets can be amended when necessity is made to appear, as suggested in the earlier and foregoing decision. Neither that decision nor this assumes to limit the number composing any of defendants' groups for persuasion only. What is reasonable and only persuasive is a safe guide.

Order accordingly, effective on bond in the sum of $5,000.

Case Questions

1. Does the court feel that the stoppage of interstate transportation, of itself, warrants issuance of an injunction?
2. Describe the picketing engaged in.
3. Discuss the liability of the union for acts of its members as stated in the case.
4. Does Judge Bourquin believe that courts had favored employers in the issuance of injunctions?
5. Do you believe that local governing bodies, at election time, would tend to favor labor in a strike?
6. What is meant by the phrase *damnum absque injuria*?
7. Does the last paragraph indicate that the equitable injunction is a flexible remedy?
8. What did Judge Bourquin say as to the size of railway guard and striking picket groups?

[1] Damage for which there is no legal redress.

SECTION 27. NATIONAL EMERGENCY STRIKES

The repeated walkouts or threats of walkouts on the part of the United Mine Workers, imperiling the national interest, were largely responsible for the inclusion of the national emergency strike provisions in the National Labor Relations Act, Secs. 206-210. These sections represent Congressional affirmation of the result reached by the Supreme Court in deciding the legality of the 1946 coal miner walkout, led by John L. Lewis. The central issue in *U. S.* v. *U.M.W.* was whether the Federal Anti-Injunction Act imposed upon the federal government the same disability in securing injunctions that it imposed on private employers. Many legal scholars are critical of the reasoning employed in the majority opinion. For that reason, the dissenting opinion of Justice Murphy is included.

The *Mine Workers* decision in this section is to be distinguished from that of the *Great Northern* case (page 179) because of the localized character of the strikes in the earlier situation. With the modern trend moving definitely in the direction of industry-wide bargaining, it is evident that an ever-increasing number of labor disputes will fall into the national emergency strike category and will therefore be subjected to the 80-day restraint imposed by Secs. 206-210 of the 1947 Act.

The decision following the *Mine Workers* case applies the above interdiction to a threatened walkout of the National Maritime Union and upholds the exercise of this power embodied in the National Labor Relations Act.

UNITED STATES v. UNITED MINE WORKERS OF AMERICA

Supreme Court of the United States, 1947. 330 U.S. 258, 67 Sup. Ct. 677

VINSON, C. J. In October, 1946, the United States was in possession of, and operating, the major portion of the country's bituminous coal mines.

Terms and conditions of employment were controlled "for the period of Government possession" by an agreement entered into on May 29, 1946, between Secretary of Interior Krug, as Coal Mines Administrator, and John L. Lewis, as President of the United Mine Workers of America. The Krug-Lewis agreement embodied far-reaching changes favorable to the miners; and except as amended and supplemented therein, the agreement carried forward the terms and conditions of the National Bituminous Coal Wage Agreement of April 11, 1945.

On October 21, 1946, the defendant Lewis directed a letter to Secretary Krug and presented issues which led directly to the present controversy.

According to the defendant Lewis, the Krug-Lewis agreement carried forward Sec. 15 of the National Bituminous Coal Wage Agreement of April 11, 1945. Under that section either party to the contract was privileged to give ten days' notice in writing of a desire for a negotiating conference which the other party was required to attend; fifteen days after the beginning of the conference either party might give notice in writing of the termination of the agreement, effective five days after receipt of such notice. Asserting authority under this clause, the defendant Lewis in his letter of October 21 requested that a conference begin November 1 for the purpose of negotiating new arrangements concerning wages, hours, practices, and other pertinent matters appertaining to the bituminous coal industry. . . .

Conferences were scheduled and began in Washington on November 1, both the union and the Government adhering to their opposing views regarding the right of either party to terminate the contract. At the fifth meeting, held on November 11, the union for the first time offered specific proposals for changes in wages and other conditions of employment. On November 13 Secretary Krug requested the union to negotiate with the mine owners. This suggestion was rejected. On November 15 the union, by John L. Lewis, notified Secretary Krug that "Fifteen days having now elapsed since the beginning of said conference, the United Mine Workers of America, exercising its option hereby terminates said Krug-Lewis Agreement as of 12:00 o'clock P.M., Midnight, Wednesday, November 20, 1946. . . .

The United States on November 18 filed a complaint in the District Court for the District of Columbia against the United Mine Workers of America and John L. Lewis, individually, and as president of the union. The suit was brought under the Declaratory Judgment Act and sought judgment to the effect that the defendants had no power unilaterally to terminate the Krug-Lewis Agreement. And alleging that the November 15 notice was in reality a strike notice, the United States, pending the final determination of the cause, requested a temporary restraining order and preliminary injunctive relief.

The court, immediately and without notice to the defendants, issued a temporary order restraining the defendants from continuing in effect the notice of November 15, from encouraging the mine

workers to interfere with the operation of the mines by strike or cessation of work, and from taking any action which would interfere with the court's jurisdiction and its determination of the case. The order by its terms was to expire at 3:00 p.m. on November 27 unless extended for good cause shown. A hearing on the preliminary injunction was set for 10:00 a.m. on the same date. The order and complaint were served on the defendants on November 18.

A gradual walkout by the miners commenced on November 18, and, by midnight of November 20, consistent with the miners' "no contract, no work" policy, a full-blown strike was in progress. Mines furnishing the major part of the nation's bituminous coal production were idle.

On November 21 the United States filed a petition for a rule to show cause why the defendants should not be punished as and for contempt, alleging a willful violation of the restraining order. The rule issued, setting November 25 as the return day and, if at that time the contempt was not sufficiently purged, setting November 27 as the day for the trial on the contempt charge.

On the return day, defendants, by counsel, informed the court that no action had been taken concerning the November 15 notice, and denied the jurisdiction of the court to issue the restraining order and rule to show cause. Trial on the contempt charge was thereupon ordered to begin as scheduled on November 27. On November 26 the defendants filed a motion to discharge and vacate the rule to show cause. Their motion challenged the jurisdiction of the court, and raised the grave question of whether the Norris-LaGuardia Act prohibited the granting of the temporary restraining order at the instance of the United States.

After extending the temporary restraining order on November 27, and after full argument on November 27 and November 29, the court, on the latter date, overruled the motion and held that its power to issue the restraining order in this case was not affected by either the Norris-LaGuardia Act or the Clayton Act.

The defendants thereupon pleaded not guilty and waived an advisory jury. Trial on the contempt charge proceeded. The Government presented eight witnesses, the defendants none. At the conclusion of the trial on December 3, the court found that the defendants had permitted the November 15 notice to remain outstanding, had encouraged the miners to interfere by a strike with the operation of the mines and with the performance of governmental functions, and had interfered with the jurisdiction of the court. Both defendants

were found guilty beyond reasonable doubt of both criminal and civil contempt dating from November 18. The court entered judgment on December 4, fining the defendant Lewis $10,000, and the defendant union $3,500,000. On the same day a preliminary injunction, effective until a final determination of the case, was issued in terms similar to those of the restraining order. . . .

Defendants' first and principal contention is that the restraining order and preliminary injunction were issued in violation of the Clayton and Norris-LaGuardia Acts. We have come to a contrary decision.

It is true that Congress decreed in Sec. 20 of the Clayton Act that "no such restraining order or injunction shall prohibit any person or persons . . . from recommending, advising, or persuading others . . ." to strike. But by the Act itself this provision was made applicable only to cases "between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment. . . ." For reasons which will be explained at greater length in discussing the applicability of the Norris-LaGuardia Act, we cannot construe the general term "employer" to include the United States, where there is no express reference to the United States and no evident affirmative grounds for believing that Congress intended to withhold an otherwise available remedy from the Government as well as from a specified class of private persons. . . .

Defendants maintain that certain facts in the legislative history of the Act so clearly indicate an intent to restrict the Government's use of injunctions that all the foregoing arguments to the contrary must be rejected. . . .

In the debates in both Houses of Congress numerous references were made to previous instances in which the United States had resorted to the injunctive process in labor disputes between private employers and private employees, where some public interest was thought to have become involved. These instances were offered as illustrations of the abuses flowing from the use of injunctions in labor disputes and the desirability of placing a limitation thereon. The frequency of these references and the attention directed to their subject matter are compelling circumstances. We agree that they indicate that Congress, in passing the Act, did not intend to permit the United States to continue to intervene by injunction in purely private labor disputes.

But whether Congress so intended or not is a question different from the one before us now. Here we are concerned only with the Government's right to injunctive relief in a dispute with its own employees. Although we recognize that Congress intended to withdraw such remedy in the former situation, it does not follow that it intended to do so in the latter. The circumstances in which the Government sought such remedy in 1894 and 1922 were vastly different from those in which the Government is seeking to carry out its responsibilities by taking legal action against its own employees, and we think that the references in question have only the most distant and uncertain bearing on our present problem. Indeed, when we look further into the history of the Act, we find other events which unequivocally demonstrate that injunctive relief was not intended to be withdrawn in the latter situation. . . .

It has been suggested, however, that Congress, in passing the War Labor Disputes Act, effectively restricted the theretofore existing authority of the courts to issue injunctions in connection with labor disputes in plants seized by the United States. Chief reliance is placed upon the rejection by the Senate of Sec. 5 of the Connally substitute bill. . . .

. . . The conferees, in producing the Act in its final form, did nothing which suggests that the Congress intended to bar injunctions sought by the Government to aid in the operation of seized plants. We thus find nothing in the legislative background of the War Labor Disputes Act which constitutes an authoritative expression of Congress directing the courts to withhold from the United States injunctive relief in connection with an Act designed to strengthen the hand of the Government in serious labor disputes.

The defendants contend, however, that workers in mines seized by the Government are not employees of the Federal Government; that in operating the mines thus seized, the Government is not engaged in a sovereign function; and that, consequently, the situation in this case does not fall within the area which we have indicated as lying outside the scope of the Norris-LaGuardia Act. It is clear, however, that workers in the mines seized by the Government under the authority of the War Labor Disputes Act stand in an entirely different relationship to the Federal Government with respect to their employment from that which existed before the seizure was effected. That Congress intended such was to be the case is apparent both from the terms of the statute and from the legislative deliberations preceding its enactment. . . .

We do not find convincing the contention of the defendants that in seizing and operating the coal mines the Government was not exercising a sovereign function and that, hence, this is not a situation which can be excluded from the terms of the Norris-LaGuardia Act. In the Executive Order which directed the seizure of the mines, the President found and proclaimed "the coal produced by such mines is required for the war effort and is indispensable for the continued operation of the national economy during the transition from war to peace; that the war effort will be unduly impeded or delayed by . . . interruptions (in production); and that the exercise . . . of the powers vested in me is necessary to insure the operation of such mines in the interest of the war effort and to preserve the national economic structure in the present emergency. . . ." Under the conditions found by the President to exist, it would be difficult to conceive of a more vital and urgent function of the Government than the seizure and operation of the bituminous coal mines. We hold that in a case such as this, where the Government has seized actual possession of the mines, or other facilities, and is operating them, and the relationship between the Government and the workers is that of employer and employee, the Norris-LaGuardia Act does not apply. . . .

It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued, *Worden* v. *Searls, supra*, 121 U.S. at pages 25, 26, 7 S. Ct. at page 820, 30 L. Ed. 853; *Salvage Process Corp.* v. *Acme Tank Cleaning Process Corp.*, 2 Cir., 1936, 86 F. 2d 727; *S. Anargyros* v. *Anargyros & Co.*, C.C. 1911, 191 F. 208; and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court. Nor does the reason underlying *United States* v. *Shipp, supra*, compel a different result. If the Norris-LaGuardia Act were applicable in this case, the conviction for civil contempt would be reversed in its entirety.

Assuming, then, that the Norris-LaGuardia Act applied to this case and prohibited injunctive relief at the request of the United States, we would set aside the preliminary injunction of December 4 and the judgment for civil contempt; but we would, subject to any infirmities in the contempt proceedings or in the fines imposed, affirm the judgments for criminal contempt as validly punishing violations of an order then outstanding and unreversed. . . .

We have examined the other contentions advanced by the defendants but have found them to be without merit. The temporary restraining order and the preliminary injunction were properly issued, and the actions of the District Court in these respects are affirmed. The judgment against the defendant Lewis is affirmed. The judgment against the defendant union is modified in accordance with this opinion, and, as modified, that judgment is affirmed. So ordered.

Affirmed in part and modified and affirmed in part.

MURPHY, J. (dissenting). An objective reading of the Norris-LaGuardia Act removes any doubts as to its meaning and as to its applicability to the facts of this case. Section 4 provides in clear, unmistakable language that "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute. . . ." That language, which is repeated in other sections of the Act, is sufficient by itself to dispose of this case without further ado. But when proper recognition is given to the background and purpose of the Act, it becomes apparent that the implications of today's decision cast a dark cloud over the future of labor relations in the United States.

Due recognition must be given to the circumstance that gave rise to this case. The Government was confronted with the necessity of preserving the economic health of the nation; dire distress would have eventuated here and abroad from a prolonged strike in the bituminous coal mines. It was imperative that some effective action be taken to break the stalemate. But those factors do not permit the conversion of the judicial process into a weapon for misapplying statutes according to the grave exigencies of the moment. That can have tragic consequences even more serious and lasting than a temporary dislocation of the nation's economy resulting from a strike of the miners.

The whole thrust of the Norris-LaGuardia Act is directed toward the use of restraining orders and injunctions in cases arising out of labor disputes between private employers and private employees. It was in that setting that the abuses of federal equity power had flourished; and it was those abuses that led to the adoption of the Act. The application of the Act to the instant situation is thus clear. It cannot be denied that this case is one growing out of a labor dispute between the private coal operators and the private miners. That is a matter of common knowledge. Executive Order No. 9728 which authorized the Secretary of the Interior to take possession of and to operate the

coal mines, explicitly stated that this action was taken "as a result of existing or threatened strikes and other labor disturbances." Those strikes and labor disturbances grew out of the relations between the operators and the miners. The Government further recognized that fact by its subsequent refusal to negotiate with the miners on their demands and its insistence that these demands be addressed to the private mine owners. It is precisely in situations arising out of disputes of this nature that Congress has said that no court of the United States shall have jurisdiction to issue any restraining order or injunction.

The crux of this case is whether the fact that the Government took over the possession and operation of the mines changed the private character of the underlying labor dispute between the operators and the miners so as to make inapplicable the Norris-LaGuardia Act. The answer is clear. Much has been said about the Government's status as employer and the miners' status as Government employees following the seizure. In my opinion, the miners remained private employees despite the temporary gloss of Government possession and operation of the mines; they bear no resemblance whatever to employees of the executive departments, the independent agencies and the other branches of the Government. But when all is said and done, the obvious fact remains that this case involves and grows out of a labor dispute between the operators and the miners. Government seizure of the mines cannot hide or change that fact. Indeed, the seizure took place only because of the existence of the dispute and because it was thought some solution might thereafter result. The dispute, however, survived the seizure and is still very much alive. And it still retains its private character, the operators on the one side and the coal miners on the other.

The important point, and it cannot be overemphasized, is that Congress has decreed that strikes and labor disturbances growing out of private labor disputes are to be dealt with by some means other than federal court restraining orders and injunctions. Further confirmation, if any be needed, is to be found in the terms and in the history of the War Labor Disputes Act. To this clearly enunciated policy of making "government by injunction" illegal, Congress has made no exception where the public interest is at stake or where the Government has seized the private properties involved. Congress can so provide. But it has not done so as yet; until it does, we are not free to sanction the use of restraining orders and injunctions in a case of this nature.

The Government's seizure of the coal mines thus becomes irrelevant to the issue. The federal equity power to issue restraining orders and injunctions simply cannot be invoked in this case, since it grows out of a private labor dispute. And it makes no difference that the party seeking the proscribed relief is the Government rather than a private employer. The touchstone of the Norris-LaGuardia Act is the existence of a labor dispute, not the status of the parties. Among the specific evils which the framers of the Act had in mind were the injunctions secured by the Government in the Debs, the Hayes and the Railway Shopmen's cases. The Act was drawn to prevent, among other things, the recurrence of such injunctions. The Government concededly could not obtain an injunction in a private labor dispute where there has been no seizure of private properties, no matter how great the public interest in the dispute might be. To permit the Government to obtain an injunction where there has been a seizure would equally flout the language and policy of the Act. In whatever capacity the Government acts, this statute closes the doors of the federal courts where a restraining order or injunction is sought in a case arising out of a private labor dispute. . . .

It has been said that the actions of the defendants threatened orderly constitutional government and the economic and social stability of the nation. Whatever may be the validity of those statements, we lack any power to ignore the plain mandates of Congress and to impose vindictive fines upon the defendants. They are entitled to be judged by this Court according to the sober principles of law. A judicial disregard of what Congress has decreed may seem justified for the moment in view of the crisis which gave birth to this case. But such a disregard may ultimately have more disastrous and lasting effects upon the economy of the nation than any action of an aggressive labor leader in disobeying a void court order. The cause of orderly constitutional government is ill-served by misapplying the law as it is written, inadequate though it may be, to meet an emergency situation, especially where that misapplication permits punitive sanctions to be placed upon an individual or an organization. . . .

Mr. Justice Black, Mr. Justice Frankfurter, Mr. Justice Douglas, and Mr. Justice Jackson dissenting in part, and Mr. Justice Murphy and Mr. Justice Rutledge dissenting.[1]

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[1] The National Labor Relations Act of 1947 under Secs. 206-210 enables the government to secure what amounts to an 80-day injunctive forestalling of strikes or lockouts affecting all or a substantial part of an industry in interstate commerce, if such activity were to imperil the national health or safety. During the interim, the government mediation service is to be invoked, but recommendations for settlement are not mandatory on the disputants. If an accord is not

Case Questions

1. What did Sec. 15 of the National Bituminous Coal Wage Agreement of 1945 provide?
2. What issue did the United States seek to determine when it filed suit in the District Court on November 18 under the Declaratory Judgment Act?
3. Did the United States make any other request of the District Court on November 18?
4. What principal defense was made by the defendant union?
5. Does the Norris-LaGuardia Act, according to the majority opinion, apply to the United States? Why?
6. Does the Norris-LaGuardia Act prohibition against injunctions apply to the United States where private labor disputes exist?
7. Why did the Supreme Court feel this strike did not involve a private labor dispute?
8. The Court said that, if the Norris-LaGuardia Act was applicable, it would reverse the judgment for civil contempt, but affirm the judgment for criminal contempt. Why?
9. As to Justice Murphy's dissenting opinion:
   (a) Do you agree that an "objective reading of the Norris-LaGuardia Act (Sec. 4) removes any doubts as to its meaning and as to its applicability to the facts of this case"?
   (b) Do you agree that "this case is one growing out of a labor dispute between private coal operators and the private miners"?
   (c) What is the "touchstone" of the Norris-LaGuardia Act in the opinion of Justice Murphy?
   (d) Which opinion is the more soundly reasoned, in your estimation?

UNITED STATES OF AMERICA v. NATIONAL MARITIME UNION OF AMERICA (C.I.O.)

United States District Court, Southern District of New York.
Civil No. 46-299. June 24, 1948, 15 Labor Cases Par. 64,599 [2]

Findings of Fact

CLANCY, D. J. 1. The Statutory Provisions of Sections 206 to 208 of the Labor Management Act of 1947 have been complied with.

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reached, the Board must poll the workers as to whether they wish to accept the employer's last offer in settlement. If the last offer is not acceptable, the injunction is dissolved and the President refers the case to Congress for such "appropriate action" as they deem advisable. The decision of the Supreme Court in the principal case would seem to offer a way to continue the injunction by the expedient of making Federal employees of the workers involved for the duration of the unsettled controversy. However, legislation appropriate to that end would be required, as the War Labor Disputes Act, under which the United States assumed jurisdiction in the parent case, expired on June 30, 1947.

In his veto message of June 20, 1947, the President expressed disapproval of the national emergency strike provisions of the 1947 Act. At a later date he employed his powers under Secs. 206-210. It is highly probable that the 1949 Congress, in the public interest, will not essentially change these provisions.

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2. The threatened strikes will affect a substantial part of the shipping industry which is engaged in trade, commerce and transportation between the several states, between the United States and some of its territories and between the United States and foreign nations.

3. If such threatened strikes occur they will clearly imperil the national health and safety.

4. There is no evidence of a lockout actual or threatened by the employers or employers' associations named as respondents in the petition.

Conclusions of Law

1. The Government's petition in this case presents for decision a controversy to which the United States is a party.

2. The Act, 29 U.S.C.A. 178-180, is constitutional.

3. The petition is denied so far as it asks injunctive relief against the employers or employers' associations.

4. An order of this Court will issue enjoining the strike threatened by the respondent employees' unions.

The employees' unions attack the constitutionality of the Act by an appeal to the language of the First, Fifth and Thirteenth Amendments. Their contentions have all been disposed of. *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway Clerks*, 281 U.S. 548. In this regard we call counsel's attention to Sec. 502 of the Act, 29 U.S.C.A. 143; *Allen Bradley Co.* v. *Union*, 325 U.S. 797; *Dorchy* v. *Kansas*, 272 U.S. 306; *In re Debs*, 158 U.S. 564. The exercise even of the constitutional rights urged here as involved in the right to strike may be curtailed in the face of clear and imminent danger to the national health and safety. We hold that on the evidence submitted to us in the Government's petition and the supporting affidavits that the imminence of a threat to the national health and safety is clear. The respondent unions say that the only foreseeable effect of the strike is probable inconvenience to some or many individuals. This is a short-sighted view. The affidavits supporting the Government's application present a picture of the nation's economy in an expectable state of confusion approaching collapse or inoperability. Whether or not the danger of that calamity is apparent and imminent is the question we have considered and decided.

We have noticed that the allegations in the petition and its accompanying affidavits about the effect of the strike on tanker and collier transportation are no longer true. We have further considered the probable changes wrought by the termination of the tanker

and collier strikes on the calculations and conclusions of the officers of the Interstate Commerce Commission, the Secretary of Commerce and the United States Maritime Commission. The effect of the stoppage of exports and of interstate and intercoast traffic on American flag vessels is not adverted to in any union affidavit and it is the effect of that stoppage that is presented so cogently in the Government's petition and its supporting affidavits. In such circumstances the Court is left without doubt, so overwhelming is the conviction that the national health and safety will be imperiled by the threatened strike.

The respondent unions argue that certain circumstances, the employers' intransigeance in the bargaining thus far conducted, and the prevention of a strike at this season profitable to the employers, constitute "equities" which should move the Court in reaching its decision. We have concluded, however, that the interest of the people whose health and safety is imperilled, as we have found it is by the threatened strikes, is the Court's real concern in determining the only facts conditioning the exercise of its power in issuing the order sought by the Government. Those fact issues are the ones we have decided in our findings.

In the original stay order issued by this Court, a paragraph required the continuation of collective bargaining. As a matter of fact Section 8(d) of the Act explicitly imposes the duty of collective bargaining on all of the original respondents here. The refusal to bargain collectively is an unfair labor practice on the part of either employer or union. There has been no charge from any source that the unions have thus far declined to bargain. They are now the only respondents. Furthermore the process for correction of unfair labor practice is prescribed in the Act and we think that the practice provided by Congress should be followed if occasion arise.

Case Questions

1. State the findings of fact made by the court.
2. Outline the procedure to forestall a national emergency strike, Secs. 206-208 of National Labor Relations Act.
3. Under what rule may the constitutional right to strike be curtailed?
4. What other arguments are advanced by the union against issuance of an injunction?

SECTION 28. STRIKE IN BREACH OF COLLECTIVE AGREEMENT

Both the *Sands* and the *Uneeda* cases in this section involve breaches of collective agreement by the unions involved. The agreements are subject to ordinary contract law interpretation. The former concerns seniority rights; the latter, the interpretation of an arbitration clause in the agreement. In either case, the breach by the unions leaves them in an untenable position. The *Sands* decision is of special significance since it reveals the effect of a breach upon employee's rights to reinstatement and back pay. The text of the *Sands* case is preceded by the author's summary of the facts leading to the labor dispute therein.

NATIONAL LABOR RELATIONS BOARD v. SANDS MANUFACTURING COMPANY

Supreme Court of the United States, 1939. 306 U.S. 332, 59 Sup. Ct. 508

The employees of the Sands Manufacturing Company, in the spring of 1934, formed an independent labor organization called the Mechanics Educational Society of America (MESA). On June 15, 1935, the Union and the Company signed an agreement which stipulated, among other matters, that the transferring of workers from one department to another, or within a department, would be handled on a departmental seniority basis rather than a plant wide basis as formerly. About July 15 of that year, business dropped off and the Company began curtailing its work force in all departments except the machine shop, which was expanding its activity.

In accordance with the agreement previously executed, the Company hired new men for the machine shop rather than transfer in workers from other departments with seniority in the organization. The latter workers were laid off since new men could be hired at lower rates of pay. The Union committee demanded that the departmental seniority provision of the agreement be disregarded. Management declined, a strike followed, new men were hired, and MESA was disestablished in favor of an A. F. of L. affiliate.

The National Labor Relations Board found that the Sands Manufacturing Co. was in violation of Sections 8 (1), 8 (3), and 8 (5) of the National Labor Relations Act of 1935, and ordered reinstatement of the discharged strikers along with back pay. The Circuit Court of Appeals, 96 F. 2d 721, denied the Board's petition for enforcement of its order, and the Board appeals.

ROBERTS, J. . . . The contract provided for departmental seniority, in Sections 5 and 6, and Section 7 did not create any ambiguity on the subject. Moreover, the record makes it clear that the com-

mittee which negotiated the contract on behalf of the union fully understood its terms in the same sense as did the respondent. In this situation how often and how long was the company bound to continue discussion of the committee's demand that the provisions of the contract should be ignored? It is to be borne in mind that Section 20 of the contract provided that if the company did not meet the committee's views within forty-eight hours the employees reserved full liberty of action and this meant that if the company did not accede to demands a strike might follow.

We come then to consider the situation of the respondent in August 1935. The Board has found that it desired to operate its machine shop in accordance with its honest understanding of the contract. Its motive, whether efficiency or economy, was proper. It had stated its views to the committee. The committee was adamant; its stand was that the company could close its entire plant if it chose, but it could not operate the machine shop in accordance with the provisions of the contract. If it attempted the latter alternative a strike was inevitable. The Board found that it was inconceivable that the employees would have accepted the company's construction of the contract even if they had been threatened with discharge at the time. It is evident that the respondent realized that it had no alternative but to operate the plant in the way the men dictated, in the teeth of the agreement, or keep it closed entirely, or have a strike. When the representatives of the two parties separated on August 21, no further negotiations were pending, each had rejected the other's proposals, and there were no arrangements for a further meeting. On the following days the factory was closed.

The Board finds that, in this situation, the respondent was under an obligation to send for the shop committee and again to reason with its members or to wait until the situation became such that it could operate its whole plant without antagonizing the employees' views with respect to departmental seniority. We think it was under no obligation to do any of these things. There is no suggestion that there was a refusal to bargain on August 21st. There could be, therefore, no duty on either side to enter into further negotiations for collective bargaining in the absence of a request therefor by the employees. No such request was made prior to September 4th. Respondent rightly understood that the men were irrevocably committed not to work in accordance with their contract. It was at liberty to treat them as having severed their relations with the company because of their breach and to consummate their separation from the

company's employ by hiring others to take their places. The Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a tort committed against the employer. As the respondent had lawfully secured others to fill the places of the former employees and recognized a new union, which, so far as appears, represented a majority of its employees, the old union and its shop committee were no longer in a position on September 4th to demand collective bargaining on behalf of the company's employees. . . . The decree is affirmed.[1]

Case Questions

1. Why did the union strike?
2. Was the company within its rights in disregarding seniority when it began to hire new men instead of transferring older workers to the machine shop?
3. May an employer discharge workers who repudiate the collective agreement?
4. Why, on September 4, was the old union not in a position to demand that the company bargain with it?
5. What remedy for breach of a collective agreement is provided the employer or the union by the National Labor Relations Act of 1947?
6. May a judgment running against a union be collected from the individual assets of the members if the union's assets are insufficient?

UNEEDA CREDIT CLOTHING STORES, INC. v. BRISKIN

Supreme Court, Kings County, 1939. 14 N.Y.S. (2d) 964

The union went on strike and threw up a picket line because the employer discontinued a department and thereby made possible the layoff of five men. The collective agreement was silent with respect to the discontinuation of departments. The court ruled that, in the absence of agreement to the contrary, the determination of whether departments would be added or discontinued was a managerial prerogative.

Management prerogatives are those matters which, by usage, are in the exclusive province of managerial decision and which, therefore, need not be submitted to the collective bargaining process in the absence of agreement to the contrary. Further examples are the setting of quality requirements, selection of supervisory and executive personnel, determining how much the

[1] By Sec. 301 of the National Labor Relations Act of 1947, the employer may sue the labor organization for any damages incurred as the result of a breach of collective agreement. The Act allows this remedy in the Federal District Court having jurisdiction over the defendant. A corollary right to sue for breach is given the union if the employer is at fault. A judgment running against a union is collectible only from it as an entity and not from the individual assets of the members.

Though Sec. 301 may be altered by the 1949 Congress, the effect will be inconsequential because damage suits in the Federal Courts were permitted prior to the 1947 Act. See Sec. 80.

company will produce and, ordinarily, where production facilities are to be located. For a case hitting the outside limits, see *N.L.R.B.* v. *J. H. Allison & Co.*, reprinted in Chapter 9, where it was held that individual merit increases were a proper subject of collective bargaining. A complete discussion of managerial prerogatives is found in Teller, *Management Functions under Collective Bargaining*, Baker-Voorhis Co., 1944.

KADIEN, J. . . . The very purpose of arbitration clauses is to determine peaceably whether what was done was right or wrong within the terms of the contract. To say that the occurrence which gave rise to the dispute was ipso facto a breach of the contract, would make an idle gesture of the arbitration of that dispute. It would prejudge the very issue to be arbitrated. Thus, when the second paragraph of the aforesaid arbitration clause states: "As long as the employer complies with all the decisions of the arbitrator and the terms of this contract, there shall be no strike, interruption of work, boycott or temporary walkout called by the union . . . ," it means that, as long as the decision of the arbitrator on the issues submitted to him and the other or remaining terms of the contract, i. e., those terms which were not involved in the dispute arbitrated, are complied with by either party, the union could not call a strike, etc., and reciprocally the employer could not cause a lockout.

The evidence adduced at the comprehensive and complete hearings in this matter amply sustains the plaintiffs' position that the defendant union violated an essential term of the contract when it refused to arbitrate the existing dispute unless the suspended employees were reinstated to their old positions, notwithstanding the offer of the plaintiffs to maintain the status quo or its equivalent, though not required to do so under article "17," by paying a week's wages pending the decision of the arbitrator, who testified that he was ready to arbitrate the matter within a day of the union's request therefor and had actually set the date, when the union refused to proceed, except upon the conditions already described.

The Court finds that the plaintiffs have suffered and will continue to suffer irreparable injury unless relief is granted pending the trial. The union has been shown to have violated the contract in refusing to arbitrate under the circumstances. There is no reason why the dispute cannot now be settled by arbitration as required by the contract between the parties. It may be that because of his participation in the conference of August 4, 1939, and his testimony at the hearings, the arbitrator designated in the contract will be unable to act. But article "18" of the contract provides for that eventuality and should the parties be unable to agree upon a new arbitrator, the

Court will make the appointment from a list submitted by both parties, or will, upon request, appoint a committee as did the late Mr. Justice Cotillo in *Busch Jewelry Co., Inc.* v. *United Retail Employees' Union Local 830,* 169 Misc. 854, 9 N.Y.S. 2d 167.

In the meantime, an order will issue restraining all picketing until the determination of the arbitration or the trial of the action, if the dispute is not arbitrated. Provision for the undertaking will be made in the order which will be settled on two days' notice

Case Questions

1. What was the gist of the arbitration clause?
2. What provision was included in Article 18?
3. Define and illustrate a managerial prerogative.

SECTION 29. HOSPITAL STRIKE

Because of the vital services rendered by hospitals to the community, the usual right to strike does not apply to hospital workers, as was true also in the case of seamen. The reader should, however, note the result that the court reaches relevant to picketing activity by hospital workers. While there is not much law on the subject, the instant case would seem to represent a sound view. At all events, the writer has found no contrary view.

SOCIETY OF THE NEW YORK HOSPITAL v. HANSON

Supreme Court of New York, 1945. 185 Misc. 937, 59 N.Y.S. (2d) 91

PECORA, J. The plaintiff, the Society of the New York Hospital, has brought this action for a permanent injunction, enjoining and restraining the defendants, a labor union organization called New York Building and Construction Trades Council's Maintenance Organization, its officers, agents, members, representatives, and those acting in concert with them, from interfering with the operation of plaintiff's hospital by causing, instigating or continuing any strike, work shortage or action of a similar nature, from picketing in front of or in the vicinity of plaintiff's hospital, and from otherwise interfering with the orderly operation of the hospital. . . .

The plaintiff is a public, charitable, non-profit and non-sectarian corporation engaged in the operation and maintenance of a general hospital in the city for the care and treatment of the sick and injured,

and for the advancement through research and teaching of preventive and curative medicine. . . .

The plaintiff employs approximately 2,500 persons in addition to its professional staff. These include employees working in the hospital's power plant, elevator operators and maintenance men, such as electricians, mechanics, plumbers, carpenters, painters and upholsterers.

The hospital is wholly dependent upon its power plant, operated by its employees, for the electricity required not only to light and heat its premises, but to operate equipment such as oxygen tents, respirators, incubators, sterilizers, and many other modern instruments and machines now recognized as essential to the proper operation of a hospital.

On November 19, 1945, about 116 non-professional employees, including power plant workers, elevator operators and maintenance men, failed to report for work following a statement made two days previously by an officer of defendant union to plaintiff's officers that some workers would not report on that day because conferences between plaintiff and defendants had apparently reached an impasse. These workers have not yet returned to their jobs, and their absence has to a certain extent handicapped plaintiff in the performance of its functions. On that day members of the defendant's union and employees of the plaintiff picketed in front of plaintiff's hospital. The picketing was discontinued late that day, as a result of the issuance and service of a temporary restraining order of this court, and it has not been resumed to this date. . . .

The courts of Pennsylvania have gone so far as to deny the benefits of the Pennsylvania State Labor Relations Act to employees of charitable hospitals, even though there is no provision in the Act excluding them from its applicability (see *Western Pennsylvania Hospital* v. *Lichliter,* 340 Pa. 382, 17 A. 2d 206; *Petition of Salvation Army,* 349 Pa. 105, 36 A. 2d 479, 1944.

This interpretation, however, was rejected by the United States Court of Appeals for the District of Columbia in *National Labor Relations Board* v. *Central Dispensary and Emergency Hospital,* in which the court refused to follow the reasoning of the Pennsylvania courts and held the National Labor Relations Act applicable to a charitable hospital. The federal court there approved the principle adopted by the Supreme Courts of Minnesota and Wisconsin, to the effect that charitable hospitals and their non-professional employees are subject to State Labor Relations Acts which do not expressly exclude charitable institutions from their provisions.

At common law, well established in this state before the passage of Article 20 of the Labor Law, the right to strike was fully recognized as one of the most valuable possessions of labor. Our courts have properly refused to enjoin workers from striking or organizing for the purpose of striking, despite such damage as might incidentally ensue to the property of those affected. In exercising this equitable function, however, the courts have been careful to protect both property and lives from strikes called to achieve improper results or which were violently conducted (*Opera on Tour, Inc.* v. *Weber,* 170 Misc., aff'd 285 N.Y. 248; *Exchange Bakery* v. *Rifkin,* 245 N.Y. 260, 1927).

It is the court's duty in each case to determine the purposes and objectives which workers embraced in the categories enumerated in Section 715 may lawfully attempt to achieve by striking. In so doing the court must weigh the public interest against that to be served by allowing such workers to obtain fair treatment through the utilization of those economic weapons which are available to them. The right to strike has proven to be of such proper potency to labor in our industrial history that this court would not curtail it in any respect except for the most impelling of reasons. But there are some contravening considerations which can be of even greater importance to the public interests as a whole. It is difficult to conceive of a public service of greater value than the maintenance of hospitals for the care of the sick and the injured. It is almost impossible to conceive of such hospitals functioning properly if they are subject to interference with their activities by strikes or otherwise. Obviously ministration to the sick cannot be delayed. . . .

A strike by its employees which injuriously affects the essential functions of a hospital must therefore be held to be improper and inimical to public interest. . . .

An injunction will therefore issue permanently restraining the defendants from striking and from organizing for the purpose of striking or inducing others to strike against the plaintiff or the hospital operated by the plaintiff. Such an injunction will not, and cannot, trespass upon the right of the individual to quit his work—for to give it such effect would be tantamount to giving abhorrent sanction to peonage. It is aimed only at concerted activities to bring about and support a strike.

It now becomes necessary to dispose of the application for injunctive relief against picketing.

It does not follow, merely because the court will enjoin a strike, that peaceful picketing should also be prohibited.

Labor's right to picket has been developed by the courts following a strong tide of enlightened public opinion. Our Court of Appeals played a prominent part in evolving the doctrine that peaceful picketing is a fundamental right of labor, with which the courts will not interfere even though no strike is in progress. (*Exchange Bakery* v. *Rifkin*, 245 N.Y. 260, 1927.) In that case the court said at page 263:

"Picketing without a strike is no more unlawful than a strike without picketing. Both are based on a lawful purpose. Resulting injury is incidental and must be endured."

The Supreme Court of the United States has also adopted this doctrine, holding that the right of labor to disseminate information through the form of picketing concerning the facts of a labor dispute, is inherent in the constitutional guarantee of freedom of speech. In *Thornhill* v. *Alabama* (310 U.S. 88) that court stated this principle in the following language:

"The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . .

"In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution" (pp. 101-102).

That court also has held, in *American Federation of Labor* v. *Swing* (312 U.S. 321), that the Fourteenth Amendment protects peaceful picketing even by a person who is not in the employ of the party picketed, although this rule was subsequently qualified by holding that such picketing is subject to reasonable regulation by the states. (*Carpenters and Joiners Union of America, Local No. 213* v. *Ritter's Cafe*, 315 U.S. 722.) . . . .

Inasmuch as peaceful picketing has consistently been held by our highest courts to be an exercise of the constitutional right of freedom of speech, this court does not feel that defendants should, at this time at least, be enjoined from picketing, provided, however, that the picketing be done in such form as will not deter persons having business or professional relations with the hospital from crossing the picket line; and provided, further, that such picketing does not otherwise interfere with the hospital's functions. . . .

Settle decree in accordance herewith.

SUPPLEMENTAL CASE DIGEST—HOSPITAL STRIKE

BETH-EL HOSPITAL v. ROBBINS. New York Supreme Court, Special Term, Part 1, Kings County, 1946; 15 N.Y.L.J. 261. The plaintiffs, membership corporations operating hospitals in the Borough of Brooklyn as non-profit and charitable institutions sought a declaratory judgment to the effect that their employees, acting in concert, have no legal right to strike, leave their employment, or engage in other public demonstrations as a means of compelling plaintiffs to bargain collectively, and an injunction restraining the defendant union, its officers and members, from committing any acts in violation of such declaration.

"Some fields of endeavor so directly involve the public safety that the individuals engaged therein are not possessed of the right to strike as a means of increasing their wages or improving their working conditions. The policeman, the fireman, the soldier, does not possess that right. The physicians in the wards or operating rooms of the plaintiff hospitals do not possess it, and those in more humble positions in the laboratory and diet kitchen, the engine room or the power plant, once they have assumed the performance of duties just as essential to the care and healing of the sick as those of the physician himself, must understand that they have, in assuming that obligation, surrendered rights possessed by those seeking employment in enterprises operated for profit, not so directly involving the public interest. . . .

"The defendant's right to picket may be exercised in any way and to any extent that it will not bring about the result that the Court is seeking to prevent. . . ." (Johnson, J.)

Case Questions

1. What states hold that employees of charitable hospitals are entitled to the benefits of the Labor Relations Act?
2. State the rule of law as to the lawfulness of a strike by charitable hospital workers.
3. Did the court adopt a different view as to picketing? State the rule.
4. Was the right to picket qualified? How?

SECTION 30. STRIKE FOR CLOSED SHOP

The legal background and social reasoning on the closed shop issue is gone into extensively in the *Canter* decision in this section. A milder form of union security was called to task in Section 22, namely, maintenance of membership. While the latter, along with the union shop, remains permissible under the provisions of the amended Act of 1947, the closed shop and all other forms of compulsory union arrangements are now unlawful, notwithstanding a respectable number of states that permitted the closed shop under their common law prior to the 1947 Act. The several states may outlaw all forms of compulsory unionism, but they cannot legalize the closed shop.

Before a union is entitled to bargain with an employer on the issue of the union shop or the maintenance of membership, the National Labor Relations Board must conduct a vote in accordance with the provisions of Sec. 9 (e) and 8 (a) (3) to determine whether a majority of the employees in an appropriate unit desire a union security agreement. Until a favorable vote is secured, the union may not strike to secure the arrangement or bargain relative thereto with an employer, even though the latter is amenable.

CANTER SAMPLE FURNITURE HOUSE, INC. v. RETAIL FURNITURE EMPLOYEES LOCAL NO. 109

Court of Chancery of New Jersey, 1937. 122 N.J. Eq. 575, 196 A. 210

BERRY, V. C. By this bill the complainant seeks to enjoin several trade union organizations and certain individuals acting in concert with them from what is alleged to be an unlawful interference with complainant's business and property rights [strike to secure closed shop]. . . .

The provision of the proposed contract which provides for the employment of members of the defendant local exclusively is violative of the fundamental right of nonmember individuals to work and brings the contract directly within the rule of *Lehigh Structural Steel Company* v. *Atlantic Smelting & Refining Works*, 92 N.J.Eq. 131, 111 A. 376, 378, in which Vice Chancellor Backes said: "Public policy favors free competition, and the courts have been keen to recognize the right of organized labor to compete for work and wage and economic and social betterment, and to use its weapon, the strike, to realize its lawful aspirations, but none has gone to the length of sanctioning a strike for a closed shop, *which has for its object the*

exclusion from work of workmen who are not members of the organization." [Author's italics.]

The object of this proposed contract and of the strike here involved is exactly what was there condemned.

This court has expressly held that closed shop contracts and a strike to obtain or enforce them are usually declared illegal because they create or *tend to create* a monopoly in the labor market and are thus opposed to public policy. . . . And this jurisdiction is not alone in so holding. *Keith Theatre* v. *Vachon,* 134 Me. 392, 187 A. 692, 698; *Jefferson & Indiana Coal Company* v. *Marks,* 287 Pa. 171, 134 A. 430, 432, 47 A.L.R. 745. And see *C. B. Smith Metropolitan Market Company, Limited* v. *Lyon,* Opinion 417270, California Superior Court, Los Angeles County, decided July 26, 1937; *Pickett* v. *Walsh,* 192 Mass. 572, 78 N.E. 753, 6 L.R.A., N.S., 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638; *L. D. Willcutt & Sons Company* v. *Driscoll,* 200 Mass. 110-117, 85 N.E. 897, 23 L.R.A., N.E., 1236; *O'Brien* v. *People,* 216 Ill. 354, 75 N.E. 108, 115, 108 Am. St. Rep. 219, 3 Ann. Cas. 966; *A. R. Barnes & Co.* v. *Chicago Typographical Union No. 16,* 232 Ill. 424, 83 N.E. 940, 14 L.R.A., N.S., 1018, 13 Ann. Cas. 54; *Huntworth* v. *Tanner,* 87 Wash. 670, 684, 152 P. 523, Ann. Cas. 1917D, 676; *St. Germain* v. *Bakery & Confectionery Workers' Union,* 97 Wash. 282, 166 P. 665, L.R.A. 1917F, 824. . . .

Our Court of Errors and Appeals, in *Cameron* v. *International, etc., Union No. 384,* 118 N.J.Eq. 11, at page 26, 176 A. 692, 699, 97 A.L.R. 594, speaking through Mr. Justice Heher, said:

"The constitutional rights of liberty and property may be limited only to the extent necessary to subserve the public interest. The union cannot, in the service of its interest, deprive a nonmember of his constitutional right of liberty and property. *The statutes giving sanction to such unions were designed 'to secure most favorable conditions for labor of their members,' and are 'not a warrant for making war upon the nonunion man, or for illegal interference with his rights and privileges.* . . . There are in such a combination against an employee the suggestions of coercion, attempted monopoly, deprivation of livelihood and remoteness of the legal purpose of the union to better its members' condition.' *American Steel Foundries* v. *Tri-City C. T. Council,* 257 U.S. 184, 42 S.Ct. 72, 66 L.Ed. 189, 27 A.L.R. 360 (*supra*). And this limitation is likewise imposed upon the combination in dealing with its members. It is restricted to the advancement of the common interest through peaceable and lawful means, provided the public interest is not thereby injuriously affected. The

function of a trade union is to increase the individual bargaining power by collective action, and thus to promote the common interest of its members. If, in the pursuit of this objective, through peaceable means and methods that are otherwise deemed to be lawful, injury incidentally results to another, it is *damnum absque injuria.* But the power conferred upon such an organization must be directed to the advancement of the common interest and general welfare of its members. Such is its extent and limit."

In that case the complainants had voluntarily entered into the contract which the court had declared to be obnoxious as an arbitrary and unreasonable restrain of trade as the result of which restraint the complainants had voluntarily bargained away an inalienable right to the prejudice of the public interest. If such an agreement in restraint of trade is obnoxious to the public welfare, even though voluntarily entered into, what lawfulness can be imported to the purpose of the defendants here, when they attempt, by the coercive methods of a strike, to achieve a monopoly of the employment in the furniture trade in the city of Newark which must necessarily result in an arbitrary and unreasonable restraint of trade? Obviously such a purpose is unlawful. While the employees may lawfully strike for increased wages and shorter hours, or to better their working conditions, when such a purpose is combined with an unlawful purpose clearly contrary to the public interest, that interest is paramount, and the combination of the lawful and the unlawful purpose renders the strike itself and all activities in connection therewith illegal. . . .

The restraints already imposed, broadened to enjoin all picketing, will be continued until final hearing.[1]

Case Questions

1. State the reasons assigned by the court for holding the closed shop illegal?
2. What did the court say as to strikes with mixed purposes?
3. Would the same result follow if the purposes are severable?
4. What does the National Labor Relations Act of 1947 say about closed-shop agreements?

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[1] The amended National Labor Relations Act of 1947 is in accord. See Sec. 7 and Sec. 8 (a) (3) for the type of allowable union security agreement that is still permissible. The closed shop is impliedly outlawed by the Act. Modification of Sec. 8(a)(3) by the 1949 Congress is likely. The extent to which compulsory unionism will be permitted is indeterminate at this writing.

SECTION 31. STRIKE AGAINST CERTIFIED UNION

The courts were not formerly in complete accord on the question of whether a strike to force disestablishment of a certified union was legal. The National Labor Relations Act of 1947, however, leaves no doubt on this issue at present. The *Euclid* case in this section reaches a result in consonance with the 1947 Act, thought it was not decided thereunder.

The National Labor Relations Act does not make illegal, as an unfair labor practice, a strike by a rival union to force recognition where neither union is certified. The policy of the Act, however, is to induce unions to resort to the certification procedure, rather than to the strike or boycott, to secure bargaining status.

EUCLID CANDY CO. OF NEW YORK, INC. v. SUMMA

Supreme Court, Special Term, Kings County, 1940.

174 Misc. 19, 19 N.Y.S. (2d) 382

DALY, J. The plaintiff moves to enjoin *pendente lite* the officers and members of the Candy and Confectionery Workers Union, Local No. 452, Greater New York A. F. of L., from calling or continuing a strike against plaintiff, picketing its premises, interfering with its business, officers, employees and customers, and for other relief.

Originally, there was a controversy between two unions, namely, the union against which relief is sought herein, which hereafter will be referred to as Local 452, and Independent Confectionery Workers Union, which hereafter will be referred to as the Independent Union, as to which should be the sole collective bargaining agent for plaintiff's employees. By an agreement dated February 15, 1940, to which the plaintiff and the two unions were parties, it was agreed that an election be held under the auspices of the National Labor Relations Board for the purpose of certifying the sole collective bargaining representative for the plaintiff's employees. . . . On February 29, 1940, an election was held by secret ballot, and the National Labor Relations Board certified that the Independent Union had been designated by plaintiff's employees as their sole collective bargaining agency. Thereupon the plaintiff entered into negotiations with the union so certified, and an agreement was made and executed, dated March 6, 1940. . . .

Some thirty-one employees, members of Local 452, refused to comply [with the contract], and went out on strike and began to picket the premises.

Upon this application the Independent Union has appeared and joined the plaintiff in its prayer for relief. It has filed an answer containing a cross-complaint against Local 452, in which it prays for injunctive relief restraining the local from unlawfully attempting to induce plaintiff to breach its aforesaid contract, and for other relief.

Although in the course of the oral argument counsel for Local 452 conceded that in this controversy no labor dispute, within the meaning of Sec. 876-a, Civil Practice Act, was involved, he nevertheless contends in his memorandum that the instant controversy is a labor dispute. Notwithstanding the broad language of the statute in defining a labor dispute, the controversy existing between the parties herein does not, in the court's opinion, come within the purview of said statute. There was a labor dispute prior to the certification by the National Labor Relations Board. This certification, following an election duly held by that Board pursuant to the agreements above referred to, brought that labor dispute to a conclusion. It would be anomalous, under these circumstances, to say that the labor dispute still exists merely because a minority of employees, apparently dissatisfied with the result (the Labor Board certification), is unwilling to abide by the will of the majority. Cf. *Oberman & Co.* v. *United Garment Workers of America*, D.C., 31 F. Supp. 20; *Union Premier Food Stores, Inc., et al.* v. *Retail Food Clerks and Managers Union, Local No. 1357*, 3 Cir., 98 F. 2d 821; *Stalban* v. *Friedman*, 171 Misc. 106, 11 N.Y.S. 2d 343. There being no labor dispute, the sole purpose of the minority union would seem to be to induce the breach of the contract which the certified union entered into with the plaintiff, and which contained the provisions for a closed shop, pursuant to the agreement entered into by both unions prior to the election. The plaintiff has thus been placed in a dilemma. If it accedes to the demands of the minority union, it breaches its contract with the certified union. If it attempts to abide by the terms of said contract, as it did in the instant case, it has a strike on its hands, and picketing and the other activities that go with it. It seems to the court that, since the picketing by the minority union is, in effect, an attempt to force the breach of the agreement which was entered into under the circumstances above described, this court of equity should prevent the irreparable injury which flows therefrom.[1]

Accordingly the motion is granted. . . .

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[1] "It shall be an unfair labor practice for a labor organization or its agents . . . to force or require any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9." National Labor Relations Act of 1947, Sec. 8 (b) (4).

SUPPLEMENTAL CASE DIGEST—STRIKE AGAINST CERTIFIED UNION

EASTWOOD-NEALLEY CORP. v. INTERNATIONAL ASSOCIATION OF MACHINISTS. New Jersey Chancery Court, 1938; 123 N.J. Eq. 274, 1 Atl. 2d 477. In a representation dispute, the defendant union went out on strike to force employer recognition. Neither contesting union had been certified by the N.L.R.B. In refusing an injunction against the strike, the Court said: ". . . complainant was not required by the statute [Sec. 8 (5) of N.L.R.A.] to break off negotiations with defendant union; the object of the strike, namely, resumption of negotiations, is not unlawful." (Bigelow, V. C.)

Case Questions

1. State the facts giving rise to the dispute.
2. Was there a valid labor dispute prior to the N.L.R.B. certification action?
3. The certified union entered into a collective agreement with the employer. Is there anything illegal about the agreement under the present rule?
4. Is pressure on an employer, prior to a certification election, permissible? (Eastwood case)

SECTION 32. SECONDARY STRIKE

Pickett v. *Walsh,* decided in 1906, which is reprinted in this section, remains a leading case on the secondary strike, its nature, and the reasons for its general illegality in the absence of interest unity. The secondary strike and the secondary boycott, though generally unlawful, may be lawful if (a) their purpose is beneficial to the union members, (b) pressure is exerted on a third party employer in unity of interest with the principal employer, and (c) the third party employer is not too remote to the controversy. These questions are more fully resolved in Chapter 7, "The Boycott."

The *De Minico* digest in this section applies the managerial prerogative theory to render illegal the strike in that situation.

PICKETT v. WALSH

Supreme Court of Massachusetts, 1906. 192 Mass. 572, 78 N.E. 753

LORING, J. When and for what end this power of coercion and compulsion commonly known as a strike may be legally used is the question which this case calls upon us to decide. In the present state of the authorities it becomes necessary to consider the general principles governing labor unions and strikes by labor unions.

The right of laborers to organize unions and to utilize such organizations by instituting a strike is an exercise of the common law right of every citizen to pursue his calling, whether of labor or business, as he in his judgment thinks fit. It is pointed out in *Carew* v. *Rutherford,* 106 Mass. 1, 14, 8 Am. Rep. 287, that in the earlier days of the colony the government undertook to control the conduct of labor and business to some extent, but that later this policy of regulation was abandoned and all citizens were left free to pursue their calling, whether of labor or business, as seemed to them best. This common law right was raised to the dignity of a constitutional right by being incorporated in the Constitution of the commonwealth. So far as the question now before us goes, it is of no consequence whether the right to pursue one's calling (whether it be of labor or of business) is a common law right or a constitutional right, since the violation of it here complained of is on the part of individuals and not on the part of the Legislature. What is of consequence here is that such a right exists. In Article I of the Declaration of Rights it is declared that "all men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reck-

oned the right of . . . acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." It is in the exercise of this right that laborers can legally combine together in what are called labor unions. . . .

We have now arrived at the point where a labor union, being an organization brought about by the exercise on the part of its members of the right of every citizen to pursue his calling as he thinks best is limited in what it can do by the existence of the same right in each and every other citizen to pursue his and their calling as he or they think best.

In addition to the limitation thus put on labor unions there is a fact which puts a further limitation on what acts a labor union can legally do. That is the increase of power which a combination of citizens has over the individual citizen. Take for example the power of a labor union to compel by a strike compliance with its demands. Speaking generally a strike to be successful means not only coercion and compulsion but coercion and compulsion which, for practical purposes, are irresistible. A successful strike by laborers means, in many if not most cases, that for practical purposes the strikers have such a control of the labor which the employer must have that he has to yield to their demands. A single individual may well be left to take his chances in a struggle with another individual. But in a struggle with a number of persons combined together to fight an individual, the individual's chance is small, if it exists at all. It is plain that a strike by a combination of persons has a power of coercion which an individual does not have.

The result of this greater power of coercion on the part of a combination of individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals; or to state it in another way, there are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do. Take for example the case put in *Allen* v. *Flood* (1898), A.C. 1, 165, of a butler refusing to renew a contract of services because the cook was personally distasteful to him, whereupon, in order to secure the services of the butler, the master refrains from reengaging the cook whose term of service also had expired. We have no doubt that it is within the legal rights of a single person to refuse to work with another for the reason that the other person is distasteful to him, or for any other reason however arbitrary. But it is established in this commonwealth that it is not legal (even where he wishes to do so) for an employer to agree with a union to discharge

a nonunion workman for an arbitrary cause at the request of the union. *Berry* v. *Donovan,* 188 Mass. 353, 74 N.E. 603. *A fortiori* a labor union cannot by a strike refuse to work with another workman for an arbitrary cause. For the general proposition that what is lawful for an individual is not necessarily lawful for a combination of individuals see *Quinn* v. *Leathem* (1901), A.C. 495, 511; *Mogul Steamship Co., Limited,* v. *McGregor, Gow & Co.,* 23 Q.B.D. 598, 616, on appeal (1892), A.C. 25, 45; *Gregory* v. *Brunswick,* 6 M. & G. 205, on appeal, 3 C.B. 481. It is in effect concluded by *Plant* v. *Woods,* 176 Mass. 492, 57 N.E. 1011, 51 L.R.A. 339, 79 Am. St. Rep. 330.

These being the general principles, we are brought to the question of the legality of the strike in the case at bar, namely, a strike of bricklayers and masons to get the work of pointing, or, to put it more accurately, a combination by the defendants, who are bricklayers and masons, to refuse to lay bricks and stone where the pointing of them is given to others. The defendants in effect say we want the work of pointing the bricks and stone laid by us, and you must give us all or none of the work.

The case is a case of competition between the defendant unions and the individual plaintiff for the work of pointing. The work of pointing for which these two sets of workmen are competing is work which the contractors are obliged to have. One peculiarity of the case therefore is that the fight here is necessarily a triangular one. It necessarily involves the two sets of competing workmen and the contractor, and is not confined to the two parties to the contract, as is the case where workmen strike to get better wages from their employer or other conditions which are better for them. In this respect the case is like *Mogul Steamship Co.* v. *McGregor,* 23 Q.B.D. 598, on appeal (1892), A.C. 25. . . .

This brings us to the legality of the strike by the union bricklayers and masons employed by the L. P. Soule & Son Company on other buildings because that corporation was doing work on a building on which work was being done by pointers employed not by the L. P. Soule & Son Company but by the owners of the building.

That strike has an element in it like that in a sympathetic strike, in a boycott and in a blacklisting, namely: It is a refusal to work for A., with whom the strikers have no dispute, because A. works for B., with whom the strikers have a dispute, for the purpose of forcing A. to force B. to yield to the strikers' demands. In the case at bar the strike on the L. P. Soule & Son Company was a strike on that contractor to force it to force the owner of the Ford Building to give

the work of pointing to the defendant unions. That passes beyond a case of competition where the owner of the Ford Building is left to choose between the two competitors. Such a strike is in effect compelling the L. P. Soule & Son Company to join in a boycott on the owner of the Ford Building. It is a combination by the union to obtain a decision in their favor by forcing third persons who have no interest in the dispute to force the employer to decide the dispute in their (the defendant unions') favor. Such a strike is not a justifiable interference with the right of the plaintiffs to pursue their calling as they think best. In our opinion organized labor's right of coercion and compulsion is limited to strikes on persons with whom the organization has a trade dispute; or to put it in another way, we are of opinion that a strike on A., with whom the striker has no trade dispute, to compel A. to force B. to yield to the striker's demands, is an unjustifiable interference with the right of A. to pursue his calling as he thinks best. . . .

For the reason that the strike on the buildings being erected by the L. P. Soule & Son Company was not a strike in a trade dispute between the union and that corporation, the first and second clauses of the decree were in substance correct.

SUPPLEMENTAL CASE DIGEST—SECONDARY STRIKE

DE MINICO v. CRAIG. Supreme Judicial Court of Massachusetts, 1911; 94 N.E. 317. The plaintiff, a foreman, was discharged by his employer on instigation of a strike by a union which disliked the plaintiff. Held not a legal strike purpose, and subject to injunction and damages. ". . . We are of opinion that that is not a legal purpose for a strike. The plaintiff had a right to work and that right of his could not be taken away from him or interfered with by the defendants unless it came into conflict with an equal or superior right of theirs. The defendants' right to better their condition is such an equal right. But to humor their personal objections, their likes and dislikes, or to escape from what 'is distasteful' to some of them is not in our opinion a superior or an equal right.

"It is doubtless true that, in a certain sense, the condition of workmen is better if they work under a foreman for whom they do not have a personal dislike, that is to say, one who is not 'distasteful' to them. But that is not true in the sense in which those words are used when it is said that a strike to better the condition of the workmen is a strike for a legal purpose. One who betters his conditions only by escaping from what he merely dislikes and by securing what

he likes does not better his condition within the meaning of those words in the rule that employees can strike to better their condition.

"The defense in the case at bar has not failed because a strike to get rid of a foreman never can be a strike for a legal purpose. We can conceive of such a case. If, for example, a foreman was in the habit of using epithets so insulting to the men that they could not maintain their self-respect and work under him, a strike to get rid of him in our opinion would be a legal strike. . . ." (Loring, J.)[1]

Case Questions

1. What does Justice Loring say about the compulsive powers of a strike?
2. Do you feel that the compulsive power of an individual corporation to resist the demands of strikers is less, equal to, or greater than the combined power of all the corporation's employees who are striking?
3. Do unskilled workers have greater coercive powers than do skilled? Explain your answer.
4. What are the facts of *Allen* v. *Flood*?
5. Explain the triangular nature of a secondary strike. Does it have secondary boycott characteristics?
6. This case was decided almost half a century ago. Is it in accord with the National Labor Relations Act of 1947?
7. State the facts and rule developed by the *De Minico* digest.

[1] "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce . . . an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances." Sec. 8 (b) (1) of the National Labor Relations Act of 1947.

The instant provision merely codifies what had been the common law rule as to representatives with adequate authority to act for the employer.

SECTION 33. STRIKE FORCING STATUTORY VIOLATION

The *Indiana Desk* case in this section introduces the effect upon labor-management relations of certain wartime federal legislation that modified the collective bargaining and the strike rights of unionized employees. The interrelationship of the National Labor Relations Act with the Emergency Price Control Act is investigated below in its impact upon labor's right to strike.

NATIONAL LABOR RELATIONS BOARD v. INDIANA DESK COMPANY

Circuit Court of Appeals, Seventh Circuit, 1945. 149 Fed. (2d) 987

MAJOR, C. J. This case is here upon petition of the National Labor Relations Board, pursuant to Sec. 10 (e) of the National Labor Relations Act (49 Stat. 449, 29 U.S.C.A. Sec. 151 et seq.), for enforcement of its order issued against respondent on April 29, 1944, following the usual proceedings under Sec. 10 (29 U.S.C.A. Sec. 160) of the Act.

The Board's order is based upon findings that respondent has engaged and is engaging in unfair labor practices affecting commerce within the meaning of Sec. 2 (6) and (7) of the Act. The unfair labor practices charged and found are that respondent (1) violated Sec. 8 (3) of the Act by discriminating against a number of its employees because of their participation in a strike and (2) interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Sec. 7 of the Act, in violation of Sec. 8 (1), by threats that employees who had engaged in the strike would be denied further employment in the community and other statements calculated to discourage membership in the union. The union referred to is the charging union, the United Furniture Workers of America, Local No. 331, affiliated with the C.I.O. The contested issues in the main are (1) whether the findings as to the unfair labor practices are supported by substantial evidence and (2) even so, whether such findings support the Board's conclusions of law that the Act has been violated as charged.

We shall first consider the situation as it pertains to the alleged violation of Sec. 8 (3). In view of the contentions advanced by respondent, it seems appropriate to consider the evidence with refer-

ence to two events, (1) that of the strike and (2) that pertaining to respondent's refusal to recognize the strikers as employees at the termination of the strike.

Respondent contends that because of the nature of the strike it had a right to discharge those who participated therein. The strike occurred on October 9, 1942, at respondent's plant located at Jasper, Indiana. Respondent, as its name indicates, was and is engaged in the manufacture of furniture, partly (the record does not show to what extent) for use of the government in its war activities. It is pertinent to note that the record is silent as to any anti-union background or activity on the part of respondent. . . .

The Board did not find, in fact there is no intimation, that respondent committed an unfair labor practice either on October 9 or theretofore. It does find, as already noted, that the 51 strikers ceased work as a result of a "wage dispute." It follows, so the Board argues, that they remained employees entitled to the protection of the Act. On the other hand, respondent contends that the strike on October 9 was instituted and prosecuted in order to compel respondent to violate the Act of October 2, 1942 and Executive Orders No. 9250 and No. 9017. The contention follows that the strike was illegal, or at any rate its purpose was illegal, and that respondent had a right to sever the employer-employee relationship with those who participated therein.

Sec. 5 of the Act of 1942 (Sec. 965, Title 50, U.S.C.A., known as the Stabilization Act) provides: "No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act."

Sec. 11 of the Stabilization Act (Sec. 971, Title 50, U.S.C.A.), provides: "Any individual, corporation, partnership, or association willfully violating any provision of this Act, or any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both such fine and imprisonment."

Executive Order No. 9250 (Secs. 1 and 2 of Title II) provides: "No increases in wage rates, granted as a result of voluntary agreement, collective bargaining, . . . shall be authorized unless notice of such increase . . . shall have been filed with the National War Labor Board and unless the National War Labor Board has approved such increases. . . ." Section 2 of the Order precludes an approval of an increase in wages by the War Labor Board except under certain conditions therein enumerated.

Sec. 2 of the National Labor Relations Act provides: "The term 'employee' shall include . . . any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice. . . ." There is presented the interesting and perplexing question as to whether the striking employees quit work as the result of a "labor dispute" within the meaning of the Act. Ordinarily, of course, a controversy concerning wages would involve a labor dispute. Also, ordinarily a dispute, labor or otherwise, is something capable of adjustment by the parties. In the instant situation, however, it was not within the power of the strikers and respondent to settle or adjust that which is claimed as a "labor dispute." In fact, by a positive provision of law they were precluded from so doing. It hardly seems reasonable to think that a "labor dispute" was intended to include a dispute the settlement of which would have violated a statutory provision. The question, as far as we are advised, has not been decided. In our judgment, however, the unconditional demand for an increase in wages did not give rise to a "labor dispute" as that term is used in the Act. . . .

Of course, respondent upon presentation of the demand for an increase in wages, could have promised, had it so desired, to take the matter up with the War Labor Board, but it was under no obligation to so do any more than it was under obligation to bargain. Furthermore, respondent was not presented with such a request; the demand was for a present increase. The purpose of the strike undoubtedly was to force compliance with such demand. To show that the unconditional demand for an increase in wages, as well as the strike for the purpose of forcing compliance with such demand, was a violation of the Emergency Price Control Act, it is only necessary to visualize the situation had the demand been complied with or the purpose of the strike accomplished. It is hardly open to doubt but that under such circumstances respondent, as well as the employees, would have violated the Price Control Act. . . .

The Board's petition for enforcement of its order as presented is denied. . . .

Case Questions

1. What reason was found by the court to motivate the strike?
2. Why is it now important for the court to decide upon the existence of a labor dispute?
3. Does the court find a protected labor dispute to exist on the facts of this case?

SECTION 34. STRIKE BY GOVERNMENTAL EMPLOYEES

In its definition of the term "employer," the National Labor Relations Act expressly excludes the United States, wholly owned government corporations, states, and municipal corporations. Thus governmental employees have no rights under the Act. This does not mean, however, that the collective bargaining process is not afforded recognition by governing bodies. The Federal government permits its employees to form, join, and assist labor organizations, as do all states, except possibly Alabama. Municipal bodies are not uniform on this issue, as many of them prohibit their employees from affiliating with a labor union.

In no case, notwithstanding a recognition of the right of governmental employees to engage in collective bargaining, has the law recognized the right of governmental employees to engage in strike or boycott activity. The applicable provision outlawing the right of federal employees to strike is reproduced below. It merely codifies the common law. The Wagner Act did not grant strike rights to governmental employees.

National Labor Relations Act, 1947, C. 372, 49 Stat. 449, 29 U.S. Code, Sections 151-166, Public No. 198, 74th Congress, as amended by Act of June 23, 1947, Public Law 101, 80th Congress, Sec. 305:

> "It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strike. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for reemployment for three years by the United States or any such agency."

CHAPTER 6

LAWFUL AND UNLAWFUL PICKET ACTIVITY

SECTION 35. TYPES OF PICKETING

Picketing of an establishment may take a number of forms—may be violent or peaceful, may be engaged in for a variety of reasons or purposes, and may or may not coexist with a strike. Though picket activity usually accompanies a strike, the converse is not necessarily true. If a union believes that the economic compulsion inherent in the publication of a labor dispute through picket activity is sufficient to enforce compliance with demands made, a picket line may be established, and legally so, without the existence of a strike against the employer in question.

Where workers in a production unit are fearful of employer retaliation for engaging in union activity, and therefore refrain from joining a union, that union may set up a picket line to exert pressure on the employer to induce his workers to join up. A strike will not exist under these conditions. When third parties, not in the relation of master and servant, picket an employer, it is known as *outsider* picketing.

In addition to outsider picketing, we may distinguish two other major forms, *primary* and *secondary* picketing. The *primary* picket results when workers in a given establishment patrol around it with placards and inform workers and the public that that employer is unfair, etc., to union labor. A strike may or may not have been called. The gist of the primary picket is a dispute with the employer whose establishment is being patrolled. The *secondary* picket, which is a species of secondary boycott, involves the stationing of workers around the place of business of a customer or supplier of the employer with whom the union has a dispute, to cause him to refrain from dealing with the employer. *Tertiary* picketing is as rare as it is unlawful, but when it occurs, we find picketing of the customer or supplier of a customer or supplier of an employer with whom the union has a dispute.

Primary picketing, if unattended by intimidation, fraud, or violence and conducted for a lawful end, is given constitutional protection as an exercise of the right of free speech. Secondary picketing, otherwise lawful, has also been held constitutionally protected if

there is "unity of interest" between the employer with whom the primary dispute exists and the intermediate party whose organization is being patrolled, though no direct dispute exists between him and the union. The *remoteness* of the ostensibly innocent third party against whom the pressure is being exerted and the *substantiality* of the business he transacts with the primary employer disputant furnish a guide to determine the degree of pressure that may lawfully be exerted against such third party. The closer the interest between the employer and his supplier or customer, the more nearly may the pressure against such supplier or customer approximate that which is being applied to the primary employer disputant. The hazy line of demarcation between permissible and prohibited secondary picketing activity is delineated by the Supreme Court in the *Wohl* [1] and *Ritter's Cafe* [2] decisions, reprinted and handled in Chapter 7 under the secondary boycott caption. Secondary picketing activity, as a species of secondary boycott, properly falls in Chapter 7 where the boycott is discussed. Chapter 6 focuses attention upon the *primary* picket.

Questions on Section 35

1. May picketing legally be carried on without a strike?
2. Distinguish the various forms of picketing.
3. Under what circumstances is primary picketing accorded constitutional protection?

[1] The *Wohl* decision is reprinted in Chapter 7, Section 50, page 339.
[2] The *Ritter's Cafe* decision is reprinted in Chapter 7, Section 49, page 328.

SECTION 36. FREE SPEECH IN GENERAL

The local police power enables state and municipal governing bodies to enact laws and ordinances controlling such matters as the assemblage of persons, the dissemination of information, the distribution of literature, and solicitation. Such legislation is ostensibly designed in the interest of orderly government and the prevention of rout and riot. In antilabor jurisdictions, these laws are sometimes directed at innocuous labor union activity, such as union gatherings, peaceful group picketing, solicitation, and leaflet distribution by labor union adherents.

To some substantial extent, not capable of precise definition, these laws can be upheld; but if they pass beyond a certain point in their tenor or enforcement, they will be in abridgement of the right of free speech and assembly protected by the First or Fourteenth Amendments to the Constitution. *Schneider* v. *State* in this section is a Supreme Court classic on this question, as it fully develops the clash between the local police power, on the one hand, and the federally protected right of free speech on the other.

The *Thomas* v. *Collins* decision in this section directly poses the free speech right under circumstances involving union organizing activity, which, of course, requires an assemblage and/or solicitation of members. This case, a recent Supreme Court pronouncement, investigates the constitutional validity of a Texas law requiring that union organizers obtain an organizer's permit precedent to solicitation of members.

SCHNEIDER v. STATE

Supreme Court of United States, 1939. 308 U.S. 147, 60 Sup. Ct. 146

ROBERTS, J. Four cases are here, each of which presents the question whether regulations embodied in a municipal ordinance abridge the freedom of speech and of the press secured against state invasion by the Fourteenth Amendment of the Constitution.

No. 13

The Municipal Code of the City of Los Angeles, 1936, provides:

"Sec. 28.00. "Hand-Bill" shall mean any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public."

"Sec. 28.01. No person shall distribute any hand-bill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any street car, or throw, place or attach any hand-bill in, to, or upon any automobile or other vehicle."

The appellant was charged in the Municipal Court with a violation of Sec. 28.01. Upon his trial it was proved that he distributed handbills to pedestrians on a public sidewalk and had more than three hundred in his possession for that purpose. Judgment of conviction was entered and sentence imposed. The Superior Court of Los Angeles County affirmed the judgment. That court being the highest court in the State authorized to pass upon such a case, an appeal to this court was allowed.

The handbill which the appellant was distributing bore a notice of a meeting to be held under the auspices of "Friends Lincoln Brigade" at which speakers would discuss the war in Spain.

The court below sustained the validity of the ordinance on the ground that experience shows littering of the streets results from the indiscriminate distribution of handbills. It held that the right of free expression is not absolute but subject to reasonable regulation and that the ordinance does not transgress the bounds of reasonableness. *Lovell* v. *City of Griffin*, 303 U.S. 44, was distinguished on the ground that the ordinance there in question prohibited distribution anywhere within the city while the one involved forbids distribution in a very limited number of places.

No. 18

An ordinance of the City of Milwaukee, Wisconsin, provides: "It is hereby made unlawful for any person . . . to . . . throw . . . paper . . . or to circulate or distribute any circular, hand-bills, cards, posters, dodgers, or other printed or advertising matter . . . in or upon any sidewalk, street, alley, wharf, boat landing, dock or other public place, park or ground within the City of Milwaukee. . . ."

The petitioner, who was acting as a picket, stood in the street in front of a meat market and distributed to passing pedestrians handbills which pertained to a labor dispute with the meat market, set forth the position of organized labor with respect to the market, and asked citizens to refrain from patronizing it. Some of the bills were thrown in the street by the persons to whom they were given and it resulted that many of the papers lay in the gutter and in the street. The police officers who arrested the petitioner and charged him with a violation of the ordinance did not arrest any of those who received

the bills and threw them away. The testimony was that the action of the officers accorded with a policy of the police department in enforcement of the ordinance to the effect that, when such distribution resulted in littering of the streets the one who was the cause of the littering, that is, he who passed out the bills, was arrested rather than those who received them and afterwards threw them away. The Milwaukee County Court found the petitioner guilty and fined him. On appeal the judgment was affirmed by the Supreme Court.

The court held that the purpose of the ordinance was to prevent an unsightly, untidy, and offensive condition of the sidewalks. It distinguished *Lovell* v. *City of Griffin, supra,* on the ground that the ordinance there considered manifestly was not aimed at prevention of littering of the streets. The court approved the administrative construction of the ordinance by the police officials and felt that this construction sustained its validity. The court said: "Unless and until delivery of the hand-bills was shown to result in a littering of the streets their distribution was not interfered with."

No. 29

An ordinance of the City of Worcester, Massachusetts, provides: "No person shall distribute in, or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. . . ."

The appellants distributed in a street leaflets announcing a protest meeting in connection with the administration of state unemployment insurance. They did not throw any of the leaflets on the sidewalk or scatter them. Some of those to whom the leaflets were handed threw them on the sidewalk and the street, with the result that some thirty were lying about.

The appellants were arrested and charged with a violation of the ordinance. The Superior Court of Worcester County rendered a judgment of conviction and imposed sentence. The Supreme Judicial Court overruled exceptions. That court held the ordinance a valid regulation of the use of the streets and sought thus to distinguish it from the one involved in *Lovell* v. *City of Griffin, supra,* which the court said was not such a regulation. Referring to the ordinance the court said: "It interferes in no way with the publication of anything in the city of Worcester, except only that it excludes the public streets and ways from the places available for free distribution. It leaves open for such distribution all other places in the city, public and private."

No. 11

An ordinance of the Town of Irvington, New Jersey, provides: "No person except as in this ordinance provided shall canvass, solicit, distribute circulars, or other matter, or call from house to house in the Town of Irvington without first having reported to and received a written permit from the Chief of Police or the officer in charge of Police Headquarters." It further enacts that a permit to canvass shall specify the number of hours or days it will be in effect; that the canvasser must make an application giving his name, address, age, height, weight, place of birth, whether or not previously arrested or convicted of crime, by whom employed, address of employer, clothing worn, and description of project for which he is canvassing; that each applicant shall be fingerprinted and photographed; that the Chief of Police shall refuse a permit in all cases where the application or further investigation made at the officer's discretion, shows that the canvasser is not of good character or is canvassing for a project not free from fraud; that canvassing may only be done between 9 A.M. and 5 P.M.; that the canvasser must furnish a photograph of himself which is to be attached to the permit; that the permittee must exhibit the permit to any police officer or other person upon request, must be courteous to all persons in canvassing, must not importune or annoy the town's inhabitants or conduct himself in an unlawful manner and must, at the expiration of the permit, surrender it at police headquarters. Persons delivering goods, merchandise, or other articles in the regular course of business to the premises of persons ordering, or entitled to receive the same, are exempted from the operation of the ordinance. Violation is punishable by fine or imprisonment.

The petitioner was arrested and charged with canvassing without a permit. The proofs show that she is a member of the Watch Tower Bible and Tract Society and, as such, certified by the society to be one of "Jehovah's Witnesses." In this capacity she called from house to house in the town at all hours of the day and night and showed to the occupants a so-called testimony and identification card signed by the society. The card stated that she would leave some booklets discussing problems affecting the person interviewed; and that, by contributing a small sum, that person would make possible the printing of more booklets which could be placed in the hands of others. The card certified that the petitioner was an ordained minister sent forth by the society, which is organized to preach the gospel of God's kingdom, and cited passages from the Bible with respect to the obligation

so to preach. The petitioner left, or offered to leave, the books or booklets with the occupants of the houses visited. She did not apply for, or obtain, a permit pursuant to the ordinance because she conscientiously believed that so to do would be an act of disobedience to the command of Almighty God.

The petitioner was convicted in the Recorder's Court. The Court of Common Pleas affirmed the judgment. On a further appeal the Supreme Court affirmed. The Court of Errors and Appeals affirmed the judgment of the Supreme Court.

The Supreme Court held that the petitioner's conduct amounted to the solicitation and acceptance of money contributions without a permit, and held the ordinance prohibiting such action a valid regulation, aimed at protecting occupants and others from disturbance and annoyance and preventing unknown strangers from visiting houses by day and night. It overruled the petitioner's contention that the measure denies or unreasonably restricts freedom of speech or freedom of the press. The Court of Errors and Appeals thought *Lovell* v. *City of Griffin, supra,* not controlling, since the ordinance in that case prohibited all distribution of printed matter and was not limited to ways which might be regarded as consistent with the maintenance of public order or as involving use or littering of the streets, whereas the ordinance here involved is aimed at canvassing or soliciting, subjects not embraced in that condemned in the *Lovell* case. The court said: "A municipality may protect its citizens against fraudulent solicitation and, when it enacts an ordinance to do so, all persons are required to abide thereby. The ordinance in question was evidently designed for that purpose. . . ."

The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state.

Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.

Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may

lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.

This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting the matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

In *Lovell* v. *City of Griffin, supra,* this court held void an ordinance which forbade the distribution by hand or otherwise of literature of any kind without written permission from the city manager. The opinion pointed out that the ordinance was not limited to obscene and immoral literature or that which advocated unlawful conduct, placed no limit on the privilege of distribution in the interest of public order, was not aimed to prevent molestation of inhabitants or misuse or littering of streets, and was without limitation as to time or place of distribution. The court said that, whatever the motive, the ordinance was bad because it imposed penalties for the distribution of pamphlets, which had become historical weapons in the defense of liberty, by subjecting such distribution to license and censor-

ship; and that the ordinance was void on its face, because it abridged the freedom of the press. Similarly in *Hague* v. *C. I. O.*, 307 U.S. 496, an ordinance was held void on its face because it provided for previous administrative censorship of the exercise of the right of speech and assembly in appropriate public places.

The Los Angeles, the Milwaukee, and the Worcester ordinances under review do not purport to license distribution but all of them absolutely prohibit it in the streets and, one of them, in other public places as well.

The motive of the legislation under attack in Numbers 13, 18, and 29 is held by the courts below to be the prevention of littering of the streets and, although the alleged offenders were not charged with themselves scattering paper in the streets, their convictions were sustained upon the theory that distribution by them encouraged or resulted in such littering. We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.

It is argued that the circumstance that in the actual enforcement of the Milwaukee ordinance the distributor is arrested only if those who receive the literature throw it in the streets, renders it valid. But, even as thus construed, the ordinance cannot be enforced without unconstitutionally abridging the liberty of free speech. As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.

It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited to streets and alleys and leaves persons free to distribute printed matter in other public places. But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

While it affects others, the Irvington ordinance drawn in question in No. 11, as construed below, affects all those, who, like the petitioner, desire to impart information and opinion to citizens at their homes. If it covers the petitioner's activities it equally applies to one who wishes to present his views on political, social or economic questions. The ordinance is not limited to those who canvass for private profit; nor is it merely the common type of ordinance requiring some form of registration or license of hawkers, or peddlers. It is not a general ordinance to prohibit trespassing. It bans unlicensed communication of any views or the advocacy of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it. The applicant must submit to that officer's judgment evidence as to his good character and as to the absence of fraud in the "project" he proposes to promote or the literature he intends to distribute, and must undergo a burdensome and inquisitorial examination, including photographing and fingerprinting. In the end, his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion.

As said in *Lovell* v. *City of Griffin, supra,* pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees.

Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and

who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.

We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires. Nor do we hold that the town may not fix reasonable hours when canvassing may be done by persons having such objects as the petitioner. Doubtless there are other features of such activities which may be regulated in the public interest without prior licensing or other invasion of constitutional liberty. We do hold, however, that the ordinance in question, as applied to the petitioner's conduct, is void, and she cannot be punished for acting without a permit.

The judgment in each case is reversed and the causes are remanded for further proceedings not inconsistent with this opinion.

Reversed.

Case Questions

1. State the facts and lower court rulings in Case Nos. 13, 18, 29, and 11.
2. Is the right of free speech and press absolute? Give examples of valid state legislation limiting the rights above.
3. State the holdings of the Court in the Lovell and Hague cases.
4. In Nos. 13, 18 and 29, what was the motive of the legislation, and how did the Supreme Court dispose of the argument?
5. May commercial solicitation be regulated?

THOMAS v. COLLINS, SHERIFF

Supreme Court of the United States, 1945. 323 U.S. 516, 65 Sup. Ct. 315

RUTLEDGE, J. The appeal is from a decision of the Supreme Court of Texas which denied appellant's petition for a writ of *habeas corpus* and remanded him to the custody of appellee, as sheriff of Travis County. 141 Tex. 591, 174 S.W. 2d 958. In so deciding the court upheld, as against constitutional and other objections, appellant's commitment for contempt for violating a temporary restraining order issued by the District Court of Travis County. The order was issued *ex parte* and in terms restrained appellant, while in Texas, from soliciting members for, or memberships in, specified labor unions and others affiliated with the Congress of Industrial Organizations, without first obtaining an organizer's card as required by House Bill No. 100, C. 104, General and Special Laws of Texas, Regular Session, 48th Legislature (1943). After the order was served, appellant

addressed a mass meeting of workers and at the end of his speech asked persons present to join a union. For this he was held in contempt, fined and sentenced to a short imprisonment.

The case has been twice argued here. Each time appellant has insisted, as he did in the state courts, that the statute as it has been applied to him is in contravention of the Fourteenth Amendment, as it incorporates the First, imposing a previous restraint upon the rights of freedom of speech and free assembly, and denying him the equal protection of the laws. He urges also that the application made of the statute is inconsistent with the provisions of the National Labor Relations Act, 49 Stat. 449, and other objections which need not be considered. For reasons to be stated we think the statute as it was applied in this case imposed previous restraint upon appellant's rights of free speech and free assembly and the judgment must be reversed. . . .

The Supreme Court of Texas, deeming habeas corpus an appropriate method for challenging the validity of the statute as applied, sustained the Act as a valid exercise of the State's police power, taken "for the protection of the general welfare of the public, and particularly the laboring class," with special reference to safeguarding laborers from imposture when approached by an alleged organizer. The provision, it was said, "affects only the right of one to engage in the business as a paid organizer, and not the mere right of an individual to express his views on the merits of the union." The court declared the Act "does not require a paid organizer to secure a license," but makes mandatory the issuance of the card "to all who come within the provisions of the Act upon their good-faith compliance therewith." Accordingly it held that the regulation was not unreasonable. . . .

Appellant first urges that the application of the statute amounted to the requirement of a license "for the simple act of delivering an address to a group of workers." He says the act penalized "was simply and solely the act of addressing the workers on the . . . benefits of unionism, and concluding the address with a plea to the audience generally and to a named worker in the audience to join a union." He points out that he did not parade on the streets, did not solicit or receive funds, did not "sign up" workers, engaged in no disturbance or breach of the peace, and that his sole purpose in going to Texas and his sole activity there were to make the address including the invitations which he extended at the end. There is no evidence that he solicited memberships or members for a union at any

other time or occasion or intended to do so. His position necessarily maintains that the right to make the speech includes the right to ask members of the audience, both generally and by name, to join the union.

Appellant also urges more broadly that the statute is an invalid restraint upon free expression in penalizing the mere asking a worker to join a union, without having procured the card, whether the asking takes place in a public assembly or privately.

Texas, on the other hand, asserts no issue of free speech or free assembly is presented. With the state court, it says the statute is directed at business practices, like selling insurance, dealing in securities, acting as commission merchant, pawnbroking, etc., and was adopted "in recognition of the fact that something more is done by a labor organizer than talking." . . .

The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider* v. *State,* 308 U.S. 147; *Cantwell* v. *Connecticut,* 310 U.S. 296; *Prince* v. *Massachusetts,* 321 U.S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-153.

For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights

of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, cf. *DeJonge* v. *Oregon,* 299 U.S. 353, 364, and therefore are united in the First Article's assurance. Cf. 1 Annals of Congress 759-760.

This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience. Cf. *Pierce* v. *Society of Sisters,* 268 U.S. 510; *Meyer* v. *Nebraska,* 262 U.S. 390; *Prince* v. *Massachusetts,* 321 U.S. 158. Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.

The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge, as Texas does, that an organization for which the rights of free speech and free assembly are claimed is one "engaged in business activities" or that the individual who leads it in exercising these rights receives compensation for doing so. Nor, on the other hand, is the answer given, whether what is done is an exercise of those rights and the restriction a forbidden impairment, by ignoring the organization's economic function, because those interests of workingmen are involved or because they have the general liberties of the citizen, as appellant would do.

These comparisons are at once too simple, too general, and too inaccurate to be determinative. Where the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests and the community's relative evaluation of both of them and of how the one will be affected by the specific restriction, the other by its absence. That judgment in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. *Schneider* v. *State,* 308 U.S. 147, 161. And the answer, under that tradition, can be affirmative, to support an intrusion upon this domain, only if grave and impending public danger requires this.

That the State has power to regulate labor unions with a view to protecting the public interest is, as the Texas court said, hardly to

be doubted. They cannot claim special immunity from regulation. Such regulation, however, whether aimed at fraud or other abuses, must not trespass upon the domains set apart for free speech and free assembly. This Court has recognized that "in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill* v. *Alabama,* 310 U.S. 88, 102-103; *Senn* v. *Tile Layers Protective Union,* 301 U.S. 468, 478. The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly. *Hague* v. *C. I. O.,* 307 U.S. 496. The Texas court, in its disposition of the cause, did not give sufficient weight to this consideration, more particularly by its failure to take account of the blanketing effect of the prohibition's present application upon public discussion and also of the bearing of the clear and present danger test in these circumstances.

In applying these principles to the facts of this case we put aside the broader contentions both parties have made and confine our decision to the narrow question whether the application made of Sec. 5 in this case contravenes the First Amendment. . . .

Thomas went to Texas for one purpose and one only—to make the speech in question. Its whole object was publicly to proclaim the advantages of workers' organization and to persuade workmen to join Local No. 1002 as part of a campaign for members. These also were the sole objects of the meeting. The campaign, and the meeting, were incidents of an impending election for collective bargaining agent, previously ordered by national authority pursuant to the guaranties of national law. Those guaranties include the workers' right to organize freely for collective bargaining. And this comprehends whatever may be appropriate and lawful to accomplish and maintain such organization. It included, in this case, the right to designate Local No. 1002 or any other union or agency as the employees' representative. It included their right fully and freely to discuss and be informed concerning this choice, privately or in public assembly. Necessarily correlative was the right of the union, its members and officials, whether residents or nonresidents of Texas and, if the latter, whether there for a single occasion or sojourning longer, to discuss

with and inform the employees concerning matters involved in their choice. These rights of assembly and discussion are protected by the First Amendment. Whatever would restrict them, without sufficient occasion, would infringe its safeguards. The occasion was clearly protected. The speech was an essential part of the occasion, unless all meaning and purpose were to be taken from it. And the invitations, both general and particular, were parts of the speech, inseparable incidents of the occasion and all that was said or done.

That there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say, there can be no doubt. The threat of the restraining order, backed by the power of contempt, and of arrest for crime, hung over every word. A speaker in such circumstances could avoid the words "solicit," "invite," "join." It would be impossible to avoid the idea. The statute requires no specific formula. It is not contended that only the use of the word "solicit" would violate the prohibition. Without such a limitation, the statute forbids any language which conveys, or reasonably could be found to convey, the meaning of invitation. That Thomas chose to meet the issue squarely, not to hide in ambiguous phrasing, does not counteract this fact. General words create different and often particular impressions on different minds. No speaker, however careful, can convey exactly his meaning, or the same meaning, to the different members of an audience. How one might "laud unionism," as the State and the State Supreme Court concede Thomas was free to do, yet in these circumstances not imply an invitation, is hard to conceive. This is the nub of the case, which the State fails to meet because it cannot do so. Workingmen do not lack capacity for making rational connections. They would understand, or some would, that the president of U.A.M. and vice president of C.I.O., addressing an organization meeting, was not urging merely a philosophic attachment to abstract principles of unionism, disconnected from the business immediately at hand. The feat would be incredible for a national leader, addressing such a meeting, lauding unions and their principles, urging adherence to union philosophy, not also and thereby to suggest attachment to the union by becoming a member.

Furthermore, whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocay, and

solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. He must take care in every word to create no impression that he means, in advocating unionism's most central principle, namely, that workingmen should unite for collective bargaining, to urge those present to do so. The vice is not merely that invitation, in the circumstances shown here, is speech. It is also that its prohibition forbids or restrains discussion which is not or may not be invitation. The sharp line cannot be drawn surely or securely. The effort to observe it could not be free speech, free press, or free assembly, in any sense of free advocacy of principle or cause. The restriction's effect, as applied, in a very practical sense was to prohibit Thomas not only to solicit members and memberships, but also to speak in advocacy of the cause of trade unionism in Texas, without having first procured the card. Thomas knew this and faced the alternatives it presented. When served with the order he had three choices: (1) to stand on his right and speak freely; (2) to quit, refusing entirely to speak; (3) to trim, and even thus to risk the penalty. He chose the first alternative. We think he was within his rights in doing so. . . .

We do not mean to say there is not, in many circumstances, a difference between urging a course of action and merely giving and acquiring information. On the other hand, history has not been without periods when the search for knowledge alone was banned. Of this we may assume the men who wrote the Bill of Rights were aware. But the protection they sought was not solely for persons in intellectual pursuits. It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts. Cf. *Abrams* v. *United States,* 250 U.S. 616, 624, and *Gitlow* v. *New York,* 268 U.S. 652, 672, dissenting opinions of Mr. Justice Holmes. Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.

Accordingly, the decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining

unions are within the First Amendment's guaranty. *Labor Board* v. *Virginia Electric & Power Co.*, 314 U.S. 469. Decisions of other courts have done likewise. When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. Cf. *Labor Board* v. *Virginia Electric & Power Co., supra.* But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Of course, espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection. . . .

The judgment is *reversed.*

SUPPLEMENTAL CASE DIGESTS—FREE SPEECH IN GENERAL

DEVON KNITWEAR CO., INC. v. LEVINSON. Supreme Court, Special Term, New York County, 1940; 173 Misc. 779, 19 N.Y.S. 2d 102. The plaintiffs, Devon Knitwear Co., Inc., sought an injunction in a court of equity to restrain the defendant labor union, Knitgoods Workers Union, Local 155, International Ladies' Garment Workers Union, from picketing in the vicinity of plaintiff's premises and from doing other acts related to such picketing. Defendants filed an affirmative defense that plaintiffs had been guilty of unfair labor practices and hence came into a court of equity with unclean hands.

". . . The rule is fundamental that a court of equity may deny relief to one who enters its portals with unclean hands. . . . Certainly in this case, where the plaintiffs are seeking the extraordinary equitable remedy of injunction, the defendant should be permitted to plead any facts which may constitute a basis for withholding such relief from plaintiffs. . . . In hearing such defense, this court no more interferes with the exclusive jurisdiction of the National Labor Relations Board to prevent plaintiffs from engaging in any unfair labor practice, than it does with the jurisdiction of the criminal courts to determine the guilt or innocence of a plaintiff against whom a defense of illegality is pleaded, where the facts showing such illegality would also establish the commission of a crime by such plaintiff. . . . The motion is denied." (Pecora, J.)

NANN v. RAIMIST. Court of Appeals of New York, 1931; 174 N.E. 690. Action was brought by the Amalgamated Food Workers against the Bakery and Confectionery Workers' International Union of America, A. F. of L., for the purpose of enjoining the International from carrying out its avowed threat to drive the Amalgamated

out of existence. Action by the defendant union against the plaintiff had been coupled with violence and breaches of the peace.

". . . The plaintiff, if threatened in its business life by the violence of the defendant or by other wrongful acts, may have the aid of the court to preserve itself from disruption through recourse to these unlawful means. The remedy is not lost because the controversy is one between the members of rival unions, and not, as happens oftener, between unions and employers. . . . If the defendant believes in good faith that the policy pursued by the plaintiff and by the shops united with the plaintiff is hostile to the interests of organized labor, and is likely, if not suppressed, to lower the standards of living for workers in the trade, it has the privilege by the pressure of notoriety and persuasion to bring its own policy to triumph. . . . Upon the facts exhibited in this record the defendant went beyond the bounds of lawful conduct in conducting its campaign for the suppression of its rival. . . ." (Cardozo, C. J.)

Case Questions

1. What did the Texas law provide? How did Collins violate the law?
2. Under what state power did the Supreme Court of Texas uphold the law?
3. May a state regulate labor unions in the public interest? Qualify as the court does.
4. What is the "nub of the case"?
5. What may an employer do with respect to persuading action as to joining or not joining unions?
6. In the *Devon* case, discuss the "clean hands" principle.
7. State the rule of the *Nann* case.

SECTION 37. PEACEFUL PICKETING

The Supreme Court decisions in the *American Steel Foundries* case (page 102) and the *Truax* v. *Corrigan* case (page 87), which drastically limited the right to engage in picket activity, spurred on many states to enact antipicketing statutes. These statutes incorporated provisions such as the prohibition of outsider, violent, massed, fraudulent, and secondary picketing. The *Thornhill* case in this section, a landmark in labor law, involves the constitutionality of an Alabama statute that prohibited *all* picketing as a misdemeanor.

The Supreme Court will not generally find a statute unconstitutional on its face unless it is clearly so. What it usually does is seek to determine whether the statute was *applied* and *construed* by the lower court, giving full expression to constitutional guarantees. Thus, the same enactment may be constitutional in one case, where properly applied, and unconstitutional where improperly applied. It was impossible for the Court to save the Alabama statute, since it was incapable of anything but an unconstitutional construction.

THORNHILL v. STATE OF ALABAMA

Supreme Court of the United States, 1940. 310 U.S. 88, 60 Sup. Ct. 736

MURPHY, J. Petitioner, Byron Thornhill, was convicted in the Circuit Court of Tuscaloosa County, Alabama, of the violation of Section 3448 of the State Code of 1923. The Code Section reads as follows: "Sec. 3448. Loitering or picketing forbidden.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

The complaint against petitioner, which is set out in the margin, is phrased substantially in the very words of the statute. The first and second counts charge that petitioner, without just cause or legal excuse, did "go near to or loiter about the premises" of the Brown Wood Preserving Company with the intent or purpose of influencing others to adopt one of enumerated courses of conduct. In the third

count, the charge is that petitioner "did picket" the works of the Company "for the purpose of hindering, delaying or interfering with or injuring (its) lawful business." Petitioner demurred to the complaint on the grounds, among others, that Section 3448 was repugnant to the Constitution of the United States (Amendment 1) in that it deprived him of "the right of peaceful assemblage," "the right of freedom of speech," and "the right to petition for redress." The demurrer, so far as the record shows, was not ruled upon, and petitioner pleaded not guilty. The Circuit Court then proceeded to try the case without a jury, one not being asked for or demanded. At the close of the case for the State, petitioner moved to exclude all the testimony taken at the trial on the ground that Section 3448 was violative of the Constitution of the United States. The Circuit Court overruled the motion, found petitioner "guilty of Loitering and Picketing as charged in the complaint," and entered judgment accordingly. The judgment was affirmed by the Court of Appeals, which considered the constitutional question and sustained the section on the authority of two previous decisions in the Alabama courts. *O'Rourke* v. *City of Birmingham,* 27 Ala. App. 133, 168 So. 206, *certiorari* denied, 232 Ala. 355, 168 So. 209; *Hardie-Tynes Mfg. Co.* v. *Cruise,* 189 Ala. 66, 66 So. 657. A petition for certiorari was denied by the Supreme Court of the State. The case is hereon certiorari granted because of the importance of the questions presented. 308 U.S. 547, 60 S. Ct. 296, 84 L. Ed. —, December 11, 1939.

The proofs consist of the testimony of two witnesses for the prosecution. It appears that petitioner on the morning of his arrest was seen "in company with six or eight other men" "on the picket line" at the plant of the Brown Wood Preserving Company. Some weeks previously a strike order had been issued by a Union, apparently affiliated with the American Federation of Labor, which had as members all but four of the approximately one hundred employees of the plant. Since that time a picket line with two picket posts of six to eight men each had been maintained around the plant twenty-four hours a day. The picket posts appear to have been on Company property, "on a private entrance for employees, and not on any public road." One witness explained that practically all of the employees live on Company property. No demand was ever made upon the men not to come on the property. There is not testimony indicating the nature of the dispute between the Union and the Preserving Company, or the course of events which led to the issuance of the strike order, or the nature of the efforts for conciliation.

The Company scheduled a day for the plant to resume operations. One of the witnesses, Clarence Simpson, who was not a member of the Union, on reporting to the plant on the day indicated, was approached by petitioner who told him that "they were on strike and did not want anybody to go up there to work." None of the other employees said anything to Simpson, who testified: "Neither Mr. Thornhill nor any other employee threatened me on the occasion testified to. Mr. Thornhill approached me in a peaceful manner, and did not put me in fear; he did not appear to be mad." "I then turned and went back to the house, and did not go to work." The other witness, J. M. Walden, testified: "At the time Mr. Thornhill and Clarence Simpson were talking to each other, there was no one else present, and I heard no harsh words and saw nothing threatening in the manner of either man." For engaging in some or all of these activities, petitioner was arrested, charged, and convicted as described.

First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.

The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. Compare *United States* v. *Carolene Products*, 304 U.S. 144, 152, 153n, 58 S. Ct. 778, 783, 784, 82 L. Ed. 1234. Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should "weigh the circumstances" and "appraise the sub-

stantiality of the reasons advanced" in support of the challenged regulations. *Schneider* v. *State*, 309 U.S. 147, 161, 162, 60 S. Ct. 146, 150, 151, 84 L. Ed. 155.

Second. The section in question must be judged upon its face. The finding against petitioner was a general one. It did not specify the testimony upon which it rested. The charges were framed in the words of the statute and so must be given a like construction. The courts below expressed no intention of narrowing the construction put upon the statute by prior State decisions. In these circumstances, there is no occasion to go behind the fact of the statute or of the complaint for the purpose of determining whether the evidence, together with the permissible inferences to be drawn from it, could ever support a conviction founded upon different and more precise charges. "Conviction upon a charge not made would be sheer denial of due process." *De Jonge* v. *Oregon*, 299 U.S. 353, 362, 57 S. Ct. 255, 259, 81 L. Ed. 278; *Stromberg* v. *California*, 283 U.S. 359, 367, 368, 51 S. Ct. 532, 535, 75 L. Ed. 1117, 73 A.L.R. 1484. The State urges that petitioner may not complain of the deprivation of any rights but his own. It would not follow that on this record petitioner could not complain of the sweeping regulations here challenged.

There is a further reason for testing the section on its face. Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. *Schneider* v. *State*, 308 U.S. 147, 162-165, 60 S.Ct. 146, 151-152, 84 L. Ed. 155; *Hague* v. *C.I.O.*, 307 U.S. 496, 516, 59 S. Ct. 954, 964, 83 L. Ed. 1423; *Lovell* v. *Griffin*, 303 U.S. 444, 451, 58 S. Ct. 666, 668, 82 L. Ed. 949. The cases when interpreted in the light of their facts indicate that the rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. Rather it derives from an appreciation of the character of the evil inherent in a licensing system. The power of the licensor against which John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing" is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near* v. *Minnesota*, 283 U.S. 697, 713, 51 S. Ct. 625, 630, 75 L. Ed. 1357. One who might have had a license for the asking may therefore call into question the whole scheme of licensing

when he is prosecuted for failure to procure it. *Lovell* v. *Griffin,* 303 U.S. 444, 58 S. Ct. 666, 82 L. Ed. 949; *Hague* v. *C.I.O.,* 307 U.S. 496 59 S. Ct. 954, 83 L. Ed. 1423. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship. An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. *Schneider* v. *State,* 308 U.S. 147, 155, 162, 163, 60 S. Ct. 146, 148, 151, 84 L. Ed. 155. Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California,* 283 U.S. 359, 368, 51 S. Ct. 532, 535, 75 L. Ed. 1117, 73 A.L.R. 1484; *Schneider* v. *State,* 308 U.S. 147, 155, 162, 163, 60 S. Ct. 146, 151, 84 L. Ed. 155. Compare *Lanzetta* v. *New Jersey,* 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888.

Third. Section 3448 has been applied by the State courts so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor; the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer. *O'Rourke* v. *City of Birmingham,* 27 Ala. App. 133, 168 So. 206, certiorari denied 232 Ala. 355, 168 So. 209. The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number

of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute.

The numerous forms of conduct proscribed by Section 3448 are subsumed under two offenses: the first embraces the activities of all who "without a just cause or legal excuse" "go near to or loiter about the premises" of any person engaged in a lawful business for the purpose of influencing or inducing others to adopt any of certain enumerated courses of action; the second, all who "picket" the place of business of any such person "for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another." It is apparent that one or the other of the offenses comprehends every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of an employer. The phrase "without a just cause or legal excuse" does not in any effective manner restrict the breadth of the regulation; the words themselves have no ascertainable meaning either inherent or historical. Compare *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453-455, 59 S. Ct. 618, 619, 83 L. Ed. 888. The courses of action, listed under the first offense, which an accused—including an employee—may not urge others to take, comprehends those which in many instances would normally result from merely publicizing, without annoyance or threat of any kind, the facts of a labor dispute. An intention to hinder, delay or interfere with a lawful business, which is an element of the second offense, likewise can be proved merely by showing that others reacted in a way normally expectable of some upon learning the facts of the dispute. The vague contours of the term "picket" are nowhere delineated. Employees or others, accordingly, may be found to be within the purview of the term and convicted for engaging in activities identical with those proscribed by the first offense. In sum, whatever the means used to publicize the facts of a labor dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise, all such activity without exception is within the inclusive prohibition of the statute so long as it occurs in the vicinity of the scene of the dispute.

Fourth. We think that Section 3448 is invalid on its face.

The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and

the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. The Continental Congress in its letter sent to the Inhabitants of Quebec (October 26, 1774) referred to the "five great rights" and said: "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." *Journal of the Continental Congress*, 1904 Ed., Vol. I, pp. 104, 108. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague* v. *C.I.O.*, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423; *Schneider* v. *State*, 308 U.S. 147, 155, 162, 163, 60 S. Ct. 146, 151, 84 L. Ed. 155. See *Senn* v. *Tile Layers Union*, 301 U.S. 468, 478, 57 S. Ct. 857, 862, 81 L. Ed. 1229. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the

Court in *Senn's* case (301 U.S. at page 478, 57 S. Ct. at page 862, 81 L. Ed. 1229): "Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. See Mr. Justice Brandeis in *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, at page 488, 41 S. Ct. 172, 184, 65 L. Ed. 349, 16 A.L.R. 196. It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society.

The range of activities proscribed by Section 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussions of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448.

The State urges that the purpose of the challenged statute is the protection of the community from the violence and breaches of the peace, which, it asserts, are the concomitants of picketing. The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated dangers to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare *American Steel Foundries* v. *Tri-City Council,* 257 U.S. 184, 205, 42 S. Ct. 72, 77, 66 L. Ed. 189, 27 A.L.R. 360. Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern.

It is not enough to say that Section 3448 is limited or restricted in its application to such activity as takes place at the scene of the labor dispute. "The streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State,* 308 U.S. 147, 161, 60 S. Ct. 146, 150, 84 L. Ed. 155; *Hague* v. *C.I.O.,* 307 U.S. 496, 515, 516, 59 S. Ct. 954, 963, 964, 83 L. Ed. 1423. The danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by Section 3448.

Reversed.

SUPPLEMENTAL CASE DIGEST—PEACEFUL PICKETING

CARLSON v. CALIFORNIA. Supreme Court of the United States, 1940; 310 U.S. 106. The conviction of one Carlson, arrested and charged with loitering, picketing, and displaying "signs and banners in a public place and in and upon a public highway in front of, and in the vicinity of the Delta Tunnel Project . . . for the purpose of inducing and

influencing persons to refrain from doing and performing services and labor" at the project in violation of a county ordinance prohibiting such activities, was overthrown on the ground that the "sweeping and inexact terms of the ordinance disclose the threat to freedom of speech inherent in its existence. . . . The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern . . . the ordinance in question here abridges liberty of discussion under circumstances presenting no clear and present danger of substantive evils within the allowable area of state control." (Murphy, J.)

Case Questions

1. State the gist of Sec. 3448 of the Alabama Code.
2. What facts gave rise to the Thornhill indictment?
3. Was the picketing on company property? Was it peaceful? Was it fraudulent?
4. Under what Amendment to the Constitution does Thornhill defend?
5. Did the Supreme Court hold Sec. 3448 invalid on its face?
6. What defense of the statute was made by the State? How was the defense disposed of?
7. Is *Carlson* v. *California* in accord with the principal decision?

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122 v. WISCONSIN EMPLOYMENT RELATIONS BOARD

Supreme Court of the United States, 1942. 315 U.S. 437, 62 Sup. Ct. 706

FRANKFURTER, J. We brought this case here from the Supreme Court of Wisconsin, 314 U.S. 590, to canvass the claim that Wisconsin has forbidden the petitioners to engage in peaceful picketing in so far as we have deemed it an exercise of the right of free speech protected by the Due Process Clause of the Fourteenth Amendment. *Thornhill* v. *Alabama*, 310 U.S. 88; *American Federation of Labor* v. *Swing*, 312 U.S. 321. The specific question for decision is the constitutional validity of an order made by the Wisconsin Employment Relations Board acting under the Employment Peace Act, Wisconsin Laws of 1939, C. 57. In deciding this question we are of course controlled by the construction placed by the Supreme Court of Wisconsin upon the order and the pertinent provisions of the Act.

These are the undisputed facts. In June 1938, the petitioners, various unions representing hotel and restaurant employees, made a

closed shop agreement for a year with the respondent Plankinton House Company, which owned two hotels in Milwaukee. After negotiations between the parties for renewal of the contract failed, the dispute was submitted to arbitration. On October 30, 1940, the Company notified the unions of its willingness to sign a contract in accordance with the terms of the arbitration. Three days later the employees of both hotels went on strike. Members of the unions picketed the hotels, and the Company continued to operate the hotels with new employees. Union pickets forcibly prevented the delivery of goods to one of the hotels. For this conduct two union officials were arrested and fined. One of them returned to the picket line immediately after his arrest, assaulted one of the non-striking employees, and was again arrested and fined. Numerous other outbreaks of violence resulted in the conviction of the offending pickets and occasioned special police measures to maintain the peace.

The Company complained to the Employment Relations Board that the petitioners had committed "unfair labor practices." After due hearing, the Board made findings of fact, not challenged throughout these proceedings. Upon the basis of these findings, the Board issued the order. . . .

In accordance with the statutory provisions for judicial review, the petitioners applied to the Circuit Court of Milwaukee County, Wisconsin, to set aside the Board's order. The Board cross-petitioned for enforcement. The Circuit Court sustained the order, and an appeal was taken to the Supreme Court of Wisconsin, which affirmed the judgment and, after further elucidating the meaning of the statute and the order, denied a rehearing. 236 Wis. 329, 352; 294 N.W. 632, 295 N.W. 634.

The Wisconsin statute underlying this controversy was enacted as a comprehensive code governing the relations between employers and employees in the state. Only a few of its many provisions are relevant here. Section 111.06 provides that it shall be "an unfair labor practice" to "cooperate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike," and to "hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads,

streets, highways, railways, airports, or other ways of travel or conveyance." The Act contains a provision expressly dealing with its construction: "Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech." Sec. 111.15.

The central attack against the order is that, as enforced by the Wisconsin courts, it enjoins peaceful picketing. Whether Wisconsin has denied the petitioners any rights under the federal Constitution is our ultimate responsibility. But precisely what restraints Wisconsin has imposed upon the petitioners is for the Wisconsin Supreme Court to determine. In its opinion in this case, and more particularly in its explanatory opinion denying a rehearing, the Court construed the relevant provisions of the Employment Peace Act and confined the scope of the challenged order to the limits of the construction which it gave them. That Court has of course the final say concerning the meaning of a Wisconsin law and the scope of administrative orders made under it. *Aikens* v. *Wisconsin,* 195 U.S. 194; *Senn* v. *Tile Layers Union,* 301 U.S. 468. What is before us, therefore, is not the order as an isolated, self-contained writing but the order with the gloss of the Supreme Court of Wisconsin upon it. And that Court has unambiguously rejected the construction upon which the claim of the petitioners rests.

That the order forbids only violence, and that it permits peaceful picketing by these petitioners, is made abundantly clear by the expressions of the Court:

"The act does not limit the right of an employee to speak freely. . . . The term "picketing," as used in (the act), does not include acts held in the *Thornhill* case, *supra,* to be within the protection of the constitutional guaranty of the right of free speech. The express language of the act forbids such a construction. It clearly refers to that kind of picketing which the *Thornhill* case says the state has power to deal with "as a part of its power to preserve the peace, and protect the privacy, the lives and the property of its residents." . . . In this case it is undisputed that numerous assaults were committed by the pickets, that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that it dealt with in this case. It is conduct of that

kind that it declared to be an unfair labor practice by the statute and from which the defendants are ordered to cease and desist. . . ." And on rehearing: "Under the statute and the order of the board as interpreted and construed by the explicit language of the (previous) opinion, freedom of speech and the right peacefully to picket is in no way interfered with. The appellants could not be ordered to cease and desist from something they were not engaged in. . . . The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the board." 236 Wis. 329, *passim.*

What public policy Wisconsin should adopt in furthering desirable industrial relations is for it to say, so long as rights guaranteed by the Constitution are respected. *Aikens* v. *Wisconsin,* 195 U.S. 194; *Senn* v. *Tile Layers Union,* 301 U.S. 468. As the order and the appropriate provisions of the statute upon which it was based leave the petitioners' freedom of speech unimpaired, the judgment below must be affirmed. Problems that would arise had the order and the pertinent provisions of the Act been otherwise construed by the Supreme Court of Wisconsin need not therefore be considered.

Affirmed.

Case Questions

1. State the facts relating to this labor dispute.
2. State the gist of the controverted Sec. 111.06 of the Wisconsin labor statute.
3. Distinguish the functions of the Supreme Courts of Wisconsin and the United States.
4. What conclusion did the United States Supreme Court draw?

SECTION 38. VIOLENT PICKETING

Violent and intimidatory picketing is unlawful in all jurisdictions. This, however, is not what causes us difficulty. What is violence and intimidation? When is intimidation of sufficient intensity to cast it in the proscribed category? While the general rule is uniformly applicable, the problem is largely one of permissible degree, and it is in this particular that the several jurisdictions vary in their application of the general rule. Hellerstein [1] gives us a summary picture of the various forms that picketing conduct may take.

> "A picketer may: (1) Merely observe workers or customers. (2) Communicate information, e. g., that a strike is in progress, making either true, untrue or libelous statements. (3) Persuade employees or customers not to engage in relations with the employer: (a) through the use of banners, without speaking, carrying true, untrue or libelous legends; (b) by speaking, (i) in a calm, dispassionate manner, (ii) in a heated, hostile manner, (iii) using abusive epithets and profanity, (iv) yelling loudly, (v) by persisting in making arguments when employees or customers refuse to listen; (c) by offering money or similar inducements to strike breakers. (4) Threaten employees or customers: (a) by the mere presence of the picketer; the presence may be a threat of, (i) physical violence, (ii) social ostracism, being branded in the community as a "scab," (iii) a trade or employees' boycott, i. e., preventing workers from securing employment and refusing to trade with customers, (iv) threatening injury to property; (b) by verbal threats. (5) Assaults and use of violence. (6) Destruction of property. (7) Blocking of entrances and interference with traffic.
>
> "The picketer may engage in a combination of any of the types of conduct enumerated above. The picketing may be carried on singly or in groups; it may be directed to employees alone or to customers alone or to both. It may involve persons who have contracts with the employer or those who have not or both."

The *Meadowmoor* decision in this section leaves not much doubt as to the original illegal conduct of the union men and to the fact that the injunction was properly issued. The court finds no problem on this score, but has no little difficulty in reconciling its decision here with those it handed down in the *Thornhill* (page 238) and *Carlson* (page 246) decisions, wherein it was held that peaceful picketing was constitutionally protected as a right of free speech. The issue in the *Meadowmoor* case is whether currently peaceful picketing, enmeshed in contemporaneously violent conduct, is properly enjoinable. The union contends that the picketing injunction should be dissolved, as the picketing is presently peaceful.

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[1] See Hellerstein, *Picketing Legislation and the Courts* (1931), 10 No. Car. L. Rev. 158, 186n.

MILK WAGON DRIVERS' UNION OF CHICAGO v. MEADOWMOOR DAIRIES, INC.

Supreme Court of the United States, 1941. 312 U.S. 287, 61 Sup. Ct. 552

FRANKFURTER, J. The Supreme Court of Illinois sustained an injunction against the Milk Wagon Drivers' Union over the latter's claim that it involved an infringement of the freedom of speech guaranteed by the Fourteenth Amendment. Since this ruling raised a question intrinsically important, as well as affecting the scope of *Thornhill* v. *Alabama*, 310 U.S. 88, and *Carlson* v. *California*, 310 U.S. 106, we brought the case here. 310 U.S. 655.

The "vendor system" for distributing milk in Chicago gave rise to the dispute. Under that system, which was fully analyzed in *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U.S. 91, milk is sold by the dairy companies to vendors operating their own trucks who resell to retailers. These vendors departed from the working standards theretofore achieved by the Union for its members as dairy employees. The Union, in order to compel observance of the established standards, took action against dairies using the vendor system. The present respondent, Meadowmoor Dairies, Inc., brought suit against the Union and its officials to stop interference with the distribution of its products. A preliminary injunction restraining all union conduct, violent and peaceful, was promptly issued, and the case was referred to a master for report. Besides peaceful picketing of the stores handling Meadowmoor's products, the master found that there had been violence on a considerable scale. Witnesses testified to more than fifty instances of window-smashing; explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy using the vendor system and to five stores; stench bombs were dropped in five stores; three trucks of vendors were wrecked, seriously injuring one driver, and another was driven into a river; a store was set on fire and in large measure ruined; two trucks of vendors were burned; a storekeeper and a truck driver were severely beaten; workers at a dairy which, like Meadowmoor, used the vendor system, were held up with guns and severely beaten about the head while being told "to join the union"; carloads of men followed vendors' trucks, threatened the drivers, and in one instance shot at the truck and driver. In more than a dozen of these occurrences, involving window-smashing, bombings, burnings, the wrecking of trucks, shootings, and beatings, there was testimony to identify the wrongdoers as union men. In the light of his findings, the master recommended that all picketing, and not merely violent acts,

should be enjoined. The trial court, however, accepted the recommendations only as to acts of violence and permitted peaceful picketing. The reversal of this ruling by the Supreme Court, 371 Ill. 377, 21 N.E. 2d 308, directing a permanent injunction as recommended by the master, is now before us.

The question which thus emerges is whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed. The Constitution is invoked to deny Illinois the power to authorize its courts to prevent the continuance and recurrence of flagrant violence, found after an extended litigation to have occurred under specific circumstances, by the terms of a decree familiar in such cases. Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance. To assimilate the two is to deny to the states their historic freedom to deal with controversies through the concreteness of individual litigation rather than through the abstractness of a general law.

The starting point is Thornhill's case. That case invoked the constitutional protection of free speech on behalf of a relatively modern means for "publicizing, without annoyance or threat of any kind, the facts of a labor dispute." 310 U.S. 100. The whole series of cases defining the scope of free speech under the Fourteenth Amendment are facets of the same principle in that they all safeguard modes appropriate for assuring the right to utterance in different situations. Peaceful picketing is the workingman's means of communication.

It must never be forgotten, however, that the Bill of Rights was the child of the Enlightment. Back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.

Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where

a claim of constitutionality is effectively made. And so the right of free speech cannot be denied by drawing from a trivial rough incident, or a moment of animal exuberance, the conclusion that otherwise peaceful picketing has the taint of force.

In this case the master found "intimidation of the customers of the plaintiff's vendors by the commission of the acts of violence," and the Supreme Court justified its decision because picketing "in connection with or following a series of assaults or destruction of property, could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred and of causing them to believe that non-compliance would possibly be followed by acts of an unlawful character." It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the State of Illinois speaking through her Supreme Court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights. No one will doubt that Illinois can protect its storekeepers from being coerced by fear of window-smashings or burnings or bombings. And acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the Supreme Court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct. Cf. *Ethyl Gasoline Corp.* v. *United States,* 309 U.S. 436.

These acts of violence are neither episodic nor isolated. Judges need not be so innocent of the actualities of such an industrial conflict as this record discloses as to find in the Constitution a denial of the right of Illinois to conclude that the use of force on such a scale was not the conduct of a few irresponsible outsiders. The Fourteenth

Amendment still leaves the state ample discretion in dealing with manifestations of force in the settlement of industrial conflicts. And in exercising its power a state is not to be treated as though the technicalities of the laws of agency were written into the Constitution. Certainly a state is not confined by the Constitution to narrower limits in fashioning remedies for dealing with industrial disputes than the scope of discretion open to the National Labor Relations Board. It is true of a union as of an employer that it may be responsible for acts which it has not expressly authorized or which might not be attributable to it on strict application of the rules of respondeat superior. *International Association of Machinists* v. *Labor Board,* 311 U.S. 72, 80; *Heinz Co.* v. *Labor Board,* 311 U.S. 514. To deny to a state the right to a judgment which the National Labor Relations Board has been allowed to make in cognate situations, would indeed be distorting the Fourteenth Amendment with restrictions upon state power which it is not our business to impose. A state may withdraw the injunction from labor controversies, but no less certainly the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club.

We have already adverted to the generous scope that must be given to the guarantee of free speech. Especially is this attitude to be observed where, as in labor controversies, the feelings of even the most detached minds may become engaged and a show of violence may make still further demands on calm judgment. It is therefore relevant to remind that the power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion. Right to free speech in the future cannot be forfeited because of disassociated acts of past violence. Nor may a state enjoin peaceful picketing merely because it may provoke violence in others. *Near* v. *Minnesota,* 283 U.S. 697, 721-22; *Cantwell* v. *Connecticut,* 310 U.S. 296. In as much as the injunction was based on findings made in 1937, this decision is no bar to resort to the state court for modification of the terms of the injunction should that court find that the passage of time has deprived the picketing of its coercive influence. In the exceptional cases warranting restraint upon normally free conduct, the restraint ought to be defined by clear and guarded language. According to the best practice, a judge himself should draw the specific terms of such restraint and not rely on

drafts submitted by the parties. But we do not have revisory power over state practice, provided such practice is not used to evade constitutional guarantees. See *Fox River Co.* v. *Railroad Comm'n,* 274 U.S. 651, 655; *Long Sault Development Co.* v. *Call,* 242 U.S. 272, 277. We are here concerned with power and not with the wisdom of its exercise. We merely hold that in the circumstances of the record before us the injunction authorized by the Supreme Court of Illinois does not transgress its constitutional power. That other states have chosen a different path in such a situation indicates differences of social view in a domain in which states are free to shape their local policy. Compare *Busch Jewelry Co.* v. *United Retail Employees' Union,* 281 N.Y. 150; 22 N.E. 2d 320, and *Baillis* v. *Fuchs,* 283 N.Y. 133, 27 N.E. 2d 812.

To maintain the balance of our federal system, in so far as it is committed to our care, demands at once zealous regard for the guarantees of the Bill of Rights and due recognition of the powers belonging to the state. Such an adjustment requires austere judgment, and a precise summary of the result may help to avoid misconstruction.

We do not qualify the *Thornhill* and *Carlson* decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on free communication declared as the law of a state by a state court enjoys no greater protection here. *Cantwell* v. *Connecticut,* 310 U.S. 296; *American Federation of Labor* v. *Swing, post,* p. 321. But just as a state through its legislature may deal with specific circumstances menacing the peace by appropriately drawn act, *Thornhill* v. *Alabama, supra,* so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts. This is precisely the kind of situation which the *Thornhill* opinion excluded from its scope. "We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger . . . as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger." 310 U.S. 105. We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to gener-

alize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved.

The exercise of the state's power which we are sustaining is the very antithesis of a ban on all discussion in Chicago of a matter of public importance. Of course we would not sustain such a ban. The injunction is confined to conduct near stores dealing in respondent's milk, and it deals with this narrow area precisely because the coercive conduct affected it. An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberty as Mr. Justice Cardozo. Compare *Nann* v. *Raimist,* 255 N.Y. 307, 174 N.E. 690. Such an injunction must be read in the context of its circumstances. Nor ought state action be held unconstitutional by interpreting the law of the state as though, to use a phrase of Mr. Justice Holmes, one were fired with a zeal to pervert. If an appropriate injunction were put to abnormal uses in its enforcement, so that encroachments were made on free discussion outside the limits of violence, as for instance discussion through newspaper or on the radio, the doors of this Court are always open.

The injunction which we sustain is "permanent" only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation. Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted. Here again, the state courts have not the last say. They must act in subordination to the duty of this Court to enforce constitutional liberties even when denied through spurious findings of fact in a state court. Compare *Chambers* v. *Florida,* 309 U.S. 227. Since the union did not urge that the coercive effect had disappeared either before us or, apparently, before the state court, that question is not now here.

A final word. Freedom of speech and freedom of the press cannot be too often invoked as basic to our scheme of society. But these liberties will not be advanced or even maintained by denying to the states with all their resources, including the instrumentality of their courts, the power to deal with coercion due to extensive violence. If the people of Illinois desire to withdraw the use of the injunction in labor controversies, the democratic process for legislative reform is at their disposal. On the other hand, if they choose to leave their courts with the power which they have historically exercised, within

the circumscribed limits which this opinion defines, and we deny them that instrument of government, that power has been taken from them permanently. Just because these industrial conflicts raise anxious difficulties, it is most important for us not to intrude into the realm of policy-making by reading our own motions into the Constitution.

Affirmed.

Case Questions

1. Describe the "vendor system" of milk distribution.
2. Had the union resorted to previous violence?
3. What question does the United States Supreme Court say is before it?
4. May the right to free speech in the future be "forfeited because of disassociated acts of past violence"?
5. Did the court qualify the Thornhill decision?
6. Is the scope of the injunction confined to a particular physical area?
7. When may the union petition for dissolution of the injunction?
8. In view of the Norris-LaGuardia Act, how was the Meadowmoor Dairy able to secure an injunction?
9. State the rule of law developed by this case.
10. Do you believe the case is soundly reasoned?

SECTION 39. FRAUDULENT PICKETING

If the conduct incident to even peaceful picketing activity can be established as involving serious misrepresentation of fact, fraud, and the usage of opprobious and profane language, then such picketing ceases to be clothed with constitutional immunity from injunction.

Most jurisdictions permit some degree of misrepresentation, as in the case of a salesman who becomes unduly expansive about the merits of his product, but variance is found both in the matter of permissible degree and in the punishment invoked. For illustration, some courts permanently enjoin the picketing if fraud is found; others require the injunction to remain in effect only as long as the misrepresentation continues.

The court decisions included in this section are principally concerned with the degree to which misrepresentation of fact is allowable before it is subject to restraint.

BUSCH JEWELRY CO., INC. v. UNITED RETAIL EMPLOYEES' UNION, LOCAL 830

Supreme Court of New York County, 1938. 168 Misc. 224, 5 N.Y.S.(2d) 575

CORTILLO, J. In this action, brought by three plaintiffs against the defendant Union Local and its officers, approximately one hundred specific instances (some repetitious) of illegal, unwarranted and socially improper conduct are claimed to have been established upon the trial as the basis for the permanent injunction demanded. The plaintiff Busch Credit Jewelry Co., Inc., operates five stores in the Boroughs of Manhattan and Bronx. . . .

The defendant Local is, as its name implies, an organization of employees of retail merchants, the individual defendants being officers of said Local. . . .

The strike, however, was called on May 17th, and the picketing complained of here began shortly thereafter. The sole question presented by this action is whether the numerous acts shown by the evidence to have accompanied the strike and picketing are legal or illegal. The grant or refusal of the permanent injunction sought by plaintiffs depends upon the answer to that question. The right to strike and the right to picket have been repeatedly upheld by the courts, and in this day and age require no discussion. Neither the right to strike or picket, however, justifies or excuses acts which are illegal per se. . . .

Numerous acts of misconduct were established by the proof, some of which are violative of law and order and distinctly conducive to

a breakdown of the public peace. They may be classified as (1) acts of physical and forcible obstruction to the proper and orderly conduct of plaintiffs' business; (2) threats, intimidation and coercion inducing a breach of the public peace and tending to constitute a violation of constitutional rights of others; (3) promulgation of false, deceitful and misleading statements calculated to deceive the public as to the true state of affairs, for which purpose the facilities of the post-office were used along with other means; and (4) false propaganda and appeals to class hatreds circulated to build up an esprit de corp among the strikers and their sympathizers, based upon unsound social economics tending to cheapen the intelligence of the workers and foment organized opposition to orderly processes and the administration of the law.

In view of the great number of acts complained of and which are established by the proofs, it will suffice for the purposes of this opinion and to keep it within proper bounds to generalize such acts and their effect and influence upon plaintiffs, their employees and customers and the public. Illustrative of the first class of acts above mentioned is the case of a customer who was stopped by two pickets as she was about to enter one of plaintiffs' stores and threatened with physical violence if she went in. The threat had its intended effect and the customer left without entering. A day or two later a prospective customer was stopped by another picket as he was about to enter another store of one of the plaintiffs. The picket referred the intending buyer to a store belonging to the picket's father and furnished him with a card bearing that store's address. At least two members of the defendant Local admitted that during the strike they called at homes of plaintiffs' customers to prevent payment by the latter of installments due to plaintiffs, one of defendant's members actually collecting an installment from one customer and pocketing the money. Another member of the Local accompanied by two other men not identified, entered the home of a female relative of one of plaintiffs' employees and threatened to picket her home and that of the employee if the relative did not compel the employee to leave his job and join the strikers. Many other similar instances were established by satisfactory proof.

While strikers may use any and all peaceful and lawful efforts to induce workers to join their ranks, the evidence shows many instances of threats, intimidation and coercion exceeding legal bounds. A female employee was followed by several members of the Local from the store where she was employed to the restaurant where she lunched

and there denounced by them as a scab and a strikebreaker and otherwise vilified. Their manner and language was such as to cause her to fear for her physical safety. Another young lady was seized by a negro picket as she was about to enter plaintiffs' store where she was employed. Aided by a co-employee, she gained the safety of the store, but was subjected to a torrent of abusive language from the picket, who applied to her the vilest term known to our language. On another occasion a different member of the defendant Local accosted this same employee in vulgar terms and threatened to spit in her face. Other employees were warned by members of the Local that they would "get" them.

The third class of acts above specified, namely, false and misleading statements concerning plaintiffs and the controversy, directly involves the public, for it was to the public that such statements were issued. This is the first case that has come to my attention wherein the United States mails were used to disseminate false propaganda relating to labor controversies. On May 27th of this year tenant in the apartment house 306 Union Avenue, Brooklyn, wherein one of the plaintiffs' employees, Rose Esposito, lived, found in his letter-box a circular signed "The Busch Strikers, Members Retail Employees Union, Local 830—U.R. & W.E.A.—C.I.O., United Optical Workers Union—Local 208 C.I.O." and which among other things contained the statement: "Your neighbor Rose Esposito, 306 Union Street, is a scab at Busch's!" Similarly the home of Dr. Benjamin Meyerowitz at Long Beach was picketed by members of the defendant Local with placards bearing the statement "Your neighbor Dr. Benjamin Meyerowitz is a scab at Busch's." Dr. Meyerowitz is an employee of one of the plaintiffs.

Other statements, both oral and printed, circulated in the immediate neighborhood of various of plaintiffs' stores, were: "We are locked out. Help us get our jobs back." "Anybody but a louse would not enter this store while the strike is on." "While the strike is on you don't have to make any payments. After the strike is settled even then you don't have to pay them if you are smart." "If you buy a radio you will have to bring it back tomorrow because this is not a reputable company." "Busch's are making prostitutes of their women." "They cheated us, they will cheat you too." "Don't make any payments. They will give you phoney receipts." "They sell cracked diamonds." "You won't get credit for the money you pay." "Don't make any payments. They can't do anything to you." "Busch's doesn't hire colored people."

Not only were these false statements exhibited on signs by defendants, but they were uttered in a loud, boisterous tone in singsong fashion by such defendants while encircling the fronts of plaintiffs' stores. The monotonous repetitions and the encircling process were definite disturbances of the peace, interfering unreasonably with the orderly process of business, and exceeded legal and orderly picketing as usually conducted and as permitted under the laws and decisions of this jurisdiction. . . .

The law is well settled that where, as in the instant case, defendant unions have repeatedly and constantly engaged in unlawful picketing accompanied by disorder, intimidation, loud and boisterous language, the issuance of false and misleading statements, congregation in great numbers in front of plaintiffs' places of business, thereby causing crowds to collect and to block ingress and egress to plaintiffs' stores, and by disorderly, offensive, abusive and insulting remarks to plaintiffs' employees, customers and prospective customers and that where it appears upon the facts of the case, as it does in this case, that there is danger of the continuance of such unlawful acts with consequent injury to plaintiffs if any picketing whatsoever is permitted, courts of equity will and have enjoined all picketing.

An early expression of this doctrine appeared in *Exchange Bakery & Restaurant, Inc.* v. *Rifkin,* 1927, 245 N.Y. 260, 157 N.E. 130, when the Court of Appeals stated at page 269, 157 N.E. at page 135:

"Where unlawful picketing has been continued, where violence and intimidation have been used, and where misstatements as to the employers' business have been distributed, a broad injunction prohibiting all picketing may be granted. The course of conduct of the strikers has been such as to indicate the danger of injury to property if any picketing whatever is allowed."

In *Nann* v. *Raimist,* 1931, 255 N.Y. 307, 174 N.E. 690, 73 A.L.R. 669, Justice Cardozo said at page 315, 174 N.E. at page 693:

"Whether the trial court, in view of this record of defiance, would give the defendant still another chance to picket peacefully and in order, was something to be determined in the exercise of a wise discretion. This court may not interfere except for manifest abuse. . . . The injunction is sustained upon the theory that the defendant, having been permitted to picket subject to conditions, violated those conditions, and in contempt of the existing mandate picketed with violence and with falsehood, spreading terror with a strong hand and a multitude of people. In the judgment of the trial court, 'the (defendant's) course of conduct . . . has been such as to indicate the

danger of injury to property if any picketing whatever is allowed.' *Exchange Bakery & Restaurant, Inc.* v. *Rifkin, supra.* We cannot say that a basis for that belief is lacking altogether."

An abuse of picketing was sufficient to enjoin all picketing in *Stillwell Theatre, Inc.* v. *Kaplan,* 1932, 259 N.Y. 405, 182 N.E. 63, 84 A.L.R. 6. Pound, C. J., cited with approval the *Exchange Bakery Case, Nann* v. *Raimist* and *Steinkritz Amusement Corporation* v. *Kaplan,* 257 N.Y. 294, 178 N.E. 11, pointing out, at page 411, 182 N.E. page 66, that the holding in the latter case had been as follows: "By abuse of picketing, it was held that the union had forfeited the right to picket." . . .

On all the facts established, the court is constrained to permanently enjoin the picketing complained of and the defendants, individually and severally, are so enjoined. Injunction granted. Findings passed on. Judgment signed.

SUPPLEMENTAL CASE DIGEST—FRAUDULENT PICKETING

DENVER LOCAL UNION NO. 13 v. PERRY TRUCK LINES. Supreme Court of Colorado, 1940; 101 P. 2d 436. "The trial court found that the placards carried by the pickets, declaring, 'This Firm Unfair to Teamsters Union No. 13,' were highly misleading and false. We cannot agree with that conclusion. This involves only a battle over words. We do not doubt that the employer considered the slogan false. He had the right to entertain that opinion. Under the facts, defendants also had the right to their opinions. The statement on the placards was not fraudulent." (Otto Bock, J.) In accord on the proposition that an "unfair" statement is privileged is the case of *Taxi Cab Drivers* v. *Yellow Cab Operating Co.,* Circuit Court of Appeals, Tenth Circuit, 1941, 123 Fed. 2d 262. For a case involving enjoinable misrepresentation of labor dispute facts by picketers, see *Sachs Quality Furniture Co.* v. *Hensley,* New York Supreme Court, 1945, 269 App. Div. 264, 55 N.Y.S. 2d 450.

Case Questions

1. List the classes of improper acts by the union.
2. What means did the union employ to publicize the labor dispute?
3. State the rule quoted from the *Exchange Bakery* case.
4. Distinguish the fraudulent statements found in the parent case and the *Denver* case digest.

WIEST v. DIRKS

Supreme Court of Indiana, 1939. 215 Ind. 568, 20 N.E. (2d) 969

FANSLER, J. This is an appeal from an interlocutory judgment enjoining the appellants from picketing the retail grocery and food store of the appellee. The petition for injunction was heard upon the verified complaint and affidavits and upon the testimony of witnesses, with full opportunity for examination and cross-examination. . . .

There is no controversy concerning the facts material to a determination of the appeal. The appellee operates a retail grocery and food store in connection with which he purchases from a jobber, and sells at retail, milk and other dairy commodities processed by the East End Dairy Company. The East End Dairy Company has more than fifty employees, four of whom are members of the appellant union. Representatives of the union demanded that the company sign a contract, by the terms of which it would agree to employ only members of the union, and would require, as a condition for continuing employment, that all of its employees join the union. This the company refused to do. The appellant Wiest and another representative of the union demanded that the appellee discontinue handling the products of the company. The appellee made inquiry and found that the company was paying wages in excess of the union scale, and that its controversy with the union involved a "closed shop." He also ascertained that there were no "closed shop" dairy products produced in the Indianapolis milk shed. He told the appellants that he would not discontinue handling the products of the East End Dairy Company, and he continued to handle them. The appellants caused appellee's place of business to be picketed. The picketing was peaceful. The pickets carried a sign upon which was printed:

"Please buy Union Dairy Products Only
"This Store sells milk produced
in an unfair Dairy
"East End Dairy is unfair to
organized labor."

The appellee's business has been interfered with and disturbed by the picketing. . . .

It is established by the authorities beyond controversy that picketing which involves false statements or misrepresentation of the facts concerning the controversy is unlawful and will be enjoined. . . . The printing on the banners displayed by the pickets is, to say the least, misleading. It necessarily leads to the inference that the products of the East End Dairy Company sold by the appellee are pro-

duced by non-union labor, and that there are products produced by union labor to be had. It does not appear that the other food stores in the neighborhood were picketed. The undoubted purpose of the picketing was to attract the attention of the community and of the appellee's customers and prospective customers, and it was obviously intended that the banners should be influential in affecting the attitude of such customers toward the appellee. The natural conclusion to be drawn from the information upon the banners is that the appellee was selling non-union products by choice when he might obtain union products, and, since the other food stores were not picketed, it would be naturally concluded that the products sold in these other stores were union products and that they differed in this respect from those sold in the appellee's store. This, according to the evidence, is not true. All dairy products available in the community were produced in plants which employ both union and non-union employees, or at least none was produced in shops employing union labor exclusively. If the East End Dairy Company was in fact unfair to organized labor, it appears to be by reason of the fact that it employed non-union as well as union employees. If such products are not union dairy products, there are no union dairy products in the community, and the request, "Please buy Union Dairy Products Only," cannot have the effect of procuring prospective customers to buy union dairy products, since there are none. It is not unreasonable to conclude that the only result of such a request is to persuade the public that union products can be had at stores which are not picketed, and cannot be had at the appellee's store. This is misrepresentation. If the signs displayed by the pickets had disclosed the true facts concerning the controversy, it would clearly appear that the appellee was handling identically the same character of products handled by every other food store in the community with respect to their being produced by union labor, and such picketing therefore would be ineffective to coerce the appellee to handle the products of some other dairy, and would be of no force in persuading prospective customers to deal with some other food store rather than with the appellee. . . .

It is clear that milk and dairy products are necessary to the public health, and public policy will not permit picketing for the purpose of coercing or inducing the community to refrain from using milk or dairy products. . . .

It must be concluded that the evidence justifies the conclusion that the facts advertised by the banners of the pickets were calculated to produce a false impression upon the public. Regardless of

the intention of the pickets, the statements have the effect of misrepresenting the facts in controversy. Since this is true, it supports the conclusion that the picketing as conducted was unlawful and the temporary injunction justified.

Case Questions

1. What does the court believe fraudulent about the picketing signs carried by the union?
2. Was the picketing otherwise peaceful?
3. What does the court say about public policy?
4. Do you believe that the court was influenced more by public policy or by its belief that the picketing banners were fraudulent?
5. Do you feel neither objection is tenable and that the court is rationalizing a result it desires to secure?

PEZOLD v. AMALGAMATED MEAT CUTTERS

District Court of Appeal, California, 1942. 128 P. (2d) 611

BISHOP, J. In this action brought to enjoin the defendants from picketing plaintiff's market, the complaint, proof and findings of fact each made out a case entitling the plaintiff to injunctive relief. The judgment which was entered, however, granted relief beyond that authorized.

The complaint states a cause of action. Much of it is taken up with a recital of facts which, summed up, establish that plaintiff's twenty-four employees were entirely satisfied with their hours of labor, wages and working conditions, were united in a union of their own, not affiliated with any other, and that no labor dispute existed between them and the plaintiff. The defendants were labor organizations and officials, it is alleged, who had conspired to compel plaintiff's employees to join their ranks. To accomplish their object the defendants picketed plaintiff's premises, using banners and the spoken word in an endeavor to convince those who were expected to deliver produce to the plaintiff's market that they should not do so; to dissuade would-be purchasers from buying; and to persuade plaintiff's employees that it was to their interest to join the defendants' unions.

These facts, without others, and unaffected by any legislation that "has undertaken to balance the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self-interest" (*Carpenters & Joiners Union* v. *Ritter's Cafe*, 1942, 62 S. Ct. 807, 808, 86 L. Ed. —), do not constitute a cause of action. Picketing may be lawful, although no labor dispute between the employer and employee exists (*Magill Bros.*

v. *Building Service, etc., Union*, 1942, 20 Cal. 2d —, 127 P. 2d 542, and cases cited) and though the object of the picketing be to unionize a place of business in which none of the pickets are employed. *American Federation of Labor* v. *Swing*, 1941, 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855; *Magill Bros.* v. *Building Service, etc., Union, supra*, 20 Cal. 2d —, 127 P. 2d 542.

The complaint contains further averments, however. It is there alleged and it was revealed by the evidence and found by the trial court that those engaged in picket duty did not limit their activities to making known their grievances against the plaintiff, nor confine to appeals to reason their endeavors to persuade would-be customers not to deal with plaintiff. Among other things they stated to them: "Don't go in there lady, there might be trouble"; "Better stay out of there or you will get hurt"; "There she goes, we'll get her next"; "Don't go into that parking lot, mister, if you do you won't get back out." Concerning the fact that the picketing was so conducted as to block the entrance to plaintiffs market, the complaint only alleges that the pickets varied in number from two to thirty-seven, but from the evidence it appears not only that the number of pickets varied from two to thirty-seven, but that on the first day they parked ten to twelve automobiles, with banners, occupying almost all the space in front of plaintiff's market, and then twenty-five pickets, carrying banners, some two by four feet in size, paraded on the sidewalk back and forth across the sixty-foot front of the market. On the occasion when the picket line reached its peak and thirty-seven were involved, they were spaced a foot apart. . . .

From these facts it appears that the picketing was beyond that now established as lawful. We recognize the fact that inherent in the labor practice of picketing there usually is, as in the case under review there undoubtedly was, an exercise of the constitutionally protected right freely to communicate ideas. But it would be stubbornly refusing to admit the obvious not to see in the activities of picketing on many occasions more than the mere expression of ideas. As stated by Mr. Justice Douglas, in an opinion concurred in by two of his associates in *Bakery & Pastry Drivers, etc.*, v. *Wohl*, 1942, 62 S. Ct. 816, 86 L. Ed. —, and quoted by our Supreme Court in *Magill Bros.* v. *Building Service, etc., Union, supra*, 20 Cal. 2d —, 531, 535, 127 P. 2d 542, 544: "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being

disseminated. Hence those aspects of picketing make it the subject of restrictive regulation." In *Magill Bros.* v. *Building Service, etc., Union,* just cited, it was held, accordingly, that "There can be no doubt that untruthful picketing is unlawful picketing" and that an injunction, limited to a correction of the unlawful aspect of the picketing, was proper. Equally without doubt it is that picketing, wherein the persuasion brought to bear contains a threat of physical violence, is unlawful, and that the use of words and an aggregation of pickets which reasonably induce fear of physical molestation may properly be enjoined. *Lisse* v. *Local Union No. 31,* 1935, 2 Cal. 2d 312, 317, 41 P. 2d 314, 316; *McKay* v. *Retail Auto., etc., Union,* 1940, 16 Cal. 2d 311, 320, 106 P. 2d 373, 378; *Steiner* v. *Long Beach Local, etc., Union,* 1942, 19 Cal. 2d 676, 682, 123 P. 2d 20, 24, 25.

The injunction issued in this case, however, was too broad. After its preliminary recitals the judgment that was entered continues:

"Now, therefore, it is hereby ordered, adjudged and decreed that the defendants, and each of them, their agents, servants, representatives and employees be and they are hereby permanently enjoined and restrained from doing or attempting to do any of the following acts:

"(a) Maintaining picket lines which interfere with free ingress and egress to and from that business and the adjoining parking lot at 847 Main Street, Santa Paula, California;

"(b) Maintaining pickets bearing banners containing false, libelous, and misleading statements and/or statements calculated to convey a threat of physical violence;

"(c) And enjoining any picket or representative while picketing from making any statements false, libelous and misleading, and/or calculated to convey a threat of physical violence;

"(d) Stationing or placing in front of or in the vicinity of plaintiff's business, pickets or representatives for the purpose of influencing or inducing or attempting to influence or induce any person to refrain from entering plaintiff's business. . . .

"It is further ordered, adjudged and decreed that plaintiff recover the sum of $1,020.55 from the defendants, and each of them, by way of damages to plaintiff's business and the good will thereof."

The facts of this case do not make out an aggravated or persistent case of mass picketing nor of any physical violence. Those who desired to enter plaintiff's market were not required to force their way through a picket chain, save possibly on one occasion. At the worst at all other times they had but to wait the passing of the picket line

at a given point and enter the market before it returned to that point. There was no picketing in defiance of a court order. Nor was there even a technical battery committed by any of the pickets upon any person, whether customer, deliveryman or employee. . . .

The picture, then, while not that of a peaceful, lawful, picket line, engaging only in practices protected by the state and federal constitutions, is yet not one in which acts of violence have so stamped themselves upon the scene that for a time at least even peaceful picketing will reflect the events of the past and appear to threaten the personal safety of customers or others, with the result that all picketing must be enjoined in order to afford the plaintiff adequate protection; and the trial court did not find this to be so as a fact. That is to say, those facts found by the trial court that are supported by the evidence do not bring this case within the principles applied in *Steiner* v. *Long Beach Local, etc., Union*, 1942, 19 Cal. 2d 676, 123 P. 2d 20, and *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 1941, 312 U.S. 287, 71 S. Ct. 552, 85 L. Ed. 836, 132 A.L.R. 1200. The trial court erred, therefore, in arriving at the conclusion of law "That in this case . . . defendants have forfeited their privilege of peaceful picketing" and in expressing the further conclusion that the defendants should be permanently enjoined from "having pickets in front of or in the vicinity of plaintiff's business. . . ."

The judgment further enjoins the doing of acts which the defendants have neither done nor threatened to do, as far as appears from the evidence, a field in which a decree in equity should not trespass. . . . We have not heretofore had occasion to note the statements appearing on the banners which the pickets carried, in addition to wearing "A. F. of L." arm bands; they were these: "Some merchants take 24 hours to do 8 hours work. How slow are you?" "We have a list of fair merchants. Is your name there?" "Sunday should be a day of rest. Do you enjoy yours?" "I don't work on Sundays and Holidays. Why do you?" "We are carrying on what Lincoln started. Free the slaves." "My baby has milk today. I arranged for it on Saturday." "Are your competitors reasonable? Some of ours are." "All Union Markets are closed Sunday and Monday. Are Yours?" "All fair merchants advertise that they will close Sunday and Monday." "We ask that all labor be given one holiday per year." "Is that fair?" "S. P. Mkt. the only Mkt. in the County working its help today." "Some employers are men. Others are exploiters. Which are you?" "This is the only Mkt. open today in this County. There is one small grocery store open here in Santa Paula. Please locate same."

"We are acquainted with our families. Are you?" "We belong to the Union. Why can't you?" "Some work from 12 to ? We work from 8 a.m. to 6 p.m." Nowhere in the findings is it found as a fact that any one of these statements was false, libelous or misleading, and they do not appear to be as a matter of law. Indeed in the complaint it is not claimed that any of them were, although it is alleged that the pickets were "so stationed . . . so as to cause prospective customers and the general public wrongfully to believe that an actual labor dispute exists" and, further, that plaintiff lost many customers because of the signs causing them to believe that a strike existed. As pointed out in *C. S. Smith Met. Market Co.* v. *Lyons*, 1940, 16 Cal. 2d 389, 394, 106 P. 2d 414, the presence of pickets is not a sound ground for the inference that a strike has been called or that a labor dispute between employer and employee exists, and the making of statements such as those noted should not be characterized as fraudulent because some persons jumped to the wrong conclusion. Nor can it be argued that any of these banners carried a threat of physical violence. There was no basis, therefore, for the provisions of subdivision (b) of the judgment enjoining the defendants from maintaining pickets bearing banners containing false, libelous and misleading statements or banners calculated to convey a threat of physical violence. . . .

The judgment, therefore, is reversed.[1]

Case Questions

1. Were the picketing unionists employees of the plaintiff's market?
2. Describe the nature of the picket with its attendant elements.
3. What acts did the lower court enjoin?
4. Did the upper court completely uphold the injunction in all its proscription?
5. Did the facts make out a persistent case of massed or violent picketing? Distinguish this from the Meadowmoor case.
6. Were the statements made by the union fraudulent in the conclusion of the court?

[1] On similar facts a contrary result was reached in *Riggs* v. *Tucker Duck and Rubber Co.*, Supreme Court of Arkansas 1938, 196 Ark. 571, 119 S.W. 2d 507.

SECTION 40. MASSED PICKETING

Another form of peaceful picketing which may be illegal is that in which the pickets are so massed as to contain elements of implicit coercion growing out of the force of numbers. Some courts have been disposed to limit substantially the number of pickets on station or patrol and the manner of their position. Others have been more liberal as long as the picketing retained its essentially peaceful character.

The Supreme Court decision of 1921 in *Truax* v. *Corrigan* (page 87), lent early weight to the proposition that numbers and mass may alone cast peaceful picketing into an unlawful category. The modern representative view on this question is found in the *Carnegie-Illinois* decision reprinted in this section.

CARNEGIE-ILLINOIS STEEL CORPORATION v. UNITED STEELWORKERS OF AMERICA

Supreme Court of Pennsylvania, 1946. 353 Pa. 420, 45 Atl. (2d) 857

MAXEY, C. J. The plaintiff filed a bill in equity against the defendants, making certain allegations as to the commission of acts of force and violence against employees of the plaintiff and interfering with the ingress of such employees to the plaintiff's property, an extensive steel works situated at Homestead. These employees who were allegedly barred from plaintiff's plant were not engaged in the work of producing steel and were in no sense of the term "strike-breakers." None of the manufacturing and productive facilities at the Homestead Steel Works have been in operation at any time during the strike. These barred-out employees were assigned to the work of maintaining the power-houses, the boilers, the pumps, the steam lines and the sprinkler system, and to guard against the constant hazard of fire and to prevent the freezing of water lines essential to water cooling systems in the plant. The steam lines and water lines in the plant total several hundred miles in length. The work of these maintenance men was essential to the keeping of the steel plant in condition to resume the production of steel as soon as the steel strike should come to an end. . . .

On January 25, 1946, a large group of pickets, estimated to be from one hundred to two hundred in number, standing three deep, extended across the gate and blocked the entrance to plaintiff's Homestead plant and thus denied access to the plant to individuals below the rank of superintendent. . . .

There were other similar injunction affidavits filed all purporting to show that supervisory officials were denied access to plaintiff's plant and that the defendant labor union and its officials and agents had arrogated to itself and themselves the authority to determine what employees of the plaintiff corporation should and should not, respectively, enter the corporation's plant, and that the Union enforced its assumed authority by massing approximately 200 pickets at the gate leading into the plant.

The court below in response to the above bill of complaint, supported by the above injunction affidavits and others, granted the injunction prayed for. . . .

The court in its opinion made the following apt statement: "Picketing which results in the intimidation and coercion of officers and employees of the plaintiff and denies workmen from legitimate business access to plaintiff's plant is not legal picketing. Picketing which results in the kidnaping of individuals and placing them under restraint and depriving them of their personal liberty is not legal picketing. Picketing which consists of at least one hundred or more pickets massed and grouped together at the main entrance of a plant for the purpose of denying the right of access is not legal picketing." . . .

Forcibly to deny an owner of property or his agents and employees access to that property for the purpose of protecting and maintaining it and its equipment or for any other legitimate purpose is in practical and legal effect a seizure or holding of that property. Such a lawless seizure of property no government worthy of the name will tolerate or condone. The employment of hostile force against persons and property is exclusively a governmental function, and exercisable even by the government only by due process of law. When any individual or organization under whatsoever name attempts to use force to gain his or its ends they are attempting to usurp governmental functions. . . .

Nowhere in the defendants' voluminous brief or in their hour's oral argument before the Supreme Court, was it asserted that the affidavits in response to which this injunction was issued were *untrue*. The defense was that on the state of the record (no hearing having been had) the court had no power to issue the injunction. This contention we overrule. When property needs protection from the acts of lawless groups, it needs it *at once*. Delays are dangerous. It is self-evident that such a vast and complex structure as plaintiff's plant, representing an investment of over $200,000,000, could be

irreparably injured by failure of proper maintenance and protection against fire and other hazards, for even a day or a lesser period. . . .

When this case reached this court and the record was before us, it then became our duty to decide whether or not the facts showed that what the defendants were doing constituted a "holding" or "seizure" of the plant or any part of it. The holding or seizure of even one gateway to the plant entitled the plaintiff to the protection of a court of equity just as fully as would the seizure of the entire plant. When a "picket line" becomes a picket *fence* it is time for government to act. Collective coercion is not a legitimate child of collective bargaining. The forcible seizure of an employer's property is the very essence of communism.

Injunctions are not issued against picketing when the latter's only purposes are to advertise the fact that there is a strike in a certain plant and to persuade workers to join in that strike and to urge the public not to patronize the employer. For these purposes, a limited number of pickets is all that is necessary. But when hundreds of pickets are massed, as at least two hundred were here at a single gate, it is obvious that this force was not mustered for a peaceful purpose. . . .

We dismiss this appeal. . . .

SUPPLEMENTAL CASE DIGEST—MASSED PICKETING

ISOLANTITE, INC. v. UNITED ELECTRICAL WORKERS. Court of Chancery of New Jersey, 1941; 130 N.J. Eq. 506, 22 A. 2d 796. "The number of pickets was limited to ten by the original order because that number seemed large enough fully to apprise the public, the employees and all other concerned of the existence of a labor dispute and to enlist sympathy on the side of the strikers. . . . Just how many pickets should be permitted cannot be determined mathematically. . . . Defendants argue that the limitation on the number of pickets violates their constitutional freedom of speech as recently interpreted by the U. S. Supreme Court in *Thornhill* v. *Alabama,* 310 U.S. 88. . . . I do not so understand these decisions. The fundamental concept of free speech is the right to appeal to the reason, the sentiment and the prejudices of the parties whom the speaker desires to move. It does not include the right to reinforce such appeals with violence, threats, intimidation, or coercion of any kind. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287. Nothing in the restraints which have been imposed in this case interferes with free

speech or reduces the effectiveness of defendant's propaganda except by excluding the argument of force." (Bigelow, V. C.)

Case Questions

1. What workers did the pickets exclude from the plant?
2. Suppose regular production workers were the only ones excluded. Would this have made a difference in the decision of the court?
3. How many pickets were at the main entrance?
4. How did the court characterize the picket line in its analogy?
5. State the rule of law of this case.
6. In the *Isolantite* case, what did the court say as to placing limitations on mass picketing?

SECTION 41. OUTSIDER PICKETING

The term "outsider picketing" is self-explanatory. It is merely picketing of an employer by persons who are not in the employ of the employer. It is also characterized by the fact that there is usually no labor dispute between the employer and his workers, the union pressure being exerted to force the employer to induce his employees to join the union. Some state courts have been prone to denounce this type of picketing as unjustified under proper circumstances, as will appear in Section 44.

The *Swing* case in this section is the Supreme Court's leading pronouncement on the legality of outsider pressure. Outsider pressure, it should be recalled, is protected both by the Federal Anti-Injunction Act and the National Labor Relations Act, which broadly define a labor dispute as not requiring the existence of the proximate relation of employer and employee.

AMERICAN FEDERATION OF LABOR v. SWING

Supreme Court of the United States, 1941. 312 U.S. 321, 61 S. Ct. 568

FRANKFURTER, J. In *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. —, decided this day, we held that acts of picketing when blended with violence may have a significance which neutralizes the constitutional immunity which such acts would have in isolation. When we took this case, 310 U.S. 620, 60 S. Ct. 1081, 84 L. Ed. 1393, it seemed to present a similar

problem. More thorough study of the record and full argument have reduced the issue to this: is the constitutional guarantee of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?

A union of those engaged in what the record describes as beauty work unsuccessfully tried to unionize Swing's beauty parlor. Picketing of the shop followed. To enjoin this interference with his business and with the freedom of his workers not to join a union, Swing and his employees began the present suit. In addition, they charged the use of false placards in picketing and forcible behavior towards Swing's customers. A preliminary injunction was granted. . . . The union sought review of this decree in the Supreme Court by writ of error. Swing and his employees moved to dismiss the writ because in seeking to obtain it the union had conceded that "all issues of the case have been settled on prior appeal and that the decree entered by the appellate court is in conformity with the mandate issued" to the appellate court. The writ was dismissed.

Such is the case as we extract it from a none too clear record. It thus appears that in passing upon the temporary injunction the Supreme Court of Illinois sustained it in part because of allegations of violence and libel. But our concern is with the final decree of the appellate court. On its face the permanent injunction in that decree rested on the explicit avowal that "peaceful persuasion" was forbidden in this case because those who were enjoined were not in Swing's employ. . . .

Since the case clearly presents a substantial claim of the right to free discussion and since, as we have frequently indicated, that right is to be guarded with a jealous eye, *Herndon* v. *Lowry*, 301 U.S. 242, 258, 57 S. Ct. 732, 739, 81 L. Ed. 1066; *Schneider* v. *State*, 308 U.S. 147, 161, 60 S. Ct. 146, 150, 84 L. Ed. 155; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 note, 58 S. Ct. 778, 783 note, 82 L. Ed. 1234, it would be improper to dispose of the case otherwise than on the face of the decree, which is the judgment now under review. We are therefore not called upon to consider the applicability of *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, *supra*, the circumstances of which obviously present quite a different situation from the controlling allegations of violence and libel made in the present bill.

All that we have before us, then, is an instance of "peaceful persuasion" disentangled from violence and free from "picketing en

masse or otherwise conducted" so as to occasion "imminent and aggravated danger." *Thornhill* v. *Alabama,* 310 U.S. 88, 105, 60 S. Ct. 736, 746, 84 L. Ed. 1093. We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no "peaceful picketing or peaceful persuasion" in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.

Such a ban of free communication is inconsistent with the guarantee of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. *American Steel Foundries* v. *Tri-City Council,* 257 U.S. 184, 209, 42 S. Ct. 72, 78, 66 L. Ed. 189, 27 A.L.R. 360. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case. "Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." *Senn* v. *Tile Layers Union,* 301 U.S. 468, 478, 57 S. Ct. 857, 862, 81 L. Ed. 1229.

Reversed.

Case Questions

1. State the issue of this case in the words of the Supreme Court.
2. Outline the facts leading to the lower court injunction.
3. Complete this sentence found in the last paragraph: "A state cannot exclude workingmen from peacefully exercising the right of free communication. . . ."

SECTION 42. PICKETING FORCING STATUTORY VIOLATION

In Section 33 of this text was discussed the legality of a strike that forced a statutory violation. The strike, however, is not afforded the same degree of protection by the Constitution as is the picket. For this reason, the decision in the *Burlington* case, reprinted in this section, must have caused the court some consternation.

The reader should observe, however, that *secondary* picketing was involved in this factual situation. The secondary picket is granted less immunity than the primary picket. Other elements that may have impelled the court's conclusion lay with the peculiar relationship of duty that exists between the public and a public carrier and the fact that the picketing was conducted by outsiders. It would appear that a contrary result could be argued with equal vigor. State courts are not as solicitous of union welfare as are the federal courts, and the Norris-LaGuardia Act does not affect their jurisdiction to issue injunctions.

BURLINGTON TRANSPORTATION COMPANY v. HATHAWAY

Supreme Court of Iowa, 1943. 12 N.W. (2d) 167

MULRONEY, C. J. Each of the plaintiffs is a common carrier of freight, by means of motor vehicles, operating to and from Burlington, Iowa. Their drivers belong to the defendant Local Union No. 218 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter called the union. The defendants, Gordon Hathaway and Roy Tweedell, are business agents of the union.

John Blaul's Sons Company is a wholesale grocery company located in Burlington whose truck drivers do not belong to the union. The defendant union, in its effort to unionize the Blaul Company, established a picket line around the latter's place of business and instructed plaintiffs' drivers not to handle Blaul merchandise. This latter action was the subject of the injunction suit which resulted in the temporary and permanent injunction enjoining the defendants "from requiring plaintiffs' employees who are members of said union to refrain from handling or delivering merchandise consigned to or from John Blaul's Sons Company." Defendants appeal.

The record shows that Gordon Hathaway called upon the Blaul Company several times and informed them that he was instructed by his union to seek a labor contract with them. When he was finally told that the company would not negotiate with him unless the union

represented a majority of the employees, the union placed the Blaul Company on the unfair list of the union, and passed a resolution not to haul or work upon any merchandise of that company. There was evidence that plaintiffs' drivers did refuse to haul Blaul merchandise; that it piled up on plaintiffs' docks; that Blaul continued to offer merchandise to plaintiffs for shipment and plaintiffs' employees refused to handle it; that Tweedell and Hathaway placed signs on the merchandise on the docks bearing the legend that the merchandise was unfair to Local 218; that plaintiffs' employees said they would not handle Blaul merchandise for they were afraid that, if they did, they would be blackballed by the union; that on one occasion Hathaway informed plaintiffs' employees they could handle some of Blaul's perishable merchandise on the docks but they were not to handle any more. There was no evidence of any acts of violence upon the part of defendants.

Upon this record one clear reason for the granting of the injunction is readily apparent. The concerted action of the defendant union had for its object an act prohibited by law. The plaintiffs are all common carriers and as such they were bound to carry property tendered by the public for shipment. The rule is thus stated in 13 C.J.S., Carriers, p. 61, Sec. 27: "Both under and apart from statutory provisions to that effect, every common carrier is under a duty to receive for transportation and to transport the property of any person tendered to it for transportation, provided the property is such as it holds itself out as willing to carry, or as it usually carries. . . ."

When the plaintiffs obtained their permits to operate as common carriers, they undertook the duty to transport the freight which the public tendered to them for transportation. The failure to carry out this duty to transport would not be excused by showing that its employees refused to obey the employers' orders. See *Chicago B. & Q. R. Co.* v. *Burlington, C. R. & N. Ry. Co. et al., C.C.*, 34 F. 481, and *Consolidated Freight Lines, Inc., et al.* v. *Department of Public Service, et al.*, 200 Wash. 659, 94 P. 2d 484, 485. In the last cited case a strike of laundry workers at the Davenport Hotel in Spokane resulted in a picket line around that hotel. Certain common carrier truck lines, who had been serving the hotel in the capacity of picking up freight or baggage and delivering it anywhere in the State of Washington or in the channels of interstate commerce, refused to send their trucks through the picket line at the hotel because the local manager of the teamsters' union threatened to call a strike of the

carriers' drivers if they were permitted to go through the picket line. The hotel filed a complaint with the Department of Public Service against the carriers for the cancellation of their permits as common carriers. This resulted in an order suspending temporarily the permits under which the carriers operated. Upon appeal the action of the Commission was affirmed, the Supreme Court of Washington stating: "The question then arises whether the appellants were excused by reason of the law. They being common carriers, it was their duty, under the facts and circumstances of this case, to send their trucks through the picket line. . . ."

For authorities holding a shipper is entitled to a mandatory injunction to compel the carrier to transport his goods when the carrier's excuse is that his employees have been ordered by their union not to handle the shipper's goods, see *Buyer* v. *Guillan*, 2 Cir., 271 F. 65, 16 A.L.R. 216; Note, 6 A.L.R. 909; 31 Am. J. 1000, Sec. 399.

Section 8044, Code of 1939, provides: "It shall be unlawful for any common carrier to . . . entail any prejudice or disadvantage upon any particular person, company, firm, corporation . . . by any . . . practice whatsoever. . . ."

Section 13251, Code of 1939, provides: "All persons within this state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of . . . public conveyances. . . ." And Section 13252 makes the denial of the rights guaranteed by Section 13251 punishable by fine and imprisonment.

From the above it is clear that if the plaintiffs were to do that which the union sought to compel them to do, namely, not handle the Blaul merchandise, they would be doing an act prohibited by the common law and the statutory law of this state and an act that could subject them to criminal prosecution.

We are not impressed with any argument based upon a distinction between the "immediate" and "ultimate" object of the union action. It is true that the ultimate object was to coerce a labor contract with the Blaul Company, but conceding this to be a legitimate action on the part of the union, nevertheless, the object of the collective union action, in so far as these plaintiffs are concerned, was to compel these plaintiffs to perform illegal acts. The only alternative given to the plaintiffs was the performance of those illegal acts. See American Law Institute Restatement: Torts, Sec. 777D, where the rule is stated: ". . . the object of concerted action is determined in relation to the person against whom the action is directed and who, by performance of the required act, can secure a termination of the

action. When a single course of action is directed toward more than one person, its object may be different with reference to each of the persons."

Since the object of the concerted action of the defendant union was unlawful, the concerted action could be enjoined even though the means employed were peaceful. In *Bloedel Donovan Lumber Mills v. International Woodworkers of America, Local No. 46, et al.*, 4 Wash. 2d 62, 102 P. 2d 270, the employer entered into a closed shop agreement with the union which had been certified by the National Labor Relations Board as sole collective bargaining agent of the employees. When a minority union picketed the employer, the Washington Supreme Court held it was rightly enjoined, stating: "While we do not wish to be understood as holding that any individual employee, or group of employees, may not at any time present grievances to respondent, in the manner provided in the working agreement, we are firmly of the opinion that Local 46 (the minority union) has no legal standing, in so far as respondent is concerned, either to insist on negotiating with respondent relative to the claimed grievances of some of its members, or to legally authorize the picketing of respondent's plants." [1]

Much of the same situation existed in *R. H. White Co.* v. *Murphy et al.*, 310 Mass. 510, 38 N.E. 2d 685, 690, decided January 2, 1942. Here the employer signed a closed shop agreement with the union that did not represent the majority of his employees, and the contract was executed while proceedings for certification of a collective bargaining agency were pending before the State Labor Relations Commission. When the Commission decided that another union was the collective bargaining agent, the first union sought to coerce the enforcement of its labor contract by peaceful picketing. The court held the picketing was rightly enjoined and stated: "The defendants have relied largely upon *Thornhill* v. *Alabama*, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, *Carlson* v. *California*, 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 1104, and *American Federation of Labor* v. *Swing*, 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855, in support of their contention that peaceful picketing though for an unlawful purpose is not itself unlawful, and may not be enjoined. We do not adopt this view, being of opinion that there is nothing in those cases to support the proposition that freedom of speech includes the right, by picketing,

[1] The rule of the *Bloedel* case has been codified in Sec. 8 (b) (4) (c) of the National Labor Relations Act of 1947. It prohibits "Forcing . . . any employer to bargain with a particular labor organization . . . if another has been certified.

to persuade or induce an employer to violate the statute by engaging in an unfair labor practice, and thus to set at naught the declared public policy of the Commonwealth, the foundation of the statute itself. In none of these cases just referred to was the picketing carried on for an unlawful purpose. . . . We are of opinion that none of the cases relied upon by the defendants, which we have already discussed, is authority for any principle that picketing by workmen in concert to persuade or induce an employer to do an unlawful act, one condemned by statute as an unfair labor practice and contrary to the defined public policy of the Commonwealth and of the nation, is permissible under the constitutional guaranty of freedom of speech, or otherwise."

See, also, American Law Institute Restatement: Torts, Sec. 794, where the rule is stated: "An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers." And the comment under the above rule, stating: "The expression of public policy is not confined to legislation and criminal law; in passing upon the propriety of an object, public policy otherwise defined is an important factor. If the object is an act against which the law has definitely set its face, it is not a proper object of concerted action."

There was no labor dispute between plaintiffs and their employees or between plaintiffs and the defendant union. The union cannot concertedly exert, in aid of their labor dispute with Blaul, any economic pressure to compel these plaintiffs to do that which the law and public policy forbid. The injunction was rightly issued.

What we have here said renders unnecessary any discussion of the legality of the union action against Blaul. Nor do we need to comment on the argument advanced by plaintiffs' counsel that the union action amounts to a violation of existing labor contracts between plaintiffs and the union. The evidence fails to show such contracts existed at the time the injunction was granted. The judgment of the trial court is affirmed.

Affirmed.

Case Questions

1. Outline the facts leading to the injunction.
2. Is there anything peculiar about the relation of plaintiffs to the public?
3. What happened in the *Consolidated* case cited in the parent decision?
4. How does the court distinguish this case from the *Thornhill* and *Swing* decisions of the Supreme Court?

SECTION 43. PICKETING OWNER-WORKERS

In the usual case where a union pickets an owner-worker, the picketing is carried on for the purpose of forcing the owner-worker and his men to join the union. In the usual case, also, the employer, upon joining with his men, is permitted to continue working with his hands.

The *Senn* case, reprinted in this section, is peculiar factually in that the union rules, in the interest of spreading work, forbade an employer member from working in competition with other men in the trade. This Senn refused to do, and, in consequence, the union picketed his premises. He argued that the Fourteenth Amendment gave him a right to work and that "the State may not authorize unions to employ publicity and picketing to induce him to refrain from exercising it," even though the picketing is peaceful.

While a few states have considered the picketing of owner-workers unlawful, even if peaceful, the *Angelos* decision, reprinted in this section following the *Senn* case, finalizes the issue as to the federal courts.

SENN v. TILE LAYERS PROTECTIVE UNION

Supreme Court of the United States, 1937. 301 U.S. 468, 57 Sup. Ct. 857

BRANDEIS, J. This case presents the question whether the provisions of the Wisconsin Labor Code which authorize giving publicity to labor disputes, declare peaceful picketing and patrolling lawful and prohibit granting of an injunction against such conduct, violate, as here construed and applied, the due process clause or equal protection clause of the Fourteenth Amendment. . . .

On December 28, 1935, Senn brought this suit in the Circuit Court of Milwaukee County, against Tile Layers Protective Union, Local No. 5, Tile Layers Helpers Union, Local No. 47, and their business agents, seeking an injunction to restrain picketing, and particularly "publishing, stating or proclaiming that the plaintiff is unfair to organized labor or to the defendant unions"; and also to restrain some other acts which have since been discontinued, and are not now material. The defendants answered; and the case was heard upon extensive evidence. The trial court found the following facts.

The journeymen tile layers at Milwaukee were, to a large extent, members of Tile Layers Protective Union, Local No. 5, and the helpers, members of Tile Layers Helpers Union, Local No. 47. Senn

was engaged at Milwaukee in the tile contracting business under the name of "Paul Senn & Co., Tile Contracting." His business was a small one, conducted, in the main, from his residence, with a showroom elsewhere. He employed one or two journeymen tile layers and one or two helpers, depending upon the amount of work he had contracted to do at the time. But, working with his own hands with tools of the trade, he performed personally on the jobs much work of a character commonly done by a tile layer or a helper. Neither Senn, nor any of his employees, was at the time this suit was begun a member of the tile layers union, since its constitution and rules require, among other things, that a journeyman tile setter shall have acquired his practical experience through an apprenticeship of not less than three years, and Senn had not served such an apprenticeship.

For some years the tile laying industry had been in a demoralized state because of lack of building operations; and members of the union had been in competition with non-union tile layers and helpers in their effort to secure work. The tile contractors by whom members of the unions were employed had entered into collective bargaining agreements with the unions governing wages, hours and working conditions. The wages paid by the union contractors had for some time been higher than those paid by Senn to his employees.

Because of the peculiar composition of the industry, which consists of employers with small numbers of employees, the unions had found it necessary for the protection of the individual rights of their members in the prosecution of their trade to require all employers agreeing to conduct a union shop to assent to the following provision:

"Article III. It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper but that the installation of all materials claimed by the party of the second part as listed under the caption 'Classification of Work' in this agreement, shall be done by journeymen members of Tile Layers Protective Union Local No. 5."

The unions endeavored to induce Senn to become a union contractor; and requested him to execute an agreement in form substantially identical with that entered into by the Milwaukee contractors who employ union men. Senn expressed a willingness to execute the agreement provided Article III was eliminated. The union declared that this was impossible; that the inclusion of the provision was essential to the unions' interest in maintaining wage standards and spreading work among their members; and, moreover, that to elimi-

nate Article III from the contract with Senn would discriminate against existing union contractors, all of whom had signed agreements containing the Article. As the unions declared its elimination impossible, Senn refused to sign the agreement and unionize his shop. Because of his refusal, the unions picketed his place of business. The picketing was peaceful, without violence, and without any unlawful act. The evidence was that the pickets carried one banner with the inscription "P. Senn Tile Company is unfair to the Tile Layers Protective Union," another with the inscription "Let the Union tile layer install your tile work."

The trial court denied the injunction and dismissed the bill. . . .

Senn appealed to the Supreme Court of the State, which affirmed the judgment of the trial court and denied a motion for rehearing, two judges dissenting. (222 Wis. 383, 400; 268 N.W. 270, 872.) The case is here on appeal. . . .

. . . The question for our decision is whether the statute, as applied to the facts found, took Senn's liberty or property or denied him equal protection of the laws in violation of the Fourteenth Amendment. Senn does not claim broadly that the Federal Constitution prohibits a State from authorizing publicity and peaceful picketing. His claim of invalidity is rested on the fact that he refused to unionize his shop solely because the union insisted upon the retention of Article III. He contends that the right to work in his business with his own hands is a right guaranteed by the Fourteenth Amendment and that the State may not authorize unions to employ publicity and picketing to induce him to refrain from exercising it.

The unions concede that Senn, so long as he conducts a nonunion shop, has the right to work with his hands and tools. He may do so, as freely as he may work his employees longer hours and at lower wages than the union rules permit. He may bid for contracts at a low figure based upon low wages and long hours. But the unions contend that, since Senn's exercise of the right to do so is harmful to the interests of their members, they may seek by legal means to induce him to agree to unionize his shop and to refrain from exercising his right to work with his own hands. The judgment of the highest court of the state establishes that both the means employed and the end sought by the unions are legal under its law. The question for our determination is whether either the means or the end sought is forbidden by the Federal Constitution.

Third. Clearly the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment.

Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. The State may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets. If the end sought by the unions is not forbidden by the Federal Constitution, the State may authorize working men to seek to attain it by combining as pickets, just as it permits capitalists and employers to combine in other ways to attain their desired economic ends. . . .

Fourth. The end sought by the unions is not unconstitutional. Article III, which the unions seek to have Senn accept, was found by the state courts to be not arbitrary or capricious, but a reasonable rule "adopted by the defendants out of the necessities of employment within the industry and for the protection of themselves as workers and craftsmen in the industry." That finding is amply supported by the evidence. There is no basis for a suggestion that the union's request that Senn refrain from working with his own hands, or their employment of picketing and publicity, was malicious; or that there was a desire to injure Senn. The sole purpose of the picketing was to acquaint the public with the facts and, by gaining its support, to induce Senn to unionize his shop. There was no effort to induce Senn to do an unlawful thing. There was no violence, no force was applied, no molestation or interference, no coercion. There was only the persuasion incident to publicity. . . .

The unions acted, and had the right to act as they did, to protect the interests of their members against the harmful effect upon them of Senn's action. Compare *American Steel Foundries* v. *Tri-City Central Trades Council, supra,* 208, 209. Because his action was harmful, the fact that none of Senn's employees was a union member, or sought the union's aid, is immaterial.

The laws of Wisconsin, as declared by its highest court, permits unions to endeavor to induce an employer, when unionizing his shop, to agree to refrain from working in his business with his own hands —so to endeavor although none of his employees is a member of a union. Whether it was wise for the State to permit the unions to do so is a question of its public policy—not our concern. The Fourteenth Amendment does not prohibit it.

Fifth. There is nothing in the Federal Constitution which forbids unions from competing with nonunion concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in the press, by circulars, or by his win-

dow display. Each member of the unions, as well as Senn, has the right to strive to earn his living. Senn seeks to do so through exercise of his individual skill and planning. The union members seek to do so through combination. Earning a living is dependent upon securing work; and securing work is dependent upon public favor. To win the patronage of the public each may strive by legal means. Exercising its police power, Wisconsin has declared that in a labor dispute peaceful picketing and truthful publicity are means legal for unions. It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. Compare *Pennsylvania Railroad Co.* v. *United States Railroad Labor Board,* 261 U.S. 72. It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right.

Sixth. It is contended that in prohibiting an injunction the statute denied to Senn equal protection of the laws, and *Truax* v. *Corrigan, supra,* is invoked. But the issue suggested by plaintiff does not arise. For we hold that the provisions of the Wisconsin statute which authorized the conduct of the unions are constitutional. One has no constitutional right to a "remedy" against the lawful conduct of another.

Affirmed.

SUPPLEMENTAL CASE DIGESTS—PICKETING OWNER-WORKERS

LYLE v. LOCAL NO. 452. Supreme Court of Tennessee, 1939; 124 S.W. 2d 701. "Upon another ground we think complainant is entitled to an injunction, and that is the unlawfulness of picketing a business where the owner is the sole person required to run his business. *Goldfinger* v. *Feintuch,* 1937, 276 N.Y. 281, 11 N.E. 2d 910; *Thompson* v. *Boekhut,* 273 N.Y. 390, 7 N.E. 2d 674; *Luft* v. *Flove,* 270 N.Y. 640, 1 N.E. 2d 369. In this particular cause, complainant alone was conducting his meat market when defendants began picketing his place of business because he would not join the Butcher's union. This does not constitute a labor dispute." (McKinney, J.)

In 313 Ill. App. 432, 40 N.E. 2d 571 (1942), it was held lawful to picket an owner-worker to regulate his hours of work. In *Ex Parte Frye,* 156 S.W. 2d 531 (1941), the constitutionality of a Texas anti-picketing law forbidding force and violence to prevent a person from working was upheld by the Texas Court of Criminal Appeals. The statute in question subjected violent picketing for the stated purpose to punishment as a felony.

The National Labor Relations Act of 1947 interdicts the application of strike and secondary boycott pressure upon owner-workers to force them to join a labor organization. Section 8 (b) (4) provides "it shall be an unfair labor practice for a labor organization to engage in a strike or a concerted refusal . . . where an object thereof is (A) forcing or requiring any employer or self-employed person to join any labor or employer organization." It would appear, however, that peaceful picket activity to accomplish the same result is still permissible. In *Bakery and Pastry Drivers* v. *Wohl,* 62 Sup. Ct. 816, 1942, peaceful secondary picketing for that purpose was upheld by the Supreme Court on free speech and unity of interest grounds. The *Angelos* decision, reprinted below, seems to dispose of the question.

Case Questions

1. State the controlling facts of the case.
2. Was Senn willing to join the union and to permit his workers to do the same?
3. What did Article 3 provide?
4. What claim under the Constitution does Senn advance?
5. How does the Supreme Court dispose of his claim? Discuss fully.
6. Do the digested cases show state courts in accord with the *Senn* decision?

CAFETERIA EMPLOYEES UNION, LOCAL 302 v. ANGELOS

Supreme Court of the United States, 1943. 320 U.S. 293, 64 Sup. Ct. 126

FRANKFURTER, J. We brought these two cases here to determine whether injunctions sanctioned by the New York Court of Appeals exceeded the bounds within which the Fourteenth Amendment confines state power. 319 U.S. 778. They were argued together and, being substantially alike, can be disposed of in a single opinion.

We start with the Court of Appeals' view of the facts. In No. 36, petitioners, a labor union and its president, picketed a cafeteria in an attempt to organize it. The cafeteria was owned by the respond-

ents, who themselves conducted the business without the aid of any employees. Picketing was carried on by a parade of one person at a time in front of the premises. The successive pickets were "at all times orderly and peaceful." They carried signs which tended to give the impression that the respondents were "unfair" to organized labor and that the pickets had been previously employed in the cafeteria. These representations were treated by the court below as knowingly false in that there had been no employees in the cafeteria and the respondents were "not unfair to organized labor." It also found that pickets told prospective customers that the cafeteria served bad food, and that by "patronizing" it "they were aiding the cause of Fascism."

The circumstances in No. 37 differ from those in No. 36 only in that pickets were found to have told prospective customers that a strike was in progress and to have "insulted customers . . . who were about to enter" the cafeteria. Upon a finding that respondents required equitable relief to avoid irreparable damages and that there was no "labor dispute" under the New York analogue of the Norris-LaGuardia Act (Sec. 876-a of the New York Civil Practice Act), the trial court enjoined petitioners in broad terms from picketing at or near respondents' places of business. The decrees were affirmed by the Appellate Division (264 App. Div. 708, 34 N.Y.S. 2d 408), and were finally sustained by the Court of Appeals, its Chief Judge and two Judges dissenting. 289 N.Y. 498, 507, 46 N.E. 2d 903.

In *Senn* v. *Tile Layers Union*, 301 U.S. 468, this Court ruled that members of a union might, "without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." 301 U.S. at 478. Later cases applied the Senn doctrine by enforcing the right of workers to state their case and to appeal for public support in an orderly and peaceful manner regardless of the area of immunity as defined by state policy. *A. F. of L.* v. *Swing*, 312 U.S. 321; *Bakery Drivers Local* v. *Wohl*, 315 U.S. 769. To be sure, the *Senn* case related to the employment of "peaceful picketing and truthful publicity." 301 U.S. at 482. That the picketing under review was peaceful is not questioned. And to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like "unfair" or "fascist"—is not to falsify facts. In a setting like the present, continuing representations unquestionably false and acts of coercion going beyond the mere influence exerted by the fact of picketing, are of course not constitutional prerogatives.

But here we have no attempt by the state through its courts to restrict conduct justifiably found to be an abusive exercise of the right to picket. We have before us a prohibition as unrestricted as that which we found to transgress state power in *A. F. of L.* v. *Swing, supra.* The Court here, as in the Swing case, was probably led into error by assuming that if a controversy does not come within the scope of state legislation limiting the issue of injunctions, efforts to make known one side of an industrial controversy by peaceful means may be enjoined. But, as we have heretofore decided, a state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way "by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." *A. F. of L.* v. *Swing,* 312 U.S. at 326.

The present situation is thus wholly outside the scope of the decision in *Milk Wagon Drivers Union* v. *Meadowmoor Co.,* 312 U.S. 287. There we sustained the equity power of a state because the record disclosed abuses deemed not episodic and isolated but of the very texture and process of the enjoined picketing. But we also made clear "that the power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion. Right to free speech in the future cannot be forfeited because of dissociated acts of past violence." 312 U.S. at 296. Still less can the right to picket itself be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing.

The judgments must be reversed and the causes returned to the state court for further proceedings not inconsistent with this opinion.

Reversed.

Case Questions

1. What are the facts of the parent case?
2. In what important particular do the facts above differ from the *Meadowmoor* decision?
3. How does the Court dispose of the argument that the picketing was fraudulent?
4. State the rule of the parent case.

SECTION 44. PICKETING TO COERCE WORKERS

The *Retail Clerks'* decision in this section involves construction of a Wisconsin statute containing provisions in close parallel to Secs. 7 and 8 (b) (1) of the National Labor Relations Act of 1947. These give employees the right to refrain from union affiliation and to be free from coercion in the exercise of that right.

RETAIL CLERKS' UNION, LOCAL No. 1403, A. F. OF L. v. WISCONSIN EMPLOYMENT RELATIONS BOARD

Supreme Court of Wisconsin, 1942. 242 Wis. 21, 6 N.W. (2d) 698

MARTIN, J. On February 5, 1941, James C. Fridle, Warren Griffith, and Einer Lange, employees of the Sears Roebuck Company's Racine store, in their own behalf, and in a representative capacity in behalf of all other employees of said store, filed a complaint with the Wisconsin Employment Relations Board, charging the appellant unions with unfair labor practices. Prior to December, 1940, Hal Norris and Dan Hubbard, the business agents of their respective unions, agreed to conduct a campaign to organize the retail stores throughout the city of Racine. They determined by lot—by drawing the name out of a hat—which of the two unions should organize a particular store. Said agents further agreed that if a store did not become organized they would picket that store.

In the latter part of November, 1940, Norris and Hubbard called on the manager of the store and obtained from him permission to post a notice in the store that a meeting would be held on the evening of December 3d, at Union Hall, for the purpose of organizing the employees of the store into A. F. L., Local No. 1403. Such notice was posted on the store bulletin board on or about November 20, with the consent and approval of the store manager. None of the store employees attended the meeting. No claim is made that the employer or any other person made any effort to prevent the store employees from attending the meeting. No further meeting of the employees was called by either union.

When Norris and Hubbard called on the manager of the store to get permission to post notice of the meeting to be held on December 3d, Norris told the manager that he "better have the men up at the meeting or else they would throw a picket line out." On December 4th Hubbard and Norris, in behalf of their respective unions, made arrangements for picketing the store. None of the store employees were members of either union. It is conceded that neither

union had any dispute with Sears Roebuck & Company; also, that there was no dispute between the company and its employees. All of the employees were satisfied with wages, hours, and working conditions.

The picketing began on December 4th or 5th, 1940. The placards carried by the picketers bore the legend that the clerks in the store did not belong to the A. F. L. or C. I. O. For a time, at the beginning of the picketing, there were only two pickets at the front of the store and one at the rear entrance, or two pickets in front and a sign posted in the rear. For twelve or fifteen days before Christmas, 1940, the store was open evenings, during which time picketing was conducted by from two to twenty-six persons. During this time the pickets occupied the doorway entrance, making it difficult for customers to get through the picket line to enter the store. There was no violence on the picket line. . . .

Section 111.04, Wis. Stats. 1939, provides: "Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall have the right to refrain from any or all of such activities."

Section 111.06 (2) provides:

"It shall be an unfair labor practice . . . :

"(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in Section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family. . . ."

After a very careful consideration of all the evidence, we are of the opinion that it supports the findings of the board. There can be no doubt that the picketing as carried on during the Christmas season of 1940, at times by as many as twenty-six pickets, and blocking the doorway entrance of the store so as to make ingress and egress difficult for those desiring to patronize the store, was clearly unlawful, and could properly be enjoined; and any future recurrence of similar conduct may be enjoined. We think no one will question the right to enjoin those on the picket line from threatening and coercing customers of the store to the point of making them return merchandise purchases. . . .

We do not hold that the appellant unions may not inform all other unions that a picket line has been established at the Sears Roebuck Company store and give the reasons why, or that they may not ask

union members to live up to their by-laws and not go through the picket line. The appellant unions had the right to resort to such means and for such purpose as the law permits.

It is generally held that coercion or intimidation is not necessarily limited to threats of violence to person or property. A man may be coerced into doing or refraining from doing by fear of the loss of his business or wages as well as by the dread of physical violence or force. 6 A.L.R. 920; 116 A.L.R. 489. . . .

In *Wisconsin Employment R. Board* v. *Milk,* etc., *Union,* 238 Wis. 379, 299 N.W. 31, there was, among other things, mass picketing, interference with delivery of materials, engaging in a secondary boycott, and attempting to induce the employer to enter into an all-union agreement when three-fourths of the employees had not voted therefor. In the instant case there was mass picketing during the Christmas season of 1940; then and since there has been interference with delivery of materials to and from the store, engaging in a secondary boycott, and attempting to induce the employer to interfere with its employees in the exercise of their right to refrain from joining either of the appellant unions. The court sustained the order of the board in *Wisconsin Employment R. Board* v. *Milk,* etc., *Union, supra.* The United States Supreme Court on *certiorari* refused to take jurisdiction of the case.

Peaceful picketing is now recognized as an exercise of the right of free speech and therefore lawful. *Thornhill* v. *State of Alabama,* 310 U.S. 88, 60 Sup. Ct. 736, 84 L.Ed. 1093, . . . However, it cannot be made the cover for concerted action against an employer in order to achieve an unlawful or prohibited object, such as to compel an employer to coerce his employees to join a union.

Under the recent decisions of the United States Supreme Court, referred to above, picketing characterized by violence, intimidation, show of force, blocking of entrances, or even peaceful picketing in such a background, may be prohibited by the state and enjoined by the state courts; so, also, may peaceful picketing for an unlawful purpose.

As hereinbefore indicated, we hold that the evidence sustains a finding that the purpose and intent of the picketing was to put pressure upon the employer to commit an unfair labor practice and coerce its employees to join the union. This being the purpose, the picketing is unlawful; and under the decisions of this court it may be enjoined. . . .

Judgment affirmed.

In accord is the National Labor Relations Act of 1947, Sec. 7, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, . . . and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3)." Section 8 (b) (1) makes it an unfair labor practice for a union to "restrain or coerce employees in the exercise of the rights guaranteed in Section 7." This provision has been subject to attack by labor and may be removed by the 81st Congress.

Case Questions

1. Who filed the complaint in the lower court?
2. Did the employees of Sears desire inclusion in the union?
3. Does the court base its conclusions on the presence of massed picketing?
4. Why is the Wisconsin statute relevant? Is the National Labor Relations Act the same on the controverted issue?
5. State the rule of this case.

SECTION 45. PICKET FOR UNION SECURITY

The picket for the closed shop is in the same category as the strike for the same purpose. It is unlawful even though peaceful in character. There must be a concurrence of both legality of pressure method and object. Under the National Labor Relations Act of 1947, the only forms of presently permissible union security forms are the union shop and maintenance of membership, and then only if a majority of employees vote in favor of union security as a bargaining issue.

Even though the 81st Congress returns to the rule of the 1935 N.L.R.A. which permitted all forms of compulsory unionism, a state may, as did Massachusetts, render compulsory unionism arrangements unlawful.

FASHIONCRAFT, INC. v. HALPERN

Supreme Judicial Court of Massachusetts, 1943.
313 Mass. 385, 48 N.E. (2d) 1

RONAN, J. The plaintiff, a manufacturer of rainproof garments, brings this bill in equity against the defendants . . . to enjoin all the defendants and members of the local and the international union from continuing a strike against the plaintiff. The defendants appealed from a final decree restraining them from maintaining the strike. . . .

. . . The judge found that the picketing, which began on the last mentioned date, has been conducted in a peaceable manner although a larger number of pickets than reasonably necessary and generally

in excess of the number authorized by the police has been maintained in front of the plaintiff's plant which had only a small street frontage. He also found that there was " 'Mass Picketing,' that is, making a demonstration not necessary for reasonable or effective 'picketing' . . . (which) met with definite objection by the police." The picketing has prevented the plaintiff from receiving shipments by express or vehicles operated by members of other unions and has compelled it to rely wholly on the parcel post. It has thereby been greatly handicapped in conducting its business. The business is of an interstate character. The object of the local is to secure a closed shop. . . .

The defendants contend that there was error in enjoining them from picketing and from representing that a strike exists and in having the decree run against the international union.

A combination of workmen, who have inflicted injuries upon a plaintiff's business for the purpose of compelling him to grant their demands is amenable under the common law of this Commonwealth for the perpetration of an actionable wrong, unless such conduct is justified on the ground that it resulted from the exercise by the defendants of a right equal or superior to the right of the plaintiff to be left alone. And the justification for the commission of acts that are ordinarily tortious in their nature and character must rest upon the fact that the defendants themselves sought to acquire a direct and immediate, rather than a remote or secondary, benefit from such acts. Whatever advantage might in general accrue to trade unionism by the acquisition of a closed shop arrangement with an employer, there is not sufficient relationship between the aim sought and the self-interest of the strikers to justify the intentional infliction of harm on another. A strike for a closed shop has, accordingly, been held a strike for an unlawful purpose. *Reynolds* v. *Davis,* 198 Mass. 294, 84 N.E. 457, 17 L.R.A., N.S., 162; . . .

Picketing by strikers has been authorized by a statute in this Commonwealth for more than a quarter of a century. . . . This statute has always been interpreted as applying only to a lawful strike. . . .

A strike for a closed shop has not become legal and the lawful limits of picketing have not been extended by St. 1935, C. 407, which in its present form appears as G.L. (ter. Ed.) C. 149, Secs. 20B, 20C; C. 214, Secs. 1, 9, 9A; C. 220, Secs. 13A, 13B. That statute . . . leaves unimpaired the distinction heretofore existing between legal and illegal strikes. It leaves untouched the somewhat limited field of the statute governing picketing. It neither restricts nor

broadens the boundaries of permissible picketing. Picketing which was illegal prior to this statute still continues as such. In a word, the statute did not change the substantive law as to either the legality of a strike or the lawfulness of picketing. *Simon* v. *Schwachman*, 301 Mass. 573, 18 N.E. 2d 1. . . .

The principal contention of the defendants is that the injunction is an invasion of their right to free speech. Picketing has been recognized as a legitimate method which strikers have a right to employ to notify the public of the existence of a strike, to disseminate information concerning the controversy, and to communicate the facts dealing with their side of the dispute. In so far as picketing comes within the category of freedom of speech, it is a right guaranteed by the Federal Constitution, Amendment 14, and the exercise of the right is not dependent upon the statute of any State. . . .

Picketing, however, may be more than a means for making public the facts of a labor dispute. The presence of persons, patrolling along the highway abutting the employer's premises; marching back and forth in more or less close formation; obstructing passage to those entering or leaving the premises; impeding free and uninterrupted travel along the public way, when considered with the number of persons participating and the character of their demeanor, may be sufficient to induce breaches of the peace and other infractions of law designed to preserve the safety and security of society. Such a situation may arise irrespective of the nature of the information conveyed by the pickets. Although picketing may be affiliated with free speech, a State is not required to tolerate picketing of all types and may regulate and restrict it in order to avert some definite substantial danger clearly arising from the methods adopted by pickets. . . . It was said in *Thornhill* v. *Alabama*, 310 U.S. 88, 103-104, 60 S. Ct. 736, 745, 84 L. Ed. 1093, that "the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants." And just as picketing may become unlawful through the use of unlawful methods, it may also become unlawful if directed to the accomplishment of an unlawful purpose. *R. H. White Co.* v. *Murphy*, 310 Mass. 510, 38 N.E. 2d 685. A State is not without authority to decide that a strike for a closed shop is not for a lawful purpose. *Plant* v. *Woods*, 176 Mass. 492, 57 N.E. 1011, 51 L.R.A. 339, 79 Am. St. Rep. 330. . . . In this Common-

wealth a strike for a closed shop is for an unlawful labor objective. It is not a lawful dispute but is a tort. *Quinton's Market, Inc.* v. *Patterson,* 303 Mass. 315, 317, 21 N.E. 2d 546. And peaceful picketing in furtherance of such strike may be enjoined. . . .

Ordered accordingly.[1]

Case Questions

1. Discuss the court's statement: "Picketing may be more than a means for making public the facts of a labor dispute."
2. State the rule of the case.

SECTION 46. JURISDICTIONAL PICKETING

Jurisdictional disputes prior to the National Labor Relations Act of 1947 were a thorn in the side of many an employer who was caught in the middle of a dispute in which he had no interest and over which he could exercise no control. The 1947 Act remedies this situation in the following particulars:

1. Sec. 8 (b) (4) (C) makes it an unfair labor practice for a union to "force or require any employer to recognize or bargain with a particular labor organization . . . if another . . . has been certified . . . under the provisions of Sec. 9."
2. Sec. 8 (b) (4) (D) makes it an unfair labor practice for a union to engage in a work jurisdictional dispute. The Board must decide these disputes under Sec. 10 (k), and, if necessary, secure an injunction under Sec. 10 (l) to preserve the *status quo* while it is deciding to whom certain work shall be assigned.

Because of its innately equitable character, the 1949 Congress may retain this limitation on union pressure. At all events, the common law rule is in consonance with the applicable provision. The employer, therefore, is not left without a remedy should Congress eliminate the limitation.

REGAL SHOE CO v. DOYLE

Supreme Court, Special Term, Kings County, 1943. 39 N.Y.S. (2d) 667

SMITH, J. Following an election heretofore conducted by the State Labor Relations Board, two specified C.I.O. unions were certified as the sole collective bargaining agent for the workers employed

[1] The National Labor Relations Act of 1947 permits union activity to force upon an employer a *union* shop, but the *closed* shop has been outlawed. Section 8 (a) (3) permits the grant of a union shop if the majority of employees vote in favor thereof, but the closed shop has been legislated out of existence. Control over hiring has thus been restored to the employer.

The controlling distinction between a closed and a union shop lies with the fact that the former requires membership in a union as a condition precedent to employment. The union shop merely makes the continuation of employment, after a specified period of time, contingent upon union membership.

in plaintiff's stores. In June, 1941, the plaintiff and the latter unions entered into a closed shop labor contract. It appears that plaintiff has fully complied with all the provisions of the agreement, no controversy having arisen relative thereto. Two of plaintiff's stores, however, have been subjected to picketing by an affiliate of the American Federation of Labor. Plaintiff seeks herein the issuance of a permanent injunction restraining the continuance of such picketing. The proof satisfactorily establishes that the picketing has been initiated, significantly, not for the purpose of effectuating an improvement of conditions under which plaintiff's employees work or to secure their protection from any other abuse, but simply in reprisal for the fact that one of the C.I.O. unions itself has picketed certain stores owned by a third party (Florsheim Shoe Stores), which, in turn, has a closed shop agreement with an affiliate of the American Federation of Labor. Defendants may not successfully utilize the provisions of Section 876-a of the Civil Practice Act as a basis upon which to justify the acts here complained of. The picketing, conceived merely in the spirit of retaliation, obviously is wholly unrelated to the attainment of a bona fide labor objective.

Judgment is, therefore, rendered in plaintiff's favor.

Case Questions

1. Who is the plaintiff?
2. Why is defendant union picketing?
3. State the rule of the case.

DINNY & ROBBINS, INC. v. DAVIS

Court of Appeals of New York, 1943. 290 N.Y. 101, 48 N.E. (2d) 280

RIPPEY, J. Plaintiff in this action is a retailer of men's shoes operating three stores in the city of New York, one of which is located at 484 Seventh Avenue. It brought this action to restrain alleged illegal picketing by the defendant on and subsequent to January 12, 1942, claiming that the picketing was not the result of any "labor dispute" within the meaning of Section 876-a of the Civil Practice Act. . . .

. . . Accordingly, the reversal [dissolving an injunction against the defendant union] was actually upon the law and the question of law passed upon is whether there was a "labor dispute" between the parties within the meaning of Section 876-a.

Preliminary to further reference to that question we repeat that there was no prohibition by the trial court in this action of lawful

picketing. The trial court found that on January 12, 1942, and thereafter, the defendants and persons designated by them picketed the store of plaintiff by one picket who paraded in front of the premises carrying a placard bearing the words "Dinny & Robbins shoes are unfair to the Retail Shoe Salesmen's Union, Local 1115-F—R.C.I. P.A., American Federation of Labor, which picketing "was misleading to the general public and the customers of the plaintiff in that they were led to believe that the employees of the plaintiff were on strike, and that the plaintiff was unfair to organized labor." The Appellate Division found, as did the trial court, that there was no mass picketing, and that there was no violence in the course of picketing, that it was peaceful at all times and that the picket made no verbal statements, and further found that no statement was made by the picket that any of plaintiff's employees were on strike "except by implication." That, of course, was the same finding as made by the trial court. The judgment of the trial court provides that the defendant should be permitted to picket with a sign which should read as follows: "This is no strike. All employees of Dinny & Robbins, Inc., are regular members of Local 1268 C.I.O., not members of Local 1115-F—R.C.I.P.A., A. F. of L." The trial court correctly found, as did the Appellate Division, that there was an implication by the sign which the picket carried that the employees of plaintiff were on strike. The judgment of the trial court also was to the effect that the sign indicated that plaintiff was unfair to organized labor and that finding, although it was the single case where the Appellate Division did not concur, was sustained by the evidence. The judgment restraining the use of such a sign was in all respects correct. *Angelos* v. *Mesevich*, 289 N.Y. 498, 46 N.E. 2d 903. The statement on the sign that the plaintiff was unfair to Retail Shoe Salesmen's Union, Local 1115-F—R.C.I.P.A., American Federation of Labor, was false since there was no obligation on the part of plaintiff to enter into a contract with the defendant, as hereafter pointed out.

On October 1, 1941, the plaintiff, as a result of collective bargaining, entered into a comprehensive written contract with Retail Shoe Salesmen's Union of New York, Local 1268, chartered by the United Retail, Wholesale and Department Store Employees of America, affiliated with the Congress of Industrial Organizations, which was in full force and effect at the time of the picketing and was to be continued in effect by its terms until October 1, 1942. It covered in detail wages and working conditions of its employees. The contract

followed at least two similar contracts with the same organization, each for a yearly period. No complaint at any time was made by the defendant in regard to the validity and comprehensive character of the agreement or that there were any matters affecting wages and working conditions which were not effectively arranged for in the contract. Counsel for defendant, upon the trial, specifically disclaimed that the plaintiff was unfair to labor generally and asserted that the defendant's sole claim was "that this plaintiff is unfair to Local 1115-F." The findings below were to the effect that that union was engaged in the same field as the defendant union; that the C.I.O. unions were picketing stores employing members of the defendant union and that the defendant union had notified the plaintiff to execute a proposed contract with it within three days, to which notice plaintiff paid no attention, and that, in retaliation, the picketing of plaintiff's store began. In other words, it has been held that, in spite of the undisputed facts that no strike had been called against the plaintiff, that there was no pretense or claim on the part of defendant union that picketing of plaintiff's store was a bona fide attempt at collective bargaining with the object of increasing wages or bettering the working conditions of plaintiff's employees, and that plaintiff in good faith had entered into and was operating under a binding contract with the C.I.O. union, by the simple demand alone on the part of the defendant that plaintiff abrogate its contract with the C.I.O. union and enter into a contract it proposed, a labor dispute existed within the meaning and intent of Section 876-a of the Civil Practice Act.

There is nothing that can be found in that section or in the purposes for which it was enacted to indicate any intent on the part of the Legislature that it should cover a retaliatory jurisdictional dispute between two rival unions where no strike existed against an employer and there was no complaint concerning terms or conditions of employment or employment relations arising out of the respective interests of employer and employee and no attempt had been made to organize such employees. That act was not designed as an instrument to promote and protect strife between rival labor groups or to injure or destroy the good will and business of innocent employers against whom there was no complaint concerning wages or working conditions solely because they refused to take sides with one group as against the other. There is nothing in the act to bar a court of equity from restraining irreparable injury to property and business of an innocent employer against a build-up of an alleged "labor

dispute" such as is indicated in this case. The act does not compel courts of equity to force the breach of a valid contract between an employer and its employees satisfactorily covering wages and working conditions of such employees when made as a result of collective bargaining . . . and to suffer suits for damages for its breach. On the contrary, the Legislature provided in the State Labor Relations Act a due and an orderly process for settling such jurisdictional disputes. Labor Law, Art. 20.

The judgment of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in this court and in the Appellate Division.[2]

SUPPLEMENTAL CASE DIGEST—JURISDICTIONAL PICKETING

R. H. WHITE CO. v. MURPHY. Supreme Court of Massachusetts, 1942; 38 N.E. 2d 685. The defendant union forced the employer into contractual recognition even though a certification proceeding indicated a rival union was the true representative of the men involved in the warehouse unit in question. The employer rescinded the closed shop contract and, in retaliation, the defendant union picketed his premises. An injunction was granted restraining the picketing activity on the ground that peaceful picketing, in furtherance of an unfair labor practice, was an unlawful purpose and therefore not constitutionally protected. The contract was similarly held void as being in defiance of the certification proceeding.

Case Questions

1. Describe the picket conduct present in the parent situation, especially as to the banner.
2. Had plaintiff entered into a valid collective agreement with a union?
3. Did the picketing union offer any benefits to the employees of plaintiff that were not granted in the subsisting contract?
4. Does the New York anti-injunction act protect jurisdictional disputes? State in the words of the court.
5. What does Sec. 8 (b) (4) (C) and (D) of the National Labor Relations Act of 1947 stipulate?
6. State the facts and decision of the court in the *R. H. White* case digest.

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[2] "It shall be an unfair labor practice for a labor organization or its agents to force or require any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Sec. 9." Sec. 8 (b) (4) of the National Labor Relations Act of 1947.

CHAPTER 7

THE BOYCOTT

SECTION 47. TYPES OF BOYCOTTS

Of all topics important to an understanding in this field, the boycott has presented problems of greatest complexity, leaving its legal status in a confused state. This has been true because the courts have refused to accept a common definition of the term, and, further, have employed the term as a repository into which is promiscuously dropped all union activities that are difficult to classify otherwise. Even by definition, the word "boycott" is inherently broad and vague. Webster defines it in these words: "To combine against in a policy of nonintercourse; to refrain by concerted action from using or purchasing." Some assistance is afforded—the gist of any boycott is a refusal to deal; but even here we encounter difficulty in that all strike and picket activity by labor combinations involve a refusal to deal, a withholding of services, or the inducement, perhaps, through picket or related weapons, of third persons likewise to actively or passively refuse to deal with the primary employer disputant. It is obvious that the delimitation of the term leaves us encroaching upon other areas. We must, at the inception, narrow or distinguish the matter of terminology.

Our treatment will be clarified if we inject another element. That element is inducement or coercion of third persons, not party to the immediate dispute, to refrain from dealing with our primary employer disputant. Thus we automatically withdraw from consideration or inclusion the primary strike, the primary picket, and, for all practical purposes, even the primary boycott.

The primary strike and picket have been previously searched. The primary boycott may be summarily dismissed since it long has been recognized as a permissible form of collective pressure. It involves only a refusal to trade with an employer with whom a labor dispute is current, and then only on the part of his own workers. Should the workers of this employer disputant go beyond merely refusing to deal themselves, should they attempt to secure sympathetic refusal by labor generally, the public, or customers of the employer, the primary boycott becomes transmuted into a secondary boycott to which different rules apply.

The secondary boycott, which furnishes the nub of this chapter, may be defined as the act of causing, or attempting to cause, by in-

ducement, persuasion, or coercion, third persons to the labor dispute, primarily suppliers and customers of an employer, to refrain from business dealing with the adversary employer. The secondary boycott may take any number of forms, among the principal ones being the secondary strike, the secondary picket, circularization of suppliers or customers of the employer by mail or personal solicitation, and the seeking of sympathetic pressure by other labor organizations, as where they are induced to refuse to cross a picket line or to refuse to work with nonunion men or materials.

The tertiary boycott involves the coercion of suppliers or customers of a supplier or customer of an employer with whom a labor difficulty exists. This form of boycott shall not be treated of, as it is uniformly held to be an illegal weapon and is thus rarely resorted to by labor organizations.

The cases presented for analysis in this chapter have a five-fold objective. First, to reveal the boycott in action at common law; second, to indicate the forms and purposes of the boycott; third, to trace the modification of the common law rule, which generally held them illegal for one reason or another, by the introduction of the unity of interest concept; fourth, to show how the Supreme Court looks upon the secondary boycott; and, finally, to show the effect of the federal legislation on the legality of secondary boycotts. As the subsequent decisions are read, the student will do well to bear in mind the following conclusions:

1. The primary boycott is recognized as legal since it involves no pressure on third persons.
2. The secondary strike weapon, by majority view, is illegal. The case of *Pickett* v. *Walsh*, reprinted on page 210, is illustrative of judicial disfavor.
3. Circularization of suppliers and customers of an employer, by mail or personal solicitation, is generally permissible conduct. The communication must not be fraudulent, however.
4. The tertiary boycott is uniformly unlawful, as it places pressure upon parties too remote to the dispute.
5. The secondary boycott, to which attention will be confined, enjoys mixed favor or disfavor depending upon (a) its purpose, (b) the means or form of boycott, (c) the degree of pressure imposed, (d) the presence or absence of constitutional prerogatives, (e) the remoteness of the third party to whom coercion is applied, (f) the unity of commercial interest existent, (g) the jurisdiction in which the remedy is being pursued, and (h) the rather indefinite role of law applied improperly by the courts.
6. The secondary picket is the form of secondary boycott that receives the strongest form of constitutional protection in that it falls under

the free speech edicts. This protection is offered, however, only where substantial unity of interest is present, and then only if the labor organization has in view a proper purpose being legitimately carried out.

Questions on Section 47

1. What is the gist of any boycott?
2. Define the following: (a) primary boycott, (b) secondary boycott, and (c) tertiary boycott.
3. What forms may the secondary boycott assume?
4. Outline briefly the legality of the following: (a) primary boycott, (b) secondary strike, (c) circularization of customers, and (d) tertiary boycott.
5. List the elements upon which the legality of the secondary boycott depends.

SECTION 48. COMMON LAW AND THE BOYCOTT

The building trades unions have been prolific producers of secondary boycott law, as shown in the *Grant Construction Company* decision in this section. This case presents an excellent survey of the common law on boycotts in all jurisdictions, and, for its time, the result reached by the court was favorable to labor. The court was undoubtedly influenced in its decision by the minor character of the boycott elements present.

The second decision reprinted in this section, *United Brewing Company* v. *Beck*, is indicative of the general judicial disfavor that the true secondary boycott has elicited from the courts. The reader will observe that the union left no stones unturned in throttling the brewing company both as to its internal operations and as to its external relations with customers.

The final reprint included in this section is the *Blanford* case. It represents, in its result, the majority view as to the permissibility of the union activity therein pursued. The decision in this case was based on recent United States Supreme Court holdings to the effect that the peaceful dissemination of information to the public is constitutionally protected as a right of speech freedom, and that "outsider" picketing is not unlawful for that reason. A word of caution must be interposed. The *Blanford* case is sound law on its own facts; but the reader will be in error if he is led to believe therefrom that all peaceful secondary boycotts are constitutionally protected.

GEORGE J. GRANT CONST. CO .v. ST. PAUL BLDG. TRADES COUNCIL

Supreme Court of Minnesota, 1917. 161 N.W. 520

HALLAM, J. Plaintiff is engaged in business as builder and contractor in St. Paul. Defendant council is an unincorporated association composed of delegates from local unions in the different branches of the building business in St. Paul and the individual defendants are officers or representatives of said organizations. The complaint covers over twenty printed pages. In brief it alleges that defendants have entered into a conspiracy to injure plaintiff and destroy its business, that defendants have posted plaintiff in public places as unfair to union labor and have placed or threatened to place on the unfair list persons who deal with plaintiff. That defendants have threatened customers and prospective customers of plaintiff with labor disturbances if they enter into business relations with plaintiff, have induced others to violate their contracts with plaintiff, have forbidden union men doing work for subcontractors in the employ of plaintiff, have induced workmen not to handle or work upon any of plaintiff's materials, have induced men to refuse to haul material to or from buildings where plaintiff was doing work and have prevented plaintiff from securing necessary material to carry on its business. The complaint then alleges that the conspiracy has never been limited as to time, place, or the means or devices employed to carry it out, and that the general scheme is to employ any and all means which may suggest themselves from time to time to destroy and crush the plaintiff and its business. Upon this complaint and upon affidavits submitted, plaintiff asked for a temporary injunction restraining the acts above complained of and others as well during the pendency of this action. An answer was interposed and answering affidavits were submitted by defendants. After a hearing, the trial court denied the injunction. Plaintiff appeals.

On the argument in this court, counsel for the plaintiff admitted that no single act done was claimed to be unlawful; his claim was that the entire set of acts taken together and in connection with the purpose with which they were done, were unlawful on the theory that they constituted what he termed "organized economic oppression." The restraining power of courts of equity has usually been invoked to enjoin some tangible or specific acts. *Badger Brass Mfg. Co.* v. *Daly,* 137 Wis. 601, 119 N.W. 328. It is not easy to frame an injunction to restrain "organized economic oppression." It is not easy to forbid a course of conduct based upon acts, lawful when taken alone,

on the theory that they are unlawful when taken as a whole. Some courts have held that an act lawful if done by one person may be unlawful if cooperated in by many, but we are not aware that it has ever been held that many lawful acts done by the same person or body of persons can constitute an unlawful whole.

Coming to the established facts we find the situation little more or less than this: A labor dispute exists between plaintiff and the defendant unions and their members. Defendants are not employes of plaintiff. The dispute has arisen mainly from the fact that plaintiff runs what is termed an "open shop," that is, it employs nonunion men and it is claimed plaintiff has at some times dealt unfairly with union men and has in some cases refused them employment. It would seem to be a bona fide dispute on both sides. With the merits of it we are not further concerned.

The unions of building trades and their members have agreed among themselves that until these controversies are adjusted they will not work for plaintiff or for any subcontractor on any contract plaintiff may have on hand. We think the lawfulness of this conduct is the one question before the court.

Some acts especially complained of are in reality within this class. For example: In one case union teamsters refused to haul sand excavated by plaintiff for a building it had under construction. The excavation was part of the construction and did not differ in principle from other work in connection with the building.

In another case union carpenters refused to work for another contractor, Mr. Norlander, with a scaffold belonging to plaintiff and hauled to the building where it was to be used by plaintiff's nonunion teamsters. The difficulty was settled by Norlander agreeing that the scaffolding should be hauled away by union teamsters. This incident signified no more than a refusal to work on a building if nonunion men were employed on work incident to the construction.

In a few isolated cases defendants have gone farther:

In one case union men refused to work with a steam shovel hired from plaintiff by another contractor. The incident was a casual one. There is no threatened injury to be enjoined. There is no showing that plaintiff manufactures or sells or habitually hires out steam shovels.

In one case the carpenter union placed the John Martin Lumber Company on the unfair list because that company refused to specify union labor on a building it was constructing and had the building erected by plaintiff's nonunion carpenters. No damage is shown to have been done or threatened to plaintiff or to any one else.

In one case some of defendants refused to participate in an outdoor sports carnival unless assured that plaintiff would be given no more work in building therefor. Plaintiff had already done a substantial part of the work and little remained to be done.

These few and isolated transactions, whether taken alone or collectively, do not seem to us important enough to warrant injunctive relief, nor do we consider their bearing on this case such that it is necessary to examine each one and determine whether the persons committing them were within their legal rights.

Some conflict is found in decisions which undertake to define the right to injunction against the acts of organized labor but not so much as may at first appear. The facts in no two cases are the same. Some involved real or threatened violence, as in *Wyeman* v. *Deady*, 79 Conn. 414, 65 Atl. 129, 118 Am. St. Rep. 152, 8 Ann. Cas. 375; some involved interference with contract relations, as in *Shine* v. *Fox Mfg. Co.*, 156 Fed. 357, 86 C.C.A. 311; *Bitterman* v. *Louisville & Nashville Ry. Co.*, 207 U.S. 206, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; *New England Cement Gun Co.* v. *McGivern*, 218 Mass. 198, 105 N.E. 885, L.R.A. 1916C, 986; some a boycott or refusal to work upon material manufactured by those whose business is such manufacture, as in *Irving* v. *Joint Dist. Council, U. B. of Carpenters*, etc. (C.C.), 180 Fed. 896; *Burnham* v. *Dowd*, 217 Mass. 351, 104 N.E. 841, 51 L.R.A. (N.S.), 778; some a general boycott of all products of a manufacturer as in *Loewe* v. *Lawlor*, 208 U.S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; *Lawlor* v. *Loewe*, 235 U.S. 532, 35 Sup. Ct. 170, 59 L. Ed. 341; *Iron Molders' Union* v. *Allis-Chalmers Co.*, 166 Fed. 45, 91 C.C.A. 631, 20 L.R.A. (N.S.) 315; some a general boycott of those who deal with the offending employer as in *Barr* v. *Essex Trades Council*, 53 N.J. Eq. 111, 30 Atl. 881; *State* v. *Glidden*, 55 Conn. 49, 8 Atl. 890, 3 Am. St. Rep. 23; *Seattle Brewing & Malting Co.* v. *Hansen* (C.C.), 144 Fed. 1011; *Quinn* v. *Leathem*, L.R. (App. Cas. 1901), 495. None of these conditions are found in this case.

It is not easy to define the point beyond which labor in combination cannot go. It is perhaps not best that we try to do so. We will do well to confine ourselves to the facts of this case and determine only the rights of the parties arising from those facts. The determination of the questions here involved is not difficult. Plaintiff may employ whom it pleases. It may maintain an open shop if it pleases. It should not be coerced into doing otherwise. Defendants have the right to work for whom they please. It is best that we give to both

employer and employee a broad field of action. As said by Judge Cooley:

> "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern." Cooley on Torts (2d Ed.) 328.

Defendants may, if no contract is involved, refuse to work in an "open shop." They may agree among themselves not to do so. *Mayer* v. *Journeymen Stone-Cutters' Ass'n,* 47 N.J. Eq. 519, 20 Atl. 492; *Purvis* v. *Local No. 500, United Brotherhood,* etc., 214 Pa. 348, 63 Atl. 585, 12 L.R.A. (N.S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275; *Rhodes Bros. Co.* v. *Musicians' Protective Union,* 37 R.I. 281, 92 Atl. 641, L.R.A. 1915E, 1037. . . .

May they, because plaintiff employs nonunion labor in construction of a building, agree not to work for a subcontractor of part of the work who does employ only union men? It seems to us this question was answered yes by this court in *Gray* v. *Building Trades Council,* 91 Minn. 171, 97 N.W. 663, 63 L.R.A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172. There, as here, the controversy arose out of the effort of the defendant unions to compel the plaintiffs to employ only union labor. Defendant unions notified owners of buildings under construction that if plaintiffs were awarded certain subcontracts for work on the buildings all union men employed on the buildings would be called out. The trial court enjoined the defendants from ordering and notifying members of the union to desist from work on the building because of the fact that plaintiffs were employed thereon. This was held erroneous. It was held that the defendants had acted within their rights and that they might for the purpose of strengthening their unions either singly or collectively refuse to work in places or on buildings on which nonunion labor was employed. We adhere to this decision.

Other authorities sustain this same position. Some go farther.

In *Meier* v. *Speer, Adm'r,* etc., *of John Carbaugh,* 96 Ark. 618, 132 S.W. 988, 32 L.R.A. (N.S.) 792, it was held that the refusal by members of a labor union to lay stone for the foundation of a building in case an employer of nonunion labor secures the contract for the superstructure gave no right of action. The court said:

> "In the absence of a contract, appellants had the absolute right, no public duty forbidding, to prescribe the terms upon which they would work for Carbaugh, O'Neal or any one else. They had the right to refuse to work unless these terms were accepted and contractual relations

were thereby created. This appellants had the right to do, severally or in combination, in the union or out of it."

In *National Protective Ass'n* v. *Cumming,* 170 N.Y. 315, 63 N.E. 369, 58 L.R.A. 135, 88 Am. St. Rep. 648, members of a union notified certain contractors that if they did not discharge members of plaintiff association and employ members of defendant union they would cause a general strike of all men of other trades employed on their building. It was held that if the primary purpose was to help members of defendant union the conduct was lawful.

In *National Fireproofing Co.* v. *Mason Builders' Ass'n,* 169 Fed. 259, 94 C.C.A. 535, 26 L.R.A. (N.S.) 148, it was held that the enforcement of a provision in a contract between mason contractors and bricklayers that items in building contracts for fireproofing shall not be sublet, by a clause forbidding bricklayers to work for those who do not comply with it, and by strikes, and notification to contractors that they cannot take contracts contrary to the terms of the agreement, without incurring the penalty, was not unlawful.

In *Gill Engraving Co.* v. *Doerr* (D.C.), 214 Fed. 112, it was held, that where the object of a photo engravers' union and its officers and members, in warning employers that the members would handle the work of only such customers as had all their work done in union shops and in threatening to strike, was to increase the power of the union and get more, easier, and better paid work for the members, and not to injure the proprietor of a nonunion shop, though such injury had occurred and was foreseen, that the object of the combination and the means employed were legal, and hence gave such proprietor no right to injunctive relief.

In *Booth & Brother* v. *Burgess,* 72 N.J. Eq. 181, 65 Atl. 226, the labor organization notified boss carpenters that plaintiff manufacturers' goods were unfair and that members of the union would not handle them. The scheme of the officers of the union was to compel the employees against their will to quit work if such material was used. It was said the employees might have combined to so refuse, though they were enjoined because of other acts.

In *Macauley Bros.* v. *Tierney,* 19 R.I. 255, 33 Atl. 1, 37 L.R.A. 455, 61 Am. St. Rep. 770, a plumbers' association, styling itself "master plumbers," was held to be lawfully entitled to notify wholesalers of plumbers' goods that it would not handle them if they sold to plumbers not members of the association.

In *Cote* v. *Murphy,* 159 Pa. 420, 28 Atl. 190, 23 L.R.A. 135, 39 Am. St. Rep. 686, it was held, in a contest between employers and

employees, the employers could lawfully attempt to induce other employers to refuse to employ any union labor by inducing wholesalers to refuse to sell their goods to any employer of union labor.

In one case it was held that in case of a strike, striking employees cannot be enjoined from inducing employees in factories by which their former employer is attempting to get the work done to fill his contract to refuse to work on it although it results in the owners of such factories breaking their contracts. *Iron Molders' Union* v. *Allis-Chalmers Co.*, 166 Fed. 45, 91 C.C.A. 631, 20 L.R.A. (N.S.) 315. See also *Lindsay & Co.* v. *Montana Federation of Labor*, 37 Mont. 264, 96 Atl. 127, 18 L.R.A. (N.S.) 707, 127 Am. St. Rep. 722, and *Parkinson Co.* v. *Building Trades Council*, 154 Cal. 581, 98 Pac. 1027, 21 L.R.A. (N.S.) 550, 16 Ann. Cas. 1165, which go farther than most courts are willing to go in legalizing boycotts.

Some courts hold against the legality of organized action against an employer other than the one by whom complaining workmen are employed. *Burnham* v. *Dowd*, 217 Mass. 351, 104 N.E. 851, 51 L.R.A. (N.S.) 778; *Newton Co.* v. *Erickson*, 70 Misc. Rep. 291, 126 N.Y. Supp. 949; *Irving* v. *Joint Dist. Council U.B. of Carpenters*, etc. (C.C.), 180 Fed. 896; *S. C. Irving* v. *Neal* (D.C.), 209 Fed. 471. But as above noticed this distinction was repudiated in the *Gray* case.

The interference with the trade relations of one with whom you have no trade relations yourself is presumptively unlawful, but conditions may be such as to furnish justification for such conduct. *Plant* v. *Woods*, 176 Mass. 492, 57 N.E. 1011, 51 L.R.A. 339, 79 Am. St. Rep. 30. A person may justify such interference if he is in pursuit of some lawful object. Intent is not the test. The test is broader. A person in furtherance of his own interests may take such action as circumstances may require, and so long as he does not act maliciously toward or unreasonably or unnecessarily interfere with the rights of his neighbor, he cannot be charged with actionable wrong, whatever may be the result of his conduct in pursuing his own welfare. *Joyce* v. *Great Northern Ry. Co.*, 100 Minn. 225, 233, 110 N.W. 975, 8 L.R.A. (N.S.) 756; *Bohn Mfg. Co.* v. *Hollis*, 54 Minn. 223, 55 N.W. 1119, 21 L.R.A. 337, 40 Am. St. Rep. 319. . . .

A certain measure of discretion is vested in the trial court in the matter of determining facts and in granting or refusing an injunction *pendente lite*. On the facts which we deem established in this case, we are of the opinion that the discretion of the court was not in this case abused.

Order affirmed.

Case Questions

1. What does plaintiff's complaint allege?
2. Discuss the court's usage of the phrase "organized economic oppression."
3. Are the defendants employees of the plaintiff?
4. What is the dispute about?
5. Tabulate as many forms of boycott as you can find discussed in the case.
6. Does your tabulation tend to show that courts have been prone to classify any action difficult of other classification into the secondary boycott category?
7. State the facts, issue, and decision of *Gray* v. *Building Trades Council*, cited in the parent case. Was it followed by the court?
8. What was the holding in *Cote* v. *Murphy*?
9. Discuss the statement: "The interference with the trade relations of one with whom you have no trade relations is presumptively unlawful. . . ."

UNITED UNION BREWING CO. v. BECK

Supreme Court of Washington, 1939. 200 Wash. 474, 93 P. (2d) 772

STEINERT, J. The complaint presents the situation substantially as follows: Appellant is a corporation organized and qualified under the laws of the state of Washington and is engaged in the business of manufacturing beer, known as Old Empire Beer, and wholesaling it throughout the various counties of this state. Its employees are all members of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, which, for brevity, we shall refer to as Brewery Workers Union. There never has been any dispute between appellant and any of its employees over wages, hours, conditions of employment or any other matter.

Respondent Dave Beck is an international organizer for International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, hereinafter referred to as the Teamsters Union. The other respondents are local unions under charter from either the parent Teamsters Union or the Culinary Workers and Bartenders Union, which latter is hereinafter referred to as Culinary Workers Union. As such international organizer, Beck exercises complete domination and control over each of the respondent local unions.

During the year preceding December, 1938, respondent Beck, solely for the malicious purpose of destroying appellant's business, directed the respondent local unions in a systematic effort designed to prevent the marketing and distributing of appellant's product. Pursuant to such directions, the respondent locals of the Teamsters Union have refused to deliver products of any kind to any place of

business in this state which buys, sells, or possesses appellant's beer, and the respondent locals of the Culinary Workers Union have refused to furnish any bartenders or any employees to any restaurant or tavern that buys, sells, or possesses such beer. Furthermore, the respondent local unions have picketed every retail business in this state which handles appellant's product; the pickets bear signs stating that such picketed premises are unfair to organized labor, although, in fact, no labor dispute exists or has existed at any of such places.

A group of defendants, who by the stipulation were dismissed from the action, are engaged in the business of wholesaling merchandise to restaurants, taverns, and other retail businesses handling beer. Pursuant to respondent Beck's directions these defendants have refused, and still refuse, to sell or deliver any product or furnish any service to such places of business as buy, sell, or possess beer manufactured by appellant. As a consequence, appellant's customers engaged in the retail business are prevented from obtaining desired merchandise and services.

This conduct of respondents has substantially decreased the sale of appellant's beer in this state, and if allowed to continue will cause appellant irreparable damage.

The foregoing constitutes the material allegations of appellant's complaint. . . .

The first question is whether or not respondents may lawfully use the methods which they have employed, in order to compel appellant to hire, as truck drivers, only those who are members of the Teamsters' Union, or to compel appellant's employees to join that union. . . .

"The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a 'secondary boycott'; that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it." *Duplex Printing Press Co.* v. *Deering,* 254 U.S. 443, 41 S. Ct. 172, 176, 65 L. Ed. 349, 16 A.L.R. 196.

"A secondary boycott may be defined as a combination to cause a loss to one person by coercing others against their will to withdraw

from him their beneficial business intercourse, by threats that unless those others do so, the combination will cause similar loss to them, or by the use of means as the infliction of bodily harm on them or such intimidation as will put them in fear of bodily harm." *Smythe Neon Sign Co.* v. *Local Union No. 405 of International Brotherhood of Electrical Workers, Iowa,* 284 N.W. 126, 130.

"The law recognizes what may be called two species of boycotts. One a primary boycott that is applied directly and alone to the offending person, by withdrawing from him all business relations on the part of the organization that initiated the boycott, and the other a secondary boycott that becomes effective when the members of the organization refuse to have any business relations with persons dealing with the offender until he has yielded to the demands of the organization." *Booker & Kinnaird* v. *Louisville Board of Fire Underwriters,* 188 Ky. 771, 224 S.W. 451, 455, 21 A.L.R. 531.

"The method adopted in this case presents a clear case of attempted boycotting, both primary and secondary. The purpose of a secondary boycott is to bring to bear a duress upon the customers of the person under attack by threatening them directly or indirectly with a boycott if they persist in trading with such person." *Ellis* v. *Journeymen Barbers' International Union,* 194 Iowa 1179, 191 N.W. 111, 113, 32 A.L.R. 756.

See, also, 32 C.J. 167, Sec. 233.

While there are some decisions to the contrary, notably in California and Montana, the weight of authority is that a conspiracy, combination or continuance of acts, formed or designed to injure a person's business by coercing his customers, or prospective customers, into withholding or withdrawing their patronage from him by acts or threats of injury to the customer's business if he fails to comply with the demands of the conspirators or combatants, constitutes a secondary boycott and will be restrained by a court of equity. 32 C.J. 168, Secs. 235(b), 236(bb); p. 172, Sec. 244 (bb). . . .

Many cases from the federal courts have condemned the secondary boycott as being in violation of the antitrust laws and have upheld the power of the courts to restrain such activities. . . .

A person's business constitutes a property right and, if lawful, is entitled to protection from any unlawful interference. *Safeway Stores* v. *Retail Clerks' Union,* 184 Wash. 322, 51 P. 2d 372; *Truax* v. *Corrigan,* 257 U.S. 312, 42 S.Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375; *Meadowmoor Dairies* v. *Milk Wagon Drivers' Union,* 371 Ill. 377, 21 N.E. 2d 308; 32 C.J. 168, Sec. 235(b).

We have in this case the following elements: (a) Property rights involved; (b) unlawful interference with such rights by acts constituting a secondary boycott and involving (c) intimidation, threats, and violence; and, as a result, (d) the owner of such property rights being threatened with great and irreparable injury.

Appellant is entitled to a decree enjoining respondents from actively interfering with the marketing of appellant's beer; from picketing, or threatening to picket, any of appellant's customers or prospective customers because such customer, present or prospective, handles or attempts to handle beer manufactured by appellant; and from interfering in any way with the delivery of other products or commodities to any of such customers or prospective customers because they handle or attempt to handle such beer.

The cause is remanded to the superior court for modification of the decree as herein indicated.

Case Questions

1. Indicate the nature of the boycott employed in this case.
2. Why did the union engage in the boycott?
3. What variance exists between the boycott definitions given in the *Duplex* and *Bookcr* cases, which are cited in the parent decision?
4. Complete this sentence, "While there are some decisions to the contrary, the weight of authority is that a . . ."
5. What have the antitrust laws to do with secondary boycotts?
6. Does the court here find an enjoinable boycott?

BLANFORD v. PRESS PUB. CO.

Court of Appeals of Kentucky, 1941. 286 Ky. 657, 151 S.W. (2d) 440

TILFORD, J. The judgment appealed from permanently enjoined the appellants from doing any act in furtherance of a secondary boycott theretofore inaugurated by them against appellee's newspaper publishing business, and conducted by publishing handbills and newspaper advertisements, and interviewing appellee's customers. The judgment denied an injunction against Carl Bartlett, and from that portion of the judgment the appellee has prayed a cross-appeal.

The pleadings and proof disclosed that appellants are representatives of two labor unions composing the Paducah Allied Printing Trades Council; that a dispute existed between the Unions and appellee over the latter's right to use the union labels; and that in order to compel appellee to unionize its shop, a demand which appellee

asserted its willingness but inability to comply with, the appellants, by use of the means referred to, publicized the controversy with distressing results to appellee's business. The contents of the handbills, substantially the same as the newspaper advertisements, were as follows:

> "Paducah Allied Printing Trades Council, Paducah, Kentucky. . . .
> "To Whom It May Concern:
> "The Allied Printing Trades Council of Paducah, Kentucky, wishes to inform all advertisers and subscribers that the 'Paducah Press' is not printed by union labor and therefore it is denied the use of the Allied Label.
> "We urge your co-operation in patronizing firms that are employing Union Printers and Union Pressmen, and using the Allied Label are:
>
> The Paducah Sun-Democrat
> Billings Printing Company
> Leak's Printing Company
> Sinclair Printing Company
> Paducah Printing Company
> Hunter H. Martin, Printers
> Young Printing Company
>
> "Thanking you in advance for any co-operation you can give us on this subject and hoping you will always demand the Allied Label on all forms of printing matter, we remain,
>
> "Respectfully yours,
> "Paducah Allied Printing Trades Council."

Emphasized in the petition, and forming the basis of the decree, was the fact that none of the appellants was in appellee's employ, from which was deduced the conclusion that no labor dispute, within the applicable proper definition of that term, existed, and that in consequence, the conspiracy to boycott, and thus injure appellee's business, was unlawful. Otherwise there would have been no basis for the injunction, since it has long been the law of this state that employees, as well as employers, have the right to combine for the purpose of promoting their own interests, and, that in furtherance thereof, employees have the right to use all peaceful means to persuade others not to patronize or accept employment from the employer with whom the dispute exists. If the agreement forming the basis of the combination was in restraint of trade, it was illegal in the sense that the courts would not enforce it, but, so long as the purpose of the combination was to promote the legitimate interests of the participants, and the means employed were not unlawful, the party injured thereby was without remedy. Specifically, this Court has held that employees may legitimately organize "to promote their

mutual advantage"; to secure fair wages; to maintain high standards of workmanship; to elevate the material, moral, and intellectual welfare of the membership; to secure the abolition of child labor, the "trucking" system, tenement house labor and prison labor; to secure better working conditions; to establish usages with respect to wages and working conditions which are fair, reasonable, and humane; and to achieve "the fundamental right to contract collectively with the employer."

To accomplish these legitimate ends, a labor organization may strike; may indulge in peaceful picketing; may use any peaceful means, not partaking of fraud, to induce others to become members; may acquaint the public with facts which it regards as unfair, publicize its cause, and use persuasive inducements to bring its own policies to triumph; when engaged in a lawful strike its members may join in a crowd to persuade other men who propose to work not to take their places; its members have a lawful right to assemble, to address their fellowmen, and to endeavor in a peaceful, reasonable, and proper manner to persuade them regarding the merits of their cause, and to enlist sympathy, support, and succor in the struggle for legitimate labor "ends"; and, finally, its members may assemble and agree to pursue, and pursue, any legal means to gain their ends, that is, use persuasive powers in a peaceful way. . . .

From the principles to be gathered from the authorities referred to, it cannot be doubted that if appellants had been employees of appellee, no basis for the issuance of an injunction would have existed, since they employed neither violence nor intimidation in their efforts to promote the legitimate interests of the organizations of which they were members.

But this Court, in protecting the rights of owners to conduct their businesses without interference from strangers, held illegal any coercive action directed against them by labor organizations, none of whose members had been in such owners' employ. Such protection appeared to be justified sociologically and morally on the theory that if one's own employees were satisfied with the wages which they received and the conditions under which they worked, both he and they were entitled to proceed in the orderly conduct of their affairs without molestation. It also appeared to be justified under the guarantees of the Fourteenth and Tenth Amendments. Interferences with such relationships, sometimes termed "secondary boycotts," were expressly denounced by this Court in the case of *Hotel, Restaurant & Soda Fountain Employees Local Union No. 181* v. *Miller, supra.* They were also held to be illegal by the Supreme Court of the United States

and many state tribunals. See dissenting opinion of Mr. Justice Roberts in the case of *United States of America* v. *William L. Hutcheson et al.*, 61 S. Ct. 463, 85 L. Ed. ... See, also, *Duplex Printing Press Co.* v. *Deering et al.*, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A.L.R. 196, in which secondary boycotts were defined, and, notwithstanding the provisions of the Clayton Act, 38 Stat. 730, held to be violative of the Sherman Act, 15 U.S.C.A. Secs. 1-7, 15 note, and enjoinable when operating in restraint of interstate commerce. However, on February 3, 1941, the Supreme Court of the United States in the case of *United States* v. *Hutcheson, supra* (61 S. Ct. 466, 85 L. Ed. —), held that the Norris-LaGuardia Act, 29 U.S.C.A. Sec. 101 et seq., had "removed the fetters upon trade union activities," a result allegedly sought to be accomplished by the Clayton Act and "explicitly formulated the 'public policy of the United States' in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation." And further: "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under Sec. 20 (Clayton Act, 29 U.S.C.A. Sec. 52) are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

On April 22, 1940, in *Thornhill* v. *State of Alabama*, 310 U.S. 88, 60 S. Ct. 736, 739, 84 L. Ed. 1093, the Supreme Court had held invalid as violative of the constitutional guarantee of the freedom of speech a statute prohibiting individuals from picketing and "without a just cause or legal excuse therefor" from going near or loitering about the business premises of others "for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by" the owners of such premises. Said the Court: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."

On the same date and for the same reasons, in the case of *Carlson* v. *People of State of California*, 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 1104, the Supreme Court held invalid a similar county ordinance; and on February 10, 1941, in the case of *American Federation of Labor et al.* v. *Swing et al.*, 61 S. Ct. 568, 570, 85 L. Ed. —, expressly held a secondary boycott, peacefully conducted, to be lawful, saying:

"We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.

"Such a ban of free communication is inconsistent with the guarantee of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. *American (Steel) Foundries* v. *Tri-City (Central Trades) Council,* 257 U.S. 184, 209, 42 S. Ct. 72, 78, 66 L. Ed. 189, 27 A.L.R. 360. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case." See, also, *Milk Wagon Drivers Union,* etc., v. *Meadowmoor Dairies, Inc.,* 61 S. Ct. 552, 85 L. Ed. —, decided by the same court February 10, 1941, in which the power of the states to interfere by injunction in labor disputes are prescribed and limited.

Since the Supreme Court is the final interpreter of the Federal Constitution, no distinction may hereafter be drawn by a state court between the acts which may be committed by employees in furtherance of their interests and those which may be committed by non-employee members of a labor union in the furtherance of its interests. Hence, members of any labor union, so long as they refrain from acts of violence, may not be enjoined from picketing the premises of any person against whom the union has a grievance, or from conducting a boycott against his business, notwithstanding the consequences to him, his accord with his own employees, or his inability to grant the demands made upon him by the union.

Since the appellants are members of bona fide labor unions, and, in attempting to compel the unionization of appellee's printing establishment, did not resort to acts of violence, it is wholly immaterial that by advertisements and personal interviews in which the facts were stated and consequences intimated, they induced many of appellee's patrons to withhold their patronage. Appellants were exercising rights guaranteed to them by the Constitution, as construed by the Supreme Court, and lesser courts are powerless to afford appellee any relief.

We have refrained from reciting the evidence in detail, since the controlling facts above alluded to are not controverted. Notwithstanding appellee's asserted willingness and inability to unionize his shop, we are not prepared to say that appellants' motives are subject to criticism, or that their actions were unjustified. Apparently they were committed in the furtherance of what appellants believed to be a worthy cause. As before stated, the basis of the injunction granted was the absence of any relationship which clothed appellants with any right to interfere with the conduct of appellee's affairs. Clothed with the protection of constitutional guarantees, no other justification was needed. Accordingly, the judgment is reversed on the original appeal with directions to dismiss the petition, and affirmed on the cross-appeal.

Case Questions

1. How was the boycott in this case conducted?
2. Were the appellants employed by the appellee? Is the presence or absence of the employment relation important in this case?
3. List the legitimate purposes of a labor organization detailed by the court.
4. What was the court's former view on the question of outsider pressure on employers?
5. In tracing Supreme Court decisions, and in reaching its result, does the Kentucky court give constitutional protection to publicizing in furtherance of a secondary boycott?
6. Suppose the union's persuasive efforts were supplemented by threats and coercion of third persons. Might the result then have been otherwise?

SECTION 49. UNITY OF COMMERCIAL INTEREST

The cases of *Goldfinger* v. *Feintuch* and *Feldman* v. *Weiner* in this section are the forerunners of the doctrine of unity of commercial interest. It found its initial inception in New York, which, contemporaneously, has generally been a prolabor state.

The doctrine is briefly this: Secondary boycott pressure may be lawfully applied to third parties who are not too remote from the primary disputant and who, because they have business dealings with him, either as suppliers or customers, are in unity of commercial interest with him. The *degree* of secondary boycott pressure that may be applied is dependent upon the *remoteness* of the third party to the primary employer disputant and the *intensity* of commercial unity, that is, the volume of business done with the primary disputant.

In the *Goldfinger* decision, the court found sufficient unity of interest to exist to warrant the secondary boycott activity therein engaged. In the *Feldman* case, a different result was reached under the theory that unity of interest was lacking. The Supreme Court has recognized the existence of this doctrine in two leading cases, *Ritter's Cafe,* reprinted in this section, and the *Wohl* decision, reprinted in Section 50 of this chapter, page 339. In the *Ritter* case, the court did not find the unity of interest present sufficient to legalize the secondary picketing carried on. In the *Wohl* case, the court held that peaceful secondary picketing was constitutionally protected, there being present the required degree of interest unity.

GOLDFINGER v. FEINTUCH

Court of Appeals of New York, 1937. 11 N.E. 2d 910, 276 N.Y. 281

FINCH, J. W. & I. Blumenthal manufacture kosher meat products which are sold under the name of "Ukor." The "Ukor" products are the only nonunion-made kosher provisions sold in the city of New York, and the salaries paid by this company range from 50 to 75 cents an hour as compared with the union scale of 95 cents to $1.25 cents an hour. The defendant Butcher Union Local No. 174 endeavored to obtain a union agreement from the manufacturer of Ukor products. When these efforts were unsuccessful, the defendant decided to picket the nonunion-made products at the retail stores. Among the stores picketed was that of the plaintiff, a dealer in kosher meat products. The defendant placed pickets, sometimes one, sometimes two, in front of the plaintiff's store, carrying signs which bore the inscriptions in English and Yiddish, "This store sells deli-

catessen that is made in a non-union factory," and "Ukor Provision Company is unfair to Union labor. Please buy Union-made delicatessen only."

The important question in this case is whether, assuming that there has been no violence, force, intimidation, breach of the peace, coercion, fraud, or unlawful threat, the act of the defendant in thus picketing the delicatessen store of the plaintiff is legal. . . .

As between an employer and an employee, the right of a union to picket peacefully is generally conceded. Its purpose must be to persuade, not to intimidate. So long as the pleas of both employer and employee are lawful, the courts have not been constituted arbiters of the fairness, justice, or wisdom of the terms demanded by either the employer or employees. *J. H. & S. Theatres, Inc.* v. *Fay,* 260 N.Y. 315, 183 N.E. 509. It is only where unlawful acts have been committed that the courts intervene to redress or prevent manifest abuse of the right to picket peacefully with a limited number of pickets. . . .

Within the limits of peaceful picketing, however, picketing may be carried on not only against the manufacturer but against a non-union product sold by one in unity of interest with the manufacturer who is in the same business for profit. Where a manufacturer pays less than union wages, both it and the retailers who sell its products are in a position to undersell competitors who pay the higher scale, and this may result in unfair reduction of the wages of union members. Concededly the defendant union would be entitled to picket peacefully the plant of the manufacturer. Where the manufacturer disposes of the product through retailers in unity of interest with it, unless the union may follow the product to the place where it is sold and peacefully ask the public to refrain from purchasing it, the union would be deprived of a fair and proper means of bringing its plea to the attention of the public.

An analogous principle has been applied by this court in *Bossert* v. *Dhuy,* 221 N.Y. 342, 117 N.E. 582, Ann. Cas. 1918D, 661, *Willson & Adams Co.* v. *Pearce,* 264 N.Y. 521, 191 N.E. 545, affirming 240 App. Div. 718, 265 N.Y.S. 624, and in *New York Lumber Trade Ass'n* v. *Lacey,* 269 N.Y. 595, 199 N.E. 688. The cases of *Auburn Draying Co.* v. *Wardell,* 227 N.Y. 1, 124 N.E. 97, 6 A.L.R. 901, and *George F. Stuhmer & Co.* v. *Korman,* 241 App. Div. 702, 269 N.Y.S. 788, affirmed, 265 N.Y. 481, 193 N.E. 281, are not in point. In the *Wardell* case all union members in the city of Auburn, regardless of industry, threatened to withdraw their patronage from any one who dealt with

the plaintiff because it refused to require its employees to join a union. In the *Stuhmer* case the pickets made false statements, obstructed the sidewalks, created disturbances, and were guilty of other unlawful conduct which so permeated all the picketing that an injunction would have been warranted whether the picketing was at the store of a retailer or that of the nonunion manufacturer.

We do not hold more than that, where a retailer is in unity of interest with the manufacturer, the union may follow the nonunion goods and seek by peaceful picketing to persuade the consuming public to refrain from purchasing the nonunion product, whether that is at the plant of the manufacturer or at the store of the retailer in the same line of business and in unity of interest with the manufacturer. Such storekeeper may be, as in the case at bar, the sole person required to man his business. If Goldfinger, the delicatessen dealer, had employed any help, legally they could strike or refuse to work for him so long as he sold Ukor products. We have so held in *Bossert* v. *Dhuy, supra.* Such employees, having the right to refuse to work for the plaintiff, would likewise have the right to inform the public why they refused to work for the plaintiff. In this respect at least it has been settled that labor may aid its cause. If a union may request its members not to work upon or with materials brought from a nonunion shop or call a strike for such reasons, it is difficult to see why, under the law of this state, it may not peacefully state the grievance by placards similar to those used here. In other words, it may, in a proper manner and in a peaceful way, ask the public to refrain from purchasing products made by nonunion labor and state where the same are sold. The holding by this court that where a shopkeeper is the sole person required to run his business he is, therefore, not subject to picketing by a union which seeks to compel him to employ union labor (*Luft* v. *Flovc,* 270 N.Y. 640, 1 N.E. 2d 369; *Thompson* v. *Boekhout,* 273 N.Y. 390, 7 N.E. 2d 674) is not authority to prevent peaceful picketing for the purposes in the case at bar. Here, the purpose is legal. There, it was unlawful.

We are thus brought to a consideration of the recently enacted statute applicable to the issuance of injunctions in labor disputes. Civil Practice Act, Sec. 876-a (Laws of 1935, C. 477). This provides in brief that no injunction shall issue in a labor dispute in the absence of certain enumerated findings which have been found on disputed evidence in the case at bar. . . .

It is urged, however, that Section 876-a was never intended to apply to the conduct involved herein; that this case does not involve

a "labor dispute" within the meaning of that term as used in the statute. Paragraph 10 of that section defines labor dispute. Pertinent portions thereof provide: "A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation . . . when the case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined)." (a) The term "labor dispute" is then defined as "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee." (c) In view of this definition it cannot be contended that the case at bar does not involve a labor dispute under Section 876-a. . . .

The judgment should be modified in accordance with this opinion, and as so modified affirmed, without costs.

Case Questions

1. Who are the parties to this action?
2. Whom did the Butcher's Union picket?
3. What is the issue of the case?
4. State the rule developed by this case.
5. How does the court justify its rule?
6. Does the court say it would be legal for Goldfinger's employees, if he had any, to strike or picket as long as he sold nonunion products?
7. How does the court distinguish this case from the *Luft* and *Thompson* cases?
8. What did plaintiff contend with respect to the New York anti-injunction act?

FELDMAN v. WEINER

Supreme Court, Special Term, New York County, 1940.
173 Misc. 461, 17 N.Y.S. (2d) 730

ROSENMAN, J. By this motion, plaintiffs seek to enjoin *pendente lite* all of the defendants and their agents from picketing their premises, and from otherwise interfering with their business.

There are certain undisputed facts: The plaintiffs are in the wholesale meat business in Manhattan. Their shop is completely unionized; all their employees are members of the Packing House Workers Union, Local No. 5 of the Amalgamated Meat Cutters &

Butchers Workmen of America, affiliated with the American Federation of Labor—a union voluntarily chosen by said employees, with which plaintiffs have a closed shop agreement. All products sold by the plaintiffs are handled and processed while on the plaintiffs' premises exclusively by union labor; and there is no dispute of any kind between the plaintiffs and their employees, or between the plaintiffs and any union having jurisdiction over their products and employees. The defendant union is not seeking to organize the plaintiffs' employees; nor is there any labor difficulty between the plaintiffs or their employees and the defendants. The defendant union is Local No. 805 of the International Brotherhood of Teamsters, affiliated with the American Federation of Labor. The defendant union is attempting to organize the employees of a firm known as the Van Iderstine Company, which is engaged in the fat rendering business in Long Island City. The Van Iderstine Company is not engaged in the meat industry as such, but is a manufacturer of tallow, grease and glue. The by-products and waste materials of plaintiffs' business include inedible fats, bones, suet and skins which the plaintiffs sell to the Van Iderstine Company from time to time, when sufficient amounts have accumulated. These periodic sales of refuse result in but incidental income to the plaintiffs. Pursuant to their efforts to unionize the Van Iderstine Company, defendants have requested plaintiffs not to sell their waste products to that company; and upon plaintiffs' refusal to comply, defendants have caused pickets to patrol in front of plaintiffs' place of business. The pickets carry signs reading as follows:

"PLEASE
Do Not Patronize
THIS PLACE.
The Employees Removing Waste Are
UNFAIR to Local 805."

There are certain disputed facts also: (1) The plaintiffs claim that the defendants have intimidated them, and threatened that if the plaintiffs did not discontinue the sale of their waste products to the Van Iderstine Company, in addition to picketing, defendants would call plaintiffs' employees out on strike, would stop deliveries of meat to plaintiffs' place of business, would prevent retail butchers from picking up the meats purchased from plaintiffs, and would ruin plaintiffs' business generally. The defendants deny such action, and insist that they are only picketing. (2) The plaintiffs claim that the legends on the signs carried by pickets are false and misleading; the defend-

ants claim them to be truthful. (3) Plaintiffs claim that the defendants persist in obtrusive picketing and block up the entrance to their place of business, thus interfering with the ingress and egress of plaintiffs' customers. This the defendants also deny.

The disputed questions of fact need not be resolved, for they do not seriously affect the questions of law presented by the undisputed facts. Do the conceded facts present a "labor dispute" within the meaning of subdivision 10 of Sec. 876-a of the Civil Practice Act? The plaintiffs admit that they have not complied with the requirements of the prior subdivisions of that section; and if a "labor dispute" is here involved, an injunction *pendente lite* may not properly issue.

In 1937 the Court of Appeals was called upon to decide whether a labor union could picket a retailer of products purchased by him from a non-union manufacturer, and whether such picketing came within the provisions of Sec. 876-a of the Civil Practice Act. *Goldfinger* v. *Feintuch*, 276 N.Y. 281, 11 N.E. 2d 910, 116 A.L.R. 477. The court held that under such circumstances, the product of the non-union manufacturer may be picketed; and that the situation presents a labor dispute within that section of the Civil Practice Act.

"It is illegal," said the court, "to picket the place of business of one who is not himself a party to an industrial dispute to persuade the public to withdraw its patronage generally from the business for the purpose of coercing the owner to take sides in a controversy in which he has no interest. . . . Within the limits of peaceful picketing, however, picketing may be carried on not only against the manufacturer but against a nonunion product sold by one in unity of interest with the manufacturer who is in the same business for profit." 276 N.Y. at p. 286, 11 N.E. 2d at page 912, 116 A.L.R. 477.

The expression, "unity of interest," was not defined by the court. At least one limitation on the term may be culled from the language above used: that such picketing is lawful only where it is against a "nonunion product" of a "manufacturer" who is in the same business for profit" as the retailer.

That such limitation was intended reasonably appears from the court's expression that "We do not hold more than that, where a retailer is in unity of interest with the manufacturer, the union may follow the nonunion goods and seek by peaceful picketing to persuade the consuming public to refrain from purchasing the nonunion product, whether that is at the plant of the manufacturer or at the store of the retailer in the same line of business and in unity of in-

terest with the manufacturer." 276 N.Y. at page 287, 11 N.E. 2d at page 913, 116 A.L.R. 477.

That this limitation was intended also appears from Judge Rippey's concurring memorandum wherein he concurred on the ground "that there was complete unity of interest between the plaintiff and the manufacturer. Except for the finding of unity of interest, the facts would establish a secondary boycott and would be illegal." 276 N.Y. at page 291, 11 N.E. 2d at page 915, 116 A.L.R. 477.

In this case the plaintiffs are not themselves parties to an industrial dispute, for the dispute is between the defendants and the Van Iderstine Company. The picketing is not being carried on against a nonunion product, for all of plaintiffs' products are unionized. It is not being carried on against a manufacturer who is in the same business for profit as the retailer; for the plaintiff is concededly in the meat business for profit while the Van Iderstine Company is in the fat rendering business and makes tallow, grease and glue for profit. The periodic sales of its waste products to the Van Iderstine Company are so small a part of plaintiffs' business, that a conclusion that the two companies are in the same business for profit cannot reasonably be made.

The defendants claim, however, that there is such "unity of interest" here as to be a "labor dispute" under the statute because "they (plaintiffs, the defendant union and the Van Iderstine Company) are engaged in the same industry and are selling products to a nonunion open shop firm" (*sic.*) (pp. 1-2, answering affidavit). But this statement is unsupported by any evidentiary facts, and the conclusion is contradicted by the undisputed facts.

The problem presented in this case was anticipated soon after the holding in *Goldfinger* v. *Feintuch*, *supra*. "The test of 'unity of interest' adopted by the court is intended to clarify the question as to the existence or nonexistence of a labor dispute in a situation where a third party is being picketed. Where one purchases from a nonunion employer and benefits directly from the underpayment of nonunion workers, the instant case applies and the statutory policy against the issuance of injunctions in labor disputes will be held in point. But the court has deliberately limited the holding to a fact pattern such as was before it in this case. . . . What of the situations where the party picketed is selling to the nonunion employer . . . ? . . . There can be no satisfactory answer to some of these problems at the present time—even from the standpoint of social desirability" (15 N.Y.U. Law Quart. Rev. 284). No reported appellate case called to the court's attention has attempted to answer the question.

The courts, since the *Goldfinger* v. *Feintuch* case, have sought to limit the application of that case to its facts; they have refrained from broadening the meaning of "unity of interest" beyond the scope embraced therein.

In *Canepa* v. *John Doe,* 277 N.Y. 52, 12 N.E. 2d 790, for example, the plaintiff, who had a liquor store, had purchased a neon sign which had been constructed and hung on plaintiff's store by a union rival of the defendant union. Defendant began to picket plaintiff to his damage. A motion to dismiss plaintiff's complaint for an injunction was made; and two questions were certified to the Court of Appeals: (1) Did the action involve a labor dispute within the provisions of Sec. 876-a of the Civil Practice Act; (2) if it did, did the complaint state a cause of action. The court's *per curiam* opinion was: "The complaint sufficiently alleges that the picketing by the defendants is part of a true secondary boycott and an unlawful interference with the business of the plaintiff. *Goldfinger* v. *Feintuch,* 276 N.Y. 281, 11 N.E. 2d 910 (116 A.L.R. 477). Whether or not the case is one 'involving or growing out of a labor dispute,' as these terms are defined by Section 876-a of the Civil Practice Act, the complaint is sufficient." The court thereupon answered only the second question, and that in the affirmative. Despite the court's failure directly to answer the first certified question, the point was definitely raised by the defendants-appellants that the complaint did not comply with the requisites of Sec. 876-a. In holding, therefore, that the complaint did state a cause of action, it may reasonably be inferred that under the circumstances there presented the court was of the opinion that the plaintiff did not have to comply with the requirements of that section.

The principle of this case has since been followed by lower courts without exception (viz: *American Gas Stations, Inc.* v. *John Doe,* 250 App. Div. 227, 228, 293 N.Y.S. 1019; *Silverglate* v. *Kirkman,* 171 Misc. 1051, 1052, 12 N.Y.S. 2d 505; *Scharf* v. *"John Doe,"* 247 App. Div. 882, 288 N.Y.S. 895 (see points 1 and 2, appellants' brief; point 1, respondents' brief; record on appeal); *Weil & Co., Inc.* v. *John Doe,* 168 Misc. 211, 214, 5 N.Y.S. 2d 559). In each of those cases the courts specifically held that no labor dispute was involved so as to require plaintiff to comply with Sec. 876-a.

Under similar circumstances the Court of Appeals in a criminal case reiterated the same principle: "There was here no such unity of interest with the manufacturer as was developed in the *Goldfinger* case. Cf. *Canepa* v. *John Doe,* 277 N.Y. 52, 12 N.E. 2d 790." *People*

of State of New York v. *Bellows*, 281 N.Y. 67, 71, 22 N.E. 2d 238, 239.

At least one appellate court has even gone further than this in its limitation when it said, "Plaintiffs sold union-made beer, which they purchased from a Binghamton bottling corporation. The defendants asserted the right to picket the restaurants conducted by the two plaintiffs, upon the ground that the beer was delivered in a truck driven by a chauffeur who was not a member of the Chauffeurs Union, of (*sic*) which a majority of the chauffeurs, in the vicinity belonged. This is a secondary boycott, and not within the protection of the statutes of the State." *Chapman* v. *John Doe*, 255 App. Div. 893, 7 N.Y.S. 2d 470, 471, leave to appeal to Court of Appeals denied, 255 App. Div. 919, 8 N.Y.S. 2d 126. See, also, *Wohl* v. *Bakery & Pastry Drivers*, etc., Sup., 14 N.Y.S. 2d 198.

The conclusion reached is that defendants' action amounts to a secondary boycott which does not come within the permissible legal exception noted in the Goldfinger case, in that the necessary "unity of interest" is absent, and that this result remains unaffected by Sec. 876-a of the Civil Practice Act because it does not involve a "labor dispute" within the contemplation of that section.

To hold otherwise would be to hold that a union-shop manufacturer of garments, for example, could be picketed if any one of his many customers, wholesale or retail, did not have a union shop. Indeed it would go further in view of the fact that the seller and buyer of the waste in this case are really in different businesses. It would require a holding that a union-shop furniture manufacturer or a union-shop stationery supplies dealer who sold his products to many customers in different kinds of business, could be subjected to picketing because one of his vendees in an entirely different line of business was not itself unionized. A mere statement of such conclusion indicates how clearly it cannot have been the legislative intent as expressed in Sec. 876-a of the Civil Practice Act. In such cases no one could say that it was a nonunion product which was being picketed, or that any "identity of interest" was present.

The motion for an injunction *pendente lite* is granted. Settle order on one day's notice and submit memoranda on the question of the amount of the bond.

Case Questions

1. Who are the three major parties concerned with this dispute? Explain why.
2. What three claims are made by plaintiffs?

3. Why does the question of a labor dispute arise in this case?
4. Why did the court hold there was insufficient unity of interest between plaintiff and the Van Iderstine Co.?
5. What is the test to be applied to determine the existence of unity of interest?
6. State the facts and decision in the case of *Canepa* v. *John Doe* and *Chapman* v. *John Doe.*

CARPENTERS & JOINERS UNION OF AMERICA, LOCAL No. 213 v. RITTER'S CAFE

Supreme Court of the United States, 1942. 315 U.S. 722, 62 Sup. Ct. 807

FRANKFURTER, J. The facts of this case are simple. Ritter, the respondent, made an agreement with a contractor named Plaster for the construction of a building at 2810 Broadway, Houston, Texas. The contract gave Plaster the right to make his own arrangements regarding the employment of labor in the construction of the building. He employed nonunion carpenters and painters. The respondent was also the owner of Ritter's Cafe, a restaurant at 418 Broadway, a mile and a half away. So far as the record discloses, the new building was wholly unconnected with the business of Ritter's Cafe. All of the restaurant employees were members of the Hotel and Restaurant Employees International Alliance, Local 808. As to their restaurant work, there was no controversy between Ritter and his employees or their union. Nor did the carpenters' and painters' unions, the petitioners here, have any quarrel with Ritter over his operation of the restaurant. No construction work of any kind was performed at the restaurant, and no carpenters or painters were employed there.

But because Plaster employed nonunion labor, members of the carpenters' and painters' unions began to picket Ritter's Cafe immediately after the construction got under way. Walking back and forth in front of the restaurant, a picket carried a placard which read: "This Place is Unfair to Carpenters and Joiners Union of America, Local No. 213, and Painters Local No. 130, Affiliated with American Federation of Labor." Later on, the wording was changed as follows: "The Owner of This Cafe Has Awarded a Contract to Erect a Building to W. A. Plaster Who is Unfair to the Carpenters Union 213 and Painters Union 130, Affiliated with the American Federation of Labor." According to the undisputed finding of the Texas courts, which is controlling here, Ritter's Cafe was picketed "for the avowed purpose of forcing and compelling plaintiff (Ritter)

to require the said contractor, Plaster, to use and employ only members of the defendant unions on the building under construction in the 2800 block on Broadway." Contemporaneously with this picketing, the restaurant workers' union, Local No. 808, called Ritter's employees out on strike and withdrew the union card from his establishment. Union truck drivers refused to cross the picket line to deliver food and other supplies to the restaurant. The effect of all this was "to prevent members of all trades-unions from patronizing plaintiff's cafe and to erect a barrier around plaintiff's cafe, across which no member of defendant-unions or an affiliate will go." A curtailment of sixty per cent of Ritter's business resulted.

Holding the petitioners' activities to constitute a violation of the state antitrust law, Texas Penal Code, Art. 1632 et seq., the Texas Court of Civil Appeals enjoined them from picketing Ritter's Cafe. The decree forbade neither picketing elsewhere (including the building under construction by Plaster) nor communication of the facts of the dispute by any means other than the picketing of Ritter's restaurant. 149 S.W. 2d 694. We brought the case here to consider the claim that the decree of the Court of Civil Appeals (the Supreme Court of Texas having refused a writ of error) infringed the freedom of speech guaranteed by the Due Process Clause of the Fourteenth Amendment. 314 U.S. 595.

The economic contest between employer and employee has never concerned merely the immediate disputants. The clash of such conflicting interests inevitably implicates the well-being of the community. Society has therefore been compelled to throw its weight into the contest. The law has undertaken to balance the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self-interest. And every intervention of government in this struggle has in some respect abridged the freedom of action of one or the other or both.

The task of mediating between these competing interests has, until recently, been left largely to judicial lawmaking and not to legislation. "Courts were required, in the absence of legislation, to determine what the public welfare demanded;—whether it would not be best subserved by leaving the contestants free to resort to any means not involving a breach of the peace or injury to tangible property; whether it was consistent with the public interest that the contestants should be permitted to invoke the aid of others not directly interested in the matter in controversy; and to what extent incidental injury to persons not parties to the controversy should be

held justifiable." Mr. Justice Brandeis in *Truax* v. *Corrigan,* 257 U.S. 312, 363. The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted. See Mr. Justice Holmes in *Aikens* v. *Wisconsin,* 195 U.S. 194, 205, and Mr. Justice Brandeis in *Truax* v. *Corrigan, supra,* at 372, *Dorchy* v. *Kansas,* 272 U.S. 306, 311, and *Senn* v. *Tile Layers Protective Union,* 301 U.S. 468, 481. But the petitioners now claim that there is to be found in the Due Process Clause of the Fourteenth Amendment a constitutional command that peaceful picketing must be wholly immune from regulation by the community in order to protect the general interest, that the states must be powerless to confine the use of this industrial weapon within reasonable bounds.

The constitutional right to communicate peaceably to the public the facts of a legitimate dispute is not lost merely because a labor dispute is involved, *Thornhill* v. *Alabama,* 310 U.S. 88, or because the communication takes the form of picketing, even when the communication does not concern a dispute between an employer and those directly employed by him. *American Federation of Labor* v. *Swing,* 312 U.S. 321. But the circumstances that a labor dispute is the occasion exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable. Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the state to impose reasonable regulations for the protection of the community as a whole, the duty of this Court is plain. Whenever state action is challenged as a denial of "liberty," the question always is whether the state has violated "the essential attributes of that liberty." Mr. Chief Justice Hughes in *Near* v. *Minnesota,* 283 U.S. 697, 708. While the right of free speech is embodied in the liberty safeguarded by the Due Process Clause, that Clause postulates the authority of the states to translate into law local policies "to promote the health, safety, morals and general welfare of its people. . . . The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise." *Ibid.,* at 707. "The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side." *Hudson Water Co.* v. *McCarter,* 209 U.S. 349, 355.

In the circumstances of the case before us, Texas has declared that its general welfare would not be served if, in a controversy between a contractor and building workers' unions, the unions were permitted to bring to bear the full weight of familiar weapons of industrial combat against a restaurant business, which, as a business, has no nexus with the building dispute but which happens to be owned by a person who contracts with the builder. The precise question is, therefore, whether the Fourteenth Amendment prohibits Texas from drawing this line in confining the area of unrestricted industrial warfare.

Texas has undertaken to localize industrial conflict by prohibiting the exertion of concerted pressure directed at the business, wholly outside the economic context of the real dispute, of a person whose relation to the dispute arises from his business dealings with one of the disputants. The state has not attempted to outlaw whatever psychological pressure may be involved in the mere communication by an individual of the facts relating to his differences with another. Nor are we confronted here with a limitation upon speech in circumstances where there exists an "interdependence of economic interest of all engaged in the same industry," *American Federation of Labor* v. *Swing*, 312 U.S. 321, 326. Compare *Journeymen Tailors Union Local No. 195* v. *Miller's, Inc.*, 312 U.S. 658, and *Bakery & Pastry Drivers & Helpers Local No. 802* v. *Wohl, post*, p. 769. The line drawn by Texas in this case is not the line drawn by New York in the Wohl case. The dispute there related to the conditions under which bakery products were sold and delivered to retailers. The business of the retailers was therefore directly involved in the dispute. In picketing the retail establishments, the union members would only be following the subject-matter of their dispute. Here we have a different situation. The dispute concerns the labor conditions surrounding the construction of a building by a contractor. Texas has deemed it desirable to insulate from the dispute an establishment which industrially has no connection with the dispute. Texas has not attempted to protect other business enterprises of the building contractor, Plaster, who is the petitioners' real adversary. We need not therefore consider problems that would arise if Texas had undertaken to draw such a line.

It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exer-

cise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing. Such a view of the Due Process Clause would compel the states to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose.

In forbidding such conscription of neutrals, in the circumstances of the case before us, Texas represents the prevailing, and probably the unanimous, policy of the states. We hold that the Constitution does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma. We must be mindful that "the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants." *Thornhill* v. *Alabama*, 310 U.S. 88, 103-04.

It is not for us to assess the wisdom of the policy underlying the law of Texas. Our duty is at an end when we find that the Fourteenth Amendment does not deny her the power to enact that policy into law.

Affirmed.

Case Questions

1. State the surrounding facts of the case.
2. Why was Ritter's Cafe picketed? What other union action accompanied the picketing?
3. Outline the scope of the injunction issued in the court below, indicating whether Plaster may be picketed.
4. On what grounds does the union seek dissolution of the injunction? How does the court answer?
5. State the rule of law developed by this case.
6. Can you reconcile this case with *Feldman* v. *Weiner* and *Goldfinger* v. *Feintuch*?

SECTION 50. SECONDARY PICKETING AND FREE SPEECH

Three decisions are reproduced on the subject of secondary picketing and freedom of speech. We have seen that secondary picketing is a form of secondary boycott. We have seen also that if unity of interest is present, the union may legitimately follow the product and the ensuing boycott is lawful. The issue raised in the *Muller*, *Mason & Dixon*, and *Wohl* cases in this section is whether secondary peaceful picketing is immune from restraint solely because of the constitutional guaranty of free speech, or whether other elements are required to raise the immunity. It is suggested that the reader contrast the degree of interest unity in the *Wohl* case of this section with the *Ritter* decision in Section 49, page 328.

PEOPLE v. MULLER

Court of Appeals of New York, 1941. 36 N.E. 2d 206, 296 N.Y. 281

LEHMAN, C. J. The defendants have been convicted upon a charge of "Disorderly conduct tending to a breach of the peace, in violation of Section 722, subdivision 2, of the Penal Law (Consol. Laws, C. 40)." Some testimony was taken at the hearing of the charge, but by stipulation all the testimony was expunged from the record and the parties stipulated the facts pertaining to the complaint which were to be taken "in lieu of the sworn testimony." We quote the facts as stipulated in full:

"1. The complainant, Ben Berkowitz, is the owner of a retail haberdashery store at 1587 Pitkin Avenue, Brooklyn, County of Kings;

"2. That on or about November 26th, 1935, the complainant and the National Wiring & Protective Co., Inc., entered into written agreements which are here offered in evidence as Exhibits 1 and 2;

"3. The National Wiring & Protective Co., Inc., have made agreements with other subscribers similar to the one represented by Exhibits 1 and 2;

"4. That on or about January 3, 1940, the defendant Andrew Fosgreen came to the store of the complainant and had a conversation with the complainant, in the course of which he told him that the union and the employees were on strike against the National Wiring & Protective Co., Inc., and that they would put out pickets in front of his store, and that the maintenance of the burglar alarm

system was unfair to Local No. 3 unless the complainant obtains union service on that system;

"5. That two days later, on January 5, 1940, the defendants Hans Muller and Vincent Teofilo appeared in front of the complainant's premises, each bearing a sign attached to his person, reading substantially as follows: 'Maintenance of Burglar Alarm in this store unfair to Local No. 3, International Brotherhood of Electrical Workers Union, A. F. of L.;'

"6. That the defendants Hans Muller and Vincent Teofilo picketed in an orderly and peaceful way;

"7. That all three defendants are members of the International Brotherhood of Electrical Workers Union, and are on strike;

"8. That there is a labor dispute over wages and hours between the International Brotherhood of Electrical Workers Union, Local No. 3, the employees, and the National Wiring & Protective Co., Inc.;

"9. That no labor was performed on the burglar alarm system installed at the complainant's premises since January 1, 1940."

The stipulated facts thus establish beyond dispute that the defendants are members of a labor union engaged in a labor dispute with the National Wiring and Protective Co., Inc., over wages and hours of its employees. The National Wiring and Protective Co., Inc., has installed in the complainant's place of business an electric burglar alarm apparatus and has agreed to maintain the apparatus in serviceable condition, and the union has demanded that the complainant obtain union service on that system. The defendants have picketed in an orderly and peaceful way. Their conduct has not been disorderly in any way and has not tended towards a breach of the peace, unless peaceful picketing with a sign calculated to inform the public that the burglary alarm system installed in the complainant's store is not being maintained by the union of which the defendants are members is unlawful, and without more constitutes disorderly conduct.

The picketing is for the purpose of promoting the lawful interests of a labor union in a labor dispute. *Goldfinger* v. *Feintuch*, 276 N.Y. 281, 11 N.E. 2d 910, 116 A.L.R. 477. There is here a "labor dispute" as that term is defined in Section 876-a of the Civil Practice Act even under the restrictive interpretation of the scope of the statute by this court in *Opera on Tour, Inc.* v. *Weber*, 285 N.Y. 348, 34 N.E. 2d 349. Even were that not true, however, peaceful picketing by the members of a union in front of a business served by the union is the exercise of a right of free speech guaranteed by the Constitution of the

United States as construed by the Supreme Court of the United States. *American Federation of Labor* v. *Swing,* 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855, decided February 10, 1941; *Bakery and Pastry Drivers and Helpers Local 802 of the International Brotherhood of Teamsters* v. *Wohl,* 61 S. Ct. 1108, 85 L. Ed. —, decided by the Supreme Court of the United States, June 2, 1941. Construction of the Federal Constitution by the Supreme Court of the United States is binding on all State courts.

The order should be affirmed.

FINCH, J. (dissenting). May a storekeeper suffer damages through loss of business and be annoyed, disturbed, interfered with and offended by having his store picketed because there is used therein an electrical burglar alarm installed four years before with an incidental agreement by the supplier to keep the machine in order. . . .

The picketing of this ultimate consumer, who is not engaged in the industry in which the labor dispute has arisen, provides a true secondary boycott which has always been held an unlawful labor objective and which this court has recently condemned. In *People* v. *Bellows,* 281 N.Y. 67, 77, 22 N.E. 2d 238, 242, this court said: "In this particular we differ with the Special Sessions and hold that such picketing, which has been declared unlawful by this Court, does constitute disorderly conduct. . . .

Likewise, in a recent case, where the plaintiff had purchased a sign which had been erected in front of his place of business by labor affiliated with the union which was a rival of the defendant union, and the defendants caused the place of business of plaintiff to be picketed, and as a result plaintiff suffered loss of business and would suffer irreparable damage and injury:

"The complaint sufficiently alleges that the picketing by the defendants is part of a true secondary boycott and an unlawful interference with the business of the plaintiff." *Canepa* v. *"John Doe,"* 277 N.Y. 52, 54, 12 N.E. 2d 790.

It is urged that, since the picketing of the complainant's store was peaceful and orderly it does not amount to disorderly conduct. The magistrate, however, has found that the parading of pickets in front of this store interferes with the business of the store, causes many persons to refrain from entering the store for fear of bodily harm or other retaliation, and threatens to cause a breach of peace. Where picketing is unlawful and threatens to cause a breach of the peace, we have only recently held that such acts amount to disorderly conduct within the meaning of Section 722, subdivision 2, of the Penal

Law which provides that any person who acts in such a manner as to annoy, disturb, interfere with, obstruct or be offensive to others, whereby a breach of the peace may be occasioned, shall be deemed to have committed the offense of disorderly conduct. *People* v. *Bellows*, 281 N.Y. 67, 22 N.E. 2d 238.

It is further urged, however, that since the right of free speech is guaranteed by the Federal and State Constitutions, this conviction, if upheld, will lead to an unconstitutional interpretation of Section 722, subdivision 2, of the Penal Law. Assuming that the right to picket is entitled to no less rights than we give to the right to free speech (cf. *American Federation of Labor* v. *Swing, supra; Bakery & Pastry Drivers' Local No. 802* v. *Wohl, supra*), by the same token, an abuse of the right of free speech would likewise be an abuse of picketing. It has been repeatedly held that the constitutional rights of freedom of speech are not absolute and are subject to such reasonable regulations as are necessary to promote and preserve the public peace. . . .

Labor unions, when their actions are unlawful, are not free from the provisions of the Penal Law and where picketing is used to further an unlawful labor objective, such as a combined effort of employees to coerce an employer to pay a stale or disputed claim, to extort money from the employer, to force the employer to commit a crime, to injure the employer solely because of malice or ill will, or to conspire in the face of an emergency or otherwise to coerce others to cease maintaining law and order or defense among those engaged in police duty or in the armed forces, it is subject to reasonable limitation by the Courts and Legislature of the State. *Opera on Tour, Inc.* v. *Weber*, 285 N.Y. 348, 356, 34 N.E. 2d 349.

It follows that the judgment of the Appellate Division should be reversed and the judgment of conviction affirmed.

Case Questions

1. Who are the three parties involved in this suit in addition to the state as prosecutor? Explain.
2. What is the charge?
3. Between whom does the primary labor dispute exist?
4. Why did the court reverse the conviction?
5. On what grounds does Judge Finch, in his dissent, believe the conviction should be affirmed?
6. Do you believe the secondary boycott here is entitled to constitutional protection?
7. Do you think the court would have arrived at a different result if this were a civil instead of a criminal case?

MASON AND DIXON LINES, INC. v. ODOM

Supreme Court of Georgia, 1942. 193 Ga. 471, 18 S.E. (2d) 841

REID, C. J. The next question is whether the judge erred in refusing to enjoin the defendants from picketing the stores for which the plaintiff was hauling merchandise. This type of activity is referred to in the adjudicated cases as secondary picketing. The courts have generally held that secondary picketing is not within the scope of permissible activity of those engaged in a strike with their employer. See, 31 Am. Jur. 949, Secs. 232, 234. In some States this is qualified to the extent that picketing of the employer's customer is permissible where it is directed against the product of the employer there sold and distributed. . . . In at least one of these States it seems to be held that where the employer merely furnishes services, and not a commodity, secondary picketing is not allowed. . . .

However, in *Thornhill* v. *Alabama*, 310 U.S. 88, 60 S. Ct. 736, 744, 84 L. Ed. 1093, the Supreme Court in declaring unconstitutional a statute of the State of Alabama prohibiting picketing, said: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." This was followed by *Carlson* v. *People of California*, 310 U.S. 106, 107, 60 S. Ct. 746, 749, 84 L. Ed. 1104, the court there saying that "publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a state." In *American Federation of Labor, John Fitzpatrick, Chicago Federation of Labor* v. *Swing*, 312 U.S. 321, 61 S. Ct. 568, 569, 85 L. Ed. 855, the Supreme Court stated the question before it as follows: "Is the constitutional guarantee of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?" The court, in its decision, said: "Such a ban of free communication is inconsistent with the guarantee of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. *The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the*

judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become commonplace. *American Foundries* v. *Tri-City Council,* 257 U.S. 184, 209, 42 S. Ct. 72, 78, 66 L. Ed. 189, 27 A.L.R. 360. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case." (Italics supplied.) See, also, *Senn* v. *Tile Layers Union,* 301 U.S. 468, 478, 57 S. Ct. 857, 81 L. Ed. 1229, cited by the court in the *Swing* case. The *Meadowmoor* case, *supra,* involved secondary picketing, and the court there clearly recognized the application to such a case of the principles above quoted; though an injunction against such activity was upheld because of violence, as already discussed. This would in fact, necessarily seem to follow from the rulings made in the *Swing* case. That case involved the effort of a union to unionize a shop where there was no dispute between the employer and his employees. Picketing in such case, like secondary picketing in a case of the present character, has been generally condemned by State courts, and upon like grounds. We are unable to perceive any rational reason why the constitutional guarantee of freedom of speech, if it applies to a situation like that presented in the *Swing* case, does not also apply in a case like the present. The defendants in the present case invoked the provisions of the Federal constitution dealt with in the foregoing case, and conclude, that under these decisions, employees engaged in a labor dispute with their employer have the constitutional right to peacefully picket a customer of their employer by displaying banners, signs, etc., stating the true facts of their controversy with their employer and the position of the person so picketed as a customer of such employer. "When we know with certainty that a question arising under the constitution of the United States has been definitely decided by the Supreme Court of that government, it is our duty to accept the decision, for the time being, as correct, whether it coincides with our own opinion or not. Any failure of due subordination on our part would be a breach, rather than the admin-

istration, of law." *Wrought Iron Range Co.* v. *Johnson,* 84 Ga. 754, 759, 11 S.E. 233, 235, 8 L.R.A. 273, quoted in *Gernatt* v. *Huiet,* 192 Ga. 729, 731, 16 S.E. 2d 587. Thus, it is seen, that despite whatever views we might entertain, if we were at liberty and not under the restraint of these adjudications, narrow boundaries have been fixed, beyond which a State may not go either by its legislature or through the tribunal exercising judicial powers, in protecting against this sort of interference with normal enjoyment of property or pursuit of trade or business. So being bound to follow the decisions of the Supreme Court on such a question, any of our own decisions that may be to the contrary, and those of courts of other States, must now be disregarded. Accordingly, we are of the opinion that the prayer for injunction restraining all picketing as against the customers of the plaintiff was properly denied. . . .

Judgments affirmed.

Case Questions

1. How have courts generally held on the issue of secondary picketing?
2. What did defendants do in this case?
3. From your recollection, has this court correctly summarized the import of the *Thornhill, Meadowmoor,* and *Swing* cases?
4. Discuss this statement: "We are unable to perceive . . . why the constitutional guarantee of freedom of speech, if it applies to a situation like that presented in the *Swing* case, does not also apply in a case like the present."

BAKERY & PASTRY DRIVERS & HELPERS LOCAL 802 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. WOHL

Supreme Court of the United States, 1942. 315 U.S. 769, 62 Sup. Ct. 816

JACKSON, J. The petitioners are a labor union and certain of its officers. The union membership consists of truck drivers occupied in the distribution of baked goods. The respondents Wohl and Platzman are, and for some years have been, peddlers of baked goods. They buy from bakeries and sell and deliver to small retailers, and keep the difference between cost and selling price, which in the case of Wohl is approximately thirty-two dollars a week, and in the case of Platzman, about thirty-five dollars a week. Out of this each must absorb credit losses and maintain a delivery truck which he owns—but has registered in the name of his wife. Both are men of family. Neither has any employee or assistant. Both work seven days a week, and Platzman about sixty-five hours a week. It was found that neither has any contract with the bakeries from whom he buys, and it does not appear that either had a contract with any customer.

The conflict between the union and these peddlers grows out of certain background facts found by the trial court and summarized here. The union has for some years been engaged in obtaining collective bargaining agreements prescribing the wages, hours, and working conditions of bakery drivers. Five years before the trial, there were in New York City comparatively few peddlers or so-called independent jobbers—fifty at most, consisting largely of men who had a long-established retail trade. About four years before the trial, the social security and unemployment compensation laws, both of which imposed taxes on payrolls, became effective in the State of New York. Thereafter, the number of peddlers of bakery products increased from year to year, until at the time of hearing they numbered more than five hundred. In the eighteen months preceding the hearings, baking companies which operated routes through employed drivers had notified the union that, at the expiration of their contracts, they would no longer employ drivers, but would permit the drivers to purchase trucks for nominal amounts, in some instances fifty dollars, and thereupon to continue to distribute their baked goods as peddlers. Within such period, a hundred and fifty drivers, who were members of the union and had previously worked under union contracts and conditions, were discharged and required to leave the industry unless they undertook to act as peddlers.

The peddler system has serious disadvantages to the peddler himself. The court has found that he is not covered by workmen's compensation insurance, unemployment insurance, or by the social security system of the State and Nation. His truck is usually uninsured against public liability and property damage, and hence commonly carried in the name of his wife or other nominee. If injured while working, he usually becomes a public charge, and his family must be supported by charity or public relief.

The union became alarmed at the aggressive inroads of this kind of competition upon the employment and living standards of its members. The trial court found that if employers with union contracts are forced to adopt the "peddler" system, "the wages, hours, working conditions, six-day week, etc., attained by the union after long years of struggle will be destroyed and lost." In the spring of 1938, the union made an effort in good faith to persuade the peddlers to become members, and those who desired were admitted to membership and were only required to abide by the same constitution, by-laws, rules and regulations as were all other members. That, however, included a requirement that no union member should work more than six days per week.

These particular peddlers were asked to join the union, and each signed an application, but neither joined. The union then determined to seek an understanding with peddlers who failed to join the union that they work only six days a week and employ an unemployed union member one day a week. The union did not insist that the relief man be paid beyond the time that he actually worked, but asked that he be paid on the basis of the union's daily wage, which fixed a scale for part of a day if but part of a day was required for the service of the route. For some ten weeks, Wohl employed a relief driver, who was paid $6.00 per day, the normal day's wage for a full day being $9.00.

When Wohl and Platzman finally refused either to join the union or to employ a union relief man, and continued to work seven days each week, the union took the measures which led to this litigation. On the twenty-third of January, 1939, the union caused two pickets to walk in the vicinity of the bakery which sold products to Wohl and Platzman, each picket carrying a placard, one bearing the name of Wohl and the other that of Platzman, and under each name appeared the following statement: "A bakery route driver works seven days a week. We ask employment for a union relief man for one day. Help us spread employment and maintain a union wage hour and condition. Bakery & Pastry Drivers & Helpers Local 802, I. B. of T. Affiliated with A.F.L." The picketing on that day lasted less than two hours. Again, on the twenty-fifth of January, the union caused two pickets to display the same placards in the same vicinity for less than an hour; and on the same day a picket with a placard bearing the name of Wohl over the same statement, picketed for a very short time in the vicinity of another bakery from which Wohl had purchased baked products. It was also found that a member of the union followed Platzman as he was distributing his products and called on two or three of his customers, advising them that the union was seeking to persuade Platzman to work but six days per week and employ a union driver as a relief man, and stating to one that, in the event he continued to purchase from Platzman, a picket would be placed in the vicinity on the following day, with a placard reading as set forth above. It does not appear that this threat was carried out.

The trial court found that the placards were truthful and accurate in all respects; that the picketing consisted of no more than two pickets at any one time and was done in a peaceful and orderly manner, without violence or threat thereof; that it created no disorder; that it was not proved that any customers turned away from such bakeries by reason of the picketing; and it was not established that the respondents sustained any monetary loss by reason thereof.

The trial court issued injunctions which restrained the union and its officers and agents from picketing either the places of business of manufacturing bakers who sell to the respondents or the places of business of their customers. 14 N.Y. Supp. 2d 198. The judgment was affirmed without opinion by the Appellate Division of the First Department, two Justices thereof dissenting with opinion, 259 App. Div. 868, 19 N.Y.S. 2d 811; and was affirmed without opinion by the Court of Appeals, 284 N.Y. 788, 31 N.E. 2d 765. This Court denied a petition for a writ of certiorari because it did not appear that the federal question presented by the petition had necessarily been decided by the Court of Appeals. 313 U.S. 572. The Court of Appeals later certified that such question had been passed upon, a petition for rehearing was granted, the writ of certiorari granted, and the judgment summarily reversed. 613 U.S. 548. We later granted another petition for rehearing, 314 U.S. 701, and have since heard argument.

The controversy in the trial court centered about the issue as to whether a labor dispute was involved within the meaning of New York statutes. The trial court found itself constrained to hold that no labor dispute was involved, and seemed to be of the impression that therefore no Constitutional rights were involved. It concluded as a matter of law that the respondents "are the sole persons required to run their business and therefore they are not subject to picketing by a union or by the defendants who seek to compel them to employ union labor." The trial court refused the petitioners' request for a finding that "it was lawful for the defendants to truthfully advise the public of its cause, whether in the vicinity of the places of business of bakers who sold to the plaintiffs, or otherwise." Likewise, it refused a request to find "that it was a constitutional right of the defendants to advise the public, accurately and truthfully and without violence or breach of the peace, that defendants worked seven days a week, and that the defendants were seeking to secure employment from the plaintiffs for unemployed members of the union, one day a week."

So far as we can ascertain from the opinions delivered by the state courts in this case, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes, and assumed that the legality of the injunction followed from a determination that such a dispute was not involved. Of course that does not follow: one need not be in a "labor dispute" as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by

publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive.

The respondents say that the basis of the decision below was revealed in a subsequent opinion of the Court of Appeals, where it was said that regard to the present case that "we held it was an unlawful labor objective to attempt to coerce a peddler employing no employees in his business and making approximately thirty-two dollars a week, to hire an employee at nine dollars a day for one day a week." *Operaon-Tour* v. *Weber*, 285 N.Y. 348, 357, 34 N.E. 2d 349, certiorari denied, 314 U.S. 615. But this lacks the deliberateness and formality of a certification, and was uttered in a case where the question of the existence of a right to free speech under the Fourteenth Amendment was neither raised nor considered.

We ourselves can perceive no substantive evil of such magnitude as to mark a limit to the right of free speech which the petitioners sought to exercise. The record in this case does not contain the slightest suggestion of embarrassment in the task of governance; there are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or conduct otherwise unlawful or oppressive; and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing. A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual. But so far as we can tell, respondents' mobility and their insulation from the public as middlemen made it practically impossible for petitioners to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the means here employed and contemplated; and those means are such as to have slight, if any, repercussions upon the interests of strangers to the issue.

The decision of the Court of Appeals must accordingly be *Reversed.*

Case Questions

1. Describe the peddler system.
2. What action did the union seek to get the peddlers to take ?
3. On refusal by the peddlers, what action did the union take?
4. Was the picketing peaceful and truthful?
5. Why did the lower court hold no labor dispute existed?
6. In the words of the court, what "repercussions" upon the interests of strangers to the issue flow from the picketing carried on here?
7. Do you feel that there is unity of interest between the peddlers on the one side and the bakers and retail outlets on the other?

SECTION 51. BOYCOTTS UNDER THE NATIONAL LABOR RELATIONS ACT OF 1947

The final matter for consideration on this matter of secondary boycotting is a determination of the effect of the National Labor Relations Act upon it. Sec. 8 (b) (4) (A) of the Act prohibits secondary boycotts as being unfair labor practices, amenable to mandatory injunctive process under Sec. 10 (l).

The two cases in this section on the interpretation of the above provision, the *Dixie* case and the *Douds* case, decide the issue presented in terms of free speech, unity of interest, and the remoteness to the controversy of the party to whom pressure is being applied. In the *Dixie* case, the element of interest unity was lacking, thus making the boycott activity illegal; while in the *Douds* decision, a contrary result was reached because of strong interest unity. It would thus appear that, by judicial construction, the law of secondary boycotts will remain substantially unchanged by Sec. 8 (b) (4) (A). The courts are almost impelled to the results reached in the *Dixie* and *Douds* decisions, for, if they were to hold otherwise, they would come into conflict with the dictates of the United States Supreme Court in the *Ritter* [1] and *Wohl* [2] cases discussed previously.

Whether the 81st Congress repeals 8(b) (4) (A) or lets it remain can make no substantial difference in the result reached, for the federal courts will probably continue to apply to boycott and secondary picketing cases the doctrine of unity of commercial interest and the free speech guaranty as they have since the lines were drawn by the Supreme Court in 1942. The same result would have been reached in the *Dixie* and *Douds* cases below under the National Labor Relations Act of 1935.

DIXIE MOTOR COACH CORPORATION v. AMALGAMATED ASSOCIATION

United States District Court, Western District of Arkansas, 1947.
74 Fed. Supp. 952

LEMLY, D. J. . . . The proof in this case shows that the Defendant Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, and the defendant J. C. Deason, its agent, advised the plaintiff, Dixie Motor Coach Corporation, about four or five days before the preliminary hearing in this case, which hearing was held on November 21st, 1947, that if it continued to

[1] Page 328.
[2] Page 339.

allow the busses of the Southern Bus Lines, Incorporated, to stop at its terminal in Texarkana, Arkansas, that the Amalgamated would picket said terminal. The defendant Amalgamated and other defendants in this action have a labor dispute with the Southern, but no labor dispute with the Dixie. The Dixie has no dispute with its own employees, who are represented by the Brotherhood of Railway Trainmen and the Brotherhood of Railway Clerks, but those employees have advised the Dixie that in the event the Amalgamated establishes a picket line at its terminal, they will refuse to cross the picket line, and certain members of those organizations have so testified in this case. This terminal is also used by the Missouri Pacific Transportation Company and the Lone River Bus Line, and these carriers, as well as Dixie, are engaged in the transportation of passengers, baggage, express and mail, in interstate commerce. Neither Missouri Pacific nor Lone River is in any way involved in the labor dispute between Southern and the Amalgamated Association; and their employees likewise are members of the Brotherhood of Railway Trainmen and Brotherhood of Railway Clerks, and there is no labor dispute between these employees and their employers. These employees nevertheless will likewise refuse to cross Amalgamated's picket line if it is established. No employee of Southern is employed in Dixie's terminal.

For approximately seven years Dixie has had a contract with Southern and its predecessor Tri-State Transit Co., under which it is selling tickets over Southern lines, which supplement Dixie's lines, and Southern picks up such passengers at Dixie's terminal. For this service, Dixie receives ten per cent of its gross sales of tickets over Southern lines.

If the picket line is established, Dixie will either have to cease doing business with Southern at the terminal in question, or close the terminal, thereby suffering irreparable damage and seriously interfering with interstate transportation and commerce. Not only will Dixie, Missouri Pacific and Lone River be seriously and irreparably damaged, but the public interest will suffer .

Dixie has brought this action to restrain and enjoin the Amalgamated Association and the other defendants herein from establishing the picket line.

Section 303 of the Taft-Hartley Act, being Section 187, Title 29, U.S.C.A., provides, in part:

"It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization

to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:—forcing or requiring any employer . . . to cease doing business with any other person."

This act on the part of the Amalgamated and its agent Deason is expressly declared to be an unlawful act by the section of the Taft-Hartley Act to which I have just referred. It is true that the Taft-Hartley Act does not expressly authorize a United States District Court to issue an injunction prohibiting the commission of such an act; on the other hand, it provides that the injured party may sue for damages resulting from the unlawful act; but the Taft-Hartley Act does not forbid the issuance of an injunction under these conditions; and here we have a situation where an unlawful act is about to be committed which will either require Dixie to become a party to the commission of such unlawful act, or close its terminal and suffer irreparable damage for which the remedy provided by the Act is inadequate, and with resulting damage to the traveling public. . . .

Thus the defendants are attempting to coerce Dixie to aid them in the commission of an unlawful act, in the very teeth of the Taft-Hartley Act.

The defendants contend that this court is prohibited by the Norris-LaGuardia Act (Secs. 101-115, Title 29, U.S.C.A.) from issuing an injunction here, by reason of the fact, so they contend, that this is a case involving or growing out of a labor dispute. I do not agree. There is no labor dispute between Dixie and the defendants. The labor dispute is between defendants and Southern, and Southern is not a party to this suit. There is no relief that Dixie is able to give the defendants. Dixie can in no way compel Southern to accede to the demands of the defendant Amalgamated Association with respect to wages and working conditions. Dixie's hands are tied. It is the innocent third party that is to be made an unwilling instrumentality whereby an unlawful act is committed, or required to suffer irreparable damage. The case is not directly in point, but under analogous circumstances, Chief Justice Bolitha J. Laws of the District Court of the United States for the District of Columbia, held in *Gomez* v. *United Office and Professional Workers of America, C.I.O., Local 16 et al.*, on July 31st of this year, 73 F. Supp. 679, that the case under consideration was not one involving or growing out of a

labor dispute within the meaning of the Norris-LaGuardia Act, and I cite his opinion as authority for my holding here.

With respect to defendants' contention that if the injunction is granted, their constitutional right of free speech will be curtailed and their citation of *Bakery Drivers Local* v. *Wohl*, 315 U.S. 769, and other cases in this connection, it is said in the *Wohl* case that "One need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive." Here we have no violence, but we do have coercion and oppressive conduct, and also conduct expressly declared to be unlawful by the Taft-Hartley Act.

A permanent injunction will be granted.[3]

Case Questions

1. State the facts in this controversy.
2. With whom does defendant have his real dispute?
3. Read Sec. 303 of the National Labor Relations Act of 1947. Does it provide for an injunctive remedy against secondary boycotts?
4. Read Sec. 10 (l) of the Act, and answer the question as to who and for what practices an injunction may be secured.
5. Why did the court grant an injunction?
6. Does the Norris-LaGuardia Act apply when the National Labor Relations Board seeks an injunction to restrain an unfair labor practice? See Section 10 (h).
7. How does the court distinguish this case from the *Wohl* case reprinted previously in this chapter?
8. Do you think there is unity of commercial interest present between Southern and Dixie?

DOUDS v. METROPOLITAN FEDERATION

United States District Court, Southern District of New York, 1948.
75 Fed. Supp. 672

RIFKIND, D. J. This is a petition brought by Charles T. Douds, Regional Director of the Second Region of the National Labor Relations Board to enjoin the respondent, Metropolitan Federation of

[3] Technically, Sec. 303 of the Act gives the employer only the right to sue the offending union for damages, and does not give him the right to sue for an injunction as in this case. The correct procedure is illustrated in the next case. The court in the above situation granted the employer an injunction under the theory that his remedy at law was not adequate, and that equity had inherent power to grant an injunction in a proper situation without express legislative authority for so doing. Circuit Courts of Appeal have generally denied employers the remedy granted above and require the employer to secure an injunction through the National Labor Relations Board and its General Counsel.

Architects, Engineers, Chemists and Technicians, Local 231, United Office & Professional Workers of America, C.I.O., from engaging in certain activities alleged to be in violation of Section 8 (b) (4) (A) of the Labor Management Relations Act of 1947, Public Law 101, 80th Congress, popularly known as the Taft-Hartley Act. Project Engineering Company, a partnership, is the "charging party," and has asked for and received permission to intervene.

The relevant portions of the Act are set out in the margin.[4]

The testimony offered by the petitioner, the respondent, and the charging party at the hearings established the following facts:

Ebasco Services, Inc., is a corporation engaged, since 1905, in the business of supplying engineering services, such as planning and designing and drafting plans for industrial and public utility installations. During the year ending September 1, 1947, the respondent union was the bargaining agent for Ebasco's employees. On that day the agreement between Ebasco and the union expired. A new agreement was not reached and a strike against Ebasco was commenced on September 5, 1947.

James P. O'Donnell and Guy M. Barbolini in 1946 organized a partnership, styled Project Engineering Company, herein called "Project." Its business is identical with Ebasco's—planning and designing and drafting plans for industrial installations, although they seem to have specialized in chemical and petroleum plants. The partnership had an inception completely independent of Ebasco or its influence. There is no common ownership of any kind. It was through Project's solicitations that Ebasco first employed the partnership. An open contract dated December 19, 1946, marked the beginning of their business relations.

Prior to August, 1946, Ebasco never subcontracted any of its work. Subsequent to that date it subcontracted some of its work. At the time the strike was called, part of Ebasco's work had been let out to Project. An appreciable percentage of Project's business for some months antedating the strike consisted of work secured from

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[4] "Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—

"(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . ."

Ebasco. After the strike had begun, an even greater percentage—about 75%—of its work was Ebasco's. Some work, which had been begun by Ebasco's workers, was transferred, after the commencement of the strike, in an unfinished condition, to Project for completion. . . .

Ebasco supervisory personnel made regular visits to Project to oversee the work on the subcontracts. After the strike was called and the work subcontracted increased, these visits increased in frequency and number of personnel involved. Ebasco supervisory personnel, whose subordinates were on strike, continued to supervise their "jobs," at Project's plant, where such work had been transferred. The working hours of Project employees were increased after the commencement of the Ebasco strike.

Delegations representing the respondent union approached the charging party on more than one occasion and asked, among other things, that it refuse to accept work which had come "off the boards" of Ebasco.

On October 28, 1947, respondent union ordered Project picketed and such picketing has continued since that day. The pickets carry signs which denominate Project a scab shop for Ebasco. A number of resignations at Project are attributable to the picketing.

The number of pickets has usually been reasonable and the picketing was ordinarily unaccompanied by violence. However, on a number of occasions, to-wit, October 28, November 6 and November 25, there was picketing by thirty-five men or more. Such occasions were marked by pushing, kicking and blocking the entrance way to the buildings. Epithets such as "scab," "louse," "rat" and others were hurled at Project employees by the pickets. On those occasions the assistance of the police was requested by Project employees and order was promptly restored. Project continues to do engineering work for Ebasco—the kind of work which Ebasco employees themselves would be doing if they were not striking.

The Taft-Hartley Act has thus far had but little judicial attention. . . . Even cursory examination of the stated facts and the quoted portions of the Act reveals that the case bristles with questions of constitutional law, statutory construction and practical application. It is necessary in this instance to find the answers to but a few of these.

One of the prohibitions of Section 8 (b) (4) (A) of the Act is:

"It shall be an unfair labor practice for a labor organization . . . to encourage the employees of any employer to engage in a strike . . .

where an object thereof is . . . requiring . . . any . . . person . . . to cease doing business with any other person."

Is Project "doing business" with Ebasco within the meaning of the Act? The term is not defined in the Act itself. Section 2 contains thirteen definitions, but none of doing business. The term itself has, of course, received a vast amount of judicial construction but always in a context so different that it is pointless to explore that field for help in construing the term in the present context. Nor is it possible to attach legal consequences to all the relationships which the dictionary meaning of the term embraces. So to do would destroy the Act by driving it to absurdity. To give such broad scope to the term would, for instance, reach out to and include the business relation between an employee of the primary employer (Ebasco, in this case) and the primary employer, or the business relationship between a primary employer and a professional supplier of strikebreakers. Certainly it is *an* object of very many strikes and picket lines to induce a reduction in the struck employer's business by an appeal to customers—"any person"—to cease dealing with the employer. This is one of the most conspicuous weapons employed in many labor disputes. The effect of a strike would be vastly attenuated if its appeals were limited to the employer's conscience. I shall proceed on the assumption, warranted by the history of the Act, that it was not the intent of Congress to ban such activity, although the words of the statute, given their broadest meaning, may seem to reach it. Moreover, such broad construction would probably run afoul of Section 13 of the Act which reads:

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

To find the limitations to which "doing business" must be confined recourse may be had to the legislative history to discover the mischief which Congress intended to remedy. In describing the "necessity for legislation" the House Committee on Education and Labor reported, Report No. 245, pp. 4-5:

"The employers' plight has likewise not been happy. . . .

"His business on occasions has been virtually brought to a standstill by disputes to which he himself was not a party and in which he himself had no interest."

The Senate Committee on Labor and Public Welfare reported the bill which it in part described thus, Report No. 105, p. 3:

"The major changes which the bill would make in the National Labor Relations Act may be summarized as follows. . . .

"3. It gives employers and individual employees rights to invoke the processes of the Board against unions which engaged in certain enumerated unfair labor practices, including secondary boycotts and jurisdiction strikes, which may result in the Board itself applying for restraining orders in certain cases."

Page 22 of the report goes on to say:

"Under paragraph (A) strikes or boycotts, or attempts to induce or encourage such action, are made violations of the Act if the purpose is to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus, it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute)."

During the Congressional debates on the Bill, Senator Pepper objected to the provision relating to the secondary boycott and stated an illustration in which he thought it would be unjust to apply them. Senator Taft, in reply, said:

"I do not quite understand the case which the Senator has put. This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." (April 29, 1947, p. 4323 of the Congressional Record, Vol. 93.)

Examination of these expositions of Congressional purpose indicates that the provision was understood to outlaw what was theretofore known as secondary boycott. It is to the history of the secondary boycott, therefore, that attention should be directed and it is in the light of that history that the term "doing business" should be evaluated. See Hellerstein, *Secondary Boycotts in Labor Disputes*, 1938, 47 Yale Law J. 341; Gramfine, *Labor's Use of Secondary Boycotts*, 1947, 15 Geo. Washington Law Rev. 327.

When the term is read with the aid of the glossary provided by the law of secondary boycott it becomes quite clear that Project cannot claim to be a victim of that weapon in labor's arsenal. To suggest that Project had no interest in the dispute between Ebasco and its employees is to look at the form and remain blind to substance. In

every meaningful sense it had made itself party to the contest. Manifestly it was not an innocent bystander, nor a neutral. It was firmly allied to Ebasco and it was its conduct as ally of Ebasco which directly provoked the union's action.

Significant is the unique character of the contract between Ebasco and Project. Ebasco did not buy any articles of commerce from Project. Ebasco did not retain the professional services of Project. Ebasco "bought" from Project, in the words of the basic contract, "services of your designers and draftsmen . . . to work under the direction and supervision of the Purchaser." The purchase price consisted of the actual wages paid by Project plus a factor for overhead and profit. In practice the terms and implications of the agreement were fully spelled out. Ebasco supplied both direction and supervision of a detailed and pervasive character. It established the maximum wage rates for which it would be charged. Invoices were in terms of man-hours, employed by employee. Daily tally was taken of the number of men at work on Ebasco assignments and communicated to Ebasco. The final product, the plans and drawings, were placed upon forms supplied by Ebasco, bearing its name, and were thus delivered to Ebasco's clients as Ebasco's work. In advertising its services to the industries which it served Ebasco held itself out as "having available" a number of designers and draftsmen which included those employed by Project.

True enough, the contract prescribes that "all employees furnished by the seller shall at all times be and remain employees of the seller." I do not, however, draw therefrom the inference advocated by the petitioner and the charging party. The very need for such a provision emphasizes the realization of the parties that they were doing business on terms which cast a shadow of doubt upon the identity of the employer. Without question, Ebasco and Project were free to contract who, as between themselves, should be subject to the burden and possessed of the privileges that attach to the employer of those on Project's payroll. But the law is not foreclosed by such agreements to examine the reality relevant to the purposes of a particular statute. Cf. *Rutherford Food Corp.* v. *McComb*, 1947, 331 U.S. 722; *N.L.R.B.* v. *Hearst Publications, Inc.*, 1944, 322 U.S. 111. I am unable to hold that corporate ownership or insulation of legal interests between two businesses can be conclusive as to neutrality or disinterestedness in a labor dispute.

The evidence is abundant that Project's employees did work, which, but for the strike of Ebasco's employees, would have been

done by Ebasco. The economic effect upon Ebasco's employees was precisely that which would flow from Ebasco's hiring strikebreakers to work on its own premises. The conduct of the union in inducing Project's employees to strike is not different in kind from its conduct in inducing Ebasco's employees to strike. If the latter is not amenable to judicial restraint, neither is the former. In encouraging a strike at Project the union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it. See *Bakery Drivers Local* v. *Wohl,* 1942, 315 U.S. 769. Cf. *Carpenters Union* v. *Ritter's Cafe,* 1942, 315 U.S. 722.

The nexus between the labor dispute and the firm picketed in the instant case is immeasurably closer than in the *Ritter* case where the injunction against picketing was upheld, or in the *Wohl* case where it was condemned. It must be apparent that a construction of the Act which outlaws the kind of union activity here involved would almost certainly cast grave doubts upon its constitutionality. It is preferable to interpret the disputed section so as to restrain only that kind of union activity which does not enjoy constitutional immunity.

The case at bar is not an instance of a secondary boycott.

For these reasons it is clear that there has been no violation of Section 8 (b) (4) (A) and the court is therefore without power to grant the requested relief.

Petitioner's evidence has tended to prove that the nature of the business relation between Project and Ebasco is common in this type of business—that it is not an unusual practice for one firm to purchase the services of another firm's employees, nor for the former to supply active supervision of the latter's employees so engaged. These facts do not affect my conclusion. All it can mean is that the practices in a particular industry may be such that the normal contractor-subcontractor relationship carries with it the label of "ally" in a labor dispute context. The decision in this case is not dispositive of subcontracting in other industries, nor do I indicate any opinion as to the application of the Act if the normal volume of subcontracting work in this case had not been increased by reason of the primary contractor's strike. For the same reasons the existence of a contract between Project and Ebasco antedating the strike is without legal significance. . . .

Petition denied.

SUPPLEMENTAL CASE DIGEST—BOYCOTTS UNDER THE NATIONAL LABOR RELATIONS ACT OF 1947

STAPLETON v. MITCHELL. District Court of Kansas, 1945; 60 Fed. Supp. 51. The Court in this case found objectionable certain provisions of Section 8 of the 1943 Kansas Labor Law as being in violation of fundamental constitutional liberties. Section 3 made it unlawful "to participate in any strike . . . without same being authorized by a majority vote of the employees to be governed thereby . . . ," Section 12 forbade the refusal "to handle, install, use, or work on particular materials or equipment and supplies because not produced, processed, or delivered by members of a labor organization," and Section 13 outlawed "cessation of work . . . by reason of any jurisdictional dispute, grievance or disagreement between or within labor organizations." C. J. Murrah, speaking for the court, wrote at page 61, "The right to peaceably strike or to participate in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the state may not condition or abridge in the absence of grave and immediate danger to the community. . . . We conclude that sub-sections (3), (12) and (13) of Section 8 of the Act are unconstitutional and void on their face. . . ."

Case Questions

1. State in detail the relationship prevailing between Ebasco and the Project Engineering Co.
2. Who is being picketed? By whom?
3. Who is the "charging party?"
4. What does Section 10 (l) of the National Labor Relations Act provide? What section of the Act must be violated before an injunction may be requested by the officer of the Board?
5. Why does the court search the legislative history of the Act? What conclusion does it draw as to the applicability of Sec. 8 (b) (4) (A)?
6. Did the court find unity of interest present?
7. State the rule of the case.

CHAPTER 8

LABOR AND THE SHERMAN ACT

SECTION 52. EARLY APPLICATIONS OF THE SHERMAN ACT

We have seen earlier, in sections 5 and 6, the application of the criminal and civil conspiracy doctrines to labor union activity that tended to restrain trade. Restraint of trade was the early common-law doctrine that embraced and rendered void all contracts, agreements, and combinations to unreasonably and coercively diminish the flow of goods or services to the market in an effort to control the price of such goods and services. It should not be concluded that every interference with a free and open market constituted an unlawful restraint.

Whenever the issue was posed in the courts, two questions arose. First, was the restraint justifiable, and second, were permissive, that is, noncoercive, methods employed to effectuate the restraint? If a negative answer ensued, the result was the application of the criminal or civil conspiracy rules. Hence, a consideration of both ends and means was vital to the issue. If the end purpose of a strike or a picket was to maliciously injure another, without any direct benefit to those causing injury, the strike or picket activity was considered illegal. On the other hand, if the activity causing injury was devoid of malice and promised direct benefit to the participants, but force or intimidation was employed to secure the lawful end, this latter element of coercion again brought into play the proscriptive ban of the law.

In the present era, the common-law doctrines of civil and criminal conspiracy and restraint of trade have been embodied in, or modified by, statutory enactments in the shape of the Sherman Act of 1890. It has been long debated whether Congress intended the Sherman Act's prohibitions to extend to the actions of labor combinations in view of the undoubted proposition that the enactment was given birth in response to public pressure for the control of monopolistic practices by big business combinations such as the Standard Oil and American Tobacco companies. Notwithstanding the authorities pro and con—and a strong case can be mustered for either view—the Federal courts, under the verbiage of Section 1, construed the Sherman Act as applying with equal vigor to *all* combinations, labor or otherwise.

The passage of the Clayton Act of 1914 was secured at the behest of labor in order to secure relief from the restrictions of the Sherman Act. In spite of the express language of the Clayton Act's Section 6, discussed more fully in Section 15 of this volume, the courts construed the Act as being merely declaratory of what had been lawful or unlawful theretofore. On the whole, the Clayton Act left labor in a more exposed position than formerly. The Sherman Act still applied in full vigor, and, in addition, the Clayton Act enabled employers to sue in their own right for restraining orders and injunctions under the Sherman Act, a right formerly had only by the Federal authorities.

The three cases in this section are landmarks indicative of judicial tenor in the application of the Sherman and Clayton acts to labor combinations until the famous turning point *Apex Hosiery* [1] decision of 1940. In analyzing all the cases in this chapter, however, the reader would do well to remember that litigation under the Sherman Act may be grounded in equity under Section 4 if an injunction or restraining order is desired, at law if for treble damages under Section 7, or it may be a criminal prosecution pursued by the government under Section 1. As such, the procedural and evidentiary requirements will vary as found in the decided cases, making observance of the form of action significant, for the evidentiary requirements are much stricter to support a criminal, rather than a civil, prosecution.

The four sections of the Sherman Act of 1890 that relate to the problems discussed in this book are as follows:

Sec 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the

[1] The *Apex Hosiery* decision is reprinted in Section 53, page 376.

court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sec. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

LAWLOR v. LOEWE

Supreme Court of the United States, 1915. 235 U.S. 522, 35 Sup. Ct. 170

HOLMES, J. This is an action under the act of July 2, 1890, C. 647, Sec. 7, 26 Stat. 209, 210, 15 U.S.C.A. Sec. 15 note, for a combination and conspiracy in restraint of commerce among the States, specifically directed against the plaintiffs (defendants in error), among others, and effectively carried out with the infliction of great damage. The declaration was held good on demurrer in *Loewe* v. *Lawlor*, 208 U.S. 274, 28 S. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, where it will be found set forth at length. The substance of the charge is that the plaintiffs were hat manufacturers who employed nonunion labor; that the defendants were members of the United Hatters of North America and also of the American Federation of Labor; that in pursuance of a general scheme to unionize the labor employed by manufacturers of fur hats (a purpose previously made effective against all but a few manufacturers), the defendants and other members of the United Hatters caused the American Federation of Labor to declare a boycott against the plaintiffs and against all hats sold by the plaintiffs to dealers in other States and against dealers who should deal in them; and that they carried out their plan with such success that they have restrained or destroyed the plaintiff's commerce with other States. The case now has been tried, the plaintiffs have got a verdict and the judgment of the District Court has been affirmed by the Circuit Court of Appeals. 209 F. 721, 126 C.C.A. 445.

The grounds for discussion under the statute that were not cut away by the decision upon the demurrer have been narrowed still

further since the trial by the case of *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600, 34 S. Ct. 951, 58 L. Ed. 1490, L.R.A. 1915A, 788. Whatever may be the law otherwise, that case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of "unfair dealers," manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States.

It requires more than the blindness of justice not to see that many branches of the United Hatters and the Federation of Labor, to both of which the defendants belonged, in pursuance of a plan emanating from headquarters made use of such lists, and of the primary and secondary boycott in their effort to subdue the plaintiffs to their demands. The union label was used and a strike of the plaintiffs' employees was ordered and carried out to the same end, and the purpose to break up the plaintiffs' commerce affected the quality of the acts. *Loewe* v. *Lawlor*, 208 U.S. 274, 299, 28 S. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815. We agree with the Circuit Court of Appeals that a combination and conspiracy forbidden by the statute were proved, and that the question is narrowed to the responsibility of the defendants for what was done by the sanction and procurement of the societies above named.

The court in substance instructed the jury that if these members paid their dues and continued to delegate authority to their officers unlawfully to interfere with the plaintiffs' interstate commerce in such circumstances that they knew or ought to have known, and such officers were warranted in the belief that they were acting in the matters within their delegated authority, then such members were jointly liable, and no others. It seems to us that this instruction sufficiently guarded the defendants' rights, and that the defendants got all that they were entitled to ask in not being held chargeable with knowledge as matter of law. It is a tax on credulity to ask anyone to believe that members of labor unions at that time did not know that the primary and secondary boycott and the use of the "We don't patronize" or "Unfair" list were means expected to be employed in the effort to unionize shops. Very possibly they were thought to be lawful. See *Gompers* v. *United States*, 233 U.S. 604, 34 S. Ct. 693, 58 L. Ed. 1115. By the Constitution of the United Hatters the directors are to use "all the means in their power" to bring shops "not

under our jurisdiction" "into the trade." The by-laws provide a separate fund to be kept for strikes, lockouts, and agitation for the union label. Members are forbidden to sell nonunion hats. The Federation of Labor with which the Hatters were affiliated had organization of labor for one of its objects, helped affiliated unions in trade disputes, and to that end, before the present trouble, had provided in its constitution for prosecuting and had prosecuted many what it called legal boycotts. Their conduct in this and former cases was made public especially among the members in every possible way. If the words of the documents on their face and without explanation did not authorize what was done, the evidence of what was done publicly and habitually showed their meaning and how they were interpreted. The jury could not but find that by the usage of the unions the acts complained of were authorized, and authorized without regard to their interference with commerce among the States. We think it unnecessary to repeat the evidence of the publicity of this particular struggle in the common newspapers and union prints, evidence that made it almost inconceivable that the defendants, all living in the neighborhood of the plaintiffs, did not know what was done in the specific case. If they did not know that, they were bound to know the constitution of their societies, and at least well might be found to have known how the words of those constitutions had been construed in the act. . . .

Judgment affirmed.[2]

Case Questions

1. What purpose was pursued by the United Hatters?
2. What pressure methods did the American Federation of Labor and the Hatters exert?
3. State the rule of the case.

DUPLEX PRINTING PRESS COMPANY v. DEERING

Supreme Court of the United States, 1921. 254 U.S. 443, 41 Sup. Ct. 172

PITNEY, J. This was a suit in equity brought by appellant in the District Court for the Southern District of New York for an injunction to restrain a course of conduct carried on by defendants in that District and vicinity in maintaining a boycott against the products of complainant's factory, in furtherance of a conspiracy to injure and destroy its good will, trade, and business—especially to obstruct and

[2] By Section 301 (b) of the National Labor Relations Act of 1947, money judgments are enforceable only against the union as an entity "and shall not be enforceable against any individual member or his assets."

destroy its interstate trade. There was also a prayer for damages, but this has not been pressed and calls for no further mention. Complainant is a Michigan corporation and manufactures printing presses at a factory in Battle Creek, in that State, employing about 200 machinists in the factory in addition to 50 office employees, traveling salesmen, and expert machinists or road men who supervise the erection of the presses for complainant's customers at their various places of business. The defendants who were brought into court and answered the bill are Emil J. Deering and William Bramley, sued individually and as business agents and representatives of District No. 15 of the International Association of Machinists, and Michael T. Neyland, sued individually and as business agent and representative of Local Lodge No. 328 of the same association. . . .

The jurisdiction of the federal court was invoked both by reason of diverse citizenship and on the ground that defendants were engaged in a conspiracy to restrain complainant's interstate trade and commerce in printing presses, contrary to the Sherman Anti-Trust Act of July 2, 1890, C. 647, 26 Stat. 209. The suit was begun before but brought to hearing after the passage of the Clayton Act of October 15, 1914, C. 323, 38 Stat. 730. Both parties invoked the provisions of the latter act, and both courts treated them as applicable. Complainant relied also upon the common law; but we shall deal first with the effect of the acts of Congress. . . .

. . . Complainant conducts its business on the "open shop" policy, without discrimination against either union or nonunion men. The individual defendants and the local organizations of which they are the representatives are affiliated with the International Association of Machinists, an unincorporated association having a membership of more than 60,000; and are united in a combination, to which the International Association also is a party, having the object of compelling complainant to unionize its factory and enforce the "closed shop," the eight-hour day, and the union scale of wages, by means of interfering with and restraining its interstate trade in the products of the factory. Complainant's principal manufacture is newspaper presses of large size and complicated mechanism, varying in weight from 10,000 to 100,000 pounds, and requiring a considerable force of labor and a considerable expenditure of time—a week or more—to handle, haul and erect them at the point of delivery. These presses are sold throughout the United States and in foreign countries; and, as they are especially designed for the production of daily papers, there is a large market for them in and about the City of New York.

They are delivered there in the ordinary course of interstate commerce, the handling, hauling and installation work at destination being done by employees of the purchaser under the supervision of a specially skilled machinist supplied by complainant. The acts complained of and sought to be restrained have nothing to do with the conduct or management of the factory in Michigan, but solely with the installation and operation of the presses by complainant's customers. None of the defendants is or ever was an employee of complainant, and complainant at no time has had relations with either of the organizations that they represent. In August, 1913 (eight months before the filing of the bill), the International Association called a strike at complainant's factory in Battle Creek, as a result of which union machinists to the number of about eleven in the factory and three who supervised the erection of presses in the field left complainant's employ. But the defection of so small a number did not materially interfere with the operation of the factory, and sales and shipments in interstate commerce continued. The acts complained of made up the details of an elaborate programme adopted and carried out by defendants and their organizations in and about the City of New York as part of a country-wide programme adopted by the International Association, for the purpose of enforcing a boycott of complainant's product. The acts embraced the following, with others: warning customers that it would be better for them not to purchase, or having purchased not to install, presses made by complainant, and threatening them with loss should they do so; threatening customers with sympathetic strikes in other trades; notifying a trucking company usually employed by customers to haul the presses not to do so, and threatening it with trouble if it should; inciting employees of the trucking company, and other men employed by customers of complainant, to strike against their respective employers in order to interfere with the hauling and installation of presses, and thus bring pressure to bear upon the customers; notifying repair shops not to do repair work on Duplex presses; coercing union men by threatening them with loss of union cards and with being blacklisted as "scabs" if they assisted in installing the presses; threatening an exposition company with a strike if it permitted complainant's presses to be exhibited; and resorting to a variety of other modes of preventing the sale of presses of complainant's manufacture in or about New York City, and delivery of them in interstate commerce, such as injuring and threatening to injure complainant's customers and prospective customers, and persons concerned in hauling, han-

dling, or installing the presses. In some cases the threats were undisguised, in other cases polite in form but none the less sinister in purpose and effect. All the judges of the Circuit Court of Appeals concurred in the view that defendants' conduct consisted essentially of efforts to render it impossible for complainant to carry on any commerce in printing presses between Michigan and New York; and that defendants had agreed to do and were endeavoring to accomplish the very thing pronounced unlawful by this court in *Loewe* v. *Lawlor,* 208 U.S. 274, 235 U.S. 522. The judges also agreed that the interference with interstate commerce was such as ought to be enjoined, unless the Clayton Act of October 15, 1914, forbade such injunction.

That act was passed after the beginning of the suit but more than two years before it was brought to hearing. We are clear that the courts below were right in giving effect to it; the real question being, whether they gave it the proper effect. In so far as the act (a) provided for relief by injunction to private suitors, (b) imposed conditions upon granting such relief under particular circumstances, and (c) otherwise modified the Sherman Act, it was effective from the time of its passage, and applicable to pending suits for injunction. . . .

The Clayton Act, in Sec. 1, includes the Sherman Act in a definition of "anti-trust laws," and, in Sec. 16 (38 Stat. 737), gives to private parties a right to relief by injunction in any court of the United States against threatened loss or damage by a violation of the anti-trust laws, under the conditions and principles regulating the granting of such relief by courts of equity. Evidently this provision was intended to supplement the Sherman Act, under which some of the federal courts had held, as this court afterwards held in *Paine Lumber Co.* v. *Neal,* 244 U.S. 459, 471, that a private party could not maintain a suit for injunction.

That complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference; that unrestrained access to the channels of interstate commerce is necessary for the successful conduct of the business; that a widespread combination exists, to which defendants and the associations represented by them are parties, to hinder and obstruct complainant's interstate trade and commerce by the means that have been indicated; and that as a result of it complainant has sustained substantial damage to its interstate trade, and is threatened with further and irreparable loss and damage in the future; is proved by clear and undisputed evidence.

Hence the right to an injunction is clear if the threatened loss is due to a violation of the Sherman Act as amended by the Clayton Act.

Looking first to the former act, the thing declared illegal by its first section (26 Stat. 209) is "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." The accepted definition of a conspiracy is, a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. *Pettibone* v. *United States*, 148 U.S. 197, 203. If the purpose be unlawful it may not be carried out even by means that otherwise would be legal; and although the purpose be lawful it may not be carried out by criminal or unlawful means.

The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a "secondary boycott," that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ("primary boycott"), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it.

As we shall see, the recognized distinction between a primary and a secondary boycott is material to be considered upon the question of the proper construction of the Clayton Act. But, in determining the right to an injunction under that and the Sherman Act, it is of minor consequence whether either kind of boycott is lawful or unlawful at common law or under the statutes of particular States. Those acts, passed in the exercise of the power of Congress to regulate commerce among the States, are of paramount authority, and their prohibitions must be given full effect irrespective of whether the things prohibited are lawful or unlawful at common law or under local statutes.

In *Loewe* v. *Lawlor*, 208 U.S. 274, where there was an effort to compel plaintiffs to unionize their factory by preventing them from manufacturing articles intended for transportation beyond the State, and also by preventing vendees from reselling articles purchased from plaintiffs and negotiating with plaintiffs for further purchases, by means of a boycott of plaintiffs' products and of dealers who

handled them, this court held that there was a conspiracy in restraint of trade actionable under Sec. 7 of the Sherman Act, and in that connection said (p. 293): "The act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business. The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes." And when the case came before the court a second time, 235 U.S. 522, 534, it was held that the use of the primary and secondary boycott and the circulation of a list of "unfair dealers," intended to influence customers of plaintiffs and thus subdue the latter to the demands of the defendants, and having the effect of interfering with plaintiffs' interstate trade, was actionable.

In *Eastern States Retail Lumber Dealers' Association* v. *United States,* 234 U.S. 600, wholesale dealers were subjected to coercion merely through the circulation among retailers, who were members of the association, of information in the form of a kind of "black list," intended to influence the retailers to refrain from dealing with the listed wholesalers, and it was held that this constituted a violation of the Sherman Act. Referring to this decision, the court said, in *Lawlor* v. *Loewe,* 235 U.S. 522, 534: "That case established that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States."

It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute.

Upon the question whether the provisions of the Clayton Act forbade the grant of an injunction under the circumstances of the present case, the Circuit Court of Appeals was divided; the majority holding that under Sec. 20, "perhaps in conjunction with Section 6,"

there could be no injunction. These sections are set forth in the margin.[3]

Defendants seek to derive from them some authority for their conduct. As to Sec. 6, it seems to us its principal importance in this discussion is for what it does not authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the anti-trust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from lawfully carrying out their legitimate objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws.

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[3] "Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

"Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

The principal reliance is upon Sec. 20. This regulates the granting of restraining orders and injunctions by the courts of the United States in a designated class of cases, with respect to (a) the terms and conditions of the relief and the practice to be pursued, and (b) the character of acts that are to be exempted from the restraint; and in the concluding words it declares (c) that none of the acts specified shall be held to be violations of any law of the United States. All its provisions are subject to a general qualification respecting the nature of the controversy and the parties affected. It is to be a "case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment."

The first paragraph merely puts into statutory form familiar restrictions upon the granting of injunctions already established and of general application in the equity practice of the courts of the United States. It is but declaratory of the law as it stood before. The second paragraph declares that "no *such* restraining order or injunction" shall prohibit certain conduct specified—manifestly still referring to a "case between an employer and employees . . . involving, or growing out of, a dispute concerning terms or conditions of employment," as designated in the first paragraph. It is very clear that the restriction upon the use of the injunction is in favor only of those concerned as parties to such a dispute as is described. The words defining the permitted conduct include particular qualifications consistent with the general one respecting the nature of the case and dispute intended; and the concluding words, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States," are to be read in the light of the context, and mean only that those acts are not to be held so when committed by parties concerned in "a dispute concerning terms or conditions of employment." If the qualifying words are to have any effect, they must operate to confine the restriction upon the granting of injunctions, and also the relaxation of the provisions of the anti-trust and other laws of the United States, to parties standing in proximate relation to a controversy such as is particularly described.

The majority of the Circuit Court of Appeals appear to have entertained the view that the words "employers and employees," as used in Sec. 20, should be treated as referring to "the business class or clan to which the parties litigant respectively belong"; and that, as there had been a dispute at complainant's factory in Michigan con-

cerning the conditions of employment there—a dispute created, it is said, if it did not exist before, by the act of the Machinists' Union in calling a strike at the factory—Sec. 20 operated to permit members of the Machinists' Union elsewhere—some 60,000 in number—although standing in no relation of employment under complainant, past, present, or prospective, to make that dispute their own and proceed to instigate sympathetic strikes, picketing, and boycotting against employers wholly unconnected with complainant's factory and having relations with the ordinary course of interstate commerce—and this where there was no dispute between such employers and their employees respecting terms or conditions of employment.

We deem this construction altogether inadmissible. Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States and upon the general operation of the anti-trust laws, a restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public; and it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of the section, not to speak of ignoring or slighting the qualifying words that are found in it. Full and fair effect will be given to every word if the exceptional privilege be confined—as the natural meaning of the words confines it—to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective. The extensive construction adopted by the majority of the courts below virtually ignores the effect of the qualifying words. Congress had in mind particular industrial controversies, not a general class war. "Terms or conditions of employment" are the only grounds of dispute recognized as adequate to bring into play the exemptions; and it would do violence to the guarded language employed were the exemption extended beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of dispute.

Nor can Sec. 20 be regarded as bringing in all members of a labor organization as parties to a "dispute concerning terms or conditions of employment" which proximately affects only a few of them, with the result of conferring upon any and all members—no matter how many thousands there may be, nor how remote from the actual

conflict—those exemptions which Congress in terms conferred only upon parties to the dispute. That would enlarge by construction the provisions of Sec. 20, which contains no mention of labor organizations, so as to produce an inconsistency with Sec. 6, which deals specifically with the subject and must be deemed to express the measure and limit of the immunity intended by Congress to be incident to mere membership in such an organization. At the same time it would virtually repeal by implication the prohibition of the Sherman Act, so far as labor organizations are concerned, notwithstanding repeals by implication are not favored; and in effect, as was noted in *Loewe* v. *Lawlor,* 208 U.S. 274, 303-304, would confer upon voluntary associations of individuals formed within the States a control over commerce among the States that is denied to the governments of the States themselves.

The qualifying effect of the words descriptive of the nature of the dispute and the parties concerned is further borne out by the phrases defining the conduct that is not to be subjected to injunction or treated as a violation of the laws of United States, that is to say: (a) "terminating any relation of employment . . . or persuading others by peaceful and lawful means so to do"; (b) "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working"; (c) "ceasing to patronize or to employ any party to such dispute, or . . . recommending, advising, or persuading others by peaceful and lawful means so to do"; (d) "paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits . . . "; (e) "doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto." The emphasis placed on the words "lawful" and "lawfully," "peaceful" and "peacefully," and the references to the dispute and the parties to it, strongly rebut a legislative intent to confer a general immunity for conduct violative of the anti-trust laws, or otherwise unlawful. The subject of the boycott is dealt with specifically in the "ceasing to patronize" provision, and by the clear force of the language employed the exemption is limited to pressure exerted upon a "party to such dispute" by means of "peaceful and *lawful*" influence upon neutrals. There is nothing here to justify defendants or the organizations they represent in using either threats or persuasion to bring about strikes or a cessation of work on the part of employees of complainant's customers or prospective customers, or of the trucking

company employed by the customers, with the object of compelling such customers to withdraw or refrain from commercial relations with complainant, and of thereby constraining complainant to yield the matter in dispute. To instigate a sympathetic strike in aid of a secondary boycott cannot be deemed "peaceful and lawful" persuasion. In essence it is a threat to inflict damage upon the immediate employer, between whom and his employees no dispute exists, in order to bring him against his will into a concerted plan to inflict damage upon another employer who is in dispute with his employees.

The majority of the Circuit Court of Appeals, very properly treating the case as involving a secondary boycott, based the decision upon the view that it was the purpose of Sec. 20 to legalize the secondary boycott "at least in so far as it rests on, or consists of, refusing to work for any one who deals with the principal offender." Characterizing the section as "blindly drawn," and conceding that the meaning attributed to it was broad, the court referred to the legislative history of the enactment as a warrant for the construction adopted. . . .

The extreme and harmful consequences of the construction adopted in the court below are not to be ignored. The present case furnishes an apt and convincing example. An ordinary controversy in a manufacturing establishment, said to concern the terms or conditions of employment there, has been held a sufficient occasion for imposing a general embargo upon the products of the establishment and a nation-wide blockade of the channels of interstate commerce against them, carried out by inciting sympathetic strikes and a secondary boycott against complainant's customers, to the great and incalculable damage of many innocent people far remote from any connection with or control over the original and actual dispute—people constituting, indeed, the general public upon whom the cost must ultimately fall, and whose vital interest in unobstructed commerce constituted the prime and paramount concern of Congress in enacting the anti-trust laws, of which the section under consideration forms after all a part.

Reaching the conclusion, as we do, that complainant has a clear right to an injunction under the Sherman Act as amended by the Clayton Act, it becomes unnecessary to consider whether a like result would follow under the common law or local statutes; there being no suggestion that relief thereunder could be broader than that to which complainant is entitled under the acts of Congress.

There should be an injunction against defendants and the associations represented by them, and all members of those associations,

restraining them, according to the prayer of the bill, from interfering or attempting to interfere with the sale, transportation, or delivery in interstate commerce of any printing press or presses manufactured by complainant, or the transportation, carting, installation, use, operation, exhibition, display, or repairing of any such press or presses, or the performance of any contract or contracts made by complainant respecting the sale, transportation, delivery, or installation of any such press or presses, by causing or threatening to cause loss, damage, trouble, or inconvenience to any person, firm, or corporation concerned in the purchase, transportation, carting, installation, use, operation, exhibition, display, or repairing of any such press or presses, or the performance of any such contract or contracts; and also and especially from using any force, threats, command, direction, or even persuasion with the object or having the effect of causing any person or persons to decline employment, cease employment, or not seek employment, or to refrain from work or cease working under any person, firm, or corporation being a purchaser or prospective purchaser of any printing press or presses from complainant, or engaged in hauling, carting, delivering, installing, handling, using, operating, or repairing any such press or presses for any customer of complainant. Other threatened conduct by defendants or the associations they represent, or the members of such associations, in furtherance of the secondary boycott should be included in the injunction according to the proofs.

Complainant is entitled to its costs in this court and in both courts below.

Decree reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Case Questions

1. What demands did the International Association of Machinists seek to enforce upon their employer?
2. How are the newspaper presses installed?
3. What acts did the union engage in to enforce their demands?
4. How does the Supreme Court circumvent the language of Section 6 of the Clayton Act?
5. How does the Supreme Court handle Section 20 of the Clayton Act?
6. Does the Clayton Act make secondary boycotts lawful according to the Supreme Court? Why?
7. What view did the Circuit Court of Appeals take upon the secondary boycott question of the Clayton Act? Why?

BEDFORD CUT STONE CO. v. JOURNEYMEN STONE CUTTERS' ASSOCIATION OF NORTH AMERICA

Supreme Court of the United States, 1929. 274 U.S. 37, 47 Sup. Ct. 522

SUTHERLAND, J. Petitioners, Bedford Cut Stone Company and 23 others, all, with one or two exceptions, Indiana corporations, are in the business of quarrying or fabricating, or both quarrying and fabricating, Indiana limestone in what is called the Bedford-Bloomington District in the State of Indiana. Their combined investment is about $6,000,000, and their annual aggregate sales amount to about $15,000,000, more than 75% of which are made in interstate commerce to customers outside the State of Indiana. The Journeymen Stone Cutters' Association of North America, sometimes called and hereinafter referred to as the "General Union," is an association of mechanics engaged in the stone-cutting trade. . . .

This suit was brought by petitioners against the General Union and some of its officers, and a number of affiliated local unions and some of their officers, to enjoin them from combining and conspiring together to commit, and from committing, various acts in restraint of interstate commerce in violation of the federal Anti-Trust Act, C. 647, 26 Stat. 209, 15 U.S.C.A. Secs. 1-7, 15 note, and to petitioners' great and irreparable damage. The federal district court for the district of Indiana, after a hearing, refused a preliminary injunction and, subsequently, on final hearing, entered a decree dismissing the bill for want of equity. On appeal this decree was affirmed by the court of appeals upon the authority of an earlier opinion in the same case. 9 F. 2d 40.

The facts, so far as necessary to be stated, follow. Limestone produced by petitioners is quarried and fabricated largely for building construction purposes. The stone is first taken in rough blocks from the earth and, generally, then cut into appropriate sizes and sometimes planed. Part of this product is shipped directly to buildings, where it is fitted, trimmed and set in place, the remainder being sold in the rough to contractors to be fabricated. The stone sold in interstate commerce comes into competition with other kinds of natural and artificial stone. The principal producers of artificial stone are unionized and are located outside of Indiana. Before 1921, petitioners carried on their work in Indiana under written agreement with the General Union, but since that time they have operated under agreements with unaffiliated unions, with the effect of closing their shops and quarries against the members of the General Union and its locals. Prior to the filing of the bill of complaint, the General

Union issued a notice to all its locals and members, directing its members not to work on stone "that has been started—planed, turned, cut, or semi-finished—by men working in opposition to our organization," and setting forth that a convention of the union had determined that "members were to rigidly enforce the rule to keep off all work started by men working in opposition to our organization, with the exception of the work of Shea-Donnelly, which firm holds an injunction against our association." Stone produced by petitioners by labor eligible to membership in respondents' union was declared "unfair"; and the president of the General Union announced that the rule against handling such stone was to be promptly enforced in every part of the country. Most of the stone workers employed, outside the State of Indiana, on the buildings where petitioners' product is used, are members of the General Union; and in most of the industrial centers, building construction is on a closed shop union basis.

The rule requiring members to refrain from working on "unfair" stone was persistently adhered to and effectively enforced against petitioner's product, in a large number of cities and in many states. The evidence shows many instances of interference with the use of petitioners' stone by interstate customers, and expressions of apprehension on the part of such customers of labor troubles if they purchased the stone. The President of the General Union himself testified, in effect, that generally the men were living up to the order and if it were shown to him that they did not do so in any place he would see that they did. Members found working on petitioners' product were ordered to stop and threatened with a revocation of their cards if they continued; and the order of the General Union seems to have been enforced even when it might be against the desire of the local union. . . .

The evidence makes plain that neither the General Union nor the locals had any grievance against any of the builders—local purchasers of the stone—or any other local grievance; and that the strikes were ordered and conducted for the sole purpose of preventing the use and, consequently, the sale and shipment in interstate commerce, of petitioners' products, in order, by threatening the loss or serious curtailment of their interstate market, to force petitioners to the alternative of coming to undesired terms with the members of these unions. . . .

From a consideration of all the evidence, it is apparent that the enforcement of the general order to strike against petitioners' product could have had no purpose other than that of coercing or induc-

ing the local employers to refrain from purchasing such product. To accept the assertion made here to the contrary, would be to say that the order and the effort to enforce it were vain and idle things without any rational purpose whatsoever. And indeed, on the argument, in answer to a question from the bench, counsel for respondents very frankly said that, unless petitioners' interstate trade in the so-called unfair stone were injuriously affected, the strikes would accomplish nothing. . . .

Respondents' chief contention is that "their sole and only purpose . . . was to unionize the cutters and carvers of stone at the quarries." And it may be conceded that this was the ultimate end in view. But how was that end to be effected? The evidence shows indubitably that it was by an attack upon the use of the product in other states to which it had been and was being shipped, with the intent and purpose of bringing about the loss or serious reduction of petitioners' interstate business, and thereby forcing compliance with the demands of the unions. And, since these strikes were directed against the use of petitioners' product in other states, with the plain design of suppressing or narrowing the interstate market, it is no answer to say that the ultimate object to be accomplished was to bring about a change of conduct on the part of petitioners in respect of the employment of union members in Indiana. A restraint of interstate commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint. *Anderson* v. *Shipowners' Ass'n of Pacific Coast,* 272 U.S. 359, 47 S. Ct. 125, 71 L. Ed. 298; *Duplex Printing Press Co.* v. *Deering,* 254 U.S. 443, 468, 41 S. Ct. 172, 65 L. Ed. 349, 16 A.L.R. 196; *Ellis* v. *Inman, Poulsen & Co.,* 131 F. 182, 186 (C.C.A. 9th). . . .

In cases arising outside the Anti-Trust Act, involving strikes like those here under review against so-called unfair products, there is a sharp conflict of opinion. On the one hand, it is said that such a strike is justified on the ground of self-interest; that the injury to the producer is inflicted, not maliciously, but in self-defense; that the refusal of the producer to deal with the union and to observe its standards threatens the interest of all its members and the members of the affiliated locals; and that a strike against the unfair material is a mere recognition of this unity of interest, and in refusing to work on such material the union is only refusing to aid in its own destruction. . . .

But with this conflict we have no concern in the present case. The question which it involves was presented and considered in the *Duplex Printing Press Co.* case, *supra,* as the prevailing and the dissenting opinions show; and there it was plainly held that the point had no bearing upon the enforcement of the Anti-Trust Act, and that since complainant had a clear right to an injunction under that Act as amended by the Clayton Act, it was "unnecessary to consider whether a like result would follow under the common law or local statutes."

Whatever may be said as to the motives of the respondents or their general right to combine for the purpose of redressing alleged grievances of their fellow craftsmen or of protecting themselves or their organizations, the present combination deliberately adopted a course of conduct which directly and substantially curtailed, or threatened thus to curtail, the natural flow in interstate commerce of a very large proportion of the building limestone production of the entire country, to the gravely probable disadvantage of producers, purchasers and the public; and it must be held to be a combination in undue and unreasonable restraint of such commerce within the meaning of the Anti-Trust Act as interpreted by this court. An act which lawfully might be done by one, may when done by many acting in concert take on the form of a conspiracy and become a public wrong, and may be prohibited if the result be hurtful to the public or to individuals against whom such concerted action is directed, *Grenada Lumber Co.* v. *Mississippi,* 217 U.S. 433, 440, 30 S. Ct. 535, 54 L. Ed. 826, and any suggestion that such concerted action here may be justified as a necessary defensive measure is completely answered by the words of this court in *Eastern States Retail Lumber Dealers' Ass'n* v. *United States,* 234 U.S. 600, 613, 34 S. Ct. 951, 954, 58 L. Ed. 1490, L.R.A. 1915A, 788, that "Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted." . . .

From the foregoing review, it is manifest that the acts and conduct of respondents fall within the terms of the Anti-Trust Act; and petitioners are entitled to relief by injunction under Section 16 of the Clayton Act, C. 323, 38 Stat. 730, 737, 15 U.S.C.A. Sec. 26, by which they are authorized to sue for such relief "against threatened loss or damage by a violation of the anti-trust laws," etc. The strikes, ordered and carried out with the sole object of preventing the use and installation of petitioners' product in other states, necessarily

threatened to destroy or narrow petitioners' interstate trade by taking from them their customers. That the organizations, in general purpose and in and of themselves, were lawful and that the ultimate result aimed at may not have been illegal in itself, are beside the point. Where the means adopted are unlawful, the innocent general character of the organizations adopting them or the lawfulness of the ultimate end sought to be attained, cannot serve as a justification.

Decree reversed.

Case Questions

1. Describe the business interests of the Bedford Cut Stone Company. How is the stone handled and installed?
2. What action by the employers caused the retaliatory steps to be taken by the General Union?
3. What was the nature of the General Union's retaliation? Was it strongly enforced and made effective?
4. Discuss the significance of the statement "neither the General Union nor the locals had any grievance against any of the builders."
5. The court speaks of unity of interest as a union defense. Does it recognize this as a good defense? Do you agree?
6. What was unlawful in the eyes of the Supreme Court, the objective of the union, the means employed, or both?

SECTION 53. INTERLACED CONSTRUCTION OF THE SHERMAN ACT

The cases in Section 52, in view of the *Apex, Hutcheson,* and *Hunt* decisions that are reprinted in this section, are largely of historical interest. The dynamic change in legal application indicated by the cases in this section is due to a series of causes that found their inception in the late thirties, among them being: the presence of a liberal Supreme Court; the enactment of the Norris-LaGuardia Anti-Injunction and Wagner Acts, reflecting a change in Congressional policy; and finally, federal sponsorship of labor combinations.

APEX HOSIERY CO. v. LEADER

Supreme Court of the United States, 1940. 310 U.S. 469, 60 Sup. Ct. 982

STONE, J. Petitioner, a Pennsylvania corporation, is engaged in the manufacture, at its factory in Philadelphia, of hosiery, a substantial part of which is shipped in interstate commerce. It brought the present suit in the federal district court for Eastern Pennsylvania against respondent Federation, a labor organization, and its officers, to recover treble the amount of damage inflicted on it by respondents in conducting a strike at petitioner's factory alleged to be a conspiracy in violation of the Sherman Anti-Trust Act. 26 Stat. 209, 15 U.S.C. Sec. 1. The trial to a jury resulted in a verdict for petitioner in the sum of $237,310, respondents saving by proper motions and exceptions the question whether the evidence was sufficient to establish a violation of the Sherman Act. The trial judge trebled the verdict to $711,932.55, in conformity to the provision of the Sherman Act as amended by Sec. 4 of the Clayton Act, 1914, 38 Stat. 731, 15 U.S.C. Sec. 15, and gave judgment accordingly. The Court of Appeals for the Third Circuit reversed, 108 F. 2d 71, on the ground that the interstate commerce restrained or affected by respondents' acts was unsubstantial, the total shipment of merchandise from petitioner's factory being less than three per cent of the total value of the output in the entire industry of the country, and on the further ground that the evidence failed to show an intent on the part of respondents to restrain interstate commerce. We granted certiorari, 309 U.S. 644, the questions presented being of importance in the administration of the Sherman Act.

The facts are undisputed. There was evidence from which the jury could have found as follows. Petitioner employs at its Phila-

delphia factory about twenty-five hundred persons in the manufacture of hosiery, and manufactures annually merchandise of the value of about $5,000,000. Its principal raw materials are silk and cotton, which are shipped to it from points outside the state. It ships interstate more than 80 per cent of its finished product, and in the last eight months of 1937 it shipped in all 274,791 dozen pairs of stockings. In April, 1937, petitioner was operating a nonunion shop. A demand of the respondent Federation at that time for a closed shop agreement came to nothing. On May 4, 1937, when only eight of petitioner's employees were members of the Federation, it ordered a strike. Shortly after midday on May 6, 1937, when petitioner's factory was shut down, members of the union, employed by other factories in Philadelphia who had stopped work, gathered at petitioner's plant. Respondent Leader, president of the Federation, then made a further demand for a closed shop agreement. When this was refused Leader declared a "sit-down strike." Immediately, acts of violence against petitioner's plant and the employees in charge of it were committed by the assembled mob. It forcibly seized the plant, whereupon, under union leadership, its members were organized to maintain themselves as sit-down strikers in possession of the plant, and it remained in possession until June 23, 1937, when the strikers were forcibly ejected pursuant to an injunction ordered by the Court of Appeals for the Third Circuit in *Apex Hosietry Co.* v. *Leader*, 90 F. 2d 155, 159; reversed and dismissal ordered as moot in *Leader* v. *Apex Hosiery Co.*, 302 U.S. 656.

The locks on all gates and entrances of petitioner's plant were changed; only strikers were given keys. No others were allowed to leave or enter the plant without permission of the strikers. During the period of their occupancy, the union supplied them with food, blankets, cots, medical care, and paid them strike benefits. While occupying the factory, the strikers wilfully wrecked machinery of great value, and did extensive damage to other property and equipment of the company. All manufacturing operations by petitioner ceased on May 6th. As the result of the destruction of the company's machinery and plant, it did not resume even partial manufacturing operations until August 19, 1937. The record discloses a lawless invasion of petitioner's plant and destruction of its property by force and violence of the most brutal and wanton character, under leadership and direction of respondents, and without interference by the local authorities.

For more than three months, by reason of respondents' acts, manufacture was suspended at petitioner's plant and the flow of petitioner's product into interstate commerce was stopped. When the plant was seized, there were on hand 130,000 dozen pairs of finished hosiery, of a value of about $800,000 ready for shipment on unfilled orders, 80 per cent of which were to be shipped to points outside the state. Shipment was prevented by the occupation of the factory by the strikers. Three times in the course of the strike respondents refused requests made by petitioner to be allowed to remove the merchandise for the purpose of shipment in filling the orders.

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Only a single question is presented by the record for our decision, whether the evidence which we have detailed, whose verity must be taken to be established by the jury's verdict, establishes a restraint of trade or commerce which the Sherman Act condemns. . . .

A point strongly urged in behalf of respondents in brief and argument before us is that Congress intended to exclude labor organizations and their activities wholly from the operation of the Sherman Act. To this the short answer must be made that for the thirty-two years which have elapsed since the decision of *Loewe* v. *Lawlor*, 208 U.S. 274, this Court, in its efforts to determine the true meaning and application of the Sherman Act has repeatedly held that the words of the act, "Every contract, combination . . . or conspiracy in restraint of trade or commerce" do embrace to some extent and in some circumstances labor unions and their activities; and that during that period Congress, although often asked to do so, has passed no act purporting to exclude labor unions wholly from the operation of the Act. On the contrary Congress has repeatedly enacted laws restricting or purporting to curtail the application of the Act to labor organizations and their activities, thus recognizing that to some extent not defined they remain subject to it. . . .

. . . In 1890 when the Sherman Act was adopted there were only a few federal statutes imposing penalties for obstructing or misusing interstate transportation. With an expanding commerce, many others have since been enacted safeguarding transportation in interstate commerce as the need was seen, including statutes declaring conspiracies to interfere or actual interference with interstate commerce by violence or threats of violence to be felonies. It was another and

quite a different evil at which the Sherman Act was aimed. It was enacted in the era of "trusts" and of "combinations" of business and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the goods and services, all of which had come to be regarded as a special form of public injury. . . .

. . . In the cases considered by this Court since the Standard Oil case in 1911 some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general, restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition. . . .

The question remains whether the effect of the combination or conspiracy among respondents was a restraint of trade within the meaning of the Sherman Act. This is not a case of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices. See *United States* v. *Brims*, 272 U.S. 549; *Local 167* v. *United States*, 291 U.S. 293. Here it is plain that the combination or conspiracy did not have as its purpose restraint upon competition in the market for petitioner's product. Its object was to compel petitioner to accede to the union's demands and an effect of it, in consequence of the strikers' tortious acts, was the prevention of the removal of petitioner's product for interstate shipment. So far as appears the delay of these shipments was not intended to have and had no effect on prices of hosiery in the market, and so was in that respect no more a restraint forbidden by the Sherman Act than the restriction upon competition and the course of trade held lawful in *Appalachian Coals* v. *United States, supra*, because, notwithstanding its effect upon the

marketing of the coal, it nevertheless was not intended to, and did not, affect market price.

A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a "restraint of trade." Since the enactment of the declaration in Sec. 6 of the Clayton Act that "the labor of a human being is not a commodity or article of commerce . . . nor shall such (labor) organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in the restraint of trade under the antitrust laws," it would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.

Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But under the doctrine applied to non-labor cases, the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act. *Appalachian Coals* v. *United States, supra,* 360. Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from nonunion made goods, see *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. . . .

This Court first applied the Sherman Act to a labor organization in *Loewe* v. *Lawlor,* 208 U.S. 274, in 1908, holding that the trial court had erroneously sustained a demurrer to the declaration in a suit for damages for violation of the Sherman Act on the ground that the combination alleged was not within the Act. The combination or con-

spiracy charged was that of a nation-wide labor organization to force all manufacturers of fur hats in the United States to organize their workers by maintaining a boycott against the purchase of the product of nonunion manufacturers shipped in interstate commerce. The restraint alleged was not a strike or refusal to work in the complainants' plant, but a secondary boycott by which, through threats to the manufacturer's wholesale customers and their customers, the Union sought to compel or induce them not to deal in the product of the complainants, and to purchase the competing products of other unionized manufacturers. This Court pointed out that the restraint was precisely like that in *Eastern States Retail Lumber Dealers Co.* v. *United States,* 234 U.S. 600, 610, 614, in which a conspiracy to circulate a "black list," intended to persuade retailers not to deal with specified wholesalers, was held to violate the Act because of its restraint upon competition with unlisted wholesalers. The Court in the *Loewe* case held that the boycott operated as a restraint of trade or commerce within the meaning of the Sherman Act, and that the language of the Act, "every combination, etc.," was broad enough to include a labor union imposing such a restraint. Like problems found a like solution in *Duplex Printing Press Co.* v. *Deering,* 254 U.S. 443, and in *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Assn.,* 274 U.S. 37; where, in the one case, a secondary boycott, and in the other, the refusal of the union to work on a product in the hands of the purchaser, were carried on on a countrywide scale by a national labor organization, in order to induce the purchasers of a manufactured product shipped in interstate commerce to withdraw their patronage from the producer. In both, as in the *Loewe* case, the effort of the union was to compel unionization of an employer's factory, not by a strike in his factory but by restraining, by the boycott or refusal to work on the manufactured product, purchases of his product in interstate commerce in competition with the like product of union shops.

In the *Bedford Stone* case it was pointed out that, as in the *Duplex Printing Press Co.* case, the strike was directed against the use of the manufactured product by consumers "with the immediate purpose and effect of restraining future sales and shipments in interstate commerce" and "with the plain design of suppressing or narrowing the interstate market," and that in this respect the case differed from those in which a factory strike, directed at the prevention of production with consequent cessation of interstate shipments, had been held not to be a violation of the Sherman law. See *First Coronado* case,

supra; Leather Workers case, *supra;* cf. *Second Coronado* case, *supra,* 310.

It will be observed that in each of these cases where the Act was held applicable to labor unions, the activities affecting interstate commerce were directed at control of the market and were so widespread as substantially to affect it. There was thus a suppression of competition in the market by methods which were deemed analogous to those found to be violations in the non-labor cases. . . . That the objective of the restraint in the boycott cases was the strengthening of the bargaining position of the union and not the elimination of business competition—which was the end in the non-labor cases—was thought to be immaterial because the Court viewed the restraint itself, in contrast to the interference with shipments caused by a local factory strike, to be of a kind regarded as offensive at common law because of its effect in curtailing a free market and it was held to offend against the Sherman Act because it effected and was aimed at suppression of competition with union made goods in the interstate market. . . .

These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to "monopolize the supply, control its price, or discriminate between its would-be purchasers." These elements of restraint of trade, found to be present in the *Second Coronado* case and alone to distinguish it from the *First Coronado* case and the *Leather Workers* case, are wholly lacking here. We do not hold that conspiracies to obstruct or prevent transportation in interstate commerce can in no circumstances be violations of the Sherman Act. Apart from the Clayton Act it makes no distinction between labor and non-labor cases. We only hold now, as we have previously held both in labor and non-labor cases, that such restraints are not within the Sherman Act unless they are intended to have, or in fact have, the effects on the market on which the Court relied to establish violation in the Second Coronado case. Unless the principle of these cases is now to be discarded, an impartial application of the Sherman Act to the activities of industry and labor alike would seem to require that the Act be held inapplicable to the activities of respondents

which had an even less substantial effect on the competitive conditions in the industry than the combination of producers upheld in the *Appalachian Coals* case and in others on which it relied.

If, without such effects on the market, we were to hold that a local factory strike, stopping production and shipment of its product interstate, violates the Sherman law, practically every strike in modern industry would be brought within the jurisdiction of the federal courts, under the Sherman Act, to remedy local law violations. The Act was plainly not intended to reach such a result, its language does not require it, and the course of our decision precludes it. The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress. The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. It draws no distinction between the restraints effected by violence and those achieved by peaceful but oftentimes quite as effective means. Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence.

Affirmed.

Case Questions

1. What was the verdict in the District Court? In the Circuit Court? In the Supreme Court?
2. State the controlling facts about the employer's business.
3. What was the union's demand? How did it seek to enforce it? Was the method of enforcement legal?
4. What is the "single question" presented by the record for decision by the Supreme Court?
5. Does this Supreme Court feel that labor combinations were intended to be entirely excluded from operation of the Sherman Act by Congress?
6. What type of restraints does the Supreme Court feel is prohibited by the Sherman Act?
7. Did the delay in hosiery shipments have an effect upon market price?
8. What does the court say as to the legality of "elimination of price competition based on differences in labor standards?"
9. How does the Supreme Court distinguish the *Apex* from the *Loewe, Bedford,* and *Duplex* cases? Does it overrule them?
10. What does the Court mean when it says the Sherman Act "draws no distinction between the restraints effected by violence and those achieved by peaceful . . . means?"
11. What illogical result does the Supreme Court feel would follow if it declared the present case to be within the Sherman Act?

UNITED STATES v. HUTCHESON

Supreme Court of the United States, 1941. 312 U.S. 219, 61 Sup. Ct. 463

FRANKFURTER, J. Whether the use of conventional, peaceful activities by a union in controversy with a rival union over certain jobs is a violation of the Sherman Law, Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. Sec. 1, is the question. It is sharply presented in this case because it arises in a criminal prosecution. Concededly an injunction either at the suit of the Government or of the employer could not issue.

Summarizing the long indictment, these are the facts. Anheuser-Busch, Inc., operating a large plant in St. Louis, contracted with Borsari Tank Corporation for the erection of an additional facility. The Gaylord Container Corporation, a lessee of adjacent property from Anheuser-Busch, made a similar contract for a new building with the Stocker Company. Anheuser-Busch obtained the materials for its brewing and other operations and sold its finished products largely through interstate shipments. The Gaylord Corporation was equally dependent on interstate commerce for marketing its goods, as were the construction companies for their building materials. Among the employees of Anheuser-Busch were members of the United Brotherhood of Carpenters and Joiners of America and of the International Association of Machinists. The conflicting claims of these two organizations, affiliated with the American Federation of Labor, in regard to the erection and dismantling of machinery had long been a source of controversy between them. Anheuser-Busch had had agreements with both organizations whereby the Machinists were given the disputed jobs and the Carpenters agreed to submit all disputes to arbitration. But in 1939 the president of the Carpenters, their general representative, and two officials of the Carpenters' local organization, the four men under indictment, stood on the claims of the Carpenters for the jobs. Rejection by the employer of the Carpenters' demand and the refusal of the latter to submit to arbitration were followed by a strike of the Carpenters, called by the defendants against Anheuser-Busch beer.

These activities on behalf of the Carpenters formed the charge of the indictment as a criminal combination and conspiracy in violation of the Sherman Law. Demurrers denying that what was charged constituted a violation of the laws of the United States were sustained, 32 F. Supp. 600, and the case came here under the Criminal Appeals Act. . . .

Section 1 of the Sherman Law on which the indictment rested is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." The controversies engendered by its application to trade union activities and the efforts to secure legislative relief from its consequences are familiar history. The Clayton Act of 1914 was the result. Act of October 15, 1914, 38 Stat. 730. "This statute was the fruit of unceasing agitation, which extended over more than twenty years and was designed to equalize before the law the position of workingmen and employer as industrial combatants." *Duplex Co.* v. *Deering,* 254 U.S. 443, 484. Section 20 of that Act, withdrew from the general interdict of the Sherman Law specifically enumerated practices of labor unions by prohibiting injunctions against them—since the use of the injunction had been the major source of dissatisfaction—and also relieved such practices of all illegal taint by the catch-all provision, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." The Clayton Act gave rise to new litigation and to renewed controversy in and out of Congress regarding the status of trade unions. By the generality of its terms the Sherman Law had necessarily compelled the courts to work out its meaning from case to case. It was widely believed that into the Clayton Act courts read the very beliefs which that Act was designed to remove. Specifically the courts restricted the scope of Sec. 20 to trade union activities directed against an employer by his own employees. *Duplex Co.* v. *Deering, supra.* Such a view, it was urged, both by powerful judicial dissents and informed lay opinion, misconceived the area of economic conflict that had best be left to economic forces and the pressure of public opinion and not subjected to the judgment of courts. *Ibid,* pp. 485-486. Agitation again led to legislation and in 1932 Congress wrote the Norris-LaGuardia Act. Act of March 23, 1932, 47 Stat. 70, 29 U.S.C. Secs. 101-115.

The Norris-LaGuardia Act removed the fetters upon trade union activities, which, according to judicial construction, Sec. 20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the "public policy of the United States" in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case,

to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and Sec. 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.

Were, then, the acts charged against the defendants prohibited, or permitted, by these three interlacing statutes? If the facts laid in the indictment come within the conduct enumerated in Sec. 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be "considered or held to be violations of any law of the United States." So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under Sec. 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means. There is nothing remotely within the terms of Sec. 20 that differentiates between trade union conduct directed against an employer because of a controversy arising in the relation between employer and employee, as such, and conduct similarly directed but ultimately due to an internecine struggle between two unions seeking the favor of the same employer. Such strife between competing unions has been an obdurate conflict in the evolution of so-called craft unionism and has undoubtedly been one of the potent forces in the modern development of industrial unions. These conflicts have intensified industrial tension but there is not the slightest warrant for saying that Congress has made Sec. 20 inapplicable to trade union conduct resulting from them.

In so far as the Clayton Act is concerned, we must therefore dispose of this case as though we had before us precisely the same conduct on the part of the defendants in pressing claims against Anheuser-Busch for increased wages, or shorter hours, or other elements of what are called working conditions. The fact that what was done in a competition for jobs against the Machinists rather than against, let us say, a company union is a differentiation which Congress has not put into the federal legislation and which therefore we cannot write into it.

It is at once apparent that the acts with which the defendants are charged are the kinds of acts protected by Sec. 20 of the Clayton Act. The refusal of the Carpenters to work for Anheuser-Busch or on construction work being done for it and its adjoining tenant, and the

peaceful attempt to get members of other unions similarly to refuse to work, are plainly within the free scope accorded to workers by Sec. 20 for "terminating any relation of employment," or "ceasing to perform any work or labor," or "recommending, advising, or persuading others by peaceful means so to do." The picketing of Anheuser-Busch premises with signs to indicate that Anheuser-Busch was unfair to organized labor, a familiar practice in these situations, comes within the language "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working." Finally, the recommendation to union members and their friends not to buy or use the product of Anheuser-Busch is explicitly covered by "ceasing to patronize . . . any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do."

Clearly, then, the facts here charged constitute lawful conduct under the Clayton Act unless the defendants cannot invoke that Act because outsiders to the immediate dispute also shared in the conduct. But we need not determine whether the conduct is legal within the restrictions which *Duplex Co.* v. *Deering* gave to the immunities of Sec. 20 of the Clayton Act. Congress in the Norris-LaGuardia Act has expressed the public policy of the United States and defined its conception of a "labor dispute" in terms that no longer leave room for doubt. *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products,* 311 U.S. 91. This was done, as we recently said, in order to "obviate the results of the judicial construction" theretofore given the Clayton Act. *New Negro Alliance* v. *Sanitary Grocery Co.,* 303 U.S. 552, 562; see *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 507, n. 26. Such a dispute, Sec. 13 (c) provides, "includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." And under Sec. 13 (b) a person is "participating or interested in a labor dispute" if he "is engaged in the same industry, trade, craft, or occupation, in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the Duplex case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines. That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness. . . .

The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. This was authoritatively stated by the House Committee on the Judiciary. "The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914 (38 Stat. L. 738), which act, by reason of its construction and application by the Federal courts, is ineffectual in accomplishing the congressional intent." H. Rep. No. 669, 72d Congress, 1st Session, p. 3. The Norris-LaGuardia Act was a disapproval of *Duplex Printing Press Co.* v. *Deering, supra,* and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.*, 274 U.S. 37, as the authoritative interpretation of Sec. 20 of the Clayton Act, for Congress now placed its own meaning upon that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light Sec. 20 removes all such allowable conduct from the taint of being a "violation of any law of the United States," including the Sherman Law.

There is no profit in discussing those cases under the Clayton Act which were decided before the courts were furnished the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict. And since the facts in the indictment are made lawful by the Clayton

Act in so far as "any law of the United States" is concerned, it would be idle to consider the Sherman Law apart from the Clayton Act as interpreted by Congress. Cf. *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469. It was precisely in order to minimize the difficulties to which the general language of the Sherman Law in its application to workers had given rise, that Congress cut through all the tangled verbalisms and enumerated concretely the types of activities which had become familiar incidents of union procedure.

Affirmed.

Case Questions

1. State the facts of this case.
2. According to this court, how can it be determined whether trade union conduct constitutes a violation of the Sherman Law?
3. What does the Court say about jurisdictional disputes and Section 20 of the Clayton Act?
4. What does Section 8 (b) (4) (D) of the National Labor Relations Act of 1947 say about jurisdictional disputes? (See text of Act in the Appendix.)
5. In the instant case, is the Norris-LaGuardia Act important to the decision? Why?

HUNT v. CRUMBOCH

Supreme Court of the United States, 1945. 325 U.S. 821, 65 Sup. Ct. 1545

BLACK, J. The question here is whether an organization of laboring men violated the Sherman Act, as amended, 26 Stat. 209, 38 Stat. 730, by refusing to admit to membership petitioner's employees, and by refusing to sell their services to petitioner, thereby making it impossible for petitioner profitably to continue in business.

For about fourteen years prior to 1939, the petitioner, a business partnership engaged in motor trucking, carried freight under a contract with the Great Atlantic & Pacific Tea Co. (A & P). Eighty-five per cent of the merchandise thus hauled by petitioner was interstate, from and to Philadelphia, Pennsylvania. The respondent union, composed of drivers and helpers, was affiliated with other A. F. of L. unions whose members worked at loading and hauling of freight by motor truck. In 1937, the respondent union called a strike of the truckers and haulers of A & P. in Philadelphia for the purpose of enforcing a closed shop. The petitioner, refusing to unionize its business, attempted to operate during the strike. Much violence occurred. One of the union men was killed near union headquarters, and a

member of the petitioner partnership was tried for the homicide and acquitted. A & P and the union entered into a closed-shop agreement, whereupon all contract haulers working for A & P, including the petitioner, were notified that their employees must join and become members of the union. All of the other contractor haulers except petitioner either joined the union or made closed-shop agreements with it. The union, however, refused to negotiate with the petitioner, and declined to admit any of its employees to membership. Although petitioner's services had been satisfactory, A & P, at the union's instigation, cancelled its contract with petitioner in accordance with the obligations of its closed-shop agreement with the union. Later, the petitioner obtained a contract with a different company, but again at the union's instigation, and upon the consummation of a closed-shop contract by that company with the union, petitioner lost that contract and business. Because of the union's refusal to negotiate with the petitioner and to accept petitioner's employees as members, the petitioner was unable to obtain any further hauling contracts in Philadelphia. The elimination of the petitioner's service did not in any manner affect the interstate operations of A & P or other companies.

The petitioner then instituted this suit in a federal district court against respondents, the union and its representatives, praying for an injunction and asking for treble damages. Demurrers to the complaint were overruled, the case was tried, findings of fact were made, and the district court rendered a judgment for the respondents on the ground that petitioner had failed to prove a cause of action under the anti-trust laws. 47 F. Supp. 571. The Circuit Court of Appeals affirmed, holding that the fact that respondents' actions had caused petitioner to go out of business was not such a restraint of interstate commerce as would be actionable under the Sherman and Clayton Acts. 143 F. 2d 902. We granted certiorari because of the questions involved concerning the responsibility of labor unions under the anti-trust laws.

The "destruction" of petitioner's business resulted from the fact that the union members, acting in concert, refused to accept employment with the petitioner, and refused to admit to their association anyone who worked for petitioner. The petitioner's loss of business is therefore analogous to the case of a manufacturer selling goods in interstate commerce who fails in business because union members refuse to work for him. Had a group of petitioner's business competitors conspired and combined to suppress petitioner's business by

refusing to sell goods and services to it, such a combination would have violated the Sherman Act. *Binderup* v. *Pathe Exchange,* 263 U.S. 291, 312; *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U.S. 457. A labor union which aided and abetted such a group would have been equally guilty. *Allen Bradley Co.* v. *Local Union No. 3, ante,* p. 797. The only combination here, however, was one of workers alone and what they refused to sell petitioner was their labor.

It is not a violation of the Sherman Act for laborers in combination to refuse to work. They can sell or not sell their labor as they please, and upon such terms and conditions as they choose, without infringing the anti-trust laws. *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 502-503. A worker is privileged under congressional enactments, acting either alone or in concert with his fellow workers, to associate or to decline to associate with other workers, to accept, refuse to accept, or to terminate a relationship of employment, and his labor is not to be treated as "a commodity or article of commerce." Clayton Act, 38 Stat. 730, 731; Norris-LaGuardia Act, 47 Stat. 70; see also *American Steel Foundries* v. *Tri-City Council,* 257 U.S. 184, 209. It was the exercise of these rights that created the situation which caused the petitioner to lose its hauling contracts and its business.

It is argued that their exercise falls within the condemnation of the Sherman Act, because the union members' refusal to accept employment was due to personal antagonism against the petitioner arising out of the killing of a union man. But Congress in the Sherman Act and the legislation which followed it manifested no purpose to make any kind of refusal to accept personal employment a violation of the anti-trust laws. Such an application of those laws would be a complete departure from their spirit and purpose. Cf. *Apex Hosiery Co.* v. *Leader, supra,* 512; *Allen Bradley* v. *Local Union No. 3, supra.* Moreover, "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under Sec. 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *United States* v. *Hutcheson,* 312 U.S. 219, 232.

It is further argued that the concerted refusal of union members to work for petitioner must be held to violate the Sherman Act because petitioner's business was "an instrumentality of interstate commerce." See *United States* v. *Trans-Missouri Freight Assn.,* 166 U.S. 290, 312. Acceptance of this contention would imply that work-

ers do not possess the same privileges to choose or reject employment with interstate carriers as with other businesses. The entire history of congressional legislation, including the Railway Labor Act, 48 Stat. 1185, belies this argument.

Finally, it is faintly suggested that our decisions in *Steele* v. *L. & N. R. Co.*, 323 U.S. 192; *Tunstall* v. *Brotherhood*, 323 U.S. 210, and *Wallace Corp.* v. *Labor Board*, 323 U.S. 248, require that we hold that respondents' conduct violated the Sherman Act. Those cases stand for the principle that a bargaining agent owes a duty not to discriminate unfairly against any of the group it purports to represent. But if the record showed discrimination against employees here, it would not even tend to show a violation of the Sherman Act. Congress has indicated no purpose to make a union's breach of duty to employees in a collective bargaining group an infraction of the Sherman Act.

The controversy in the instant case, between a union and an employer, involves nothing more than a dispute over employment, and the withholding of labor services. It cannot therefore be said to violate the Sherman Act, as amended. That Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce. "The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 513. Whether the respondents' conduct amounts to an actionable wrong subjecting them to liability for damages under Pennsylvania law is not our concern.

Affirmed.

Case Questions

1. Describe the triangular nature of this labor dispute.
2. What effect did the union's conduct have upon the petitioner's business?
3. State the rule of *Binderup* v. *Pathe Exchange*, 263 U.S. 291. Does the same rule apply to laborers in combination?
4. Under the rule of this case, is any kind of refusal to accept personal employment a violation of the antitrust laws?

SECTION 54. CONCERT WITH NONLABOR GROUPS

It is not to be concluded from the materials in Section 53 that the Sherman Act has been stripped of all efficacy in its impact upon labor combinations. There still remains an area, somewhat narrow in scope it is true, across which the antitrust laws still raise a limiting barrier. The nature of that barrier is exemplified in the *Brims* and *Allen Bradley* decisions reprinted in this section.

The last two cases in this section, while involving labor concert with employer groups, have been injected to emphasize two other elements, the jurisdictional and the evidentiary. The *Albrecht* case illustrates the former and the *United Brotherhood* case illustrates the latter.

UNITED STATES v. BRIMS

Supreme Court of the United States, 1926. 272 U.S. 549, 47 Sup. Ct. 169

MCREYNOLDS, J. Respondents were charged with engaging in a combination and conspiracy to restrain interstate trade and commerce contrary to inhibitions of the Sherman Act, C. 647, 26 Stat. 209, 15 U.S.C.A. Secs. 1-7, 15 note, and were found guilty by a jury. The Circuit Court of Appeals reviewed and reversed the judgment of conviction upon the sole ground of fatal variance between allegation and proof, or failure of proof to support the charge. 6 F. 2d 98. They said:

"The indictment charged defendants with 'combining or conspiring to prevent manufacturing plants located outside of the City of Chicago and in other States than Illinois from selling and delivering their building material in and shipping the same to said City of Chicago.' . . . The proof, however, disclosed merely an agreement between defendants whereby union defendants were not to work upon nonunion-made millwork. . . . The agreement which the defendants entered into merely dealt with millwork which was the product of nonunion labor. It mattered not where the millwork was produced, whether in or outside of Illinois, if it bore the union label. The restriction was not against the shipment of millwork into Illinois. It was against nonunion-made millwork produced in or out of Illinois. We find no evidence which would support a finding that the agreement embodied in Article 3 of Section 3 was not the real agreement of the parties. Wherefore, we conclude there is a fatal variance and the evidence does not sustain the indictment."

They considered no other objection to the judgment of conviction, and the cause came here by certiorari because that point seemed to require further examination. We think it was wrongly decided.

The challenged combination and agreement related to the manufacture and installation in the City of Chicago of building material commonly known as millwork, which includes window and door fittings, sash, baseboard, molding, cornice, etc., etc. The respondents were manufacturers of millwork in Chicago, building contractors who purchase and cause such work to be installed, and representatives of the carpenters' union whose members are employed by both manufacturers and contractors.

It appears that the respondent manufacturers found their business seriously impeded by the competition of material made by nonunion mills located outside of Illinois—mostly in Wisconsin and the South—which sold their product in the Chicago market cheaper than local manufacturers who employed union labor could afford to do. Their operations were thus abridged and they did not employ so many carpenters as otherwise they could have done.

They wished to eliminate the competition of Wisconsin and other nonunion mills which were paying lower wages and consequently could undersell them. Obviously, it would tend to bring about the desired result if a general combination could be secured under which the manufacturers and contractors would employ only union carpenters with the understanding that the latter would refuse to install nonunion-made millwork. And we think there is evidence reasonably tending to show that such a combination was brought about, and that, as intended by all the parties, the so-called outside competition was cut down and thereby interstate commerce directly and materially impeded. The local manufacturers, relieved from the competition that came through interstate commerce, increased their output and profits; they gave special discounts to local contractors; more union carpenters secured employment in Chicago and their wages were increased. These were the incentives which brought about the combination. The nonunion mills outside of the city found their Chicago market greatly circumscribed or destroyed; the price of buildings was increased; and, as usual under such circumstances, the public paid excessive prices.

The allegations of the bill were sufficient to cover a combination like the one which some of the evidence tended to show. It is a matter of no consequence that the purpose was to shut out nonunion millwork made within Illinois as well as that made without. The crime

of restraining interstate commerce through combination is not condoned by the inclusion of intrastate commerce as well. . . .

An order will be entered reversing the judgment of the Circuit Court of Appeals and remanding the cause to that court for further proceedings in harmony with this opinion.

Reversed.

Case Questions

1. Upon what grounds did the Circuit Court of Appeals reverse the conviction of defendants?
2. What was the nature and effect of the agreement between the union and the mills?
3. What decision did the Supreme Court reach?

ALLEN BRADLEY CO. v. LOCAL UNION NO. 3

Supreme Court of the United States, 1945. 325 U.S. 797, 65 Sup. Ct. 1533

BLACK, J. The question presented is whether it is a violation of the Sherman Anti-Trust Act for labor unions and their members, prompted by a desire to get and hold jobs for themselves at good wages and under high working standards, to combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods.

Upon the complaint of petitioners and after a lengthy hearing the District Court held that such a combination did violate the Sherman Act, entered a declaratory judgment to that effect, and entered an injunction restraining respondents from engaging in a wide range of specified activities. 41 F. Supp. 727, 51 F. Supp. 36. The Circuit Court of Appeals reversed the decision and dismissed the cause, holding that combinations of unions and business men which restrained trade and tended to monopoly were not in violation of the Act where the bona fide purpose of the unions was to raise wages, provide better working conditions, and bring about better conditions of employment for their members. 145 F. 2d 215. The Ninth Circuit Court of Appeals having reached a contrary conclusion in a similar case, 144 F. 2d 546, we granted certiorari in both cases.

The facts were sufficiently set out in the opinions below and need not be detailed again. The following summary will suffice for our purposes.

Petitioners are manufacturers of electrical equipment. Their places of manufacture are outside of New York City, and most of

them are outside of New York State as well. They have brought this action because of their desire to sell their products in New York City, a market area that has been closed to them through the activities of respondents and others.

Respondents are a labor union, its officials and its members. The union, Local No. 3 of the International Brotherhood of Electrical Workers, has jurisdiction only over the metropolitan area of New York City. It is therefore impossible for the union to enter into a collective bargaining agreement with petitioners. Some of petitioners do have collective bargaining agreements with other unions, and in some cases even with other locals of the I.B.E.W.

Some of the members of respondent union work for manufacturers who produce electrical equipment similar to that made by petitioners; other members of respondent union are employed by contractors and work on the installation of electrical equipment, rather than in its production.

The union's consistent aim for many years has been to expand its membership, to obtain shorter hours and increased wages, and to enlarge employment opportunities for its members. To achieve this latter goal—that is, to make more work for its own members—the union realized that local manufacturers, employers of the local members, must have the widest possible outlets for their product. The union therefore waged aggressive campaigns to obtain closed-shop agreements with all local electrical equipment manufacturers and contractors. Using conventional labor union methods, such as strikes and boycotts, it gradually obtained more and more closed-shop agreements in New York City area. Under these agreements, contractors were obligated to purchase equipment from none but local manufacturers who also had closed-shop agreements with Local No. 3; manufacturers obligated themselves to confine their New York City sales to contractors employing the Local's members. In the course of time, this type of individual employer-employee agreement expanded into industry-wide understandings, looking not merely to terms and conditions of employment but also to price and market control. Agencies were set up composed of representatives of all three groups to boycott recalcitrant local contractors and manufacturers and to bar from the area equipment manufactured outside its boundaries. The combination among the three groups, union, contractors, and manufacturers, became highly successful from the standpoint of all of them. . . .

Quite obviously, this combination of business men has violated both Secs. 1 and 2 of the Sherman Act, unless its conduct is im-

munized by the participation of the union. For it intended to and did restrain trade in and monopolize the supply of electrical equipment in the New York City area to the exclusion of equipment manufactured in and shipped from other states, and did also control its price and discriminate between its would-be customers. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 512-513. Our problem in this case is therefore a very narrow one—do labor unions violate the Sherman Act when, in order to further their own interests as wage earners, they aid and abet business men to do the precise things which that Act prohibits?

The Sherman Act as originally passed contained no language expressly exempting any labor union activities. Sharp controversy soon arose as to whether the Act applied to unions. One viewpoint was that the only evil at which Congress had aimed was high consumer prices achieved through combinations looking to control of markets by powerful groups; that those who would have a great incentive for such combinations would be the business men who would be the direct beneficiaries of them; therefore, the argument proceeded, Congress drafted its law to apply only to business combinations, particularly the large trusts, and not to labor unions or any of their activities as such. Involved in this viewpoint were the following contentions: that the Sherman Act is a law to regulate trade, not labor, a law to prescribe the rules governing barter and sale, and not the personal relations of employers and employees; that good wages and working conditions helped and did not hinder trade, even though increased labor costs might be reflected in the cost of products; that labor was not a commodity; that laborers had an inherent right to accept or terminate employment at their own will, either separately or in concert; that to enforce their claims for better wages and working conditions, they had a right to refuse to buy goods from their employer or anybody else; that what they could do to aid their cause, they had a right to persuade others to do; and that the antitrust laws designed to regulate trading were unsuitable to regulate employer-employee relations and controversies. The claim was that the history of the legislation supported this line of argument.

The contrary viewpoint was that the Act covered all classes of people and all types of combinations, including unions, if their activities even physically interrupted the free flow of trade or tended to create business monopolies, and that a combination of laborers to obtain a raise in wages was itself a prohibited monopoly. Federal courts adopted the latter view and soon applied the law to unions in

a number of cases. Injunctions were used to enforce the Act against unions. At the same time, employers invoked injunctions to restrain labor union activities even where no violation of the Sherman Act was charged.

Vigorous protests arose from employee groups. The unions urged congressional relief from what they considered to be two separate, but partially overlapping evils—application of the Sherman Act to unions, and issuance of injunctions against strikes, boycotts and other labor union weapons. Numerous bills to curb injunctions were offered. Other proposed legislation was intended to take labor unions wholly outside any possible application of the Sherman Act. All of this is a part of the well known history of the era between 1890 and 1914.

To amend, supplement and strengthen the Sherman Act against monopolistic business practices, and in response to the complaints of the unions against injunctions and application of the Act to them, Congress in 1914 passed the Clayton Act. Elimination of those "trade practices" which injuriously affected competition was its first objective. Each section of the measure prohibiting such trade practices contained language peculiarly appropriate to commercial transactions as distinguished from labor union activities, but there is no record indication in anything that was said or done in its passage which indicates that those engaged in business could escape its or the Sherman Act's prohibitions by obtaining the help of labor unions or others. That this bill was intended to make it all the more certain that competition should be the rule in all commercial transactions is clear from its language and history.

In its treatment of labor unions and their activities, the Clayton Act pointed in an opposite direction. Congress in that Act responded to the prolonged complaints concerning application of the Sherman law to labor groups by adopting Sec. 6; for this purpose, and also drastically to restrict the general power of federal courts to issue labor injunctions, Sec. 20 was adopted. Section 6 declared that labor was neither a commodity nor an article of commerce, and that the Sherman Act should not be "construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help. . . ." Section 20 limited the power of courts to issue injunctions in a case "involving or growing out of a labor dispute over terms or conditions of employment. . . ." It declared that no restraining order or injunction should prohibit certain specified acts, and further declared that no one of these speci-

fied acts should be "held to be violations of any law of the United States." This Act was broadly proclaimed by many as labor's "Magna Carta," wholly exempting labor from any possible inclusion in the antitrust legislation; others, however, strongly denied this.

This Court later declined to interpret the Clayton Act as manifesting a congressional purpose wholly to exempt labor unions from the Sherman Act. *Duplex Co.* v. *Deering,* 254 U.S. 443; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U.S. 37. In those cases labor unions had engaged in a secondary boycott; they had boycotted dealers, by whom the union members were not employed, because those dealers insisted on selling goods produced by the employers with whom the unions had an existing controversy over terms and conditions of employment. This court held that the Clayton Act exempted labor union activities only in so far as those activities were directed against the employees' immediate employers and that controversies over the sale of goods by other dealers did not constitute "labor disputes" within the meaning of the Clayton Act.

Again the unions went to Congress. They protested against this Court's interpretation, repeating the arguments they had made against application of the Sherman Act to them. Congress adopted their viewpoint, at least in large part, and in order to escape the effect of the *Duplex* and *Bedford* decisions, passed the Norris-LaGuardia Act, 47 Stat. 70. That Act greatly broadened the meaning this Court had attributed to the words "labor dispute," further restricted the use of injunctions in such a dispute, and emphasized the public importance under modern economic conditions of protecting the rights of concerted activities for the purpose of collective bargaining or other mutual aid and protection." This congressional purpose found further expression in the Wagner Act, 49 Stat. 449.

We said in *Apex Hosiery Co.* v. *Leader, supra,* 488, that labor unions are still subject to the Sherman Act to "some extent not defined." The opinion in that case, however, went on to explain that the Sherman Act "was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern"; that its purpose was to protect consumers from monopoly prices, and not to serve as a comprehensive code to regulate and police all kinds and types of interruptions and obstructions to the flow of trade. This was a recognition of the fact that Congress had accepted the arguments made continuously since

1890 by groups opposing application of the Sherman Act to unions. It was an interpretation commanded by a fair consideration of the full history of anti-trust and labor legislation.

United States v. *Hutcheson*, 312 U.S. 219, declared that the Sherman, Clayton and Norris-LaGuardia Acts must be jointly considered in arriving at a conclusion as to whether labor union activities run counter to the anti-trust legislation. Conduct which they permit is not to be declared a violation of federal law. That decision held that the doctrine of the *Duplex* and *Bedford* cases was inconsistent with the congressional policy set out in the three "interlacing statutes."

The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.

Aside from the fact that the labor union here acted in combination with the contractors and manufacturers, the means it adopted to contribute to the combination's purpose fall squarely within the "specified acts" declared by Sec. 20 not to be violations of federal law. For the union's contribution to the trade boycott was accomplished through threats that unless their employers bought their goods from local manufacturers the union laborers would terminate the "relation of employment" with them and cease to perform "work or labor" for them; and through their "recommending, advising, or persuading others by peaceful and lawful means" not to "patronize" sellers of the boycotted electrical equipment. Consequently, under our holdings in the Hutcheson case and other cases which followed it, had there been no union-contractor-manufacturer combination, the union's actions here, coming as they did within the exemptions of the Clayton and Norris-LaGuardia Acts, would not have been violations of the Sherman Act. We pass to the question of whether unions can with impunity aid and abet business men who are violating the Act.

On two occasions this Court has held that the Sherman Act was violated by a combination of labor unions and business men to restrain trade. In neither of them was the Court's attention sharply called to the crucial questions here presented. Furthermore, both were decided before the passage of the Norris-LaGuardia Act and prior to our holding in the Hutcheson case. It is correctly argued by respondents that these factors greatly detract from the weight which

the two cases might otherwise have in the instant case. See *United States* v. *Hutcheson, supra,* 236. Without regard to these cases, however, we think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services.

Section 6 of the Clayton Act declares that the Sherman Act must not be so construed as to forbid the "existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help. . . ." But "the purpose of mutual help" can hardly be thought to cover activities for the purpose of "employer-help" in controlling markets and prices. And in an analogous situation where an agricultural association joined with other groups to control the agricultural market, we said:

"The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise." *United States* v. *Borden Co.,* 308 U.S. 188, 204-205. (Italics supplied.)

We have been pointed to no language in any act of Congress or in its reports or debates, nor have we found any, which indicates that it was ever suggested, considered, or legislatively determined that labor unions should be granted an immunity such as is sought in the present case. It has been argued that this immunity can be inferred from a union's right to make bargaining agreements with its employer. Since union members can without violating the Sherman Act strike to enforce a union boycott of goods, it is said they may settle the strike by getting their employers to agree to refuse to buy the goods. Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local No. 3. We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other business men from that area, and to charge the public prices above a competitive level. It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved

this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. *Apex Hosiery Co.* v. *Leader, supra,* 503. But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.

It must be remembered that the exemptions granted the unions were special exceptions to a general legislative plan. The primary objective of all the anti-trust legislation has been to preserve business competition and to proscribe business monopoly. It would be a surprising thing if Congress, in order to prevent a misapplication of that legislation to labor unions, had bestowed upon such unions complete and unreviewable authority to aid business groups to frustrate its primary objective. For if business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves. Seldom, if ever, has it been claimed before, that by permitting labor unions to carry on their own activities, Congress intended completely to abdicate its constitutional power to regulate interstate commerce and to empower interested business groups to shift our society from a competitive to a monopolistic economy. Finding no purpose of Congress to immunize labor unions who aid and abet manufacturers and traders in violating the Sherman Act, we hold that the district court correctly concluded that the respondents had violated the Act.

Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. This, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress. *Apex Hosiery Co.* v. *Leader, supra.* It is true that many labor union activities do substantially interrupt the course of trade and that these activities, lifted out of the prohibitions of the Sherman Act, include substantially all, if not all, of the normal peaceful activities of labor unions. It is also true that the Sherman Act "draws no distinction between the restraints effected by violence and those achieved by peaceful . . . means," *Apex Hosiery Co.* v. *Leader, supra,* 513, and that a union's exemption

from the Sherman Act is not to be determined by a judicial "judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *United States* v. *Hutcheson, supra,* 232. Thus, these congressionally permitted union activities may restrain trade in and of themselves. There is no denying the fact that many of them do so, both directly and indirectly. Congress evidently concluded, however, that the chief objective of anti-trust legislation, preservation of business competition, could be accomplished by applying the legislation primarily only to those business groups which are directly interested in destroying competition. The difficulty of drawing legislation primarily aimed at trusts and monopolies so that it could also be applied to labor organizations without impairing the collective bargaining and related rights of those organizations has been emphasized both by congressional and judicial attempts to draw lines between permissible and prohibited union activities. There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolis. A business monopoly is no less such because a union participates, and such participation is a violation of the Act.

The judgment of the Circuit Court of Appeals ordering the action dismissed is accordingly reversed and the cause is remanded to the district court for modification and clarification of the judgment and injunction, consistent with this opinion.

Reversed and remanded.

Case Questions

1. Discuss the triangular nature of the agreement to exercise price and market control in this situation.
2. State the problem of the case in the words of the court.
3. State the line of argument employed by those who contend that the Sherman Act was intended for application only against employer combinations and not labor combinations.
4. Reiterate the provisions of Sections 6 and 20 of the Clayton Act.
5. Discuss the history of the Norris-LaGuardia Act.
6. Would it have been a violation of the Sherman Act if the employers agreed with the union not to purchase goods by companies not employing members of Local No. 3?
7. Did the agreement go further than that stated in Question 6?
8. State the major rule of law developed by the case.

ALBRECHT v. KINSELLA

Circuit Court of Appeals, Seventh Circuit, 1941. 119 Fed. (2d) 1003

EVANS, C. J. The trial court sustained defendants' motion to dismiss plaintiff's complaint, which attempted to state a case for treble damages under the Clayton Act. The damages arose out of an alleged conspiracy between a contractors' association and a labor union, to monopolize—to the exclusion of plaintiff—the contracting business in the City of Peoria, Illinois, which exclusion affected interstate commerce by causing plaintiff to cease importing his materials from without the State of Illinois.

The two issues are: (1) Does the complaint allege a conspiracy within the Sherman and Clayton Acts? (2) Is a labor union liable for violation of the said Acts?

The plaintiff is a plastering contractor, a resident of Pekin, Illinois, and has an office in Peoria, Illinois.

The defendants are: (1) Local No. 12, which is a labor union of plasterers and cement finishers; (2) Jack Kinsella, who is business manager of Local No. 12, and other officials of said union; and (3) James Bell, et al., plastering contractors in Peoria, who formed a contractors association.

Plaintiff alleges that the contractors association and the union entered into an agreement that members of the Local Union would work only for such contractors who were members of the association (or were recognized by it). Plaintiff was informed that if he did not become a member of the association he would be unable to do any jobs in Peoria. Under this threat, he sought to join the association, but was refused membership on the ground that he was not a resident of Peoria. He alleges that such refusal was arbitrary, and was really the result of the conspiracy to prevent him from working in Peoria, which conspiracy sought to monopolize the plastering work in that vicinity.

He alleges that Kinsella told him that if he would pay the contractors association ten per cent of the amount received by him he would be furnished labor. Plaintiff submitted bids gauged to include said extra ten per cent, but never succeeded in obtaining work, because the bid was too high. He also charges that during the years 1936-1938 he completed contracts aggregating $146,500 in value, but that, in the year 1939, he was unable to negotiate any contract in that vicinity, and those contracts which he had begun had to be abandoned to others. As a result thereof, he purchased no materials from outside the state. In carrying out his contracts he had always purchased

metal laths from a company in Iowa, and purchased lime from a local dealer, but said lime was manufactured outside the State of Illinois.

In August, 1939, plaintiff was performing a contract of plastering and lathing a school building in East Peoria, and had half completed the work. On the fourth of August, Kinsella "ordered all the men employed by the plaintiff on said jobs to cease work and thereafter refused to let plaintiff have workmen to complete said jobs. . . . The general contractor completed the jobs and plaintiff lost considerable profit he would otherwise have earned."

Passing first upon the applicability of the Sherman Anti-Trust Act, 15 U.S.C.A. Secs. 1-7, 15 note, and Clayton Act, 38 Stat. 730, to labor unions, we conclude that the instant conspiracy, one party to which was a labor union, would fall within the condemnation of the Acts, if the other necessary factors were present.

Since the decision in the *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311, 128 A.L.R. 1044, there is little doubt that the instances in which a labor union can run afoul the Act are few; nevertheless, they are not completely free from its ambit.

In the instant case, the union was seeking no such ordinary end as an increase in wages, decrease in hours, proper representations, etc. Taking the allegations of the complaint at their face value, the union and the contractors association were attempting to monopolize the plaster contracting business to increase the profits of the respective members. This was to be accomplished by stifling competition, through methods foul and unfair. It had the objectives—taking the allegations as verities—which the Sherman and Clayton Acts were directly aimed at punishing.

"The end sought (by the Acts) was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury." *Apex* case, *supra,* 310 U.S., page 493, 60 S. Ct., page 992, 84 L. Ed. 1311, 128 A.L.R. 1044.

Labor unions as such were here involved only in name—and the name of labor was being used as a shield or blind behind which a venal group was hiding and at the same time levying a tribute upon industry, business, and home builders.

When a corporation acts outside the scope of its authority, the result may be, and often is, the creation of an officers' or directors' liability. The owner of a valid patent has a legal monopoly of the

product covered by the patent. If he steps outside that monopoly, however, and joins with other patentees to stifle competition and extend and tighten the monopoly in said product, he is liable, in a civil suit, and he is also subject to a criminal prosecution. When officials of the labor union step outside their union labor fields and act as highway men, levying tribute on those who wish to build homes or other buildings, acting for their individual gain, the immunity granted to labor unions under the amendment to the Sherman Act does not extend to them. They are not acting as labor unions except in name. The test is whether the activity complained of is one promotive of, and within the scope of, the legitimate objects of a labor union or whether the union is being misused by those holding official position or positions of trust therein, who, conspiring for their private and their personal profit, are using the union name to obtain immunity from Sherman Act prosecutions and at the same time shield their misconduct behind an organization whose fair name and activities are likely to mislead a court or jury as well as the public.

Another issue, however, is fatal to plaintiff's right to recover. It may be stated thus,—Was the commerce which the conspiracies involved, such as is required by the Sherman and Clayton Acts? Stating it more narrowly, since we have determined that the objects of the conspiracy were within the contemplation of the Acts,—Is the interstate commerce involved in this conspiracy of that quality or character and so related to the object of the conspiracies as is necessary to invoke the Sherman and Clayton Acts and make them applicable?

Because the effect upon interstate commerce is remote and merely incidental and the object of the conspiracy was not directed against such interstate trade, but wholly against local trade, we must, under the decisions, hold that the case falls outside these Acts. *Levering & G. Co.* v. *Morin,* 289 U.S. 103, 53 S. Ct. 549, 77 L. Ed. 1062; *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311, 128 A.L.R. 1044.

Further comment, or statement of our views, is unnecessary. We have not only a square holding by the majority of the court, which we must follow, to the effect that the interstate commerce such as is here involved, is insufficient to invoke the application of the Acts, but we have a dissenting opinion which helps to clarify the extent of the majority opinion holding. To express our sympathy with the views of the minority opinion would be supererogation. We bow to and follow the majority opinion and therefore hold that the interstate

commerce here involved was insufficient to invoke the application of the Federal Acts in question.

The judgment is affirmed.

Case Questions

1. What is the plaintiff seeking in this case?
2. Discuss the agreement entered into here and its purpose.
3. What result was reached by the court and why?

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA v. UNITED STATES

Supreme Court of the United States, 1947. 330 U.S. 395, 67 Sup. Ct. 775

REED, J. These are criminal cases in which conviction of various defendants has been obtained in the District Court of the United States for the Northern District of California, Southern Division, and affirmed by the Circuit Court of Appeals of the Ninth Circuit, 144 F. 2d 546. They were charged with conspiracy to violate the Sherman Act, Sec. 1. The parties to the alleged conspiracy were of two groups: on the one hand, local manufacturers of and dealers in the commodities affected and their incorporated trade associations and officials thereof; and, on the other, unincorporated trade unions and their officials or business agents. The indictment charged that the defendants below unlawfully combined and conspired together, successfully, to monopolize unduly a part of interstate commerce in millwork and patterned lumber. The purpose and effect of the conspiracy was alleged to be to restrain out-of-state manufacturers from shipping and selling these commodities within the San Francisco Bay area of California and to prevent the dealers in that area from freely handling them. It was alleged that the conspiracy also sought to raise the prices of the products affected. To achieve the purpose, a contract was entered into between the defendants for a wage scale for members of labor unions working on the articles involved, combined with a restrictive clause, ". . . no material will be purchased from, and no work will be done on any material or article that has had any operation performed on same by Saw Mills or Cabinet Shops, or their distributors, that do not conform to the rates of wage and working conditions of this agreement," with specified exceptions not here material. This clause, it is alleged, was enforced to the mutual advantage of the conspirators by some of the parties through conference or picketing or acquiescence in the arrangement. By means

of the conspiracy, union workmen obtained better wages, the employers higher profits and manufacturers against whom the conspiracy was directed were largely prevented from sharing in the Bay Area business, all to the price disadvantage of the consumer and the unreasonable restraint of interstate commerce. The legal theory which was followed in their conviction was that conspiracies between employers and employees to restrain interstate commerce violate the Sherman Act.

Five petitions for certiorari were presented to this Court by different defendants either singly or jointly with others. It is sufficient for the purposes of this review to say that they raised the question of the application of Sec. 1 of the Sherman Act to conspiracies between employers and employees to restrain commerce and, except the petitions in the employer group, the application of Sec. 6 of the Norris-LaGuardia Act in a trial of such an indictment.[1] On account of the importance of the federal questions raised and asserted conflicts in the circuits, the writs of certiorari were granted.

Since these cases were taken the important question of the application of the Sherman Act to a conspiracy between labor union and business groups has been decided by us. We held that such a conspiracy to restrain trade violated the Sherman Act. *Allen Bradley Co.* v. *Local Union No. 3,* 325 U.S. 797, 65 Sup. Ct. 1533, 89 L. Ed. 1939. This holding causes us to approve the ruling of the trial and appellate courts on the first question presented by the certiorari but it left unresolved the question as to the application of Sec. 6 of the Norris-LaGuardia Act, the point to which this decision is directed.

The indictment charges a conspiracy forbidden by the Sherman Act. On that issue, the power of the trial court is limited by Sec. 6 of the Norris-LaGuardia Act. Note 1, *supra.* The limitations of that section are upon all courts of the United States in all matters growing out of labor disputes, covered by the Act, which may come before them. It properly is conceded that this agreement grew out of such a labor dispute and that all parties defendant participated or were interested in that dispute. . . .

We need not determine whether Sec. 6 should be called a rule of evidence or one that changes the substantive law of agency. We hold

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[1] 47 Stat. 70, 71, 29 U.S.C.A. Sec. 106:
"Sec. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

that its purpose and effect was to relieve organizations, whether of labor or capital, and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization without clear proof that the organization or member, charged with responsibility for the offense, actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration.

Thus Sec. 6 limited responsibility for acts of a co-conspirator—a matter of moment to the advocates of the bill. Before the enactment of Sec. 6, when a conspiracy between labor unions and their members, prohibited under the Sherman Act, was established, a widely publicized case had held both the unions and their members liable for all overt acts of their co-conspirators. This liability resulted whether the members or the unions approved of the acts or not or whether or not the acts were offenses under the criminal law. While of course participants in a conspiracy that is covered by Sec. 6 are not immunized from responsibility for authorized acts in furtherance of such a conspiracy, they now are protected against liability for unauthorized illegal acts of other participants in the conspiracy.

The legislative history makes the intended meaning of the word "authorization," we think, almost equally clear. The rule of liability for acts of an agent within the scope of his authority, based on the *Danbury Hatters* case, was urged as an argument against the language of Sec. 6. When the Senate Committee on the Judiciary reported the bill, it dealt with this contention.

"But the argument is made that a man is held legally responsible for the acts of his agents taken in due course of employment. This argument is evidently based upon a doctrine of the civil law of negligence. It has no application to the criminal law. If a man is held responsible for an unlawful act, his responsibility rests on the basis of actual or implied participation. He is responsible for conspiring to do an unlawful act or for setting in motion forces intended to result, or necessarily resulting, in an unlawful act.

". . . It is high time that, by legislative action, the courts should be required to uphold the long established law that guilt is personal and that men can only be held responsible for the unlawful acts of associates because of participation in, authorization or ratification of such acts. As a rule of evidence, clear proof should be required, so that criminal guilt and criminal responsibility should not be imputed but proven beyond reasonable doubt in order to impose liability."

We hold, therefore, that "authorization" as used in Sec. 6 means something different from corporate criminal responsibility for the acts of officers and agents in the course or scope of employment. We are of the opinion that the requirement of "authorization" restricts the responsibility or liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of those associations or organizations, although such officers or members are acting within the scope of their general authority as such officers or members, to those associations, organizations or their officers or members who actually participate in the unlawful acts, except upon clear proof that the particular act charged, or acts generally of that type and quality, had been expressly authorized, or necessarily followed from a granted authority, by the association or non-participating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence.

In this prosecution the United Brotherhood of Carpenters and Joiners and all the local unions who were convicted requested an instruction or instructions that embodied the above interpretation of Sec. 6. A similar request was made by the individual members by requested instruction No. 58. These requested instructions were refused and instead instructions were given that stated a different concept of law. . . .

So far as the Unions, both local and national, are concerned, the necessity, under our construction, for an instruction based on Sec. 6 is apparent. The United Brotherhood was not a party to any of the agreements. Local unions took a more definite part than the United Brotherhood. In some instances the name of a local union was signed to the agreement that contained the restrictive clause. Necessarily, acts performed by or for the unions were done by their individual officers, members or agents. We do not enter into an analysis of the evidence that was relied upon to show the participation of the unions in the conspiracy. The evidence in any new trial may be quite different. No matter how strong the evidence may be of an association's or organization's participation through its agents in the conspiracy, there must be a charge to the jury setting out correctly the limited liability under Sec. 6 of such association or organization for acts of its agents. For a judge may not direct a verdict of guilty no matter how conclusive the evidence. There is no way of knowing here whether the jury's verdict was based on facts within the condemned instructions, or on actual authorization or ratification of such acts.

A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction. We are of the opinion, therefore, that the judge should have instructed the jury as to the limitations upon the association's liability for the acts of its agents under Sec. 6. The error is aggravated by the failure to give the correct charge upon request.

The suggestion is made that the alert and powerful unions and corporations gain the greatest degree of immunity under our interpretation of Sec. 6. That is not the case. Section 6 draws no distinction as to liability for unauthorized acts between the large and the small, between national unions and local unions, between associations or organizations and their members. And we draw no such distinctions.

There is no implication in what we have said that an association or organization in circumstances covered by Sec. 6 must give explicit authority to its officers or agents to violate in a labor controversy the Sherman Act or any other law or to give antecedent approval to any act that its officers may do. Certainly an association or organization cannot escape responsibility by standing orders disavowing authority on the part of its officers to make any agreements in violation of the Sherman Act and disclaiming union responsibility for such agreements. Facile arrangements do not create immunity from the act, whether they are made by employee or by employer groups. The conditions of liability under Sec. 6 are the same in the case of each. The grant of authority to an officer of a union to negotiate agreements with employers regarding hours, wages, and working conditions may well be sufficient to make the union liable. An illustrative but nonrestrictive example might be where there was knowing participation by the union in the operation of the illegal agreement after its execution. And the custom or traditional practice of a particular union can also be a source of actual authorization of an officer to act for and bind the union.

Our only point is this: Congress in Sec. 6 has specified the standards by which the liability of employee and employer groups is to be determined. No matter how clear the evidence, they are entitled to have the jury instructed in accordance with the standards which Congress has prescribed. To repeat, guilt is determined by the jury, not the court. The problem is not materially different from one where the evidence against an accused charged with a crime is well nigh conclusive and the court fails to give the reasonable doubt

instruction. It could not be said that the failure was harmless error.[2] . . .

The judgments in each case are reversed and the causes remanded to the District Court.

Case Questions

1. What type of action was brought against defendants?
2. Who are the defendants and why was action brought?
3. State the substance of Section 6 of the Norris-LaGuardia Act.
4. What was the purpose of Section 6?
5. What jury instruction was asked for by the defendants in the court below?
6. Should the instruction asked have been given to the jury? Why?

[2] The agency rule enunciated in Sec. 2 (13) of the National Labor Relations Act of 1947 is not applicable to suits under the Sherman Act. In criminal prosecutions under the Sherman Act, the rule of the parent case obtains. Section 303 of the National Labor Relations Act, while permitting private parties to sue for single damages for violations of Section 8 (b) (4), does not open the way to permit triple damage suits under the Sherman Act for such violations. The rights and liabilities of litigants under the antitrust laws remain essentially unchanged by the 1947 National Labor Relations Act.

CHAPTER 9

THE NATIONAL LABOR RELATIONS ACT

SECTION 55. HISTORICAL DEVELOPMENT OF THE ACT

The evolution of the National Labor Relations Act of 1947, otherwise known as the Labor Management Relations Act or the Taft-Hartley Act, can be traced to the Railway Labor Act of 1926, which is analyzed in Chapter 10 of this volume. This is true because, prior to 1926, the fundamental right of workers to engage in labor organization activity without fear of employer retaliation and discrimination was unprotected. Illustrative of both employer and court resistance are the three Supreme Court pronouncements found in *Adair* v. *United States*, 208 U.S. 161, 1908, *Coppage* v. *Kansas*, 236 U.S. 1, 1915, and *Hitchman Coal Company* v. *Mitchell*, 245 U.S. 229, 1917.

In the *Adair* decision, the Supreme Court invalidated, on constitutional grounds, the Erdman Act of 1898, which made it a criminal offense for an agent of an interstate carrier to discriminate against an employee for membership in a labor union. The *Coppage* and *Hitchman* cases were authority for the proposition that an employer may legally require nonmembership in a labor union as a condition precedent to continuation of employment. In Section 7 of Chapter 2 we have traced how the yellow dog contract was legislatively outlawed by the Railway Labor Act of 1926 and the Anti-Injunction Act of 1932, indicating legislative disapproval of the aforementioned decisions. In view of these early decisions by the Supreme Court, however, it was not without some misgiving that Congress enacted the Railway Labor Act. These legislative doubts were resolved favorably for labor in the *Texas and New Orleans Railway* case of 1930, 281 U.S. 548, wherein it was held that railway workers had the right to designate representatives of their own choosing without interference by their employers.

Three years later Congress enacted the National Industrial Recovery Act, the first in a whole series of New Deal enactments designed to lift the nation out of the depression of the thirties. In providing for codes of fair competition under the act, it was provided that approval of any code required compliance with Section 7 (a) of the Act, which read as follows:

"(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;

"(2) That no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing or assisting a labor organization of his own choosing. . . ."

To effectuate compliance with Sec. 7 (a), to adjudicate its initial interpretation, and to conduct elections to determine bargaining representatives, the President set up the National Labor Board, supplanting it, in 1934, with the National Labor Relations Board. The latter board had essentially the same powers as its predecessor, and it continued to function in labor dispute and representation cases until the National Industrial Recovery Act was declared unconstitutional by the Supreme Court in 1935, *Schechter Corporation* v. *United States,* 295 U.S. 495.

Undeterred by this decision, Congress enacted a comprehensive labor code on July 5, 1935, the original National Labor Relations Act, sometimes called the Wagner Act for its principal senatorial sponsor. In constructing this piece of legislation, Congress drew heavily upon experience secured under the Railway Labor Act of 1926 and Section 7 (a) of N.I.R.A., confident that, in so doing, it would avoid an adverse constitutional interpretation by the Supreme Court. The National Labor Relations Act was grounded on the power of the federal government to regulate interstate commerce, Article 1, Sec. 8. The Statement of Policy prefacing the Act (Sec. 1) recited that the purpose of the labor code was to remove obstructions to commerce and restore equality of bargaining powers arising out of employers' general denial to labor of the right to bargain collectively with them. From this denial resulted a number of detrimental consequences, namely, poor working conditions, depression of wage rates, and diminution of purchasing power, all of which had served to cause and aggravate business depressions.

The two most significant portions of the National Labor Relations Act are embodied in Sections 7 and 8. The substantive rights of employees are stated in Section 7 to be as follows:

"Sec. 7. Employees shall have the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

As can be noted, there is a close parallel between the above and Sec. 7 (a) of the National Industrial Recovery Act. The rights granted by Sec. 7 were to be guarded against employer interference by Sec. 8, which detailed and prohibited five practices deemed to be unfair to labor. These were:

1. Interference with efforts of employees to form, join, or assist labor organizations, or to engage in concerted activities for mutual aid or protection. Sec. 8 (1).

2. Domination of a labor organization. This outlawed the company formed or assisted labor union. Sec. 8 (2).

3. Discrimination in hire or tenure for reason of union affiliation. Sec. 8 (3).

4. Discrimination for filing charges or giving testimony under the Act. Sec. 8 (4).

5. Refusing to bargain collectively with a duly designated representative of the employees. Sec. 8 (5).

There can be no doubt that the labor movement secured to itself phenomenal growth and strength by reason of the broad protective cover afforded by Sections 7 and 8. Rejoicing in the ranks of labor was spontaneous when the Supreme Court upheld the Wagner Act in a series of companion decisions beginning with *N.L.R.B.* v. *Jones and Laughlin Steel Corporation* in 1937. This case is reprinted in Section 57 of this text, page 421.

During the years that the original National Labor Relations Act was in effect, it was subjected to a continuing running battle by employer groups. They argued that legislative sponsorship of labor under the Wagner Act, instead of restoring equality in bargaining power, had served to tip the balance measurably in favor of labor. Criticism of the Wagner Act of 1935 and its interpretation was leveled for the major reasons listed:

1. The National Labor Relations Board was said to be biased in favor of labor.

2. The constitutional free speech right of employers was severely limited by adverse interpretation of the Act.

3. The Act prescribed only employer unfair practices, leaving union unfair labor practices untouched.

4. The Act permitted all forms of union security, including the closed shop.

5. The Act caught the employer in the midst of jurisdictional disputes, causing him damage on a matter in which he had no interest and over which he had no control.

6. Interpretation of the Act gave supervisors the right to form and assist labor organizations, along with prescribing for the employer the duty of bargaining with supervisors' unions.

When Congress became convinced that many of the employer charges above were founded in fact, remedial legislation was proposed and extensively debated. Finally, over presidential veto, the amendment to the National Labor Relations Act became law on June 23, 1947.

During the last twelve years, a vast body of interpretative law has been rendered in construction of the Wagner Act. A substantial part of this law remains unaffected as to its present validity under the amended Act. Therefore the student should not be perturbed by the inclusion, in the succeeding sections, of court decisions under the original National Labor Relations Act.

The major changes introduced by the 1947 Act are listed at this juncture for preview summary purposes only. Detailed consideration of these changes is reserved for succeeding sections in this chapter.

1. The closed shop is outlawed. Union security arrangements open to labor organizations are narrowed. Sec. 8 (a) (3) and 9 (e).

2. Employers need not recognize or bargain with unions formed by supervisory personnel. Sec. 14.

3. Employers and unions may both maintain suits in federal courts for damages for breach of collective agreements. Sec. 301.

4. Employers may sue unions for damages arising out of secondary boycotts and strikes for unlawful purposes. Recovery is allowed only out of union assets. Sec. 303.

5. The employer's right of free speech is broadened. Sec. 8 (c).

6. Employees may refrain from union activity as well as engage in it. Sec. 7.

7. Unions may not engage in unfair labor practices. These are:

(a) Coercion of workers as to their rights under Sec. 7. See Sec. 8 (b) (1).

(b) Causing an employer to discriminate against his employees except where the employee, under a valid union security arrangement, fails to pay periodic dues or initiation fees. Sec. 8 (b) (2).

(c) Refusing to bargain in good faith with an employer. Sec. 8 (b) (3).

(d) Engaging in certain strikes and boycotts unlawful in objective as specified in Sec. 8 (b) (4).

(e) Requiring payment of excessive initiation fees under a union security contract. Sec. 8 (b) (5).

(f) Engaging in featherbed practices. Sec. 8 (b) (6).

8. Labor organizations must meet certain filing requirements precedent to exercise of representation and bargaining rights. Sec. 9 (f) (g) and (h).

9. National Emergency Strikes are subject to an 80-day restraining order. Secs. 206, 207 and 208.

10. Evidence to support a board finding must be substantial. Sec. 10 (e).

11. Check-off of union dues must be authorized by employees in writing. Sec. 302 (c).

12. Employee welfare funds are limited to certain uses and joint administrative requirements. Sec. 302 (c) (5).

13. Labor organizations and employers may not make contributions or expenditures in federal elections. Sec. 304.

14. Certification elections are final for the period of one year. Sec. 9 (c) (3).

15. Labor Board determinations of unit appropriateness for bargaining purposes are modified as to professional personnel and plant guards. Sec. 9 (b).

The 1947 amendment to the National Labor Relations Act has been subjected to bitter criticism by labor. None of the changes introduced by the amendment has been agreeable to labor. The purport of their charge is that the Act significantly weakens the labor movement by virtue of its discriminatory and restrictive provisions. In view of the strong pressure exerted by labor in the 1948 Presidential and Congressional elections, it is altogether probable that the Administration will either repeal or modify the restrictions imposed upon labor organizations by the 1947 Amendment. In pursuing the ensuing materials, the reader should investigate the issues raised by observing the following facts:

(1) The National Labor Relations Act of 1947 was a substantial re-enactment of the 1935 Act. Labor had little quarrel with the latter. Therefore, under any new enactment, the greater bulk of law decided between 1935 and 1947 will doubtless remain applicable even though the 1947 amendment may be repealed.

(2) Many of the so-called "changes" introduced by the 1947 enactment are not really changes at all, since they are but codifications of the common-law rules that were quite uniformly developed and applied by the federal courts prior to 1947. Reference is made to Secs. 301 and 303 of the 1947 Act governing actions for damage suits by and against labor organizations, the employer's right of free speech in Sec. 8 (c), the refusal to bargain by unions incorporated in Sec. 8 (b) (3), the prohibition of secondary strikes and boycotts by Sec. 8 (b) (4), the substantial evidence test of Sec. 10 (e), and the finality of certification elections provided for in Sec. 9 (c) (3). It follows from this that, should Congress totally repeal the 1947 amendment, little change will be noted as far as the above matters are concerned, since the common-law rules will be reapplied to reach the same results that are now had under the statute.

(3) Certain changes introduced by the 1947 Amendment are fundamental. Of this group, many are desirable, either in the interest of the rank-and-file worker or in the public interest. In the former category may be placed the union security restrictions imposed on labor organizations by Sec. 8 (a) (3), the financial information sharing requirement imposed by Secs. 9 (f) and (g), the protection from excessive initiation fees and dues provided by Sec. 8 (b) (5), and the limitations placed upon the administration and disposition of welfare funds by Sec. 302 (c) (5).

Favoring the public interest are Secs. 206-210 governing National Emergency Strikes. It is here that we find the National Labor Relations Act taking a progressive step in the direction of the Railway Labor Act in that crippling strikes may be forestalled by federal injunction for an 80-day period, during which time the Federal Mediation Service is to invoke its conciliatory offices with the view toward obtaining a peaceful reconciliation of the dispute. It is unlikely that this section of the Act will be disturbed by Congress in 1949.

As can be seen above, the greater part of law developed in connection with the National Labor Relations Act remained effective upon enactment of the 1947 Amendment and will remain so even though Congress effects a complete repeal with a restoration of the Wagner Act's 1935 provisions. It would seem the preferable course for Congress, in its forthcoming legislation, to give some expression to the interest of the rank-and-file worker and the public by retaining the desirable features of the 1947 Amendment to the National Labor Relations Act.

Questions on Section 55

1. Why do we trace the evolution of the National Labor Relations Act back to the Railway Labor Act of 1926 and Sec. 7 (a) of the Recovery Act of 1933?
2. Is the yellow dog contract outlawed by the Railway Labor Act?
3. What rule was developed by the *Texas and New Orleans Railway* case?
4. Why is the *Schechter* decision famous?
5. What justification for the National Labor Relations Act is contained in the Statement of Policy (Sec. 1) of that Act?
6. State the five employer unfair labor practices under the National Labor Relations Act of 1935.
7. List five objections employers had to the Act of 1935.

SECTION 56. ADMINISTRATION OF THE ACT

Administration of the amended Act is entrusted to the National Labor Relations Board and, in some respects later explained, to the General Counsel. There are five members on the Board, appointed by the President, with the approval of the Senate, for a term of five years. They may be removed only for neglect of duty or malfeasance, and they may be reappointed at the expiration of five years. To facilitate its administrative work, regional offices have been established in some twenty cities, plus Hawaii and Puerto Rico. These are in charge of Regional Directors and are staffed with appropriate numbers of trial examiners, attorneys, and clerical personnel. All are appointed by the parent Board. The National Labor Relations Board, under its present organization, has appellate jurisdiction over decisions emanating from the Regional offices. Its orders are not final, however, until judicial enforcement is secured.

The functions and powers of the National Labor Relations Board may be summarized as follows:

1. Prevention of unfair labor practices by both employers and labor organizations. This power derives from Section 10 of the Act; it is judicial in character, since the General Counsel is vested with the authority over the investigation of unfair labor practice charges, the issuance of complaints, and the prosecution of those complaints before the Board. See Sec. 3 (d).

2. Conduct of representation proceedings under authority and in the manner prescribed by Section 9 of the Act. This includes:

(a) Determine units appropriate for purposes of collective bargaining.

(b) Investigation of petitions for certification or decertification of labor organizations.

(c) Conducting an election to determine the majority representative.

3. Securing enforcement or review of its orders by the federal courts in both representation and unfair labor practice cases. It is important to note that a National Labor Relations Board order has no final validity upon either the employer or the labor organization unless and until the federal courts issue an enforcing decree. See Section 10 (e), which provides a procedure for judicial enforcement of Board orders, and Section 10 (f), which details the method whereunder judicial review of a Board order may be secured by an aggrieved party.

4. Conduct a vote among employees about to engage in a National Emergency Strike, the purpose of such vote being to determine whether the employees wish to accept the employer's last offer. See Sec. 209.

5. Conduct votes in representation cases involving craft and professional employees in those cases where they evince a desire for inclusion in a separate bargaining unit. See Secs. 9 (b) (1), 9 (b) (2), and 2 (12).

6. Conduct votes among employees as to whether they desire a union shop contract. See Secs. 8 (a) (3) and 9 (e). It should be made clear, however, that an affirmative vote means only that the union may then seek

to obtain the employer's agreement on the issue. It does not require an employer to accede to the union shop or maintenance of membership. In the absence of an affirmative vote, union security is not an issue for collective bargaining.

7. Settle jurisdictional disputes between rival unions. See Secs. 8 (b) (4) (D), 10 (k), and 10 (l). The last section empowers the Board to petition for injunctive relief in these situations if necessary to protect the rights of an interested party.

8. Secure injunctions against all unfair labor practices of unions and employers. See Secs. 10 (e), 10 (f), and 10 (j).

9. Secure injunctions to quell certain strikes and boycotts forbidden by Sec. 8 (b) (4). An injunction is second under Sec. 10 (l), applies only to unions, and is mandatory if the charge is supported.

10. Determine that labor organizations have filed in accordance with the informational and financial statement requirements of Sec. 9 (f) prior to entertaining representation and unfair labor practice questions raised by the affected labor organization.

11. Determine that officers of labor organizations have complied with the noncommunist affidavit requirements of Sec. 9 (h) precedent to entertaining representation or unfair labor practice questions raised by the affected labor organization.

At the outset of this section, the office of General Counsel was mentioned as being of importance to the administration of the amended Act. Under Sec. 4 of the Wagner Act, the Board had authority to appoint counsel to represent it in court cases. Under the 1947 Act, the Board is divested of its powers in this regard. Section 3 (d) provides for appointment by the President of a General Counsel to act for a term of four years. His powers are best stated in House Report No. 510, 80th Congress at p. 37.

> ". . . The general counsel is to have general supervision and direction of all attorneys employed by the Board, excluding the trial examiners and the legal assistants to the individual members of the Board, and of all the officers and employees in the Board's regional offices, and is to have the final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges (under Section 10) and the issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board. . . ."

The importance of the General Counsel's role should not be underestimated, especially in view of the fact that Sec. 10 provides for the prevention of unfair labor practices. It would seem that Congress was wise in separating the functions of investigation and prosecution, on the one hand, from the judicial function of deciding the merits of the controversy, on the other. The likelihood of power abuse was a difficult one to guard against, with the Board, under the superseded

Act, acting in the concurrent role of investigator, prosecutor, and judge. Independence of judgment on the part of the General Counsel is preserved, in that he reports to the President and the Senate and not to the National Labor Relations Board as formerly.

Having traced the evolutionary development of the National Labor Relations Act, the important changes it incorporates, and its major administrative aspects, we are in a position to consider the constitutional and coverage aspects of the Act.

Questions on Section 56

1. Is the office of National Labor Relations Board member elective or appointive?
2. For what reasons may a Board member be removed?
3. How many regional offices has National Labor Relations Board established?
4. What is the jurisdiction of the Board?
5. Are Board orders mandatory as to compliance?
6. List the major functions of the Board.
7. Is the office of General Counsel independent of the Board? Discuss the background of this question.
8. What are the powers of the General Counsel?

SECTION 57. CONSTITUTIONALITY OF THE ACT

Since the National Labor Relations Act was enacted by Congress under the commerce power, employers made a determined effort, in unrelated industries, to have it declared unconstitutional as being an abuse of that power. The classic case on this issue is *National Labor Relations Board* v. *Jones and Laughlin,* but this case also decides two other matters: Is the Act violative of (1) the due process clause of the 5th Amendment and (2) the 7th Amendment because trial by jury was not had on the back-pay order of the Board?

NATIONAL LABOR RELATIONS BOARD v. JONES & LAUGHLIN STEEL CORP.

Supreme Court of the United States, 1937. 301 U.S. 1, 57 Sup. Ct. 615

HUGHES, C. J. In a proceeding under the National Labor Relations Act of 1935, the National Labor Relations Board found that the respondent, Jones & Laughlin Steel Corporation, had violated the Act by engaging in unfair labor practices affecting commerce. The proceeding was instituted by the Beaver Valley Lodge No. 200, affiliated

with the Amalgamated Association of Iron, Steel and Tin Workers of America, a labor organization. The unfair labor practices charged were that the corporation was discriminating against members of the union with regard to hire and tenure of employment, and was coercing and intimidating its employees in order to interfere with their self-organization. The discriminatory and coercive action alleged was the discharge of certain employees.

The National Labor Relations Board, sustaining the charge, ordered the corporation to cease and desist from such discrimination and coercion, to offer reinstatement to ten of the employees named, to make good their losses in pay, and to post for thirty days notices that the corporation would not discharge or discriminate against members, or those desiring to become members, of the labor union. As the corporation failed to comply, the Board petitioned the Circuit Court of Appeals to enforce the order. The Court denied the petition, holding that the order lay beyond the range of federal power. 83 F. (2d) 998. We granted *certiorari*. . . .

Contesting the ruling of the Board, the respondent argues (1) that the Act is in reality a regulation of labor relations and not of interstate commerce; (2) that the Act can have no application to the respondent's relations with its production employees because they are not subject to regulation by the federal government; and (3) that the provisions of the Act violate Sec. 2 of Article III and the Fifth and Seventh Amendments of the Constitution of the United States.

The facts as to the nature and scope of the business of the Jones & Laughlin Steel Corporation have been found by the Labor Board and, so far as they are essential to the determination of this controversy, they are not in dispute. The Labor Board has found: The corporation is organized under the laws of Pennsylvania and has its principal office at Pittsburgh. It is engaged in the business of manufacturing iron and steel in plants situated in Pittsburgh and nearby Aliquippa, Pennsylvania. It manufactures and distributes a widely diversified line of steel and pig iron, being the fourth largest producer of steel in the United States. With its subsidiaries—nineteen in number—it is a completely integrated enterprise, owning and operating ore, coal and limestone properties, lake and river transportation facilities and terminal railroads located at its manufacturing plants. It owns or controls mines in Michigan and Minnesota. It operates four ore steamships on the Great Lakes, used in the transportation of ore to its factories. It owns coal mines in Pennsylvania. . . .

To carry on the activities of the entire steel industry, 33,000 men mine ore, 44,000 men mine coal, 4,000 men quarry limestone, 16,000 men manufacture coke, 343,000 men manufacture steel, and 83,000 men transport its product. Respondent has about 10,000 employees in its Aliquippa plant. . . .

Practically all the factual evidence in the case, except that which dealt with the nature of respondent's business, concerned its relations with the employees in the Aliquippa plant whose discharge was the subject of the complaint. These employees were active leaders in the labor union. Several were officers and others were leaders of particular groups. Two of the employees were motor inspectors; one was a tractor driver; three were crane operators; one was a washer in the coke plant; and three were laborers. Three other employees were mentioned in the complaint, but it was withdrawn as to one of them and no evidence was heard on the action taken with respect to the other two.

While respondent criticizes the evidence and the attitude of the Board, which is described as being hostile toward employers and particularly toward those who insisted upon their constitutional rights, respondent did not take advantage of its opportunity to present evidence to refute that which was offered to show discrimination and coercion. In this situation, the record presents no ground for setting aside the order of the Board so far as the facts pertaining to the circumstances and purpose of the discharge of the employees are concerned. Upon that point it is sufficient to say that the evidence supports the findings of the Board that respondent discharged these men "because of their union activity and for the purpose of discouraging membership in the union." We turn to the questions of law which respondent urges in contesting the validity and application of the Act.

First. The Scope of the Act.—The Act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. It is asserted that the references in the Act to interstate and foreign commerce are colorable at best; that the Act is not a true regulation of such commerce or of matters which directly affect it but on the contrary has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation. The argument seeks support in the broad words of the preamble (section one) and in the sweep of the provisions of the Act, and it is further insisted that its legislative history shows an essential uni-

versal purpose in the light of which its scope cannot be limited by either construction or by the application of the separability clause.

If this conception of terms, intent and consequent inseparability were sound, the Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. *Schechter Corp.* v. *United States,* 295 U.S. 495, 549, 550, 554. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system. *Id.*

But we are not at liberty to deny effect to specific provisions, which Congress has constitutional power to enact, by superimposing upon them inferences from general legislative declarations of an ambiguous character, even if found in the same statute. The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same. . . .

We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority. The jurisdiction conferred upon the Board, and invoked in this instance, is found in Sec. 10 (a), which provides:

"Sec. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."

The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are "affecting commerce." The Act specifically defines the "commerce" to which it refers [Sec. 2 (6)]:

"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

There can be no question that the commerce thus contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The Act also defines the term "affecting commerce" [Sec. 2 (7)]:

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or in the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. . . . It is the effect upon commerce, not the source of the injury, which is the criterion. *Second Employers' Liability Cases,* 223 U.S. 1, 51. Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed.

Second. The unfair labor practices in question.—The unfair labor practices found by the Board are those defined in Sec. 8, subdivisions (1) and (3). These provide:

Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ."

Section 8, subdivision (1), refers to Sec. 7, which is as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in

concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and to select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209. We reiterated these views when we had under consideration the Railway Labor Act of 1926. Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it. Congress could seek to make appropriate collective action of employees an instrument of peace rather than of strife. We said that such collective action would be a mockery if representation were made futile by interference with freedom of choice. Hence the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, "instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both." *Texas & N. O. R. Co.* v. *Railway Clerks, supra.* . . .

Third. The application of the Act to employees engaged in production.—The principle involved.—Respondent says that whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department

of respondent's enterprise are not subject to federal regulation. The argument rests upon the proposition that manufacturing in itself is not commerce. (Citing cases.) . . .

The Government distinguishes these cases. The various parts of respondent's enterprise are described as interdependent and as thus involving "a great movement of iron ore, coal and limestone along well-defined paths to the steel mills, thence through them, and thence in the form of steel products into the consuming centers of the country—a definite and well-understood course of business." It is urged that these activities constitute a "stream" or "flow" of commerce, of which the Aliquippa manufacturing plant is the focal point, and that industrial strife at that point would cripple the entire movement. . . .

Respondent contends that the instant case presents material distinctions. Respondent says that the Aliquippa plant is extensive in size and represents a large investment in buildings, machinery and equipment. The raw materials which are brought to the plant are delayed for long periods and, after being subjected to manufacturing processes, "are changed substantially as to character, utility and value." The finished products which emerge "are to a large extent manufactured without reference to pre-existing orders and contracts and are entirely different from the raw materials which enter at the other end." Hence respondent argues that "If importation and exportation in interstate commerce do not singly transfer purely local activities into the field of congressional regulation, it should follow that their combination would not alter the local situation." *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 151; *Oliver Iron Co.* v. *Lord, supra.*

We do not find it necessary to determine whether these features of defendant's business dispose of the asserted analogy to the "stream of commerce" cases. The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protective power which the Government invokes in support of the present Act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action, springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement" (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures "to

promote its growth and insure its safety" (*Mobile County* v. *Kimball*, 102 U.S. 691, 696, 697); "to foster, protect, control and restrain." *Second Employers' Liability Cases, supra*, p. 47. See *Texas & N. O. R. Co.* v. *Railway Clerks, supra.* That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." *Second Employers' Liability Cases*, p. 51; *Schechter Corp.* v. *United States, supra.* Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *Schechter Corp.* v. *United States, supra.* Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *Id.* The question is necessarily one of degree. . . .

Fourth. Effects of the unfair labor practice in respondent's enterprise.—Giving full weight to respondent's contention with respect to a break in the complete continuity of the "stream of commerce" by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interference with that commerce must be appraised by a judgment that does not ignore actual experience.

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer

and negotiate has been one of the most prolific causes of strike. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice. . . .

Fifth. The means which the Act employs.—Questions under the due process clause and other constitutional restrictions.—Respondent asserts its right to conduct its business in an orderly manner without being subjected to arbitrary restraints. What we have said points to the fallacy in the argument. Employees have their correlative right to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *Texas & N. O. R. Co.* v. *Railway Clerks, supra; Virginia Railway Co.* v. *System Federation, No. 40.* Restraint for the purpose of preventing an unjust interference with that right cannot be considered arbitrary or capricious. The provision of Sec. 9 (a) that representatives, for the purpose of collective bargaining, of the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit, imposes upon the respondent only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute. This provision has its analogue in Sec. 2, Ninth, of the Railway Labor Act which was under consideration in *Virginian Railway Co.* v. *System Federation, No. 40, supra.* The decree which we affirmed in that case required the Railway Company to treat with the representative chosen by the employees and also to refrain from entering into collective labor agreements with anyone other than their true representative as ascertained in accordance with the provisions of the Act. We said that the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with no other. We also pointed out that, as conceded by the Government, the injunction against the Company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was "designed only to prevent collective bargaining with anyone purporting to represent employees" other than the representative they had selected. It was taken "to prohibit the negotiation of labor contracts generally applicable to employees" in the described unit with any other representative than the one so chosen, "but not as precluding such individual contracts" as the Company might "elect to make directly with individual employees." We think this construction also applies to Sec. 9 (a) of the National Labor Relations Act.

The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine." The Act expressly provides in Sec. 9 (a) that any individual employee or a group of employees shall have the right at any time to present grievances to their employer. The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. As we said in *Texas & N. O. R. Co.* v. *Railway Clerks, supra,* and repeated in *Virginian Railway Co.* v. *System Federation, No. 40, supra,* the cases of *Adair* v. *United States,* 208 U.S. 161, and *Coppage* v. *Kansas,* 236 U.S. 1, are inapplicable to legislation of this character. The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts. It would seem that when employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge.

The Act has been criticised as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible; that it fails to provide a more comprehensive plan,—with better assurances of fairness to both sides and with increased chances of success in bringing about, if not compelling, equitable solutions of industrial disputes affecting interstate commerce. But we are dealing with the power of Congress, not with a particular policy or with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid "cautious advance, step by step," in dealing with the evils which are exhibited in activities within the range of legislative

power. . . . The question in such cases is whether the Legislature, in what it does prescribe, has gone beyond constitutional limits.

The procedural provisions of the Act are assailed. But these provisions, as we construe them, do not offend against the constitutional requirements governing the creation and action of administrative bodies. See *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 91, 33 S. Ct. 185, 57 L. Ed. 431. The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. It is not necessary to repeat these rules, which have frequently been declared. None of them appears to have been transgressed in the instant case. Respondent was notified and heard. It had opportunity to meet the charge of unfair labor practices upon the merits, and by withdrawing from the hearing it declined to avail itself of that opportunity. The facts found by the Board support its order and the evidence supports the findings. Respondent has no just ground for complaint on this score.

The order of the Board required the reinstatement of the employees who were found to have been discharged because of their "union activity" and for the purpose of "discouraging membership in the union." That requirement was authorized by the Act. Sec. 10 (c), 29 U.S.C.A. Sec. 160 (c). In *Texas & N. O. R. Co.* v. *Railway & S. S. Clerks, supra,* a similar order for restoration to service was made by the court in contempt proceedings for the violation of an injunction issued by the court to restrain an interference with the right of employees as guaranteed by the Railway Labor Act of 1926. The requirement of restoration to service of employees discharged in violation of the provisions of the Act was thus a sanction imposed in the enforcement of a judicial decree. We do not doubt that Congress could impose a like sanction for the enforce-

ment of its valid regulation. The fact that in the one case it was a judicial sanction, and in the other a legislative one, is not an essential difference in determining its propriety.

Respondent complains that the Board not only ordered reinstatement but directed the payment of wages for the time lost by the discharge, less amounts earned by the employee during that period. This part of the order was also authorized by the Act. Sec. 10 (c). It is argued that the requirement is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury. The Seventh Amendment provides that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The Amendment thus preserves the right which existed under the common law when the Amendment was adopted. . . . Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. . . . It does not apply where the proceeding is not in the nature of a suit at common law. . . .

The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit.

Our conclusion is that the order of the Board was within its competency and that the Act is valid as here applied. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion. *Reversed.*

Case Questions

1. What charges did the union make against the steel corporation?
2. What action did the Board take after investigation of the above charges?
3. Did the Circuit Court uphold the Board? On what ground?
4. Describe the "integration" aspects of the steel company's operations.
5. Does the Supreme Court believe labor has a "fundamental" right to organize?
6. On what basis does the company contend its activities are not in commerce?
7. Does the Act compel agreements between employers and employees?
8. Does the Act interfere with the employer's right to hire and discharge?
9. How does the Supreme Court answer the Company's contention with reference to the violation of the due process clause and of the 7th amendment?

SECTION 58. EMPLOYERS UNDER THE ACT

On the same day that the Supreme Court rendered the *Jones & Laughlin* decision, upholding the Act of 1935 on all contested constitutional grounds and placing interstate manufacturing operations within the pale of the federal commerce power, four companion cases were simultaneously handed down, all of which upheld the constitutionality and coverage of the Act.[1] Thus, in one fell stroke, manufacturing, textiles, transport, and newspapers were included in the employer coverage. Jurisdiction of the Board, however, is still based on Secs. 2 (6) and 2 (7) of the Act. The term *commerce* is defined in Sec. 2 (6) and the term *affecting commerce* in Sec. 2 (7). The broadness of the latter is herein indicated: "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

Purely local activities are not under the jurisdiction of the National Labor Relations Board. The approach of the courts in deciding whether a particular business or activity is either *in commerce* or *affecting commerce* is illustrated by the *Austin* case presented in this section.

The term *employer* is defined by Sec. 2 (2). This section excludes from the Act's coverage the following employers:

(1) Federal, state, or municipal corporations.
(2) Federal Reserve Banks.
(3) Charitable hospitals.
(4) Railroad companies under the Railway Labor Act.
(5) Labor organizations in their representation capacity.

NATIONAL LABOR RELATIONS BOARD v. AUSTIN COMPANY

Circuit Court of Appeals, Seventh Circuit, 1947. 165 Fed. (2d) 592

KERNER, C. J. The National Labor Relations Board is petitioning for enforcement of its order issued against respondent after proceedings under Sec. 10 of the National Labor Relations Act. The Board found that respondent's operations were subject to the terms

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[1] *Associated Press* v. *N.L.R.B.*, 301 U.S. 103; *N.L.R.B.* v. *Friedman-Marks Clothing Co.*, 301 U.S. 58; *N.L.R.B.* v. *Fruehauf Trailer Co.*, 301 U.S. 49; *Washington V. & M. Coach Co.* v. *N.L.R.B.*, 301 U.S. 142.

of the Act, and that respondent had committed unfair labor practices in violation of Sec. 8 (1) and (3) of the Act.

The questions presented for our review are (1) whether the Act is applicable to respondent's operations; (2) whether the Board's findings of fact are supported by substantial evidence on the record as a whole; and (3) whether the Board's order is valid and proper.

Respondent is engaged in the business of designing and constructing office and industrial buildings throughout the United States, Canada, and other countries. To facilitate the operation of its business the respondent maintains fourteen offices in ten States and the District of Columbia, and has employees in several foreign countries. During the period mentioned in the complaint (September, 1945), its Chicago office, where the alleged unfair labor practices occurred, was engaged in designing and constructing buildings and structures in several States for numerous corporations. Specifically, the work of the Chicago office consisted of the determination of an appropriate design, the preparation of plans and blueprints, and the purchases of necessary construction materials for the erection of the desired building. At the commencement of construction a field force was sent out from the Chicago office to supervise the work. As the work progressed, lay-outs and blueprints were completed at the Chicago office and sent to the site of construction. The value of the design work performed by the Chicago office for the eighteen months preceding July 1, 1945, was over $400,000 and of this twenty-five per cent was performed for projects located outside of Illinois. The value of the materials purchased by the Chicago office during this same period was over $1,600,000 and it appears that a substantial portion of this was transported in interstate commerce to the site of construction.

Respondent contends that by the nature of its business it is not subject to the jurisdiction of the Board, because it is not engaged in interstate commerce within the purview of the Act. It argues that it is engaged in a purely local business of construction, which in this instance merely comprises a service leading up to construction work, although sometimes it does include the actual construction; that the primary nature of its business of construction is not altered by the fact that materials and men are gathered from outside the State wherein the construction work is performed. In support of its contentions, the respondent relies upon *Schechter Corp.* v. *United States,* 295 U.S. 495; *Carter* v. *Carter Coal Co.,* 298 U.S. 238; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301

U.S. 1; and *Santa Cruz Co.* v. *National Labor Relations Board,* 303 U.S. 453. In each of these cases there is no doubt that the Supreme Court has examined minutely the power of Congress to extend federal control over activities which separately considered are intrastate. In the two earlier cases, neither of which considered the Act here involved, the Court found that the activities involved—coal mining and operation of a slaughter-house—were of sufficiently local nature as to be excluded from any governmental regulation of interstate commerce. The two later cases, both of which were in consideration of the terms of the Act, widened the purlieus of interstate commerce regulation (without a rejection of the earlier cases) and set up the criterion "of degree" in the relation of interstate commerce to the activity under consideration. As the Court explained it in *Santa Cruz Co.* v. *National Labor Relations Board, supra,* 467, "The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes."

By a subsequent pronouncement in *National Labor Relations Board* v. *Fainblatt,* 306 U.S. 601, the Court recognized the expansion of Federal regulation over interstate commerce, and at page 604, said: ". . . an employer may be subject to the National Labor Relations Act although not himself engaged in commerce. The end sought in the enactment of the statute was the prevention of the disturbance to interstate commerce consequent upon strikes and labor disputes induced or likely to be induced because of unfair labor practices named in the Act."

Any questions directed at the Board's jurisdiction then must be answered by placing the particular facts of each case against the possible obstruction of interstate commerce "induced or likely to be induced" by unfair labor practices.

In this case it is obvious that interstate commerce could be affected by industrial strife in the Chicago office. Any interference due to an unfair labor practice in the transmission of the blueprints in interstate commerce necessarily would retard construction and would disrupt the flow of building materials traveling in interstate commerce. This would constitute sufficient cause to bring respondent within the Act, because "Interstate communication of a business nature, whatever the means of such communication, is interstate commerce reg-

ulable by Congress under the Constitution." *Associated Press* v. *N.L.R.B.*, 301 U.S. 103. . . .

SUPPLEMENTAL NOTE—EMPLOYER COVERAGE

Mining has been held to be within the scope of the Act, 110 Fed. (2d) 780, as have public utilities, 305 U.S. 197, the telegraph, 304 U.S. 333, the lumber industry, 94 Fed. (2d) 138, the insurance business, 322 U.S. 643, and a laundry business near a state line, 118 Fed. (2d) 1002. If a local activity is integrated with an interstate company, the former is subject to Board jurisdiction, 48 N.L.R.B. 92.

The *Austin* case on page 433 represents a departure from the norm because the Board in the past has uniformly held construction activities to be beyond its powers. The size of the activity here in question undoubtedly influenced the decision, as well as the fact that many labor and employer abuses take place in the building trades.

Case Questions

1. Describe the nature of the Austin Company's business.
2. Did the court find interstate commerce in the *Schechter* and *Carter* cases?
3. State the rule of the *Associated Press* case.
4. In the instant case, does the court ascribe the jurisdiction of the Labor Board to Sec. 2 (6) or to Sec. 2 (7)?

SECTION 59. AGENTS OF EMPLOYERS

The cases included in this section consider the criteria employed by the courts in distinguishing between the three legal relations of principal, agent, and independent contractor.

An employer who acts in his own capacity and right does so as a *principal* and entails the full legal responsibility of a principal. When an employer acts through others who are given express or implied authority to act for him, he remains responsible as a principal because he has created an *agency* relation. This rule of imputed liability applies so long as the agent acts within the scope of his express or implied authority. Acts of an agent beyond this authority are not imputable to the employer unless they are subsequently ratified by him and thus made his own.

The legal relation of *independent contractor* is that of a principal. He contracts and performs independent acts himself or through his agents. For those acts he is liable as long as their performance is free from the control or intervention of another person or agency.

The National Labor Relations Act introduces the above legalisms in three sections:

Sec. 2 (2) provides "the term 'employer' includes any person acting as an agent of an employer, directly or indirectly. . . ."

Sec. 2 (13) states: "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Sec. 2 (3) excludes independent contractors from the term "employee."

In the *International Association of Machinists* and *Long Lake* decisions reprinted in this section, the Supreme Court gives expression to the rules of principal and agent briefly summarized above. The former is a leading case in labor law on the question of an authority grant by implication and acquiescence.

These decisions introduce the concept of independent contractor versus agent and joint employer. An employer can generally relieve himself of liability if the unfair labor practices committed are those of an independent contractor rather than an agent or a joint employer. The employer remains jointly liable, however, if he procures the commission of an unfair labor practice by third persons over whom he retains the express or covert power of control.

INTERNATIONAL ASSOCIATION OF MACHINISTS v. NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States, 1940. 311 U.S. 72, 62 Sup. Ct. 348

DOUGLAS, J. . . . The Board found, in proceedings duly had under Sec. 10 of the Act, that the employer, Serrick Corporation, had engaged in unfair labor practices within the meaning of the Act. It ordered the employer to cease and desist from those practices and to take certain affirmative action. More specifically, it directed the employer to cease giving effect to a closed-shop contract with petitioner [International Association of Machinists] covering the toolroom employees; to deal with U.A.W., an industrial unit, as the exclusive bargaining agent of its employees, including the toolroom men; to desist from various discriminatory practices in favor of petitioner and against U.A.W.; and to reinstate and make whole certain employees who had been improperly discharged. The employer has complied with the Board's order. But petitioner, an intervener in the proceedings before the Board, filed a petition in the court below to review and set aside those portions of the order which direct the employer to cease and desist from giving effect to its closed-shop contract with petitioner and to bargain exclusively with U.A.W. The court below affirmed the order of the Board. . . .

. . . It is clear that the employer had an open and avowed hostility to U.A.W. It is plain that the employer exerted great effort, though unsuccessfully, to sustain its old company union, the Acme Welfare Association, as a bulwark against U.A.W. And it is evident that the employer, while evincing great hostility to U.A.W. in a contest to enlist its production force, acquiesced without protest in the organization by petitioner of the toolroom employees. The main contested issue here is narrowly confined. It is whether or not the employer "assisted" the petitioner in enrolling its majority.

Fouts, Shock, Dininger, Bolander, Byroad and Baker were all employees of the toolroom. Four of these—Fouts, Shock, Byroad and Bolander—were old and trusted employees. Fouts was "more or less an assistant foreman," having certain employees under him. Shock was in charge of the toolroom during the absence of the foreman. Dininger and Bolander were in charge of the second and third shifts respectively, working at night. Prior to mid-July, 1937, they had been actively engaged on behalf of the company union. When it became apparent at that time that the efforts to build up that union were not successful, Fouts, Shock, Byroad and Bolander suddenly shifted their

support from the company union to petitioner and moved into the forefront in enlisting the support of the employees for petitioner. The general manager told Shock that he would close the plant rather than deal with U.A.W. The superintendent and Shock reported to toolroom employees that the employer would not recognize the C.I.O. The superintendent let it be known that the employer would deal with an A. F. of L. union. At the same time the superintendent also stated to one of the employees that some of the "foremen don't like the C.I.O." and added, with prophetic vision, that there was "going to be quite a layoff around here and these fellows that don't like the C.I.O. are going to lay those fellows off first." . . . Not less than a week before August 13, the personnel director advised two employees to join the A. F. of L. Byroad spent considerable time during working hours soliciting employees, threatening loss of employment to those who did not sign up with petitioner and representing that he was acting in line with the desires of the toolroom foreman, McCoy. This active solicitation for petitioner was on company time and was made openly in the shop. Much of it was made in the presence of the toolroom foreman, McCoy, who clearly knew what was being done. Yet the freedom allowed solicitors for petitioner was apparently denied solicitors for U.A.W. The plant manager warned some of the latter to check out their time for a conference with him on U.A.W. and questioned their right to discuss U.A.W. matters on company property. The inference is justified that U.A.W. solicitors were closely watched, while those acting for petitioner were allowed more leeway.

Five U.A.W. officials had been discharged in June, 1937, because of their union activities. The known antagonism of the employer to U.A.W. before petitioner's drive for membership started made it patent that the employees were not free to choose U.A.W. as their bargaining representative. Petitioner started its drive for membership late in July, 1937, and its closed-shop contract was signed August 11, 1937. On August 10, 1937, the U.A.W., having a clear majority of all the employees, presented to the employer a proposed written contract for collective bargaining. This was refused. On August 13, 1937, all toolroom employees who refused membership in petitioner, some 20 in number, were discharged. On August 15, 1937, the management circulated among the employees a statement which, as found by the Board, was a thinly veiled attack on the U.A.W. and a firm declaration that the employer would not enter into any agreement with it.

Petitioner insists that the employer's hostility to U.A.W. cannot be translated into assistance to the petitioner *and that none of the*

acts of the employees above mentioned, who were soliciting for petitioner, can be attributed to the employer. [Author's italics.]

We disagree with that view. We agree with the court below that the toolroom episode was but an integral part of a long plant controversy. What happened during the relatively brief period from late July to August 11, 1937, cannot properly be divorced from the events immediately preceding and following. The active opposition of the employer to U.A.W. throughout the whole controversy has a direct bearing on the events during that intermediate period. Known hostility to one union and clear discrimination against it may indeed make seemingly trivial intimations of preference for another union powerful assistance for it. Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure. The freedom of activity permitted one group and the close surveillance given another may be more powerful support for the former than campaign utterances.

To be sure, it does not appear that the employer instigated the introduction of petitioner into the plant. But the Board was wholly justified in finding that the employer "assisted" it in its organizational drive. Silent approval of or acquiescence in that drive for membership and close surveillance of the competitor; the intimations of the employer's choice made by superiors; the fact that the employee-solicitors had been closely identified with the company union until their quick shift to petitioner; the rank and position of those employee-solicitors; the ready acceptance of petitioner's contract and the contemporaneous rejection of the contract tendered by U.A.W.; the employer's known prejudice against the U.A.W. were all proper elements for it to take into consideration in weighing the evidence and drawing its inferences. To say that the Board must disregard what preceded and what followed the membership drive would be to require it to shut its eyes to potent imponderables permeating this entire record. The detection and appraisal of such imponderables are indeed one of the essential functions of an expert administrative agency.

Petitioner asserts that it had obtained its majority of toolroom employees by July 28, 1938, and that there was no finding by the Board that that majority was maintained between then and the date of execution of the closed-shop contract by unfair labor practices. In this case, however, that is an irrelevant refinement. The existence of unfair labor practices throughout this whole period permits the inference that the employees did not have that freedom of choice which

is the essence of collective bargaining. And the finding of the Board that petitioner did not represent an uncoerced majority of toolroom employees when the closed-shop contract was executed is adequate to support the conclusion that the maintenance as well as the acquisition of the alleged majority was contaminated by the employer's aid.

Petitioner attacks the Board's conclusion that its membership drive was headed by "supervisory" employees—Fouts, Shock, Dininger and Bolander. According to petitioner these men were not foremen, let alone supervisors entrusted with executive or directorial functions, but merely "lead men" who, by reason of long experience, were skilled in handling new jobs and hence directed the set-up of the work. Petitioner's argument is that since these men were not supervisory their acts of solicitation were not coercive and not attributable to the employer.

The employer, however, may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of *respondeat superior*. We are dealing here not with private rights (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261) nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence. The existence of that interference must be determined by careful scrutiny of all the factors, often subtle, which restrain the employees' choice and for which the employer may fairly be said to be responsible. Thus, where the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates. Here there was ample evidence to support that inference. As we have said, Fouts, Shock, Dininger and Bolander all had men working under them. To be sure, they were not high in the factory hierarchy and apparently did not have the power to hire or to fire. But they did exercise general authority over the employees and were in a strategic position to translate to their subordinates the policies and desires of the management. It is clear that they did exactly that. Moreover, three of them—Fouts, Shock and Bolander—had been actively engaged during the preceding weeks in promoting the company union. During the membership drive for petitioner they stressed the fact

that the employer would prefer those who joined petitioner to those who joined U.A.W. They spread the idea that the purpose in establishing petitioner was "to beat the C.I.O." and that the employees might withdraw from the petitioner once this objective was reached. And in doing these things they were emulating the example set by the management. The conclusion then is justified that this is not a case where solicitors for one union merely engaged in a zealous membership drive which just happened to coincide with the management's desires. Hence the fact that they were *bona fide* members of petitioner did not require the Board to disregard the other circumstances we have noted. . . .

. . . The presence of such practices in this case justified the Board's conclusion that petitioner did not represent an uncoerced majority of the toolroom employees.

Affirmed.

Case Questions

1. Who is the petitioner in this case?
2. Why does petitioner make this appeal?
3. As between petitioner and the U.A.W., whom did the Serrick Corp. favor? Did it show favoritism by its acts?
4. What positions were held by the "trusted" employees who solicited for the I.A.M. union?
5. Does the court hold that the employees in Question No. 4 were agents of Serrick?
6. Does the act of an agent require express authorization to bind the employer? See Sec. 2 (13) of the National Labor Relations Act in the Appendix on page 893.

NATIONAL LABOR RELATIONS BOARD v. LONG LAKE LUMBER COMPANY

Circuit Court of Appeals, Ninth Circuit, 1944. 138 Fed. (2d) 363

HEALY, C. J. The National Labor Relations Board petitions for our decree enforcing its order directed toward respondents. The order is predicated on findings that the respondents interfered with and coerced their employees in the exercise of rights guaranteed under the Act and refused to bargain collectively with a union—a local of International Woodworkers of America, affiliated with C.I.O.—to which most of the respondents' employees adhered. Respondents were ordered by the Board to desist from these practices, were directed to bargain collectively with the union upon request, and to offer reinstatement with back pay and to make whole the employees found to have been unlawfully discriminated against.

The jurisdiction of the Board is conceded, and it is not denied that the respondent Robinson engaged in the unfair labor practices charged. Admittedly the decree should be granted as against him. The single complaint is that the Board's order should have been directed against Robinson alone, it being contended by respondent Long Lake Lumber Company that Robinson was an independent contractor and the sole employer of the men affected.

The Long Lake Lumber Company has two mills at Spokane and obtains its logs in part from Caribou Basin in the neighborhood of Sanpoint, Idaho. Robinson had a contract with the Long Lake Company for the logging of standing timber owned by the Company at that place. His contract was terminable on thirty days' notice, and his payrolls and other operating expenses were financed by Long Lake. In June of 1939, not long after Robinson opened the particular logging operation, a representative of the International Woodworkers, aided by some of the employed men, commenced an organizational drive among the employees in the camp. Learning of this, Robinson declared he would fire every man who received a union card. He threatened to shut the camp down, saying that he could not "operate with that kind of organization at all." There followed a meeting of the Woodworkers local, to which a large majority of the men at that time undertook to adhere. At first Robinson declared he would not permit the meeting to be held in the camp, but later he withdrew his objections. Immediately after the union session, which was held in the evening, he met with a committee of the local and agreed to recognize it as the bargaining representative of the local's members, and in fact bargained with the committee on several matters at the time.

Later that evening Robinson was twice called on the telephone from Spokane by James Brown, Sr., the president of the Long Lake Company. Brown's son, the assistant woods superintendent of the Company, arrived at the camp during the evening and conferred with Robinson. The following morning Robinson informed the employees that the camp was being shut down, and the men were instructed to turn in their tools and blankets. The Board attributed this abrupt change in attitude to instructions given Robinson by the Browns.

In protest against the shutdown the men went on strike, the camp was later picketed, and the organizational dispute dragged along for well over a month. There is additional evidence of Long Lake's active intervention in the affair, notably a declaration of Robinson's to the effect that "my hands are tied." According to one

witness, Brown, Jr., remarked that Robinson was indebted to Long Lake and to a bank for large sums and that "there isn't any chance of our getting our money back." The job, Brown, Jr., is reported as saying, was too large for Robinson; there was too much friction between him and the camp, and "he is not the man to handle that job; we are going to take Frank (Robinson) and put him on another job." There is other testimony of the same general tenor, but we need not pursue it in detail. Enough to say that the showing manifests an attitude of hostility on the part of Long Lake toward the unionization of the logging camp by Woodworkers and that the evidence is indicative as well of a measure of domination by Long Lake inconsistent with the notion that Robinson was really a free agent either in handling the enterprise or in dealing with the men employed. Naturally, there is much evidence on the other side, but it was for the Board to determine where the truth lay.

We think the record warranted the Board's treatment of Robinson and the Long Lake Company as joint employers. *Cf. N.L.R.B.* v. *Grower-Shipper Vegetable Ass'n*, 9 Cir., 122 F. 2d 368, 377; *N.L.R.B.* v. *Condenser Corp.*, 3 Cir., 128 F. 2d 67; *Butler Bros.* v. *N.L.R.B.*, 7 Cir., 134 F. 2d 981. More particularly is the treatment appropriate since the term "employer" is defined in Section 2 of the Act as including "any person acting in the interest of an employer, directly or indirectly. . . ." Respondents rely on cases such as *Williams* v. *United States*, 126 F. 2d 129, involving the employer-employee relationship as interpreted in the administration of the Social Security Act of 1935 and the regulations thereunder. In this connection compare our own discussion of that problem in *Anglim* v. *Empire Star Mines Co.*, 129 F. 2d 914. For obvious reasons decisions involving that Act are not apposite here.

Decree will be entered in conformity with the order of the Board.

Case Questions

1. What is the principal contention of the Long Lake Lumber Company?
2. What arrangement existed between Long Lake and Robinson?
3. Did Long Lake contend Robinson was an independent contractor or an agent of that company? What do the facts indicate? What does the court decide?
4. What does the court say about the applicability of the *Williams* case?

SECTION 60. EMPLOYEES UNDER THE ACT

Since one of the major policy objectives of the National Labor Relations Act is the protection of those employee organizational rights guaranteed by Section 7 (see Section 62 of this book), the statutory exclusiveness of the term "employee," embodied in Sec. 2 (3), becomes of prime importance.

In addition to indicating what employees are not protected against unfair labor practices, Sec. 2 (3) becomes equally significant in connection with the remedial aspects of the Act. For example, should a worker lose his status as an employee protected by the Act, by virtue of his participation in unlawful strike or boycott activity, he will not be entitled to reinstatement to his position, he will lose the right to back pay, and he will not be eligible to participate in representation elections. Once employee status is lost, the employer may refuse to bargain with the union representing such workers and may discriminate against those workers who have lost their protected status. On the other hand, the Act in the same Section protects the employee in his conditional right to reinstatement with back pay if the exerted pressure is lawful in object and means.

The details of these remedial aspects are left for subsequent consideration. We shall at this point merely consider the exclusionary aspects of the term "employee" as outlined in Section 2 (3). The following classes of employees are not protected by the Act:

1. Workers under the Railway Labor Act.
2. Employees of employers not covered by the Act.
3. Independent contractors.
4. Domestic servants in the home.
5. Persons employed by parents or spouses.
6. Agricultural workers.
7. Supervisors.

We shall not discuss the exclusion of workers under the Railway Labor Act at this point in as much as the jurisdictional aspects of that Act are defined in Chapter 10 of this volume. Neither is discussion required in connection with the exclusion of employees of employers not covered by the Act, for this exclusion is necessitated by logical necessity.

This leaves five excluded categories to be explained in the forthcoming case materials. The relation of independent contractor was introduced in Section 59 of this book, "Agents of Employers." It is further developed in this section, directly under the purview of Sec. 2

(3), by the *Phoenix Mutual* decision, page 447. The *North Whittier* case on page 450 gives us Congressional reasoning for exempting domestic servants and persons employed by spouses. The *North Whittier* case (page 450), introduces the baffling problem of when agricultural labor may, nonetheless, come under the Act's provisions. It is hoped that this anomaly is adequately explained by the facts present. At any rate, the problem here presented reveals why the courts prefer to decide each case on its own facts and merits rather than strait-jacket themselves within the confines of unyielding rules of law.

The last decision in this section, *L. A. Young* v. *N.L.R.B.*, covers the supervisor exemption of Sec. 2 (3). The test to be applied in determining whether an employee is a supervisor is specified in Sec. 2 (11), which says, "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, *or effectively to recommend such action*, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." [Author's italics.] The italicized phrase should be observed in that its effect will be to broaden the base of those falling into supervisory categories.

Sec. 14 of the Act must also be referred to in securing the complete implication of the Sec. 2 (3) exemption. Sec. 14 states "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, *but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.* [Author's italics.] As can be seen, the italicized phrase relieves the employer from the legal obligation of collectively bargaining in good faith with supervisors or from abstaining from other unfair labor practices in their direction. While supervisors can yet form and join unions, conduct strikes, and exert legal combined pressure on the employer, the employer is not compelled by law to recognize or bargain with supervisors, for they are no longer considered to be employees. Congressional theory, backing the supervisor sections of the amended Act, hinges around the idea that supervisors are management representatives and, as such, should not be encouraged to divide their loyalties as was formerly permissive.

NATIONAL LABOR RELATIONS BOARD v. PHOENIX MUTUAL LIFE INSURANCE CO.

Circuit Court of Appeals, Seventh Circuit, 1948. 167 Fed. (2d) 983

DUFFY, D. J. The National Labor Relations Board petitions this Court pursuant to Section 10 (e) of the National Labor Relations Act (49 Stat. 450, Sec. 1, *et seq.*; 29 U.S.C., Sec. 151, *et seq.*) for enforcement of its order of June 6, 1947, based upon findings that the respondent, in discharging employees Davis and Johnson, engaged in unfair labor practices affecting commerce in violation of Section 8 (1) of the Act. The Board found that respondent had interfered with, restrained, and coerced its employees in their rights guaranteed under Section 7 because they had engaged in concerted activity for their mutual aid or protection. The Board ordered respondent to cease and desist from the unfair labor practice so found and to reinstate Messrs. Davis and Johnson with back pay and to post appropriate notices of compliance.

Section 8 (1) of the Act provides:

"It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. . . ."

Section 7 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

The issues to be here decided are: (1) Is the National Labor Relations Act applicable to respondent's operations? (2) Were salesmen Davis and Johnson employees of respondent or independent contractors? (3) Is the Board's finding that Davis and Johnson were discharged by respondent because they engaged in concerted activities for their mutual aid or protection supported by substantial evidence, and if so did respondent's actions amount to an unfair labor practice under the Act? and (4) Was the Board's order valid and proper?

Respondent, a Connecticut corporation, is a mutual life insurance company whose business is selling and issuing life insurance policies and annuities. On the basis of total insurance in force it ranks 24th among all insurance companies in the United States. It conducts business in 33 States and in the District of Columbia. Of its two branch offices in Chicago, the one known as the Chicago-

LaSalle Office is involved in this proceeding. On December 31, 1945, respondent had in force insurance amounting to the total of $814,-789,831, and its total assets amounted to $386,044,844.

There can be no doubt as to the Act's application to the business of respondent. *Polish National Alliance* v. *National Labor Relations Board,* 322 U.S. 643. . . .

Respondent strongly urges that its salesmen are not employees within the meaning of the Act and argues that Davis and Johnson were independent contractors to whom the protection of the Act may not properly be extended.

The Act does not contain a precise definition of the term "employee." As amended in 1947 by the Taft-Hartley Law (Public Law No. 101, 80th Cong., 1st Sess., Chap. 120), the Act provides that the term "employee" shall not include "any individual having the status of an independent contractor." Therefore, it was incumbent upon the Board in the first instance to determine whether the insurance salesmen involved were employees or independent contractors, and this Court likewise must determine that issue on the Board's petition for enforcement of its order.

A similar question was considered by this Court in *Williams* v. *United States,* 126 F. (2d) 129, 132, cert. den., 317 U.S. 655, where the rule was stated that each case must depend upon its own facts, and that the test most *usually* employed for determining the distinction between an independent contractor and an employee is found in the nature and the amount of control reserved by the person for whom the work is done. This Court there pointed out that the employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, and that it is the right and not the exercise of control which is the determining element. A number of tests were pointed out, such as the right to hire and discharge persons doing the work, the method and determination of the amount of the payment to the workmen, whether the person doing the work is engaged in an independent business or enterprise, whether he stands to make a profit on the work of those working under him, the question of which party furnishes the tools or materials with which the work is done, and who has control of the premises where the work is done. In addition to the tests there mentioned, consideration must be given to other factors, such as whether the relationship is of a permanent character, the skill required in the

particular occupation, and who designates the place where the work is to be performed.

In the case at bar the respondent provides headquarters for its salesmen and furnishes each of them with office space, a desk, a telephone, stenographic service, stationery, postage, filing cabinets, sales supplies, and business cards. It also pays for the indemnity bonds and license fees which the State of Illinois requires of each insurance agent. Each salesman is required to devote his full time to respondent's business and may not assign his contract, nor employ anyone to work under him. Respondent requires each salesman to produce a specified minimum of new business each year, and if he fails to do so he is subject to discharge. The salesmen are engaged in soliciting life and endowment insurance within an assigned territory and usually collect the first premium. Respondent selects its agents from among those persons who make written applications for these positions, and after having a personal interview. To be selected as an insurance salesman, it is not necessary for the applicants to have previous experience at selling insurance. After an applicant is selected and after signing an agency contract, each is given an intensive training by respondent's supervisory staff. He spends the first two weeks of his employment in respondent's offices receiving instructions from the office manager and other supervisory personnel, and is taught the use of the company's various forms and records, and initiated in the sales approach. After completing this training period the salesmen are permitted to take field trips. During their first interviews they usually are accompanied by respondent's office manager or other supervisor, but as they gain experience they are subjected to less field supervision. During the first two years of their service they are known as junior salesmen and as such may operate under a financing contract rather than a regular commission contract. Under such a contract the salesmen may borrow $100.00 up to as much as $300.00 a month. These loans are in the nature of advances on commissions which the salesman is expected to earn. After they become senior salesmen they no longer are entitled to borrow under a financing contract but receive other benefits or inducements which encourage them to remain permanently with the respondent.

The evidence before the Board discloses that respondent keeps a close check on the details of its salesmen's work and exercises a large measure of control over them. Each salesman must furnish management regularly with an accurate daily record of interviews and sales, must show for each day of the week the number of hours worked in

the field, the number of interviews had, the number of new prospects interviewed and many other similar details. Respondent furnishes each salesman with certain sales services, such as circularizing by mail, without cost to the salesman, and supplying the salesman with advertising specialties and miscellaneous material.

It is also persuasive evidence of the salesmen's status as employees that respondent maintains a plan for the retirement and pensioning of its salesmen. This retirement and pension plan is noncontributory, although they do have the privilege of increasing their retirement income through voluntary participation. Respondent has also made available for its salesmen special pensions providing income for total and permanent disability.

Respondent regarded its salesmen as being in a somewhat different class than ordinary insurance salesmen. In its pamphlet, "Selecting Salesmen," it said:

". . . It (respondent) then decided to take the most forward steps known to Life Insurance. These involved the cancellation of all part-time contracts and the employment thereafter of only representatives who would devote their full business time to the Phoenix . . . the Phoenix is still the only company on the American continent which employes a small, compact, and exclusively full-time sales representation."

In another pamphlet it referred to the fact that the hiring of salesmen had been put upon a scientific basis.

It is thus apparent from the undisputed facts before the Board that respondent's salesmen, by all applicable recognized standards, fall into the class of employees rather than independent contractors, and we so hold. . . .

The remainder of this case, which construes the Sec. 7 right of the salesmen, is reprinted on page 467 in Section 62 of this book.

Case Questions

1. What legal relation does the Phoenix Company contend is applicable to Davis and Johnson?
2. What test does the *Williams* case lay down in distinguishing between independent contractors and employees?
3. Indicate the elements in the case which show that the insurance salesmen were employees.

NORTH WHITTIER HEIGHTS CITRUS ASS'N v. NATIONAL LABOR RELATIONS BOARD

Circuit Court of Appeals, Ninth Circuit, 1940. 109 Fed. (2d) 76

STEPHENS, C. J. Charges by the Citrus Packing House Workers Union Local No. 21,091, were laid before the National Labor Rela-

tions Board, that North Whittier Heights Citrus Association was guilty of unfair practices by interfering with, restraining and coercing twenty-eight employees in the exercise of the rights guaranteed under Section 7 of the National Labor Relations Act. . . . At the opening of the hearing the Association filed its motion to dismiss the proceedings upon the ground that its employees were agricultural laborers and therefore exempt from the Board's jurisdiction, and that its operations do not directly burden or affect interstate or foreign commerce. . . .

There is competent and substantial evidence to support the following factual account of the proceeding. Petitioner is a corporate body . . . engaged in the business of receiving, handling, washing, grading, assembling, packing and shipping the citrus fruit of its members and others for marketing under a marketing contract with the Semi-Tropic Fruit Exchange, which has a marketing agreement with the California Fruit Growers Exchange. . . .

We shall proceed to consider whether or not those employed in petitioner's packing house are "agricultural laborers" and as such exempt under the Act from the Board's jurisdiction.

The pursuit of definitions of "agricultural laborers" through the cases leads to confusion because generally the case definitions have grown out of special statutory phraseology or out of judicial effort to conform to legislative intent. While it is quite impossible to phrase an all inclusive yet accurate definition of the term "agricultural laborer" as it is used in the Wagner Act, the intent of Congress is not at all obscure. . . .

In Section 2, subdivision (3), of the Act it is provided that unless the Act explicitly states otherwise, the term "employee" shall include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

The purpose of the Act is clear and we find the Act specifically excepting three kinds of employees from its provisions. It would seem profitable to consider whether or not there is a "common denominator" in these three exemptions. We think there is. Why is "any individual employed by his parent or spouse" exempted? Because (not excluding other reasons) in this classification there never would be a great number suffering under the difficulty of negotiating

with the actual employer and there would be no need for collective bargaining and conditions leading to strikes would not obtain. The same holds good as to "domestic service," and the same holds good as to "agricultural laborer" if the term be not enlarged beyond the usual idea that the term suggests. Enlarge the meaning of any of these terms beyond their common usage and confusion results. When every detail of farming from plowing to delivering the produce to the consumer was done by the farmer and his "hired man," this common denominator was present. But when in the transition of citrus fruit growing from this independent action to the great industry of the present in which the fruit is passed from the individual grower through contract to a corporation for treatment in a packing house owned and run by such corporation, to be delivered by this corporation to an allied corporation for transportation and market, we think the common denominator has ceased to exist. The fact that these corporations are allied through their membership of growers does not, in our opinion, affect the situation under consideration. See *Pinnacle Packing Company et al* v. *State Unemployment Commission,* decided February 19, 1937, by the Circuit Court of Jackson County, Oregon.

Petitioner in his brief points to these important changes and concludes, "It therefore becomes important to devise some test or touchstone to determine whether certain practices are agricultural or industrial." It can hardly be contended that agriculture and industry are opposites generically speaking. Agriculture is a great industry. So, of course, petitioner has used these terms in their more limited meanings, and has perhaps unwittingly discovered his sought after "touchstone."

Industrial activity commonly means the treatment or processing of raw products in factories. When the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing it has entered upon the status of "industry." In this status of this industry there would seem to be as much need for the remedial provisions of the Wagner Act, upon principle, as for any other industrial activity.

Petitioner maintains that the nature of the work is the true test. Perhaps it would more nearly conform to the true test to say that the nature of the work modified by the custom of doing it determines whether the worker is or is not an agricultural laborer.

Petitioner argues that if each member of the non-profit cooperative corporation that runs the packing house were to personally hire

and direct those doing his own packing and sorting, the work would be agricultural and his employees would be agricultural laborers; that it follows, therefore, that in the case of the same members acting under a single organization to accomplish the same result there can be no change in the nature of the work nor in the status of the persons doing it. The conclusion does not follow. The factual change in the manner of accomplishing the same work is exactly what does change the status of those doing it. The premise laid down by petitioner in this phase of its argument is not, however, the exact situation facing us. The packing house activity is much more than the mere treatment of the fruit. When it reaches the packing house it is then in the practical control of a great selling organization which accounts to the individual farmer under the terms of the statute law and its own by-laws.

There are many instances related in the authorities showing that work done in one way is agricultural labor and workmen doing the same nature of work but under different circumstances are not agricultural laborers, and vice versa. See *Trullinger* v. *Fremont County,* 223 Iowa 677, 273 N.W. 124. Also see *Miller & Lux, Inc.* v. *Industrial Accident Commission,* 179 Cal. 764, 178 P. 960, 7 A.L.R. 1291, in which it is held that a workman employed by the Land Company to repair farming equipment was engaged in farm labor; *Mullen v. Little,* 186 App. Div. 169, 173 N.Y.S. 578, 580, where a farm laborer storing ice for use on the farm was held to be a farm laborer for the reason that the work was "incidental to farm purposes"; and *Maryland Casualty Co.* v. *Dobbs,* Tex. Civ. App., 1934, 70 S.W. 2d 751, where one working for a company whose business was the spraying of citrus trees was held not to be a farm laborer. There is confusion in the so-called threshing machine cases, as may be ascertained by reference to the note in 13 A.L.R. 955.

So to be agricultural labor, the work need not be strictly related to the crop, and every work related strictly to the crop is not of necessity agricultural labor and those doing it agricultural laborers. It is said in *Re Boyer,* 65 Ind. App. 408, 117 N.E. 507, 508: "While the threshing of wheat may be a part of the work necessary to be done on the farm, the farmer himself rarely does it. On the contrary, he has it done by someone who is specially equipped with the machinery to do this kind of work. Wheat threshing is a business or industrial pursuit in and of itself, entirely separate and independent of farming." Here is an admirable example of the nature of the work, modi-

fied by the custom of doing it affecting the category into which the work falls—agricultural or industrial. See *H. Duys & Co.* v. *Joseph M. Tone, Commissioner,* 125 Conn. 300, 5 A. 2d 23.

The opinion in the case of *Pinnacle Packing Co.* v. *State Unemployment Commission, supra,* a case arising under a cooperative arrangement for processing and marketing fruit, contains some apt language. We quote: "The fruit growers who are engaged in the care, cultivation, picking, and delivery of the products of the orchard to be processed, graded, packed and marketed are engaged in agricultural labor and are exempt from the provisions of the statute. As soon as the fruit is delivered by the growers to the plaintiff for processing, grading, packing, and marketing, then the exemption ceases. The plaintiffs engaged in processing, grading, and packing and marketing the fruits are engaged in industry and are, therefore, subject to the provisions of the act and are not exempt as being engaged in agricultural labor."

We conclude that the workers in petitioner's packing house are not agricultural laborers and are therefore not exempt from the operation of the Act.

Petitioner contends in its second point as follows: "Briefly, it is the contention of petitioner that when it handles the fruit by picking, grading and packing the same, the fruit is not yet in the channels of trade and commerce, either intrastate or interstate."

At this late date it hardly seems necessary to devote a great deal of attention to this branch of the case. The facts show that the work done by the packing house is in every sense specialized factory work applied to fruit that has left the orchard. The major part of the fruit is moved directly by the packing house workers, through the agency of two allied corporations, into the rail cars for prompt movement in interstate trade. Most certainly any considerable interference in such work would affect the free flow of interstate commerce. . . .

Petitioner is denied relief, and the order of the Board is ordered enforced.

Case Questions

1. State the business activities carried on by petitioner.
2. What defenses does it interpose?
3. What is the "common denominator" to which the court refers?
4. When do products of the soil enter upon the status of industry?
5. Explain the statement, "So to be agricultural labor, the work need not be strictly related to the crop, and every work related strictly to the crop is not of necessity agricultural labor."

L. A. YOUNG SPRING & WIRE CORPORATION v. NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals, District of Columbia, 1947.
163 Fed. (2d) 905

WILBUR K. MILLER, A. J. On August 26, 1946, the National Labor Relations Board ordered the L. A. Young Spring & Wire Corporation to cease and desist from what it had held to be unfair labor practices, and to bargain collectively concerning wages and other conditions of employment with Chapter No. 155, Foremen's Association of America. That union had theretofore been certified by the Board as the exclusive bargaining agent of the foremen and assistant foremen in the company's Los Angeles plant. The company declined to comply, and petitioned this Court to review and set aside the Board's order on the ground that its supervisory personnel were not employees within the meaning of that term as used in Sec. 2(3) of the National Labor Relations Act and so were not covered by the Act.

In answering, the Labor Board denied the petitioner's contention. It prayed that we enter a decree directing the enforcement of its order.

The privileges and benefits of the National Labor Relations Act are conferred upon "employees." The Supreme Court of the United States has pointed out that "Sec. 2(3) of the Act, so far as relevant [to the case then being considered], provides 'The term "employee" shall include any employee . . .' 49 Stat. 450." *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485. In the course of its opinion the Supreme Court said, "And we see no basis in this Act whatever for holding that foremen are forbidden the protection of the Act when they take collective action to protect their collective interests," and later said, "But there is nothing in the Act which indicates that Congress intended to deny its benefits to foremen as employees, if they choose to believe that their interests as employees would be better served by organization than by individual competition."

The Labor Board relies upon the *Packard* case as decisive of the appeal now before us. The petitioner, on the other hand, presses upon us the argument that the facts of this case with respect to the duties and authority of foremen differ so widely from comparable facts in the *Packard* case that the Supreme Court's decision there is inapplicable here. But regardless of factual differences between that case and this, it cannot be denied that the foremen here involved, no matter to what extent they act in the interest of the employer, are them-

selves employees as the Supreme Court said of the Packard foremen, "both in the most technical sense at common law as well as in common acceptance of the term. . . ." Consequently it is our view that except for intervening legislation, the *Packard* case would imperatively require us to decree the enforcement of the Board's order.

After this petition for review was filed and while it was pending before us, the Congress enacted the Labor Management Relations Act, 1947 (Public Law No. 101, 80th Congress, 1st Session, Chapter 120), commonly known as the Taft-Hartley Act. This statute qualifies the heretofore unqualified statement of Sec. 2(3) of the original National Labor Relations Act to the effect that the term "employee" shall include every employee by providing that "The term 'employee' . . . shall not include . . . any individual employed as a supervisor" [Sec. 2(3) Taft-Hartley Act]. Section 2(11) of the new enactment is as follows: "(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The purpose of this amendment to the National Labor Relations Act is emphasized by Sec. 14(a) of the Taft-Hartley Act, which is as follows: "Sec. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Before the adoption of this amendatory legislation, it was of course true, as the Supreme Court said in the *Packard* opinion, that there was nothing in the National Labor Relations Act which indicated that Congress intended to deny its benefits to foremen as employees. It is now unmistakably clear, however, that the 80th Congress intended to deny, and has denied, the benefits of the Act to "supervisors." . . . Order of Board denied enforcement.

Case Questions

1. What was the holding of the United States Supreme Court in the *Packard* decision?
2. What tests are laid down by Sec. 2 (11) as being determinative of supervisory status?
3. What is the import and effect of Sec. 14 (a) of the Act?

SECTION 61. UNIONS AND LABOR DISPUTES COVERED BY THE ACT

This topic may be summarily dismissed because of previous coverage of the subject matter in this volume. Reference may be made to Section 10 of Chapter 3 on the definition of a labor organization. Because the concept of a labor dispute is interrelated with the labor injunction, full treatment is found in Chapter 4 on the labor injunction. The National Labor Relations Act, reprinted in the Appendix of this book, defines a "labor organization" in Sec. 2 (5) and the term "labor dispute" in Sec. 2 (9) .

SECTION 62. EMPLOYEE RIGHTS UNDER SECTION 7 OF THE ACT

Labor's Magna Carta may be found in Sec. 7 of the National Labor Relations Act. It is here that Congress has given basic expression to the right of labor to form, join, and assist labor unions with a view toward fostering the reconciliation of divergent interests by resort to collective bargaining procedure rather than by resort to collective coercion in the form of costly, and oftentimes violent, strike and boycott activity. Because of its importance, it is reprinted here in full. The italicized unit represents that portion of Sec. 7 which, by addition, was changed from what it had formerly been under the National Labor Relations Act of 1935.

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).*"

Interference with the right granted labor is made an unfair labor practice for employers by virtue of the subsections of Sec. 8 (a), and for unions under the prohibition of Sec. 8 (b) (1), (2), and (5). Investigation of the above unfair interferences is reserved for subsequent treatment.

We are here concerned with but one major question, namely, what in general constitutes proper subject matter for purposes of collective bargaining? The answer to this question merits pursuit, in as much as an employer will not be guilty of an unfair labor practice in re-

fusing to bargain with a labor organization about those matters that the law considers solely in the pale of managerial discretion.

The body of law surrounding management prerogatives is rather sparse and slow in development. To delineate the issues of this section, we may list a few of the items that bodies such as the War Labor Board have classified as managerial rights. They include, among others, the right to determine plant location, manufacturing method, volume of output, selection of executive staff, products to be manufactured, size of work force, and structure of the organization. An employer has been within his rights to refuse to bargain with a labor organization concerning the above matters without being liable to a charge under Sec. 8 (a) (5) of the Act.

On the other hand, wages, hours of work, incentive payment methods, physical working conditions, gratuities such as vacation and medical payment, time standards related to output, seniority rights, union security, and subcontracting of work to other vendors or affiliates have been held to be proper subjects of collective bargaining. Refusal by an employer to negotiate with a union relative to these matters opens the door to an unfair labor practice charge.

It should be noted, however, that there is nothing to prevent a labor organization from conducting lawful strike and picket activity to force the employer to narrow his concept of managerial prerogatives. Conversely, just because the law requires an employer to bargain collectively with respect to issues that are not managerial prerogatives does not mean that he is required to accede to the demands made by the union. All that is required of him is that he make a continuing effort to conduct *good faith* negotiations with labor's selected representative.

The cases included in this section will give the reader a broad perspective as to the *nature* of the Sec. 7 right. They are representative but not all-inclusive, for the quality and formality of bargaining required by the law is developed in Secs. 63.5 and 64.3 of this book.

The *Allison* decision is presented first in this section. It treats of the question of merit increases as a valid subject of collective bargaining. Next is the *Phoenix Mutual* case, which investigates whether employees are protected in their right to recommend that management hire a particular worker. A somewhat related set of facts is found in the *Reynolds* case, wherein workers walked out to prevent the demotion of a popular foreman. In the *Schwartz* case, employees who circulated a petition requesting overtime were discharged, raising again the question of Sec. 7 protection. The final decision included

in this section, *Inland Steel Company,* investigates whether retirement plans are sufficiently a part of earnings to make them a required topic for employer-union good faith negotiation.

NATIONAL LABOR RELATIONS BOARD v. J. H. ALLISON & COMPANY

Circuit Court of Appeals, Sixth Circuit, 1948. 165 Fed. (2d) 766

MARTIN, C. J. The National Labor Relations Board ordered the respondent J. H. Allison & Company, a Tennessee corporation doing business in Chattanooga, Tennessee, to cease and desist from refusing to bargain collectively concerning so-called "merit wage increases" with a labor union (affiliated with the American Federation of Labor), as exclusive representative and bargaining agent of its production workers; and to grant no merit wage increases to such employees "without prior consultation with the Union."

Respondent was affirmatively ordered to bargain collectively with the union regarding merit wage increases, and, upon request, to furnish the union "full information with respect to merit wage increases, including the number of such increases, the amount of such increases, and the standards employed in arriving at such increases." The customary directions as to notice-posting and notification of the Regional Director were given. This Court is petitioned to enter a decree enforcing the Board's order in entirety. Respondent vigorously opposes the petition.

The Labor Board agreed with the Trial Examiner that respondent had violated Section 8 (5) of the National Labor Relations Act, 49 Stat. 449; affirmed his rulings; and substantially adopted his findings, conclusions and recommendations.

The material facts are not in dispute. The respondent company for approximately five years had dealt with the union and had executed exclusive bargaining contracts with it as representative of the employees. At the time of the occurrences during 1945 upon which the complaint is based, one of these annual agreements, dated January 7, 1945, was in effect. This contract provided for a minimum wage scale; but no provision was made therein for merit increases. Indeed, the subject was not mentioned in the signed agreement. A few months after the execution of this contract, the company, in conformity with its past practice, gave some thirty-one, out of a total number of from one hundred and five to one hundred and fifteen, of its employees wage increases. Upon learning this, an official repre-

sentative of the union requested respondent on May 2, 1945, to furnish the union with a list of the names of the employees who had received increased pay, together with the amount of the raise granted each. He stated that such information was necessary as a basis for further collective bargaining negotiations on wage rates. Respondent refused to divulge the desired information, and was likewise adamant to similar later requests from the union. The reasons given by the company for rejection were that merit wage increases are not proper subject matter for collective bargaining, but fall within exclusively managerial function; and that the union could obtain from its own membership the information which it sought.

In his testimony before the Trial Examiner, Vice President McCall frankly stated the company's position, thus: "We feel that the granting of these individual merit increases is a matter that is determined on the basis of an individual's performance, and that the Union is not involved in that, as a negotiated increase; that is, it isn't collective bargaining; that the fact that it is based on merit removes it from bargaining and negotiation, which indicates that it is something that is discussed and compromised, perhaps; but we have felt that an individual merit increase is a reward for increased production or skill, and that that has always been our policy to recognize that whenever we could, when we felt it was justified. . . . We think that it is not the proper function of the Union under our contract to discuss individual merit increases."

Upon substantial evidence, the Labor Board found that during negotiations for 1946, the ensuing year, the union requested respondent to include in the contract a clause concerning the union's rights with respect to merit increases and other changes in wages, but that respondent "presumably adhering to its previously announced position that merit increases are not a bargainable issue," refused the request of the union, which "then dropped its request stating that the matter would probably be settled in the proceedings which it had instituted before the Board."

In its decision, the Board expressed concurrence in the Trial Examiner's conclusion that the respondent had not fulfilled its obligation to bargain collectively with the union. No merit was found in the company's contention that merit increases are a prerogative of management; but they were deemed by the Board "an integral part of the wage structure" and, as such, a proper subject for collective bargaining. The refusal of respondent, during the formulation of the 1946 contract, to negotiate with the union concerning merit wage

increases and to furnish information upon the subject so that the union could adequately represent the employees, was declared to be the basis of the Board's finding that respondent had refused to bargain within the meaning of Section 8 (5) of the Act.

One member of the Labor Board dissented. He expressed accord with his colleagues "that merit increases are a proper subject of collective bargaining," but considered sound the contention that "it was not incumbent upon respondent to disclose information concerning merit wage increases" when requested by the union to do so on May 2, 1945, in as much as the contract in effect on that date contained a minimum wage scale but was silent as to maximum wages. He pointed out that the parties had reached an agreement for a definite period of time and that "the Act does not require an employer to furnish information upon which it has based certain merit increases, not in violation of the provisions of the existing contract, after only 4 months of the contract year have elapsed."

The minority Board member stated further: "I believe it is unwise, granting that maximum as well as minimum wages are bargainable subjects, to hold that the respondent company refused to bargain in the negotiations for the new agreement. The findings of the Trial Examiner which are not in dispute reveal that the respondent and the Union, as a result of these negotiations, reached an understanding which was embodied in a collective agreement for an additional year. There is no obligation under Section 8 (5) for an employer to agree to anything. Consequently, it cannot be said that an employer failed in his duty under the Act when he 'traded off' a demand on one issue for a substantial concession on another. Had the parties reached an impasse, then we would have been confronted by quite another question."

We think the dissent does not meet the real issue. As to unreasonableness of the demand on May 2, 1945, it should not be overlooked that, according to the record, the demand for the information was renewed later during the negotiations for the 1946 contract. Moreover, the constant position of respondent has been, and now is, that merit increases are not, under the National Labor Relations Act, a proper subject for collective bargaining; and that the company will not negotiate or bargain with the union upon the subject until "ordered so to do by final authority." This pat position of the employer necessitates the course pursued by the union to enforce the rights of its membership claimed under the Act. Nor do we see logical justification in the view that in entering into a collective bargaining agree-

ment for a new year, even though the contract was silent upon a controverted matter, the union should be held to have waived any rights secured under the Act, including its right to have a say-so as to so-called merit increases. Such interpretation would seem to be disruptive rather than fostering in its effect upon collective bargaining, the national desideratum disclosed in the broad terms of the first section of the National Labor Relations Act.

In its brief, respondent states its insistence that "the ex parte giving of merit increases does not come within the scope of collective bargaining in the absence of a provision in its contract to the contrary, and that under the existing contract and usage obtaining between the Company and the Union, the merit increases were not the subject of collective bargaining." Respondent asserts that the real and sole issue in the case is whether, under the existing contract and practice, it is necessary for respondent "to affirmatively bargain with the union with respect to merit increases." Respondent argues that it is common practice for employers to grant merit increases; and that, unless there is an express stipulation in the bargaining agreement to the contrary, the employer may at any time during the term of the contract give an individual employee a merit increase within "the network" of the wage scale negotiated between the employer and the union representing its employees as bargaining agent. It is pointed out that, should there be a charge of discrimination—which there is not in this case—the matter would fall within the ambit of grievance procedure.

In our judgment, the argument of the respondent will not stand. We think the logical deduction to be drawn from the opinions of the Supreme Court is that by virtue of the National Labor Relations Act the obligation of the employer to bargain collectively with representatives of its employees with respect to wages, hours and working conditions, includes the duty to bargain with such representatives concerning individual merit wage increases. The labeling of a wage increase as a gratuity does not obviate the fact that a gratuitous increase on the basis of merit does, in actuality, effectuate changes in rates of pay and wages, which are by the Act made the subject of collective bargaining.

In *J. I. Case Co.* v. *National Labor Relations Board,* 321 U.S. 332, 337-339, the Supreme Court discusses generally the relation of individual contracts to collective bargaining, and declared that, regardless of the circumstances justifying the execution of individual contracts, the procedures prescribed by the National Labor Relations

Act, looking to collective bargaining, may not by individual employment contracts be defeated or used to forestall collective bargaining or "to limit or condition the terms of the collective agreement." It is pointed out that the very purpose of providing by statute for collective agreements is to supersede the terms of separate agreements of employees "with terms which reflect the strength and bargaining power and serve the welfare of the group." Replying to the argument that some employees may lose by the collective agreement, in as much as an individual worker may sometimes be capable of obtaining better terms of employment than those obtainable by groups and that accordingly his freedom of contract must be respected, the Supreme Court said: "The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. Such discriminations not infrequently amount to unfair labor practices. The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result."

On the same day that the opinion in the case just discussed was announced, the Supreme Court held, in *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 346, 347, that the failure of a carrier to give notice to the bargaining representative of its employees of an intended change affecting rates of pay of certain individual employees constituted a violation of Section 6 of the Railway Labor Act of 1926 (the 1934 Railway Act containing a similar provision), 48 Stat. 1197, 45 U.S.C., Sec. 156. Mr. Justice Jackson, who also wrote the opinion in *J. I. Case Co.* v. *National Labor Relations Board, supra,* said: "From the first the position of labor with reference to the wage structure of an industry has been much like that of the carriers about rate structures. It is insisted that excep-

tional situations often have an importance to the whole because they introduce competitions and discriminations that are upsetting to the entire structure. Hence effective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions. Collective bargains used not and do not always settle or embrace every exception. It may be agreed that particular situations are reserved for individual contracting, either completely or within prescribed limits. Had this proposed rate of pay been submitted to the collective bargaining process, it might have been settled thereby or might have resulted in an agreement that the Company should be free to negotiate with the agents severally. But the Company did not observe the right of the representatives of the whole unit to be notified and dealt with concerning a matter which from an employee's point of view may not be exceptional or which may provide a leverage for taking away other advantages of the collective contract."

In *Medo Photo Supply Corp.* v. *National Labor Relations Board,* 321 U.S. 678, 684, Chief Justice Stone pointed to the two opinions which have been discussed, and to *National Licorice Co.* v. *Labor Board,* 309 U.S. 350 359-361. He asserted that it is a violation of the essential principle of collective bargaining and an infringement of the National Labor Relations Act for the employer to disregard the bargaining representative of its employees by negotiating with them individually, with respect to wages, hours and working conditions.

We think that *May Stores Co.* v. *Labor Board,* 326 U.S. 376, 384, 385, bears close analogy in principle. In that case, the Supreme Court reasserted that the National Labor Relations Act makes it imperative upon the employer to bargain collectively only with the duly recognized or accredited representatives of employees, and declared that employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot logically or realistically be distinguished from bargaining with individuals or minorities. The court considered that unilateral action by the employer in an application to the War Labor Board for authority to increase wages was not getting itself into position to negotiate with the bargaining agent of its employees. Mr. Justice Reed said: "Such unilateral action minimizes the influence of collective bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent."

Even though the foregoing decisions of the Supreme Court do not hold directly that so-called merit increases are so closely identified with "rates of pay" as to be properly considered within the coverage of that phrase as used in the Act, we think that the discussion and reasoning in the cases leads to the conclusion that the union, as collective bargaining agent, may not be ignored by refusal of the employer to furnish information as to the basis of such increases, or the names of those receiving betterments in the wage scale and the amounts of the increased wages received by them.

Aluminum Ore Co. v. *National Labor Relations Board,* 131 F. (2d) 485, 487, is closely in point. There, the complaint was that the employer had taken unilateral action as to certain wage increases, and had withheld from the union "information as to pay rates which was necessary and basic to collective bargaining." There, as here, the relationship between the company and the union as recognized bargaining agent of its employees had been at all times serene and friendly. The employer and the union, from time to time both before and after the complaint was filed, had entered into collective bargaining agreement. Ultimately, the company insisted that any increase in wages should be determined by consideration of the individual members of several separate groups included in the union.

Quite reasonably and with honest belief in the justification of its position, the company argued that in view of its past record of increases, a flat horizontal increase to all members of the union in the same proportion or amounts would work inequities, as the wages of some of the men had been raised comparatively recently and those of others had not. The union insisted that its members be treated as a whole. While the negotiations were continuing, an apparent impasse was reached; but the union receded from its earlier position and announced its willingness to bargain upon the basis of consideration of the respective groups.

The company declared, however, that it would determine for itself what the wages and rates of pay should be, as it had done for many years; that it was making presently certain increases of which it had advised the union (as was not done by respondent in the instant case), and that such increases would stand unless and until there should be objections by any individual member of the union, in which event the company would permit any aggrieved person to present his complaint, either personally or through the union.

The Court of Appeals held justifiable the finding of the Labor Board that the employment of unilateral procedure by the company

was not within the spirit and contemplation of the Act. In enforcing the order of the Board, with immaterial modifications in so far as the opinion is authoritative here, the court said: "In determining what employees should receive increases and in what amounts, it could have been only helpful to have before the bargainers the wage history of the various employees, including full information as to the work done by the respective employees and as to their respective wages in the past, their respective increases from time to time and all other facts bearing upon what constituted fair wages and fair increases. . . . Petitioner announced the increases it would be willing to make but it refused to supply the wage history. From this refusal, we think the Board was justified in concluding that petitioner had failed to cooperate wholeheartedly in collective bargaining."

The *Aluminum Ore Company* case is not distinguished by the fact that, there, the employer insisted upon making all wage changes unilaterally, while the employer in the case at bar asserts the right to grant wage increases only to certain individuals of its own choice. In both cases, the insistence is upon impermissible unilateral company action as to wage increases.

For the reasons which have been indicated, a decree of enforcement of the order of the National Labor Relations Board will be entered as prayed in its petition to this Court.

SIMONS, C. J. (dissenting): I regret that I am unable to concur in the views of my colleagues. Undoubtedly, an employer may not unilaterally bargain with respect to wages. *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 322; *Order of R. R. Telegraphers* v. *Railway Express Agency*, 321 U.S. 342; *Medo Photo Supply Corp.* v. *N.L.R.B.*, 321 U.S. 678; *May Department Stores Co.* v. *N.L.R.B.*, 326 U.S. 376. These decisions do not, however, reach the point whether merit increases are so closely identified with rates of pay that they should be considered within the meaning of that phrase as used in the Act. So much the opinion of the majority appears to concede. Merit increases as such are neither the result of negotiations nor contract. They differ from bonuses in that they are not applied generally to all employees, and so whether governed by contract or not are anticipated by employees as wages. *Singer Manufacturing Co.* v. *N.L.R.B.*, 119 Fed. (2d) 131, and the importance of such distinction was recognized by the National Labor Relations Board in *Libby, McNeil & Libby*, 65 N.L.R.B. 873, where it was held that the inauguration of an incentive plan by an employer is not *per se* an unfair labor practice unless there is proof that the increases were part of a plan to undermine the Union. In the

instant case, there is no finding that the merit increases were in pursuance of such plan, no finding that they did, in fact, undermine the Union, no evidence to sustain such findings if they had been made, and the history of labor-management relations in the respondent's plant repels any inference that its merit increases had either such purpose or effect. Moreover, in an era when emphasis is laid upon production and ever more production as a check to inflationary processes, if not indeed as a cure for all other economic ills, it is difficult to accept the concept that gratuitous increases based upon zeal and ability and not in conflict with a collective bargaining agreement freely arrived at is an unfair labor practice. Nothing in the Act either expressly or by fair implication precludes recognition of individual merit.

Even upon the assumption that merit increases are properly the subject of collective bargaining, those involved do not constitute an unfair labor practice by refusal to bargain. The law compels bargaining. It does not and may not compel agreement. In the present case, the Union sought to bargain upon the subject of merit increases, but abandoned its demand and freely entered upon an agreement still in effect when the order was made which contained no reference to merit increases or maximum compensation. The Union should, as the employer must, stand by its bargain. The Allison Company was not guilty of an unfair labor practice and enforcement should be denied to the Board's order.

Case Questions

1. State the facts leading to the dispute.
2. What is the issue in this case?
3. What section of the Act did the Board find Allison to have violated?
4. Why does Allison management contend merit increases to be non-bargainable?
5. On what basis does the court find merit increases to be bargainable?
6. What is meant by "unilateral" action?
7. In the dissenting opinion, why does Chief Justice Simons feel that merit increases are not bargainable?

NATIONAL LABOR RELATIONS BOARD v. PHOENIX MUTUAL LIFE INSURANCE CO.

Circuit Court of Appeals, Seventh Circuit, 1948. 167 Fed. (2d) 983

The opening portion of this case, in which the Court held insurance salesmen to be "employees" under Sec. 2 (3) of the Labor Management Relations Act, is reprinted on page 447 in Section 60 of this book.

DUFFY, D. J. . . . In September, 1944, ten insurance salesmen worked under the supervision of respondent's branch manager of the

Chicago-LaSalle Office. There was also a clerical and stenographic staff of five persons who worked under the supervision of the cashier of that office. In addition to acting as a service department to the home office and to the public, the cashier's department has the responsibility of serving the salesmen efficiently. Those in the cashier's department work in close cooperation with the insurance salesmen. The cashier's department disburses initial commissions to salesmen and maintains records concerning the applications received and policies issued. When requested it functions to furnish information to salesmen concerning policies, premiums, dividends, conversions, beneficiaries and in general to assist them with information not generally known or published. The degree of efficiency of the cashier and employees in that department often aids or hinders the effectiveness of the work of the insurance salesmen. Inconvenience, embarrassment, added work and loss of sales to prospective customers have, in the past, resulted to salesmen from such incidents as errors which a cashier made in calculating costs to guide the salesmen in dealing with prospective policyholders, the erroneous application of dividends which had accrued to a policyholder, and giving faulty information supplied by a cashier respecting a settlement agreement.

The Board found that the capability and competency of the cashier had a direct connection with and relationship to the working conditions of respondent's salesmen, and substantial evidence supports the Board's finding.

About September 1, 1944, Mr. Herbig, the manager of the Chicago-LaSalle Office, called a meeting of the salesmen and announced the resignation of the cashier, telling them selection of a successor was under consideration by the home office and that the new appointee probably would be transferred from another branch office. The impending change loomed important to the salesmen by reason of their dependence upon the cashier's department for information and assistance affecting their earnings. During the two weeks after the announcement the salesmen discussed the matter of the cashier's successor at some length.

On the morning of September 11, and again at lunch on that day, the salesmen met and expressed their dissatisfaction with the fact that they had suffered inconvenience and loss of time due to the "breaking in" of four different cashiers during the last few years. The salesmen discussed the advisability of making a recommendation to respondent and all of them agreed that the assistant cashier was well qualified to fill the vacancy, and that they would prefer her to

an outsider; but as to whether the salesmen should recommend the appointment of any specific person there was some disagreement. Salesman Davis was designated by all the group to write a letter which, if approved and signed by all ten of the salesmen, was to be sent to the home office. Davis, with the assistance of Johnson and Goldberg, prepared a tentative draft of such letter, which was discussed and revised at a subsequent luncheon meeting of the salesmen.

Before the final draft had been agreed upon, the manager learned of the proposed letter and questioned salesman Goldberg, who explained that the final draft had not been completed and that he therefore did not know just what the contents would be. The manager thereupon advised him not to sign it.

On September 15, before Davis had an opportunity to put the letter in final form, he and Johnson received notices from the respondent terminating their agency contracts. The letters were almost identical. Each stated: "Your recent actions and involvement in the resignations and new appointment affecting our Cashier's Department have been so far beyond the premise of your responsibility, and so completely unpleasant that in full agreement with the Home Office we are cancelling your Agent's Contract, effective thirty days from today." The letters further instructed Davis and Johnson to turn in their supplies and rate books, to have their desks cleaned out, and their agency affairs closed by noon of the following day.

Section 7 of the Act provides that "employees shall have the right . . . to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." By incorporating this language, Congress must have intended to include within the Act what the usual meaning of these unambiguous words conveys. A proper construction is that the employees shall have the right to engage in concerted activities for their mutual aid or protection even though no union activity be involved, or collective bargaining be contemplated. Here Davis and Johnson and other salesmen were properly concerned with the identity and capability of the new cashier. Conceding they had no authority to appoint a new cashier or even recommend anyone for the appointment, they had a legitimate interest in acting concertedly in making known their views to management without being discharged for that interest. The moderate conduct of Davis and Johnson and the others bore a reasonable relation to conditions of their employment. It was, therefore, an unfair labor practice for respondent to interfere with the exercise of the right of Davis and Johnson and the other salesmen to engage in concerted activities

for their mutual aid or protection. The finding of the Board that Davis and Johnson were discharged because they engaged in concerted activities for their mutual aid or protection is supported by substantial evidence on the record as a whole. . . .

The petition for enforcement of the order is granted.

MAJOR, C. J. (dissenting): I would deny enforcement of the Board's order for the reason that the "concerted activities" in which respondent's insurance salesmen engaged, as found by the Board, were not for their "mutual aid or protection," as contemplated by Sec. 7 of the Act. In my judgment, both the stated purpose of the Act and a reasonable interpretation thereof require a holding that was never contemplated by Congress that such activities should form the basis for an unfair labor practice. It must be remembered that no labor dispute or labor union, or the right to form, join or assist a labor organization, or any right on the part of the salesmen, or refusal on the part of the respondent to bargain collectively, as those terms are defined by the Act and many times construed by the courts, are involved. Neither is there any grievance concerning wages, rates of pay, hours of employment or conditions of work. In fact, the grievance is not only petty but personal and private in its nature.

The grievance concerns the selection by respondent of a cashier, which was wholly the prerogative of management. To put it bluntly, their grievance was directed at a matter which was none of their business or concern. The opinion of the majority on this aspect of the case has the effect of enlarging the jurisdiction of the Board beyond all intendments and penalizes an employer for discharging an employee who busies himself in concert with fellow employees about matters which are none of their concern, all under the guise that it is for their "mutual aid or protection." I would suppose under the holding of the majority that the salesmen would also be protected if they engaged in "concerted activities" regarding respondent's president, its board of directors, its attorneys, the location of its office, or the form and contents of the policies issued by respondent which the salesmen are authorized to sell, this notwithstanding that respondent would be under no obligation to bargain with them concerning these and other matters wholly within the realm of the managerial orbit, all under the pretext that they had a "legitimate interest" in such matters.

Case Questions

1. What functions were performed by the cashier's department?
2. Why were Davis and Johnson released by Phoenix?
3. Does Sec. 7 protect "concerted activity" by employees though no collective bargaining is contemplated?
4. What was the court's decision?
5. What is the basis of Judge Major's dissent?
6. Do you agree with the majority or the minority? Why?

NATIONAL LABOR RELATIONS BOARD v. REYNOLDS INTERNATIONAL PEN COMPANY

Circuit Court of Appeals, Seventh Circuit, 1947. 162 Fed. (2d) 680

MAJOR, C. J. This case is here upon petition of National Labor Relations Board, pursuant to Sec. 10 (e) of the National Labor Relations Act (29 U.S.C.A. Sec. 151, et seq.) for enforcement of its order issued against respondent on August 30, 1946, following the usual proceedings under Sec. 10 of the Act. The Board's order is based on findings that respondent (1) in violation of Sec. 8 (1) of the Act interfered with, restrained and coerced its employees by various acts and statements calculated to thwart their efforts at self-organization, and (2) in violation of Sec. 8 (3) and (1), discriminatorily discharged employees Bullard and Lingle because of their leadership and affiliation with and activities on behalf of the union (Fountain Pen and Pencil Makers' Union, Local 13,318, A. F. of L.).

The Board's order requires respondent to cease and desist from its unfair labor practices, to reinstate with back pay the employees discriminatorily discharged and to post appropriate notices.

The Board's findings are predicated almost entirely upon statements found to have been made by respondent's supervisory employees. The practices complained of are narrowly limited as to time and those affected. They all occurred between January 5 and January 21, 1946, and the employees involved were about twenty-two women employed on the night shift in respondent's ball-point department. At that time, respondent employed about five hundred persons, almost equally divided between day and night shifts, 95% of whom were women. The record is not clear as to whether respondent's employees generally were organized or represented by a union. The proof shows conclusively, however, and there is no contention to the contrary, that the employees involved in this proceeding were not members of a union and that no effort had been made at organization

prior to the happening of the events connected with the instant proceedings. . . .

While there are numerous incidents relied upon by the Board, we think its findings as to two major events are largely determinative of the validity of its order, especially as it relates to Sec. 8 (1) of the Act. These two findings relate to a walkout on January 5, 1946, and a speech made by Reynolds to all of respondent's employees on January 12, 1946.

As to the walkout, we quote from the Board's brief: "On January 5, 1946, Foreman Kaiser, of the night shift in respondent's ball-point department, informed his subordinates that he was being demoted. This announcement stirred up considerable unrest and discussion among the employees, particularly because of earlier rumors of impending wage reductions which had been current in the department. The employees feared that Kaiser's reported demotion presaged a decrease in their own rates of pay. After discussion, they authorized employee Helen Fisher to ask General Manager Fleishhacker to talk to them and give a definite explanation of the situation. Fleishhacker was not present at the plant and the employees, upon the suggestion of employee Margaret Bullard, decided to stage a walk-out. All but one of them punched out their time cards and left the plant."

The leaders in the walkout movement were employees Lingle and Bullard (subsequently discharged) and Fisher. After leaving the plant the employees gathered at a nearby cafe and attempted unsuccessfully to get in contact with Fleishhacker. While at the cafe, they decided, at the suggestion of Kaiser, to seek the aid of a labor organization. On the following morning, January 6, Fisher telephoned Fleishhacker and asked him whether "she had a job." Fleishhacker answered that if she reapplied for employment he would give her a job, but stated that "Marge Bullard and her girl friend (by whom the Board found he meant Elsie Lingle) were the instigators of the girls walking out, and they were going to be fired." From this finding the Board concludes: "It is self-evident that for the respondent thus to single out two of the leaders of the employees' legitimate concerted activities, and to threaten them with discharge in reprisal for such leadership, was calculated to interfere with, restrain, and coerce the employees in their exercise of the rights protected by Section 7 of the Act."

The validity of this conclusion can be sustained only if the employees who participated in the walkout were engaged in "legitimate concerted activities." The Board's conclusion is predicated upon its

finding that the walkout was due to an apprehension on the part of the employees that their pay was to be decreased. We think there is no substantial evidence in support of this finding. True, there was some testimony that there had been a rumor among the employees of a wage cut, and certain witnesses, obviously as an afterthought and for the purpose of bolstering the Board's case, attempted to couple this rumor with the actual reason for the walkout. The proof shows, however, without any room for a contrary view, that the walkout was staged in protest over the demotion of Kaiser who was at that time night foreman.

Foreman Kaiser was not in respondent's employment at the time of the hearing; in fact, he appeared as a representative of the union and was a witness for the Board. In his testimony he makes no mention of any rumor concerning a wage decrease as a reason for the walkout. Subsequent to the walkout Fisher, at the request of the other employees participating in the walkout, contacted officials of the union and arranged for a meeting, which was held on January 7, 1946. Cortese, the president of the union, with whom this meeting was held, was a witness for the Board. He testified that when Fisher sought to arrange for the meeting he asked her the reason for the walkout and that she replied that they thought the foreman was efficient to carry out his duties and that they were sympathizing with him. At the meeting which was held with Cortese on January 7, the employees assigned the same reason. Cortese testified that he told them at the meeting that "the foreman was purely a management prerogative and that they were wrong in walking out in sympathy with their foreman," and that he advised them to go back to work.

We reject the finding as to the cause of the walkout, and it follows that we must also reject the conclusion based thereon, that it was an unfair labor practice to threaten the discharge of Bullard and Lingle. *Cf. National Labor Relations Board* v. *Draper Corp.*, 145 F. (2d) 199. These employees who walked out because they were dissatisfied with the change of a foreman, which, as the union leader told them, was a prerogative of management, were not protected by the Act. In fact, as they all recognized by making application for reinstatement, they severed their relations as employees and we are of the view that respondent would have committed no unfair labor practice if it had threatened to discharge all of those involved or had refused to reinstate them. The fact that respondent threatened to discharge only Bullard and Lingle, two of the leaders in the walkout, does not alter the situation. Neither does the fact that respondent saw fit to rein-

state all of those who had walked out, including Lingle and Bullard, aid the Board's cause. Respondent should not be condemned because of its willingness to overlook their unjustifiable conduct.

Moreover, assuming the validity of the Board's finding that the walkout was attributable to rumors of a wage decrease, we still think it was unauthorized. It must be kept in mind that at the time of the walkout no demand had been made upon management concerning wages and no bargaining in reference thereto had been undertaken or suggested. In fact, there was no existing labor dispute or controversy of any character. The so-called justification for the walkout admittedly was based entirely upon rumor. The record further discloses that there was no reasonable basis even for this rumor because on January 3, two days before the walkout, a speech was made by Superintendent Heil to all of respondent's employees, including those here involved, in which he took cognizance of the rumor concerning a wage cut and informed them definitely that there would be no reduction in wages but if anything an increase. . . .

The Board argues the discriminatory nature of these discharges as though the burden was upon respondent to exonerate itself of the charges made against it. The burden, however, was upon the Board to prove affirmatively and by substantial evidence that Bullard and Lingle were discharged because of union membership and activities and for the purpose of discouraging membership in the union. . . . We think the Board failed to carry its burden in this respect.

The petition of the Board for the enforcement of its order is denied.

Case Questions

1. What remedial action did the Board order?
2. What caused the employees to stage the walkout?
3. Were the employees unionized at the time of the walkout?
4. What did the Board find to be the reason for the walkout?
5. Had the workers made a wage demand on Reynolds prior to the walkout?
6. Is the Board's view of the facts supported by "substantial" evidence?
7. Upon whom is the "burden of proof"?

NATIONAL LABOR RELATIONS BOARD v. HYMIE SCHWARTZ

Circuit Court of Appeals, Fifth Circuit, 1945. 146 Fed. (2d) 773

WALLER, C. J. Having found that the respondent discharged employee Leona Presley because of her union activities and because she

was organizing a movement among the employees to secure overtime work, and that a discharge for the latter reason also discourages membership in a labor union, and having ordered the respondent to cease and desist the labor practices that were adjudged to be unfair and to offer reinstatement to Leona Presley and to make her whole for any loss of pay that she may have suffered by reason of her discharge, the Board now petitions this Court to enforce said order.

It is undisputed that the discharged employee had procured and made available to a number of the employees of the respondent application cards for membership in the union, and that certain employees, including the discharged employee, had signed such application cards, and that they had been returned to the union.

There is substantial and convincing evidence that the forelady of the respondent, believing that the discharged employee was circulating cards, or a petition, to present to the company for the allowance of additional overtime work, discharged Mrs. Presley for that reason. The Board, however, found that the forelady discharged her for her union activities. It is true that the cards which she aided in circulating were applications for membership in the union, but the evidence shows that the forelady evidently had mistaken the purpose of the cards and believed they were part of an effort to secure overtime work for the employees. There is no proof whatever that Mrs. Norris, the forelady, knew that the cards were for membership in the union. The testimony as to the statement of the forelady on the reason for the discharge justifies the inference that the forelady believed that the cards were part of a movement to obtain additional overtime as well as the conclusion that this was the real reason for the employee's discharge rather than her inefficiency.

A careful search of the record fails to reveal any evidence tending to show that Mrs. Norris knew that the cards were applications for membership in the union, and there is no evidence in the record to support the finding that Mrs. Presley was fired for her union activities. But the absence of this proof will be of no avail to the respondent, for the evidence is quite substantial that Mrs. Presley was discharged for her activities in furtherance of an effort to get additional pay for the employees through the medium of overtime work. Under Sec. 7 of the Act (Sec. 157 of Title 29 U.S.C.), the employees have a right "to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." Under the Act the employees had the right to sign cards or to petition for overtime work, and to thus engage in concerted activities for their mutual aid.

To restrain or coerce the employees in the exercise of that right, as guaranteed in Sec. 7, is by Sec. 8 made an unfair labor practice.

Contrary to a rather general misconception, the National Labor Relations Act was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions, and the prohibition of unfair labor practices designed by an employer to prevent the free exercise by employees of their wishes in reference to becoming members of a union was intended by Congress as a grant of rights to the employees rather than as a grant of power to the union. Consequently the right of employees lawfully to engage in concerted activities for the purpose of mutual aid, outside of a union, is specified by the Act.

Although the order of the Board is without support in the evidence as to the finding that the employee was discharged for anti-union activity, there is abundant evidence to show that the employee was discharged for what the forelady believed to be the engaging in concerted activities for the mutual aid of the employees in seeking additional overtime, and since this is also within the condemnation of the Act as an unfair labor practice, although not as an act to discourage membership in a labor union, the order of the Board will be enforced, upon appropriate amendment to conform to the conclusions herein expressed.

Case Questions

1. What reason did the Board find motivated Mrs. Presley's discharge?
2. Does the court agree? Does this change the result reached? Why?
3. For whose benefit was the National Labor Relations Act enacted?
4. May employees, though not unionized, engage in "concerted activities"?

INLAND STEEL COMPANY v. NATIONAL LABOR RELATIONS BOARD

Circuit Court of Appeals, Seventh Circuit, October Term, 1947, April Session, 1948, September 23, 1948, 15 Labor Cases, Par. 64,737 [1]

MAJOR, C. J. These cases are here upon petition (in No. 9612) of Inland Steel Company (hereinafter called the Company), to review and set aside an order issued by the National Labor Relations Board. . . .

The Company, in case No. 9612, attacks that portion of the order which requires it to bargain with respect to its retirement and pension policies. The union has been permitted to intervene and joins the Board in the defense of this part of the order. . . .

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. . . It follows that the issue for decision is, as the Board asserts, whether pension and retirement plans are part of the subject matter of compulsory collective bargaining within the meaning of the Act. . . .

An integral, and it is asserted an essential, part of the plan from the beginning was that employees be compulsorily retired at the age of 65. (There are some exceptions to this requirement which are not material here.)

The Company's plan had been in effect for five and one-half years when, because of the increased demands for production and with a shortage of manpower occasioned by the war, it was compelled to suspend the retirement of its employees as provided by its established program. In consequence there were no retirements for age at either of the plants involved in the instant proceeding from August 26, 1941 to April 1, 1946. This temporary suspension of the compulsory retirement rule was abrogated, and it was determined by the Company that no retirements should be deferred beyond June 30, 1946. By April 1, 1946, all of the Company's employees, some 224 in number, who had reached the age of 65, had been retired. Thereupon, the Union filed with the Company a grievance protesting its action in the automatic retirement of employees at the age of 65. The Company refused to discuss this grievance with the Union, taking the position that it was not required under the Act to do so or to bargain concerning its retirement and pension plan, and particularly concerning the compulsory retirement feature thereof. Whereupon, the instant proceeding was instituted before the Board, with the result already noted.

This brings us to the particular language in controversy. Sec. 8 (5) of the Act requires an employer "to bargain collectively with the representative of his employees, subject to the provisions of Sec. 9(a)," and the latter section provides that the duly selected representative of the employees in an appropriate unit shall be their exclusive representative "for the purpose of collective bargaining *in respect to rates of pay, wages, hours of employment, or other conditions of employment.* . . ." The instant controversy has to do with the construction to be given or the meaning to be attached to the italicized words; in fact, the controversy is narrowed to the meaning to be attached to the term "wages" or "other conditions of employment."

The Board found and concluded that the benefits accruing to an employee by reason of a retirement or pension plan are encompassed in both categories. . . .

The opening sentence in the Company's argument is as follows: "Sections 8(5) and 9(a) of the Act do not refer to industrial retirement and pension plans, such as that of the petitioner, *in haec verba.*"[2] Of course not, and this is equally true as to the myriad matters arising from the employer-employee relationship which are recognized as included in the bargaining requirements of the Act but which are not specifically referred to. Illustrative are the numerous matters concerning which the Company and the Union have bargained and agreed, as embodied in their contract of April 30, 1945. A few of such matters are: a provision agreeing to bargain concerning nondiscriminatory discharges; a provision concerning seniority rights, with its far-reaching effect upon promotions and demotions; a provision for the benefit of employees inducted into the military service; a provision determining vacation periods with pay; a provision concerning the safety and health of employees, including clinic facilities; a provision for in-plant feeding, and a provision binding the Company and the Union to bargain, in conformity with a Directive Order of the National War Labor Board concerning dismissal or severance pay for employees displaced as the result of the closing of plants or the reduction in the working force following the termination of the war. None of these matters and many others which could be mentioned are referred to in the Act "*in haec verba,*" yet we think they are recognized generally, and they have been specifically recognized by the Company in the instant case as proper matters for bargaining and, as a result, have been included in a contract with the Union. Some of the benefits thus conferred could properly be designated as "wages," and they are all "conditions of employment." We think no common sense view would permit a distinction to be made as to the benefits inuring to the employees by reason of a retirement and pension plan.

The Company in its brief states the reasons for the establishment of a uniform fixed compulsory retirement age for all of its employees in connection with its retirement annuity program, among which are: (1) "The fixed retirement age gives the employee advance notice as to the length of his possible service with the Company and enables him to plan accordingly"; (2) "The fixed retirement age prevents grievances that otherwise would multiply as the question of each employee's employability arose"; (3) "A fixed retirement age gives an incentive to younger men"; and (4) "It is unfair and destructive

[2] In so many words.

of employee morale to discriminate between types of jobs or types of employees in retiring such employees from service." These reasons thus stated for a compulsory retirement age demonstrate, so we think contrary to the Company's contention, that the plan is included in "conditions of employment."

The Supreme Court, in *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350, 360, held that collective bargaining extends to matters involving discharge actions and, as already noted, the Company in its contract with the Union has so recognized. We are unable to differentiate between the conceded right of a Union to bargain concerning a discharge, and particularly a nondiscriminatory discharge, of an employee and its right to bargain concerning the age at which he is compelled to retire. In either case, the employee loses his job at the command of the employer; in either case, the effect upon the "conditions" of the person's employment is that the employment is terminated, and we think, in either case, the affected employee is entitled under the Act to bargain collectively through his duly selected representatives concerning such termination. In one instance, the cessation of employment comes perhaps suddenly and without advance notice or warning, while in the other, his employment ceases as a result of a plan announced in advance by the Company. And it must be remembered that the retirement age in the instant situation is determined by the Company and forced upon the employees without consultation and without any voice as to whether the retirement age is to be 65 or some other age. The Company's position that the age of retirement is not a matter for bargaining leads to the incongruous result that a proper bargaining matter is presented if an employee is suddenly discharged on the day before he reaches the age of 65, but that the next day, when he is subject to compulsory retirement, his Union is without right to bargain concerning such retirement.

The Company, however, attempts to escape the force of this reasoning by arguing that the retirement provision affects tenure of employment as distinguished from a condition of employment. The argument, as we understand, rests on the premise that the Act makes a distinction between "tenure of employment" and "conditions of employment," and attention is called to the use of those terms in Secs. 8 (3) and 2 (9) of the Act. Having thus asserted this distinction, the argument proceeds that tenure of employment is not embraced within the term "conditions of employment." Assuming that the Act recognizes such distinction for some purposes, it does not follow that such a distinction may properly be made for the purpose of collective

bargaining, as defined in Sec. 9 (a). "Tenure," as presently used, undoubtedly means duration or length of employment. The tenure of employment is terminated just as effectively by a discharge for cause as by a dismissal occasioned by a retirement provision. And in both instances alike, the time of the termination of such tenure is determined by the Company. As already shown, a termination by discharge is concededly a matter for collective bargaining. To say that termination by retirement is not amenable to the same process could not, in our judgment, be supported by logic, reason or common sense. In our view, the contention is without merit.

The Company also concedes that seniority is a proper matter for collective bargaining and, as already noted, has so recognized by its contract with the Union. It states in its brief that seniority is "the very heart of conditions of employment." Among the purposes which seniority serves is the protection of employees against arbitrary management conduct in connection with hire, promotion, demotion, transfer and discharge, and the creation of job security for older workers. A unilateral retirement and pension plan has as its main objective not job security for older workers but their retirement at an age predetermined by the Company, and we think the latter is as much included in "conditions of employment" as the former. What would be the purpose of protecting senior employees against layoff when an employer could arbitrarily and unilaterally place the compulsory retirement age at any level which might suit its purpose. If the Company may fix an age at 65, there is nothing to prevent it from deciding that 50 or 45 is the age at which employees are no longer employable, and in this manner wholly frustrate the seniority protections for which the Union has bargained. Again we note that discharges and seniority rights, like a retirement and pension plan, are not specifically mentioned in the bargaining requirements of the Act.

The Company in its brief as to seniority rights states that it "affects the employee's status every day." In contrast, the plain implication to be drawn from its argument is that an employee is a stranger to a retirement and pension plan during all the days of his employment and that it affects him in no manner until he arrives at the retirement age. We think such reasoning is without logic. Suppose that a person seeking employment was offered a job by each of two companies equal in all respects except that one had a retirement and pension plan and that the other did not. We think it reasonable to assume an acceptance of the job with the company which had such plan. Of course, that might be described merely as the inducement

which caused the job to be accepted, but on acceptance it would become, so we think, one of the "conditions of employment." Every day that such an employee worked, his financial status would be enhanced to the extent that his pension benefits increased, and his labor would be performed under a pledge from the company that certain specified monetary benefits would be his upon reaching the designated age. It surely cannot be seriously disputed but that such a pledge on the part of the company forms a part of the consideration for work performed, and we see no reason why an employee entitled to the benefit of the plan could not upon the refusal of the company to pay, sue and recover such benefits. In this view, the pension thus promised would appear to be as much a part of his "wages" as the money paid him at the time of the rendition of his services. But again we say that in any event such a plan is one of the "conditions of employment."

The Company makes the far fetched argument that the contributions made to a pension plan "differ in no respect from a voluntary payment that might be made to each employee on his marriage, or on the birth of a child, or on attaining the age of 50, or on enlisting in the armed forces in time of war or on participating as a member of a successful company baseball team," but we think there is a vast difference which arises from the fact that such hypothetical payments are not made as the result of a promise contained in a plan or program. They represent nothing more than a gift. Assume, however, that such supposed payments were made to employees as a result of a company obligation contained in a plan or program. Such an obligation would represent a part of the consideration for services performed, and payments made in the discharge of such obligation would, in our view, be "wages" or included in "conditions of employment."

The Board cites a number of authorities wherein the term "wages" in other fields of law has been broadly construed in support of its conclusion in the instant case that the term includes retirement and pension benefits for the purpose of collective bargaining. While we do not attach too much importance to the broad interpretation given the term in unrelated fields, we think they do show that a broad interpretation here is not unreasonable. For instance, the Board has been sustained in a number of cases where it has treated for the purpose of remedying the effects of discriminatory discharges, in violation of Sec. 8 (3) of the Act, pension and other "beneficial insurance rights of employees as part of the employees' real wages

and, in accordance with its authority under Sec. 10 (c) to order reinstatement of employees with . . . back pay," and has required the employer to restore such benefits to employees discriminated against. See *Butler Bros. et al.* v. *N.L.R.B.*, 134 F. (2d) 981, 985, *General Motors Corp.* v. *N.L.R.B.*, 150 F. (2d) 201, and *N.L.R.B.* v. *Stackpole Carbon Co.*, 128 F. (2d) 188. In the latter case, the court stated (page 191) that the Board's conclusion "seems to us to be in line with the purposes of the Act for the insurance rights in substance were part of the employee's wages."

In the Social Security Act (49 Stat. 642, Sec. 907, 42 U.S.C.A. Sec. 1107), the same Congress which enacted the National Labor Relations Act defined taxable "wages" as embracing "all remuneration . . . for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash. . . ." This definition has been construed, as the Supreme Court noted, in *Social Security Board* v. *Nierotko*, 327 U.S. 358, 365 (note 17), as including "vacation allowances," "sick pay," and "dismissal pay."

In the field of taxation, pension and retirement allowances have been deemed to be income of the recipients within the Internal Revenue Act definition of wages as "compensation for personal services." [26 U.S.C.A. Int. Rev. Code, Sec. 22 (a).] Thus, in *Hooker* v. *Hoey*, 27 F. Supp. 489, 490, affirmed, 107 F. (2d) 1016, the court said:

"It cannot be doubted that pensions or retiring allowances paid because of past services are one form of compensation for personal service and constitute taxable income. . . ."

The Company in its effort to obtain a construction of Sec. 9 (a) favorable to its contention devotes much of its brief to the legislative history of the Act which it is claimed demonstrates that Congress did not intend to subject retirement and pension plans to the bargaining process. In view of what we have said, this argument may be disposed of without extended discussion. It is sufficient to note that we have studied this legislative history and, while there are some portions of it which appear to support the company's position, yet taken as a whole it is not convincing. . . .

The Company places great stress upon the bargaining language used in the Railway Labor Act of 1926, on the theory that the instant Act is *in pari materia*.[3] It points out that numerous retirement and pension plans were put into effect by the railroads and that they were never subjected to the process of collective bargaining. This showing

[3] On the same subject, and therefore requiring similar interpretation.

is made for the purpose of demonstrating that Congress, in the enactment of the legislation now before us, did not intend to include such matters. In this connection, we think it is pertinent to note that in the Railway Labor Act the bargaining language was quite different from that of the instant legislation. There, it read, "rates of pay, rules, or working conditions." Here, it reads, "rates of pay, hours of employment, or other conditions of employment." A comparison of the language of the two Acts shows that Congress in the instant legislation must have intended a bargaining provision of broader scope than that contemplated in the Railway Labor Act. Certainly the term "wages" was intended to include something more than "rates of pay." Otherwise, its use would have served no purpose. Congress in the instant legislation used the phrase, "other conditions of employment" instead of the phrase, "working conditions," which it had previously used in the Railway Act. We think it is obvious that the phrase which it later used is more inclusive than that which it had formerly used. Even though the disputed language of the instant Act was open to construction, we think a comparison of the language of these two Acts is of no benefit to the Company. . . .

It is our view, therefore, and we so hold, that the order of the Board, in so far as it requires the Company to bargain with respect to retirement and pension matters, is valid, and the petition to review, filed by the Company in No. 9612, is denied. . . .

Case Questions

1. What is the issue for decision in this case?
2. What objection does the union have to the company's retirement plan?
3. Name some of the matters detailed in the case as to which bargaining had been carried on between the company and the union.
4. What advantages does the company enlist in favor of a compulsory retirement age?
5. State the argument of the court in drawing an analogy between bargaining about employee discharges and employee retirement age.
6. What is meant by "tenure"?
7. Does the company concede seniority rights to be bargainable?
8. What are the advantages of seniority rules? Does seniority affect the problem of retirement?
9. Does the court conclude that retirement plans are a "condition of employment"?
10. Does the court consider a retirement plan in the same category as gratuitous promises that are not enforceable in the court?
11. Discuss the proposition as to whether retirement benefits are embraced under the term "wages," making special reference to the tax laws, the Social Security Act, and the Railway Labor Act.

SECTION 63. EMPLOYER UNFAIR LABOR PRACTICES

In the preceding section the nature of the Sec. 7 rights of labor under the National Labor Relations Act was covered. Interference with these rights is made the subject of specific unfair labor practices that are detailed as subsections under Sec. 8 (a) of the Act. Sec. 8 (b) of the Act details union unfair labor practices, a feature that was not present in the original Wagner Act. These latter practices are reserved for subsequent individual treatment in Section 68 of this book. Specific employer unfair labor practices proscribed by the act include the following:

1. Interference, restraint, and coercion of employees as to their rights under Section 7. Sec. 8 (a) (1).
2. Domination of unions, including employer interference with the administration of, or the furnishing of financial assistance to, labor organizations. Sec. 8 (a) (2).
3. Discrimination against employees for union activity as to their terms of hire, tenure, or working conditions. Sec. 8 (a) (3).
4. Discrimination for filing charges or giving testimony under the Act. Sec. 8 (a) (4).
5. Refusing to bargain collectively with an authorized representative of labor. Sec. 8 (a) (5).

As the reader analyzes the succeeding case materials, matters of *remedy* as well as *right* should be observed. Matters of remedy will include the ramifications of the order issued by the National Labor Relations Board. These embrace the terms of cease and desist orders, requirements for the reinstatement of employees with compensation for wages lost because of employer unfair labor practices, requirements for the posting of notices relative to the commission of employer unfair labor practices, and related matters. The Board is generally empowered to issue, in its discretion, such orders as will "effectuate the purposes of the Act." The courts have indicated that the Act is remedial rather than punitive in character. Thus, while generally the courts uphold the discretion of the Board in orders that it issues to effectuate the purposes of the Act, there are some cases wherein the courts find Board orders repugnant for punitive, rather than remedial, elements. When such is the case, the order is modified to restore its remedial character.

The forthcoming cases in the next five subsections of this book, with a few exceptions, were decided under the National Labor Relations Act prior to amendment in 1947. This is not material, for the 1947 amendment did not change the wording of the 1935 Act on this topic.

SECTION 63.1. INTERFERENCE, RESTRAINT, AND COERCION

In the *Ford* decision reprinted below, the interference found was that of physical intimidation, while in the *Ward* case it consisted of espionage activities by company agents. Both forms of restraint on labor organization activity are unfair labor practices under Sec. 8 (a) (1) of the 1947 Act. Other prohibited forms of interference include threatening of workers, promising them rewards for non-affiliation and penalties for affiliation, engaging in strikebreaking, conducting individual bargaining with employees represented by a union, engaging in unilateral action on bargainable issues, and interrogating employees as to their union affiliations.

NATIONAL LABOR RELATIONS BOARD v. FORD MOTOR CO.

Circuit Court of Appeals, Sixth Circuit, 1940. 114 Fed. (2d) 905

SIMONS, C. J. Upon charges filed with the petitioner's Regional Director at Detroit, by the International Union, United Automobile Workers of America, accusing the respondent of engaging in unfair labor practices as defined and condemned by the National Labor Relations Act, 29 U.S.C.A. Sec. 151 *et seq.*, a complaint was issued on June 26, 1937, alleging violations of the provisions of Section 8 (1), (2) and (3) of the Act. Following a hearing before a trial examiner, subsequent transfer of the proceedings to the Board, and numerous procedural steps before the Board and here, the order sought to be enforced was issued on August 9, 1939. . . .

The unfair labor practices charged to have been engaged in by the respondent include assaults alleged to have been made under its authority or sanction upon certain union organizers, employees, and others, to prevent distribution of union literature in the so-called riot of May 26, 1937, and upon May 27, 1937; the distribution of anti-union literature among its employees by the respondent; the taking and publicizing of a so-called "Vote of Confidence" by employees expressing approval of the respondent's labor policy; and the discriminatory discharge of 24 employees for union activity. . . .

The riot of May 26, 1937, during which a number of officers of the union, and others, including men who may fairly be said to come within the definition of "employees" within the meaning of Section 2

of the Act, were found to have been viciously and brutally assaulted by a number of Ford service men while attempting to distribute literature, forms the basis for one of the principal unfair labor practices found by the Board to have been committed. The inference drawn by the Board as to its cause and origin is said to have no substantial basis in the facts disclosed by the record when these are projected against a background of labor terrorism which the Board failed and of which we are urged to take judicial notice.[1]

There is evidence that a group of U.A.W. men, known as the Ford Organizing Committee, had arranged to distribute union leaflets to workers at the respondent's River Rouge plant, and that from 50 to 75 persons, the majority of whom were women, were selected to pass out the handbills. They arrived at the plant on the afternoon of May 26, 1937, an hour and a half before the change of shifts. The union leaders proceeded to gate 4 where entrance to the plant is by means of an overpass across a public highway. Photographers employed by Detroit newspapers, informed of the proposed distribution, were present and took the pictures of the group which are in evidence. Presently appeared a number of Ford service men, who announced that the overpass was Ford property and forcefully, if inelegantly, directed immediate departure therefrom. The union group without belligerent response turned to leave, whereupon the assault upon them took place. Other members of the union in the vicinity of gate 4 were likewise subject to attack. Newspapermen, attempting to take pictures, were pursued by service men intent upon destroying the films or plates, and attempted distributions at gates 9, 10 and 1 encountered like opposition. The next day there was an unprovoked assault upon U.A.W. men driving by the respondent's plant, in which a Ford service man participated. From the evidence credited by the Board thus condensed, placed against a background of Ford's previously announced anti-union views, the Board found that the attacks upon union members and sympathizers were attributable to the respondent, and that it thereby interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, such rights, of course, including the right of self-organization; to form, join and assist labor organizations; and to bargain collectively through representatives of their own choosing.

If the events of May 26 and 27, thus delineated by substantial evidence credited by the Board, point directly or by reasonable infer-

[1] A doctrine of evidence that relieves a party from the necessity of proving facts of common knowledge.

ence to assaults upon union organizers, with the purpose of preventing the distribution of union literature, its seizure, and the driving away from the plant gates of those selected to distribute it by persons acting under the authority of the respondent, or with its sanction or approval, then undoubtedly the respondent interfered with the rights of its employees guaranteed to them by the National Labor Relations Act, and such interference is an unfair labor practice sustaining the appropriate remedial provision of the Board's order. The respondent, however, paints a different picture and requires for it a setting of the condition of the times, which, it says, it was not permitted by the examiner fully to develop, was not considered by the Board, of which the court may take judicial notice, or declining to do so, should grant its motion to remand the case to the Board for the taking of additional evidence.

The setting in which the respondent places the riot is the industrial turmoil which began late in 1936 when a wave of sit-down strikes became a national phenomenon with its incidence most conspicuous in the automobile industry in Michigan. The protracted sit-down strikes in the plants of General Motors and Chrysler began in December, 1936, and continued through March, 1937, and by them it was demonstrated that a small minority of employees could, with the aid of outsiders, forcibly take control of an industrial plant, stop production, and throw all of the men normally employed, out of work. It was also demonstrated that the regular agencies of law enforcement would, in such situation, be unable or unwilling to take the drastic measures required to evict the strikers so that normal legal remedies were not available to owners of seized property. It is urged that there were repeated public threats by U.A.W. and C.I.O. leaders to inaugurate a sit-down strike in the respondent's plant, and that the Board should have recognized that the violent and lawless methods of the U.A.W. at other plants might have led some of the respondent's 80,000 employees to take active measures in opposition, and so would reasonably explain the violence committed upon union organizers upon grounds other than respondent's opposition to unionization, and its pursuit of a purpose to interfere with employees' rights of self-organization. It says that the Board's complete disregard of this setting gives an entirely distorted impression of the riot, as well as of other alleged unfair labor practices, and that the evidence in support of them could not properly be appraised, or its probative force be determined, without consideration of the background of the sit-down strikes, the threat to extend them to the plant of the respondent,

and the preparations to resist such strikes there made. The cease and desist order, it contends, is therefore invalid because the Board failed to consider facts and circumstances which, because pertinent, it was required to consider. *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033. . . .

In this situation it may be assumed that the respondent was justified in the precautions it took to protect its plant from seizure, either by employees from within, or by others from without. It had reason to fear that there would be an attempt to seize the gates of the River Rouge plant and to invade it for the purpose of staging a sit-down strike. It increased the number of its service men stationed at each gate on May 26. The gates were either locked or kept in such position that they could be locked at a few moments' notice. At gates which could not be locked, Ford trucks were strategically placed so that, if necessary, they could be driven into position to block the road against an invading motor cavalcade. Expecting that trouble, if it came, would most likely be at gate 4, principal entrance to the plant, a group of 50 to 75 men of the service department was kept in readiness to repel invasion at that point. Other precautions need not be detailed.

The conclusion is, however, inescapable that the preparation of the respondent to prevent the seizure of its property was more than adequate to repel an attempted seizure which the approach of 50 to 75 union organizers, mostly women, might signify even to the most fearful, as imminent. Even assuming that the respondent had reasonable grounds to believe that the ostensible purpose of the organizers to distribute union literature was but a blind to conceal an attempt to stage a sit-down strike, the assault upon them was not necessary for the safeguarding of the respondent's property, nor was it provoked by the union men. The finding of the Board that it was attributable to the respondent, is sustained by evidence that the assailants on the overpass included two foremen of the River Rouge plant and a member of the service department, and that other service department employees took more or less prominent parts at other points, but also by credible evidence of the interview between newspaper men and Everett Moore, chief of the respondent's service department, prior to the riot.

The reporters were expecting trouble and appeared on the scene with photographers. They interviewed Moore as to whether they would be able to take pictures without interference, and asked whether the respondent was going to do anything to prevent the distribution of literature. They were told that the service department would take

no action to prevent distribution but that some loyal employees might resent it, and that if they did it wouldn't be the fault of the Ford Motor Company. The reasonable inference from this evidence, which the Board drew, was that the head of the respondent's service department knew that the ostensible purpose of the union men was to distribute literature; that he expected it would be met with violence; and that he would take no action to prevent it, indulging the belief that if it occurred it would not be the fault of the Ford Motor Company. It is clear, from the evidence, that the service men were under the immediate direction and control of Moore; that production employees were not, at the time, in substantial number in proximity to gate 4 since it was still an hour or more before the afternoon change of shifts; and that though trouble was anticipated, not only were no steps taken to avoid it, but it was precipitated and continued by men directly subject to Moore's orders. In this situation the respondent may not deny responsibility whether the doctrine of *respondeat superior*[1] is applicable, in strict literalness, to such cases or not. See *Consumers Power Co.* v. *N.L.R.B.*, 6 Cir., 113 F. 2d 38, 44, announced by us June 27, 1940. Nor is it enough to say that the event was but a normal manifestation under provocation of human behavior, since it was anticipated and could easily have been prevented. The finding that the assaults upon the union organizers constituted an unfair labor practice, must be sustained, and the remedial provisions of the order, based upon such findings, enforced. . . .

Case Questions

1. What was the Organizing Committee engaged in at the time of the incidents in question?
2. Did the Board find Ford anti-union?
3. How did the Ford agents interfere with the Committee?
4. What defense does Ford interpose?
5. What is the decision of the court?

MONTGOMERY WARD & CO., INC. v. NATIONAL LABOR RELATIONS BOARD

Circuit Court of Appeals, Eighth Circuit, 1940. 115 Fed. (2d) 700

SANBORN, C. J. The petitioner, Montgomery Ward & Co., Inc., asks for the reversal of an order of the National Labor Relations Board, which, so far as now pertinent, requires the petitioner to cease and desist from "either directly or indirectly engaging in any manner of espionage or surveillance, or engaging the services of any agency

[1] The principal is responsible for acts of his agents

or individuals for the purpose of interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purposes of collective bargaining and other mutual aid or protection;" . . . and requires the petitioner (respondent before the Board) to take the following affirmative action: "Notify in writing all its present and any future under-cover operatives at the St. Paul house that they shall not spy upon the respondent's (petitioner's) employees in their exercise of the right to self-organization, to form, join, or assist labor organizations of their own choosing, and to engage in concerted activities for the purposes of collective bargaining and other mutual aid or protection, and that they shall not report to the respondent (petitioner) regarding such exercise by the respondent's (petitioner's) employees; . . ." The Board asks for the enforcement of this order. . . .

In addition to the order requiring the petitioner to cease and desist from violating Sec. 8 (1) of the Act, the Board ordered it to place the fifteen employees named in the complaint on a preferential list, to be offered employment when available, and to reinstate them to their former or equivalent positions before it hired others therefor. The complaint, in so far as it alleged that petitioner had discriminated against the fifteen employees named in the complaint, was dismissed.

In this court the Board, in its response to the petition for the review of its order, asserted the validity of the entire order, and requested its enforcement, but in its brief it has requested the elimination from the order of all reference to placing the fifteen named employees upon a preferential list. Only so much of the order as related to the alleged violation of Sec. 8 (1) of the Act, through petitioner's use of a system of espionage, need be discussed.

The facts out of which this controversy arises are not seriously in dispute. It is the inferences, drawn by the Board from the facts, that the petitioner challenges.

The petitioner is an Illinois corporation engaged in merchandising, with its main office and place of business in Chicago. It owns and operates a large retail and mail order house or establishment in St. Paul, Minnesota. For a long time the petitioner has maintained a system of espionage or surveillance of its employees, which has been primarily used for obtaining information relative to matters in which it has a direct and proper interest, such as the honesty, moral character, and efficiency of the large number of employees who work in

the establishment at St. Paul. These matters were not in any way related to the rights of its employees guaranteed by Sec. 7 of the National Labor Relations Act. In 1936, 1937 and 1938 the system was utilized by the petitioner to secure information as to the attitude of its employees toward unionization and with respect to union activities; and it was this use of the system which caused the filing of charges by the union with the Board that petitioner had interfered with the rights of its employees and thus violated Sec. 8 (1) of the Act.

The evidence disclosed that the head of petitioner's espionage or secret service system of St. Paul was the chief of petitioner's store police. His operatives were secured from among the regular employees of petitioner, who received, as their compensation for this special service, either extra pay or promises of an increase in pay or of promotion. Confidential instructions were given to the operatives, both verbal and in writing, by the chief of the system. They were directed to report thefts and irregularities of fellow employees which required immediate attention to the Personnel Director of petitioner, or, in case of necessity, to the chief. At the end of each week, each operative was required to mail a confidential report, containing matters of interest, to the chief at his residence address, or, in case of his absence, to the residence address of the Personnel Director. The operatives were instructed to report fairly and impartially upon both the bad and the good qualities of their fellow employees. The reports were to show "the true attitude of employees regarding their work, efficiency, attitude toward their immediate superiors, the management or company in general, employees' outstanding qualities or dishonest or careless tendencies." The operatives were advised that all information furnished was to be held in strictest confidence and referred only to the management.

In June, 1936, the operatives received from their chief a letter which contained the following: "The management is very much interested in knowing the full details of the present labor situation throughout the house, namely, what the attitude is of the persons who have recently joined Local 120, what benefits they expect to derive from it, what their general attitude is toward this movement, also if there is any talk of organizing the house as a whole. . . . Please destroy this letter as soon as read."

In December, 1936, after an affiliated union had initiated the unionization of petitioner's employees, the chief wrote his operatives as follows:

"Labor organizers are again at work among Ward employees. As usual, they are using the Government as an excuse to encourage organization among themselves.

"A number of Ward employees have received a letter soliciting membership in The National Union of Mail Order Employees. This letter is signed 'The Committee,' although a Saint Paul attorney, John T. O'Donnell at 519 New York Building, is named in the letter.

"This is the way many organizations start and many times in the end cause trouble between companies and employees, with the result that both lose. You know that your company is anxious to do what is fair to its employees and, therefore, please be sure to report as soon as possible any discussions you hear of this new effort to cause trouble within the Ward organization." . . .

There is no direct evidence that the petitioner actually used the information secured through its espionage system to influence or coerce any of its employees with respect to joining or not joining a union or with respect to wages or conditions of employment. . . .

In addition to proof of the existence of the espionage system and its use, there is evidence, as already pointed out, that the chief of the system had a bias against the union, which he communicated to some of petitioner's employees, and certainly to those whom he engaged as operatives. The statements of the chief, above referred to, tended to characterize the system, in so far as it was used to gather information relative to the union affiliations and activities of petitioner's employees, as one antagonistic to unionization. Moreover, from the evidence that the chief of the system had openly stated that he had operatives in the union, the Board could reasonably infer that the employees could hardly be ignorant of the existence of the system and of the interest of the petitioner in ascertaining their labor affiliations and activities. It is scarcely conceivable, we think, that the statements of the chief of the system and the knowledge of the employees of the use of the system to spy upon their union activities could have been without some effect upon their freedom in the exercise of the rights guaranteed by Sec. 7 of the Act.

The petitioner contends that the statements of the chief antagonistic to the unionization of the employees may not properly be charged against it, but should be considered an expression of his personal views. He was, however, the supervisor of the system for petitioner, and it is not unreasonable to suppose that, as such, he knew what information was desired by the petitioner and the purpose for which it was desired. It was his duty to instruct the employees who

were acting as his operatives. His relation to the petitioner and the nature of his employment and duties were such that we think the Board was justified in concluding that his statements with respect to the unionization of the employees were attributable to petitioner. The distinction between statements made by the head of an espionage system which are germane to the business entrusted to him by the employer and the statements made by a supervisory employee working on a match machine, which were considered by this court in *Cupples Co. Manufacturers* v. *National Labor Relations Board,* 106 F. (2d) 100, 114-116, is too obvious to require discussion.

The suggestion by petitioner that the order of the Board will prevent petitioner from using its system of espionage for the purpose of detecting thefts and irregularities of its employees, is clearly without merit. The order of the Board merely prevents the petitioner from using the system for the purpose of interfering with, restraining or coercing its employees in respect to the rights guaranteed by Sec. 7 of the Act.[3]

Our conclusion is that, under the evidence, the question of whether the petitioner had violated Sec. 8 (1) of the Act is not a question of law for this court to decide, but was a question of fact for the Board to determine, and that its finding is conclusive upon the petitioner and upon this court. See and compare: *National Labor Relations Board* v. *Fruehauf Trailer Co.,* 301 U.S. 49, 54, 57 S. Ct. 642, 630, 81 L. Ed. 918, 108 A.L.R. 1352; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.,* 301 U.S. 58, 75, 57 S. Ct. 645. . . .

The order of the Board will, as requested by it, be modified by eliminating therefrom all reference to placing the fifteen employees named in its order on a preferential list. As so modified, the enforcement of the order is directed.

Case Questions

1. What does the Board order require Ward to do?
2. State the evidence tending to sustain the charge.
3. What does the court say of the lack of agency authority defense set up by Ward?
4. How does Ward justify the espionage?

[3] In 122 Fed. (2d) 368, the fact that employees were unaware of surveillance was held to be no defense. A labor association may be interfered with, restrained, or coerced without realizing it.

SECTION 63.2. DOMINATION OF LABOR ORGANIZATIONS

Company formed and dominated unions are outlawed by the Act in Sec. 8 (a) (2). The Board can draw inferences as to domination in those cases where the company contributes aid to it financially or otherwise, is instrumental in its formation, and has its supervisory staff solicit membership therein. The Board is entitled to make its decision on domination under the totality of conduct doctrine, namely, many little acts when summed up place the conduct in the unfair labor practice category, but when taken individually are unimportant.

Under the National Labor Relations Act, Sec. 10 (c) provides that in deciding interference and domination charges, the Board is to treat independent [1] and affiliated unions alike. Under the Wagner Act, the Board overlooked much employer domination conduct directed toward an affiliated union, but was doubly circumspect with reference to independent unions. The *Friedrich* case below is illustrative of the type of domination forbidden by the Board in any situation.

NATIONAL LABOR RELATIONS BOARD v. ED. FRIEDRICH, INC.

Circuit Court of Appeals, Fifth Circuit, 1940. 116 Fed. (2d) 888

HUTCHESON, C. J. The Board found: that the Ed. Friedrich, Inc., Employee's Union was company dominated and supported; that a closed shop agreement between respondent and the union was therefore void and of no effect; and that respondent was guilty of unfair labor practices in dominating and supporting the union and in discharging one Frank Baranek because he refused to join it, all in violation of Sec. 8, National Labor Relations Act. It ordered respondent: to cease and desist from its unfair labor practices; to withdraw recognition from and disestablish the union as employees' representative; to reinstate Baranek with back pay without deduction for sums earned by Baranek on work relief projects; and to post the usual notices. It has petitioned to enforce the order.

Respondent complaining of the hearing as unfair, and of the findings and order as unsupported by evidence, is here resisting enforcement. . . .

The Board replying, points out that in order to establish company domination or support of an unaffiliated union, it is not necessary to prove overt or express acts or words of domination or support by stockholders or executive officers of the company. A showing of covert

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[1] A union not part of one of the large nationals, e. g., A. F. of L. or C.I.O. See the result reached by the Board in *N.L.R.B.* v. *Southern Bell*, 319 U.S. 50.

support or domination is sufficient. It is sufficient to show acts of supervisory employees and a general setup of such a nature and so carried out as to reasonably warrant the inference that the union was a company project. It insists that this record is replete with evidence of such acts and such a setup, and that they are vigorous and eloquent testimony to the fact that the employee's union was both fostered and dominated by the company. We agree. Not only was there antagonism shown by two of the foremen to the Mill Workers Local, the affiliated union then beginning an organizational campaign among respondent's employees, but under the auspices and leadership of foremen and supervisory employees, petitions were drafted reciting: "That we the undersigned, hereby petition Ed. Friedrich, Inc., to allow us to form our own local." On the following day, after intensive solicitation, through the plant on working time, the signatures of 90% of the employees had been procured and presented by Bergman, assistant foreman, to the respondent officers. On that same day, which was pay day, the employees received in their pay envelopes, a notice from the company that it had been reported "that over 95% of our employees are desirous of forming an employee's union which is apparently and entirely satisfactory with us. We are glad to learn of your plans and we will be pleased to meet with you any time after Monday, July 12th, to discuss this matter and enter negotiations." This was signed by Richard Friedrich, vice-president, and by Ed. Friedrich, president, and Geo. Friedrich, secretary and treasurer.

Thereafter a notice appeared on respondent's bulletin board announcing a labor meeting in employee's recreation hall and a committee from the Mill Workers Local asked Richard Friedrich's permission to address the meeting and present the local worker's point of view. Friedrich refused to permit this or to permit the Mill Workers to use the bulletin board or distribute leaflets in the plant. At the July 15 meeting, the assistant foreman, Bergman, opened the meeting and relinquished the chairmanship to Brinkoeter, respondent's general superintendent, who introduced Arnold, an attorney, invited several days before by Bergman and Brinkoeter to attend. Arnold then read the governing articles of an inside union, obtaining at the plant of a furniture company of which he was counsel, and they were then adopted by minor variations. The employees were then informed that they could become members of the new organization by signing their names in a ledger book; and elections for the executive committee were conducted at the plant during working hours. This was followed

by the election of officers, when superintendent Brinkoeter was chosen president, Bergman, vice-president, and Kinley, one of Richard Friedrich's secretaries, secretary. At a meeting of the Friedrich union's executive committee, Superintendent Brinkoeter produced a proposed contract with respondent, which he told the other committeemen was satisfactory to the Friedrichs. The committee voted to adopt it. The contract assured, by means of a closed shop agreement, the continuing existence of the Friedrich union and fastened complete subservience upon that organization by its other provisions, among which were: "that the absolute right to hire, discharge, lay off, and promote employees was reserved to the company." Another clause relieved respondent from the obligation of considering seniority and stated that "the employer shall have the exclusive right to come to its determination and make selections from its employees, influenced solely by its judgment as to the respective skill and desirability of the various employees who may be affected."

The dominant purpose and intent of the labor relations act, plainly expressed in it and vigorously given effect by the decisions of all the courts, was to permit employees to form their own organizations without interference of any kind on the part of their employers. . . . To attain these ends, the act plainly and flatly prohibits interference, domination or support by the company and it is in each case for the Board to say on the whole record whether a particular organization formed or assisted by the employees, has been formed or is being assisted by them of their free choice or under the support or domination of the employer, and for the courts to say whether that determination is supported by substantial evidence.

Examining this record with that rule in view, we think it clear that formed and organized as it was and conducted as it has been, the evidence not only amply supports the findings of the Board that the union was company dominated and fostered, but indeed precludes any other reasonable inference. The Board concedes that the provision of the order forbidding respondent's taking credit for sums earned by Baranek on work relief projects and requiring such amounts to be repaid to the appropriate agencies, is invalid. The petition for the enforcement of the order, except as to this provision, is granted and an appropriate decree may be presented.

Case Questions

1. What did the Board charge in this case?
2. What evidence supports the charge?
3. At the time the union was formed inside, was another union attempting to organize the employees?

SECTION 63.3. DISCRIMINATION AS TO HIRE AND TENURE

Section 8 (a) (3) of the National Labor Relations Act forbids the employer all forms of discrimination tending to encourage as well as to discourage membership in a labor union. This rule is subject to the proviso that he may lawfully discriminate in instances where the labor organization is functioning under authority of a valid union shop or maintenance of membership agreement and the union seeks the discharge of an employee because he has failed to pay his dues or initiation fees.

The National Labor Relations Board has found evidence of discrimination against active union supporters where the employer:

(a) Gives inconsistent reasons for discharge.
(b) Discharges on the strength of past misdeeds that were condoned.
(c) Neglects to give customary warning prior to discharge.
(d) Discharges for a rule generally unenforced.
(e) Applies disproportionately severe punishment to union supporters.
(f) Effects layoffs in violation of seniority status.

The nature of a discriminatory discharge tending to discourage membership in a labor organization is well exemplified by the *Peoples Motor Express* decision, reprinted in this section. The reader should observe that many of the cases in Section 63 will incorporate a charge that more than one unfair labor practice has been committed. Since interference, restraint and coercion is something of a catch-all unfair labor practice, a finding by the Board that the employer dominated, under Sec. 8(a) (2), or discriminated, under Secs. 8 (a) (3) or (4), will also support the inference that he interfered in contravention of Sec. 8 (a) (1).

PEOPLES MOTOR EXPRESS v. NATIONAL LABOR RELATIONS BOARD

Circuit Court of Appeals, Fourth Circuit, 1948. 165 Fed. (2d) 903

DOBIE, C. J. . . . We are called on to decide whether there was substantial evidence in the record to support the following findings of the Board: (1) That petitioner refused to bargain collectively with Local Union No. 71 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, affiliated with the

American Federation of Labor (hereinafter called the union) in violation of Section 8(5) of the Act; (2) That petitioner, by threats of economic reprisal and other acts and statements indicating hostility to the union and tending to discourage membership therein, restrained and coerced petitioner's employees in violation of Section 8 (1) of the Act; (3) That petitioner, in violation of Section 8 (3) of the Act, discriminatorily discharged employees Humphries, Britt and Moyer, because of their leadership and activities in the union.

Much of the evidence bears on all three of these findings and particularly the first two. On April 2, 1946, seven out of ten of petitioner's employees signed membership application cards designating the union as their collective bargaining representative. On April 6, 1946, employees Humphries, Britt and Moyer, at the request of all the employees, called on James Thrower, petitioner's president and manager, to discuss improvements in working conditions. Thrower immediately manifested anger and said: "If you don't want to work the way I am working, you can get out"; and then to Humphries, spokesman of the group, Thrower stated: "I feel like you are responsible for the whole entire thing, and you are fired now." Britt, upon admitting that he, too, was in the union, was also discharged by Thrower. Moyer then disclosed his union membership and Humphries stated that all of petitioner's drivers and the mechanic had signed union cards. Whereupon Thrower said: "Well, you are all fired. Every man who has his name on a card is fired." Thrower also declared: "Before I will go to a union, I'll park my trucks, close up my warehouse because I have all the money I need."

On April 8, 1946, when Humphries reported the results of this interview with Thrower to petitioner's other employees, they promptly quit work. Upon his arrival at the Charlotte, North Carolina, Terminal that morning, Thrower was informed by Humphries that the men were on strike and that only through the union could the strike be settled. Thrower again expressed his feelings against the union and threatened that he would sell out the business before he would deal with the union. Thrower, however, told Humphries that if the employees would drop any connection with the union then Thrower would sign individual 1-year contracts with them; but when this offer was referred to the employees by Humphries, they rejected the offer and Thrower was told of this rejection.

Later that same day, Herndon (an agent of the union), accompanied by Humphries, Britt and Moyer, went to Thrower's office, identified himself and sought union recognition. There were then 10

employees in the appropriate unit and Herndon showed Thrower union designation of 8 of these employees. Thrower once more refused to recognize, or deal with, the union, reiterating his previous statements that he did not wish his employees to join the union.

Herndon thereupon sought the aid of the United States Conciliation Service. That night, a representative of the Conciliation Service arranged for a conference between the union and Thrower, to take place the following day. At this meeting, held on April 9, 1946, it was agreed to hold a consent election. All eight of the eligible employees voted in this election, held on April 30, 1946, when 5 employees voted against, and three employees in favor of, the union.

Even in the brief period between Thrower's first interview with Herndon on April 8 and the conference held the next morning, April 9, Thrower endeavored with some success to persuade his employees to sign individual 1-year contracts which provided for better jobs and increased salaries and were conditioned upon the abandonment of the union by these employees. Between the conference and the election, Thrower actively renewed (again with some success) his anti-union tactics, by threats and offer of favorable individual contracts to those employees who would desert the union. On the ground that Thrower's coercive practices had prevented a free election, timely objection to the election of April 30 was filed by the union, and after an investigation, the Regional Director, on June 26, 1946, set aside the election.

Upon such a record, we must hold that there was substantial evidence to support the first two findings of the Board: (1) That petitioner refused to bargain collectively with the union in violation of Section 8 (5) of the Act; and (2) That petitioner, by threats of economic reprisal and other anti-union acts and statements, coerced its employees in violation of Section 8 (1) of the Act. We, therefore, must uphold these findings and we must grant the enforcement of these parts of the Board's order which directed the petitioner to bargain collectively with the union and to cease and desist from its unfair labor practices, discouraging membership in the union. . . .

This brings us to our last question—(3) Was there substantial evidence to support the Board's finding that petitioner, in violation of Section 8 (3) of the Act, discriminatorily discharged employees Humphries, Britt and Moyer because of their activities in the union? Since these three men were discharged at different times, under somewhat different circumstances, we take up each discharge separately.

Humphries was the unquestioned leader of, and spokesman for, the union. That he, to a greater extent than any other employee, vexed

Thrower, is hardly open to doubt. At the time of his discharge, May 1, 1946, he had been employed by petitioner as a driver for seven years. On the very day after the election, he was assigned to drive a tractor which was older and less satisfactory than the tractor he had been accustomed to drive. Upon his return from his first run with this inferior tractor, the day after the election, Humphries reported to Thrower at the Charlotte Terminal and was forthwith discharged by Thrower, who gave no reason for the discharge beyond the bare remark: 'I can't use you any more."

Petitioner, at the hearing, for the first time contended that Humphries had been discharged because he had damaged the transmission on the tractor he had been driving. There was nothing in the evidence to show that Humphries had a bad record as a careless driver. During his seven-year term of employment he had been only in very minor (and not unusual) road accidents; furthermore, it was never proved that Humphries was responsible for the damage to the transmission of the tractor.

The long arm of circumstances cannot here be overlooked. A study of the record convinces us that there is substantial evidence to support the Board's finding that Humphries was discriminatorily discharged by petitioner for his union activities. See *National Labor Relations Board* v. *Harris-Woodson Co.*, 162 F. (2d) 97, 100; *North Carolina Finishing Co.* v. *National Labor Relations Board*, 133 F. (2d) 714, 717.

The discharge of Britt occurred on May 4, 1946, only three days after the discharge of Humphries. Next to Humphries, Britt seems to have been the most active supporter of the union. On May 4, Thrower showed Britt a manifest dated January 31 and inquired about four tires listed in the manifest, which (according to the allegations of Thrower) had never been delivered. Once before, prior to the advent of the union into the picture, Britt had been questioned by Thrower concerning these tires and his explanation (which was corrobated) had apparently been accepted by Thrower.

After a brief argument, when this old affair was revived by Thrower on May 4 (four days after the election), Thrower remarked that he, himself, would have to drive the truck assigned to Britt as he was not making any money on it, and he forthwith discharged Britt upon the spot. Britt's offer to check the manifest was summarily rejected and when Britt returned to the terminal two days later (the following Monday) with the purpose of tracing the shipment in question, he was told that petitioner could not find this mani-

fest and that Thrower had issued instructions that Humphries and Britt were not to be permitted on the premises of petitioner.

The evidence here does not satisfactorily prove that these tires were actually lost, much less that any negligent conduct of Britt contributed to the loss. No documentary evidence whatever was introduced to support Thrower's allegations about the tires. The Board doubted that Thrower even believed that Britt was responsible for the loss of the tires. There is real significance in the time that Thrower elected to revive an ancient (and apparently forgotten) complaint, and make it serve as the proffered excuse or reason for Britt's discharge.

We must hold, therefore, that the Board's finding as to Britt, of discriminatory discharge due to union activity, has substantial support in the evidence. See *National Labor Relations Board* v. *Fairmont Creamery Co.*, 143 F. (2d) 668, 672, cert. denied, 323 U.S. 752; *Hartsell Mills Co.* v. *National Labor Relations Board,* 111 F. (2d) 291, 292.

Finally we come to the discharge of Moyer, whose employment by petitioner covered the period from January to June, 1946. His treatment by Thrower, in the period right after the election, is in striking contrast to the treatment handed out to Humphries and Britt. A more desirable job was given to Moyer with a weekly salary increase from $45 to $65. After Moyer had been working at this new job for about three weeks, the truck he was driving was involved in a traffic accident which resulted in a dented fender. Thrower was not satisfied with Moyer's explanation of the accident.

Had Thrower been waiting for a pretext for Moyer's discharge, here it was. Moyer, however, was taken off the road and put to work, at a reduced salary, in the garage of the Charlotte Terminal. A few days later, Thrower permitted Moyer to resume his work on the road. Thrower then learned that Moyer had communicated some complaint against petitioner to the Interstate Commerce Commission and Thrower questioned Moyer about this.

On the next Saturday night, which was pay day, Moyer received only $44.70, whereupon he protested to Thrower concerning this alleged underpayment. Thrower then discharged Moyer, and, as an excuse or reason for the discharge, Thrower stated that Moyer was unable to get along with Yandal, manager of petitioner's Charlotte Terminal. When Moyer himself was questioned at the hearing as to the reason for his discharge, he testified:

"Q. You have testified that you were let go on account of personal reasons between you and Mr. Yandal, is that right, Mr. Moyer? That is all I want to know.

"A. You heard what I said first?

"Q. What do you say, now?

"A. I said Mr. Thrower fired me because me and Mr. Yandal couldn't get along together."

The discharge of Moyer did not occur until the lapse of five weeks from the election and more than four weeks after the discharge of Humphries and Britt. The record discloses no unusual union activity on Moyer's part during the period preceding his discharge. The election, which the Union had lost, had not then been set aside, and with Humphries and Britt out of Thrower's way, his fears as to union domination appear to have been, temporarily at least, lulled into security, and there was no imminent reason demanding the dismissal of Moyer.

We cannot hold that, as to Moyer, there is substantial evidence to support the finding of a majority of the Board that Moyer was discriminatorily discharged for union activities. We agree with the contrary finding of Chairman Herzog of the Board.

Said Circuit Judge Wilbur, in *National Labor Relations Board* v. *Citizen-News Co.*, 134 F. (2d) 970, 974:

"Circumstances that merely raise a suspicion that an employer may be activated by unlawful motives (in discharging an employee) are not sufficiently substantial to support a finding."

In *Interlake Iron Corp.* v. *National Labor Relations Board,* 131 F. (2d) 129, 133, Circuit Judge Minton stated:

"The Board also held that 'respondent failed to show that Bulich was less efficient or less valuable employee than the employees in his occupational unit who received higher wages.' We do not think any such burden rests upon the company. It was the burden of the Board to show that Bulich was not only discriminated against in his rating and therefore in the layoff, but that the discrimination was caused by his union activities. It is not sufficient for the Board to show that the system is capable of being used discriminatorily. It must go further and show that it was used discriminatorily and that the discrimination was because the employee upon whom the system was thus used was a union member and the discrimination was because of his union activities. This burden is not met by showing that the company was hostile to the union." And Circuit Judge Parker, speaking for our

Court, in *Appalachian Electric Power Co.* v. *National Labor Relations Board,* 93 F. (2d) 985, 989, remarked:

". . . substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences."

The request of the Board for the enforcement of its order is granted, save as to that portion of the order which requires the reinstatement with back pay of the employee Moyer; the petition of Peoples Motor Express, Inc., to set aside the Board's order is granted only as to that part of the order dealing with Moyer. The Board's order as to Moyer must be deleted and, with that modification, the order will be enforced.

Order modified and enforced.

Case Questions

1. What was Thrower's reaction to his employees' original request for collective bargaining?
2. What was the result of the consent election of April 30?
3. Did the Regional Director set the election aside?
4. State the facts surrounding the discharge of Humphries and of Britt.
5. Why was Moyer's discharge held nondiscriminatory?

SECTION 63.3. DISCRIMINATION AS TO HIRE AND TENURE (Continued)

The Act preserves the right of the employer to maintain control over his work force in the interest of discipline, efficiency, and pleasant and safe customer relations. Employees, on the other hand, have the right to be free from coercive discrimination resulting from union activity.

At times these two rights collide. For example, an employee may be discharged for two reasons, (a) violation of a valid company rule and (b) union activity. The former is given by the employer as the reason for severance, the latter remains unstated on his part, causing the labor organization to file a Sec. 8 (a) (3) charge against the employer. These are known as *dual motive* cases. The general rule in this type of situation is to hold the employer guilty of an unfair labor practice and to remedy the effect of discrimination by ordering reinstatement with back pay.

The exception to the general rule in dual motive situations is invoked where the *compelling reason* for discharge was not union activity, but some other extenuating circumstance. If the employer finds it necessary to lay off workers because of business inactivity and does so in accordance with seniority rules, he cannot be charged with discrimination if, by chance, those workers with the least seniority happen to be the most active in the union. The fact that the employer is secretly delighted does not alter the validity of such severances.

Then again, suppose that the employee being discharged is an active labor adherent, but that the reason for discharge, coexisting with labor activity, is insubordination, refusal to perform assigned duties or to work overtime, defective performance of work, lewd or dangerous or violent conduct, inefficient performance of work, participation in an unlawful strike or property seizure, intoxication, or infection with communicable or loathsome disease. It can then be successfully maintained that the compelling reason for discharge was the reason stated rather than union activity.

The *Dixie* and the *Union Pacific Stages* decisions in this section reveal the application of both the dual motive and the compelling reason rules on the subject of discriminatory discharge. The important factor to bear in mind as these cases are analyzed is the *degree* to which the dual motive or compelling reason is present or absent. This factor is the court's sole determining guide in each case.

NATIONAL LABOR RELATIONS BOARD v. DIXIE MOTOR COACH CORPORATION

Circuit Court of Appeals, Fifth Circuit, 1942. 128 F. (2d) 201

HOLMES, C. J. In proceedings before the National Labor Relations Board, it was determined that respondents had interfered with the rights of their employees to unite for purposes of collective bargaining, had refused to bargain collectively with the employees' appropriate representative, had discriminatorily discharged three employees because of their union activities, and had discharged one for giving testimony in a proceedings under the Act, all in violation of Section 8 (1), (3), (4), and (5) of the National Labor Relations Act. The order of the Board pursuant to these findings is before us upon a petition to enforce it, and the primary question for our decision is whether such findings are supported by substantial evidence.

Respondents' conduct, as disclosed by the record, clearly reveals that they were antagonistic to the efforts of their employees to organize a union; that they executed repeated maneuvers patently designed to discourage and thwart the same; that this attitude of respondents was plainly apparent to all employees, and effectively interfered with the formation and operation of the union. The record also supports the finding of the Board that respondents refused to bargain in good faith with the proper representative of the employees. There is substantial evidence to show that respondents deliberately resorted to dilatory tactics to postpone recognition of and bargaining with the appropriate representative of the employees, and used the time thus gained to coerce and intimidate enough of the members to withdraw from the union to deprive it of its majority. Such practices are not effective either to change the bargaining representative previously chosen or to excuse the respondents from their duty to bargain in good faith with that representative.

Four employees, named Warren, Richards, McCullough, and Wilkinson, respectively, were found to have been discriminatorily discharged; and the order directed that they be reinstated with back pay. Each was discharged under different circumstances, so each discharge will be considered separately.

Warren, a capable employee with eight years of service, was discharged when the respondents were presented a petition, signed by more than half of the employees, requesting that he be discharged because he was a disturbing influence and a troublemaker. Warren was the spearhead in the union's drive to organize the employees, and was a member of the bargaining committee. His efforts to union-

ize the workers had not been stopped by the coercive methods employed by the management, and he had failed to heed a subsequent warning by the superintendent to abandon his efforts in behalf of the union, lest he lose his job. The petition asking for his discharge was circulated among the employees by a notorious opponent of the union, who was known to be close to the manager, and the petition was written upon company paper with a company typewriter on company time and property. These facts support the inference that respondents instigated the circulation of the petition in furtherance of their desire to stamp out all union activities, and that the employees signed it because they feared reprisal if they opposed the will of the management. The finding that Warren was discharged because of his union activities is supported by the evidence, and the order directing his reinstatement with back pay will be enforced.

Richards, a bus driver, was discharged on August 31, 1938, and his continued use of intoxicating liquor after repeated cautionings against it was assigned as the reason therefor. In 1935, Richards had been laid off for several days because of his drinking, and he was then warned that a repetition of his conduct would result in his discharge. During the latter part of August, 1938, according to the testimony of six disinterested witnesses, Richards appeared repeatedly along the route taken by his bus in an intoxicated condition, and talked in loud tones and thick voice to another bus driver and a ticket agent in the presence of passengers. Some of the witnesses testified that Richards frequently became intoxicated, and that on occasions he drove his bus on his regular run before he had fully recovered from a drinking spree. More than once he had been seen wearing his driver's uniform while intoxicated.

Richards acknowledged that he had been suspended for drinking in 1935 and warned against repeating the offense; that he had drunk intoxicants intermittently between 1935 and 1938; and that he appeared along his regular bus route in the latter part of August, 1938, having in his possession a quart bottle of whisky from which he had drunk; but he denied that he was intoxicated on that occasion. On August 31, 1938, immediately after these occurrences, the manager of the companies directed the superintendent to discharge Richards, saying that he had reports that Richards had been drinking again; that all the other drivers knew about it; that he had warned Richards to stop drinking or lose his job; and that he must therefore be discharged. It is undisputed that the Rules and Regulations of the Rail-

road Commission of Texas forbid the operation of any motor bus by an operator who drinks intoxicating liquor either on or off duty.

Against this overwhelming evidence indicating that the reason for the discharge of Richards was that assigned by the manager, the record contains only the following: Richards' denial that he had been drinking regularly or was drunk on the occasion immediately preceding his discharge; evidence that Richards was an active union member and that his membership might reasonably have been known by the management; and the background of the hostile attitude of the companies toward the union. The public interest, as well as that of the employer, requires of any one entrusted with the lives and safety of the traveling public that he conduct himself in a manner in keeping with his responsibilities. We think the record is without substantial evidence to support the finding that Richards was discharged because of union activity, and that the reinstatement of such an employee to such a position would do violence to the public welfare and to the purposes of the National Labor Relations Act. The undisputed facts show that this employee's drinking habits were such as to place upon his employer the duty to discharge him.

Wilkinson was a loyal union member, who gave testimony before the Board favorable to the union and against the companies. One month later he was demoted, and two months thereafter he was laid off. These circumstances were relied upon by the Board to support the inference that the lay-off was actually a discharge caused by Wilkinson's testimony at the hearing. We would consider the finding well supported but for the presence of other admitted facts that render the inference arbitrary and unreasonable. It is acknowledged that both the demotion and the lay-off were necessitated by economic considerations, and that in each instance divisional seniority was recognized. Further, Wilkinson on two occasions was offered other positions with the companies, which he declined for reasons of his own, and the companies did not hire any new employee prior to Wilkinson's refusal of the employment offered. Such manifest willingness to continue Wilkinson in their employ is wholly inconsistent with the theory that the companies discharged him illegally because he gave testimony at the hearing, and the finding of discriminatory discharge cannot be upheld.

Finally, the record contains evidence from which an inference reasonably could be drawn that McCullough was laid off and was refused re-employment because of his union activities. McCullough's testimony, which was believed by the Board, disclosed that he was

told by respondents' manager that McCullough's efforts to obtain help from the National Labor Relations Board had foreclosed him forever from again being employed by the respondents. No person may be discriminated against, either with regard to hire or tenure of employment, merely because he undertakes to avail himself of the rights accorded to him by law. The action of the Board in directing this man's reinstatement is supported by the evidence.

The order under review will be modified to conform to this opinion, and, as modified, enforced.

Case Questions

1. Had the Dixie Company revealed an antilabor attitude?
2. State the reason for Warren's discharge and the Court's holding relative thereto.
3. State the reason for Richard's discharge and the Court's holding relative thereto.
4. What did the Court find as to McCullough?
5. State the compelling reason rule.

SUPPLEMENTAL CASE DIGEST—DISCRIMINATION

N.L.R.B. v. UNION PACIFIC STAGES, C.C.A. 9th, 1938; 99 F. (2d) 153. "This raises the critical question, did respondent act because of some valid reason which appeared to it sufficient ground for discharging these drivers, or was the action capricious or merely a camouflage as determined by the Board? The Company could not discharge them as a penalty for union activities, but it has the undoubted right to do so for violations of its proper rules, regulations or policies.

"The Act does not compel respondent to employ anyone; it does not require it to retain in its service one who fails faithfully to observe the rules and regulations promulgated by it to secure the safety, comfort and courteous treatment of its patrons. It has the right to enforce policies of its own choosing with respect to operating its busses, by discharging an employee who fails to comply with the reasonable rules and regulations it may adopt." (GARRECHT, C. J.)

SECTION 63.3. DISCRIMINATION AS TO HIRE AND TENURE (Continued)

A frequent cause of discharge has been found to be violation of a company rule addressed to prohibiting solicitation of union members or organizational activities on company time or property. The *Republic Aviation* decision, reprinted in this section, prescribes the limitations imposed upon employers who seek to enforce this rule. We have seen that, ordinarily, the employer may promulgate reasonable rules and regulations, holding employees accountable for their infraction. The non-solicitation rule, because it infringes on rights guaranteed by Sec. 7, requires a modification of management's prerogative to make and enforce its own rules and regulations.

REPUBLIC AVIATION CORPORATION v. NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States, 1945. 324 U.S. 793, 65 Sup. Ct. 982

REED, J. In the Republic Aviation Corporation case, the employer, a large and rapidly growing military aircraft manufacturer, adopted, well before any union activity at the plant, a general rule against soliciting which read as follows:

> "Soliciting of any type cannot be permitted in the factory or offices."

The Republic plant was located in a built-up section of Suffolk County, New York. An employee persisted after being warned of the rule in soliciting union membership in the plant by passing out application cards to employees on his own time during lunch periods. The employee was discharged for infraction of the rule and, as the National Labor Relations Board found, without discrimination on the part of the employer toward union activity.

Three other employees were discharged for wearing UAW-CIO union steward buttons in the plant after being requested to remove the insignia. The union was at that time active in seeking to organize the plant. The reason which the employer gave for the request was that, as the union was not then the duly designated representative of the employees, the wearing of the steward buttons in the plant indicated an acknowledgment by the management of the authority of the stewards to represent the employees in dealing with the management and might impinge upon the employer's policy of strict neutrality in union matters and might interfere with the existing grievance system of the corporation.

The Board was of the view that wearing union steward buttons by employees did not carry any implication of recognition of that union by the employer where, as here, there was no competing labor organization in the plant. The discharges of the stewards, however, were found not to be motivated by opposition to the particular union or, we deduce, to unionism.

The Board determined that the promulgation and enforcement of the "no solicitation" rule violated Sec. 8 (1) of the National Labor Relations Act as it interfered with, restrained and coerced employees in their rights under Sec. 7 and discriminated against the discharged employee under Sec. 8 (3). It determined also that the discharge of the stewards violated Sec. 8 (1) and 8 (3). As a consequence of its conclusions as to the solicitation and the wearing of the insignia, the Board entered the usual cease and desist order and directed the reinstatement of the discharged employees with back pay and also the rescission of "the rule against solicitation in so far as it prohibits union activity and solicitation on company property during the employees' own time." 51 N.L.R.B. 1186, 1189. The Circuit Court of Appeals for the Second Circuit affirmed, 142 F. 2d 193, and we granted *certiorari*, 323 U.S. 688, because of conflict with the decisions of other circuits.

In the case of *Le Tourneau Company of Georgia*, two employees were suspended two days each for distributing union literature or circulars on the employees' own time on company owned and policed parking lots, adjacent to the company's fenced-in plant, in violation of a long standing and strictly enforced rule, adopted prior to union organization activity about the premises, which read as follows: "In the future no Merchants, Concern, Company, or Individual or Individuals will be permitted to distribute, post, or otherwise circulate handbills or posters, or any literature of any description, on Company property without first securing permission from the Personnel Department."

The rule was adopted to control littering and petty pilfering from parked autos by distributors. The Board determined that there was no union bias or discrimination by the company in enforcing the rule. . . .

The Board found that the application of the rule to the distribution of union literature by the employees on company property which resulted in the layoffs was an unfair labor practice under Sec. 8 (1) and 8 (3). Cease and desist, and rule rescission orders, with directions to pay the employees for their lost time, followed. 54 N.L.R.B.

1253. The Circuit Court of Appeals for the Fifth Circuit reversed the Board, 143 F. 2d 67, and we granted *certiorari* because of conflict with the *Republic* case. 323 U.S. 698.

These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.

The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. . . .

In the *Republic Aviation Corporation* case the evidence showed that the petitioner was in early 1943 a non-urban manufacturing establishment for military production which employed thousands. It was growing rapidly. Trains and automobiles gathered daily many employees for the plant from an area on Long Island, certainly larger than walking distance. The rule against solicitation was introduced in evidence and the circumstances of its violation by the dismissed employee after warning was detailed.

As to the employees who were discharged for wearing the buttons of a union steward, the evidence showed in addition the discussion in regard to their right to wear the insignia when the union had not been recognized by the petitioner as the representative of the employees. Petitioner looked upon a steward as a union representative for the adjustment of grievances with the management after employer recognition of the stewards' union. Until such recognition petitioner felt that it would violate its neutrality in labor organization if it permitted the display of a steward button by an employee. From its point of view, such display represented to other employees that the union already was recognized.

No evidence was offered that any unusual conditions existed in labor relations, the plant location or otherwise to support any contention that conditions at this plant differed from those occurring normally at any other large establishment.

The Le Tourneau Company of Georgia case also is barren of special circumstances. The evidence which was introduced tends to prove the simple facts heretofore set out as to the circumstances surrounding the discharge of the two employees for distributing union circulars. . . .

Not only has the Board in these cases sufficiently expressed the theory upon which it concludes that rules against solicitation or prohibitions against the wearing of insignia must fall as interferences with union organization, but, in so far as rules against solicitation are concerned, it had theretofore succinctly expressed the requirements of proof which it considered appropriate to outweigh or overcome the presumption as to rules against solicitation. In the *Peyton Packing Company* case, 49 N.L.R.B. 828, at 843, hereinbefore referred to, the presumption adopted by the Board is set forth.

"The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline."

In the *Republic Aviation* case, petitioner urges that irrespective of the validity of the rule against solicitation, its application in this instance did not violate Sec. 8 (3), note 1, *supra,* because the rule was not discriminatorily applied against union solicitation but was impartially enforced against all solicitors. It seems clear, however, that if a rule against solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, a discharge because of violation of that rule discourages membership in a labor organization.

Republic Aviation Corporation v. *National Labor Relations Board* is affirmed.

National Labor Relations Board v. *Le Tourneau Company of Georgia* is reversed.

SUPPLEMENTAL CASE DIGEST

N.L.R.B. v. MAY DEPARTMENT STORES Co., 154 Fed. (2d) 533, 1946. "For the Board to have tested the no solicitation rule in this case on the basis of the presumptions and requirements of proof which it has thus established was therefore neither improper nor unreasonable. And, on the record, we are required to hold that the Board was warranted in declaring 59 N.L.R.B. at page 981: 'The respondent has adduced no convincing evidence that such a blanket injunction (no union solicitation on any part of the premises at any time) bears reasonable relation to the efficient operation of its business. However, we do see reasonable ground for prohibiting union solicitation at all time on the selling floor. Even though both the solicitor and the persons being solicited are on their lunch hour, for example, the solicitation, if carried on on the selling floor, where customers are normally present, might conceivably be disruptive of the respondent's business. We therefore find that the respondent's rule is invalid, and violative of the Act, only in so far as it prohibits union solicitation off the selling floor during nonworking hours (such as luncheon and rest periods)'." (JOHNSEN, C. J.)

Case Questions

1. When was Republic's rule against solicitation adopted?
2. At what time did the employee discharged by Republic pass out union applications?
3. Where did the discharged employees in the *Le Tourneau* case pass out their circulars?
4. What was the holding of the Board in the *Republic* case? the *Le Tourneau* case?
5. Did the Circuit Court reverse the Board in the *Le Tourneau* case?
6. State the decision of the Supreme Court.
7. Phrase a rule of law governing no-solicitation cases.

SECTION 63.3. DISCRIMINATION AS TO HIRE AND TENURE (Continued)

A final matter remains for consideration. It has been seen that an employer may not ordinarily discriminate against employees for organizational action. Does the same rule apply to an employer when, faced with departmental or plant inactivity, he is selecting men for lay-off? Does it apply with equal stringency when he is selecting for hire from among a number of applicants? The *Sandy Hill* and *Phelps-Dodge* holdings, reprinted in this section, cover the aforementioned queries.

NATIONAL LABOR RELATIONS BOARD v. SANDY HILL IRON & BRASS WORKS

Circuit Court of Appeals, Second District, 1947. 165 Fed. (2d) 660

CHASE, C. J. The National Labor Relations Board filed this petition under Section 10(e) of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C.A. Sec. 151, *et seq.*, to enforce an order issued against the respondent on July 11, 1946. The order required the respondent to reinstate a number of discharged employees or to put them on a preferred employment list; to make them whole for back pay less their interim net earnings; to cease and desist from the unfair labor practices found; and to post the usual notices. It was made after a hearing on a complaint issued by the Board, upon two separate charges, one filed by the United Steel Workers of America (C.I.O.) and the other by a discharged employee named Billetdoux. The order was based upon findings which the respondent does not now contend are insufficient in content or inadequately supported by the evidence to sustain the Board's conclusions that the respondent was guilty of unfair labor practices in violation of Sec. 8(1), (3), and (4) of the Act as it stood on the date the order was made. Enforcement of the order, except in so far as it deals with unnamed employees, is resisted only on two grounds stated as follows: "1. The Board's order may not be enforced under the provisions of the Labor Management Relations Act of 1947 (Public Law 101, 80th Congress, June 23, 1947). 2. The Board's findings of fact may not be sustained under the provisions of the Administrative Procedure Act of 1946 (Public Law 404, Chapter 324, 79th Congress, 2nd Session June 11, 1946), and the Labor Management Relations Act of 1947."

The petition for enforcement was filed in this court in May, 1947, and thus before the enactment of the Labor Management Relations Act of 1947, hereinafter to be called the New Act, on June 23, 1947. It did amend the first statute above cited, the Wagner Act, in certain respects but in others left it unaltered. We are now primarily concerned with what changes, if any, were made as to the kind of unfair labor practices this order sought to correct as to the past and prevent as to the future. The aspect of correction will be considered separately from that of prevention.

The respondent was found to have violated the Wagner Act by attempting to discourage union organization in several ways, viz., by threats and intimidation, by promises of benefits or reward, and by discriminatory discharges. Anti-union conduct of this nature remains violative of the New Act. If the findings regarding such conduct are now as adequate to support the order as they were when it was made, to the extent that they do, it should be enforced. . . .

The reason for enforcement is perfectly plain. Correction of these unfair labor practices is still required. The means and methods of correction are as available as before. It is enough that the findings show the respondent to have violated the applicable statute both as it was when the order was made and as it is now. Since the statute is essentially remedial, rather than punitive, *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 236, . . . it is immaterial that some of the conduct on which the findings of violations of the Wagner Act were based would not be forbidden by the New Act.

But the rule is different in respect to the preventive portions of the order. Conduct which was unlawful when the order was made was properly forbidden as of that time. But some of that conduct ceased being unlawful upon the passage of the New Act. To the extent that the preventive portions of the order may be considered to prohibit conduct that is now lawful, they are not enforceable and cannot be made the basis for contempt proceedings. *United States* v. *The Schooner Peggy*, 1 Cranch 103, 110. . . . For instance, statements by representatives of the respondent derogatory to unions, union members, or union organization, but falling short of threats, intimidation, or promises of favor or benefit would not be unlawful if presently made and thus could not now be forbidden. Having made this clear, we do not believe any change in the phraseology of the order is needed.

Part of the order requires action in respect to unnamed persons, and is, therefore, presently so indefinite that further action by the

Board is necessary. The difficulty is one of identification of the employees who were unlawfully discharged and it arose in this way. After a strike at respondent's plant some one hundred and fifty employees were discharged. The Board found that the respondent then had a sufficient economic reason, the curtailment of its business, to reduce the number of its employees to the extent it did. The respondent insists that since the discharges were, therefore, for cause, Sec. 10(c) of the New Act makes the order invalid as to the reinstatement of any of these employees with back pay. The Board also found and held, however, that the respondent unlawfully discriminated against union members or sympathizers by selecting for discharge a much greater proportion of them than of others, without showing any lawful basis for making the selection, as, for instance, less seniority, ability, skill, or the like. Consequently, although the discharges were for cause in the sense that there was a legitimate business reason for making them, they were not for cause in the sense that there was any lawful basis for the selection of the particular employees discharged. That the term "for cause" was used in the statute in both senses, there can be no doubt.

When the question of identifying all of the discharged employees arose, the respondent refused to obey a subpoena to produce its records and the Board was frustrated in its effort to identify them by name. Under these circumstances the order was as definite as it could be. The case comes, we think, well within the power of the Board to frame its order in terms consonant with the needs of actual, and often complicated, conditions and subject to such later modification for purposes of obtaining precision as circumstances require. See *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 198-200. . . . The order contains provisions, which now must be obeyed, requiring the respondent to make available to the Board the information necessary to enable it to amplify the order in this respect. It will then be the Board's duty to make this portion of the order precise and it may then, if necessary, move to make the enforcement order definite and final on this point. *N.L.R.B.* v. *New York Merchandise Co.*, 2 Cir., 134 F. 2d 949, 953.

The second ground upon which enforcement is resisted is a bit more nebulous than the first. The argument is that the findings of the Board cannot support the order because there was a failure to observe the standards for decision set up in Sec. 10(c) of the New Act. . . . It is enough that an inspection of the record discloses evi-

dence sufficient to support the Board's findings no matter which of these standards is to be applied.

A typical example of a finding that respondent claims not to be sufficiently supported by the evidence is the one that the respondent violated Sec. 8(3) of the Wagner Act, and, under our holding above of the New Act, in discharging 142 out of 154 employees owing to their union membership and activities or to their participation in a strike called by a local of the United Steelworkers of America. This finding was based upon three circumstances: the fact that about twelve times as many strikers were discharged as non-strikers while the total ratio of strikers to non-strikers was about two to one; the fact that among the Union members who were discharged were several who were of greater seniority and ability than fellow employees who were not discharged, so that the respondent could not validly claim that ability, skill, seniority, or the like rather than Union membership or strike participation was the governing factor in the selection of employees for discharge; and the fact that respondent's personnel director admitted at one time that participation in the strike was one of the considerations in making up the discharge lists. Respondent argues, apparently, that the finding of discrimination from the discharge of a disproportionate number of strikers is a finding based solely upon the "expert" judgment of the Board and thus not based upon substantial evidence under the New Act. See Conference Report, H. R. Rep. No. 510, 80th Cong. 1st Sess. 53, 54. It is a sufficient answer to this to point out that the finding of discrimination, while an inference to be sure, is nevertheless properly drawn from the facts above mentioned which were found on substantial evidence. Indeed, it is difficult to conceive of how the Board could have inferred otherwise in view of the absence of any specific proof to the contrary. But respondent also argues that the testimony of these several discharged employees was uncorroborated and thus not reliable, probative, and substantial. The answers to this are two. In the first place the testimony of each employee was to some extent corroborated, not only by the testimony of the others, but also by that of the personnel director. And in the second, the fact that the evidence was in no other way substantiated is immaterial. Lack of corroboration goes only to the question of credibility.

The petition to enforce the order is granted.

Case Questions

1. Upon what grounds does Sandy Hill predicate its appeal for reversal of the Board order?

2. What is the rule under the 1947 Act as to statements made by representatives of the employer derogatory to unions?
3. What did the Board find with respect to Sandy Hill's discharge policy?
4. What is the court's position as to the failure of the Board to identify those employees who were to be reinstated?
5. Indicate the facts upon which the court determines there was substantial evidence to support the Board finding as to the reason for discharge.

PHELPS DODGE CORP. v. NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States, 1941. 313 U.S. 177, 62 Sup. Ct. 333

FRANKFURTER, J. The dominating question which this litigation brings here for the first time is whether an employer subject to the National Labor Relations Act may refuse to hire employees solely because of their affiliations with a labor union. . . .

The source of the controversy was a strike, begun on June 10, 1935, by the International Union of Mine, Mill and Smelter Workers at Phelps Dodge's Copper Queen Mine, Bisbee, Arizona. Picketing of the mine continued until August 24, 1935, when the strike terminated. During the strike, the National Labor Relations Act came into force. . . . The basis of the Board's conclusion that the Corporation had committed unfair labor practices in violation of Sec. 8 (3) of the Act was a finding, not challenged here, that a number of men had been refused employment because of their affiliations with the Union. Of these men, two, Curtis and Daugherty, had ceased to be in the Corporation's employ before the strike but sought employment after its close. The others, thirty-eight in number, were strikers. To "effectuate the policies" of the Act, Sec. 10 (c), the Board ordered the Corporation to offer Curtis and Daugherty jobs and to make them whole for the loss of pay resulting from the refusal to hire them, and it ordered thirty-seven of the strikers reinstated with back pay, and the other striker made whole for loss in wages up to the time he became unemployable. Save for a modification presently to be discussed, the Circuit Court of Appeals enforced the order affecting the strikers but struck down the provisions relating to Curtis and Daugherty. . . .

It is no longer disputed that workers cannot be dismissed from employment because of their union affiliations. Is the national interest in industrial peace less affected by discrimination against union activity when men are hired? The contrary is overwhelmingly attested by the long history of industrial conflicts, the diagnosis of their

causes by official investigations, the conviction of public men, industrialists and scholars. Because of the Pullman strike, Congress in the Erdman Act of 1898 prohibited inroads upon the workingman's right of association by discriminatory practices at the point of hiring. Kindred legislation has been put on the statute books of more than half the states. And during the late war the National War Labor Board concluded that discrimination against union men at the time of hiring violated its declared policy that "The right of workers to organize in trade-unions and to bargain collectively . . . shall not be denied, abridged, or interfered with by the employers in any manner whatsoever." Such a policy is an inevitable corollary of the principle of freedom of organization. Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.

These are commonplaces in the history of American industrial relations. But precisely for that reason they must be kept in the forefront in ascertaining the meaning of a major enactment dealing with these relations. To be sure, in outlawing unfair labor practices Congress did not leave the matter at large. The practices condemned "are strictly limited to those enumerated in Section 8," S.Rep. No. 573, 74th Cong., 1st Sess., p. 8. Section 8 (3) is the foundation of the Board's determination that in refusing employment to the two men because of their union affiliations Phelps Dodge violated the Act. And so we turn to its provisions that "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." . . .

. . . We are asked to read "hire" as meaning the wages paid to an employee so as to make the statute merely forbid discrimination in one of the terms of men who have secured employment. So to read the statute would do violence to a spontaneous textual reading of Sec. 8 (3) in that "hire" would serve no function because, in the sense which is urged upon us, it is included in the prohibition against "discrimination in regard to . . . any term or condition of employment." Contemporaneous legislative history, and, above all, the background of industrial experience, forbid such textual mutilation.

The natural construction which the text, the legislative setting and the function of the statute command, does not impose an obligation on the employer to favor union members in hiring employees. He is as free to hire as he is to discharge employees. The statute does not touch "the normal exercise of the right of the employer to select its employees or to discharge them." It is directed solely against the abuse of that right by interfering with the countervailing right of self-organization. . . .

Reinstatement is the conventional correction for discriminatory discharges. Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other. The powers of the Board as well as the restrictions upon it must be drawn from 10 (c), which directs the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." It could not be seriously denied that to require discrimination in hiring or firing to be "neutralized," *Labor Board* v. *Mackay Co.*, 304 U.S. 333, 348, by requiring the discrimination to cease not abstractly but in the concrete victimizing instances, is an "affirmative action" which "will effectuate the policies of this Act." Therefore, if Sec. 10 (c) had empowered the Board to "take such affirmative action as will effectuate the policies of this Act," the right to restore to a man employment which was wrongful denied him could hardly be doubted. Even without such a mandate from Congress this Court compelled reinstatement to enforce the legislative policy against discrimination represented by the Railway Labor Act. *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U.S. 548. . . . To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed.

As part of its remedial action against the unfair labor practices, the Board ordered that workers who had been denied employment be made whole for their loss of pay. In specific terms, the Board ordered payment to the men of a sum equal to what they normally would have earned from the date of the discrimination to the time of employment less their earnings during this period. The court below added a further deduction of amounts which the workers "failed without excuse to earn," and the Board here challenges this modification.

Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which

the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred. To this the Board counters that to apply this abstractly just doctrine of mitigation of damages to the situations before it, often involving substantial numbers of workmen, would put on the Board details too burdensome for effective administration. Simplicity of administration is thus the justification for deducting only actual earnings and for avoiding the domain of controversy as to wages that might have been earned.

But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness. . . .

The Board has a wide discretion to keep the present matter within reasonable bounds through flexible procedural devices. The Board will thus have it within its power to avoid delays and difficulties incident to passing on remote and speculative claims by employers, while at the same time it may give appropriate weight to a clearly unjustifiable refusal to take desirable new employment. By leaving such an adjustment to the administrative process we have in mind not so much the minimization of damages as the healthy policy of promoting production and employment. . . .

The decree below should be modified in accordance with this opinion.

Modified.

Case Questions

1. State the dominating question involved.
2. Were Curtis and Daugherty in the employ of the company at the time of the strike? Did this fact influence the Circuit Court of Appeals?
3. Does the Act prescribe that employers favor union men in hiring?
4. What is the conventional remedy for discriminatory discharge?
5. Phrase the rule of law covering this situation.
6. What rule is to be followed by the Board to mitigate damages for the employer?

SECTION 63.4. DISCRIMINATION FOR FILING CHARGES

Section 8 (a) (4) of the National Labor Relations Act makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." There are very few decided cases on this issue for, apparently, employers probably desist from the practice because of the obvious inferences that will be drawn from such action on his part.

The *Northwestern* decision below is not confined to the 8 (a) (4) charge alone, since it reveals a course of anti-union conduct including interference, domination, and discrimination. The decision is of significance also for it reveals the position of the courts as to those persons who assist an employer in the commission of unfair labor practices.

NATIONAL LABOR RELATIONS BOARD v. NORTHWESTERN MUT. FIRE ASS'N.

Circuit Court of Appeals, Ninth Circuit, 1944. 142 Fed. (2d) 866

HEALY, C. J. This is a petition of the National Labor Relations Board for the enforcement of an order entered upon the Board's determination that respondents had engaged in unfair labor practices affecting commerce. . . .

One Sylvester, a salaried salesman of respondent insurance companies, undertook to organize a union of the home office employees as an affiliate of the American Federation of Labor. The work of recruiting membership proceeded quietly and with a considerable measure of success. Plans were announced for the holding of a general meeting of all employees at a local (Seattle) hotel on the evening of December 4, 1940, for the purpose of perfecting the organization. When news of the proposed meeting reached the respondents' governing staff, directions were given to two supervisory employees—the assistant treasurer and the personnel manager—to attend and report their observations to Mr. Brill, the secretary of the companies. The two appeared at the meeting, at which a large group of employees were in attendance as was also a representative of the AFL. During the course of the meeting the two supervisors were requested to leave and did so. Following their departure a number of those present signed membership application cards.

Next morning the supervisory employees reported the results of their surveillance to the governing staff, giving the names of those present at the meeting and describing its course. The staff then

directed to the various department heads a written notice stating that if their views were asked with reference to the forming of the union the reply was to be that "under the law the company is not permitted to give advice on the subject." The notice was not, however, publicly posted nor does it appear to have been otherwise communicated to the employees themselves.

During the course of the morning of December 5th, Crisman, the sales agency manager, was informed by Sylvester of the formation of the union. When told who some of the joining members were, Crisman observed to Sylvester, "You sure got a low-minded bunch in that union." This conversation was shortly reported to Fletcher, Crisman's superior in the agency department, and later to respondents' secretary, Brill. Fletcher at once telephoned Sylvester's wife and brother in a patent effort to exert outside pressure on Sylvester. The wife in effect declined to intercede, but the brother, who was an attorney representing several insurance companies, immediately got in touch with Sylvester and sought to persuade him to drop the union, saying that a continuance of his activities would embarrass the brother. The pressure, so the Board found, was renewed later in the day through respondent Greenwood, the manager of the building occupied by respondent companies. Greenwood appears to have gone to considerable lengths, by threats and otherwise, to dissuade Sylvester from further participation in the union movement and his efforts were not without the desired effect. In the course of the evening Greenwood telephoned Brill at the latter's home stating, in substance, that Sylvester was at his office, that he, Sylvester, had been doing some work "that he was not particularly proud of and that he wanted to come out and make amends and apologize and forget the whole business." Brill assented to the proposed visit of the two men and at Greenwood's telephoned suggestion had a fire lit in the fireplace when they arrived. At the session of the three in Brill's house, Sylvester produced the union cards signed by some 95 employees and burned all but a few of them in the fireplace.

From the testimony relating to the session in Brill's home it is plain that this high official was aware of the pressure being exerted by Greenwood upon Sylvester and that Brill did nothing to discourage it. As Sylvester was leaving the house Brill patted him on the back and told him to forget it, "that we all make mistakes some time or other." There is undisputed evidence that Greenwood had long been closely associated with the officials of respondent companies and was deeply in the latter's debt financially and otherwise. The Board inferred, and the inference is a fair one, that Greenwood's activities

in squelching Sylvester had Brill's approval and at least his passive cooperation. Since Greenwood was found to have acted in the interest of the companies, the Board determined that he was an employer within the meaning of Sec. 2 (2) of the Act, 29 U.S.C.A. Sec. 152 (2).

With the collapse of Sylvester, the unionization movement subsided, and there followed immediately a counter drive to set up an independent association among the employees. The Board found that the establishment of the latter association was aided by the respondents' demonstrated antagonism toward the AFL union and its leader and by their active assistance in soliciting members for the association; also that the administration of the so-called independent union was completely dominated and controlled by representatives of the respondents. . . . The propriety of the order requiring the disestablishment of the association, as well as the propriety of the cease and desist order, is not open to serious doubt.

We have felt some hesitation as to a third provision of the order. This relates to the reinstatement of an employee named O'Connell. O'Connell had been in the employ of respondents since 1934, and for more than four years had been assistant cashier of the companies. He was one of the leaders—second only to Sylvester—in the abortive AFL movement. In January, 1941, with the establishment of the independent association or company union, O'Connell became chairman of a small remnant still adhering to the AFL group. In the spring of that year he was transferred to the auditing department over his protest that he had no training in that work and that his transfer would result in loss of compensation he had been receiving for overtime. Thereafter the post of assistant treasurer became vacant several times, but requests of O'Connell to be restored to the post were disregarded. There is no evidence that O'Connell had not performed efficiently the duties of assistant treasurer, and it is clear that his removal from that position was a demotion. The Board inferred that he had been demoted and refused reinstatement because of his lack of interest in the independent association and because of his activities in behalf of the AFL union. We think the inference is substantially supported.

When the present proceeding was being heard before an examiner, O'Connell was called as a Board witness and testified in a manner unfavorable to the respondents. On cross-examination he was asked whether he had not, a few days earlier, supplied a list of the names and addresses of company employees to one Hughes, an AFL organizer. He denied having done so. He also said that he had had

nothing to do with the sending of notices for a proposed meeting of the AFL. After the noon recess O'Connell returned to the stand at his own request and stated that, in the interest of shielding a fellow employee who had aided him, he had earlier given incorrect testimony; that he had in fact submitted an employee mailing list to an AFL organizer named Lamberton; that he had compiled the list in part from a file in the mailing room of the respondent companies; and that Lamberton had used the list in mailing notices of a meeting at which the existing employee association was to be attacked as company-dominated.

Next morning Brill summoned O'Connell and informed him that he was being discharged immediately, Brill stating that he would not "tolerate an untruthful employee in my office." The following day Brill recalled O'Connell and said "I want you to know that we are not dismissing you because you told a lie in court; but the reason is because you gave information in our records to others."

From the evidence before it, the Board was not persuaded that the list obtained and given out by O'Connell was in fact confidential matter. It found that in any event "the unexplained inconsistency of the respondents' reasons for discharging O'Connell negatives the claim that he was discharged for either of these reasons," and that his employment was terminated because the companies had learned from his testimony that he "was taking an active part in the (AFL) Union's attempt to revive interest among their employees." Respondents were ordered to reinstate O'Connell upon request and to make him whole for any loss of pay he might have suffered by reason of his discharge.

On the whole record we are not able to say that the finding is unsupported or the order improper. It is the province of the Board, not of the courts, to determine what affirmative action will effectuate the policies of the Act.

Decree will be entered enforcing the Board's order in all respects.

Case Questions

1. Did the company post a notice indicating a neutral attitude toward union organization?
2. Outline the pressure exerted on Sylvester. Did it succeed?
3. What was the fate of the "independent association" at the hands of the Board?
4. What reasons were given by Brill for the discharge of O'Connell?
5. Does the Board agree as to Brill's reason?
6. Does Brill's inconsistency as to reason have an effect on the court's decision?

SECTION 63.5. REFUSAL TO BARGAIN

The terms of Sec. 8 (a) (5) provide "it shall be an unfair labor practice for an employer to refuse to bargain collectively with his employees, subject to the provisions of Sec. 9 (a)." Sec. 9 (a) preserves the right of individual employees to present grievances in the manner there prescribed.

The nature of the employees' collective bargaining right was pursued in Section 62 of this text. Sec. 8 (a) (5) of the Act protects that right by making it the affirmative duty of the employer to engage in continued and good-faith bargaining with labor's designated representatives. Note that the union also has a corollary obligation in this respect. See Sec. 8 (b) (3) of the Act.

The *J. I. Case Company* decision in this section treats of the legitimacy of individual contracts with employees as being a bar to certification proceedings for the purpose of securing a bargaining representative for the employees and as relieving the employer from the necessity of collective bargaining during the duration of such contracts of employment. The individual contract device, as employed in this case, can probably be linked in purpose to the yellow-dog contract previously rendered void and unenforceable.

In the *Heinz Company* digest in this section, the query raised is whether failure to reduce a collective bargaining agreement to writing indicate a lack of good-faith bargaining on the part of the one who refuses.

J. I. CASE CO. v. NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States, 1944. 321 U.S. 332, 64 Sup. Ct. 576

JACKSON, J. This cause was heard by the National Labor Relations Board on stipulated facts which so far as concern present issues are as follows:

The petitioner, J. I. Case Company, at its Rock Island, Illinois, plant, from 1937 offered each employee an individual contract of employment. The contracts were uniform and for a term of one year. The Company agreed to furnish employment as steadily as conditions permitted, to pay a specified rate, which the Company might redetermine if the job changed, and to maintain certain hospital facilities. The employee agreed to accept the provisions, to serve faithfully and honestly for the term, to comply with factory rules, and that defective work should not be paid for. About 75% of the employees accepted and worked under these agreements.

According to the Board's stipulation and finding, the execution of the contracts was not a condition of employment, nor was the status of individual employees affected by reason of signing or failing to sign the contracts. It is not found or contended that the agreements were coerced, obtained by any unfair labor practice, or that they were not valid under the circumstances in which they were made.

While the individual contracts executed August 1, 1941, were in effect, a C.I.O. union petitioned the Board for certification as the exclusive bargaining representative of the production and maintenance employees. On December 17, 1941, a hearing was held, at which the Company urged the individual contracts as a bar to representation proceedings. The Board, however, directed an election, which was won by the union. The union was thereupon certified as the exclusive bargaining representative of the employees in question in respect to wages, hours, and other conditions of employment.

The union then asked the Company to bargain. It refused, declaring that it could not deal with the union in any manner affecting rights and obligations under the individual contracts while they remained in effect. It offered to negotiate on matters which did not affect rights under the individual contracts, and said that upon the expiration of the contracts it would bargain as to all matters. Twice the Company sent circulars to its employees asserting the validity of the individual contracts and stating the position that it took before the Board in reference to them.

The Board held that the Company had refused to bargain collectively, in violation of Sec. 8 (5) of the National Labor Relations Act; and that the contracts had been utilized, by means of the circulars, to impede employees in the exercise of rights guaranteed by Sec. 7 of the Act, with the result that the Company had engaged in unfair labor practices within the meaning of Sec. 8 (1) of the Act. It ordered the Company to cease and desist from giving effect to the contracts, from extending them or entering into new ones, from refusing to bargain and from interfering with the employees; and it required the Company to give notice accordingly and to bargain upon request.

The Circuit Court of Appeals, with modification not in issue here, granted an order of enforcement. The issues are unsettled ones important in the administration of the Act, and we granted *certiorari*. . . .

Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually

a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. . . .

After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring. This hiring may be by writing or by word of mouth or may be implied from conduct. In the sense of contracts of hiring, individual contracts between the employer and employee are not forbidden, but indeed are necessitated by the collective bargaining procedure.

But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of standard provisions, or the utility customer the benefit of legally established rates.

Concurrent existence of these two types of agreement raises problems as to which the National Labor Relations Act makes no express provision. We have, however, held that individual contracts obtained as the result of an unfair labor practice may not be the basis of advantage to the violator of the Act nor of disadvantage to employees. *National Licorice Co.* v. *Labor Board,* 309 U.S. 350, 364. Whenever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.

It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the

group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.

But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account. We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement, but we find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. Such discriminations not infrequently amount to unfair labor practices. The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result. We cannot except individual contracts generally from the operation of collective ones because some may be more individually advantageous. Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forms under the laws of contracts applicable, and to the Labor Board if they constitute unfair labor practices.

It also is urged that such individual contracts may embody matters that are not necessarily included within the statutory scope of collective bargaining, such as stock purchase, group insurance, hospitalization, or medical attention. We know of nothing to prevent the employees, because he is an employee, making any contract provided

it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice. But in so doing the employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by collective agreement.

Hence we find that the contentions of the Company that the individual contracts precluded a choice of representatives and warranted refusal to bargain during their duration were properly overruled. It follows that representation to the employees by circular letter that they had such legal effect was improper and could properly be prohibited by the Board.

As so modified the decree is *affirmed.*

SUPPLEMENTAL CASE DIGEST

H. J. HEINZ Co. v. N.L.R.B., 311 U.S. 514, 61 Sup. Ct. 320, 1941, "It is conceded that although petitioner has reached an agreement with the Union concerning wages, hours and working conditions of the employees, it has nevertheless refused to sign any contract embodying the terms of the agreement. The Board supports its order directing petitioner, on request of the Union, to sign a written contract embodying the terms agreed upon on the ground, among others, that a refusal to sign is a refusal to bargain within the meaning of the Act. . . .

". . . It is true that the National Labor Relations Act, while requiring the employer to bargain collectively, does not compel him to enter into an agreement. But it does not follow, as petitioner argues, that, having reached an agreement, he can refuse to sign it, because he has never agreed to sign one. He may never have agreed to bargain but the statute requires him to do. To that extent his freedom is restricted in order to secure the legislative objective of collective bargaining as the means of curtailing labor disputes affecting interstate commerce. The freedom of the employer to refuse to make an agreement relates to its terms in matters of substance and not, once it is reached, to its expression in a signed contract, the absence of which, as experience has shown, tends to frustrate the end sought by the requirement for collective bargaining. . . .

"Petitioner's refusal to sign was a refusal to bargain collectively and an unfair labor practice defined by Sec. 8 (5). The Board's order requiring petitioner at the request of the Union to sign a written

contract embodying agreed terms is authorized by Sec. 10 (c). This is the conclusion which has been reached by five of the six courts of appeals which have passed upon the question. *Affirmed.*" (STONE, J.)

Case Questions

1. Were the contracts secured by the Case Company coerced? What were their provisions?
2. Why did the Company refuse to bargain with the elected representative of labor?
3. How does the Court dispose of this defense in terms of the conflict caused between a trade agreement and individual contracts of employment?
4. Is a collective bargaining agreement a contract of employment? Discuss.
5. Does the presence of a trade agreement render unenforceable all individual contracts which the employee enters into with his employer?

SECTION 63.5. REFUSAL TO BARGAIN (Continued)

The last case in this section concludes our treatment of employer unfair labor practices. The central issue presented is whether an employer must continue to bargain with a labor organization that has lost the majority of its constituents, if such loss of majority is caused by employer unfair labor practices. In the *Medo* case, repudiation of the association was caused by the employer's promise of a wage increase in exchange for such repudiation.

MEDO PHOTO SUPPLY CORP. v. NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States, 1944. 321 U.S. 678, 64 Sup. Ct. 830

STONE, C. J. Petitioner recognized a labor union as the bargaining representative of its employees. At their request and upon their statement that they were dissatisfied with the union and would abandon it if their wages were increased, petitioner negotiated with them without the intervention of the union, granted the requested increases in wages and thereafter refused to recognize or bargain with the union. The only questions raised by the petitioner for *certiorari* are

whether, in the circumstances, petitioner's negotiations with its employees, its payment of increased wages, and its refusal to bargain with the union constituted unfair labor practices in violation of Sec. 8 (1) and (5) of the National Labor Relations Act, 29 U.S.C. Secs. 158 (1) and (5). . . .

. . . The Board entered the usual order directing petitioner to cease the unfair labor practices so found, and requiring it to bargain with the union. 43 N.L.R.B. 989. On the Board's petition to enforce its order, the Court of Appeals for the Second Circuit overruled petitioner's contentions that the union, at the time of the alleged unfair labor practices, no longer represented petitioner's employees for purposes of collective bargaining and directed compliance with the order. 135 F. 2d 279. We granted *certiorari*, 320 U.S. 723, as the case involves questions of importance in the administration of the National Labor Relations Act.

The Board made findings supported by evidence that after eighteen of the twenty-six employees in petitioner's shipping and receiving department, constituting an appropriate bargaining unit, had designated the union as their bargaining agent, petitioner, on June 4th and 5th, 1941, recognized it as the exclusive bargaining representative of the employees. The union having proposed a contract providing for an increase of wages for the employees, petitioner agreed to meet the union representatives on June 9, 1941, in order to begin collective bargaining.

Two days before that date, twelve of the employees, who were members of the union, waited on petitioner's manager and stated that they and the six other members had no desire to belong to the union if through their own efforts they could obtain wage increases, a list of which they submitted. The manager, at that time, declined to discuss the union, but stated that he would consider the request for wage increases with petitioner's president on the latter's return to the office on June 9th, and asked the employees to return on that day.

On June 9th, the manager, after a conference with the president, met with a committee of four of the employees who had conferred with him two days before. He advised them that petitioner would grant substantially the requested wage increases. The committee then withdrew to convey this message to the other employees, who thereupon agreed to accept the wage increases. The committee returned to inform the manager of this and that the employees "felt that they did not need the union, and we would rather stay out." Later in the day, the committee notified the union representative that the em-

ployees no longer desired the union to represent them. At a meeting on the same day with the representatives of the union, at which this committee was present, petitioner's attorney stated that he understood that the union no longer represented a majority of the employees and he declined to negotiate with it unless it were established by an election that it did. . . .

The petition for *certiorari* does not challenge the Board's findings that the union represented a majority of the employees in petitioner's shipping department, and that they constituted a proper bargaining unit and that petitioner had agreed to bargain with the union. The evidence shows and the Board found that when the employees opened their negotiations with petitioner's manager on June 7th, they had not repudiated the union. On the contrary they made it plain that their proposal for its abandonment was contingent upon petitioner's willingness to give the desired wage increases. The evidence also shows, as the Board found, that the employees did not withdraw their designation of the union as their bargaining representative until after they had voted to accept the wage increases, and that until then, they had held themselves out as union members throughout their negotiations with petitioner and its representatives.

The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive, see Sec. 9 (a) of the Act, 29 U.S.C. Sec. 159 (a), it exacts "the negative duty to treat with no other." *Labor Board* v. *Jones & Laughlin Corp.*, 301 U.S. 1, 44; and see *Virginian Ry. Co.* v. *System Federation,* 300 U.S. 515, 548-549. Petitioner, by ignoring the union as the employees' exclusive bargaining representative, by negotiating with its employees concerning wages at a time when wage negotiations with the union were pending, and by inducing its employees to abandon the union by promising them higher wages, violated Sec. 8 (1) of the Act, which forbids interference with the right of employees to bargain collectively through representatives of their own choice.

That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions was recognized by this Court in *J. I. Case Co.* v. *Labor Board,* 321 U.S. 332; cf. *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U.S. 342; see also *National Licorice Co.* v. *Labor Board,* 309 U.S. 350, 359-361. The statute guar-

antees to all employees the right to bargain collectively through their chosen representatives. Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field, has found. Such conduct is therefore an interference with the rights guaranteed by Sec. 7 and a violation of Sec. 8 (1) of the Act. There is no necessity for us to determine the extent to which or the periods for which the employees, having designated a bargaining representative, may be foreclosed from revoking their designation, if at all, or the formalities, if any, necessary for such a revocation. Compare *Labor Board* v. *Century Oxford Mfg. Co.*, 140 F. 2d 541, C.C.A. 2d, decided February 15, 1944. But orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves, prior to such a revocation. And it is the fact here, as found by the Board, that the employees did not revoke their designation of the union as their bargaining agent at any time while they were themselves negotiating with petitioner, and that they left the union, as they had promised petitioner to do, only when petitioner had agreed to give them increased wages.

Quite apart from the Board's finding of an unfair labor practice in petitioner's direct negotiations with its employees when they had not revoked their designation of the union, there can be no question but that it was likewise an unfair labor practice for petitioner, in response to the offer of its employees, to induce them by the grant of wage increases, to leave the union. *Labor Board* v. *Falk Corp.*, 308 U.S. 453, 460-461. This violation of Sec. 8 (1) was in itself sufficient to support the Board's order to cease and desist. The words and purpose of Secs. 7 and 8 (1) of the Act enjoin an employer from interfering with, or coercing, its employees in their rights to self-organization, to form, join, or assist labor organizations, and to bargain collectively through representatives of their own choosing. There could be no more obvious way of interfering with these rights of employees than by grants of wage increases upon the understanding that they would leave the union in return. The action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination. . . .

Petitioner contends that it would be equally an unfair labor practice to refuse the wage increases as to grant them, for that would

influence the employees to stay in the union, instead of abandoning it. But either consequence, as well as any violation of the Act, would in this case have been avoided if the employer, as is its statutory duty, had refused to negotiate with any one other than the duly designated bargaining representative of his employees. We are not now concerned with the question whether, in other circumstances, such action would have been an unfair labor practice. Nor does that possibility relieve petitioner of the consequences of its unfair labor practices which the Board has found.

Petitioner was not relieved from its obligations because the employees asked that they be disregarded. The statute was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer, even though the employees consent, *Labor Board* v. *Newport News Co.*, 308 U.S. 241, 251, or the employees suggest the conduct found to be an unfair labor practice, *National Licorice Co.* v. *Labor Board, supra,* 353, at least where the employer is in a position to secure any advantage from these practices, *H. J. Heinz Co.* v. *Labor Board,* 311 U.S. 514, 519-521, and cases cited.

Petitioner cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will. . . . Petitioner's refusal to bargain under those circumstances was but an aggravation of its unfair labor practice in destroying the majority's support of the union, and was a violation of Sec. 8 (1) and (5) of the Act.

The Board rightly determined that petitioner had engaged in the unfair labor practices which the Board found, and this determination supports its order directing the cessation of those practices. . . .

Affirmed.

Case Questions

1. What action by the company caused repudiation of the union?
2. State the defense of the company to the N.L.R.B. order.
3. What action did the Medo attorney ask be taken by the union before he would negotiate with it?
4. Had the employees repudiated the union prior to or after the company granted the wage increase? Is this factor significant?
5. Was it a good defense for the company to say that the employees consented to relieve it of its obligations under the Act?

SECTION 64. UNION UNFAIR LABOR PRACTICES

The most far-reaching changes introduced by the National Labor Relations Act of 1947 are those added by Sec. 8 (b), which prohibit union unfair labor practices. The text of the Wagner Act provided for employer unfair labor practices, but left untouched the unfair labor practices of labor organizations. The statement of policy in Sec. 1 of the Act outlines the reasoning behind the new restrictions imposed upon labor as follows:

> "Experience has further demonstrated that certain practices by some labor organizations . . . have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed."

An individual analysis of each of the union unfair labor practices is made in the next six sections. In its remedial aspects, the reader will recall that all unfair labor practices are subject to injunctive restraint by the N.L.R.B. without regard to the limitation by the Federal Anti-Injunction Act. Further than this, certain strikes and secondary boycotts, detailed in Sec. 8 (b) (4), may be made the subject of damage suits against the unions' assets by the injured party. See Sec. 303 of the Act. Many of the union unfair labor practices were illegal at common law, as was seen in earlier chapters of this volume. Congressional invalidation of Section 8 (b) will therefore leave *public* rights essentially unchanged, but will serve to narrow some of the rights granted by the 1947 Act to labor, both in the union and nonunion areas.

Under the statutory prohibition of Sec. 8 (b) a labor organization becomes amenable to an unfair labor practice charge if it:

(1) Coerces or restrains workers in derogation of their right under Sec. 7 to refrain from union activity if they so choose.
(2) Coerces an employer to discriminate against employees under a union security agreement, except where the employee fails to pay reasonable dues and initiation fees to the union.
(3) Refuses to engage in good faith bargaining with the employer or his representative.
(4) Engages in secondary strikes and boycotts.
(5) Levies excessive or discriminatory dues and initiation fees if it enjoys a union shop contract.
(6) Engages in featherbed practices.

SECTION 64.1. COERCION OF EMPLOYEES BY LABOR UNIONS

The first union unfair labor practice is predicated upon the Sec. 7 right of employees to refrain from union activities as well as to participate in them. Sec. 8 (b) (1) provides as follows:

> "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce (A) employees in the exercise of the rights guaranteed in Sec. 7; provided that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or, (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

Congressional reasoning in including Sec. 8 (b) (1) can clearly be determined from an extract of Senate Report 105, 80th Congress, at page 50:

> ". . . The committee heard many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence. Some of these acts are made illegal by state law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act. We believe that the freedom of the individual workman should be protected from duress by the union as well as from duress by the employer."

The legislative history of this provision indicates that Congress had no intention to proscribe the normal exercise by unions of the right to appeal to employees or members by persuasive speech or conduct which carried no threat of force or reprisal. If they pass these allowable bounds, however, by violence to the employee's person or property, or its threat, a violation of 8 (b) (1) will have resulted. The reader is referred to Section 44 of this book, "Picketing to Coerce Workers," for a further discussion of this point. Massed picketing may also have an unlawful restraining effect upon workers under Sec. 8 (b) (1).

Clause (B) of Sec. 8 (b) (1) prohibits union coercion of the employer in his selection of a bargaining representative. The applicability of this clause depends, however, upon whether the representative selected by the employer has authority sufficient to make final decisions in the bargaining process. If he possesses adequate delegated authority, the labor organization may not compel his removal. See 127 Fed. (2d) 180.

SECTION 64.2. CAUSING EMPLOYER TO DISCRIMINATE

Sec. 8 (b) (2) makes it an unfair labor practice for a union

> "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection 8(a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Under Sec. 8 (3) of the Wagner Act of 1935, as finally construed, all forms of union security were permitted, including the closed shop, union shop, maintenance of membership, preferential hiring, and the check-off of union dues. By virtue of the Labor Management Relations Act of 1947, Sec. 8 (a) (3), only union shop and maintenance of membership agreements may be entered into with employers, and then only if the majority of employees, by prior vote, agree thereto. See Sec. 9 (e). The check-off of union dues is still allowed, provided the employee consents to the deduction in writing. See Sec. 302 (c).

The significance of this present Sec. 8 (b) (2) limitation upon union power is apparent from the fact that, under a Wagner Act union security agreement, the employer was generally compelled to discharge employees who had been refused admittance to, or who had been expelled from, the union for any reason whatsoever. Under the Act as amended in 1947, an employer is compelled to discharge an employee, at the behest of the union, only if the following circumstances prevail:

(a) A valid union shop or maintenance of membership agreement is in force.

(b) The employee has been denied membership in the labor association for failure to pay a reasonable initiation fee, or is expelled from membership because he has failed to pay dues which are reasonable under Sec. 8(b) (5).

It would appear that an employer would also be jointly guilty of an unfair labor practice if he should co-operate with a union by refusing to hire nonunion men for reason of nonmembership alone, or by discharging employees who had been expelled from a union, unless the employee, in the latter case, had failed to pay reasonable dues and initiation fees. Both the union and the employer are liable for back pay in case of an unfair discharge. See Sec. 10 (c).

One final point should be made clear. Sec. 8 (b) (1) maintains intact the right of a labor organization to prescribe its own rules,

arbitrary or fair, covering acquisition or retention of membership therein. However, Sec. 8 (b) (2) qualifies the effect of membership or nonmembership in a labor organization upon the converse right of an employee to secure and retain a job without fear that a labor organization can cause his unfair removal.

The case of *Wallace Corporation* v. *N.L.R.B.* was decided under the superseded National Labor Relations Act and is included in this section to illustrate the type of coercion of an employer that is no longer countenanced under the Labor Management Relations Act. A result consistent with the amended Act was secured in the *Wallace* case because the union that caused the employer discrimination was held to be company dominated, and because of the fact that discharges for prior affiliation with a rival union were not recognized as valid by the Supreme Court. The second reason is popularly known as discharge for "dual unionism."

WALLACE CORPORATION v. NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States, 1944. 323 U.S. 248, 65 Sup. Ct. 238

BLACK, J. In an attempt to settle a labor dispute at the plant of petitioner company, an agreement approved by the Board was signed by a C.I.O. union, an Independent union, and the company. At a consent election held pursuant to this agreement, Independent won a majority of the votes cast and was certified by the Board as bargaining representative. The company then signed a union shop contract with Independent, with knowledge—so the Board has found—that Independent intended by refusing membership to C.I.O. employees, to oust them from their jobs. Independent refused to admit C.I.O. men to membership and the company discharged them.

In a subsequent unfair labor practice proceeding the Board found that (1) Independent had been set up, maintained, and used by the petitioner to frustrate the threatened unionization of its plant by the C.I.O., and (2) the union shop contract was made by the company with knowledge that Independent intended to use the contract as a means of bringing about the discharge of former C.I.O. employees by denying them membership in Independent. The Board held that the conduct of the company in both these instances constituted unfair labor practices. It entered an order requiring petitioner to disestablish Independent, denominated by it a "company union;" to cease and desist from giving effect to the union shop contract between it and

Independent; and to reinstate with back pay forty-three employees, found to have been discharged because of their affiliation with the C.I.O., and because of their failure to belong to Independent, as required by the union shop contract. The Circuit Court of Appeals ordered enforcement of the Order. We granted *certiorari* because of the importance to the administration of the Act of the questions involved. 322 U.S. 721.

The Board's findings if valid support the entire order. This is so because Sec. 8 (3) of the Act does not permit such a contract to be made between a company and a labor organization which it has "established, maintained, or assisted." The Board therefore is authorized by the Act to order disestablishment of such unions and to order an employer to renounce such contracts. Nor can the company, if the Board's findings are well-grounded, defend its discharge of the C.I.O. employees on the ground that the contract with Independent required it to do so. It is contended that the Board's findings are not supported by substantial evidence. As shown by its analysis, the Board gave careful consideration to the evidence before it relating to the unfair labor practices which occurred both before and after the settlement agreement and the certification. The Circuit Court of Appeals unreservedly affirmed the Board's findings, and we find ample substantiating evidence in the record to justify that affirmance. We need therefore but briefly refer to the circumstances leading to the Board's order.

The findings of the Board establish the fact of an abiding hostility on the part of the company to any recognition of a C.I.O. union. This hostility we must take it extended to any employee who did or who might affiliate himself with the C.I.O. union. The company apparently preferred to close down this one of its two plants rather than to bargain collectively with the C.I.O. It publicly proclaimed through one of its foremen that ". . . the ones that did not sign up with the C.I.O. didn't have anything to worry about . . . the company would see that they were taken care of." The settlement agreement plainly implied that the old employees could retain their jobs with the company simply by becoming members of whichever union would win the election. Nevertheless, the company entered into an agreement with Independent which inevitably resulted in bringing about the discharge of a large bloc of C.I.O. men and their president.

The contract was executed after notice to the company by the business manager of Independent that Independent must have the right to refuse membership to old C.I.O. employees who might jeopardize

its majority. This business manager, who had himself originally been recommended to Independent by a company employee, wrote the company, prior to the making of the contract, that Independent insisted upon a closed-shop agreement because it wanted a "legal means of disposing of any present employees" who might affect its majority, and "who are unfavorable to our interests." The contract further significantly provided that the company would be released from the clause requiring it to retain in its employ union men only if Independent should lose its majority and the C.I.O. win it.

Neither the Board nor the court below found that the company engaged in a conspiracy to bring about the discharge of former C.I.O. members. Both of them, however, have found that the contract was signed with knowledge on the part of the Company that Independent proposed to refuse to admit them to membership and thus accomplish the very same purpose. By the plan carried out the company has been able to achieve that which the Board found was its object from the beginning, namely, to rid itself of C.I.O. members, categorized by its foreman as "agitators." . . .

To prevent disputes like the one here involved, the Board has from the very beginning encouraged compromises and settlements. The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them. The attempted settlement here wholly failed to prevent the wholesale discard of employees as a result of their union affiliations. The purpose of the settlement was thereby defeated. Upon this failure, when the Board's further action was properly invoked, it became its duty to take fresh steps to prevent frustration of the Act. To meet such situations the Board has established as a working rule the principle that it ordinarily will respect the terms of a settlement agreement approved by it. It has consistently gone behind such agreements, however, where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a subsequent unfair labor practice. We think this rule adopted by the Board is appropriate to accomplish the Act's purpose with fairness to all concerned. Consequently, since the Board correctly found that there was a subsequent unfair labor practice, it was justified in considering evidence as to petitioner's conduct, both before and after the settlement and certification.

The company denies the existence of a subsequent unfair labor practice. It attacks the Board's conclusion that it was an unfair labor practice to execute the union shop contract with knowledge that Inde-

pendent at that time intended to deny membership to C.I.O. employees because of their former affiliations with the C.I.O. It admits that had there been no union shop agreement, discharge of employees on account of their membership in the C.I.O. would have been an unlawful discrimination contrary to Sec. 8 (3) of the Act. But the proviso in Sec. 8 (3) permits union shop agreements. It follows therefore, the company argues, that, in as much as such agreements contemplate discharge of those who are not members of the contracting union, and in as much as the company has no control over admission to union membership, the contract is valid and the company must discharge non-union members, regardless of the union's discriminatory purpose, and the company's knowledge of such purpose. This argument we cannot accept.

The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation. *No employee can be deprived of his employment because of his prior affiliation with any particular union.* [Author's italics.] The Labor Relations Act was designed to wipe out such discrimination in industrial relations. Numerous decisions of this Court dealing with the Act have established beyond doubt that workers shall not be discriminatorily discharged because of their affiliation with a union. We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers. It was as much a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone. To permit it to do so by indirection, through the medium of a "union" of its own creation, would be to sanction a readily contrived mechanism for evasion of the Act.

One final argument remains. The company, it is said, bargained with Independent because it was compelled to do so by law. The union shop contract to which the company at first objected, but into which it entered against the advice of counsel, was the result of that

bargaining. The company, it is pointed out, persistently though unsuccessfully sought to persuade Independent to admit C.I.O. workers as members of Independent. Hence, we are told, the company did all in its power to prevent the discharges and should not be held responsible for them. Two answers suggest themselves: First, that the company was not compelled by law to enter into a contract under which it knew that discriminatory discharges of its employees were bound to occur; second, the record discloses that there was more the company could and should have done to prevent these discriminatory discharges even after the contract was executed. Immediately after the discharge of this large group of employees, the Labor Board complained to the company. The company appealed in writing to Independent's business manager to admit the men to membership, and thus make possible their reinstatement. This appeal was rejected. The Board then called to the company's attention our decision in *Labor Board* v. *Electric Vacuum Cleaner Co.*, 315 U.S. 685, asserting that under its authority the men had been illegally discharged and should be reinstated. In subsequent correspondence, the Board suggested to the company that if it should later be required to reinstate the discharged employees, it would have only itself to blame, since it had voluntarily dispensed with their services. It insisted that the company was taking a needless risk of liability because if the Board should hear charges and dismiss them, the men could then be discharged, but if on the other hand, the Board should sustain the complaint, the discharged employees "would have retained their positions and your client would have no further liability because of their wrongful discharge." The Board's representative at that time wrote the company, "I again beseech you to return them to work pending a decision by the National Labor Relations Board on this question."

It follows from what we have said that we affirm the judgment of the court below approving the order of the Board in its entirety.

Affirmed.

Case Questions

1. Why were the employees discharged?
2. What findings did the Board make?
3. Answer the defense of the Wallace Corporation that it had sought to get Independent to admit C.I.O. members.
4. What is the duty of a bargaining representative?

SECTION 64.3. REFUSAL TO BARGAIN BY UNION

The original National Labor Relations Act imposed no explicit duty upon a labor organization to engage in good faith bargaining, presumably under the theory that such a provision would be superfluous since the basic purpose of a labor association is to represent employees for purposes of collective bargaining. The amended Act, in Sec. 8 (b) (3), imposes an affirmative duty upon employees to bargain collectively, and makes refusal to do so an unfair labor practice.

The requirement of Sec. 8 (b) (3) seems to the writer to be unnecessary in view of prior authoritative interpretation of the Wagner Act that implied a concurrent duty to bargain on both parties. One case is included in this section on this requirement, the *Columbian Enameling Company* decision. The question of what comprises mutual, bona fide bargaining is raised in this holding.

The final decision in this section, *N.L.R.B.* v. *Boeing,* was decided under the Act of 1947 and is an authoritative construction of Sec. 8 (d), the effect of which is that a labor organization which fails to give the employer the required 60 days' notice, prior to the expiration date of a trade agreement, of intention to modify or terminate such trade agreement, loses its bargaining rights by engaging in a strike, and its constituents lose their status as employees under Sec. 2 (3).

NATIONAL LABOR RELATIONS BOARD v. COLUMBIAN ENAMELING & STAMPING CO.

Supreme Court of the United States, 1939. 306 U.S. 292, 59 Sup. Ct. 501

STONE, J. This petition tests the validity of an order of the National Labor Relations Board of February 14, 1936, directing respondent to discharge from its service employees who were not employed by it on July 22, 1935; to reinstate, to the vacancies so created, those who were employed on that date and have not since received substantially equivalent employment elsewhere; and to desist from refusing to bargain collectively with Enameling and Stamping Mill Employees Union No. 19694 as the exclusive representative of respondent's production employees with respect to rates of pay, wages, hours, and other conditions of employment. Unless the finding of the Board that respondent had refused to bargain collectively with the Union on July 23, 1935, is sustained by the evidence, the order is invalid.

Pursuant to a charge lodged with it by the Union, the Board issued its complaint charging respondent with unfair labor practices affecting interstate commerce within the meaning of Sec. 8 (1) and (5) of the National Labor Relations Act. 49 Stat. 449. After hearing, the Board made findings which, so far as now relevant, may be summarized as follows: Respondent corporation is engaged at Terre Haute, Indiana, in the manufacture and sale in interstate commerce of metal utensils and other products. On July 14, 1934, respondent and the Union entered into a written contract for one year, terminable on thirty days' notice, prescribing various conditions of employment. It provided that no employee should be discriminated against by reason of membership or nonmembership in, or affiliation or nonaffiliation with, any union or labor organization. It also provided for arbitration, before an arbitration committee, of disputes arising under the contract, and that "There shall be no stoppage of work by either party to this contract, pending decision by the Committee of Arbitration."

Between the date of the signing of the agreement, July 14, 1934, and March 23, 1935, respondent's officers held numerous meetings with representatives of the Union, usually the Union Scale Committee, for the consideration and adjustment of various demands of the Union. At a meeting on January 4, 1935, the committee presented a number of requests, among them the demand that respondent should discharge any employees who might be suspended by the Union. That this and the other demands of January 4th be arbitrated was likewise refused on the ground that they were not arbitrable under the agreement. The committee afterward presented new demands at other meetings and then at a meeting on March 11th renewed the demands of January 4th, which respondent again rejected. On March 17th the Union passed resolutions reciting grievances and demanding a closed shop, and on March 23rd ordered a strike, when four hundred and fifty of respondent's five hundred employees left work. On March 30th respondent announced that its factory was closed indefinitely.

The strike was in effect July 5, 1935, when the National Labor Relations Act was approved, and continued until about July 23rd, when respondent resumed operations at its plant. By August 19th it had received three thousand applications for employment and had reemployed one hundred and ninety of its production employees. By the end of the second week in September respondent had employed a full force. On July 23rd two labor conciliators from the Department

of Labor appeared in Terre Haute and were requested by the Union "to try and open up negotiations with the respondent." On that day the conciliators met and conferred with the Scale Committee. Several days later he [respondent's president] informed them that he would not meet with them or with the Scale Committee. Later respondent received, but did not answer, letters of the Union of September 20th and October 11th, asking for a meeting to settle the controversy between them.

The Board concluded that on July 23rd the "union represented a majority of the respondent's employees, that it sought to bargain with the respondent, that the respondent refused to so bargain, and that this constituted an unfair labor practice" within the meaning of Sec. 8, subdivision (5) of the Act. It ordered respondent to discharge all of its production employees who were not employed by it on July 22, 1935, to reinstate its employees as of that date, and thereupon to desist from refusing to bargain with the Union as the exclusive representative of respondent's production employees.

Application by the Board for a decree enforcing its order was denied by the Circuit Court of Appeals for the Seventh Circuit, 96 F. 2d 948, on the ground that as the employees had struck before the enactment of the National Labor Relations Act, in violation of their contract not to strike and to submit differences to arbitration, they did not retain and were not entitled to protection of their status as employees under Sec. 2 (3) of the Act. We granted *certiorari*, 305 U.S. 583, the questions presented with respect to the administration of the National Labor Relations Act being of public importance.

The Board's order is without support unless the date of the refusal to bargain collectively be fixed as July 23, 1935. The evidence and findings leave no doubt that later, in September, respondent ignored the Union's request for collective bargaining, but as at that time respondent's factory had been reopened and was operating with a full complement of production employees, the refusal to bargain could afford no basis for an order by the Board directing, as of that date, the discharge of new employees and their replacement by strikers. Restoration of the strikers to their employment, by order of the Board, under Sec. 10 (c) of the Act, could as a practical matter be effected only if respondent had failed in its statutory duty to bargain collectively at some time after the approval of the National Labor Relations Act on July 5th, and before respondent had resumed normal operation of its factory. The date fixed by the Board was July 23rd, when respondent reopened its factory, and the occasion was the

personal interview on that day and a later telephone conversation of respondent's president with the conciliators from the Labor Department, who were not members or official representatives of the Union and who, so far as the testimony discloses, did not then appear to the president to be authorized to speak for the Union.

In appraising these transactions between the conciliators and respondent's president, it is important to bear in mind the nature and extent of the legal duty imposed upon the employer by the National Labor Relations Act. Section 8 (5) declares that it is an "unfair labor practice" for an employer "to refuse to bargain collectively with the representatives of his employees," and Secs. 2 and 10 (c) give to the Board an extensive authority to order the employer to cease an unfair labor practice and to compel reinstatement of employees with back pay when employment has ceased in consequence of a labor dispute or unfair labor practice. See *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333. While the Act thus makes it the employer's duty to bargain with his employees, and failure to perform that duty entails serious consequences to him, it imposes no like duty on his employees. *Since there must be at least two parties to a bargain and to any negotiations for a bargain, it follows that there can be no breach of the statutory duty by the employer—when he has not refused to receive communications from his employees —without some indication given to him by them or their representatives of their desire or willingness to bargain. In the normal course of transactions between them, willingness of the employees is evidenced by their request, invitation, or expressed desire to bargain, communicated to their employer.* [Author's italics.]

However desirable may be the exhibition by the employer of a tolerant and conciliatory spirit in the settlement of labor disputes, we think it plain that the statute does not compel him to seek out his employees or request their participation in negotiations for purposes of collective bargaining, and that he may ignore or reject proposals for such bargaining which come from third persons not purporting to act with authority of his employees, without violation of law and without suffering the drastic consequences which violation may entail. To put the employer in default here, the employees must at least have signified to respondent their desire to negotiate. Measured by this test the Board's conclusion that respondent refused to bargain with the Union is without support, for the reason that there is no evidence that the Union gave to the employer, through the conciliators or otherwise, any indication of its willingness to bargain or that re-

spondent knew that they represented the Union. The employer cannot, under the statute, be charged with refusal of that which is not proffered.

During the eight months preceding the strike respondent had, upon request, entered into negotiations with the Union on some eleven different occasions. Such meetings, always with some known representatives of the Union, were customarily with the Union Scale Committee and on its written request. All negotiations were broken off by the Union by the strike which followed almost immediately its resolutions of March 17th. On July 23rd the strike had continued for about four months, accompanied by picketing, violence and destruction of property, and had culminated, on July 22nd, in a proclamation of martial law. A meeting on June 11th had resulted in no change of attitude on either side. From then until July 23rd no attempt appears to have been made on either side to resume negotiations.

While there was before the Board testimony of the secretary of the Union that on July 23rd he had asked the conciliators to "try and open up negotiations," there was no testimony that respondent or its officers had ever been informed of that fact or that they were advised in any way of the willingness of the Union to enter into negotiations. This was pointedly brought to the attention of the Board and the trial examiner by a motion to strike the testimony of the secretary and that of respondent's president, giving his account of his interview with the conciliators. But the conciliators were not called as witnesses and no attempt was made to supply the omission.

Respondent's president testified that on July 23rd the conciliators asked him if he would meet with them and the Scale Committee; that he replied that he would; that no meeting was arranged and that several days later he called one of the conciliators on the telephone and informed him that he, the witness, "would not have any meeting with him or with the Scale Committee." All else that took place between the conciliators and respondent is left a matter of conjecture.

This testimony, on which the Board relies to support its finding, shows on its face that there was no indication until sometime later than July 23rd of any unwillingness on the part of respondent's president to meet the Union. Furthermore, it contains no hint that the Union at any time after July 5th, and before September, communicated to respondent its willingness to bargain, or that the conciliators, in asking a meeting and discussing the matter with respond-

ent's president, purported to speak for the Union. The testimony is consistent throughout with the inference, and indeed supports it, that the conciliators, so far as known to respondent, appeared in their official role as mediators to compose the long-standing dispute between respondent and its employees; that the employer first consented in advance to attend a meeting, and later withdrew its consent when they had failed for some days to arrange a meeting. Whether in the meantime the Scale Committee or any other representative of the Union was in fact willing to attend a meeting does not appear.

Section 10 (e) of the Act provides: ". . . The findings of the Board as to the facts, if supported by evidence, shall be conclusive." But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. *Washington, V. & M. Coach Co.* v. *National Labor Relations Board,* 301 U.S. 142; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197. . . . Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co.* v. *National Labor Relations Board, supra,* p. 229, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. See *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U.S. 521, 524; *Gunning* v. *Cooley,* 281 U.S. 90, 94; *Appalachian Electric Power Co.* v. *National Labor Relations Board, supra,* 989.

Judged by these tests or any of them we cannot say that there was substantial evidence that respondent at any time between July 5, 1935, and September, 1935, was aware that the Union desired or sought to bargain collectively with respondent, or that there is support in the evidence for the Board's conclusion that on or about July 23, 1935, respondent refused to bargain collectively with the Union. *Affirmed.*

Case Questions

1. State the requirements of the Board's order.
2. State the significant provisions of the trade agreement.
3. What demand was made by the union on January 4?
4. What was the reason for the strike?
5. Describe the action taken by the company during and after the strike.
6. On what theory does the Supreme Court support the Company?
7. Define substantial evidence as the Court does.

NATIONAL LABOR RELATIONS BOARD v. BOEING AIRPLANE COMPANY

United States District Court, Western District of Washington, Northern Division. Civil No. 2034. June 22, 1948, 15 Labor Cases Par. 64,604 [1]

BOWEN, D. J. . . . The Petitioner in this case comes before the Court and invokes this Trial Court's equity powers, relying as the Petitioner does upon that part of the Labor-Management Relations Statute of 1947 which expressly gives to the Petitioner Labor Board the right to so proceed in aid of the Board's proceeding upon the merits of the disputes existing between any employer and its employees engaged in commerce within the meaning of the Act and particularly such an employer and employees as are concerned in this strike at the Boeing plants, but the Court's decision in this injunctive proceeding is not binding upon the Board's action on the merits.

After invoking the Court's jurisdiction under the statute to hear the Labor Board's petition, the Board thereafter fails to show compliance with any other statutory conditions other than the union's willingness to bargain as a basis for invoking this Court's jurisdiction to hear the Labor Board's petition in this proceeding. Instead of relying upon performance by the union of the important duties imposed upon it by the Labor-Management Relations Act of 1947, the Board undertakes to explain away and justify the union's failure to act as required by that law in certain specific instances. That law, 29 U.S.C.A., Section 158, subsection (d), [Sec. 8 (d) of the Act], provides in part "That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification serves a written notice on the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;" and, further, unless the party desiring such termination or modification "continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later."

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By the same statute, in the same section and subsection thereof, in the last sentence of part (4) of the subsection, it is further provided that "Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of Sections 8, 9 and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is re-employed by such employer."

The Court finds and concludes that, although this contract was by its terms to continue in effect until March 16, 1947, it until the day of the strike continued in effect by reason of the further provision in the last modification of the working agreement between the Boeing Company and its employees to the effect that it should not only continue in effect until March 16, 1947, but also "and thereafter until a new agreement has been reached by the parties either through negotiation or arbitration."

In that connection it may well be observed that in the forepart of 1947 the parties to that contract expected that it would about that time terminate and that it would be replaced by a new contract. It, however, never was so replaced and the Court finds from the evidence that the union decided to keep that contract in effect after the 1947 Labor Management Relations Act took effect. . . .

. . . Upon the entire record, the Court finds and concludes:

1. The Court has jurisdiction of this proceeding by virtue of Section 10 (j) of the National Labor Relations Act, as amended (29 U.S.C.A. 151 *et seq.*) herein called the Act, and has jurisdiction of the parties.

2. Aeronautical Industrial District Lodge No. 751, International Association of Machinists (herein called Lodge 751), an unincorporated association, is a labor organization within the meaning of Section 2 (5) of the Act.

3. The Labor Relations Agreement, as amended to March 16, 1946, (introduced in evidence as respondents' Exhibit R1) was in full force and effect at all times from March 16, 1946, and until the time of the strike on April 22, 1948. Said Agreement, as amended, constituted a collective bargaining contract between Lodge 751 and respondent Boeing Airplane Company covering certain employees of respondent Boeing Airplane Company in an industry affecting commerce within the meaning of the Act.

4. On April 22, 1948, Lodge 751 resorted to and caused a strike at the plants and places of operation of respondent Boeing Airplane

Company within the State of Washington, which strike was in violation of Section 8 (d) [29 U.S.C.A. 158 (d)] of the Act in that:

(a) So far as a lawful strike under the terms and provision of the 1947 Act is concerned, what occurred in the calling of a strike under the law before the Act became effective had no valid effect. No other acts intended as calling or arranging for a strike of employees of respondent Company took place, so far as giving formal notice was concerned, prior to the letter from Lodge 751 to respondent Company dated April 20, 1948 (introduced in evidence as respondents' Exhibit R11). The strike took effect on April 22, 1948. Therefore, the sixty-day notice provided in Section 8 (d) of the Act [29 U.S.C.A. 158 (d)] was not given;

(b) Lodge 751 did not continue in full force and effect, without resorting to strike, all the terms and conditions of said Agreement, as amended, for a period of sixty days after giving notice, as required by Section 8 (d) (4) of the Act.

5. Said strike has continued until the date hereof and by reason of engaging in a strike within the sixty-day period specified in Section 8 (d) of the Act, all employees of respondent Boeing Airplane Company engaged in the strike have lost their status as employees of respondent Boeing Airplane Company for the purposes of Sections 8, 9, and 10 of the Act (29 U.S.C.A. 158, 159 and 160) and Lodge 751 is not a representative of employees of respondent Boeing Airplane Company for collective bargaining purposes within the meaning of the Act.

6. By reason of the foregoing, the Court is of the opinion that the respondent Company is not required by the Act to bargain collectively with Lodge 751 or to recognize Lodge 751 as the collective bargaining representative of the presently striking employees of respondent Company.

7. The Court is of the opinion that it would not be just and proper within the meaning of Section 10 (j) of the Act [29 U.S.C.A. 160 (j)] to grant to the Board any injunctive relief in this cause. . . .

Case Questions

1. On whose behalf is the Labor Board acting?
2. State the gist of Sec. 8(d) of the Act.
3. Had the union complied with Sec. 8(d)?
4. Had the trade agreement expired before the strike? Was this material?
5. State the effect of noncompliance on (a) the employer, (b) the labor organization, and (c) the employees.

SECTION 64.4. UNLAWFUL STRIKES AND BOYCOTTS

Section 8 (b) (4) forbids labor organizations in their usage of certain strikes and secondary boycotts. Each of the subsections will be considered separately and its provisions reduced to simpler terms.

Subsection (A) prohibits strikes and secondary boycotts where the purpose is:

(a) To force an employer to join an employer organization.
(b) To force a self-employed person to join a labor organization (see Section 43 of this volume).
(c) To force one employer to cease dealing with another employer.

Boycott activity in its various forms, and for various purposes, has previously been subjected to scrutiny in Chapter 7, particularly in Section 51, "Boycotts and the National Labor Relations Act." No further discussion is warranted at this point other than to recall the Supreme Court's views on picketing as an exercise of the right of free speech and its application of the unity of interest doctrine. We have seen that a secondary boycott may be carried on lawfully by way of secondary picketing, provided unity of interest is present between the primary disputant and the third party employer to whom pressure is being applied.

Whether the Supreme Court will finally construe Sec. 8 (b) (4) (A) to permit more extreme pressure upon third parties in the form of secondary strikes has not as yet been determined. Logic would seem to impel the conclusion that, even as to the strike weapon, its permissibility in a specific case should rest upon the remoteness of the third party to the controversy and the extent of his interest unity. On the whole, however, the strike has not been given the same degree of constitutionality immunity as has the picket method of pressure tactic.

Subsection (B) outlaws the secondary strike and boycott to force employer recognition prior to a N.L.R.B. certification. The primary strike for recognition may still be engaged in *prior* to a certification. (See Section 31 in Chapter 4 of this volume for a complete discussion.)

Subsection (C) prohibits strikes and boycotts to secure recognition *after* another union has been certified. (See Section 31 of this volume.)

Subsection (D) prohibits strike and boycott activity in work jurisdictional disputes, except where the employer assigns work to a particular unit when the N.L.R.B. has ordered the work given to another unit. (See Section 46 of this volume.)

It is entirely probable that subsections (B), (C) and (D) will be upheld as reasonable restrictions on the exercise of power by labor unions. As to subsection (A), the courts can uphold it by applying thereto rules of construction that will prohibit or permit secondary boycott activity on the basis of free speech, remoteness, and unity of interest. The cases thus far decided show a disposition in this direction.

Two other matters remain for consideration. First, the activities prohibited in Sec. 8 (b) (4) are subject to remedial action in two ways: (a) a damage suit by the employer or aggrieved party against the union under Sec. 303, and (b) a mandatory injunction against the union activity by the Board acting through the courts under Sec. 10 (l). Second, an important proviso is attached to the end of Sec. 8 (b) (4). This provision legalizes the refusal of workers to cross the picket lines around the premises of another employer, if the employees of that other employer are engaged in a primary strike ratified by the lawful bargaining representative. This legalizes a very important form of sympathetic activity in the tool chest of labor organizations.

SECTION 64.5. EXCESSIVE INITIATION FEES AND DUES

Labor organizations that operate under permitted forms of union security may not charge excessive or discriminatory dues or initiation fees by virtue of Sec. 8 (b) (5). The General Counsel of the N.L.R.B. has issued a statement that shows a disposition to handle each charge on this issue as it arises, with the determination of unfair labor practice resting on a study of custom in the trade, the earnings made by the constituents, and the extent of protection offered to them. Thus what might be considered excessive in one case may be entirely reasonable in another. Rate discrimination within a specific class because of race, color, or creed is, on the other hand, uniformly outlawed.

SECTION 64.6. FEATHERBEDDING

Specifically, Sec. 8 (b) (6) makes unlawful those attempts to cause an employer to "pay for services which are not performed or not to be performed." It apparently permits certain make-work forms of

featherbedding, which would include those situations where two men do the work which conceivably or reasonably one man could do. Sec. 8(b) (6) is inapplicable, then, where unnecessary work is performed. The test is *performance* and not *necessity of performance.*

The Lea Act, which outlawed featherbedding in the broadcasting industry, attaches criminal penalties for violation, as does the Anti-Racketeering Act. (See Sections 12 and 14 of this volume.) Under the Labor Relations Act of 1947, the only remedy provided is a N.L.R.B. cease and desist order, followed by an injunction secured by the Board if necessary. The employer cannot secure an injunction in his own right, nor may he sue for damages under Sec. 303.

The opinion of the N.L.R.B. General Counsel may throw some light on what will be considered an unlawful exaction.

> N.L.R.B. Release R-4, Sept. 23, 1947.
> ". . . But within the purview of this section as it is written, the term has a decidedly narrow limitation. Standby crews, for example, who simply are present and do nothing, come within the proscriptions of this section; and it makes no difference whether they are sheet metal workers hired to stand by while an iron worker does a job because of a jurisdictional dispute, or musicians who are held in the anteroom of a radio station while the disc jockey is turning platters in the control room. The gist of this section is that the payment is made for services 'which are not performed or not to be performed.' Thus, when the Teamsters halted trucks at the mouth of the Holland Tunnel and required the driver to put a member of the Teamsters Union on the seat in order to qualify to deliver the load in New York City, and to pay him a full day's wages for taking the ride, I don't doubt that the owner of the truck called it 'featherbedding,' but I have great doubt that it could ever be brought within the terms of the section of the statute. On the other hand, if the driver accepted the option which often was tendered to him of paying the money but waiving the privilege of having his 'helper' ride with him, we have a situation where there were no services performed or to be performed, and probably a violation."

The prohibition of featherbedding has been actively opposed by labor. Here again we have evidence of possible disregard of the public interest should Congress remove the above restriction in favor of labor.

Questions on Section 64.6

1. Distinguish between "performance" and "necessity of performance."
2. What is featherbedding?
3. Indicate the remedy provided for featherbed practices.
4. Distinguish the case of the teamster who gets in the cab with a driver and one who does not.

SECTION 65. EMPLOYER FREE SPEECH

In its administration of the Wagner Act, the N.L.R.B. had developed rules in its interpretation of Sec. 8 (1), on employer interference, which tended in the direction of limiting the employers' constitutional prerogative of free speech. Critics of the Act contended that its administration was one-sided, especially in permitting free speech to employees while at the same time restricting the same right as to employers. Controversies on this point arose most frequently in connection with union organizing campaigns, during which the employer might himself, or through his agents, address his employees on the subject of his opinion of labor unionism. More frequently than not, antiunion statements were made, giving rise to charges of interference and coercion by the labor organization seeking a favorable employee response.

In deciding whether antiunion statements amounted to interference and restraint in violation of Sec. 8 (1), the Board found two questions of importance:

(a) Were the statements made coercive *per se,* such as threats to dismiss everyone who joined the union or a threat to close down the plant if the union won support of the employees? Statements that were coercive in themselves were held to constitute unlawful interference. This class of statement remains unprivileged under the 1947 Act.

(b) If the statements were not coercive *per se,* or standing alone, were they raised to coercive stature because of the total antiunion history of the employer, of which the statements were but a part? If the total conduct of the employer indicated an antilabor background, statements that were innocent in themselves could be considered as being coercive and violative of Sec. 8 (1) of the Act.

The Labor Relations Act of 1947 leaves intact rule (a) above, but does not any longer permit the Board to apply the "totality of conduct" doctrine to antiunion statements that are innocent when standing alone. Sec. 8 (c) provides that "the expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

In *N.L.R.B.* v. *American Laundry Machinery Co.,* the first case in this section, the court approves the "totality of conduct" doctrine in holding that statements which are noncoercive when standing alone

may be found coercive if coexisting with an antiunion background. In so holding, the court followed the mandate of the Supreme Court handed down in the *Virginia Electric Company* decision of 1941, given as a supplemental case in this section. The totality of conduct doctrine is rejected by Sec. 8 (c) of the 1947 Act. It is probable that Congress will reinstall this doctrine in 1949.

The remaining two decisions in this section, *Mylan Sparta* and *Big Lake Oil Co.*, are soundly reasoned under either view as showing the extent of the employer's free speech privilege in communicating with his workers.

NATIONAL LABOR RELATIONS BOARD v. AMERICAN LAUNDRY MACHINERY CO.

Circuit Court of Appeals, Second Circuit, 1945. 152 Fed. (2d) 400

SWAN, C. J. In 1942 the Congress of Industrial Organization began to organize a local union among respondent's employees. The employer's interference with such organizational efforts resulted in an order of the Board issued on December 4, 1942, which came before this court on a prior petition of the Board. On October 29, 1943, we granted enforcement of that order. . . . Meanwhile and during the pendency of that proceeding in this court, the union renewed its campaign of organization and on June 30, 1943, the Board ordered an election to be held on July 28, 1943, to determine whether the respondent's employees desired to select the union as their collective bargaining representative. Some of the employees voluntarily organized an "unaffiliated" group to oppose the election. The union lost the election. It immediately filed objections to the Regional Director's report of election and a charge of unfair labor practices by the employer. These two proceedings were consolidated for hearing by the Board. On July 4, 1944, the Board issued the order of which it seeks enforcement by its present petition. It found that during the three or four weeks preceding the election three of the respondent's supervisory employees questioned certain of their subordinates as to why they joined the union, made disparaging remarks regarding the union and threatened that economic reprisals might follow if the union won the election. The Board also found that, a day or two before the election, the respondent's vice-president addressed the employees in a letter and a speech; and it concluded that these communications, considered in the light of the respondent's earlier antiunion activities and the current conduct of its three supervisory employees,

carried at least an intimation that by voting for the union the employees would risk incurring the employer's displeasure and incite it to some unfavorable action against them. Accordingly the Board set aside the election of July 28, 1943, ordered the respondent to cease and desist from interfering in any manner with its employees in their right to self-organization, and directed it to mail to all of its employees a notice that it will not engage in the conduct from which it was ordered to desist, and to post similar notices in its plant.

The respondent's main contention is that the Board's findings of fact are not supported by substantial evidence. It is true that the three instances of alleged interference by supervisory employees are not by themselves very persuasive of coercion, and that the letter and speech of the vice-president taken literally do not necessarily suggest any threat of retaliation by the employer if the union be elected. However, it is the Board's province to interpret the words of the respondent's agents in the light of its former antiunion conduct, which included the unjustifiable discharge of four union men and the failure to reinstate them pursuant to the Board's order of December 4, 1942, which was being contested in this court. Against this background the Board inferred that the employees might understand the language of the speech and letter as containing covert threats of reprisal and as having coercive effect. We cannot say that such an inference is wholly unreasonable, and unless it is, there was no infringement by the Board of the employer's freedom of speech. See *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U.S. 469, 477, 62 S. Ct. 344. . . .

It is also urged that the Board has exceeded its power in requiring the respondent to mail to all its employees a notice that it will not engage in the conduct from which it is ordered to cease and desist. While it is true that the Board is usually satisfied to require only the posting of notices in conspicuous places within the employer's plant, the Board's power extends to any remedy appropriate to redress the unfair labor practices which the employer is found to have committed. . . .

An order of enforcement will be entered.

SUPPLEMENTAL CASE DIGEST—EMPLOYER FREE SPEECH

NATIONAL LABOR RELATIONS BOARD v. VIRGINIA ELECTRIC & POWER Co. Supreme Court of the United States, 1941; 314 U.S. 469. In connection with organizing activity at its plant, the company, through

its agents, delivered some speeches and posted a bulletin which implied that strikes and industrial unrest are caused by unions, stressed the happy relations between the management and workers without a union, and emphasized the negative right of the workers to refrain from union activity. The Board found the speeches and bulletin to be in restraint and coercion of the workers, violative of rights granted them in Sec. 7. The Supreme Court reversed and remanded in order to secure Board clarification on the issue of whether it had held the speeches and bulletin coercive *per se*, or whether they were so only because of the background in which they were made. "The employer in this case is as free now as ever to take any side it may choose in this controversial issue. But, certainly, conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways. . . . It is clear that the Board specifically found that those utterances were unfair labor practices, and it does not appear that the Board raised them to the stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them above. The bulletin and speeches set forth the right of employees to do as they please without fear of retaliation by the Company. . . . Whether there are sufficient findings and evidence of interference, restraint, coercion and domination, without reference to the bulletins and speeches, or whether the whole course of conduct evidenced in part by utterances, was aimed at achieving objectives forbidden by the Act, are questions for the Board to decide upon the evidence. . . ." (MURPHY, J.)

Case Questions

1. Indicate the nature of the antiunion statements made in the main case.
2. What is the American Laundry Machinery Company's defense?
3. On what theory did the Court approve the Board's order in the main case?
4. Does the decision in the main case represent sound law in view of the Labor Management Relations Act, Sec. 8 (c)?

NATIONAL LABOR RELATIONS BOARD v. MYLAN-SPARTA COMPANY

Circuit Court of Appeals, Sixth Circuit, 1948. 166 Fed. (2d) 485

MILLER, C. J. The petitioner, National Labor Relations Board, seeks enforcement of its order of August 26, 1946, pursuant to Section 10 (2) of the National Labor Relations Act. . . . By the order in question the respondents, Mylan-Sparta Company, Inc., Mylan Manufacturing Company, Inc., and M. C. Wallace were ordered to cease and desist from interfering with, restraining or coercing the employees of the two companies in the exercise of the right to form or join United Construction Workers, U.M.W.A., or any other labor organization, that the corporations make whole to seven employees any loss of pay suffered by reason of their discriminatory discharge, that the corporations post appropriate notices, and that Wallace publish in the local newspaper a notice stating that he would not interfere with or coerce the employees in the exercise of their right to self-organization and to join a labor organization. Wallace was not an officer or an employee of either corporation. . . .

The complaint charges the respondents with engaging in unfair labor practices within the meaning of Secs. 8 (1) and 8 (3) of the National Labor Relations Act. In addition to proceeding against the employing industry, it also named as respondents the Sparta-White County Chamber of Commerce of Sparta, Tennessee, and M. C. Wallace, James R. Tubb, Jr., and Robert J. Snodgrass, three individual residents of Sparta. Sparta is a town of approximately 2500 population. The employing industry is engaged in the manufacture and sale of men's and boy's shirts and is the principal industry in the town, employing between 600 and 800 persons. The businessmen of Sparta were vitally concerned with its continued and successful operation. A possible organization of a union was prevented by some of them in 1942. In February, 1945, when an expected wage increase for some of the employees did not materialize, a group of about 50 to 75 employees started to walk out of the plant but were persuaded by the plant superintendent to return to work. About March 1, 1945, two organizers of the union arrived and started the distribution of union membership application cards to employees at the plant. A meeting of some of the businessmen of Sparta was held at Wallace's home. Charles Bassine, plant manager and part owner of the business, and R. E. Knowles, a former sheriff, were present. It was suggested that some of the businessmen of Sparta attend a meeting of the employees at the plant. Bassine arranged to address the employees at the plant

at about 4:00 p. m. on March 9th. Bassine told the employees that he understood that there were union organizers interested in obtaining their membership in a union, that they had the right to join a union, and also the right not to join a union. He appealed for continuing production, urged that the employees not walk out even though they had the right to do so, and stated that while the plant might be closed for reasons beyond his control it would not close by any act of his. Some 50 or more businessmen, including Wallace, attended the meeting. When Bassine finished his talk and the meeting started to break up, Wallace called for attention and made a talk to the employees remaining to listen to him. Wallace told them about the coal mines located nearby having closed in previous years by reason of the organization of a union and about the silk mill that had previously been located in the same building having also closed on account of union activities, that the employees should listen to friends instead of strangers, and expressed the opinion that union organization in the Mylan plant would result in the ultimate closing down of the plant. Bassine did not make any additional statement after Wallace concluded. On March 15, 1945, the union held a meeting in the yard of Ora Burgess, one of Mylan's oldest employees, at which officers were elected. Between March 13th and March 19th, the following employees were discharged: Pauline Anderson, Carrie Bennett, Della Fletcher, Nola Martin, Mary Hardie and Rebecca Bell. Ora Burgess was discharged on April 12th. All seven of these employees were active in the organization of the union.

When the union organizers first arrived in Sparta they talked to Herman Anderson, an employee who undertook the distribution of union membership application cards, became an active union supporter and later its president. At lunch time on March 7th, Anderson found a memorandum attached to his timecard, saying "Call Operator 27, Atlanta, Georgia, at lunch" and also "See Ed Knowles at City Hall." The customary way of delivering a message to an employee was to attach such a memorandum to his timecard. Anderson called the Atlanta operator and talked to his brother. After getting lunch he went to the City Hall and saw Knowles. Knowles urged Anderson to abandon the union and to tell the organizers to get out of town; offered Anderson another job and told him that the factory wouldn't run if a union came in. Knowles talked in a similar way to Mary Hardie, another active union adherent, as she left the plant that afternoon. That evening Knowles, accompanied by the sheriff, went to Anderson's home. He had a typewritten list of Mylan's employees

and urged Anderson to indicate which of the employees were leaders of the union. Anderson refused to do so. Knowles asked Anderson to attend a meeting with Bassine and other businessmen which Anderson declined to do. The next evening Knowles and the Chief of Police came to the home of Anderson's father-in-law and talked to Anderson again, telling him "to stop fooling with the union." Knowles and the Chief of Police watched from a close distance the union meeting on March 15th, and following the meeting trailed the two union organizers and arrested them for reckless driving. After they were fined by a Justice of the Peace, Knowles ordered them to get out of town and offered them protection to the county line. The organizers left immediately.

During the organization movement, Feinstein, the plant superintendent, repeatedly told employees that his boss didn't want the union and that he would be better to them than the union would be. On one occasion an employee, Myrtle Bussell, who had not joined the union, asked Feinstein for a raise. Feinstein at first refused but after the employee talked with Bassine, Feinstein agreed to a five cent raise and told her, "You are one lady, you never joined a union, and never walked out. I am giving you top price. You have a job here as long as this mill runs." She was later discharged on July 22, 1945, for alleged defective work. A forelady, Maud Hale, told employees: "They have got that old union started in here again and the one that started that union oughtn't to be fired, they ought to be kicked out." Another forelady, Della Goodwin, let it be known that Feinstein had said that he would see to it that those who hadn't signed with the union would work "if he had to call a militia."

A reading of the evidence in its entirety shows that it is amply sufficient to sustain the cease and desist order against the employing industry. We recognize respondents' contention that the businessmen of Sparta and its Chamber of Commerce have the right to take an interest and a position in a matter affecting the welfare of the community, and that their activities in support of their position cannot be attributed to an employer in the absence of proof that they were inspired by the employer. *N.L.R.B.* v. *American Pearl Button Co.*, 149 Fed. (2d) 311, 317-318, C.C.A. 8th. We also recognize the right of the employer to express his views concerning the advantages and disadvantages of unions, as exercised by the plant manager and by Wallace at the meeting of the employees. *N.L.R.B.* v. *Ford Motor Co.*, 114 Fed. (2d) 905, C.C.A. 6th; *N.L.R.B.* v. *Brandeis*, 145 Fed. (2d) 556, 563-566, C.C.A. 8th. But irrespective of those phases of the case, there is substantial evidence in support of the finding that the em-

ploying industry was guilty of the unfair labor practices prohibited by Sections 8 (1) and 8 (3). The activities of its supervisory staff, particularly in advising employees of the management's opposition to the union and in rewarding a non-union employee for not having joined the union, the cooperation of the plant manager with the businessmen openly and actively opposed to the establishment of the union in that community, the action of Knowles, whose unofficial affiliation with the management seems established, in actively fighting the formation of the union, and the prompt discharge of several union leaders without real cause justify the findings of the Board to that effect. The activities of the supervisory staff referred to were not of the sporadic, isolated type, promptly repudiated by the management, as were held not chargeable to management in *N.L.R.B.* v. *Clinton Woolen Mfg. Co.*, 141 Fed. (2d) 753, 757-758, C.C.A. 6th. Rather they are more correctly viewed against a background of employer hostility to unionization where the circumstances were such "as to induce in subordinate employees a reasonable apprehension that the acts condemned reflect the policy of the employer" in which case the employer is called upon for more appropriate action than mere declarations of neutrality even though made in good faith. *Consumers Power Co.* v. *N.L.R.B.*, 113 Fed. (2d) 38, 44, C.C.A. 6th.

The Board dismissed the proceedings against the Chamber of Commerce and the individuals Tubb and Snodgrass, who were not connected with the company. We are of the opinion that it should also have dismissed them against Wallace. Although its finding that Wallace was acting in the interest of the employer and so subject to the provisions of the Act, as provided by Sec. 2 (2) thereof, is supported by substantial evidence, we are of the opinion that Wallace's speech at the employer's meeting did not transcend his right of free speech. The Board's characterization of it as "an openly anti-union speech" is not sufficient to condemn it. An employer may express his hostility to a union and his views on labor problems or policy, providing he does not threaten or coerce his employees. *N.L.R.B.* v. *Ford Motor Co., supra; N.L.R.B.* v. *Brown-Brockmeyer Co.*, 143 Fed. (2d) 537, 542-543, C.C.A. 6th. . . . The record fails to show very definitely what Wallace said or the exact words used, the evidence dealing mostly in generalities and conclusions. This, in itself, is a failure to comply with the rule announced by this Court in *N.L.R.B.* v. *West Kentucky Coal Company, supra,* that partial quotations from a speech are not sufficient to sustain the burden of proof. What the record does disclose shows truthful references to the history of the union

movement in Sparta, and his opinion that the present movement would cause the same result. Prophecy is not in itself a threat or coercion. Wallace was not a part of the company management and had no authority or power to change prophecies into realities.

We are of the opinion that the evidence is sufficient to sustain the findings of the Board that the employees Pauline Anderson, Della Fletcher and Nola Martin were discharged because of their union activities in violation of Sec. 8 (3) of the Act. In the case of each of these employees the employing industry relied upon the excuse that the particular kind of work which the employee was engaged in ran out. But in each instance the employee was an experienced worker, capable of doing work in another department. The employing industry was under great pressure from the Government to maintain production on its war contracts and was employing new inexperienced employees. Considering these facts in connection with the facts that Pauline Anderson was the wife of Herman Anderson, who was the original leader of the labor union movement, that Della Fletcher indicated her willingness to transfer to another department, and that Nola Martin was promptly replaced by another employee on the same kind of work, we believe the Board's findings in these three cases should not be set aside. However, we also believe that the discharges of Carrie Bennett, Mary Hardie, Rebecca Bell and Ora Burgess were justified by the circumstances in each case. It is settled that the National Labor Relations Act does not furnish a guarantee against discharge by an employer merely because the discharged employee is a member of a union. *N.L.R.B.* v. *Sands Mfg. Co.*, 96 Fed. (2d) 721, C.C.A. 6th; *N.L.R.B.* v. *Empire Furniture Corp.*, 107 Fed. (2d) 92, C.C.A. 6th. The Act does not take from the employer the right to make and enforce reasonable rules for the conduct of the business and to take disciplinary action against employees who either violate the rules, are inefficient or malcontent, or for reasons generally are not suitable for efficient production. The Act does not authorize the Board to substitute its own ideas of discipline or management for those of the employer, except barring discrimination or discharge for union membership. *Midland Steel Products Co.* v. *N.L.R.B.*, 113 Fed. (2d) 800, C.C.A. 6th. . . . Carrie Bennett, although a thoroughly experienced employee, consistently failed to make her production. After her reemployment in February, 1945, for five consecutive weeks before being let out she failed to make the minimum rate, requiring the Company to make up a weekly deficiency of from $4.14 to $10.63. She admitted her consistent failure to make production but claimed

she had worked in other factories which didn't require production and many other employees didn't make production either. She also admitted that she spent time during her work talking loudly to other employees about the union, and testified, "I mean I talked plenty loud," because of the instructions from the union organizer not to be backward about doing it. Such conversation with other workers not only was partly responsible for her own failure to make production, but also interfered with obtaining the best work from other employees. See *Midland Steel Products Co.* v. *N.L.R.B.*, 113 Fed. (2d) 800, 805-806. The company's answer to the complaint stated that her production was so low in comparison with her ability it was finally obliged in order to correct the situation to terminate her services. It also introduced records, which were not denied, showing the discharge of 87 other employees for failure to make the required production. The fact that other companies did not require production is immaterial, and the company was justified in adopting a policy of permitting new inexperienced employees to fail to make production without discharge while insisting on experienced employees giving their best efforts to their work. Although she denied the company's claim that she was given several individual warnings, yet she admits that a forelady prior to her discharge conveyed to a group of them a message from the plant superintendent that he couldn't take the production he was getting. These undisputed facts justified the disciplinary action taken by the company. Mary Hardie admitted leaving her place of duty and going to the washroom in an entirely different portion of the building on several occasions where she met other employees to whom she gave union application cards. She admitted that it interfered with the production of the factory. Although most of the employees did not work on Saturday, yet at times some of them upon request would agree to do so. Rebecca Bell agreed to work on a Saturday, but later at her home changed her mind for personal reasons and did not report with a resulting disruption in the amount of work planned for her and other employees on that day. Ora Burgess, after working the first three days of one week, left without excuse in the middle of the day on Thursday to do some washing at her home which was usually done on Saturday. When the assistant plant superintendent instructed her to get permission from the superintendent, she stated to him, "I will see nobody," and left. She testified on cross-examination with reference to her talk with the assistant, "No, I didn't tell him I wanted to go. I told him I was going." In view of the undisputed character of the evidence in each of these four cases, we believe

that part of the Board's order that directed these four employees be made whole was erroneous and should be set aside.

The order of the Board will be modified as above indicated and as so modified will be enforced.

MCALLISTER, C. J. (dissenting in part). I concur with the foregoing opinion except with respect to the matter of Carrie Bennett. She was not discharged for propagandizing or disturbing or hindering other workers in the performance of their duties, but solely for failure to "make her production." But although she admitted she did not make such production, a comparison of her record with that of other trimmers shows that she was far more efficient than a majority of her fellow employees, and actually produced more than most of the other workers performing similar work. The company first registered its complaint about her production record on the day after she had become an ardent and enthusiastic charter member of the union. I am of the opinion that the findings of the Board that she was discharged for union activities are sustained by the evidence.

SUPPLEMENTAL CASE DIGEST—EMPLOYER FREE SPEECH

BIG LAKE OIL CO. v. NATIONAL LABOR RELATIONS BOARD, Circuit Court of Appeals, Fifth Circuit, 1945; 146 Fed. (2d) 967. The employer issued a letter to its employees pending a certification election. The letter stressed present benefits, among them the payment of a Christmas bonus, the payment of sick benefits, hospitalization, recreational facilities and a retirement plan, concluding "these are not accomplishments of any union but the result of twenty years' cooperation between you and the Company." Since there was present no threat that the benefits would be withdrawn if the union won the election, the letter was held to be informative and not coercive, and therefore constitutionally protected as an exercise of the right of free speech.

Case Questions

1. List the requirements of the Board order in the *Mylan-Sparta* case.
2. What forms of antiunion activity marked this case?
3. Were the seven discharged employees active in the union?
4. To whom does the court apply the "dual motive" rule? the "compelling reason" rule?
5. Is Feinstein's statement protected by Sec. 8 (c)?
6. Is Wallace's speech protected by Sec. 8 (c)?
7. Under the Act, does an employer have the right to express hostility to labor organizations?
8. Under the Act, does an employer have the right to promise to give his employees a wage increase if they refrain from joining a union?

SECTION 66. REPRESENTATIVES AND ELECTIONS

The National Labor Relations Board has two major functions: first, to determine which labor organizations are entitled to represent employees, and second, to prevent unfair labor practices. It is our purpose at this juncture to investigate some of the salient features of the National Labor Relations Act with respect to certification of bargaining representatives.

If a union believes it is entitled to recognition by the employer as the bargaining agent of an appropriate unit of employees, Sec. 9 (c) (1) (A) requires the union to file a petition alleging that the employer refuses recognition and that a substantial number of employees desire representation. The Board will require evidence that at least 30 per cent of the employees are adherents of the petitioning union. This evidence is adduced at the pre-election hearing, following which the Board will set a date for an election among the employees. If more than one union believes itself to be the majority representative, each will be permitted to intervene upon a showing of substantial interest as heretofore explained.

When the election is held and the results are tabulated, the winning union is certified if it has received approval of a majority of workers in an appropriate unit. If the election is inconclusive or negative and no bargaining agent is designated, the Board will certify that fact. See Sec. 9 (c) (1). We shall later determine what constitutes a "majority" of employees and analyze the rules applied to determine whether the unit is "appropriate."

Whether the results of an election are positive or negative, such election results will remain binding for the period of one year, under Sec. 9 (c) (3), unless the election proceedings have been tainted with fraud or the designated representative fails in its duty to represent fairly all employees in the unit regardless of race or creed or membership in the union.

Should the result of the vote be *inconclusive* rather than negative, that is, if a majority of workers have expressed a preference for union representation but no union received a valid majority, the Board may order a run-off election under Sec. 9 (c) (3). In the run-off, "the ballot [shall provide] for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election."

Participation in any election by workers requires that they qualify as employees under the Act. Sec. 9 (c) (3) provides "Employees on

strike who are not entitled to reinstatement shall not be eligible to vote." This disables the following workers from participating:

(1) Strikers engaged in illegal or union unfair labor practice strikes, such as a strike for the closed shop.

(2) Economic strikers who have been effectively replaced by the employer. The economic strike is to be distinguished from the employer unfair labor practice strike. In the former instance, the strike is called for a lawful objective, e.g. higher wages, shorter hours, or permitted forms of union security. Workers retain their status as employees until the employer secures *effective* replacements or the job itself is discontinued. In the latter instance, the employer unfair labor practice strike, the labor organization has walked out to force the employer to discontinue unfair labor practices such as interference, discrimination, or domination. These strikers retain their employee status for all purposes, including reinstatement, back pay, and voting, even though the employer has replaced the strikers with new men who have effectively supplanted the strikers.

Subject to the one-year rule, employees may, by virtue of Sec. 9 (c) (1) (A), petition the Board for decertification of an existing bargaining agent. Such petition must be supported by a substantial showing of interest, as was true in the case of an original representation petition.

It should be observed that the employer under Sec. 9 (c) (1) (B) may petition for an original election if confronted with a representation claim by one or more purported bargaining representatives. The employer, however, is not accorded the right to institute decertification proceedings on his own volition. The same essential procedure was provided under the Wagner Act of 1935.

We now turn to the cases that support and illustrate the above general rules. They are to be found in the next five subsections.

SECTION 66.1. SHOWING OF SUBSTANTIAL INTEREST

Before the N.L.R.B. will order an election under Sec. 9 (c) (1), the petitioning union must make a showing of substantial interest under Sec. 9 (c) (1) (A). This procedure is illustrated by the Board's decision in the *West Virginia* case below. The *Delaware* case digest reveals the rule applied to determine what constitutes adherence to a labor organization for purposes of an interest showing.

IN THE MATTER OF WEST VIRGINIA PULP & PAPER COMPANY

66 N.L.R.B. 309, 1946

Upon a petition duly filed by International Brotherhood, Pulp, Sulphite, and Paper Mill Workers, AFL, herein called the Paper Mill Workers, alleging that a question affecting commerce had arisen concerning the representation of employees of West Virginia Pulp & Paper Company, at its Covington, Virginia; Williamsburg, Pennsylvania; and Luke, Maryland, plants, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Earle K. Shawe, Trial Examiner. . . . The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. All parties were afforded an opportunity to file briefs with the Board. . . .

The Company admits that it is engaged in commerce within the meaning of the National Labor Relations Act, and we so find.

International Brotherhood, Pulp, Sulphite, and Paper Mill Workers, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the Company.

International Brotherhood of Firemen and Oilers, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the Company.

International Association of Machinists is a labor organization admitting to membership employees of the Company.

Paper Workers Organizing Committee, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the Company.

The Company has refused to grant recognition to the Paper Mill Workers as the exclusive bargaining representative of certain of the Company's employees until the Paper Mill Workers has been certified by the Board in an appropriate unit. The CIO moved the dismissal of the petition on the grounds that (1) its contract with the Company is a bar to a present determination of representatives and (2) the Paper Mill Workers has made an insufficient showing of interest to warrant an election.

On November 15, 1944, the CIO and the Company entered into a collective bargaining contract covering the production and maintenance employees here sought to be represented by the Paper Mill Workers. The contract provided a 1-year term and contained a maintenance-of-membership clause applicable to those employees who were members of the CIO on November 30, 1944, or who joined it hereafter.

In July, 1945, the contracting parties entered into a written Interim Agreement, providing that a new contract was to be negotiated and that when the new contract was entered into it would supersede the November 1944 contract. Negotiations continued until August 20, when an agreement was reached, a copy of which was initialed by the negotiators. Pursuant to that agreement, notices were posted on August 21 at the three plants involved herein, notifying the employees that the new contract provides for a maintenance-of-membership clause and advising them that (1) nonmembers of the CIO were not required to join, (2) employees who joined or rejoined the CIO after September 4 would be required to maintain their membership for the duration of the contract (i.e., until August 20, 1946), and (3) members of the CIO would have an opportunity until September 4 to notify the CIO in writing of their desire to withdraw from membership, but would be required to remain members for the contract term if they did not do so. As a result less than 20 employees at the three plants resigned their CIO membership. By August 31, the CIO locals at the three plants had ratified the August 20 agreement; on September 19 the Paper Mill Workers filed its present petition; on September 24 the contracting parties formally signed their new contract.

There is some controversy among the parties as to the date when the new contract became a legal, binding instrument. We find it unnecessary to determine that question. To October 9, to October 30, and to the date of the hearing, the Paper Mill Workers were able to produce cards of only 13½, 16⅘, and 17⅘ per cent, respectively, of the employees in the unit it proposes. Although we have, on occasion, entertained a petition and directed an election upon a showing of less than the 30 per cent which we normally require, where an intervening labor organization had a maintenance-of-membership or closed-shop contract, the reasons underlying those decisions are not applicable here. In this case, the escape provision of the new contract was publicized and, in effect, opened up the maintenance-of-membership clause on August 21, 1945, for a period of 15 days shortly before the Paper Mill Workers' request for recognition, at a time when, presumably, the Paper Mill Workers was engaged in its organizational campaign. Thus, there was no requirement in effect which might have deterred employees from signing cards of the Paper Mill Workers. Under these circumstances, we are of the opinion that the Paper Mill Workers have failed to make a sufficient showing of interest to warrant an election upon its petition. We shall therefore dismiss the petition. . . .

SUPPLEMENTAL CASE DIGEST—SHOWING OF INTEREST

N.L.R.B. v. DELAWARE-NEW JERSEY FERRY Co., C.C.A. 3rd, 1941.

"It has been held repeatedly that an application for membership, in the form of a signed membership card, is a sufficient indication by the individual employee of a desire to join a union and constitutes membership therein, 310 U.S. 318. . . . It follows therefore that whether or not the local has acted formally upon the applications for membership signed by the respondent's employees is immaterial." (BIGGS, C. J.)

Case Questions

1. Who filed the petition in this case?
2. Who was the existing bargaining representative?
3. Why did the Board reject the petition?

SECTION 66.2. REQUIREMENT OF A MAJORITY

Before a bargaining agent may be designated, it must secure a majority of votes in an appropriate unit. What constitutes a majority? The N.L.R.B. has successively applied three rules in answer:

(1) The bargaining representative must be designated by a majority of employees eligible to vote. Thus, if 1000 employees are eligible, 501 votes must be cast for a particular representative before it can be designated. This rule proved too harsh and was early discarded in favor of the next rule.

(2) The bargaining representative must be designated by a majority of those participating in the election, provided those voting constituted a majority of those eligible to vote. To secure certification under the above circumstances, at least 251 votes were required to be cast for a particular representative. Even this rule was believed inadequate and was recently abandoned in favor of the current rule laid down in No. 3 below. Application of the second rule is made in the *Whittier* decision in this section.

(3) The bargaining representative must be designated by a majority of participants, and the participants must comprise a substantial number of the eligible employees, though they may be *less than a majority.* Application of this rule is made in the *Standard Lime* case following the *Whittier* decision.

NATIONAL LABOR RELATIONS BOARD v. WHITTIER MILLS CO.

Circuit Court of Appeals, Fifth Circuit, 1940. 111 Fed. (2d) 474

SIBLEY, C. J. On the consolidated hearing Whittier Mills Company, Silver Lake Company, and Scottdale Mills, all more or less under the same management and represented in the transactions under scrutiny by the same bargaining agents, were ordered by the National Labor Relations Board to desist from refusing to bargain with Textile Workers Organizing Committee as the exclusive representative of the production and maintenance employees of the mills, and from interfering with or coercing the employees; and required them to bargain, and to post notices in the usual form. The Board applies to the court for a decree enforcing the order, but it alleges no disobedience of it since it was made. No answer was filed, but resistance is made by brief on three grounds: (1) that the Committee was not the lawful bargaining agency of the employees at the material dates; (2) that the one act found of cutting wages pending the negotiation without notifying and discussing it with the Committee was not a refusal to bargain; (3) that neither such act of wage cutting, nor the proven remarks of two foremen, constituted interference with or coercion of the employees by the mills. . . .

As to the first point of attack, the record shows that on November 1, 1937, the Board, after due proceedings under Section 9 of the National Labor Relations Act, 29 U.S.C.A. Sec. 159, and on secret ballots of the employees, certified the Textile Workers' Organizing Committee as the bargaining representative of the employees of the respondents; and that in each election a majority of the employees voted, and a slender majority of those voting voted for the Committee; but those voting for the Committee in no instance were a majority of the employees in the bargaining unit designated by the Board. The unfair labor practices found by the Board occurred in June and July, 1939, after the number of employees in each bargaining unit had decreased materially because of curtailment of operations. The contentions are that since the record concerning the certificates shows on its face that the Committee is not a "Representative designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes," [Section 9 (a) of the Act], the certificates are invalid because contrary to law; and since the memberships of the units have substantially changed in the year and a half since the certificates were made, if originally valid they no longer show the Committee to be the true representative of the employees.

The decisions in *American Federation of Labor* v. *National Labor Board,* 60 S. Ct. 300, 84 L. Ed. —, and *National Labor Relations Board* v. *International Brotherhood of Electrical Workers,* 60 S. Ct. 306, 84 L. Ed. —, denied jurisdiction in the Circuit Courts of Appeal to review such certificates before an order under Sections 10, 29 U.S.C.A. Section 160, is made against an employer. But Section 9 (d) requires that the record touching the certification shall be sent to the court when enforcement or review is sought of an order under Sections 8 and 10 which is based in whole or in part upon the facts certified. This provision, though indicating the certificate is not to be reviewed before an order under Sections 8 and 10 is presented for enforcement or review, clearly means that when an order is presented the record on which the certificate was based may be looked into to determine the lawfulness of the certificate. There can be no other reason for sending up such a record. On reviewing it, we should regard the Board's determination of facts as final, as in reviewing the order based on Sections 8 and 10; and of course in matters which are discretionary, the Board's acts within the limits of law are final. Only where the law has been ignored or violated would the court nullify the certificate of a bargaining representative.

If the affirmative act of a majority of all the employees in a unit fixed by the Board is always necessary to designate a bargaining representative for the unit under the above quoted language of Section 9, the certificates in this record would be unlawful, for in each case the certificate rests on the affirmative act of less than a majority. If a representative rests his claim on separate private authorizations, he would have to obtain a majority of all to be "designated or selected" by such a mode. But the statute, Section 9 (c), expressly provides for official action by the Board, and for the "taking by it of a secret ballot" as a means of ascertaining the wish of the unit. There is no express provision as to what sort of majority shall control the result of such an election. The general rule, in the absence of a clear provision otherwise, is that voters who could have voted in a formal election but do not are considered to assent to the will of the majority of those who do vote; so that if those who do vote make up a majority of all, the will of all is expressed by the majority of those who vote. 18 Am. Jur. Elections, Sec. 243; *County of Cass* v. *Johnston,* 95 U.S. 360, 24 L. Ed. 416; *Carroll County* v. *Smith,* 111 U.S. 556, 4 S. Ct. 539, 28 L. Ed. 517. This rule was applied to different language, but of the same general import, used in the Railway Labor Act, 45 U.S. C.A. Sec. 151 et seq., in *Virginia Railway Co.* v. *Federation No. 40,*

300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789. It should be applied here. Where with fair opportunity to all members of the unit to vote, a majority do vote, they are, so to speak, a quorum to settle the matter, and the majority of that quorum binds those not voting, and suffices to select the bargaining representative of the unit. . . .

. . . So long as the employees make no contention that they are not correctly represented, it would seem that the employer could safely continue to deal indefinitely with the designated bargaining agent. In the present case the employees have not protested at all, and the employer has raised the question belatedly. Assuming the question duly raised, the Board decided it adversely. There is no certain evidence that a majority of the present employees do not now desire representation by the Committee. Many persons who were employees a year and a half ago had ceased to be, but it cannot be assumed that all of these were either assenters to or dissenters from the selection of the Committee. On the other hand the newly signed union cards do not prove a gain in assents, for the signers may have voted originally for the Committee. The present wishes of a majority of the employees are not established either way. The presumption of the continuance of the established status justifies the Board's finding that the Committee is still the representative designated and selected by the majority.

As to the second point of attack, the Board found that in June and July, 1939, at the very beginning of renewed negotiations broken off nearly a year before, each of the mills announced a cut in wages, without even notifying the Committee, and notwithstanding wages were a part of the contract just proposed by the Committee and taken under advisement by the mills; and this act was adhered to over protest that it should not be done without notice to and recognition of the Committee. The Board held that irrespective of whether or not there was any subsequent bargaining about other matters, this was in itself a refusal to bargain. In mitigation or excuse it is shown by the mills that the cut was necessitated by daily operating losses, and it was hoped that the price reduction it made possible would result in more orders and more regular employment; and no mention of it was made to the Committee because the mills understood that wages had been by the Committee's consent eliminated from discussion. But it also appears that the wage cuts were determined on immediately after the Committee notified the mills it desired to negotiate a collective contract, and the misunderstanding about the elimination of wages from the negotiation, if it existed, had been removed in a con-

ference about the cut by one mill before the cut was made by the other mill, which also was protested but without result. The Board finds as a fact: "We cannot credit the excuse asserted by Weekes and Candler for not consulting the T.W.O.C. as regards either the Scottdale reduction or the Whittier and Silver Lake reductions. We find that the respondent's disregard of the T.W.O.C. with respect to these reductions was knowing and deliberate." The quoted finding, while attacked, we think is a factual inference the Board could reasonably make, and is binding on us. The question of law therefore is, Was there in these facts a refusal to bargain within the meaning of Section 8 (5)? It cannot be denied that before any contract was made, all these mill hands were employed from day to day, or at best from one payday to the next. Nothing prevented the employer at any time from changing for the future the wages he would pay. Inability to pay the current wage would be the best of reasons for reduction, if any reason were needed. The pendency of a negotiation for a collective contract would not destroy the employer's right in this regard. On the other hand a main purpose of the National Labor Relations Act is to secure amicable bargaining between employers and their employees as a class, through capable designated representatives, and to avoid wrangling, distrust and strike; and the Act requires, when requested, a good faith negotiation touching wages, hours and conditions of labor. Though there be surface bargaining, yet if in reality there is a purpose to defeat it, and wilful obstruction of it, there is a refusal really to bargain. The Board has found that in this case there was not an emergency wage reduction, but there was a deliberate effort by a sudden well-timed wage cut to discourage if not defeat any bargaining on that subject. Such was the natural effect of it, and if that was its purpose, as the Board finds, adhered to after remonstrance, we hold that there was a refusal to bargain about wages within the Act. . . .

Case Questions

1. State the charge and defense in this case.
2. In what sense did T.W.O.C. receive a majority of votes?
3. Under the current majority rule, would T.W.O.C. be certified?
4. Does the Act prescribe what constitutes a majority?
5. Are certifications reviewable by the courts? In what respects?
6. Is the same rule of majority applied in the Railway Labor Act?
7. How could "the present wishes of a majority of employees" be established?
8. Why did the court here hold the employer bound to bargain on the wage issue?

NATIONAL LABOR RELATIONS BOARD v. STANDARD LIME AND STONE COMPANY

Circuit Court of Appeals, Fourth Circuit, 1945. 149 Fed. (2d) 435

PARKER, C. J. This is a petition to enforce an order of the National Labor Relations Board directing the Standard Lime and Stone Company to bargain collectively with an A. F. of L. union as the bargaining representative of its employees. The company resists enforcement on the ground that the union has not been chosen as bargaining representative because (1) a majority of eligible employees did not participate in the election at which the union was chosen, (2) the election was not representative of the choice of the majority, and (3) opportunity was not given, in a run-off election between two unions, to vote against representation by either.

The facts are that a United Mine Workers union petitioned the Board to make an investigation and certify a bargaining representative for the employees of the company. An A. F. of L. union intervened in this proceeding and on April 13, 1943, the Board proceeded to hold an election at which the company's employees were allowed to indicate by secret ballot their choice of the U.M.W. union, the A. F. of L. union or "neither" as bargaining representative. 439 employees were eligible to vote in this election, but only 218 votes were cast. 99 of these were cast for the A. F. of L. union, 62 for the U.M.W. union, and 57 for "neither." The company then asked that the petition be dismissed, but both unions asked that a run-off election be held and, on May 14, 1943, one was held between the two unions, with the "neither" choice eliminated. At the time of the run-off election, 409 employees were eligible and 166 voted, one of the ballots being void. 137 votes were cast for the A. F. of L. union and 28 for the U.M.W. union.

Both elections were fairly advertised and properly held and there is no evidence of coercion or interference on the part of the company or anyone else, and nothing to indicate that they were not fairly representative of the sentiment of the employees. The Board found that the vote was "substantial and representative" and certified the A. F. of L. union as the bargaining representative. The Company's refusal to bargain with the union was found by the Board to be an unfair labor practice and the usual order was entered directing the company to bargain with it.

On the first and principal question, that presented by lack of majority participation in either of the elections, we think that the conclusive answer is found in the decision of the Supreme Court in

Virginian Railway v. *System Federation No. 40*, 300 U.S. 515, affirming the decision of this Court reported in 84 F. 2d 641. In that case both this Court and the Supreme Court held that, in employees' elections under the Railway Labor Act for the selection of bargaining representatives, the political principle of majority rule should be applied, viz., that those not participating in the election must be presumed to assent to the expressed will of the majority of those voting, so that such majority determines a choice. The Supreme Court said: "Section 2, Fourth, of the Railway Labor Act provides: 'The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.' Petitioner construes this section as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but is silent as to the manner in which that right shall be exercised. Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. *Carroll County* v. *Smith*, 111 U.S. 556. . . . Those who do not participate are presumed to assent to the expressed will of the majority of those voting. *Cass County* v. *Johnston*, 95 U.S. 360, 369, and see *Carroll County* v. *Smith*, *supra*. We see no reason for supposing that Sec. 2, Fourth, was intended to adopt a different rule."

And we see no reason to think that a different rule was intended by the National Labor Relations Act. . . .

Although there is no decision of the Supreme Court holding that a majority of the votes cast in an election is sufficient for the choice of a bargaining representative under the National Labor Relations Act, this is the holding of the Labor Board and of all of the Circuit Courts of Appeals which have had occasion to pass upon the question. . . .

The company seeks to distinguish the Virginian Railway case and certain other of the decisions above cited on the ground that a majority of the employees participated in the elections there; but nothing in the statute furnishes the basis for such distinction. . . .

There is every reason to apply the sensible political rule to elections of this sort, and no reason that we can see to the contrary. The elections are held, not for the purpose of choosing representatives for the employees in their private and personal capacities, but for the purposes of collective bargaining, i. e., for the purpose of setting

up industrial democracy by choosing some one to represent the interest of the employee in determining the rate of wages, hours of work, living conditions, etc., for the plant. The establishment of such industrial democracy is the avowed purpose of the National Labor Relations Act, which declares it to be in the public interest because of its tendency to preserve industrial peace and prevent interference with interstate commerce. . . . This being true, it would be as absurd to hold that collective bargaining is defeated because a majority of employees fail to participate in an election of representatives as it would be to hold that the people of a municipality are without officers to represent them because a majority of the qualified voters do not participate in an election held to choose such officers. In the one case, as in the other, the representative is being chosen to represent a constituency because it is in the public interest that the constituency be represented; all that should be necessary is that the election be properly advertised and fairly held and that the settled principle of majority rule be applied to the result. If the employees do not wish to be represented in collective bargaining they can so declare in the election; but where, as here, only a comparatively small number so express themselves the result should not be the same as if a majority had so voted. We pointed out in the Virginian Railway case the disadvantages and dangers which would follow from failure to apply the political rule in such elections.

The contention that the election was not representative is without merit. The Board found that the vote was substantial and representative, and there is nothing in the record to the contrary. The company's argument on the point resolves itself into a contention that an election should not be permitted to determine a choice unless there is affirmative showing that a majority either participated or was prevented in some way from participating; but there is nothing in the statute or in reason to support such a position. It is for the Board, not us, to say whether an election is fair and representative; and where the record shows that over forty per cent of the company's employees participated in it and that it was fairly advertised and conducted, we cannot say that the Board's finding that it was representative is arbitrary and unreasonable or without support in the record.

And we are not impressed with the contention that the Board's certification may be ignored because "neither" was omitted from the choices submitted in the run-off election. On the first election only 57 of the votes cast registered that choice, which was less than the votes

cast for either of the unions. It could not be unreasonable to drop in the run-off the choice which had received the lowest number of votes.[1] This is quite usual procedure in other elections and we can see nothing unfair in applying it here. . . . Order enforced.

Case Questions

1. What is the "political principle" of majority rule?
2. How were the votes cast in the run-off election? State the current rule applied. Was the vote substantial?
3. Why was it justifiable to eliminate the "neither" choice in the run-off election?
4. Why is the current rule expedient?

SECTION 66.3. DURATION OF CERTIFICATION

Sec. 9 (c) (3) provides "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve month period, a valid election shall have been held. . . ." While the above makes no provision for exceptions, it is probable that the Board will continue to order decertification if a fraud is perpetrated in the election proceedings or if the designated representative violates its duty to represent both members and nonmembers fairly, without regard to race or creed distinctions.

Upon the expiration of a year, employees under Sec. 9 (c) (1) (A), upon a showing of substantial interest, may petition for decertification of the existing bargaining agent. The employer under Sec. 9 (c) (1) (B) apparently may petition for an election when confronted with a new recognition demand at the expiration of a year, but he may not initiate decertification proceedings purely in his own right.

The *Appalachian* decision, reprinted in this section, though decided under the superseded Wagner Act, reaches a result consistent with the National Labor Relations Act of 1947. May employees

[1] Sec. 9(c) (3) of the amended Act is in accord. Only the two highest designations participate in run-off elections.

repudiate a certified union two months after they had voted in favor of it? The digest of the *Hollywood* case covers what might be an exception to the one-year rule, as would cases involving fraud and discriminatory espousal of employees' rights. In view of the explicit language of the amended Act, which allows for no exceptions, the Board may alter its remedy in these exceptional situations, but to date has shown no inclination to do so. On the whole, Sec. 9 (c) (3) represents no significant departure from the rules developed under the Wagner Act. These held that the certification was binding for a "reasonable time."

NATIONAL LABOR RELATIONS BOARD v. APPALACHIAN ELECTRIC POWER CO.

Circuit Court of Appeals, Fourth Circuit, 1944. 140 Fed. (2d) 217

DOBIE, C. J. This is a petition by the National Labor Relations Board (hereinafter called the Board) for the enforcement of its order issued against the Appalachian Electric Power Company. . . .

The Company, a Virginia corporation with its principal place of business at Roanoke, Virginia, is engaged in the production, transmission and distribution of electric power in the States of Virginia and West Virginia. The Company employs 1,652 non-supervisory employees in four divisions, one of which is known as the Roanoke-Lynchburg division. Each division is in turn divided into districts. For example, the Lynchburg dstrict of the Roanoke-Lynchburg division employs approximately 150 employees, while the Roanoke district comprising the remaining portion of the Roanoke-Lynchburg division, employs approximately 350 employees. . . .

On February 21, 1942, pursuant to an election held by the Board in which 81 out of 88 employees in the prescribed Lynchburg unit voted, 41 employees voted in favor of the Union as their bargaining agent and 40 employees voted against such representation. The Union was thereafter duly certified by the Board on March 14, 1942. . . .

We now turn to a consideration of the second alleged unfair labor practice of the Company. This concerns one Painter, a non-supervisory employee at Lynchburg, who had "voted against the Union wholeheartedly" at the election. He later decided that it would be in the best interests of all the employees to eliminate the Union from the plant. Accordingly, acting on his own initiative, he addressed a letter to Jackson, Lynchburg district manager, which stated:

"We fellow employees hold great esteem for you as our manager and have appreciated every advantage that you have given us in the past. And

through careful thinking we do not want to be governed or affiliated with any union.

"We the undersigned acknowledge with our signature."

Painter solicited signatures for this document during the week of May 18, 1942, and was successful in procuring 66 names. The Board makes much of the fact that Painter acted on Company property and time without having his wages docked. Yet these same rights and privileges were accorded the Union and our decision in *N.L.R.B.* v. *Mathieson Alkali Works,* 1940, 114 F. 2d 796, adequately disposes of the Board's contention that the Company unlawfully acquiesced in the circulation of the petition. . . .

We now come to the pivotal issue and main pillar upon which the Company's position rests. Was the Company justified in accepting the unsolicited petition of a large majority of its employees in the appropriate bargaining unit as conclusive evidence of the fact that the Union no longer was their representative for collective bargaining purposes, so as to warrant the refusal of the Company to bargain with the Union as the duly credited representative of the employees? We think not, despite our holding that the Company has not been guilty of the other unfair practices as found by the Board and above discussed by us.

The instant case, in this respect, is therefore different from our recent decision in *Great Southern Trucking Co.* v. *N.L.R.B.,* 139 F. 2d 984, decided January 10, 1944. Nevertheless, we feel that the doctrine enunciated in the *Great Southern Trucking Co.* case is equally applicable here, namely, that the primary responsibility for the ascertainment of the true will of the employees is properly placed upon the Board and not upon the Company or the courts.

Accordingly, when the Board, after following the proper statutory procedure, has given certification to a unit, this certification must be honored by the Company so long as it remains in force, at least for a reasonable time. To assume that the Board's certification speaks with certainty only for the day of its issuance and that a Company may, with impunity, at any time thereafter refuse to bargain collectively on the ground that a change of sentiment has divested the duly certified representative of its majority status would lead to litigious bedlam and judicial chaos. Indeed, if the Company's contention were correct, the Board's certification might even be obsolete and subject to nullification by an interim informal Gallup poll vote on the very day of its issuance. Thus, the certification reports the will of the majority as of the day of the election, but it necessarily does not issue

until after the following sequence of events has taken place: (1) the count of the votes, (2) the report of the Regional Director to the Board, (3) the notification of the results to the parties, (4) the passage of time for the parties to file objections either to the election or to the report, (5) the consideration of such objections, if any, by the Board, and (6) the Board's final decision, perhaps weeks or months later. Thus, the holding of constant and repeated elections is quite impracticable.

It is therefore obvious that the Company's position is clearly incompatible with the Congressional intent since a resulting certification might be, pursuant to the Company's theory, subject to defeasance almost before the certification could be even announced.

In as much as a major objective of the Wagner Act is to bring about a contract binding on both parties with some fair degree of permanence, we feel that a certification must be endowed with a longevity sufficient to accomplish its essential purpose. The operative life of a certification should be at least a reasonable time, dependent upon the circumstances of the individual case. Surely Congress in establishing the machinery for the enforcement of the Act could not have intended to defeat the administration of the Act by denying such measure of stability to a certification. . . .

Petition to enforce order modified and affirmed.

SUPPLEMENTAL CASE—DURATION OF CERTIFICATION

N.L.R.B. v. HOLLYWOOD-MAXWELL COMPANY, 9 Cir., 1942; 126 Fed. (2d) 815. A C.I.O. Union was certified by the Board as the exclusive bargaining agent of the employees. When the employees discovered that the C.I.O. organizer had been bribed by the President of the Company, they wrote a letter to the Board, requesting a revocation of the certification. The Ninth Circuit Court of Appeals held that, under these circumstances, the Company was justified in refusing to bargain with the Union after the date of the letter of revocation. Thus the illegal action of both the Company and the Union was deemed sufficient to vitiate the Board's certification.

Case Questions

1. How long had the certification in the main case been in effect when the employees requested its revocation?
2. Had the company solicited the petition?
3. Why did the court refuse to decertify?
4. Whose duty is it to ascertain the "true will" of the employees?

SECTION 66.4. DUTY TO REPRESENT EMPLOYEES

We have seen that the policy of the Act, in the interest of industrial harmony, is to substitute *collective* bargaining for *individual* bargaining. To effectuate this purpose, two issues remain for resolution, namely, (a) the implications arising from the duty of a bargaining agent to represent all employees who are included in an appropriate unit and (b) the extent to which employees may seek individual redress of their grievances without the intercession or intervention of the bargaining agent.

The first case in this section, *In the Matter of Larus,* a Board ruling, addresses itself to the first question, while the *North American* case, reprinted on page 590, treats of the proviso to Sec. 9 (a) which gives employees the right to individually present grievances without intervention of the bargaining agent. Is there a distinction between a "grievance" and a legitimate "bargaining" matter? The Act of 1947 makes no departure from practice of the Board and the courts under the Wagner Act of 1935.

IN THE MATTER OF LARUS & BROTHER COMPANY, INC.

62 N.L.R.B. 1075, 1945

Larus & Brother Company, Inc., is a corporation engaged in the manufacture and sale of tobacco products. . . .

In 1937, following consent elections, two separate collective bargaining units were established among employees in the Company's manufacturing plant. One unit was composed of white production and maintenance employees, represented at one period by the Larus Employee's Association (now defunct) and later by the AFL; and a second unit was composed of all colored production and maintenance employees, represented by the CIO. In 1941, again following a consent election, a third bargaining unit was established, composed of all production and maintenance employees at the stemmery plant, represented by the CIO. There has been no collective bargaining history in the leaf and raw material warehouses. Until the election of March 1944, and the resultant certification of the AFL as representative of the employees in the manufacturing plant, the Company maintained collective bargaining relations with the CIO and AFL on this three-unit basis, pursuant to three separate bargaining agreements.

At the hearing in December 1943, as in its petition previously filed, the AFL sought a unit composed of all production and maintenance employees, excluding watchmen, truck drivers, laboratory,

advertising, mimeograph, and kitchen employees. The CIO asked for a unit including the stemmery and warehouse employees but otherwise the same as that sought by the AFL.

As noted heretofore, on February 16, 1944, the Board directed that an election be held among the employees in the manufacturing plant, upon a one-unit basis. The Board found that the stemmery constituted a separate unit because of its physical separation from the manufacturing plant and because of its history as a separate bargaining unit since 1941; accordingly, the CIO's petition for the plant-wide unit was dismissed. Kitchen and warehouse employees were excluded from both units. In the same decision, on the question of bargaining based upon racial units the Board stated:

> All parties are agreed that bargaining on the basis of racial units in the manufacturing plant should be abandoned, and, indeed this Board is committed to the policy that "the color or race of employees is an irrelevant and extraneous consideration in determining in any case, the unit appropriate for the purposes of collective bargaining." (Citing *Matter of U.S. Bedding Company*, 52 N.L.R.B. 382.)

With respect to events after the election of March 14, 1944, the Trial Examiner made the following findings of fact:

1. Immediately after the election, a move was initiated by George Benjamin, vice president of the International and himself a Negro, to set up a segregated local, within the structure of the International Union, separating for collective bargaining purposes the white and colered employees in the unit found by the Board to be appropriate. As a direct result of his efforts, a segregated local for Negro employees—Local 219-B—was established, Local 219, the certified local, remained—as it always had been—the local for white employees.

2. Upon Benjamin's advice and urging, 15 of the Negro employees applied for a charter in the International. On March 31, 1944, the charter was issued and the Negro local came into being. . . .

3. Local 219 and Local 219-B are separate and distinct entities. Each has a separate charter, separate treasury, separate set of officers, separate committees and a separate delegate to the International Convention. Legally, under the International constitution, each is an autonomous organization.

4. Negotiations for a contract with the Company were conducted by a joint committee, consisting of four representatives from the white local and four from the colored. After many meetings, a contract was agreed upon. It was read to the members of both locals at their respective meetings and its terms were approved. The contract was signed on April 28, 1944, by representatives of the Company, the International, and Local 219. It was also signed by Richard Pate,

president of Local 219-B, but it was not signed by him in that representative capacity.

5. The contract, by its terms, is between Local 219 and the Company. It contains no mention of 219-B. The agreement expressly recognized Local 219 as the sole bargaining agent for all the employees in the unit. At the hearing, the Company stated that it had not bargained with, and did not consider itself contractually bound to, Local 219-B. Local 219-B is not an express party to the contract, although its president was one of the signatories on behalf of the union.

6. Although comparatively few grievances have been handled, it appears that the two committees work together, as a unit, in the higher levels of the contractual grievance procedure, but that in lower levels the committees act separately in handling grievances of white and colored employees—219 for white and 219-B for colored. A Labor-Management Committee, provided for in the contract, has been established with three white and two colored employees serving upon it.

7. The contract contains both a maintenance-of-membership and a check-off provision. Employees who were members of Local 219 at the time of the signing of the contract are required to remain members for the life of the agreement, and employees joining 219 during the contract term are likewise required to maintain such membership. The check-off provision, although actually governing only members of 219, has been applied to members of 219-B as well. Dues checked off for both unions are mailed by the Company to Local 219, which then transfers to 219-B those dues deducted from the wages of members of the latter local.

8. The contract contains, *inter alia*, a seniority provision and a so-called job-pulling provision. It was shown at the hearing that the plant-wide seniority provided for in the divisions where the colored workers predominate likewise existed in the contract which the Company had previously had with the CIO. Its inclusion in the present contract was at the request of the committee of Local 219-B in the belief that it was in the best interests of the Negro employees. It was not shown at the hearing that this clause worked any discriminatory injury to the Negro employees on the basis of race and we therefore find, as did the Trial Examiner, that the clause is not discriminatory. The job-pulling provision is also a carry-over from previous contracts and was not included in this contract for the purpose of freezing Negro workers in their jobs. Originally included in an AFL contract at the insistence of the Company, its purpose is to prevent any worker,

white or colored, from interpreting the seniority provision as entitling him to a job held by another person at the time of the signing of the contract because of his, the job claimant's, greater seniority. We find, as did the Trial Examiner, that this clause is not discriminatory.

9. As has been stated above, Local 219-B is not a party to the contract and as a union accordingly has no rights thereunder. The record shows that Negroes were permitted to speak freely and participate as members of committees working with white committees in meetings with the Company. However, while the white committee met with the Company pursuant to the certification and contract, it appears that the committee of Local 219-B participated by sufferance of both the Company and the white Local 219. This is not to say that the colored employees in the *unit* (as distinguished from the *union*) have no rights under the contract; in so far as the contract deals with such matters as wages, hours, and working conditions, they, as well as the members of 219 and those employees who belong to neither union, are covered by it.

The record supports all of the foregoing findings of fact made by the Trial Examiner and we hereby adopt them.

It is the CIO's position that the record proves that the AFL has violated its duty as the statutory bargaining agent and that, therefore, its certification should be rescinded.

This Board has been vigilant within the limited powers given it by Congress to see to it that certification under the National Labor Relations Act should not be made the vehicle of discriminatory racial practices by labor organizations. We have consistently refused to recognize a petition for representation if the petition proposes, either explicitly or implicitly, to exclude Negroes from the bargaining unit on the basis of race. We have also refused to entertain petitions from joint bargaining representatives which do not admit locals composed of colored employees to the councils of the bargaining organization. Thus, in a recent case in which a metal trades council filed a petition for an election among all the employees in a shipyard, we deferred issuing a direction of election upon a showing that two affiliates of the council, the Boilermakers and the Machinists, refused to admit Negro and Oriental employees of the yard classified in those crafts. When the petitioner, however, by amendment, admitted to its enumerated list of constituent locals the organizations which took the colored craftsmen into membership, we felt constrained to grant the election. In our decision, we said (p. 1016):

> We entertain grave doubt whether a union which discriminately denies membership to employees on the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit composed in part of members of the excluded race. Such bargainings might have consequences at variance with the purposes of the Act. If such a representative should enter into a contract requiring membership in the union as a condition of employment, the contract, if legal, might have the effect of subjecting those in the excluded group, who are properly part of the bargaining unit, to loss of employment solely on the basis of an arbitrary and discriminatory denial to them of the privilege of union membership. In these circumstances, the validity under the proviso of Section 8(3) of the Act of such a contract would be open to serious question.

This Board has no express authority to remedy undemocratic practices within the structure of union organizations, but we have conceived it to be our duty under the statute to see to it that any organization certified under Section 9 (c) as the bargaining representative acted as a genuine representative of all the employees in the bargaining unit. Lacking such authority to insist that labor organizations admit all the employees they purported to represent to membership, or to give them equal voting rights, we have in closed shop situations held that where a union obtained a contract requiring membership as a condition of employment, it was not entitled to insist upon the discharge of, and the employer was not entitled to discharge, employees discriminately denied membership in the union. In such situations, being without power to order the union to admit them, we have ordered employers to reinstate them.

Although these decisions were criticized vigorously by some sections of organized labor on the ground that the Board was assuming to do indirectly what it was without power to do directly, the Supreme Court ultimately upheld these policies. In a 5 to 4 decision, that Court upheld a Board order requiring the reinstatement of several employees who had been denied membership in the contracting union because of prior activity in behalf of a rival union. (*Wallace Corp.* v. *N.L.R.B.*, 323 U.S. 248. And see *Hunt* v. *Crumboch*, decided by the Supreme Court June 18, 1945, in which the Court cited the *Steele*, *Tunstall*, and *Wallace* cases and observed: "Those cases stand for the principle that a bargaining agent owes a duty not to discriminate unfairly against any of the group it purports to represent.") Similarly, under the Railway Labor Act, where no such policies have been developed administratively, the Supreme Court has held that unions purporting to act as exclusive representatives under that statute may not rely upon their statutory status to place colored workers

in the bargaining unit at a disadvantage with respect to promotions and seniority. In reaching this result, the Supreme Court construed the language in the Railway Labor Act similar to that in the National Labor Relations Act as invalidating collective agreements negotiated by railway employees (admitting only white employees to membership) with certain carriers which tended to disqualify Negro firemen from occupations on better runs and looked to their ultimate elimination from certain classifications. (*Steele* v. *Louisville & N. R. Co. et al.*, 65 S. Ct. 227; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76 et al.*, 65 S. Ct. 236.

These holdings give support to many decisions of this Board in which we have said that there is a duty on the statutory bargaining agent to represent all members of the union equally and without discrimination, on the basis of race, color or creed.

The CIO urges that by establishing Local 219-B, the AFL has, in effect, subverted the Board's findings that bargaining should be conducted on the basis of a single unit, including all employees, white and Negro alike. The record does not support this contention. Bargaining has been conducted by a joint committee of whites and Negroes, grievances have been prosecuted jointly, and there is a single contract covering all employees in the bargaining unit. The fact that a separate local has been established for the Negro employees does not, in our opinion, constitute *per se*, a subversion of our unit finding.

The CIO makes the additional contention that we should go much further than we have in any decided case and hold, as a matter of law, that irrespective of whether or not the collective bargaining contract discriminates on the basis of race or non-membership in the exclusive representative, or otherwise imposes obligations with respect to membership in a labor organization, the exclusive bargaining representative must admit to membership all employees in a bargaining unit. Such a contention immediately raises a serious question concerning our statutory authority. In condemning the discriminatory practices before it in the *Steele* case, *supra*, the Supreme Court said: ". . . While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent nonunion or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. . . ."

Despite this unequivocal language, the argument was made that it might be disregarded in the light of a more recent decision of the Supreme Court, passing upon a New York statute forbidding labor

organizations to deny a person membership by reason of race, color or creed. In this case (*Railway Mail Association* v. *Corsi, etc., et al.*, 16 LRRM 610, June 18, 1945), the constitutionality of the New York statute was attacked by a railway labor organization on the ground that the due process clause prevented such legislation interfering with the union's right to selection of membership, and abridgement of its property rights and liberty of contract. The Supreme Court found no constitutional basis in the practice of racial discrimination by labor organizations and rejected this argument. While the holding in this case was confined to the powers of a state legislature, we do not doubt that the broad language of the decision makes it equally plain that Congress possesses such power with respect to labor organizations dealing with employment affecting interstate commerce. But a holding that certain powers reside in a state legislature or Congress affords no clear basis for the inference that such power resides in an administrative agency which is solely a creature of Congress.

In any event, the sole question necessary for us to determine is simply this: Was there a failure upon the part of the AFL in this case to represent all the members of the bargaining unit equally and without discrimination on the basis of race, color or creed? We think that while there was no discriminatory practice as to wages, hours and working conditions against the Negro employee in this bargaining unit, the AFL did fail to perform its full statutory duty under the certification. The certification ran only to Local 219 and not to Local 219-B, and the contract named only Local 219. However, the check-off, and inferentially the maintenance-of-membership requirement, was applied to the members of both locals. Thus, the certified union used its statutory power as exclusive representative to compel dues payments, and continuance of membership, with respect to an organization which was not the certified union and which, under the certification and the contract, had no legal standing. We think that this was a clear abuse of the standard of conduct imposed upon the exclusive representative under Section 9 (a) of the Act.

If it were not for the additional circumstances set forth below, we should rescind the AFL's certification. However, the contract has now expired and more than a year has passed since the AFL was certified. In a written motion to the Board and at the oral argument, the AFL voluntarily relinquished its certification and requested the Board to conduct a new election. It declared its willingness to accept whatever conditions the Board should impose upon its new petition. Since

the contract has expired and since the AFL has relinquished its certification, the issue of discrimination under the old certification is now moot. If the AFL desires to file a new petition, it may do so in the name of Local 219 and 219-B, as joint petitioners. This will bring the petition within the principles laid down in our recent decision in the *Atlanta Oak Flooring* case and within the views here expressed. If the CIO should desire to participate in a new election, it may do so by filing a separate petition or by filing a motion to intervene in any proceedings which may be instituted by the AFL. To the extent that the conclusions and recommendations of the Trial Examiner are inconsistent with this decision, they are hereby modified.

Upon the basis of the above findings of fact and upon the entire record in the case, it is hereby ordered that the motion of the CIO be, and it hereby is, dismissed.

Case Questions

1. Outline the relationship between Local 219 and Local 219-B.
2. On what basis does the C.I.O. seek disestablishment of the A. F. of L.?
3. Do the same contractual provisions apply to Local 219 and to Local 219-B? Were they discriminatory?
4. Has Local 219-B any rights under the contract as a *union*? as a *unit*?
5. How does the Board punish discriminatory bargaining agents?
6. Does segregation alone indicate discrimination?
7. How does the Board finally handle this situation?

NATIONAL LABOR RELATIONS BOARD v. NORTH AMERICAN AVIATION, INC.

Circuit Court of Appeals, Ninth Circuit, 1943. 136 Fed. (2d) 898

STEPHENS, C. J. The National Labor Relations Board (the Board) issued an order directed to the North American Aviation, Inc. (the Company), to cease and desist certain practices and to take certain affirmative action. The Company has not complied, and the Board is here asking for an order of enforcement.

The Company and a labor union, properly authorized as the bargaining agent of the Company's employees, entered into and put into effect a comprehensive agreement in regard to their relations as employer and employees. This agreement encompassed the subject of employee grievances and provided in detail for a system of handling grievances from their presentation to their disposal by agreement and for a procedure of arbitration if agreement could not be reached.

Something like a month after this collective agreement became effective, the Company issued to its employees and has continued to issue to new employees a notice in which employees are informed that

they may present any grievance to it and press the same to agreement, and, if no agreement is reached, to a decision by arbitration, and a complete procedure therefor is prescribed.

The complaint in this proceeding is based upon the union's claim that the maintenance and operation of the Company's scheme for the treatment of grievances is in violation of the provisions in the collective agreement treating of that subject. And, since such subject is a proper one for collective agreement, these acts of the Company constitute unfair labor practices.

But the Company defends, by citing a section of the Labor Act, which, as it claims, gives the employee the right to come to it with his grievances notwithstanding the broad language of the agreement. And, so it further claims, this right is specifically preserved by a provision of the collective agreement itself. It then argues, and we think to a sound conclusion, that this right carries with it the right, if not the duty, of the Company to consider and dispose of the grievance. It will be necessary to notice the section of the Labor Act together with the provision of the agreement to which reference is made.

Section 9 (a) of the Labor Act, 29 U.S.C.A. Section 159(a), is as follows: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or group of employees shall have the right at any time to present grievances to their employer."

The portion of the collective agreement referred to is as follows: "No provision of this Article (covering the subject of grievances) shall be interpreted to prevent any employees or group of employees from presenting grievances to the (Company) management in accordance with the provisions of Section 9 (a) of the National Labor Relations Act."

If the proviso contained in the quoted section of the Labor Act and specifically affirmed as effective in the collective agreement encompasses adjustment of, and if necessary the prosecution of, any kind of grievance to a decision or through arbitration, then plainly the statute makes it the Company's right, if not its duty, to hear and determine any grievance presented to it, and its doing so could not constitute an unfair labor practice.

If the proviso carries a right as extensive as above suggested, and a specific method of handling grievances is provided for by the collective agreement, we have two methods of handling grievances each operative under a separate entity. In one, the method of treatment is prescribed by the Company in its notice. In the other, it is prescribed in the collective agreement. We think the two methods of handling grievances have been legally provided for here and that the terms and conditions of the collective agreement are binding upon both entities in their treatment of grievances.

It is argued by the Board that the proviso authorizes the Company to handle only those items of grievance which do not come within the scope of the agreement—a sort of catch-all for the small out-of-mind grievances. But the fallacy of this interpretation of the proviso is apparent, for if only grievances outside the scope of the agreement remain for consideration by virtue of the proviso, the proviso could be nullified by drawing the agreement so as to cover the whole field of grievances. It will be noticed that the instant agreement by express terms purports to cover "any dispute arising regarding the interpretation or application of any of the terms of this agreement or any other request or grievance. . . ."

It may be argued that the right given by the proviso may be waived by any beneficiary of this right. We do not pass upon this problem for it is not in this case. Even if it might be held that those employees comprising the majority would be bound if the agreement provided for the waiving of such right, it would not affect this proceeding, for the agreement itself specifically reaffirms the provisions of the proviso, and this goes to the rights of all employees.

It is contended by the Board that the dual handling of grievances can but lead to confusion and would tend to nullify the beneficial effect of the collective agreement. Of course, the Board's argument is that a statute should be construed so as to support its purpose in the fullest possible degree. But it may be that the law makers in blazing a course for collective bargaining also had in mind the preservation of the individual right of protest as well as the benefits that logically flow from an understanding between employer and employee. . . .

The petition of the Board is denied and its order is set aside.

SUPPLEMENTAL CASE DIGEST—DUTY TO REPRESENT

HUGHES TOOL CO. v. NATIONAL LABOR RELATIONS BOARD. Circuit Court of Appeals, Fifth Circuit, 1945; 147 Fed. (2d) 69. "This case, presenting no question of fact, asks whether the adjustment of indi-

vidual grievances is the exclusive function of the bargaining representative under the National Labor Relations Act. . . . The representative, whether an individual, a committee, or a 'union,' has its powers and privileges defined in Section 9 (a), 29 U.S.C.A. 159 (a), thus: 'Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* that any individual employee or group of employees shall have the right at any time to present grievances to their employer.' Taking the quoted provisions together, it is plain that collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment which will fix for the future the rules of the employment for everyone in the unit, is distinguished from 'grievances,' which are usually the claims of individuals or small groups that their rights under the collective bargain have not been respected. These claims may involve no question of the meaning and scope of the bargain, but only some question of fact or conduct peculiar to the employee, not affecting the unit. They may, however, raise a question of the meaning of the contract, or present a situation covered by the contract touching which an agreement ought to be made. In the latter cases it is plain that the representative ought to participate, for bargaining, rather than the mere decision of a case according to the contract, is involved. . . ." (SIBLEY, C. J.)

The rule enunciated above has not been substantially changed by the National Labor Relations Act of 1947. The latter portion of Sec. 9 (a) presently reads "*Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided, further,* That the bargaining representative has been given opportunity to be present at such adjustment."

Case Questions

1. What is the union's objection in the *North American* case based upon?
2. Does the N.L.R.B. agree with the union's contention?
3. Does the court in the *North American* case distinguish between grievances and bargaining issues?
4. What result is reached by the court?
5. In the *Hughes Tool* decision, describe the distinction drawn between grievances and bargaining matters. Do you feel the distinction significant?

SECTION 66.5. EMPLOYEES ELIGIBLE TO VOTE

From a detail aspect, the question of an employee's eligibility to vote may become highly important, as is exemplified in the *Norris* case presented below. Both parties to the controversy admit that workers who have resigned their employment are no longer "employees" within the Act, and therefore are ineligible to participate in representation elections. The question presented, however, is whether the instant workers had actually quit their employment in the full meaning of that term.

We have seen previously that Sec. 9 (c) (3) of the Act specifically renders ineligible for representation purposes those employees who are participating in an unfair labor practice or other illegal form of strike. In addition to loss of voting rights, such strikers also lose their rights to reinstatement and back pay whether the company elects to rehire them or not. Economic strikers, as previously explained, remain eligible to vote if the employer has not secured effective replacements, that is, replacements which substantially place the employer in the same position, as to output and costs, that he was in prior to the economic strike against him. Strikers walking out in protest of employer unfair labor practices cannot be divested of their voting capacity or their rights to reinstatement and back pay. The same applies to employees who are ill, on temporary leave, or on vacation, in so far as voting eligibility is concerned.

By repeal of the 1947 Act, employees engaging in some unfair labor practice strikes would not be rendered ineligible to vote or disentitled to reinstatement. The true test would then be whether the strike was illegal. (See Chapter 5 on strike legality.)

NATIONAL LABOR RELATIONS BOARD v. NORRIS, INCORPORATED

Circuit Court of Appeals, Fifth Circuit, 1947. 162 Fed. (2d) 50

LEE, C. J. The NLRB petitions for enforcement of its order directing Norris, Incorporated, to bargain collectively with Bakery and Confectionery Workers' Union No. 42, AFL, as exclusive bargaining representative, with certain exceptions, of Norris, Incorporated's inside workers.

The question presented involves the result of an election as declared by the Board, by which the Bakery and Confectionery Workers' Union was chosen as exclusive bargaining representative of the appropriate unit.

Because of a strike begun on November 16, 1944, current at the date of the election, the Board, in accordance with an agreement of the parties, declared eligible to vote at the election those employees who were on Norris' pay roll during the week beginning November 13, 1944, and those who would have been thereon that week but for illness —excluding those who had since quit or been discharged for cause. The election was held on February 16, 1945, and resulted in 209 votes being cast. Of these, 71 were for union representation, 81 were against union representation, and 57 were challenged ballots. Following an investigation in accordance with its procedure, the Board ordered 35 of the challenged votes counted; 26 of these were for representation, 9 were against. The result of the election was then found to be 97 votes in favor of union representation and 90 votes against. Thereupon, the Board certified the union as the bargaining representative of the unit. Upon Norris refusing to bargain with it, the union filed charges with the Board, alleging violation of Section 8 (5) of the National Labor Relations Act. . . .

The controversy here revolves around (1) the Board's finding that Opalee Butler, Lois McConnell, Emma Pirkle, Lillian Burton, Willie Daniel, and Ruth Petty were employees of Norris at the time of the election, and its order that their challenged ballots be counted. . . .

Norris contends that these findings were not supported by substantial evidence, hence that the orders are erroneous.

It is to be noted that the Board in its order fixing eligibility to participate in the election excluded those employees on the November 13, 1944, pay roll who had since quit or been discharged for cause. The personnel absenteeism at the time of the strike was shown to be pronounced, and it was not possible in some cases to tell whether an employee was on strike or had quit. The six found by the Board to be employees of Norris at the time of the election had made application to other employers for employment. The Board contends that the employment sought was temporary. As proof of this, the Board relies upon a general understanding the union had with the new employers that any former employee of Norris would be released if she desired to return to work for Norris. Norris contends that the six had left its employ. To prove this, it filed in evidence the written applications of the six employees for new employment. These applications, filled out and signed by the applicants, show that four of the six continued in Norris' employ until January, 1945, one to November, 1944, and one to November 16, 1944. Each of them received a referral card from the United States Employment Service and sub-

mitted it along with the application for new employment. Four of the six were employed elsewhere at the time of the election. One had made no application for new employment prior to that time; her application was made in April following the election in February, but she, as the others, had written "Quit" in her application as her reason for leaving Norris' employ. The remaining employee obtained new employment prior to the election but left that job after working one night (she desired daytime work, and no job on a day shift was available). Of the six, she was the only one called as a witness by the Board. She was asked: "Q. Now, Miss Burton, was that a temporary job you had at National Biscuit? A. Well, I didn't ask him if I could come back to Norris, but I thought it was understood when the strike was settled I might come back. Q. Did he (referring to the employer) say anything to you? A. He did not."

None of the six gave the strike as a reason for terminating employment with Norris. Five said in their applications that they had "quit," one said that she had "resigned." The strike was called on November 16, 1944. Four of the six in their applications stated that they were employed by Norris until January, 1945, some two months after the strike was called. The evidence refutes any inference that at the time of the election the six were employees of Norris. The Board's order that the six challenged votes be counted was erroneous. . . .

Enforcement of the Board's order is refused.

Case Questions

1. Why did the employer refuse to bargain?
2. What evidence indicates that the six workers in question had quit their employment? Is there evidence to the contrary?
3. What does the court find on the above question?
4. What result accrues from the court's conclusion?

SECTION 67. APPROPRIATENESS OF THE UNIT

As was previously indicated, a labor organization has to meet two conditions in order to secure agency designation for bargaining purposes. The first, securing of a majority, has already been explored, leaving for final analysis the question of whether the proposed unit is appropriate. In this aspect, the Board, due to its administrative qualifications and investigatory powers, is permitted wide discretionary latitude by the courts. See Sec. 9 (b). Its findings with respect to the appropriateness of a given bargaining unit are given the utmost degree of finality by the courts. Since the questions here raised are extremely complicated, only a high point review is in order to set out the general rules that the Board has developed as guideposts to its determinations.

Perhaps our investigation at this point would best be served by detailing the specific limitations imposed by the amended Labor Relations Act upon the Board's discretionary power to decide upon the appropriateness of a suggested unit. These limitations are listed below:

(1) Employees not covered by the Act, discussed in Section 60 of this book, and including domestic servants, agricultural laborers, and independent contractors, are excluded from all units.
(2) Employees of employer's beyond the pale of the Act, such as those under the Railway Labor Act, federal and state governments, and federal agencies, are excluded.
(3) Supervisors may not be included in a unit since they are not accorded collective bargaining rights. See Sec. 2 (11) and Sec. 14 of the Act and Sections 59 and 60 of this volume.
(4) Professional employees, under Sec. 9 (b) (1), are given the right to secure separate representation in units of their own, unless a majority of them agree by vote to inclusion in a unit with the rank-and-file workers.
(5) Craft employees, under Sec. 9 (b) (2), are given broader rights to form separate units of their own. Because of its complexity, this limitation is discussed in Section 67.2 of this volume.
(6) Plant guards may not, under Sec. 9 (b) (3), be included in a bargaining unit that admits rank-and-file employees. Further, a union, or an affiliate of a union, that represents rank-and-file workers may not represent plant guards, even if a separate unit is formed.

Aside from the above statutory limitations upon its power to decide upon the appropriateness of a unit, the Board is permitted extensive exercise of its administrative discretion. It has developed the following guideposts to decide whether certain employees may or may not be grouped together, or whether, in the case of multiple plant

operation under unitary management, separate or combined employee units should be formed.

(1) Physical location of production facilities under common ownership. If the facilities are fairly close together, the Board has tended to favor a combined unit embracing workers in all plants.

(2) The skill requirements of the work to be performed, if sufficiently simple to enable the interchange of workers from plant to plant, influences the Board to favor a combined unit. The craft question usually leads to a separation because the routine worker and the craftsman are subjected to differing wage and working condition benefits and otherwise have little in common. At any rate, skilled workers must be accorded the right to vote on the question of separate or combined representation.

(3) Degree of ownership and managerial integration is also a factor in deciding whether employees should be grouped or separated for bargaining purposes. Are the facilities in question commonly owned? Would cessation of activity in one facility adversely affect performance in the others? Are managerial policies centrally formulated and uniformly applied to all facilities? Are conditions of employment essentially uniform among the several plants? If the answer is in the affirmative, the Board has favored a homogeneous unit.

(4) The collective bargaining history of an employer has often led the Board to separate or combine bargaining units based on the employer's previous experience. If a particular employer has formerly enjoyed amicable relations with his employees under separate or combined units, such forms will generally be favored for present purposes.

(5) Extent of organization is the final consideration entering into the Board's resolve to separate or combine for negotiation and representation purposes. By extent of organization is meant the degree to which employees in individual plants of multiple-plant companies have presently organized. Under the Wagner Act, the Board could decide that employees in plant A were entitled to representation as a single unit if they were desirous thereof, though the employees in plants B and C had not, as yet, been sufficiently organized to call for an election. Some limitation is placed upon the Board's discretion in this regard by the 1947 Act. Sec. 9 (c) (5) provides "in determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." Thus, by legislative mandate, if other factors favor a multiple-plant unit, the Board may not base a single-unit decision upon a finding that the present extent of organization militates against a multiple-plant unit. This proviso, of course, favors employers, for they generally find a bargaining advantage in dealing with separate units. Finally, the proviso does not outlaw consideration by the Board of organizational extent; it merely limits the *weight* that the Board can accord it in deciding whether to separate or combine for appropriate unit purposes.

SECTION 67.1. GENERAL CONSIDERATIONS

A textual summary of the National Labor Relations Board's discretionary powers in appropriate unit determinations was given in Section 67. These powers derive from Sec. 9 (b) of the Act. Two decisions are presented in this section to clarify these issues, the *Pittsburgh* and *Lund* cases. In both instances the Board held that a company-wide bargaining unit would best serve the interests of equitable and efficient collective bargaining. In both cases the companies involved contended that the weight of evidence pointed to separate, rather than combined, units. Previously alluded to was the fact that employers generally favor separation as a device to enhance their bargaining advantage and to minimize the risks incident to a company-wide shutdown in the event of labor trouble. The *Pittsburgh Plate Glass Co.* is a landmark decision on appropriateness of the unit for bargaining purposes. These decisions are sound law, as the issues involved were not among those subjected to change by the amended Act.

PITTSBURGH PLATE GLASS CO. v. NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States, 1941. 313 U.S. 146, 61 Sup. Ct. 908

REED, J. The petitioners in the two cases covered by these certioraris are the Pittsburgh Plate Glass Company, an employer, and the Crystal City Glass Workers Union, an "independent" or "local" union, that is, a union unaffiliated with any other employee organization. Charged with an unfair labor practice in refusing to bargain collectively with duly accredited representatives of its employees, the Company countered the complaint with the assertion that it had and did bargain collectively with the proper representatives of its employees, but that it denied the validity of a Board decision including the Crystal City plant of the Company as a part of the appropriate bargaining unit. The central issue thus is the legality of the Labor Board's decision, under Sec. 9 (b) of the National Labor Relations Act, determining that "the production and maintenance employees of the Company" at all six plants of its flat glass division, as a whole, constitute the appropriate unit for collective bargaining for the Crystal City employees, rather than the employees of the Crystal City plant only. The Board's conclusion is challenged on the merits, on procedural and on constitutional grounds. The certioraris were

granted because of the importance of the "appropriate unit" problem in the administration of the Act.

The six plants of the flat glass division are located in five different states: Ford City, Pennsylvania; Creighton, Pennsylvania; Mount Vernon, Ohio; Clarksburg, West Virginia; Henryetta, Oklahoma; and Crystal City, Missouri. The normal number of employees in the whole division is about 6500. The Crystal City Plant, with 1600, and the slightly larger plants at Ford City and Creighton account for the bulk of these workers; the remaining three together employ only about 1000. The Federation of Flat Glass Workers, an affiliate of the Congress of Industrial Organizations, has a majority of all the employees in the flat glass division and also a majority at each plant except Crystal City. Its position, which the Board sustained, is that the entire division should be a single bargaining unit. The Crystal City Union, which claims a majority at that plant, and the Company both contend that the circumstances of this case require Crystal City to be separated from the rest of the division for the purpose of fixing the unit. . . .

. . . Accordingly, about a month after its certification order, the Board issued a complaint in this proceeding, the third and pending stage of the labor dispute, alleging a refusal to bargain collectively in violation of Secs. 8 (1) and (5). At the hearing on this complaint, at which the Crystal City Union was permitted to intervene, the trial examiner excluded a certain offer of proof by it and the Company. For various reasons the Board found that the exclusion was in part proper and for the rest non-prejudicial. On the merits the Board, with one member dissenting, adhered to its original view that the Crystal City plant should be included in the unit and therefore found that the Company had committed an unfair labor practice. The Company and the Crystal City Union sought review of the Board's decision in the Circuit Court of Appeals, which affirmed, and we brought the case here on certiorari.

To reach a conclusion upon the complaint under consideration against the Company of unfair labor practices, violating Sec. 8, subsections (1) and (5) of the National Labor Relations Act, the validity of the Board's decision as to the appropriate unit must be decided. As the unfair practice charged was the refusal to bargain collectively because of the inclusion of the Crystal City employees in the unit, if they were improperly included the complaint fails.

The Labor Act places upon the Board the responsibility of determining the appropriate group of employees for the bargaining unit.

In accordance with this delegation of authority, the Board may decide that all employees of a single employer form the most suitable unit for the selection of collective bargaining representatives, or the Board may decide that the workers in any craft or plant or subdivision thereof are more appropriate. The petitioners' contention that Sec. 9 (a) grants to the majority of employees in a unit appropriate for such purposes the absolute right to bargain collectively through representatives of their own choosing is correct only in the sense that the "appropriate unit" is the one declared by the Board under Sec. 9 (b), not one that might be deemed appropriate under other circumstances. In its Annual Reports, the Board has stated the general considerations which motivate its action:

"In determining whether the employees of one, several, or all plants of an employer, or the employees in all or only a part of a system of communications, transportation, or public utilities, constitute an appropriate unit for the purposes of collective bargaining, the Board has taken into consideration the following factors: (1) the history, extent, and type of organization of the employees; (2) the history of their collective bargaining, including any contracts; (3) the history, extent, and type of organization, and the collective bargaining, of employees of other employers in the same industry; (4) the relationship between any proposed unit or units and the employer's organization, management, and operation of his business, including the geographical location of the various plants or parts of the system; and (5) the skill, wages, working conditions, and work of the employees.

In its hearings on the appropriate unit the Board received evidence as to the organization of the Company, the variety of its business, its distribution of this business into divisions and the location, size and method of operation of its flat glass plants, which composed the flat glass division. The history of collective bargaining in the business was developed. Finally the relation of the several plants of the flat glass division was examined and the characteristics of each plant and their respective employees gone into. From this evidence the Board determined that the production and maintenance employees of the six scattered flat glass plants were the appropriate unit and that the Federation, which had majorities of the employees in all the plants except Crystal City, was the labor representative for purposes of collective bargaining.

The Company and the local union contend that Crystal City's inclusion was erroneous because neither in the hearings on the appro-

priate unit nor on this unfair labor practice did the Board permit the introduction of material evidence on the question of appropriate units, the exclusion of which was prejudicial to the respondents.

While the ruling of the Board determining the appropriate unit for bargaining is not subject to direct review under the statute, the ruling is subject to challenge when, as here, a complaint of unfair practices is made predicated upon the ruling. Petitioners press that challenge upon the ground (1) that the procedure denied due process of law, (2) that there was no substantial evidence to justify the ruling, and (3) that the authority granted the Board is an unconstitutional delegation of legislative power.

First. Petitioners find in the refusal of the Board to admit certain proffered evidence in the unit hearing and in this hearing a denial of due process in that the exclusion was illegal and arbitrary in depriving the parties of a full and fair hearing as guaranteed by the Fifth Amendment. . . .

Acquiescing, for the argument, in the conclusion that selection of the appropriate unit is a function of the Board, petitioners urge that this function must be exercised in the light of properly available evidence. Much may be and was said upon either side of the issue as to whether Crystal City plant or the flat glass division would be the most efficient collective bargaining unit. Additional evidence might have brought the Board to a different conclusion. Hence, urge petitioners, the introduction of certain evidence before it, either in the hearing on the appropriate unit and certification of representatives or in this present hearing on unfair labor practices predicated upon that determination and certification, is important. As the Board's conclusion upon the appropriate unit determined that the Federation, the choice of a majority in the selected unit, would be the bargaining representative for all, including the Crystal City employees, we need not give specific consideration to the refusal of the Board to certify the petitioner, the Crystal City Glass Workers Union, as the bargaining representative of those workers. Certification of the bargaining representative follows the determination of the appropriate unit. As will presently appear, however, this does not dispose of the admissibility of evidence as to the Crystal City workers' desire to be represented by the Union. This is a fact which has a bearing on the determination of the appropriate unit.

For the same reason, the availability of a workers' organization for purposes of representation is not in itself decisive in determining the appropriate bargaining unit. Naturally the wishes of employees

are a factor in a Board conclusion upon a unit. They are to be weighed with the similarity of working duties and conditions, the character of the various plants and the anticipated effectiveness of the unit in maintaining industrial peace through collective bargaining. It can hardly be said that the domination of a labor union by an employer is irrelevant to the question of what unit is appropriate for the choice of labor representative, but certainly it is a collateral matter in that investigation. It is only a fact to take into consideration. If the unit chosen has an employer dominated union, the workers may be given an opportunity to choose representatives, free of this infirmity, and if the union is free of employer influence, it may be chosen as representative. In short, domination pertains directly to representation but influences the choice of a unit only casually.

Turning to the refusal of the Board to admit tendered evidence in this case, there are five instances alleged as error. In the next preceding paragraph we have referred to the first, the desire of 1500 workers out of 1800 in the Crystal City plant to have that plant a bargaining unit and their opposition to Federation representation. This was before the Board. The petition of the Crystal City workers was presented in the hearing on the appropriate unit, was admitted and considered. It is entirely proper for the Board to utilize its knowledge of the desires of the workers obtained in the prior unit proceeding, since both petitioners, the employer and the Crystal City Union, were parties to that prior proceeding. The unit proceeding and this complaint on unfair labor practices are really one. Consequently the refusal to admit further evidence of the attitude of the workers is unimportant. . . .

Further, if we consider all the contentions about exclusion of evidence together instead of separately, we do not find that in the aggregate the evidence excluded could have materially affected the outcome on the "appropriate unit" issue, in the light of the criteria by which the Board determined that issue.

Second. Petitioners complain that the record contains no evidence to support certain essential findings. One of these is the finding in regard to the history of collective bargaining. The Board determined that the Federation after 1934 and until 1937 held written labor agreements covering their members in all the plants of the Company, including Crystal City:

"Not until January 20, 1937, did the Company for the first time insist that Crystal City be excluded from the agreement between it and the Federation on the ground that the Federation did not have

as members a majority of the employees at this plant. The written agreement signed on that day, at the insistence of the Company, despite the Federation's objections, did not cover the Federation members at Crystal City." The Board thought the evidence justified the conclusion that the Federation had sought and sometimes succeeded in organizing the Company on a "division-wide" basis. An examination of the contracts shows that three were entered into with the Federation between 1934 and 1937, all three of which recognized obligations towards "employees who are members of the Federation of Flat Glass Workers of America." Another granted a five per cent wage increase "in all plate and safety glass plants." This included Crystal City. There was testimony that all plants were covered and testimony by petitioners that the Crystal City plant was not covered. There were certain provisions applicable only where a plant had a local union. There was none at Crystal City. The evidence, we conclude, justifies the Board's finding that contracts were signed on a division-wide basis. Certainly the express exclusion of Crystal City employees in the 1937 contract on the employer's demand shows an endeavor to organize on that basis.

Petitioners find failure of evidence to establish the appropriateness of the division-wide unit. It is true the record shows a substantial degree of local autonomy. Crystal City is a separate industrial unit, not one mechanically integrated into the division. The local superintendent deals with labor grievances, the plant has its own purchasing agent and there is no exchange of employees. On the other hand, labor policies and wages come from the central office in Pittsburgh, there is great similarity in the class of work done. Wages, hours, working conditions, manufacturing processes differ only slightly among the plants. An independent unit at Crystal City, the Board was justified in finding, would frustrate division-wide effort at labor adjustments. It would enable the employer to use the plant there for continuous operation in case of stoppage of labor at the other plants. We are of the view that there was adequate evidence to support the conclusion that the bargaining unit should be division-wide.

Third. Finally, petitioners urge that the standards for Board action as to the appropriate unit are inadequate to give a guide to the administrative action and the result is necessarily capricious, arbitrary and an unconstitutional delegation of legislative power. We find adequate standards to guide the Board's decision. While the exact limits of the Board's powers or the precise meaning of the terms have not been fully defined judicially, we know that they lie within the

area covered by the words "employer," "plant," and "craft." The division-wide unit here deemed appropriate is well within these limits. As a standard, the Board must comply, also, with the requirement that the unit selected must be one to effectuate the policy of the act, the policy of efficient collective bargaining. Where the policy of an act is so definitely and elaborately stated, this requirement acts as a permitted measure of delegated authority. *Affirmed.*

Case Questions

1. What did the N.L.R.B. decide was an appropriate unit?
2. Were the plants in question physically proximate to each other?
3. Which plant did the company contend should be a separate unit? What argument do they advance in support? How does the Supreme Court answer the argument?
4. List the factors stated in the case employed by the Board to determine the appropriate unit.
5. When may an appropriate unit determination of the Board be subjected to judicial scrutiny? Is it subject to direct review?
6. How does the Supreme Court decide the company's contention that the Board refused to admit evidence on the desires of the Crystal City employees?
7. Does the history of collective bargaining point to division-wide bargaining?
8. Discuss the statement, "Crystal City is a separate industrial unit, not one mechanically integrated into the division."
9. How does the Supreme Court dispose of the company's contention that the standards for Board action are an inadequate guide to administrative action and therefore an unconstitutional delegation of legislative power?

NATIONAL LABOR RELATIONS BOARD v. LUND

Circuit Court of Appeals, Eighth Circuit, 1939. 103 Fed. (2d) 815

THOMAS, C. J. The National Labor Relations Board has filed a petition in this court praying for the enforcement of its order of April 5, 1938, directed to the respondents. Both respondents resist the enforcement of the order and pray that it be vacated and set aside and the complaint upon which it is based be dismissed. . . .

The Northland Ski Manufacturing Company (hereinafter referred to as Northland), is a Minnesota corporation engaged at its plant in St. Paul, Minnesota, in the manufacture, sale and distribution of skis, accessories, and toboggans. It is managed, operated and controlled

by Christian A. Lund, who, together with the members of his family, own all of the capital stock. The C. A. Lund Company (hereinafter referred to as Lund) is the trade name of a business wholly owned by Christian A. Lund. Under this name Lund has a plant at the town of Hastings, Minnesota, about 20 miles from St. Paul, where products similar to those made at the Northland plant in St. Paul are manufactured and sold. It is conceded that the business at both plants involves interstate commerce. . . .

The important question in this case is whether employees in the St. Paul and Hastings plants as a whole constitute an appropriate unit under the Act for collective bargaining. The respondents say they do not constitute such a unit because there are two separate employers.

In April, May, and June, 1937, representatives of the Union attempted to negotiate a contract with Lund covering rates of pay and conditions of labor at both plants, and Lund refused to negotiate with them on any basis. At the times of such refusal Lund did not base his decision on the ground that the unit was not an appropriate one. He then refused to treat with the Union under any circumstances. At the hearing, however, he testified that he was at all times willing to treat with the employees separately; and that the Independent Order, recognized by him, represented a majority of the employees of the Hastings plant.

As grounds for determining that the employees in both plants constitute an appropriate unit for collective bargaining the Board found that although owned by separate entities a unity of interest exists both in the management and among the employees. Christian A. Lund owns, and through his son as his agent, controls and manages the plant at Hastings. Through ownership of all the stock of Northland by himself and his family and as president and manager of that company, he controls its activities. The business and operation of the two plants are similar. Workers are from time to time transferred from one plant to the other. Joint purchases of raw materials are sometimes received in one plant for both, and a portion is later shipped to the other. Products partially manufactured at one plant are not infrequently finished at, and shipped from, the other. Although each plant ordinarily uses its own trademark, products manufactured at one plant have been sold under the other's mark. The production employees of both plants in general do the same kind of work, requiring the same degree of skill. No appreciable wage differential exists between the two plants. All employees recognize the authority of Christian A. Lund.

The principal differences between the two plants are that the St. Paul plant makes higher-priced, better-grade products than are made at Hastings; it sells to retailers while Hastings sells to wholesalers; and snow-shoes and hockey sticks are made at Hastings but not at St. Paul.

If Lund may deal with the employees of the two plants as separate units it is believed that collective bargaining would be a farce and that Lund, because of his hostility to the Union, would evade the purpose and intent of the law by transferring business from one plant to the other as his interest dictated according to the unit with which he could make the most favorable bargain. In other words, Lund would be in a position where he could force competition between the two groups of his employees to their detriment and his gain.

The findings and conclusions of the Board plainly demonstrate the appropriateness of including the employees of both plants in one unit for purposes of collective bargaining, unless the law fails to authorize such joinder.

Counsel for the Board point out that Section 2(2) of the Act, 29 U.S.C.A. Sec. 152(2), provides that "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly," and that paragraph (1) of the same section provides that "The term 'person' includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees," etc. It is argued that these provisions leave the Board free to group the employees of two nominally independent but in fact commonly controlled enterprises into a single unit for purposes of collective bargaining.

The respondents say that when properly construed Section 2 (1) and (2) of the Act is intended only to prevent an employer from evading the Act by acting through an agent.

Section 9(b) of the Act, 29 U.S.C.A. Sec. 159(b), gives the Board power to "decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

Obviously all these provisions of the Act place a broad power of discretion, though not one that may be exercised arbitrarily, in the Board for the designation of an appropriate bargaining unit. . . . In *Consolidated Edison Co.* v. *Board, supra,* the order was directed at more than one legal entity. These entities consisted of the consolidated company and its affiliates, together constituting an integrated

system. Each affiliated company was nevertheless a separate entity. It was not suggested in that case either by court or counsel that the fact that the employers were separate corporate entities was a fact affecting the jurisdiction of the Board. The inference to be drawn from these decisions of the Supreme Court and from the language of the statute is that, within the meaning of the Act, whoever as or in the capacity of an employer controls the employer-employee relations in an integrated industry is the employer. So interpreted it can make no difference in determining what constitutes an appropriate unit for collective bargaining whether there be two employers of one group of employees or one employer of two groups of employees. Either situation having been established, the question of appropriateness depends upon other factors such as unity of interest, common control, dependent operation, sameness in character of work and unity of labor relations. There may be others; but, unless the finding of the Board is clearly arbitrary upon the point, the court is bound by its finding. In the present instance the conclusion of the Board appears reasonable rather than arbitrary, and its finding is sustained. . . .

Case Questions

1. What is the tie between Northland Ski and the C. A. Lund Co.?
2. How close are the plants to each other?
3. What is the question for decision and the defense of the respondents?
4. State the factors leading the Board to decide in favor of a multiple-plant unit.
5. What are the differences between the two plants?
6. List the factors establishing appropriateness.

SECTION 67.2. PROFESSIONAL AND CRAFT EMPLOYEES

We have seen that the amended Act limits Board discretion with respect to professional and craft employees. Sec. 9 (b) provides:

> ". . . the Board shall not (1) decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation. . . ."

The enactment of Sec. 9 (b) (2) on craft employees finds its roots in the ruling of the National Labor Relations Board in the *Globe Machine* case, 3 N.L.R.B. 294, decided in 1937. In that case, the Board was nonplussed by the fact that some skilled and craft workers expressed a desire to form separate units apart from production and maintenance workers. The Board decided that the fairest method to ascertain the desires of the employees was to conduct an election. It said, "In such a case where the considerations are so evenly balanced, the determining factor is the desire of the men themselves. On this point the record affords no help. . . . On the results of these elections will depend the determination of the appropriate unit for the purpose of collective bargaining. . . ."

Following the *Globe* ruling, the Board developed a series of complicated rules. The purport of these rules was that, ordinarily, the Board would not disassociate craft or skilled workers from industrial units if the craft or skilled workers had become merged or "assimilated" by the rank and file union. As a result, many craft employees found themselves represented by production units which had no genuine unity of interest with them.

This was the reasoning employed by Congress in enacting Sec. 9 (b) (2). What it amounts to, in effect, is a concession not only to skilled workers, but to employers as well. Craft men are in a more advantageous bargaining position than are unskilled workers. A refusal to tender services on their part has much more serious consequences on his operations than a refusal engaged in by a similar number of production employees. Ten power plant electricians can bottle-neck a plant as effectively as a walkout by a thousand machine tenders. By fostering the separation of the key craft workers from the rank and file, the bargaining strength of the former is increased, but that of the latter is decreased. Regardless of the policy considerations involved, the clear mandate to the Board embodied in Sec. 9

(b) (2) requires that the Board, both in forming new appropriate units, and in splitting existing units, permit craft and skilled employees to vote upon whether they desire separation from, or inclusion with, the rank and file.

The *Worthington* and *Lumbermen's Insurance Co.* rulings of the Board, reprinted in this section, give adequate treatment to the question of professional employees, the former case involving time-study men and the latter, attorneys and adjusters. The employer in the *Worthington* case contended he was not obliged to bargain with the time-study and standards engineers because they were management representatives and therefore were excluded from bargaining rights by Sec. 14. If they were held to be management representatives, the company could not be guilty of an 8 (a) (5) refusal to bargain, but if they fell into the professional category, a converse result would follow. There is no serious contention in the *Insurance Co.* situation that attorneys are not professionals; the employer there contends that the relations of attorney and client precludes the necessity for collective bargaining with them.

IN THE MATTER OF WORTHINGTON PUMP AND MACHINERY CORPORATION
75 N.L.R.B. 678, 1947

. . . The Trial Examiner found that the respondent violated Section 8 (5) of the Act, and thereby also violated Section 8 (1), by refusing to bargain with the Union as the duly designated bargaining representative of its time-study and standards employees. We agree. The respondent admitted that it refused to bargain with the Union, but contends that such refusal was not an unfair labor practice. In support of this contention, the respondent asserts that time-study and standards employees are management representatives and are not employees within the meaning of Section 2 (3) of the Act, and consequently that they may not constitute an appropriate bargaining unit within the meaning of the Act. The same contention was rejected in the representation case wherein the Union was certified as the statutory representative.

We have reexamined our position in the representation case, together with further evidence introduced in the present proceeding concerning the duties and responsibilities of the respondent's time-study and standards employees. We conclude that the principal function of these employees is, by utilizing their training and experience,

to determine the factual basis for the operation of the respondent's incentive wage plan. They are, therefore, essentially fact finders. Although it appears that they exercise considerable judgment and discretion in the performance of their duties, they do not do so to any substantial degree in the formulation, determination, or effectuation of management policies. We therefore affirm our earlier conclusion that the individuals here in question are employees within the meaning of Section 2 (3) of the Act, and that they may properly constitute an appropriate unit for the purposes of collective bargaining.

We also find that time-study employees are employees within the meaning of Section 2 (3) of the Act, as amended, and that such employees, by reason of their training and responsibilities, are professional employees within the meaning of Section 2 (12) of the amended Act. The legislative history of the Labor Management Relations Act, 1947, reveals that the Congress gave specific consideration to the "employee" status of time-study employees, professional employees, guards, foremen, and others, and that while doing so, it was conversant with the Board's decisions according bargaining rights to such employees. Time-study personnel were originally included within the supervisory category in the House Bill and, as supervisors, were denied employee status; however, they were *not* included within such supervisory classification in the final Conference Bill. The Conference Report indicates that, at the very least, time-study employees may be regarded as professional employees, subject to the statutory qualifications respecting a unit of such employees. Thus, although the Act, as ultimately amended, excluded supervisors from the classification of individuals who are to be considered employees for the purposes of the Act, and imposed limitations respecting units of guards and professional employees, it nonetheless included professional employees within the statutory definition of employees. Finally, the statute itself refutes the respondent's contention that employees like the ones in question are to be deprived of employee status because of the nature of their duties; for, by express language, a professional employee is defined, in part, as any "employee engaged in work . . . involving the consistent exercise of discretion and judgment in its performance."

The bargaining unit in the present case is comprised solely of time-study and standards employees and the labor organization representing the employees herein is unaffiliated, admitting only such personnel to membership. For purposes of this case, therefore, it is unnecessary to determine the propriety of a mixed unit of time-study and other employees; nor is it necessary to decide whether we would

reach the same conclusion if the labor organization herein admitted to membership, or was affiliated with other labor organizations admitting to membership, employees other than time-study personnel. We conclude, therefore, as the Trial Examiner found, that by refusing to bargain with the Union as the certified bargaining representative of its time-study personnel, the respondent violated Section 8 (5) and (1) of the Act. . . .

Case Questions

1. Upon what basis does the company justify its refusal to bargain?
2. Why does the Board conclude that time-study men are not management representatives?
3. Are professional workers employees within the Act? What proviso attaches to their representation?
4. Was an election held to be necessary in this case?

IN THE MATTER OF LUMBERMEN'S MUTUAL CASUALTY CO. OF CHICAGO

75 N.L.R.B. 1132, 1948

. . . The Petitioner seeks a unit consisting of all investigators, adjusters, and attorneys employed in the New York City Branch of the Employer, excluding the claims manager, the assistant claims manager, the attorney of record, the head of the suit department, the head of the compensation claim department, the office manager, and all other supervisory employees. . . .

The Employer, on the other hand, contends that neither attorneys nor adjusters are appropriately included in any unit. The employer argues that its attorneys are not employees within the meaning of the Act because they are professional employees, and because they represent management. Furthermore, asserts the Employer, as "officers of the court" and holders of a "public trust" the attorneys are precluded from taking any oath which would in any manner limit the obligation placed upon them as attorneys and fiduciaries. In addition, the Employer contends that an attorney's membership in a union would violate the Canons of Ethics of the American Bar Association. The Employer would exclude the adjusters from any unit because of its contention that they represent management. In any event, the Employer contends, two separate units, one for attorneys and one for adjusters and investigators, should be established, in conformance with the Petitioner's alternative request.

The Attorneys

The New York City branch of the Employer maintains a claim department, which investigates, adjusts, and/or litigates all claims which arise within its jurisdiction. This department is subdivided into claim and legal divisions, the investigative and adjusting functions resting with the claim division, and the litigation functons resting with the legal division. A claims manager heads the claim department, and directs and supervises the work of both the claim and legal subdivisions. The legal subdivision is headed by an attorney of record, who has approximately 10 or 11 attorneys under him. He assigns certain courts to each of his attorneys, and all cases that are to be litigated in these courts are tried by the assigned attorney, who performs the usual functions of an attorney in the preparation of pleadings and the conduct of the trial of the case, and, in addition, is required to submit a trial report upon the conclusion of the trial.

The individual attorney has no right to select those cases which he shall try. He is subject to the control and direction of the Employer in the course of his work, and may be disciplined by the attorney of record and the claims manager for refusal to follow instructions. Although the attorneys use their own discretion at all stages of the pretrial and trial work, they are governed generally by policies set forth by the Employer. The Employer prescribes the type of cases for which a jury trial is not to be requested. Various affirmative defenses are required to be pleaded in certain types of actions, such as the defense of contributory negligence in any action involving the death of a plaintiff. In addition, the attorneys are not permitted to settle any case without the express consent of the Employer.

The attorneys are hired in the same manner as are other employees of the Employer. Like the other employees, they are subject to withholding tax, unemployment insurance, social security taxes, and Workmen's Compensation Insurance; like the other employees, they work regular hours (from 8:55 a.m. to 5:00 p.m.); like the other employees, they are required to be covered by health and accident insurance; like the other employees, they carry identification cards issued by the Employer; and like the other employees, they receive vacations based on length of service. Unlike the other employees, however, the attorneys are professional personnel. And unlike the other employees, they are "officers of the court" and fiduciaries.

We shall first consider whether the attorneys' professional status is sufficient to deprive them of the benefits of the Act. We have in the past certified labor organizations as the bargaining representa-

tives of professional employees. This practice has been inferentially endorsed by the Labor-Management Relations Act, 1947, which contemplates the establishment of separate units of professional employees. We are of the opinion, therefore, that the mere fact that the attorneys are professional personnel does not preclude them from being employees within the meaning of the Act, and entitled to its benefits, and we reject the Employer's contention in this respect.

Nor are these attorneys, in our opinion, either supervisory, managerial, or confidential employees. The attorneys sought herein admittedly do not exercise supervisory authority. The only other employees of the Employer who "work for" the attorneys to any degree are the stenographic and clerical personnel, and none of the attorneys sought by the Petitioner has any authority with respect to these stenographers and clerks, who are drawn from a common pool as they become available.

The attorneys, in addition, are not in a position to formulate, determine, or effectuate management policies generally, and they are not concerned with the Employer's labor relations policies either directly or indirectly. They are not, therefore, either managerial or confidential employees.

All of the Employer's attorneys are salaried, being paid from $1,500 to $3,000 per year. They represent the Employer in court, although none of the attorneys sought by the Petitioner tries cases other than in the Municipal, City, and County Courts. As we have previously indicated, their discretion is limited by certain rules prescribed by the Employer, and they are not permitted to settle any case without the consent of the Employer.

Any employee may be said to act for management to some extent, in as much as he is paid by his employer, and owes a certain duty and loyalty to that employer. For example, a salesman acts for management by taking orders for his employer, and a receiving clerk acts for management by signing for the receipt of merchandise for his employer. But, as we stated with respect to nurses in a recent case, ". . . there is no necessary conflict between self-organization and collective bargaining, and the faithful performance of duty." As the record reveals, and as we have previously found, the attorneys herein are not supervisory personnel; they do not formulate policies for the Employer, either generally or in the field of labor relations; nor do they act in a confidential capacity to persons who do formulate such policies; and the discretion which they exercise in the performance of their duties is limited. We would not ordinarily impute actions of

these attorneys to the Employer so as to warrant an unfair labor practice finding against the Employer. Because the usual incidents pertaining to an employer-employee relationship here exist, because they are neither supervisory, managerial, nor confidential, none of these contentions made by the Employer persuades us that the attorneys are not employees, or that they should be deprived of the benefits of self-organization guaranteed them by the National Labor Relations Act, as amended.

In our opinion the fact that the attorneys sought herein are, like all attorneys, officers of the court and fiduciaries, is not a sufficient basis for denying them the benefits of the Act. Attorneys, in general, including the Employer's attorneys, are subject to various rules of conduct prescribed by the courts. The wages, hours, and conditions of employment of these attorneys, however, remain matters to be determined by their Employer, rather than by the courts. Thus, as we have stated, the usual incidents of an employer-employee relationship exist here. Unlike attorneys generally, this Employer's attorneys are salaried; unlike attorneys generally, they work regular hours and receive regular vacations; and unlike attorneys generally, their activities are greatly limited by policies set forth by their Employer. In this situation, the statutory objectives, including the right to collective bargaining, may be achieved despite any limitations imposed on the attorneys by virtue of their status as officers of the court.

The Employer also asserts that the relationship of client-attorney existing between it and these employees precludes the existence of an employer-employee status. We do not agree. The entire association between the Employer and its attorneys is pervaded by an employer-employee relationship. The attorneys are hired, discharged, and promoted in the same manner as the other employees of the Employer. They have the same working conditions as other employees. Furthermore, in the performance of their duties as attorneys, they are directed and controlled by the Employer. They are not paid a fee for each case which they try, but receive an annual salary in payment for all the work which they perform during the year at the direction of the Employer. Bouvier's Law Dictionary (Rawle's Third Revision, on page 284) states: "In estimating the value of services rendered by an attorney it is proper to take into account the time necessarily employed in and the success of the litigation; the amount of values involved; and recovered; the ability, learning and experience of the attorney and his standing in the profession; the character of the claim and the amount of the services to be rendered." These are not

the considerations by which this Employer's attorneys are compensated. The character of a particular claim, the amount of values involved and recovered, and the time necessarily employed in and the success of the litigation are not taken into account in the payment of these attorneys. They are paid by the year, not on a case-to-case basis. For all these reasons, we are of the opinion that, although a client-attorney relationship is coexistent with that of an employer-employee in this case, the client-attorney relationship does not preclude these employees from exercising their statutory right to bargain collectively with respect to conditions of employment.

That the attorneys have a statutory right to self-organization cannot be denied. If doubt ever existed, it has been removed by the Labor-Management Relations Act of 1947, which defines "professional employees." The legislative history of this Act clearly indicates that attorneys are included in this definition. . . .

We have in the past certified labor organizations which admitted to membership non-professional employees as the collective bargaining representatives of professional employees. And the Labor-Management Relations Act, 1947, together with its legislative history, clearly confirms our practice in this respect, merely requiring that we not place professional and non-professional employees in the same unit unless a majority of the former are willing. We shall not deprive these attorneys of their right to be represented by a labor organization for the purposes of collective bargaining, even though the labor organization admits non-professional employees to membership. But we believe that any problems which may arise with respect to the attorneys may best be solved by their representation in a separate unit. We shall, accordingly, place them in a unit of their own.

The Adjusters and Investigators

The Employer's objection to the establishment of the adjusters either as a separate unit or as part of a more comprehensive unit is based on its contention that the adjusters are representatives of management. The evidence at the hearing was conflicting with respect to the settlement authority of the adjusters generally. Testimony to the effect that all adjusters were limited to $2,500 in settling a case, and that this limitation was further governed by a "reserve" set on the insurance policy by the Employer, was contradicted by other witnesses, who testified that some adjusters had no general limitation placed upon their authority to settle a case, and that others, who were limited, could pay considerably more than the limitation called for in

exceptional cases if the facts so warranted. One of the witnesses, who testified at one point that there was no limitation on the settlement authority of adjusters, later stated that there was a limitation, but that it was not always enforced. On the basis of the entire record, we are of the opinion, and find, that the adjusters are limited to a great extent as to the amount of settlement in any case.

It is true that in making settlements the adjusters exercise discretion within these limits, and that it is to the Employer's interest that a settlement be made in the lowest amount possible. We do not believe, however, that the judgment, discretion, and loyalty of the adjusters in making settlements favorable to the Employer would be affected by permitting them to organize, within the framework of the Act, for the purposes of collective bargaining with respect to their own wages, hours, and conditions of employment. These adjusters are not supervisory personnel, they are not confidential employees, and they are not managerial employees, nor do they assist anyone who is on a policy-making level for the Employer. Under all the circumstances, we are of the opinion that they comprise an appropriate unit within the meaning of the Act.

There remains for consideration the inclusion, in the unit of adjusters and investigators, of certain adjusters classified as "supervisors." Although testimony adduced by the Employer at the hearing indicates that there are three classifications of adjusters—outside adjusters, inside adjusters, and supervisors—other testimony seems to indicate that the inside adjusters and supervisors are the same, the titles being used interchangeably. The Employer's brief fails to clarify the matter, for at one point it divides adjusters into two classes, and at another point it divides the same adjusters into three categories, separating the inside adjusters from the so-called supervisors. This confusion emphasizes the lack of any real distinction between those adjusters asserted by the Employer to be supervisory and the other adjusters in the New York Branch of the Employer. The record reveals that none of the employees classified as "supervisors" has the authority to hire, promote, or discharge any other employee, or effectively recommend such action. Any distinction that may exist would appear to be in the type of claim handled; the record shows that the "supervisors" deal primarily with automobile and accident claims. Accordingly, we are of the opinion that the "supervisors," including the heads of the suit and compensation department. do not in fact possess supervisory authority, within the meaning of the Act, as amended; we shall include them in the unit of adjusters.

We shall exclude from this unit, however, the claims manager, the attorney of record, and the office manager, who, all parties agree, are supervisors.

We find, accordingly, that the employees in the following groups, excluding all supervisors, constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act:

1. All attorneys employed by the Employer in its New York branch office, excluding the attorney of record.

2. All investigators and adjusters employed by the Employer in its New York branch office, excluding the claim manager and the office manager. . . .

SUPPLEMENTAL CASE DIGEST—PROFESSIONAL AND CRAFT EMPLOYEES

In 76 N.L.R.B. No. 70, 1948, the Board held that the work of editorial employees and rewrite men was not of a professional character within the meaning of Section 2 (12), since their activity did not require licensing or specialized training in an academic or professional institution of higher learning. In so doing, the Board rejected the employer's contention that the above employees could not properly be included in a collective bargaining unit with the other rank and file editorial department workers in the absence of an election to determine their wishes.

Case Questions

1. Upon what basis does the Mutual Company object to a unit of attorneys?
2. Outline the degree of control maintained by Mutual over its attorneys.
3. Are professional men "employees" under the Act?
4. Are the attorneys considered supervisors, since they have stenographic and clerical assistants? Do they formulate or effectuate management policies?
5. Does the fact that attorneys are fiduciaries and officers of the court and establish an attorney-client relation divest them of bargaining rights?
6. May professional and nonprofessional workers be grouped in the same unit?
7. What contention does the employer make as to the adjusters? How is it disposed of?
8. How does the Board finally decide to set up bargaining units?

SECTION 67.3. PLANT GUARDS

A bitter source of contention for a decade has been whether plant guards should be included with a union also representing other employees. Employers raised objection to their inclusion reasoning that, as guardians of the employer's property, their allegiance, in the event of a strike by the union, should be undivided. Notwithstanding the inherent soundness of this position, the N.L.R.B., and finally the Supreme Court, took a contrary view on the theory that plant guards were "employees" and, as such, could not be denied representation rights even though this tended to jeopardize the employer's property rights. The *Jones & Laughlin* decision of 1947, reprinted below, represents the view on this question that has been legislatively repudiated by Sec. 9 (b) (3) of the 1947 Act.

Under this section, plant guards may not be included in a unit representing employees other than plant guards, nor may they form a separate unit under the jurisdiction of a labor organization, or an affiliate thereof, which admits to membership other than plant guards. The practical impact of this section is to divest plant guards of effective bargaining *power*, though they still possess bargaining *rights*. They are now in a position more precarious than supervisors, for the latter group are more difficult of replacement by the employer than are the former, notwithstanding the effect of Sec. 14, which grants supervisors no protected bargaining rights and no protection from employer unfair labor practices. Supervisors are simply not "employees" under the Act, but this fact does not make concerted action on their part illegal, nor does it weaken significantly the compulsive power inhering in their position should they make demands behind a united front.

NATIONAL LABOR RELATIONS BOARD v. JONES & LAUGHLIN STEEL CORPORATION

Supreme Court of the United States, 1947. 331 U.S. 316, 67th Sup. Ct. 1274

MURPHY, J. Like *Labor Board* v. *Atkins & Co.*, — U.S. —, this case involves the rights of militarized plant guards under the National Labor Relations Act, 29 U.S.C., Sec. 151 *et seq.* But certain problems are raised here which are not present in the *Atkins* case.

Respondent owns and operates several large steel manufacturing works and was engaged in the production of war materials during the recent war. At respondent's Otis Works at Cleveland, Ohio, about 4,700 individuals are employed. Production and maintenance employees constitute the great bulk of these workers. But there is also

included in the total a group of guards and watchmen, numbering about sixty men normally.

A union affiliated with the United Steelworkers of America, C.I.O., has been the exclusive bargaining agent for the production and maintenance employees. Under a contract made with respondent late in 1942, this union disclaimed any representation of "Foremen or Assistant Foremen in charge of any classes of labor, watchmen, salaried employees and nurses." On March 15, 1943, this union filed a petition for investigation and certification of representatives pursuant to Sec. 9 (c) of the Act, in which it sought to be certified as the collective bargaining representative of the guard force. A hearing was then held. Respondent claimed that a unit composed of these guards was inappropriate because they "perform certain assigned work that is strictly representative of management." Respondent also claimed that any allegation by the union that a unit including watchmen is appropriate was "a direct contravention" of the 1942 contract. And it was further alleged that any unionization of watchmen or guards was particularly inappropriate during a time of war, that their duties "do not differ greatly from the duties performed by members of a city, county or state police force" and that these guards had been sworn in as auxiliary military police of the United States Army. . . .

On May 3, 1943, the Board issued its decision and direction of eltction. 49 N.L.R.B. 390. . . . It rejected all of respondent's contentions, pointing out among other things that the union, while representing production and maintenance employees, intended to bargain for the plant guards and watchmen as a separate unit.

The election resulted in the selection of the Steelworkers union as the bargaining representative of the unit in question. The union was certified as the exclusive representative of the unit, respondent refused to bargain with the union and the Board issued its complaint based upon that refusal. On December 2, 1943, the Board affirmed the appropriateness of the unit and found that respondent had committed unfair labor practices in refusing to bargain. The usual order was entered. 53 N.L.R.B. 1046.

The Sixth Circuit Court of Appeals denied the Board's petition for a decree enforcing its order. 146 F. 2d 718. While upholding the Board's determination that the militarized guard forces were employees within the meaning of the National Labor Relations Act, the court felt that the unit selected for bargaining purposes was inappropriate and reflected a disregard by the Board of the national welfare. In the eyes of that court, the Board's fatal error was its authorizing

the militarized guards to join the same union which represented the production and maintenance employees because "when they were inducted into the Unions and became subject to their orders, rules, and decisions, the plant protection employees assumed obligations to the Unions and their fellow workers, which might well in given circumstances bring them in conflict with their obligation to their employers, and with their paramount duty as militarized police of the United States Government." 146 F. (2d) at 722. . . .

Unanswered by the *Atkins* decision, however, is the question whether the militarization of the plant guards precluded the Board from grouping the guards in a separate unit and permitting them to choose as their bargaining representative a union which also represented production and maintenance employees. To that issue, which is the primary one raised by this case, we now turn.

The Board, of course, has wide discretion in performing its statutory function under Sec. 9 (b) of deciding "the unit appropriate for the purposes of collective bargaining." *Pittsburgh Plate Glass Co.* v. *Labor Board,* 313 U.S. 146. It likewise has discretion to place appropriate limitations on the choice of bargaining representatives should it find that public statutory policies so dictate. Its determinations in these respects are binding upon reviewing courts if grounded in reasonableness. *May Stores Co.* v. *Labor Board,* 326 U.S. 376, 380. A proper determination as to any of these matters, of course, necessarily implies that the Board has given due consideration to all the relevant factors and that it has correlated the policies of the Act with whatever public or private interests may allegedly or actually be in conflict.

Thus, in determining the proper unit for militarized guards and in deciding whether they should be permitted to choose the same union that represents production and maintenance employees, the Board must be guided not alone by the wishes of the guards or the union or by what is appropriate in the case of non-militarized guards. It must also give due consideration to the military duties and obligations of the guards and their possible relationships to a union representing other employees; it must consider what limitations, if any, on the normal freedom to choose whatever representative the guards may desire are necessitated by the war effort.

It is clear that the Board has given these matters due consideration. It has not acted in this case in disregard of the national welfare. Sanctioning the creation of a separate unit of respondent's guards and permitting them to select a union of their own choosing, a union which happened to be the representative of the production

and maintenance employees, are indicative of a considered, mature judgment on the Board's part. The problem has been raised in many cases before the Board and its conclusion is in accord with that reached by the War Department. . . .

We are unable to say that the policy formulated by the Board is without reason. When the employer retains unfettered power to fix the wages, hours or other working conditions of militarized guards, the guards stand in the same relation to the employer regarding those matters as do production and maintenance employees. In disputes with the employer over those matters, they suffer from the same inequality of bargaining power as suffered by other unorganized employees. . . .

After deliberation, the Board has concluded that this freedom can safely be recognized to the fullest extent as to militarized guards, provided only that they be placed in separate bargaining units. We cannot say that this conclusion is one so lacking in an appreciation of the military necessities of the situation that we should voice our disapproval and substitute our own views of public policy. It is significant that the Board, in weighing the military requirements against the normal policies of the Act, has arrived at a result which coincides with that reached by the War Department. The latter agency has been satisfied that militarized guards can safely join and choose unions representing other employees without impairing their loyalty to the United States or their ability to perform their military duties satisfactorily. We assume that attitude was adopted after a full consideration of all the military necessities, matters which are peculiarly within the competence and knowledge of the War Department.

Reversed.

SUPPLEMENTAL CASE DIGEST—PLANT GUARDS

NATIONAL LABOR RELATIONS BOARD v. E. C. ATKINS AND COMPANY. United States Circuit Court of Appeals, Seventh Circuit, No. 8669, September 24, 1947. PER CURIAM: . . . and the Supreme Court on June 19, 1947, having issued a mandate reversing the judgment of this Court and remanding this case to this Court for proceedings in conformity with the Opinion of the Supreme Court; and said mandate having been received by this Court and entered upon its records; and the Congress of the United States having enacted the Labor Management Relations Act, 1947 (Public Law 101, 80th Congress, Chapter 120, 1st Session), on June 23, 1947, thereby declaring a different national purpose and policy from that existing at the time the Opin-

ion of the Supreme Court was rendered; and the Congress having therein provided that no employer should be required to bargain with a labor organization as representative of its guards if that labor organization admits to membership, or is affiliated with an organization admitting to membership, employees other than guards; and it being clear and undisputed upon the record that International Association of Machinists admits to membership employees other than guards, so that it would be contrary to the public policy enacted by the Congress subsequent to the mandate of the Supreme Court to require respondent to bargain with International Association of Machinists or any labor organization affiliated with it as a representative of respondent's guards:

Now, therefore, it is ordered, adjudged and decreed by this Court that the motion of National Labor Relations Board for enforcement of its Order entered in this case on May 30, 1944, be and the same is hereby, denied.

Case Questions

1. What objection did the company make to the Board certification?
2. Upon what grounds did the lower court reverse the Board order?
3. On what grounds does the Supreme Court reverse the lower court?
4. State the present bargaining rights of plant guards.

SECTION 68. FILING REQUIREMENTS OF LABOR ORGANIZATIONS

The privileges granted labor by the National Labor Relations Act of 1947 have been conditioned by the filing and affidavit Sections 9 (f), (g), and (h). If a labor organization fails to comply with these three sections, it may not:

(1) Petition the Board to investigate a representation question under Sec. 9 (c),
(2) Petition the Board to conduct a union security election under Sec. 9 (e) (1),
(3) Present a complaint of employer unfair labor practice under Sec. 10 (b).

It can thus be appreciated that a union which does not, or cannot, comply with the stipulated sections invites its own destruction as an effective bargaining representative. The conditions precedent to the exercise of bargaining rights by labor organizations may be summarized as follows:

(1) Sec. 9 (f) requires the filing by the union with the Secretary of Labor of a copy of its constitution, bylaws, and a report covering its assets and liabilities, its receipts and disbursements, the names of its principal officers and their compensation, the amount of initiation fees and dues, and other matters of like import covering internal union operation.
(2) Sec. 9 (g) requires that all the above information be supplied annually to the Secretary of Labor, and that union members be given a copy of its financial reports.
(3) Sec. 9 (h) requires that the officers of both the national and local union contemporaneously file an affidavit (a) disavowing affiliation with, or membership in, the Communist party and (b) disavowing membership in any organization which advocates overthrow of the government by force or other illegal method. This affidavit need not be supplied by individual employees who file charges, and the General Counsel has ruled that noncompliance by the national or parent body does not disenable the local, if it complies therewith, from exercising full rights granted by the Act.

The *Herzog* decision below is one of the first pronouncements upon the constitutionality of the three disputed filing sections. In view of Supreme Court rulings on enactments imposing requirements similar to Secs. 9 (f) and (g), there is little doubt but that this Court will sustain their constitutional validity. There is some doubt about the first part of Sec. 9 (h) because of its tendency to abridge political belief, a right normally guaranteed against impairment by the First Amendment. The *Herzog* case has been included in full text because of the importance of these controverted sections to the labor movement. The dissenting opinion is presented in part for it reveals the line of argument that might be made to the Supreme Court on appeal by the Maritime Union.

NATIONAL MARITIME UNION OF AMERICA v. PAUL M. HERZOG

United States District Court, District of Columbia, 1948. 78 Fed. Supp. 146

WILBUR K. MILLER, A. J. The National Maritime Union of America, its president and two of its members, complain of the National Labor Relations Board. They seek to enjoin the enforcement of the provisions of the Labor Management Relations Act, 1947, which deny the privilege of being chosen as exclusive bargaining agent to a union which has not filed with the Secretary of Labor certain financial and structural information and the officers of which have not filed with the Board their affidavits denying membership in or affiliation with the Communist Party and denying belief in the overthrow of the United States Government by force; they say these provisions are unconstitutional.

Plaintiff union is a far flung organization of seamen. Its members are on ships in both oceans and in the Gulf of Mexico. During 1947 it expended more than $25,000 in attempting to recruit members among the sailors on ships in the Great Lakes. It was particularly interested in enrolling employees of the M. A. Hanna Company and the Wilson Transit Company, both of which operate fleets on the Lakes. The plaintiff labor organization had competition in that respect from the Seafarers International Union of North America, which was also attempting to organize the Hanna and Wilson seamen. Seafarers International filed petitions with the National Labor Relations Board pursuant to Sec. 9 (c) of the National Labor Relations Act, raising questions concerning representation for collective bargaining of the employees of these two shipping companies. Hearing of this, the plaintiff union intervened in the proceedings before the Board and sought the opportunity to be chosen as exclusive bargaining agent for the two bargaining units.

While these petitions were pending before the Board, Congress enacted the Labor Management Relations Act, 1947, commonly known as the Taft-Hartley Act, which contains the provisions the plaintiffs assail as violative of the Constitution. The defendant Board called the plaintiff union's attention to those portions of the new statute which make the filing of the statements and affidavits to which we have referred obligatory upon a union which desires the privilege, conferred by the Wagner Act as amended, of being selected by a majority vote in a bargaining unit as exclusive bargaining agent for all the employees in the unit.

Time for compliance was extended, first to September 30 and then to October 31, 1947, and the Maritime Union was warned by the Board that its non-compliance would make it ineligible to be chosen by the employees of the two companies to enjoy the statutory privilege of being their exclusive bargaining agent. But the union did not file the required statements with the Secretary of Labor and its officers did not file with the Board the affidavits contemplated by the Act. In November the Board ordered that elections be held pursuant to the petitions of the Seafarers International Union but denied to the Maritime Union a place on the ballots because of its refusal to comply with the provisions of the Taft-Hartley Act, which are now assailed by it. In due course the elections were held. The results were inconclusive in the *Hanna* case so that a run-off election will be conducted at a later date. A majority of the employees of the Wilson company voted against union representation. Thereafter this suit was filed.

It is necessary, we think, first to examine the defensive plea that the plaintiffs lack capacity to sue; for that purpose we shall consider separately the status of the four plaintiffs, three of whom are individuals, and the Act's impact upon them.

Although it is alleged that neither Curran, the president of the union, nor any other officer, has executed and filed the affidavit contemplated by Sec. 9 (h), the complaint, verified by Curran, contains this affirmative allegation:

". . . plaintiff Curran is not a member of the Communist Party, is not affiliated with said Party, does not believe in or advocate the overthrow of the government by force and violence, is not knowingly a member of and does not knowingly support or believe in any organization which advocates such doctrines, but has not executed the affidavit required by statute for the reason that it constitutes a trespass upon and an impairment of his right of free speech, press, and assembly, and for the further reason that the language of the statute is too vague, ambiguous and uncertain to establish a reasonable standard of conduct."

It thus appears that Curran has filed with us the affidavit which he asserts is unconstitutionally required by the statute. Filing with the Board an affidavit substantially similar to that contained in his complaint would prevent the denial of statutory benefits to his union as far as his position as president is concerned. He is, consequently, quite willing and able to make the statutory affidavit but refrains from making and filing it with the Board solely because he regards Sec. 9 (h) as unconstitutional. Since he is not adversely affected by the statute, no injury can come to him as an individual because of it. It follows that he asks us to answer an academic question for him, which the courts consistently decline to do. For this reason we conclude that Curran has no standing as an individual to maintain this suit. Neither can he do so in his capacity as president, for the union sues as an entity and its president's participation as a plaintiff is not necessary to enable that organization to state a cause of action. We conclude that Curran cannot sue in either capacity.

The other two individual plaintiffs are seamen who are members of the plaintiff union. They say that they will be deprived of representation by the collective bargaining agent of their choice; that they will be deprived of the opportunity to work under wage standards and working conditions established and maintained by the National Maritime Union, which wages and conditions are superior to any

others in the industry; and that they will be deprived of a voice in the establishment of their wage standards and hiring and working conditions unless they surrender their membership in the National Maritime Union.

These individual plaintiffs have no constitutional right to be represented by the collective bargaining agent of their choice. Each time a union, chosen by a bare majority vote in a bargaining unit, is certified as an exclusive bargaining agent for that unit, the employees who did not vote with the majority are deprived of representation by a collective bargaining agent of their choice. It has never been held that the Wagner Act is therefore invalid.

Furthermore, neither the Constitution nor any statute guarantees the members of the National Maritime Union the right to work under wage standards and working conditions established and maintained by that union. Nor will these two plaintiffs be deprived of a voice in the establishment of wage standards and hiring and working conditions unless they surrender their membership in the National Maritime Union. This is so because, if some union which complies with Sec. 9 is voted for by a majority of those in the bargaining units to which these individuals belong, they will have through that union, regardless of their non-membership in it, a voice in the establishment of their wage standards and hiring and working conditions. This will be true even though they continue to be members of the National Maritime Union. If their bargaining units should cast a majority vote against any union, these individuals will continue to have the right to bargain with their employers as individuals, and the National Maritime Union to which they belong will continue to have the right to bargain collectively, for its members only, with those employers. It is true that in the latter instance there is no coercion of law upon the employers to bargain with them or with their union; but they have no constitutional right to have that coercion put upon an employer, and no statutory right to it, except when an exclusive bargaining agent has been chosen by the employees.

From what has been said, it is seen that these two individuals make no showing in the complaint of an invasion of their constitutional rights and so they cannot maintain this action. Considered on a motion to dismiss, the complaint does not show injury to the plaintiff union's constitutional rights so as to give it standing to challenge the validity of the portions of the statute here involved for the reason that it is not affirmatively shown that the union has a Communist among its officers. It appears from an affidavit in the record, how-

ever, that at least one of its officers is a member of the Communist Party, a fact which makes it impossible for the union to qualify under Sec. 9 (h). The fact could be shown by a brief amended complaint. Since we have that information, we proceed to consider the constitutional validity of the three subsections of Sec. 9.

In entering upon a consideration of this case we bear in mind the elementary principle, which cannot too often be repeated, that a court usurps legislative functions when it presumes to adjudge a law void where the repugnancy between the law and the Constitution is not established beyond reasonable doubt. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other. So if a court be in doubt whether a law be or be not in pursuance of the Constitution—where the repugnancy is not clear and beyond doubt—it should refrain from making the law void in effect by its judgment, lest it should be really repealing a valid law by a legislative act, instead of declaring it void by a judicial act.

Quite apart from any statutory provision, employees have always had the right to organize trade unions, and through them to bargain collectively with employers concerning wages, hours, working conditions or any other appropriate subject. It is further true that a single employee has always had the right to bargain with his employer. Congress observed, however, that although employees had the right to organize and bargain, they did not have the power to do so on a basis of equality with employers; that this lack of power produced industrial unrest; and that strikes and other manifestations of such unrest interfered with the free flow of commerce.

To correct the situation so observed, and pursuant to its broad power to regulate interstate commerce and to promote the general welfare, Congress acted to give employees equality of bargaining power and so to remove the basic cause of discontent which tended to impede commerce. It added to the fundamental right of employees to organize and to bargain with their employers, certain important privileges and benefits which had not existed theretofore. Not only was the right to organize unions and to bargain through them affirmed, but also the privilege of becoming the exclusive bargaining agent of all employees in a bargaining unit was extended to a labor organization favored by a majority vote. This, to be sure, was an abridgment of the minority's fundamental rights, as well as those of employers. But the importance of the broad public purpose sought to be served justified the means employed.

Important in the consideration of the present case is the fact that, apart from the National Labor Relations Act, no union has the right to be exclusive bargaining agent. That extraordinary privilege is extended by statute and except for the Act, employers are not under compulsion to bargain collectively.

After some twelve years of experience with the Wagner Act, Congress said, after repeating the broad purpose of promoting the flow of commerce by protecting workmen's right to organize and attain equality of bargaining power, and by so removing what are known to be sources of industrial strife:

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed."

Having so declared, Congress proceeded to amend the Wagner Act by adding, *inter alia*, the three subsections of Sec. 9 which are here assailed. Provision is still made to extend to a labor organization the important privilege of being chosen by a simple majority as the exclusive bargaining representative of all employees, which the employer is required to recognize. But, in order to eliminate "certain practices by some labor organizations, their officers, and members" which "have the intent or the necessary effect of burdening or obstructing commerce," Congress decided to condition the privilege of being an exclusive bargaining agent with which an employer must deal. The union's position simply is that it lacked the power to do so in the manner set forth in Sec. 9 (f), (g) and (h). These provisions will be separately considered, except that we shall first take up one of the plaintiff's contentions that is common to all three. . . .

Turning then to subsection (f), we find that it forbids the Board to investigate a question of representation raised by a labor organization under subsection (c), or to entertain a petition to authorize or rescind a closed shop agreement, or to issue a complaint pursuant to a union's charge of unfair labor practices, unless the union shall theretofore have filed with the Secretary of Labor copies of its constitution and bylaws and a statement containing prescribed data concerning its financial setup and its general method of dealing with its members, and that it has furnished to each of its members a copy of the financial report required to be filed with the Department of Labor.

We shall first summarize the plaintiff's argument in support of its assertion that subsection (f) is unconstitutional. A direct reference to it in its principal brief is in these words:

". . . If the Congress felt that the information prescribed by Sec. 9 (f) was necessary, then there were other available means to require that the information be supplied; it was not necessary and, indeed, not reasonable to demand it under virtual threat of destruction."

The following appears in the reply brief of the union:

"The plaintiffs contest the validity of Section 9 (f) not because it withdraws benefits and not because it creates competition, but because, on the facts of this case, it directly impairs their basic liberties. It is not the withdrawal of a privilege which constitutes the illegal sanction, but the burden imposed on these rights. Cf. *Electric Bond & Share* v. *SEC*, 303 U.S. 419, 442; *Helvering* v. *Mitchell*, 303 U.S. 391, 399. But penalties which involve invasion of constitutionally protected activities are another matter. As *Thornhill* v. *Alabama*, *supra*, makes clear, a condition imposed upon the enjoyment of rights protected by the Bill of Rights cannot be saved by an argument of reasonableness. It is the mere exertion of the power, not the extent of its exercise, which is drawn in question. See also *Schneider* v. *Irvington*, 308 U.S. 147, 164. It is the plaintiffs' view that they need not establish that the reporting was unreasonable, but that the results which flow are beyond the power of Congress to impose."

Arguing orally at the bar, plaintiff's counsel said:

"I mean (f) and (h). We believe they are both unconstitutional because of the sanctions which are imposed. They are unconstitutional sanctions." . . .

The argument of the plaintiff, which we have summarized above, concedes that Congress had the right to require the reports called for by Sec. 9 (f) but asserts that it had no right to withhold from a union which refused to file them, the privilege conferred by the same statute of being chosen as exclusive bargaining agent. The "results that flow" from so doing will be virtual destruction of the union, plaintiff says. Those results flow, not from the operation of the statute, but from the plaintiff's willful refusal to furnish information which they admit is constitutionally required. . . .

The decision of Mr. Chief Justice Hughes, writing for the Court in *Electric Bond & Share Company* v. *Securities and Exchange Commission*, 303 U.S. 419, is further precedent in this connection. The Chief Justice stated that case in this manner, at pp. 426 and 427:

"The Securities and Exchange Commission brought this suit to enforce the provisions of Sections 4 (a) and 5 of the Public Utility Holding Company Act of 1935. 49 Stat. 803, 812, 813. These sections provide for registration with the Commission of holding companies, as defined, Sec. 5 (a), and prohibit the use of the mails and the instrumentalities of interstate commerce to those companies which fail to register. Sec. 4 (a). Section 5 (b) provides for the filing of a registration statement giving information with respect to the organization, financial structure and nature of the business of the registrant, together with various details of operations.

"Defendants, including intervenors, contested the validity of these provisions and sought by cross bill a declaratory judgment that the Act was invalid in its entirety, as being in excess of the powers granted to Congress by Sec. 8 of Article I, and in violation of Sec. 1 of Article I and of the Fifth and Tenth Amendments, of the Constitution of the United States. . . ."

In the course of the opinion (pp. 437 and 438), it is said:

". . . Regulation requiring the submission of information is a familiar category. Information bearing upon activities which are within the range of congressional power may be sought not only by congressional investigation as an aid to appropriate legislation, but through the continuous supervision of an administrative body. . . . An illustration of the latter is found in the statute relating to newspapers and periodicals, enjoying the privileges accorded to second class mail, which requires an annual statement setting forth the names and addresses of the editor, publisher, business manager, owner, and, in case of ownership by a corporation, the stockholders, and also the names of known bondholders or other security holder, together with a statement as to circulation. 39 U.S.C. 233. See *Lewis Publishing Co.* v. *Morgan,* 229 U.S. 288." . . .

Plaintiff's misconception of the nature of the Taft-Hartley Act lies at the root of much of its argument, and renders inapposite many of the authorities which it cites. That misconception is well illustrated by a sentence in its brief which reads, "This statute is not to be considered as one which confers a privilege upon conditions." That was indeed true of the original National Labor Relations Act which, before amendment, conferred the privilege of exclusive representation, with attendant coercion upon the employer without imposing any conditions upon the union. If the Taft-Hartley Act be considered alone, without any reference to the Wagner Act which it amends, it would be accurate to say, as plaintiff does, that it "is not to be con-

sidered as one which confers a privilege upon conditions." The Taft-Hartley Act, however, does not stand alone. It is amendatory of the Wagner Act and, upon adoption, became a part of it, so that the two measures are read together as the National Labor Relations Act, as amended. The Wagner Act conferred the privilege unconditionally. The Taft-Hartley Act imposed conditions. The united statutes confer the privilege upon conditions. . . .

We are clearly of the opinion, from the reasoning of the authorities cited, that Congress was acting within its power when it imposed upon unions desiring to continue to enjoy the new and valuable benefits of the Wagner Act the duty of first filing the statements described in Sec. 9 (f). And Sec. 9 (g), which requires annual renewals of the organizational data exacted by Sec. 9 (f), is, of course, equally impervious to the plaintiff's attack.

The foregoing discussion of Sec. 9 (f) and the conclusion we have reached substantially narrow the area of argument with respect to Sec. 9 (h), to a consideration of which we now turn. That the Wagner Act confers a privilege is beyond doubt; that a privilege granted by Congress may be conditioned by it is almost axiomatic and is thoroughly established as an elementary principle. Since we have already decided that the statutory privilege may be withheld for failure to conform to conditions which are constitutionally valid, our only task with respect to Sec. 9 (h) is to consider whether the condition there imposed upon the grant of privilege is repugnant to the basic law.

The condition imposed by Sec. 9 (h) is, of course, that the chance to be chosen as exclusive bargaining agent shall not be extended to a labor organization unless its officers have theretofore filed with the Board their affidavits that (a) they are not members of, or affiliated with, the Communist Party, and (b) they do not believe in the forcible overthrow of the United States Government. As to the second statement, plaintiff does not assert invalidity, so we are concerned only with the non-Communist angle of the affidavit.

It is forbidden by a federal statute "to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government" or to be a member of or affiliated with any society or group which teaches, advocates, or encourages such action. Despite this provision, we assume for the purposes of this case that it is not at present unlawful in America to belong to

the Communist Party or to believe in its doctrine. The problem, therefore, is whether, in offering to grant a legislative favor, the Congress may declare ineligible to receive it those who engage in an activity or an affiliation not per se illegal. Authorities already cited show that Congress may do so if the test of eligibility is not purely whimsical; that is, if it bears a reasonable relation to the legislative objective—if there is a substantial basis in fact for imposing the test.

Before the enactment of the Taft-Hartley Act, of which Sec. 9 (h) is a part, extensive hearings were conducted by congressional committees at which alarming evidence was presented that Communists in positions of authority in trade unions tend to foment industrial unrest and strife, not to attain legitimate economic aims, but to serve political purposes; that they thus impede the flow of commerce in the very teeth of the Act's purpose to promote it. Quotations from the abundant evidence presented to the committees would prolong this opinion unduly. Suffice it to say it afforded ample basis for the formation of a legislative policy to curb Communist influence in labor relations. . . .

For reasons heretofore given, we have concluded that Congress validly excluded from the enjoyment of the statutory advantage any union having a Communist as an officer. Plaintiff's real attack is made upon the second provision of Sec. 9 (h) which commands the Board to require the affidavit as proof of eligibility under the first provision of the section. That is, of course, a command to the Board to make an inquiry, to ask the question, "Are you a Communist?" In putting the query, the Board does nothing more than seek factual information to use as a guide in making the condition effective; for the Act does not require the question to be answered, does not punish the witness for declining to answer, and does not penalize him if he answers by saying he is a Communist. If the union official refuses to answer, or answering says he belongs to or is affiliated with the Communist Party, the only consequence is that the statute's benefit is withheld from his union—a consequence validly visited, as we have seen.

With the affidavit requirement thus established as nothing more than an administrative inquiry which Congress directed to be made, we find the following statement from *Barsky* v. *United States, supra*, to be directly applicable:

"If Congress has power to inquire into the subjects of Communism and the Communist Party, it has power to identify the individuals who believe in Communism and those who belong to the party. . . .

The problem relates to the power of inquiry into a matter which is not a violation of law."

Section 9 (h), in requiring the affidavit, seeks nothing except to identify the individuals who believe in Communism and those who belong to the Party.

The problem before us is thus reduced to the question whether the Board's permissible effort, in the course of its regulation of labor unions, to identify the individuals who are Communists violates the First, Fifth and Ninth Amendments when it takes the form of asking them to identify themselves.

Plaintiff says Sec. 9 (h) abridges the freedom of its officer not to say he is a Communist. Freedom of speech is said to include freedom of silence. If this provision of the Act were a simple legislative requirement, standing entirely alone and unrelated to a legitimate legislative purpose, that union officers deny under oath membership in or affiliation with the Communist Party, the point might be well taken. But this Act does not require any union officer to say whether he is a Communist. He may be one and remain silent about it, as is his constitutional right; and the Act under consideration will not disturb him. It is therefore clearly wrong to say that Sec. 9 (h) impinges on a union officer's freedom of speech.

But if a union officer exercises the constitutional right of refraining from saying whether he is a Communist, his union is forbidden the opportunity to enjoy the statutory benefit as long as he remains an officer. Unhampered is his freedom of speech and silence; he may freely choose to speak or not to speak. The "result that flows" from his silence, if he chooses that course, is the denial of a statutory privilege to his union. Neither the officer nor his union has a constitutional right to the advantage offered by the Act; consequently, if a union officer stands upon his freedom of speech and declines to execute the affidavit, it is his decision to remain silent which excludes his union. His voluntary act deprives his organization, not of a constitutional right, but of a statutorily created and extraordinary privilege. Thus again it seems indisputable that the non-Communist oath provision does no violence to a union officer's freedom of speech.

Plaintiff further asserts that it and its members are deprived of liberty without due process of law, which is forbidden by the Fifth Amendment. Its theory is that liberty of association is diminished, if not destroyed, without due process, and also that the right peaceably to assemble or associate is denied, contrary also to the First Amendment. What has been said earlier in this opinion sufficiently

shows, we think, that freedom of assembly is not infringed and that there is no deprivation of liberty of association without due process of law, or at all.

Plaintiff characterizes Sec. 9 (h) as a bill of attainder, a legislative act which inflicts punishment without a judicial trial. It is not punishment to withhold the grant of a privilege from one who cannot or will not meet the valid conditions upon which it is offered. Cf. Mr. Justice Frankfurter's concurring opinion in *United States* v. *Lovett,* 328 U.S. 303, 324. . . .

Finally, we consider the plaintiff's contention that "The statute does not establish ascertainable standards of conduct; its language is vague and indefinite." The difficulty which the Supreme Court experienced in defining the word "affiliation" is cited in support of that charge against the statute. It was in *Bridges* v. *Wixon, supra,* that the Court found definition difficult and concluded that affiliation "imports . . . less than membership but more than sympathy."

In that case it was necessary to ascertain from extrinsic evidence whether Bridges was "affiliated." In the present case, there is no such necessity. A union official is simply asked to say whether he is "affiliated"; i.e., whether he considers himself as affiliated. We may safely assume that any man intelligent and schooled enough to be chosen as a union official will be familiar with the word "affiliated" and will have a definite idea of its meaning. His notion of the word's significance may not coincide with that of another, and may not be what a dictionary gives. But he is not called upon to define "affiliated" in his affidavit. He is asked to say whether he considers himself affiliated in the sense in which that word has significance to him. There is no vagueness or uncertainty in his own personal definition. . . .

Instead of being convinced beyond reasonable doubt that Sec. 9 (h) of the statute is void for violating the basic law, we hold the considered view that the subsection is a constitutional exercise of congressional power to prescribe qualifications which must be possessed by those who ask to enjoy the extraordinary privilege of acting as exclusive bargaining agent. It would be unrealistic to say, in the light of all that appears, that the presence of Communists in key positions in labor relations does not constitute a clearly discernible and imminent threat to important national interests. Since we are of the opinion that all three provisions of the statute assailed by the plaintiffs were enacted and may be enforced without offense to the Constitution, we shall dismiss the complaint.

PRETTYMAN, A. J. (dissenting): I think that the motions to dismiss and for summary judgment should be denied and that evidence should be taken upon the question of fact raised by one of the constitutional issues. That issue is the validity of the clause of Section 9 (h) of the Act which provides that the facilities of the Board shall not be available to a labor organization unless each of its officers swears "that he is not a member of the Communist Party or affiliated with such party." The question of fact is whether the nature of the Communist Party is such that a member of it would, or would likely, impede the objectives of the Act.

The Court is of the view that the conclusions of Congress must be accepted if the test itself bears a reasonable relation to the legislative purpose, and that the finding of constitutionality may be made upon evidence taken by committees of the Congress and "facts of current history" of which the court will take judicial notice. I am of the view that when an act of Congress abridges freedom of speech, press and assembly, the court itself, by an independent examination and upon evidence presented to it, must determine the actuality of the necessity for the abridgement. . . .

Case Questions

1. How did this controversy arise?
2. What is the principal contention of the Maritime Union?
3. Was Curran a Communist? Why does he refuse to file the affidavit?
4. Has Curran capacity to sue? Have the two individual seamen capacity to sue? Explain.
5. Upon what basis does the court entertain this suit for injunction by the Maritime Union?
6. What affirmative requirements are embodied in Sec. 9 (f), (g) and (h) of the amended Act?
7. What rights are lost by unions that fail to file as required?
8. Have regulations requiring the submission of information been formerly upheld? What type of information?
9. What is the union's "misconception" of the Taft-Hartley Act?
10. Is the Communist party *per se* illegal?
11. Answer plaintiff's argument, "Freedom of speech included freedom of silence."
12. What is a bill of attainder?
13. Does the majority opinion conclude that Communism is "an imminent threat to important national interests"? On what evidence?
14. What weakness does the minority find in the majority opinion? How does the minority opinion propose to remedy it?

SECTION 69. REMEDIAL POWERS OF THE NATIONAL LABOR RELATIONS BOARD

In Section 56 of this volume are to be found outlined the broad express and implied powers of the Board as to the dual aspect of its duties, including representation proceedings, which were further investigated in Section 67, and the prevention of unfair labor practices, which are the subject of this section. We shall not again detail the specific manner in which the remedy is pursued by the Board through the courts; rather, our purpose here is to investigate the limitations placed upon Board powers in their pursuit of a remedy.

All administrative bodies, of which the National Labor Relations Board is representative, are subject to the rule that their proceedings must conform to due process of law; their findings of fact, if supported by evidence, may not be disturbed by judicial review; generally a dissatisfied party may not secure a trial *de novo*, or from the beginning, in the courts; in the case of the National Labor Relations Act, the punishment prescribed by the Board for violations must be remedial and not punitive or arbitrary in tenor. Within this broad framework, the N.L.R.B. may make its investigation, conduct a hearing, and file an order prescribing such remedies, including the posting of notices to employees, reinstatement, back pay, orders to cease and desist, supported by injunction if required, disestablishment of company-dominated unions, and other like measures, as will effectuate the purposes of the Act to the end that the effects of the commission of past unfair labor practices are not only dissipated, but are prevented from recurring by virtue of the sanction imposed upon the violator. Court enforcement and review of Board orders is provided by Secs. 10 (e) and (f) of the Act of 1947.

The entire gamut of administrative procedure and remedy is covered in the *Prettyman* decision reprinted in this section. The defense of the employer was that the Board proceedings violated due process in that the alleged unfair labor practices were committed in Michigan and the remedy pursued in Washington, D. C. May the doctrine of *forum non conveniens* [1] be interposed in defense to proceedings by an administrative body? What constitutes due process of law?

NATIONAL LABOR RELATIONS BOARD v. PRETTYMAN

Circuit Court of Appeals, Sixth Circuit, 1941. 117 Fed. (2d) 786

HAMILTON, C. J. This is a proceeding by the National Labor Relations Board to enforce its order issued pursuant to Section 10 (c)

[1] The place of trial is inconvenient to defend the suit.

of the National Labor Relations Act . . . against respondents, Horace G. Prettyman and Arthur J. Wiltse, co-partners, doing business as the Ann Arbor Press.

After charges were filed against respondents by the International Typographical Union, a labor organization, the petitioner issued a complaint against respondents on April 23, 1938, alleging, in addition to jurisdictional matters, that since September 1, 1937, they had engaged in unfair labor practices within the meaning of Section 8 (1), (2), (3) and (5) of the Act.

Respondents answered and denied the jurisdiction of the Board and all allegations of the complaint. An examiner was designated and a hearing was had in which respondents participated and at which proof was heard. The Trial Examiner filed his intermediate report containing findings of fact and conclusions of law supporting the allegations of the complaint. Respondents filed exceptions which, after hearing, were overruled by the Board and a finding made that respondents had violated Section 8 (1), (2), (3), (5) and Section 2 (6), (7) of the Act. The Board issued a cease and desist order requiring the respondents (a) to withdraw all recognition from and completely disestablish an Association of its employees, (b) to bargain collectively with the International Typographical Union as a representative of its employees, (c) upon application, to reinstate their employees who went on strike and those who had been discriminatorily discharged for union activities, placing those for whom employment was not immediately available upon a preferential list, (d) to make whole the employees discriminated against for union activity for any loss of pay they may have suffered by reason of such discrimination and to make whole for loss of pay any strikers who, five days after application, were not reinstated or placed upon a preferential list, and (e) to post appropriate notices.

Petitioner seeks to have the cease and desist order enforced.

Respondents resist enforcement on the following grounds: (1) That their business was intrastate and did not directly affect commerce among the states; (2) That the Board's hearings were arbitrary and they were denied due process of law; (3) That the Board based its order in part on incompetent evidence and that its order is not supported by substantial evidence; (4) That the Board erroneously denied the complainant's motion to dismiss the proceeding; (5) That they had settled their controversy with the complainants before the Board entered its order.

Respondents are co-partners, operating a commercial printing establishment with their only plant and offices at Ann Arbor. . . .

Under the Supreme Court's latest pronouncement of constitutional power, the right of Congress to regulate interstate commerce is plenary and extends to all such commerce whether great or small. The amount thereof is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from its regulatory measure by express provision or fair implication. *National Labor Board* v. *Fainblatt*, 306 U.S. 601, 606, 59 S. Ct. 668, 83 L. Ed. 1014. . . .

Under these cases the respondents' business sufficiently affected interstate commerce to bring it within the National Labor Relations Act. The Board had jurisdiction.

Frank H. Bowen, Regional Director of the National Labor Relations Board for the Seventh Region, which includes the state of Michigan, pursuant to charges filed by the International Typographical Union issued a complaint March 18, 1938, against respondent and issued notice of a hearing at Ann Arbor, Michigan, on March 31, 1938. On March 30, 1938, respondents instituted an action in chancery in the Circuit Court for the County of Washtenaw against Frank H. Bowen, Regional Director for the Seventh Region of the National Labor Relations Board . . . seeking to enjoin the defendants, officers of the National Labor Relations Board, from holding a hearing on March 31, 1938, or at any other time on the complaint issued against them by the National Labor Relations Board and enjoining defendants Reifin and Falstreaux from interfering with respondents' business by intimidating and coercing employees and former employees into joining International Typographical Union 154, and by making false statements to customers of respondents and false statements of their relations with their employees. They prayed for other relief not material here.

Without notice or hearing on March 30, 1938, the Michigan Court issued an injunction conformable to the prayer of respondents' petition. On April 18, 1938, the National Labor Relations Board by its attorney, Harold A. Cranefield, filed a motion in the State action for the dissolution of the injunction and that the bill of complaint be dismissed. The court requested briefs and took the motions under advisement and on November 22, 1938, entered a decree dissolving the injunction and dismissing the bill of complaint.

The National Labor Relations Board abandoned the proceedings against complainant commenced March 18, 1938, and instituted the present proceedings. The unfair labor practices on which the present complaint is based were identical with the ones on which the hearing was enjoined by the Michigan Court.

The charges on which petitioner issued its complaint were filed with the Board in Washington, D. C., and notice of a hearing there was mailed to respondents April 25, 1938, and a hearing had from May 2 through May 12, 1938, before a Trial Examiner duly designated by the Board. Petitioner admits that the hearing was had in Washington solely to avoid interference by the State Courts of Michigan.

On April 30, 1938, respondents moved the Board to abandon the hearing in Washington on the ground that their residences and place of business and where the controversy arose with their employees was in the city of Ann Arbor, approximately 700 miles from Washington and that the trial in Washington would place an unreasonable burden on them in bringing witnesses to the hearing and that such a proceeding was unreasonable and arbitrary and denial of due process. They further claimed they were financially unable to make a proper defense to the matters set forth in the complaint at such a great distance from their residences and place of business. They further stated they were compelled to answer the complaint within five days and be prepared to go into a trial of the issues within nine days. Their motion was supported by the affidavit of the respondent, Arthur J. Wiltse. The motion was denied.

Respondents insist that the present hearing did not comport with the standards of fairness inherent in procedural due process for the reasons that their place of business, all of their records and employees, and all of their witnesses lived six hundred and fifty miles from Washington and that all of their employees who had any knowledge of the matters inquired about were their executives and to have transported them to Washington would have required the closing of their plant for ten days and imposed on them a heavy financial burden.

No particular form of procedure is required to constitute due process in administrative hearings. Its requirement must be measured in the light and purpose of such hearings. Under the National Labor Relations Act, hearings are not of an executive character purely, but require the taking and weighing of evidence, determination of facts based upon consideration of evidence and the making of an order supported by such findings. Proceedings under the Act in their essential aspects resemble judicial hearings, and may be characterized as quasi judicial. . . .

An employer is entitled to a hearing of and decision on the charges against him according to the fundamental principles that inhere in

due process of law, and indispensable requisites of such hearings are that the course of proceedings shall be appropriate to the case and just to the employer; that he shall be notified of the charges against him in time to meet them and shall have an opportunity to be heard and cross-examine the witnesses against him and shall have time and opportunity at a convenient place, after the evidence against him is produced and known to him, to produce evidence and witnesses to refute the charges, and that the decision of the Board shall be governed by and based upon the evidence produced at the hearing.

Under the provisions of the Act . . . the principal office of the Board is in the District of Columbia, but it may meet and exercise any or all of its powers in any place in the United States and it may delegate its power to hear complaints to any of its agents who may prosecute the inquiry in any part of the United States.

The petitioner urges on us that under the above provisions of the Act, it has the uncontrolled discretion to hold hearings at whatever point it deems proper within the United States and its territories. To this we cannot agree. In the Act, the Congress manifests an intention to create a system for the prevention of controversies between employers and employees and it is the duty of the court to effectuate that purpose by such construction as will make the system consistent in all of its parts and uniform in all of its operations. To this end, the procedure must harmonize with the characteristics of our system of government that the law is supreme, which means, in the first place, the absolute supremacy or preponderance of regular law as opposed to the influence of arbitrary power. It excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Where great inconvenience will result to persons affected by a statute from a particular construction, that construction should be avoided unless the meaning of the legislature is so plain no other is possible. . . .

The power conferred on the Board by the Act to hold hearings anywhere within the territorial limits of the United States, was not conferred for its sole benefit, but for the benefit also of those subject to the provisions of the Act. It was not intended that those affected by the Act should be penalized by being required to travel and transport witnesses unreasonable distances to attend hearings pursuant to complaint, nor was it intended that the Act should be used as an instrument of intimidation or oppression on those affected by it. One of the purposes to be accomplished in the administration of every law is the maintenance of public confidence in the value of the meas-

ure. This idea was clearly expressed in *Morgan* v. *United States*, 304 U.S. 1, 14, 58 S. Ct. 773, 775, 999, 82 L. Ed. 1129, in which it was said:

"The first question goes to the very foundation of the action of administrative agencies intrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the Legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.' "

It is the practice of the Board to hold hearings at places convenient to the parties and petitioner assigns as its reason for departing from this practice that the respondents obtained from the Circuit Court of Washtenaw County an injunction prohibiting the hearing at Ann Arbor. The action of the respondents in the State Court was in good faith. They there contended they were engaged exclusively in intrastate commerce, for which reason the Board lacked jurisdiction, and the Court sustained them. The Board was not compelled to litigate its jurisdiction in the State Court of Michigan, but its representative voluntarily participated in that hearing. After an unfavorable decision, the Board sought to avoid jurisdiction of the State Court, by resorting to its alleged powers under the statute to institute a new proceeding beyond the reach of the Michigan courts and at a place remote from all the necessary witnesses. If the Board had authority to thus proceed, it could have issued its citation to respondents to appear in St. Andrews, Maine, or Fort Dick, California. No sensible rule of statutory construction would support such an interpretation of the statute and such a course of conduct would shortly bring a beneficient statute into disrepute. Fair play, under the statute, required the Board to hold a hearing at a place convenient to each of the parties.

Section 10 (e) of the Act, 29 U.S.C.A. Sec. 160 (e), authorizes this court, when a petition for enforcement of the Board's order is brought before it, to consider any objection made before the Board

or one of its agents, or to pass upon objections not so raised, if the circumstances are such as to justify it.

Congress has given the Board the authority to administer the National Labor Relations Act, subject to the supervisory power of the Court of Appeals, and the court must act within the bounds of the statute, without intruding upon the administrative province, but it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. *Ford Motor Company* v. *National Labor Relations Board,* 305 U.S. 364, 373, 59 S. Ct. 301, 83 L. Ed. 221. The court is not compelled to enforce an order of the Board which is impregnated with a hearing not comporting with the standards of fairness inherent in procedural due process. So scrupulous are our courts to maintain the supremacy of the ordinary law in cases where officers of the Government itself are concerned, they will not permit the Government to profit in any way to wrongs which its officers have committed. . . .

"The maintenance of proper standards on the part of administrative agencies in the performance of their quasi judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play." *Morgan* v. *United States, supra.*

Even if the order of the Board were justified by the facts, which we are not here deciding, the necessity of according due process of law to the respondents is not obviated. No order is just if obtained without due process of law; otherwise, the Board could enter orders without a hearing. . . .

On November 23, 1938, the International Typographical Union, which had filed the charges that resulted in the complaint against respondents, petitioned the Board to dismiss the charges, because an amicable settlement of the differences had been made. The Board denied the motion. Respondents insist that as the controversy between them and their employees had been settled, the Board, in the exercise of a reasonable discretion, should have ended the hearing and for this alleged abuse they urge on us to remand the cause with directions to dismiss. This we cannot do under the Act, as it does not provide individuals with administrative remedy for private

wrongs. An employee or an association of such persons, if deeming themselves aggrieved, because of unfair labor practices on the part of an employer, may make complaint to the Board against the alleged wrongdoer, but under the statute the formal complaint must be brought in the Board's name and prosecuted wholly by it at Government expense. The power to prevent unfair labor practices is vested by Congress in the Board alone. . . .

The purpose of the National Labor Relations Act is to promote peaceful settlement of disputes between employers and employees by providing legal remedies for the invasion of employees' rights of self-organization and collective bargaining, and at any stage of the proceedings, after complaint has been filed, when the object of the complaint has been accomplished, the proceedings should be brought to an end, but the Board itself representing the United States is a party in interest relating to unfair labor practices under the Act and any agreement between the parties settling their differences must have the approval of the Board. No evidence appears as to the terms of the settlement. Under the facts here, there is no abuse of the Board's discretion.

Since the Board is not empowered to initiate proceedings on its own motion but must await the filing of charges by employees [or employers] before issuing a complaint, and since there has been, as indicated, an amicable settlement of the differences between the respondents and the representatives of their employees in a collective bargaining agreement, and the right of the Board to proceed, notwithstanding the request of the complaining employees that their charges be withdrawn, has now been vindicated, it may appear to the satisfaction of the Board that the public interest no longer requires the renewal of proceedings in a situation where a specific grievance has already been compromised.

An order will be entered denying the petitioner's petition in its entirety but without prejudice to the right of the Board to conduct a new hearing at Ann Arbor, Michigan.

Case Questions

1. State the facts which led the N.L.R.B. to institute enforcement proceedings in Washington.
2. What are the major defenses interposed by Prettyman?
3. Indicate the requirements of an administrative hearing conducted within the bounds of due process of law.
4. Does the Act give the Board power to conduct hearings anywhere?
5. Why does the court refuse to dismiss the action?
6. What does it order the Board to do?

SECTION 69. REMEDIAL POWERS OF THE NATIONAL LABOR RELATIONS BOARD (Continued)

The National Labor Relations Act of 1947 has deprived the Board of some of its powers under the Wagner Act and added others. Principal among the latter is the power to issue orders running against labor organizations that commit unfair labor practices. If, therefore, a violation of Sec. 8 (b) is found, the Board may take appropriate action against a labor organization in the same manner, including affirmative action such as the payment of back pay if the union has coerced an unfair discharge, as against an employer. See Sec. 10 (c) which now includes labor organizations as well as employers.

In the usual case, reinstatement with or without back pay is the primary remedy imposed by the Board on employers whose employees go on strike in protest against the commission of employer unfair labor practices. If employees are discriminatorily discharged for testifying under the Act or for organizing activity, both reinstatement and back pay are ordered. If the union engages in an illegal strike, neither remedy may be offered them, even though the strike is in protest of an employer unfair labor practice. Economic strikers may be ordered reinstated with back pay if the employer has not secured effective replacements. In no case may reinstatement be ordered if the employee has "secured regular and substantially equivalent employment" elsewhere. See Sec. 2 (3). The Board has also been upheld by the Supreme Court in a case of employer domination where the Board not only ordered disestablishment of the dependent union, but also required the employer to repay to employees dues and assessments collected from them by the company-dominated union, 319 U.S. 533, 1943.

Back pay orders generally run from the date the employer consummated the illegal discharge to the date that he offers reinstatement, less the earnings of the worker on other jobs during the period of discharge. In the *Republic* decision of 1940, 311 U.S. 7, the Board ordered the steel company to make such payment in accord with the rule above. Some of the workers had secured W.P.A. employment in the interim. The amount so received by the employees from the government was ordered deducted from back pay payments to them. The Board further ordered the W.P.A. monies to be reimbursed to the government. The court refused to uphold this last portion of the order, since it held that the government had received the benefit of service reasonably worth the amounts paid.

The employee is under a duty to mitigate damages. If he refuses other employment or fails to make a sincere effort to locate it, the Board, in its discretion, may make appropriate deduction therefor from the back pay compensation awarded. See 128 Fed. (2d) 67. Unemployment insurance and gifts received by the employee during his period of discharge are not deductible. Also deductible are amounts which the employee did not earn due to illness or disability or the seasonal character of the employer's business. In 133 Fed. (2d) 295, it was held that the duty to reinstate terminates with the good faith discontinuance of the employer's business, but if the employer deliberately closes down operations to stifle the union, the Board may order reinstatement, notwithstanding that to comply he must resume operations. 315 U.S. 100. The N.L.R.B. has exclusive power over back pay orders, 309 U.S. 261, and the employee may not individually enforce the right as a personal claim against the employer. Public, not private, rights are protected by the Act.

The Board's discretion in awarding reinstatement and back pay may not be abused. A conditioning of its powers is apparent in the *Fansteel* case, reprinted in this section, which involves the usual form of sitdown strike. The strike was called in retaliation for employer unfair labor practices. Will the illegality of a strike as to its method or place prove a bar to reinstatement and back pay if the employer also comes into court with unclean hands? How broad is the Board's power to issue orders which "effectuate the purposes of the Act?"

NATIONAL LABOR RELATIONS BOARD v. FANSTEEL METALLURGICAL CORP.

Supreme Court of the United States, 1939. 306 U.S. 240, 59 Sup. Ct. 490

HUGHES, C. J. The Circuit Court of Appeals set aside an order of the National Labor Relations Board requiring respondent to desist from labor practices found to be in violation of the National Labor Relations Act and to offer reinstatement to certain discharged employees with back pay. While the other portions of the Board's order are under review, the principal question presented relates to the authority of the Board to require respondent to reinstate employees who were discharged because of their unlawful conduct in seizing respondent's property in what is called a "sitdown strike."

Respondent, Fansteel Metallurgical Corporation, is engaged at North Chicago, Illinois, in the manufacture and sale of products made

from rare metals. No question is raised as to the intimate relation of its operations to interstate commerce or the effect upon that commerce of the unfair labor practices with which the corporation is charged. The findings of the Board show that in the summer of 1936 a group of employees organized Lodge 66 under the auspices of a committee of the Amalgamated Association of Iron, Steel and Tin Workers of North America; that respondent employed a "labor spy" to engage in espionage within the Union and his employment was continued until about December 1, 1936; that on September 10, 1936, respondent's superintendent was requested to meet with a committee of the Union and the superintendent required that the committee should consist only of employee's of five years' standing; that a committee, so constituted, presented a contract relating to working conditions; that the superintendent objected to "closed-shop and check-off provisions" and announced that it was respondent's policy to refuse recognition to "outside" unions; that on September 21, 1936, the superintendent refused to confer with the committee in which an "outside" organizer had been included; that meanwhile, and later, respondent's representatives sought to have a "company union" set up, but the attempt proved abortive; that from November, 1936, to January, 1937, the superintendent required the president of the Union to work in a room adjoining the superintendent's office with the purpose of keeping him away from the other workers; that while in September, 1936, the Union did not have a majority of the production and maintenance employees, an appropriate unit for collective bargaining, by February 17, 1937, 155 of respondent's 229 employees in that unit had joined the Union and had designated it as their collective bargaining representative; that on that date, a committee of the Union met twice with the superintendent, who refused to bargain with the Union as to rates of pay, hours and conditions of employment, the refusal being upon the ground that respondent would not deal with an "outside" union.

Shortly after the second meeting in the afternoon of February 17th the Union committee decided upon a "sitdown strike" by taking over and holding two of respondent's "key" buildings. These were thereupon occupied by about 95 employees. Work stopped and the remainder of the plant also ceased operations. Employees who did not desire to participate were permitted to leave, and a number of Union members who were on the night shift and did not arrive for work until after the seizure did not join their fellow members inside the buildings. At about six o'clock in the evening the superintendent,

accompanied by police officials and respondent's counsel, went to each of the buildings and demanded that the men leave. They refused, and respondent's counsel "thereupon announced in loud tones that all the men in the plant were discharged for the seizure and retention of the buildings." The men continued to occupy the buildings until February 26, 1937. Their fellow members brought them food, blankets, stoves, cigarettes and other supplies.

On February 18th, respondent obtained from the state court an injunction order requiring the men to surrender the premises. The men refused to obey the order and a writ of attachment for contempt was served on February 19th. Upon the men's refusal to submit, a pitched battle ensued and the men successfully resisted the attempt by the sheriff to evict and arrest them. Efforts at mediation on the part of the United States Department of Labor and the Governor of Illinois proved unavailing. On February 26th the sheriff with an increased force of deputies made a further attempt and this time, after another battle, the men were ousted and placed under arrest. Most of them were eventually fined and given jail sentences for violating the injunction.

Respondent on regaining possession undertook to resume operations, and production gradually began. By March 12th the restaffing was approximately complete. A large number of the strikers, including many who had participated in the occupation of the buildings, were individually solicited to return to work with back pay but without recognition of the Union. Some accepted the offer and were reinstated; others refused to return unless there were union recognition and mass reinstatement, and were still out at the time of the hearing before the Board. New men were hired to fill the positions of those remaining on strike.

Meanwhile the Union was not inactive. On March 3d and 5th there were requests, which respondent refused, for meetings to consider the recognition of the Union for collective bargaining. There was no collective request for reinstatement of all the strikers. The position of practically all the strikers who did not go back, and who were named in the complaint filed with the Board, was "that they were determined to stay out until the Union reached a settlement with the respondent."

Early in April a labor organization known as Rare Metal Workers of America, Local No. 1, was organized among respondent's employees. There was a meeting in one of respondent's buildings on April 15th, which was attended by about 200 employees, and the

balloting resulted in a vote of 185 to 15 in favor of the formation of an "independent" organization. Another meeting was held soon after for the election of officers. Respondent accorded these efforts various forms of support. The Board concluded that the Rare Metal Workers of America, Local No. 1, was the result of the respondent's "anti-union campaign" and that respondent had dominated and interfered with its formation and administration.

Upon the basis of these findings and its conclusions of law, the Board made its order directing respondent to desist from interfering with its employees in the exercise of their right to self-organization and to bargain collectively through representatives of their own choosing as guaranteed in Sec. 7 of the Act; from dominating or interfering with the formation or administration of the Rare Metal Workers of America, Local No. 1, or any other labor organization of its employees or contributing support thereto; and from refusing to bargain collectively with the Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 66, as the exclusive representative of the employees described. The Board also ordered the following affirmative action which it was found would "effectuate the policies" of the Act;—that is, upon request, to bargain collectively with the Amalgamated Association as stated above; to offer, upon application, to the employees who went on strike on February 17, 1937, and thereafter, "immediate and full reinstatement to their former positions," with back pay, dismissing, if necessary, all persons hired since that date; to withdraw all recognition from Rare Metal Workers of America, Local No. 1, as a representative of the employees for the purpose of dealing with respondent as to labor questions, and to "completely disastablish" that organization as such representative; and to post notices of compliance. 5 N.L.R.B. 930.

The Board found that respondent had not engaged in unfair labor practices by "discrimination in regard to hire or tenure of employment" in order to "encourage or discourage membership in any labor organization," and accordingly the complaint under Sec. 8 (3) of the Act was dismissed. Id.

On respondent's petition, the Circuit Court of Appeals set aside the Board's order, 98 F. 2d 375, and this Court granted certiorari, 305 U.S. 590.

First. The unfair labor practices.—The Board concluded that by "the anti-union statements and actions" of the superintendent on September 10, 1936, and September 21, 1936, by "the campaign to introduce into the plant a company union," by "the isolation of the

Union president from contact with his fellow employees," and by the employment and use of a "labor spy," respondent had interfered with its employees, and restrained and coerced them, in the exercise of their right to self-organization guaranteed in Sec. 7 of the Act, and thus had engaged in an unfair labor practice under Sec. 8 (1) of the Act.

Owing to the fact that in September, 1936, the Union did not have a majority of the employees in the appropriate unit, the Board held that it was precluded from finding unfair labor practices in refusing to bargain collectively at that time, but the Board found that there was such a refusal on February 17, 1937, when the Union did have a majority of the employees in the appropriate unit, and that this constituted a violation of Sec. 8 (5).

These conclusions are supported by the findings of the Board and the latter in this relation have substantial support in the evidence.

Second. The discharge of the employees for illegal conduct in seizing and holding respondent's buildings.—The Board does not now contend that there was not a real discharge on February 17th when the men refused to surrender possession. The discharge was clearly proved.

Nor is there any basis for dispute as to the cause of the discharge. Representatives of respondent demanded that the men leave, and on their refusal announced that they were discharged "for the seizure and retention of the buildings." The fact that it was a general announcement applicable to all the men in the plant who thus refused to leave does not detract from the effect of the discharge either in fact or in law.

Nor is it questioned that the seizure and retention of respondent's property were unlawful. It was a high-handed proceeding without shadow of legal right. It became the subject of denunciation by the state court under the state law, resulting in fines and jail sentences for defiance of the court's order to vacate and in a final decree for respondent as the complainant in the injunction suit.

This conduct on the part of the employees manifestly gave good cause for their discharge unless the National Labor Relations Act abrogates the right of the employer to refuse to retain in his employ those who illegally take and hold possession of his property.

Third. The authority of the Board to require the reinstatement of the employees thus discharged.—The contentions of the Board in substance are these: (1) That the unfair labor practices of respondent led to the strike and thus furnished ground for requiring the

reinstatement of the strikers; (2) That under the terms of the Act employees who go on strike because of an unfair labor practice retain their status as employees and are to be considered as such despite discharge for illegal conduct; (3) That the Board was entitled to order reinstatement or reemployment in order to "effectuate the policies" of the Act.

(1) For the unfair labor practices of respondent the Act provided a remedy. Interference in the summer and fall of 1936 with the right of self-organization could at once have been the subject of complaint to the Board. The same remedy was available to the employees when collective bargaining was refused on February 17, 1937. But reprehensible as was that conduct of the respondent, there is no ground for saying that it made respondent an outlaw or deprived it of its legal rights to the possession and protection of its property. The employees had the right to strike but they had no license to commit acts of violence or the seizure of their employer's plant. We may put on one side the contested questions as to the circumstances and extent of injury to the plant and its contents in the efforts of the men to resist eviction. The seizure and holding of the buildings was itself a thing apart from any acts of sabotage. But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its goods, or the despoiling of its property or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society.

As respondent's unfair labor practices afforded no excuse for the seizure and holding of its buildings, respondent had its normal rights of redress. Those rights, in their most obvious scope, included the right to discharge the wrongdoers from its employ. To say that respondent could resort to the state court to recover damages or to procure punishment, but was powerless to discharge those responsible for the unlawful seizure would be to create an anomalous distinction for which there is no warrant unless it can be found in the terms of the National Labor Relations Act. We turn to the provisions which the Board invokes.

(2) In construing the Act in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, 46, we said that it "does not interfere with the normal exercise of the right of the employer

to select its employees or to discharge them"; that the employer "may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion." . . .

We think that the true purpose of Congress is reasonably clear. Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra,* p. 33. To assure that protection, the employer is not permitted to discharge his employees because of union activity or agitation for collective bargaining. *Associated Press* v. *National Labor Relations Board, supra.* The conduct thus protected is lawful conduct. . . .

(3) The Board contends that its order is valid under the terms of the Act "regardless of whether the men remained employees." The Board bases its contention on the general authority, conferred by Sec. 10 (c), to require the employer to take such affirmative action as will "effectuate the policies" of the Act. Such action, it is argued, may embrace not only reinstatement of those whose status as employees has been continued by virtue of Sec. 2 (3), but also a requirement of the "reemployment" of those who have ceased to be employed.

The authority to require affirmative action to "effectuate the policies" of the Act is broad but it is not unlimited. It has the essential limitations which inhere in the very policies of the Act which the Board invokes. Thus in *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, we held that the authority to order affirmative action did not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board is of the opinion that the policies of the Act may be effectuated by such an order. We held that the power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. . . .

We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate

any policy of the Act but would directly tend to make abortive its plan for peaceable procedure.

What we have said also meets the point that the question whether reinstatement or reemployment would effectuate the policies of the Act is committed to the decision of the Board in the exercise of its discretion subject only to the limitation that its action may not be "arbitrary, unreasonable or capricious." The Board recognizes that in "many situations" reinstatement or reemployment after discharge for illegal acts would not be proper, but the Board insists that it was proper in this instance. For the reasons we have given we disagree with that view. We think that a clearer case could hardly be presented and that, whatever discretion may be deemed to be committed to the Board, its limits were transcended by the order under review. . . .

Sixth. The requirement that respondent shall bargain collectively with Lodge 66 of the Amalgamated Association as the exclusive representative of the employees in the described unit.

Respondent resumed work about March 12, 1937. The Board's order was made on March 14, 1938. In view of the change in the situation by reason of the valid discharge of the "sit-down" strikers and the filling of positions with new men, we see no basis for a conclusion that after the resumption of work Lodge 66 was the choice of a majority of respondent's employees for the purpose of collective bargaining. The Board's order properly requires respondent to desist from interfering in any manner with its employees in the exercise of their right to self-organization and to bargain collectively through representatives of their own choosing. But it is a different matter to require respondent to treat Lodge 66 in the altered circumstances as such a representative. If it is contended that Lodge 66 is the choice of the employees, the Board has abundant authority to settle the question by requiring an election.

Seventh. The requirement that respondent shall withdraw all recognition from Rare Metal Workers of America, Local No. 1.

While respondent presents a strong protest, insisting that Local No. 1 of the Rare Metal Workers was the free choice of the employees after work was resumed, we cannot say that there is not substantial evidence that the formation of this organization was brought about through promotion efforts of respondent contrary to the provision of Sec. 8 (2), and we think that the order of the Board in this respect should be sustained. . . .

Modified and Affirmed.

SUPPLEMENTAL CASE DIGEST—REMEDIAL POWERS OF NATIONAL LABOR RELATIONS BOARD

VIRGINIA ELECTRIC & POWER CO. v. N.L.R.B. 319 U.S. 533 (1943).

After the remand of this case in 314 U.S. 469, the N.L.R.B. reconsidered it upon the original record, made new findings of fact, and concluded that the Company had violated Sections 8 (1), (2) and (3) of the National Labor Relations Act. A new order was entered requiring the Company to cease and desist from the unfair labor practices found and from giving effect to its contract with the Independent Organization of Employees, a company-wide unaffiliated labor organization. The Board held that the said I.O.E. "was not the result of the employees' free choice." The order also directed the Company to withdraw recognition from and disestablish said I.O.E. as a representative of its employees, to reinstate with back pay two of three employees found to have been discriminatorily discharged, *and to reimburse its employees in the amount of dues and assessments deducted from their wages by the Company and paid to the I.O.E.* [Author's italics.] The Company challenged only the authority of the Board to require reimbursement of the checked-off dues. *Held:* That ". . . Section 10 (c) of the Act authorizes the Board to require persons found engaged or engaging in unfair labor practices 'to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.' The declared policy of the Act in Section 1 is to prevent, by encouraging and protecting collective bargaining and full freedom of association for workers, the costly dislocation and interruption of the flow of commerce caused by unnecessary industrial strife and unrest. . . . Within this limit the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of affirmative order, namely, reinstatement with or without back pay. . . . The particular means by which the effects of unfair labor practices are to be expunged are matters for the Board, not the courts, to determine. . . .

". . . The instant reimbursement order is not a redress for a private wrong. Like a back pay order, it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this, both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in

achieving the elimination of industrial conflict. They vindicate public, not private, rights. . . . The Board has here determined that the employees suffered a definite loss in the amount of the dues deducted from their wages and that the effectuation of the policies of the Act requires reimbursement of those dues in full. We cannot say this considered judgment does not effectuate the statutory purpose. . . . *Affirmed.*" (MURPHY, J.)

Case Questions

1. What do the findings of fact of the Board reveal as to Fansteel's actions?
2. Had Lodge 66 been certified by the N.L.R.B.?
3. Indicate the steps taken by Fansteel when it resumed operations. Did it offer mass reinstatement?
4. Was the Rare Metal Workers Union company-assisted?
5. State the gist of the reinstatement order. Was back pay ordered?
6. When may an employer lawfully discharge strikers?
7. State the rule of the *Consolidated Edison* decision cited in the opinion.
8. What does the court suggest as to the present status of Lodge 66 and the Rare Metal Workers?

SECTION 70. RULES OF EVIDENCE

One of the persistent criticisms of the Wagner Act, as administered by the National Labor Relations Board, was that the N.L.R.B. disregarded rules of evidence in its conduct of hearings, admitted hearsay evidence, and made findings of fact contrary to the weight of the evidence. Administrative bodies are not usually bound to observe strict rules of law concerning the admissibility of evidence. Their proceedings may be informally conducted as distinguished from those of pure judicial bodies. Recognition of this difference was embodied in the original National Labor Relations Act which provided that "the rules of evidence prevailing in courts of law or equity shall not be controlling," and further, "the findings of the Board as to the facts, if supported by evidence, shall be conclusive."

The Act as amended in 1947 makes two ostensibly important changes in the evidentiary requirements of Board proceedings. Sec. 10 (b) provides "any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States. . . ." Sec. 10 (e) stipulates that "the findings of the Board with respect to questions of fact *if supported by substantial evidence* on the record considered as a whole shall be conclusive. . . ." [Author's italics.] Thus, by legislative mandate, the Board is required to support its findings of fact by substantial evidence to assure that the courts will sustain their orders on review, and to follow generally the rules of evidence prevailing in the federal courts. Under the Wagner Act, the courts generally refused to disturb Board findings of fact if they were supported by *some* evidence in the record. The Supreme Court had broadly construed "some evidence" to mean "more than a mere scintilla."

The changes introduced by the 1947 Act should not be misleading. They do not amount to a trial *de novo*,[1] nor do they mean that the courts will meticulously weigh the evidence. All the courts of review are bound to do is search the record to ascertain whether there is *substantial* evidence to support the findings of fact handed down by the Board. Substantial evidence need not be the greater part of the evidence; in fact, the *weight* of evidence, on the record as a whole, may be against the Board's finding and still be conclusive upon the courts of review because of substantial support.

Because of its practical importance, three decisions are included in this section on the subject of evidence requirements. The *Wool-*

[1] From the beginning.

worth decision was decided under the National Labor Relations Act. The *Woolworth* case investigates the judicial efficacy of circumstantial evidence as well as the extent of review provided by the Wagner Act, namely, review to ascertain if there is *some* evidence to support the Board's finding of fact.

The last two decisions are holdings on this issue under the National Labor Relations Act of 1947. Neither of the courts in the *Caroline Mills* or *Austin* cases believes that the review powers of the courts have been significantly enlarged by Secs. 10 (b) and 10 (e) of the amended Act, perhaps because a trial *de novo* is not provided for. An air of consternation pervades Judge Hutcheson's opening paragraph in the *Caroline Mills* decision, wherein he points out that the Board is in an advantageous position, because it combines, in itself, the role of complainant, prosecutor, and trier of fact. This anomaly is explicable only in the view that the Board is presumed expert in its power to draw reasonable inferences from facts presented and is unbiased in its role as a trier of fact.

F. W. WOOLWORTH CO. v. NATIONAL LABOR RELATIONS BOARD

Circuit Court of Appeals, Second Circuit, 1941. 121 Fed. (2d) 658

FRANK, C. J. The F. W. Woolworth Company, a New York corporation having its principal place of business in New York City, has petitioned to have an order of the National Labor Relations Board reviewed and set aside. In answering the petition, the Board requests that its order be enforced. Petitioner has been found by the Board to have engaged in violations of Sections 8 (1) and 8 (3) of the National Labor Relations Act . . . with respect to the employees of a warehouse which it operates in New York City, for the purpose of storing and distributing merchandise to its retail variety stores.

Prior to July, 1937, those employees were unorganized. In that month, when there were about 420 employees, a union (which later became Local 65, United Wholesale and Warehouse Employees of America) began a campaign to organize the warehouse. By some time in November, the union had succeeded in signing up 291 men as members. The Board found that, during this period, petitioner engaged in violations of Section 8 (1) of the Act by interfering, restraining and coercing the men in exercising the rights of self-organization guaranteed to them by the statute. In making this finding, the Board had before it a number of incidents, none of them perhaps conclusive in itself, which, added together, constitute a body of anti-

union activity which amply justified the finding of the Board. *Since it is not our province to do more than determine whether there was evidence to sustain the Board's findings* [Section 10 (e)] . . . we do not set out the evidence in any detail. [Author's italics.]

The facts adduced at the hearing showed that a principal aim of the union's campaign, announced in circulars distributed outside the warehouse, was the elimination of compulsory overtime work and the payment of overtime at time and one-half. This was an old grievance, yet nothing was done about it until a few days after the distribution of the union's circulars, when the company, suddenly and without explanation, began to ask its employees whether they wished to work overtime, and began to pay time and one-half for such work. The Board concluded that this, and a later wage raise, were tactics designed to forestall the union's campaign. Petitioner objects that there is no proof that this was, in fact, the company's purpose, and it points out that the union promptly claimed the action as its first victory. The latter is, of course, immaterial; and the former goes to an issue of creditability and inference with which the Board is more capable of dealing than are we. During July and August petitioner abandoned its old practice of permitting employees to move about the packing room without restraint, and assigned certain employees to the middle aisle, ordering them not to leave it. The men working there were under greater surveillance by the foremen and were to some degree isolated from the rest of the employees. No explanation was given for the establishment of this "observation aisle," and there was positive evidence that inability to move about the room resulted in reduced efficiency. All of the men assigned to the aisle were union members; among them were the shop chairman, several captains and financial secretaries, and others who later became captains. The Board concluded, and we think properly, that petitioner segregated active union men in order to hinder self-organization. Petitioner attacks the Board's finding because there was no positive proof that it knew which of its employees were, and which were not, members of the union. This same protestation is made as a defense to the allegation of discriminatory discharges (which will be discussed below), where the evidence is capable of no other rational explanation than the petitioner knew which employees were members. It seems unlikely that petitioner remained entirely ignorant of the identity of the active union men at a time when they were distributing circulars, soliciting membership, signing up other employees, and collecting dues from their fellow workers. The Board found that the union duties

of the active men involved "extensive contact" with the other employees which petitioner must have noted. We cannot say the Board was wrong.

Implicit in petitioner's argument is a basic objection to reliance upon so-called "circumstantial evidence." But courts and other triers of facts, in a multitude of cases, must rely upon such evidence, i.e., inferences from testimony as to attitudes, acts and deeds; where such matters as purpose, plans, designs, motives, intent, or similar matters, are involved, the use of such inferences is often indispensable. Persons engaged in unlawful conduct seldom write letters or make public pronouncements explicitly stating their attitudes or objectives; such facts must usually be discovered by inference; the evidence does not come in packages labelled, "Use me," like the cake, bearing the words "Eat me," which Alice found helpful in Wonderland. . . .

In sum, petitioner's case does not remotely approach the strength and persuasiveness which we require before we will undertake to reverse the Board's findings. Its entire case on this issue, in effect, is a plea that, if we were to try the case *de novo*, we might conceivably find against the Board's. That is not our function, and it is a waste of our time and of the client's money to bring before us cases based on such a misconception of our duties. . . .

The petition to review and to set aside the Board's order is denied. . . .

Case Questions

1. What initial grievance was present in this case?
2. Was the company's action, upon distribution of the circulars, significant?
3. Discuss the "observation aisle."
4. What is circumstantial evidence? Is it admissible?

NATIONAL LABOR RELATIONS BOARD v. CAROLINE MILLS, INCORPORATED

Circuit Court of Appeals, Fifth District, 1948. 167 Fed. (2d) 212

HUTCHESON, C. J. This is another of those dreary reviews of Board proceedings presenting the question not whether the findings of fact made by the Board, as trier of the facts, on evidence presented by the Board, as prosecutor, in support of charges filed by the Board, as complainant, have been fairly, impartially, and justly arrived at, but whether they are "supported by substantial evidence on the rec-

ord considered as a whole." It presents the usual picture of supporting findings arrived at by a process of quite uniformly "crediting" testimony favorable to the charges and as uniformly "discrediting" testimony opposed.

The respondent insists that the provisions of the Labor Management Relations Act of 1947, have outmoded, if not outlawed, this method of selectivity supporting a desired, if not predetermined, decision. It urges upon us that the Board's findings are not supported by "the preponderance of the testimony taken by the Board," or "by substantial evidence on the record considered as a whole." It urges upon us, too, that the evidence establishes beyond question that Mize and Jacobs were discharged for cause, Mize for disability and Jacobs for refusal to do the work assigned him, and "having been discharged for cause," the order of the Board, requiring reinstatement and back pay, was in the teeth of the statute.

We are in no doubt that the invoked provisions of the Labor Management Relations Act were directed at these abuses of administrative expertness so called, which the prevailing climate of Washington opinion, both Board and Court wise, has done so much to foster and encourage. Neither are we in any doubt that their total purpose has been, their effect will be, not only to proscribe bad, while prescribing good, practices for the Board, but to give the courts more latitude on review. They do not, however, provide for a hearing *de novo*, and we cannot on this record say that the fact findings complained of, that respondent has been guilty of unfair labor practices and that it discriminatorily discharged Mize and Jacobs, were clearly erroneous.

As to Mize, however, we think it clear that the Board's order requiring his reinstatement may not stand, for it is established on the undisputed evidence that Mize was not only reinstated but was given a better job than the one he had when he was discharged, and that after being reinstated he voluntarily left the employment of the company. The order then will be modified by striking out the provision for reinstatement as to Mize, and, as modified, will be ordered enforced.

Respondent, in its answer to the petition for enforcement, alleges: that it has gone out of business; that its plant is in process of being dismantled; that its most desirable and essential machines have already been sold; that all of its employees have been dismissed because of this program of dismantling and selling; and that, because of these facts, compliance with the Board's order for posting notices is futile and reinstatement of Jacobs is impossible.

The Board, citing our case, correctly replies that whether or not respondent is able to comply with the provisions of the Board's order is to be determined not now but later by this Court upon charges made here after the parties have made an earnest and honest effort to effectuate the Board's order.

Of course, if Caroline Mills has, in good faith, and not only pretendedly, gone out of business, this Court will not hold it in contempt for not reinstating Jacobs. The law does not, the Board cannot, therefore, require that an employer stay in business merely in order to give employment. . . .

An order modified as above in respect to Mize may be presented for entry.

Case Questions

1. Explain the triple role of the N.L.R.B.
2. What changes in evidence requirements are made by the Act of 1947? Does the court believe they are material?
3. Indicate the action the court takes as to Mize.
4. Can an employer escape reinstatement if, in good faith, he is going out of business?

NATIONAL LABOR RELATIONS BOARD v. AUSTIN COMPANY

Circuit Court of Appeals, Seventh Circuit, 1947. 165 Fed. (2d) 592

KERNER, C. J. . . . In considering the question of whether the Board's findings of fact are supported by substantial evidence, we are not unmindful of the recent enactment by Congress of the Labor Management Relations Act of 1947, which, among other things, amended the National Labor Relations Act. Under Sec. 10 (f) of the original Act courts, reviewing the orders of the Board, were guided by the provision that ". . . the findings of the Board as to the facts, if supported by evidence, shall . . . be conclusive." Under Sec. 10 (f) of the amending Act the reviewing courts are now empowered to apply the test that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall . . . be conclusive." While there is no doubt that it was the intention of Congress that the scope of the courts' reviewing power be broadened, there is a question of how far the test to be applied should go. Certainly there is to be no trial *de novo* and this quite definitely would seem to eliminate the doctrine of weighing the evidence. *We are impelled to the conclusion that, in*

effect, the scope of our review under the new Act is only immaterially changed from the scope of our review under the National Labor Relations Act. [Author's italics.]

The findings of fact as set out by the trial examiner in his intermediate report were adopted by the Board as its findings. His conclusion that respondent had engaged in concerted activities in violation of Sec. 8 (1) and (3) of the Act was predicated upon the discharge by respondent of Arthur S. Brown. Brown, an electrical engineer, went to work for respondent about August 16, 1945, and was discharged upon September 14, 1945. The period of his employment with respondent covered a period of about four weeks. Brown was a member of the International Federation of Technical Engineers', Architects' and Draftsmen's Union (hereinafter called the union).

During the period in question, the keystone of respondent's office procedure was based on a method called the squad system. . . . There was evidence that Brown, as well as others, violated the squad system which, admittedly, was not perfect in practice. There was further testimony that Brown was argumentative and failed to fit into respondent's scheme of office routine. By themselves these facts would appear to constitute sufficient cause for discharge, but the trial examiner, while not overlooking them, concluded that the real cause for the discharge was to be found in Brown's union activities.

As stated, Brown belonged to the union during the tenure of his employment, and he testified that he spoke to about ten other engineers in the office of approximately sixty regarding joining the union and organizing the office force. Respondent urges that in view of this evidence the extent of the union activities involved were so minimal in nature that there can be no evidence of a bona fide labor dispute. Against this, however, is the episode leading up to the discharge, which indicates that respondent was aware of Brown's union activities and did not regard them as slight in nature.

At the time it hired Brown respondent was seeking a practical plan to eliminate night work, which was causing dissatisfaction among the employees. This problem was resolved favorably by Brown, who, despite the fact of his recent employment, initiated a petition regarding a new work week schedule which was signed by a majority of the employees and approved by respondent's management. Respondent's district engineer, Engle, upon discovering that Brown had authored the petition, discharged him. Brown testified that upon asking Engle why he was discharged, he was told that it was because he, a new man, had originated the petition and because he was attempting

to organize a union among the men. Engle denied making such a statement. Respondent contends that to hold this as evidence that respondent was aware of Brown's organizing efforts is piling inference upon inference and hardly substantial. If we assume that Brown's version of his interview with Engle is correct (and the trial examiner in accepting it noted that Brown made a more favorable impression than Engle as a witness), it is a reasonable inference that Engle was aware of Brown's union activities. It is unquestioned that the Board has the exclusive right of drawing reasonable inferences from the facts. *Interlake Iron Corp.* v. *National Labor Relations Board,* 131 F. (2d) 129. . . . Moreover, there is evidence to the effect that two squad leaders were informed by Engle that they had stuck their necks out in signing the petition, which further substantiates the probability that respondent was aware of Brown's union activities. Brown's right to initiate the petition to improve working conditions and to propagandize on behalf of the union was protected under Sec. 7 of the Act. The evidence is substantial in support of the Board's conclusion that Brown was discharged in violation of Sec. 8 (1) and (3) of the Act. . . .

The third question is whether the Board's order is valid and proper. Respondent is directed to cease and desist from discouraging membership in the union and from interfering with its employees in the exercise of their rights to self-organization. Respondent is further ordered to reinstate Brown and make him whole for any loss of pay, and, finally, it is ordered to post appropriate notices. Respondent contends that the order is too broad, in that only one employee was involved and hence there was no indication of a general anti-union discrimination. Under the view we take, the violations having been established, the number of employees involved is immaterial. Moreover, this court has held that to effectuate the policies of the Act the Board may, in cases of violation of Sec. 8 (1) and (3), order reinstatement and with back pay. *National Labor Relations Board* v. *Vail Mfg. Co.,* 158 F. (2) 664. We find no abuse in the Board's discretion.

The petition for enforcement of the order is granted.

SUPPLEMENTAL CASE DIGEST—RULES OF EVIDENCE

BUSSMANN MANUFACTURING CO. v. N.L.R.B., C.C.A., Eighth Circuit, 1940; 111 Fed. (2d) 783. "Likert's case differs from Hogges' in that when he was requested to stay and work overtime he said that he 'would plan to work that night.' On Tuesday, however, without saying a word to anyone, he walked out and went home. This

conduct was ground to warrant the discharge of Likert and, standing alone, to support the employer's claim that this was the basis of its motive for discharging him. This situation left the question of the reason for the discharge in the realm of speculation. It is not sufficient to show that the employer may have discharged Likert for union activity—the evidence must point to that fact. When the testimony shows, as it does here, that the cause of the discharge may have been one of two things, one of which was illegal and the other legal, the fact finding tribunal cannot guess between the two causes and find that union activities was the real cause when there is no satisfactory foundation in the testimony to support the conclusion. *Patton* v. *T. & P. Railway Co.*, 179 U.S. 658. When evidence is consistent with either of two inconsistent hypotheses, it establishes neither. *Stevens* v. *The White City*, 285 U.S. 195. . . . Under these circumstances, had the case been tried to a jury, it would have been the duty of the trial judge to direct a verdict for the defendant. . . . Proof of mere sequence is not sufficient to establish consequence or casual sequence. . . . Had there been evidence that the employer sometimes or often had discharged employees for union activity, or had there been other substantial evidence to show that it was highly probable that the discharge was the result of union activities, the Board's conclusion could be sustained. . . . But no such probative circumstances are in evidence. . . . The order is affirmed . . . except that part relating to the reinstatement of Roland Likert and the restoration of his pay." (THOMAS, C. J.)

Case Questions

1. Does Judge Kerner believe that the rules of evidence have been materially changed by the 1947 Act?
2. Is this a dual motive or compelling motive case? State the rules.
3. May the Board draw reasonable inferences from facts?
4. Does the court find substantial evidence?
5. Discuss the alleged broadness of the Board's order.

SECTION 71. WELFARE FUNDS

The National Labor Relations Act provides for broad limitations upon the inception and administration of employee welfare funds. The welfare fund issue came into the public view largely as a result of the United Mine Workers' pressure in that direction, but many labor organizations, other than U.M.W., have received payments from employers pursuant to such purposes. Congress incorporated Sec. 302 into the Act of 1947 because it believed that the maladministration and diversion of some funds made it desirable to subject them to control. Criminal penalties are applied for violation of Sec. 302, which provides the following limitations:

(1) The trust fund must be for the *benefit* of employees, their families, or their dependents.
(2) The fund must be for the *purpose* of medical or hospital care, pensions, disability or illness compensation, unemployment benefits, or life, sickness, or accident insurance.
(3) The *basis of payment* must be specified in a written agreement with the employer.
(4) The fund must be jointly *administered* by employer, employee, and neutral representatives.
(5) The agreement must provide for handling of *deadlocks*, either by appointment of an umpire, or, if this fails, the appointment of an umpire by the appropriate district court.
(6) The fund must be annually *audited* and the results made available for inspection.
(7) If the payments are to be used for *pensions or annuities*, a separate trust must be established, out of which payments may be made only for the two stated purposes.
(8) The only *exemptions* are those provided for in Sec. 302 (g) of the Act.

Labor organization leadership is uniformly opposed to joint control over welfare fund accumulations. The same opposition extends to the filing requirements which were investigated in Section 68 of this volume. This fact may point the way toward repeal of these power restrictions on labor leadership by the 1949 Congress.

Questions on Section 71

1. Why was Sec. 302 incorporated in the Act?
2. What form of penalty is provided for violation?
3. Discuss the purpose and administration of the fund.
4. Is there an audit requirement?

SECTION 72. POLITICAL CONTRIBUTIONS

Sec. 304 of the 1947 Act prohibits political contributions or expenditures by corporations or labor organizations that have the purpose of influencing the election of a person to federal office. The prohibition is not limited to the final election; it extends to primaries and conventions as well. Violations are subject to the prescribed criminal penalties.

Two decisions have been selected for inclusion on the constitutional issues involved. A contrary result is reached in each case, the first being in point on Sec. 304 above. The second decision was handed down by a Texas court on the construction of a state statute incorporating a provision similar to Sec. 304. As can be seen, the law on this issue has not been finally resolved, since the Supreme Court has not, as yet, passed upon the constitutional validity of Sec. 304. Congress may remove Sec. 304 from subsequent legislation, at which time the issue raised will become moot.

UNITED STATES OF AMERICA v. CONGRESS OF INDUSTRIAL ORGANIZATIONS

United States District Court, District of Columbia, 1948. 77 Fed. Supp. 355

MOORE, D. J. The Labor Management Relations Act recently passed by Congress imposes many conditions, restrictions, limitations and prohibitions upon labor organizations in the economic arena wherein the battles between labor and management are fought. With these economic features of the Act we are not concerned in this case. However, by one section of the Act Congress broadened its scope to include activities of labor organizations in the political field.

Section 304 (2 U.S.C.A. Sec. 251) makes it unlawful for any labor organization to make an expenditure in connection with any election at which candidates for a federal office are to be selected or voted for. The penal sanctions of this section extend also to an officer of a labor organization who consents to such an expenditure by the organization of which he is an officer.

This case arises under Section 304 of the Act.

The Congress of Industrial Organizations, conveniently referred to as CIO, publishes and circulates a newspaper called the CIO News. Philip Murray is president of CIO.

On July 15, 1947, a special election was held to elect a representative in Congress in the Third Congressional District of the State of Maryland. Immediately prior to this election, in express disobedience of the provisions of Section 304 of the Labor Management Relations

Act relative to expenditures by labor organizations in connection with federal elections, and for the purpose of testing their constitutionality, Murray wrote an editorial favoring one of the candidates and opposing the other, and caused it to be published in the CIO News, and circulated in the Third Congressional District of Maryland. Apparently to remove all doubt that CIO was by this act making expenditures in connection with an election, one thousand extra copies of the newspaper containing Murray's editorial were printed and circulated by CIO. The expenditures for publishing and circulating the newspaper were made in the District of Columbia, and the one thousand extra copies were mailed from there to be circulated in Maryland.

This indictment followed. It charges CIO with making expenditures in connection with a federal election by publishing and circulating the Murray editorial, and Murray as president of CIO with consenting to such expenditures.

Defendants have moved to dismiss the indictment on the broad ground that the applicable part of Section 304 of the Act is unconstitutional because it violates the guaranties of the Bill of Rights, particularly those of the First Amendment.

The government concedes that rights guaranteed by the First Amendment are abridged by the prohibition against expenditures by labor organizations in connection with elections; but it says that Congress has power under Article I, Section 4, of the Constitution to abridge First Amendment rights if it considers such a course necessary in maintaining the purity and freedom of elections.

Thus the Court is confronted with the necessity of passing on the validity of Section 304 of the Act, in so far as it relates to expenditures by labor organizations in connection with federal elections.

I am sensible of the deference which courts must accord to the considered will of the legislative branch of the government as expressed in a statute. If a reasonable construction of the statute can logically be made under which it is free from imputation of unconstitutionality, the statute must be so interpreted. If, however, the words of the statute are plain and can have only one meaning, a court cannot escape the obligation of deciding whether or not it falls within the limits of constitutional legislative power. *Gemsco, Inc. et al.* v. *Walling*, 324 U.S. 244, 260; *United States* v. *Rice, District Judge*, 327 U.S. 742, 753. By the words of this statute expenditures of a labor organization in connection with any federal election are made unlawful. Regardless of whether this provision does or does not fix an ascertainable standard of guilt, it is clear that the acts of CIO in

publishing and circulating the editorial, and of Murray in consenting thereto, come within its scope. The editorial was written with specific reference to a particular federal election and the expenditure made for publishing and circulating it was therefore necessarily made in connection with that election. The statute contains no exemption or exclusion eliminating from its prohibitions those activities which the Bill of Rights protects. Indeed, few acts in connection with an election, other than those which have for their purpose some sort of coercion, intimidation or corruption of the electorate could be said to be without the boundaries of such protection. It is plain that Congress by this statutory provision denounced as unlawful acts which would otherwise be entirely innocent in nature, and in the exercise of which a labor organization is concededly protected under the Bill of Rights. *Cf. Grosjean* v. *American Press Co., Inc., et al.*, 297 U.S. 233; *Bridges* v. *California*, 314 U.S. 252. I conclude, therefore, that the indictment charges an offense under Section 304 of the Labor Management Relations Act, and it follows that if the provisions of that section, pursuant to which the indictment was returned, were constitutionally valid, the indictment would necessarily be sustained.

Judged by its plain terms, the statute on its face fails to survive the constitutional test.

I am of opinion that the questioned portion of Section 304 of the Act is an unconstitutional abridgment of freedom of speech, freedom of the press and freedom of assembly. At no time are these rights so vital as when they are exercised during, preceding or following an election. If they were permitted only at times when they could have no effect in influencing public opinion, and denied at the very time and in relation to the very matters that are calculated to give the rights value, they would lose that precious character with which they have been clothed from the beginning of our national life. *Cf. Bridges* v. *California, supra*, 269.

The legislative history of the statutory provision under consideration, copiously related in briefs of counsel for the government, clearly shows that the legislation was aimed at the very type of political activity which is charged as an offense in this indictment, namely, the publication and distribution of papers containing editorials favoring or opposing candidates for federal office. It is insisted by the government that Congress could abridge the freedoms guaranteed by the First Amendment (which the government concedes was done here) because of its constitutional control over the manner of holding elections, and its consequent power to prevent corruption therein, and

to secure clean elections. This argument would be persuasive if the statute prohibited specific acts of a kind which might conceivably be expected to produce corruption in any of its forms, or to prevent in any way the holding of free elections; but the untrammeled right of free expression of views as to candidates for office, through newspapers or other means of conveying the written or spoken word, and of the public in general to have free access thereto, far from being a conceivable means of corrupting or interfering with free elections, is in fact one of the most valuable means of promoting purity and freedom in the electoral process. See *De Jonge* v. *Oregon,* 299 U.S. 353, 365.

It must be remembered that it is not only the right of the publisher of a newspaper or editorial sheet which is protected by the First Amendment; but also, and perhaps over and above that right, there is the right of the people to be informed of the views represented by conflicting interests and opinions. How are they to get such information concerning the views of laboring men and women if the organization in and through which such persons are united in a common purpose is forbidden to publish any views whatsoever?

It is contended that the evil sought to be remedied by this legislation consists in the use of money, paid into the treasury of a labor organization in the form of dues, for the purpose of publishing opinions and arguments which may not be in accord with the views of a minority of the organization. Such use of money, says the government, is fraught with implications of oppression and coercion of minorities of such import that Congress could act to prevent it, even to the extent of abridging the basic freedoms. It is doubtful whether such a contention would avail, even though the statute had been framed to cover only such cases. Inherent in the idea of collective activity is the principle that it shall be exercised on behalf of the organization pursuant to the will of the majority of its membership. This principle is recognized in the very statute of which the Labor Management Relations Act containing this Section 304 is an amendment. Labor Management Relations Act, 1947, 29 U.S.C.A. Secs. 151, 159. However, the provision prohibiting expenditures by labor organizations in connection with elections does not purport to affect only cases in which a minority of the membership, however small or great, is opposed to the expenditure. It covers all such expenditures in connection with federal elections. We cannot presume that substantial differences of opinion or desire exist in labor organizations with reference to matters concerning labor's welfare. Such organiza-

tions do not follow political party lines as such, and to say that doubtless there are in the membership large numbers of voters of differing political party affiliation is not to say that all these may not be unitedly in favor of or opposed to candidates who respectively favor or oppose the type of legislation which laboring men and women in general believe to be in their best interest.

From what has been said it is plain that no clear and present danger to the public interest can be found in the circumstances surrounding the enactment of this legislation. The Supreme Court has said, and reiterated in many cases, that such a situation must exist if any abridgment of the freedoms of the First Amendment is to be justified. *Thornhill* v. *Alabama*, 310 U.S. 88; *West Virginia State Board of Education et al* v. *Barnette et al.*, 319 U.S. 624; *Thomas* v. *Collins*, 323 U.S. 516. Nowhere is the idea better expressed than in the *Thomas* case, wherein Mr. Justice Rutledge, speaking for the majority of the Court, says:

"The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.

"For these reasons any attempt to restrict these liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interest, give occasion for permissible limitation."

Further on in the same opinion Mr. Justice Rutledge continues:

"Where the line shall be placed in a particular application rests . . . on the concrete clash of particular interests and the community's relative evaluation both of them and of how the one will be affected by the specific restriction, the other by its absence. That judgment

in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. And the answer, under that tradition, can be affirmative, to support an intrusion upon this domain, only if grave and impending public danger requires this."

In support of its argument that congressional control over elections may be exercised in abridgment of rights protected by the First Amendment, the government points to the case of *United Public Workers* v. *Mitchell,* 330 U.S. 75. As I read that case the decision turned, not on the power of Congress to regulate elections, but on the right of the government to prescribe rules concerning the conduct of its own employees. *Cf. United States* v. *Wurzbach,* 280 U.S. 398. The activities in which Mitchell had engaged and which resulted in his dismissal were accepting office as a committeeman of a political party, and acting as paymaster for party workers. Such conduct can hardly be said to be comparable to the printing and circulating of editorial opinions by a person or group of persons not connected with either the government or a political party. I am unable to perceive that the views expressed herein are in any way at variance with the holding in the *Mitchell* case. Moreover, the *Mitchell* case and all the other cases cited by the government dealing with congressional authority over elections extend only to the regulation of political activities. In no other statute except the one we are considering here have I found that Congress has prohibited absolutely all activities of any person or group at elections. The prohibition in this statute against expenditures by labor organizations in effect would prevent such organizations from doing any act in connection with an election, since they are composite entities and not individuals, and by their very nature can make no move which does not involve some expenditure.

Defendants contend that the legislation is vulnerable also as an arbitrary discrimination against labor organizations in violation of the Fifth Amendment, and because it does not fix an ascertainable standard of guilt, as required by the Fifth and Sixth Amendments. I do not deem it essential to decide these questions, since I have concluded that the challenged provision of the statute is invalid because of abridgment of rights guaranteed by the First Amendment.

For the reasons given, the motion of defendants to dismiss the indictment will be sustained. An appropriate order may be presented for entry.

SUPPLEMENTAL CASE DIGEST—POLITICAL CONTRIBUTIONS

A. F. OF L. v. MANN. Court of Civil Appeals of Texas, 1945; 188 S.W. 2d 276. The State of Texas passed an act regulating union affairs. Sec. 4b prohibits unions from making any financial contribution to any political party or to any candidate for political office as part of its or his campaign expenses. In upholding this provision, the court, through Justice Baugh, stated: "Nor is Sec. 4b subject to the criticisms lodged against it by appellants. Few subjects have been deemed more essential to the preservation, protection and operation of our democratic form of government than the free and untrammeled selection by the people of their public officials. This is on the principle that such officials represent all of the people, and not merely the interests of any particular party, group or class. To that end laws are designed to prevent their becoming unduly amenable to, or subject to undue control or influence by, any particular group when the interests of such group affect the public interest. Such campaign contributions by corporations have long been forbidden. . . . And in 1943 the Federal Corrupt Practices Act, 2 U.S.C.A., Sec. 241, was amended to expressly include "labor organizations" within such prohibited class of campaign contributions. . . .

"Clearly the language of this section of the Act cannot be reasonably construed as applying to, or limiting the rights of, the members of the unions as individual citizens; nor to prohibit the rights of the union to educate or inform its members as to the merits or demerits of any candidate, or of any political party. It applies only to financial contributions by "any labor union" to a party or a candidate for political office in its capacity as a separate functioning institution as distinguished from the individuals who compose it. See *U. S.* v. *White*, 322 U.S. 694, 64 S. Ct. 1248. As such the State was clearly authorized to so regulate such unions."

Case Questions

1. State the facts giving rise to the indictment.
2. Does the government concede that Sec. 304 abridges the First Amendment? How does it reconcile its concession?
3. What is the court's answer to No. 2 above?
4. Does the court find any "clear and present danger" to exist?
5. How does the court distinguish the *Mitchell* case?
6. Outline the reasoning in the supplemental case digest that leads to an answer contrary to this one.

SECTION 73. NEGOTIATION, MEDIATION, AND ARBITRATION

Before determining the effect of the National Labor Relations Act upon the principle of negotiation, mediation, and arbitration, it is desirable to distinguish these terms as they apply to the settlement of labor disputes.

(1) *Negotiation* is the act of settling the issues of a labor dispute directly between the immediate parties thereto, namely, between the representative of the employer and the representative of the employees, through the medium of collective bargaining. It is the first phase of dispute settlement. If it fails, it may be followed by the further conciliatory devices of mediation and/or arbitration, on the one hand, as against self-help in the form of strike or picket pressure on the other.

(2) *Mediation* is the act of a third party intermediary, directed toward inducing the parties to a labor dispute to resume negotiations that have terminated by reason of inability to agree on a collective bargain. It is synonymous with the term *conciliation.* It is directed to forestall resort to self-help pressure tactics, or to stop their exercise if they have already begun. Pure mediation does not concern itself with the direct settlement of the issues at stake; the mediator makes no decision for the parties. He usually acts in the role of a peace bearer to get the parties to the dispute to resume or continue their bargaining efforts. In some cases, the mediator may be called upon to make findings of fact pursuant to a solution, but his recommendations do not bind the parties thereto. As we shall see in Chapter 10 on the Railway Labor Act, a major portion thereof is concerned with outlining the procedure of negotiation, mediation, and arbitration. These have been notably successful in the elimination or forestalling of many strikes in that vital industry.

(3) *Arbitration* is the act of settling a labor dispute between the immediate parties through the medium of a *neutral* third party who is empowered to decide the issue causing the dispute. His decision is binding upon the disputants and is enforceable in the courts. Many collective bargaining agreements of today incorporate a provision requiring the submission of certain or all disputes to the arbitration process. Agreements to arbitrate are subject to the remedy of specific performance by a court of equity.

While the common law refused to recognize or enforce arbitration decisions, even if the parties had agreed thereto, under the theory that everyone is entitled to his day in court, the modern view favors resort to arbitration, and the courts will presently enforce such awards as being conclusive on both the law and the facts. An arbitration award will be refused enforcement only if the party adversely affected can prove one or more of the following:

(a) The arbitrator was interested in the result of the dispute by financial or other interest, exceeded his power, or was guilty of misconduct in the proceedings.
(b) The party securing the award was guilty of fraud in the procurement.
(c) Material mistake was involved.

While the federal government has long fostered the policy of mediation and arbitration in the interstate carrier field, the same has not been true with respect to the bulk of industrial disputes. The National Labor Relations Act is moving slowly in the direction of the Railway Labor Act. Title II of the 1947 Act devotes itself entirely to the conciliation of labor disputes in industries affecting commerce, implementing the sections of the Act providing for mediation methods with Secs. 206-210, which provide a procedure for the forestalling of national emergency strikes.

Sec. 202 (d) of the 1947 Act extinguishes the U. S. Conciliation Service and transfers its functions to a newly created agency, the Federal Mediation and Conciliation Service. All mediation and conciliation functions formerly handled by the Department of Labor are likewise transferred to the new agency, making it the sole present authority in the federal mediation field. It is an independent agency in all respects.

The functions of the Federal Mediation and Conciliation Service are detailed in Sec. 203. These duties may be summarized as follows:

(1) "The Service *may* proffer its services in any labor dispute . . . whenever in its judgment such dispute threatens to cause a *substantial* interruption of commerce." Sec. 203(b). [Author's italics.]

(2) "If the Director is not able to bring the parties to agreement by conciliation . . . he shall seek to induce the parties *voluntarily* to seek other means of settling the dispute without resort to strike, lockout, or other coercion. . . ." Sec. 203(c). [Author's italics.] Resort to arbitration may not be compelled.

(3) ". . . The Service is directed to make [itself] available in the settlement of *grievance* disputes only as a last resort and in exceptional cases." Sec. 203(d). [Author's italics.] Thus, the Service is to concern itself only with major disputes, and only incidentally, if at all, with minor disputes classified as grievances. The Railway Labor Act takes hold of this grievance area more broadly in that the National Railroad Adjustment Board is directed to handle all disputes in the grievance category which the parties refer to it.

(4) The parties to a dispute are urged to use the Service, but "the failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act." Sec. 203(c). Under the Railway Labor Act, if the parties submit a dispute to the National Mediation Board or to the National Railroad Adjustment Board, binding jurisdiction to settle the dispute through arbitration fastens itself on the parties.

To conclude, while Title II is a step in the direction of fostered mediation, it seems to represent no significant departure from procedures heretofore followed. The parties have no duty to use the Service and are under no duty to arbitrate. The Service may assume jurisdiction only in major industries and then only with reference to the larger bargaining matters and not grievances.

Questions on Section 73

1. Distinguish between negotiation, mediation, and arbitration.
2. What was the status of arbitration at common law?
3. On what grounds may an arbitration award be set aside?
4. Under what conditions will the Federal Mediation Service assume to act?
5. Do you feel that the Service will be effective in securing its objectives?

CHAPTER 10

THE RAILWAY LABOR ACT

SECTION 74. HISTORY AND PURPOSE OF THE RAILWAY LABOR ACT

Because of their immediate impact upon interstate commerce and their economic character as a public utility, American interstate railways were early recognized as an appropriate and necessary object of Federal legislative intervention in the public interest. This necessity gradually became more manifest in its labor relations aspect as employees of the carriers, in the 1860's, began to form and join the nucleus of the Big Four Brotherhoods. By 1880, railroad workers sought to exercise their latent strength by engaging in a series of prolonged and costly strikes that had no mean effect upon the nation's economy.

As a result of this early flareup in the ranks of organized railway labor, Congress enacted the first in a series of legislative enactments designed to promote the peaceful settlement of controversies and to forestall employment of the strike weapon in so vital an industry. This was the Arbitration Act of 1888, which provided for voluntary arbitration between the parties and for the creation of investigatory boards in work stoppage situations. However, these boards, which were appointed as need arose by the President, lacked other than the power of publicity to enforce their conclusions upon the merits of a labor dispute. The arbitration provisions were rarely used and the investigatory powers were invoked only in connection with the Pullman strike of 1894. (See *In re Debs*, Section 25, page 172.)

This Act was permitted to atrophy for ten years. Congress finally decided to supplant the Act of 1888 with the Erdman Act of 1898. This later legislation strengthened the voluntary arbitration provisions of its predecessor, introduced the method of Federal mediation and conciliation to further peaceful settlement efforts, and rendered illegal employer discrimination for the reason of union membership. Some resort was had to the arbitration features of the Act, but because of the resistance or apathy of the carriers, little benefit was secured from its mediation provisions. The Supreme Court, in *Adair* v. *U. S.*, 208 U.S. 161, decided in 1908, invalidated the penal anti-discrimination portion of the Act, leaving it likewise in a state of desuetude.

Upon failure of hoped-for results from the Erdman Act, Congress passed the Newlands Act of 1913, which established a permanent

three-member Board of Mediation but retained almost intact the voluntary arbitration features of the Erdman Act. The Newlands Act met its nemesis in 1916 when the four railroad brotherhoods began agitation for the 8-hour day. A strike loomed imminent as the Brotherhood of Firemen and Engineers flatly rejected arbitration of this issue; it was prevented only upon passage of the Adamson Act of 1916, which established the 8-hour day for railway employees.

For the next three years little labor difficulty was encountered, as the carriers were operated by the government and labor had girded itself to the war effort. A general order of the Director General of Railroads served to protect from discrimination those railway workers who sought to form and join labor organizations. In retrospect, these war years were marked by a placid labor front and the flourishing of the principle of collective bargaining. The government entered into trade agreements with authorized bargaining agents; any disputes arising from diverse interpretations of these agreements were required to be ultimately referred to boards of adjustment for final settlement. Strikes were implicitly outlawed by this mandatory settlement procedure.

As the carriers were returned to private operation, Congress again deemed it necessary to overhaul the Newlands Act in the form of the Transportation Act of 1920. This act created a Railway Labor Board of three members, the carrier, the employees, and the public securing one representative each. The Board was empowered to publish its decisions upon investigation of the facts of a dispute; sole reliance was to be placed upon the force of public opinion. While arbitration was fostered by the Act of 1920, mediation was completely neglected as being ineffective in the finalization of controversies. More significantly, the immediate postwar period gave rise to a concerted push by employers in the direction of company-dominated labor organizations.

Reprinted below is the 1923 decision of the Supreme Court in the *Pennsylvania Railroad* case. Here the Supreme Court subjects to scrutiny the rights of the carrier and its employees and the power of the Labor Board to effectuate those rights under the Transportation Act of 1920. Are these rights substantial as to labor?

PENNSYLVANIA RAILROAD COMPANY v. UNITED STATES RAILROAD LABOR BOARD

Supreme Court of the United States, 1923. 261 U.S. 72, 43 S. Ct. 278

TAFT, C. J. It is evident from a review of Title III of the Transportation Act of 1920 that Congress deems it of the highest public

interest to prevent the interruption of interstate commerce by labor disputes and strikes, and that its plan is to encourage settlement without strikes, first by conference between the parties; failing that, by reference to adjustment boards of the parties' own choosing, and if this is ineffective, by a full hearing before a National Board appointed by the President, upon which are an equal number of representatives of the Carrier Group, the Labor Group, and the Public. The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding. The evident thought of Congress in these provisions is that the economic interest of every member of the Public in the undisturbed flow of interstate commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy and arouses public criticism of the side thought to be at fault. The function of the Labor Board is to direct that public criticism against the party who, it thinks, justly deserves it.

The main and controlling question in this case is, whether the members of the Board exceeded their powers on the facts as disclosed in the bill and answer.

It is contended by the carrier that the Labor Board cannot obtain jurisdiction to hear and decide a dispute until it is referred by the parties to the Board after they have conferred and failed to agree under Sec. 301. Undoubtedly the act requires a serious effort by the carrier and his employees to adjust their differences as the first step in settling a dispute, but the subsequent sections dispel the idea that the jurisdiction of the Board to function in respect to the dispute is dependent on a joint submission of the dispute to it. If adjustment boards are not agreed upon, then under Sec. 307, either side is given an opportunity to bring its complaint before the Labor Board, which then is to summon everyone having an interest, and after a full hearing is to render a decision. A dispute existed between all the carriers and the officers of the National Labor Unions as to rules and working conditions in the operation of the railroads. By order of the Labor Board, this dispute, which had arisen before the passage of the Transportation Act and before the Government had turned back the railroads to their owners, was continued for settlement before the Labor Board. That Board had been obliged to postpone the decision

of the controversy until it could give it full hearing and meantime had ordered that the existing rules and conditions should be maintained as a *modus vivendi.*

Counsel of the Railroad Company insist that the Board had no jurisdiction to make an order or to take up the controversies between the Government Railroad Administration and the National Labor Unions; that when the railroads were turned back to their owners each company had the right to make its own rules and conditions and to deal with its own employees under Sec. 301, and that the jurisdiction of the Board did not attach until a dispute as to such rules and conditions between the company and its employees had thereafter arisen.

We are not called upon to pass upon the propriety or legality of what the Labor Board did in continuing the existing rules and labor conditions which had come over from the Railroad Administration, or in hearing an argument as to their amendment by its decision. It suffices for our decision that the Labor Board at the instance of the carriers finally referred the whole question of rules and labor conditions to each company and its employees to be settled by conference under Sec. 301; that such conferences were attempted in this case, and that thereafter the matter was brought before the Board by Federation No. 90 of Shop Crafts of the Pennsylvania System under Sec. 307. It is the alleged invalidity of this proceeding, thus initiated, which is really the basis of the bill of complaint of the Company herein, and it is this only which we need consider.

First, Did Federation No. 90 have the right under Sec. 307 to institute the hearing of the dispute? Section 307 says that this may be invoked on the application of the chief executive of any organization of employees whose members are directly interested in the dispute. Its name indicates, and the record shows, that the Federation is an association of employees of the Pennsylvania Company directly interested in the dispute. The only question between the Company and the Federation is whether the membership of the latter includes a majority of the Company's employees who are interested. But it is said that the Federation is a labor union affiliated with the American Federation of Labor and that the phrase "organization of employees" used in the act was not intended by Congress to include labor unions. We find nothing in the act to impose any such limitation if the organization in other respects fulfills the description of the act. Congress has frequently recognized the legality of labor unions, *United Mine Workers* v. *Coronado Coal Co.,* 259 U.S. 344, and no reason suggests itself why such an association, if its membership is properly inclu-

sive, may not be regarded as among the organizations of employees referred to in this legislation.

The next objection made by the Company to the jurisdiction of the Board to entertain the proceeding initiated by the Federation is that it did not involve the kind of dispute of which the Board could take cognizance under the act. The result of the conferences between the Pennsylvania Railroad Company and its employees under Sec. 301 appears in the statement of the case. By a vote of 3,000 out of more than 30,000 employees, a representative committee was appointed with which the officers of the Company made an agreement as to rules and working conditions. Federation No. 90 for its members objected to the settlement on the ground that it had not been made by properly chosen representatives of the employees and brought this dispute before the Labor Board. The Pennsylvania Company was summoned and appeared before the Board and the issue was heard.

It is urged that the question who may represent the employees as to grievances, rules and working conditions under Sec. 301 is not within the jurisdiction of the Labor Board to decide; that these representatives must be determined before the conferences are held under that section; that the jurisdiction of the Labor Board does not begin until after these conferences are held; and that the representatives who can make application under Sec. 307 to the Board are representatives engaged in the conference under Sec. 301. Such a construction would give either side an easy opportunity to defeat the operation of the act and to prevent the Labor Board from considering any dispute. It would tend to make the act unworkable. If the Board has jurisdiction to hear representatives of the employees, it must of necessity have the power to determine who are proper representatives of the employees. That is a condition precedent to its effective exercise of jurisdiction at all. One of its specific powers conferred by Sec. 308 is to "make regulations necessary for the efficient execution of the functions vested in it by this title." This must include the authority to determine who are proper representatives of the employees and to make reasonable rules for ascertaining the will of the employees in the matter.

Again, we think that this question of who may be representatives of employees, not only before the Board, but in the conferences and elsewhere, is and always has been one of the most important of the rules and working conditions in the operation of a railroad. The purpose of Congress to promote harmonious relations between the managers of railways and their employees is seen in every section of this act, and the importance attached by Congress to conferences between

them for this purpose is equally obvious. Congress must have intended, therefore, to include the procedure for determining representatives of employees as a proper subject matter of dispute to be considered by the Board under Sec. 307. The act is to be liberally construed to effect the manifest effort of Congress to compose differences between railroad companies and their employees, and it would not help this effort, to exclude from the lawful consideration of the Labor Board a question which has so often seriously affected the relations between the companies and their employees in the past and is often encountered on the very threshold of controversies between them.

The second objection is that the Labor Board in Decision 119 and Principles 5 and 15, and in Decision 218, compels the Railroad Company to recognize labor unions as factors in the conduct of its business. The counsel for the Company insist that the right to deal with individual representatives of its employees as to rules and working conditions is an inherent right which cannot be constitutionally taken from it. The employees, or at least those who are members of the labor unions, contend that they have a lawful right to select their own representatives, and that it is not within the right of the Company to restrict them in their selection to employees of the Company or to forbid selection of officers of their labor unions qualified to deal with and protect their interests. This statute certainly does not deprive either side of the rights claimed.

But Title III was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees or to enforce or protect them. Courts can do that. The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to cooperate in running the railroad. It was to reach a fair compromise between the parties without regard to the legal rights upon which each side might insist in a court of law. The Board is to act as a Board of Arbitration. It is to give expression to its view of the moral obligation of each side as members of society to agree upon a basis for cooperation in the work of running the railroad in the public interest. The only limitation upon the Board's decisions is that they should establish a standard of conditions, which, in its opinions, is just and reasonable. The jurisdiction of the Board to direct the parties to do what it deems they should do is not to be limited by their constitutional or legal right to refuse to do it. Under the act there is no constraint upon them to do what the Board decides they should do except the moral constraint, already mentioned, of publication of its decision.

It is not for this or any other court to pass upon the correctness of the conclusion of the Labor Board if it keeps within the jurisdiction thus assigned to it by the statute. The statute does not require the Railway Company to recognize or to deal with, or confer with labor unions. It does not require employees to deal with their employers through their fellow employees. But we think it does vest the Labor Board with power to decide how such representatives ought to be chosen with a view to securing a satisfactory cooperation and leaves it to the two sides to accept or reject the decision. The statute provides the machinery for conferences, the hearings, the decisions and the moral sanction. The Labor Board must comply with the requirements of the statute; but having thus complied, it is not in its reasonings and conclusions limited as a court is limited to a consideration of the legal rights of the parties.

The propriety of the Board's announcing in advance of litigated disputes the rules of decision as to them is not before us except as to Principles 5 and 15 of Decision No. 119, so far as they determine the methods by which representatives of employees should be selected. They were applied and followed in the form of ballot prescribed by Decision 218. These decisions were necessary in order that conferences should be properly begun under Sec. 301, and that disputes there arising should be brought before the Board. They were therefore not premature. It is not for us to express any opinion upon the merits of these principles and decisions. All that we may do in this case is to hold, as we do, that they were within the lawful function of the Board to render, and not being compulsory, violate no legal or equitable right of the complaining company.

For this reason, we think that the District Court was wrong in enjoining the Labor Board from proceeding to entertain further jurisdiction and from publishing its opinions, and that the Court of Appeals was right in reversing the District Court and in directing a dismissal of the bill. . . .

Decree affirmed.

Case Questions

1. Are decisions of the Labor Board enforceable by legal process?
2. What sanction is there in a Board decision?
3. What is the "controlling question" of this case?
4. Is Federation No. 90 a company union?
5. What rights do the employees assert? Is the right enforceable?
6. Has the carrier a right not to deal with a labor organization?
7. Does the employer have a right to form a company union?
8. What action did the District Court take in this case?
9. State the decision of the Supreme Court.

SECTION 74. HISTORY AND PURPOSE OF THE RAILWAY LABOR ACT (Continued)

An appreciation of the impotence of the Labor Board can be gleaned from the *Pennsylvania* decision's construction of the Board's powers under the Act of 1920. The conspicuous failing of the Transportation Act, as was true also of its predecessors, was the inability of the Labor Board to compel injunctive compliance on the part of the party adversely affected by an award. True, public opinion did give rise to some coercive pressure, but, generally, it was not an effective force in disputes of telling impact.

In enacting the Railway Labor Act of 1926, Congress drew heavily upon the experience it had accumulated in railroad labor legislation and disputes since 1888. We are not to infer, however, that this permeating policy was to be fundamentally changed. Now, more than ever, the machinery for peaceful arbitration and mediation was strengthened; and emphasis continued to rest upon the voluntary settlement procedure rather than upon the compulsive provisions of the Act, though the latter were not again conspicuous by their absence. Criminal penalties, however, were not attached for noncompliance with the 1926 Act. This aspect will become explicable as we proceed, but first it is necessary to detail the broad administrative outline of the 1926 Act and its purposes.

The purpose of this enactment, as formerly, was to avoid work stoppages by employees and lockouts by employers through establishment of negotiation, mediation, and arbitration procedure, effectuated by the legal sanction that previously was lacking. The principle of mediation, which had been discarded by the Act of 1920, again was to play a principal role. Major power of administration was vested in a nonpartisan Board of Mediation appointed by the President. Disputes were to be settled as follows:

(1) In the event of a labor dispute, the Mediation Board was called upon to attempt to get the parties to *negotiate* their differences.

(2) Failing in this, the next step was to induce them to submit the difficulty to *arbitration.* If arbitration was agreed to, the awards accruing therefrom became binding and legally enforceable. The parties could not be compelled to submit their controversy to arbitration. Arbitration was, and remains, voluntary.

(3) If arbitration is refused by one or both parties, the Board of Mediation, in its discretion, was to recommend that the President create an emergency board of investigation. (a) If the President created such an emergency board, the latter was required to submit a report to the President on the controversy within 30 days. The disputants were required by law to maintain the *status quo* in effect

until the board submitted its report and 30 days thereafter. At the expiration, then, of a maximum of 60 days, if the parties still are at variance and do not agree to abide by the findings of the emergency board, they are free to engage in a strike or a lockout. (b) If the President does not appoint an emergency board as recommended by the Board of Mediation, the disputants are required to maintain the *status quo* for 30 days. It can be seen that the effect of either alternative is to *delay* precipitate action on the part of the disputants in the hope that, in the interim, their dispute will satisfactorily be settled either by way of negotiation or arbitration. Labor is not deprived of its right to strike under the Act, nor is the employer deprived of the lockout; however, these rights may be exercised only upon compliance with the dilatory features of the Act.

A complete treatment of the Railway Labor Act is left for subsequent sections, since it was amended in important respects in 1934 and again in 1936. At this point, only one matter of significance need be developed. That is the provision in the Act which gives both parties the right to designate representatives without the "interference, influence or coercion" of the other. (Sec. 2, third subdivision.) The *Texas and New Orleans* pronouncement of the Supreme Court, reprinted in this section, is the landmark manifesto on the 1926 Railway Labor Act. Not only does the decision handle the constitutional questions raised by the Texas & New Orleans Railroad Company, but it also interprets the major procedural and substantive provisions of the Act, including the controverted Sec. 2, Third. What is the effect of this section upon company fostered and dominated labor organizations?

TEXAS & NEW ORLEANS RAILROAD COMPANY v. BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS

Supreme Court of the United States, 1930. 281 U.S. 548, 50 Sup. Ct. 427

HUGHES, C. J. This suit was brought in the District Court by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Southern Pacific Lines in Texas and Louisiana, a voluntary association, and H. W. Harper, General Chairman of its System Board of Adjustment, against the Texas and New Orleans Railroad Company, and certain officers and agents of that Company, to obtain an injunction restraining the defendants from interfering with, influencing or coercing the clerical employees of the Railroad Company in the matter of their organization and designation of representatives for the purposes set forth in the Railway

Labor Act of May 20, 1926, C. 347, 44 Stat. 577; U.S.C., Tit. 45, Secs. 151-163.

The substance of the allegations of the bill of complaint was that the Brotherhood, since its organization in September, 1918, had been authorized by a majority of the railway clerks in the employ of the Railroad Company (apart from general office employees) to represent them in all matters relating to their employment; that this representation was recognized by the Railroad Company before and after the application by the Brotherhood in November, 1925, for an increase of the wages of the railway clerks and after the denial of that application by the Railroad Company and the reference of the controversy by the Brotherhood to the United States Board of Mediation; that, while the controversy was pending before that Board, the Railroad Company instigated the formation of a union of its railway clerks (other than general office employees) known as the "Association of Clerical Employees—Southern Pacific Lines"; and that the Railroad Company had endeavored to intimidate members of the Brotherhood and to coerce them to withdraw from it and to make the Association their representative in dealings with the Railroad Company, and thus to prevent the railway clerks from freely designating their representatives by collective action.

The District Court granted a temporary injunction. Thereafter the Railroad Company recognized the Association of Clerical Employees—Southern Pacific Lines as the representative of the clerical employees of the Company. The Railroad Company stated that this course was taken after a committee of the Association had shown authorizations signed by those who were regarded as constituting a majority of the employees of the described class. The subsequent action of the Railroad Company and its officers and agents was in accord with this recognition of the Association and the consequent non-recognition of the Brotherhood. In proceedings to punish for contempt, the District Court decided that the Railroad Company and certain of its officers who were defendants had violated the order of injunction and completely nullified it. The Court directed that, in order to purge themselves of this contempt, the Railroad Company and these officers should completely "disestablish the Association of Clerical Employees" as it was then constituted as the recognized representative of the clerical employees of the Railroad Company, and should reinstate the Brotherhood as such representative, until such time as these employees by a secret ballot taken in accordance with the further direction of the Court, and without the dictation or

interference of the Railroad Company and its officers, should choose other representatives. The order also required the restoration to service and to stated privileges of certain employees who had been discharged by the Railroad Company. 24 F. (2d) 426. Punishment was prescribed in case the defendants did not purge themselves of contempt as directed.

On final hearing, the temporary injunction was made permanent. 25 F. (2d) 873. At the same time, a motion to vacate the order in the contempt proceedings was denied. 25 F. (2d) 876. The Circuit Court of Appeals affirmed the decree, holding that the injunction was properly granted and that, in imposing conditions for the purging of the defendants of contempt, the District Court had not gone beyond the appropriate exercise of its authority in providing for the restoration of the *status quo*. 33 F. (2d) 13. This Court granted a writ of certiorari. 280 U.S. 550.

The bill of complaint invoked subdivision third of Section 2 of the Railway Labor Act of 1926 (C. 347, 44 Stat. 577), which provides as follows:

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

The controversy is with respect to the construction, validity and application of this statutory provision. The petitioners, the Railroad Company and its officers, contend that the provision confers merely an abstract right which was not intended to be enforced by legal proceedings; that, in so far as the statute undertakes to prevent either party from influencing the other in the selection of representatives, it is unconstitutional because it seeks to take away an inherent and inalienable right in violation of the First and Fifth Amendments of the Federal Constitution. . . .

. . . We cannot say that there was such error in this case. Both the District Court and the Circuit Court of Appeals approached the consideration of the evidence as to intimidation and coercion, and resolved such conflicts as the evidence presented, in the light of the demonstration that a strong motive existed on the part of the Railroad Company to oppose the demands of the Brotherhood and to promote another organization of the clerical employees which would be more favorable to the interests and contentions of the Company. Both

courts found the explanation of the Company's attitude in the letter addressed by H. M. Lull, executive vice-president of the Railroad Company, to A. D. McDonald, its president, under date of May 24, 1927, shortly before the activities of which complaint was made in this suit. In this letter Mr. Lull referred to the pendency before the United States Board of Mediation of the demand of the Brotherhood for an increase of wages for the clerical employees, and it was stated that if the matter went to arbitration, and the award was made on the same basis as one which had recently been made with respect to the lines west of El Paso, it would mean an increased pay-roll cost of approximately $340,000 per annum. Mr. Lull said that from the best information obtainable the majority of the clerical and station service employees of the Railroad Company did not belong to the national organization (the Brotherhood), and that "it is our intention, when handling the matter in mediation proceedings, to raise the question of the right of this organization to represent these employees, and if arbitration is proposed, we shall decline to arbitrate on the basis that the petitioner does not represent the majority of the employees. This will permit us to get away from the interference of this organization, and if successful in this, I am satisfied we can make settlement with our own employees at a cost not to exceed $75,000 per annum."

Motive is a persuasive interpreter of equivocal conduct, and the petitioners are not entitled to complain because their activities were viewed in the light of manifest interest and purpose. The most that can be said in favor of the petitioners on the questions of fact is that the evidence permits conflicting inferences, and this is not enough. The circumstances of the soliciting of authorizations and memberships on behalf of the Association, the fact that employees of the Railroad Company who were active in promoting the development of the Association were permitted to devote their time to that enterprise without deduction from their pay, the charge to the Railroad Company of expenses incurred in recruiting members of the Association, the reports made to the Railroad Company of the progress of these efforts, and the discharge from the service of the Railroad Company of leading representatives of the Brotherhood and the cancellation of their passes, gave support, despite the attempted justification of these proceedings, to the conclusion of the courts below that the Railroad Company and its officers were actually engaged in promoting the organization of the Association in the interest of the Company and in opposition to the Brotherhood, and that these activities constituted an actual interference with the liberty of the clerical employees in the

selection of their representatives. In this view, we decline to subject to minute scrutiny the language employed by these courts in discussing questions of fact (*Page* v. *Rogers*, 211 U.S. 575, 577) and we pass to the important questions of law whether the statute imposed a legal duty upon the Railroad Company, that is, an obligation enforceable by judicial proceedings. . . .

It was with clear appreciation of the infirmity of the existing legislation, and in the endeavor to establish a more practicable plan in order to accomplish the desired result, that Congress enacted the Railway Labor Act of 1926. It was decided to make a fresh start. The situation was thus described in the report of the bill to the Senate by the Committee on Interstate Commerce (69th Cong., 1st sess., Sen. Rep. No. 222): "In view of the fact that the employees absolutely refuse to appear before the labor board and that many of the important railroads are themselves opposed to it, that it has been held by the Supreme Court to have no power to enforce its judgments, that its authority is not recognized or respected by the employees and by a number of important railroads, that the President has suggested that it would be wise to seek a substitute for it, and that the party platforms of both the Republican and Democratic Parties in 1924 clearly indicated dissatisfaction with the provisions of the transportation act relating to labor, the committee concluded that the time had arrived when the labor board should be abolished and the provisions relating to labor in the transportation act, 1920, should be repealed."

The bill was introduced as the result of prolonged conferences between representative committees of railroad presidents and of executives of railroad labor organizations, and embodied an agreement of a large majority of both. The provisions of Title III of the Transportation Act, 1920, and also the Act of July 15, 1913 (C. 6, 38 Stat. 103) which provided for mediation, conciliation and arbitration in controversies with railway employees, were repealed.

While adhering in the new statute to the policy of providing for the amicable adjustment of labor disputes, and for voluntary submissions to arbitration as opposed to a system of compulsory arbitration, Congress buttressed this policy by creating certain definite legal obligations. The outstanding feature of the Act of 1926 is the provision for an enforceable award in arbitration proceedings. The arbitration is voluntary, but the award pursuant to the arbitration is conclusive upon the parties as to the merits and facts of the controversy submitted. (Section 9.) The award is to be filed in the clerk's

office of the District Court of the United States designated in the agreement to arbitrate, and unless a petition to impeach the award is filed within ten days, the court is to enter judgment on the award, and this judgment is final and conclusive. Petition for the impeachment of the award may be made upon the grounds that the award does not conform to the substantive requirements of the Act or to the stipulation of the parties, or that the proceedings were not in accordance with the Act or were tainted with fraud or corruption. But the court is not to entertain such a petition on the ground that the award is invalid for uncertainty, and in such case the remedy is to be found in a submission of the award to a reconvened board or to a subcommittee thereof for interpretation, as provided in the Act. Thus it is contemplated that the proceedings for the amicable adjustment of disputes will have an appropriate termination in a binding adjudication, enforceable as such.

Another definite object of the Act of 1926 is to provide, in case of a dispute between a carrier and its employees which has not been adjusted under the provisions of the Act, for the more effectual protection of interstate commerce from interruption to such a degree as to deprive any section of the country of essential transportation service. (Section 10.) In case the Board of Mediation established by the Act, as an independent agency in the executive branch of the Government, finds that such an interruption of interstate commerce is threatened, that Board is to notify the President, who may thereupon in his discretion create an emergency board of investigation to report, within thirty days, with respect to the dispute. The Act then provides that "After the creation of such board and for thirty days after such Board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the condition out of which the dispute arose." (Id.) This prohibition, in order to safeguard the vital interests of the country while an investigation is in progress, manifestly imports a legal obligation. The Brotherhood insists, and we think rightly, that the major purpose of Congress in passing the Railway Labor Act was "to provide a machinery to prevent strikes." Section 10 is described by counsel for the Brotherhood as "a provision limiting the right to strike," and in this view it is insisted that there "is no possible question that Congress intended to make the provisions of Section 10 enforceable to the extent of authorizing any court of competent jurisdiction to restrain either party to the controversy from changing the existing status during the sixty-day period provided for the emergency board." . . .

It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, found it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings. The question before us is whether a legal obligation of this sort is also to be found in the provisions of subdivision third of Section 2 of the Act providing that "Representatives, for the purposes of this Act, shall be designated by the respective parties . . . without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules and working conditions, and to settle disputes with all expedition in conference between authorized representatives, but added this distinct prohibition against coercive measures. This addition cannot be treated as superfluous or insignificant, or as intended to be without effect. . . .

. . . Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the Act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained. There is no impairment of the voluntary character of arrangements for the adjustment of disputes in the imposition of a legal obligation not to interfere with the free choice of those who are to make such adjustments. On the contrary, it is of the essence of a voluntary scheme, if it is to accomplish its purpose, that this liberty should be safeguarded. The definite prohibition which Congress inserted in the Act cannot therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated.

The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of

the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards and the prohibition of change in conditions pending the investigation and report of an emergency board, but in each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each. The same is true of the prohibition of interference or coercion in connection with the choice of representatives. The right is created and the remedy exists. *Marbury* v. *Madison,* 1 Cranch 137, 162, 163.

We entertain no doubt of the constitutional authority of Congress to enact the prohibition. The power to regulate commerce is the power to enact "all appropriate legislation" for its "protection and advancement" (*The Daniel Ball,* 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*County of Mobile* v. *Kimball,* 102 U.S. 691, 696, 697); to "foster, protect, control and restrain" (*Second Employers' Liability Cases,* 223 U.S. 1, 47). Exercising this authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures. The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both. . . . The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional

right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds. . . .

We do not find that the decree below goes beyond the proper enforcement of the provision of the Railway Labor Act.

Decree affirmed.

Case Questions

1. Who brought suit against the Texas & New Orleans Railroad Company?
2. What was the purpose of the suit?
3. What was the decision of the District Court?
4. How may defendants purge themselves of contempt?
5. State the purport of Sec. 2, Third and its effect on company unions.
6. What defense was made by the Company as to Sec. 2, Third? What was the Court's answer?
7. Why did Congress seek "a fresh start" in 1926?
8. List the outstanding features of the Act.
9. May an award be impeached? How?
10. If mediation and arbitration bog down, what procedure is provided?
11. Discuss the objection to constitutionality of the Act.

SECTION 74. HISTORY AND PURPOSE OF THE RAILWAY LABOR ACT (Concluded)

After closely watching the Railway Labor Act of 1926 in operation for nearly a decade, Congress, though gratified with the successful operation that attended the Act, sought to fill in a few of the loopholes that by then had become apparent. In 1934, and again in 1936, the Railway Labor Act was amended in the following major particulars:

(1) Criminal penalties were added by Sec. 2, Tenth, for violations by unions, carriers and their officers of certain of the Act's provisions. The provisions carrying strong misdemeanor sanction are 2, Third, Fourth, Fifth, Seventh, and Eighth.

(a) Sec. 2, Third, provides that "Representatives . . . shall be designated without interference, influence, or coercion by either party over the designation of representatives by the other . . .

(b) Sec. 2, Fourth, grants employees "the right to organize and bargain collectively through representatives of their own choosing."

(c) Sec. 2, Fifth, stipulates "No carrier . . . shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization . . ." This outlaws not only the yellow dog contract, but also disenables railway labor organizations from demanding any form of compulsory unionism in the interest of union security. In this respect, the Railway Labor Act is more stringent than the National Labor Relations Act of 1947, which does permit limited forms of union security arrangements.

(d) Sec. 2, Seventh, reads "No carrier . . . shall change the rates of pay, rules, or working conditions of its employees as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act." This section, as can be seen, forces the parties to arbitrate their differences if they would avoid the stringent penal sanction imposed by Sec. 2, Tenth.

(e) Sec. 2, Eighth, requires carriers to attorn to the Act by notifying its employees through printed notices thereof, "and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee . . . regardless of any other express or implied agreements between them." Thus is impressed on both parties the public character of the rights and duties created.

(2) The duty to recognize and bargain with the designated representative was vastly strengthened by the addition of Sec. 2, Ninth, which provides a method for the designation of bargaining representatives by certification procedure and commands that "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act." It should be noted that Sec. 2, Ninth, above merely strengthens Sec. 2, First, which provides "It shall be the duty of all carriers . . . and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . to avoid any interruption to commerce. . . ." While these two paragraphs do not provide the remedy of equitable enforcement in so many words, the Supreme Court held, in the *Virginian* case, reprinted in this section, that the *duty to bargain* was made so strong by the Act's verbiage as to require the courts to impose injunctive pressure on the party refusing to bargain in good faith.

As is true under the National Labor Relations Act, the duty to treat with a bargaining representative does not make it mandatory for the parties to reach an accord. It requires only good-faith negotiation and the reduction of any agreements reached to writing.

(3) The third major change introduced by the Railway Labor Act of 1934 was to create the National Railroad Adjustment Board and to reconstitute the Board of Mediation with new powers as the National Mediation Board. The details of this change are discussed in Section 75 of this book.

(4) The final amendment to the Railway Labor Act was added in 1936 when coverage of the Act was extended to include common air carriers in interstate or foreign commerce or the transportation of United States mail.

In the field of railway labor law, the case of the *Virginian Railway Co.* is second in its sweeping import only to the *Texas and New Orleans* decision previously analyzed. It is here that we find the Supreme Court giving to the 1934 Act the vitality lacking in all its predecessors, by permitting judicial enforcement of the duty to bargain. An excellent historical summary of the weaknesses of the forerunners of the 1934 enactment is also embodied in this decision.

VIRGINIAN RAILWAY CO. v. SYSTEM FEDERATION NO. 40

Supreme Court of the United States, 1937. 300 U.S. 515, 57 Sup. Ct. 592

STONE, J. This case presents questions as to the constitutional validity of certain provisions of the Railway Labor Act of May 20, 1926, C. 347, 44 Stat. 577, as amended by the Act of June 21, 1934, C. 619, 48 Stat. 1185, 45 U.S.C. Secs. 151-163, and as to the nature and extent of the relief which courts are authorized by the Act to give.

Respondents are System Federation No. 40, which will be referred to as the Federation, a labor organization affiliated with the American Federation of Labor and representing shop craft employees of petitioner railway, and certain individuals who are officers and members of the System Federation. They brought the present suit in equity in the District Court for Eastern Virginia, to compel petitioner, an interstate rail carrier, to recognize and treat with respondent Federation, as the duly accredited representative of the mechanical department employees of petitioner, and to restrain petitioner from in any way interfering with, influencing or coercing its shop craft employees in their free choice of representatives, for the purpose of contracting with petitioner with respect to rules, rates of pay and working conditions, and for the purpose of considering and settling disputes between petitioner and such employees. . . .

In 1927 the American Federation of Labor formed a local organization, which, in 1934, demanded recognition by petitioner of its

authority to represent the shop craft employees, and invoked the aid of the National Mediation Board, constituted under the Railway Labor Act as amended, to establish its authority. The Board, pursuant to agreement between the petitioner, the Federation, and the Association, and in conformity to the statute, held an election by petitioner's shop craft employees, to choose representatives for the purpose of collective bargaining with petitioner. As the result of the election, the Board certified that the Federation was the duly accredited representative of petitioner's employees in the six shop crafts.

Upon this and other evidence, not now necessary to be detailed, the trial court found that the Federation was the duly authorized representative of the mechanical department employees of petitioner, except the carmen and coach cleaners; that the petitioner, in violation of Sec. 2 of the Railway Labor Act, had failed to treat with the Federation as the duly accredited representative of petitioner's employees; that petitioner had sought to influence its employees against any affiliation with labor organizations other than an association maintained by petitioner, and to prevent its employees from exercising their right to choose their own representative; that for that purpose, following the certification by the National Mediation Board, of the Federation, as the duly authorized representative of petitioner's mechanical department employees, petitioner had organized the Independent Shop Craft Association of its shop craft employees, and had sought to induce its employees to join the independent association, and to put it forward as the authorized representative of petitioner's employees.

Upon the basis of these findings the trial court gave its decree applicable to petitioner's mechanical department employees except the carmen and coach cleaners. It directed petitioner to "treat with" the Federation and to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise. . . ." It restrained petitioner from "entering into any contract, undertaking or agreement of whatsoever kind concerning rules, rates of pay or working conditions affecting its Mechanical Department employees . . . except . . . with the Federation," and from "interfering with, influencing or coercing" its employees with respect to their free choice of representatives "for the purpose of making and maintaining contracts" with petitioner "relating to rules, rates of pay, and working conditions or for the purpose of considering and deciding disputes between the Mechanical

Department employees" and petitioner. The decree further restrained the petitioner from organizing or fostering any union of its mechanical department employees for the purpose of interfering with the Federation as the accredited representative of such employees. 11 F. Supp. 621.

On appeal the Court of Appeals for the Fourth Circuit approved and adopted the findings of the District Court and affirmed its decree. 84 F. (2d) 641. This Court granted certiorari to review the cause as one of public importance.

Petitioner here, as below, makes two main contentions: First, with respect to the relief granted, it maintains that Sec. 2, Ninth, of the Railway Labor Act, which provides that a carrier shall treat with those certified by the Mediation Board to be the representatives of a craft or class, imposes no legally enforcible obligation upon the carrier to negotiate with the representative so certified, and that in any case the statute imposes no obligation to treat or negotiate which can be appropriately enforced by a court of equity. Second, that Sec. 2, Ninth, in so far as it attempts to regulate labor relations between petitioner and its "back shop" employees, is not a regulation of interstate commerce authorized by the commerce clause because, as it asserts, they are engaged solely in intrastate activities; and that so far as it imposes on the carrier any obligation to negotiate with a labor union authorized to represent its employees, and restrains it from making agreements with any other labor organization, it is a denial of due process guaranteed by the Fifth Amendment. Other minor objections to the decree, so far as relevant to our decision, will be referred to later in the course of this opinion. . . .

First. The Obligation Imposed by the Statute. By Title III of the Transportation Act of February 28, 1920, C. 91, 41 Stat. 456, 469, Congress set up the Railroad Labor Board as a means for the peaceful settlement, by agreement or by arbitration, of labor controversies between interstate carriers and their employees. It sought "to encourage settlement without strikes, first by conference between the parties; failing that, by reference to adjustment boards of the parties' own choosing, and if this is ineffective, by a full hearing before a National Board. . . ." *Pennsylvania R. Co.* v. *Railroad Labor Board,* 261 U.S. 72, 79. The decisions of the Board were supported by no legal sanctions. The disputants were not "in any way to be forced into compliance with the statute or with the judgments pronounced by the Labor Board, except through the effect of adverse public opinion." *Pennsylvania Federation* v. *Pennsylvania R. Co.,* 267 U.S. 203, 216.

In 1926 Congress, aware of the impotence of the Board, and of the fact that its authority was generally not recognized or respected by the railroads or their employees, made a fresh start towards the peaceful settlement of labor disputes affecting railroads, by the repeal of the 1920 Act and the adoption of the Railway Labor Act. Report, Senate Committee on Interstate Commerce, No. 222, 69th Cong., 1st Sess. *Texas & N. O. R. Co.* v. *Brotherhood of Railway & S.S. Clerks, supra,* 563. By the new measure Congress continued its policy of encouraging the amicable adjustment of labor disputes by their voluntary submission to arbitration before an impartial board, but it supported that policy by the imposition of legal obligations. It provided means for enforcing the award obtained by arbitration between the parties to labor disputes. Sec. 9. In certain circumstances it prohibited any change in conditions, by the parties to an unadjusted labor dispute, for a period of thirty days, except by agreement. Sec. 10. It recognized their right to designate representatives for the purposes of the Act "without interference, influence or coercion exercised by either party over the self-organization or designation of representatives by the other." Sec. 2, Third. Under the last-mentioned provision this Court held, in the Railway Clerks case, *supra,* that employees were free to organize and to make choice of their representatives without the "coercive interference" and "pressure" of a company union organized and maintained by the employer; and that the statute protected the freedom of choice of representatives, which was an essential of the statutory scheme, with a legal sanction which it was the duty of courts to enforce by appropriate decree.

The prohibition against such interference was continued and made more explicit by the amendment of 1934. Petitioner does not challenge that part of the decree which enjoins any interference by it with the free choice of representatives by its employees, and the fostering, in the circumstances of this case, of the company union. That contention is not open to it in view of our decision in the *Railway Clerks* case, *supra,* and of the unambiguous language of Sec. 2, Third and Fourth of the Act, as amended.

But petitioner insists that the statute affords no legal sanction for so much of the decree as directs petitioner to "treat with" respondent Federation "and exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise." It points out that the requirement for reasonable effort to reach an agreement is couched in the very words of Sec. 2, First, which was taken from Sec. 301 of the

Transportation Act, and which were held to be without legal sanction in that Act. *Pennsylvania Federation* v. *Pennsylvania R. Co., supra,* 215. It is argued that they cannot now be given greater force as reenacted in the Railway Labor Act of 1926, and continued in the 1934 amendment. But these words no longer stand alone and unaided by mandatory provision of the statute as they did when first enacted. The amendment of the Railway Labor Act added new provisions in Sec. 2, Ninth, which makes it the duty of the Mediation Board, when any dispute arises among the carrier's employees, "as to who are the representatives of such employees," to investigate the dispute and to certify, as was done in this case, the name of the organization authorized to represent the employees. It commands that "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act."

It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts. The policy of the Transportation Act of encouraging voluntary adjustment of labor disputes, made manifest by those provisions of the Act which clearly contemplated the moral force of public opinion as affording its ultimate sanction, was, as we have seen, abandoned by the enactment of the Railway Labor Act. Neither the purposes of the later Act, as amended, nor its provisions when read, as they must be, in the light of our decision in the *Railway Clerks* case, *supra,* lend support to the contention that its enactments, which are mandatory in form and capable of enforcement by judicial process, were intended to be without legal sanction. . . .

Petitioner argues that the phrase "treat with" must be taken as meaning "regard" or "act towards," so that compliance with its mandate requires the employer to meet the authorized representative of the employees only if and when he shall elect to negotiate with them. This suggestion disregards the words of the section, and ignores the plain purpose made manifest throughout the numerous provisions of the Act. Its major objective is the avoidance of industrial strife, by conference between the authorized representatives of employer and employee. The command to the employer to "treat with" the authorized representative of the employees adds nothing to the 1926 Act, unless it requires some affirmative act on the part of the employer. Compare the *Railway Clerks* case, *supra.* As we cannot assume that its addition to the statute was purposeless, we must take its meaning to be that which the words suggest, which alone would add some-

thing to the statute as it was before amendment, and which alone would tend to effect the purpose of the legislation. The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by Sec. 2, First.

Petitioner's insistence that the statute does not warrant so much of the decree as forbids it to enter into contracts of employment with its individual employees is based upon a misconstruction of the decree. Both the statute and the decree are aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them. . . .

Second. Constitutionality of Sec. 2 of the Railway Labor Act. (A) Validity Under the Commerce Clause. The power of Congress over interstate commerce extends to such regulations of the relations of rail carriers to their employees as are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders. *Wilson* v. *New,* 243 U.S. 332, 347-348. The Railway Labor Act, Sec. 2, declares that its purposes, among others, are "To avoid any interruption to commerce or to the operation of any carrier engaged therein," and "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions." The provisions of the Act and its history, to which reference has been made, establish that such are its purposes, and that the latter is in aid of the former. What has been said indicates clearly that its provisions are aimed at the settlement of industrial disputes by the promotion of collective bargaining between employers and the authorized representative of their employees, and by mediation and arbitration when such bargaining does not result in agreement. It was for Congress to make the choice of the means by which its objective of securing the uninterrupted service of interstate railroads was to be secured, and its judgment, supported as it is by our long experience with industrial disputes, and the history of railroad labor relations, to which we have referred, is not open to review here. The means chosen are appropriate to the end sought and hence are within the congressional power. See *Railway Clerks* case, *supra,* 570; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U.S. 330, 369.

But petitioner insists that the Act as applied to its "back shop" employees is not within the commerce power since their duties have no direct relationship to interstate transportation. Of the 824 employees in the six shop crafts eligible to vote for a choice of representatives, 322 work in petitioner's "back shops" at Princeton, West Virginia. They are there engaged in making classified repairs, which consist of heavy repairs on locomotives and cars withdrawn from service for that purpose for long periods (an average of 105 days for locomotives and 109 days for cars). The repair work is upon the equipment used by petitioner in its transportation service, 97% of which is interstate. At times a continuous stream of engines and cars passes through the "back shops" for such repairs. When not engaged in repair work, the back shop employees perform "store order work," the manufacture of material such as rivets and repair parts, to be placed in railroad stores for use at the Princeton shop and other points on the line.

The activities in which these employees are engaged have such a relation to the other confessedly interstate activities of the petitioner that they are to be regarded as a part of them. All taken together fall within the power of Congress over interstate commerce. *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n*, 221 U.S. 612, 619; Cf. *Pedersen* v. *Delaware, L. & W. R. Co.*, 229 U.S. 146, 151. Both courts below have found that interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation. The relation of the back shop to transportation is such that a strike of petitioner's employees there, quite apart from the likelihood of its spreading to the operating department, would subject petitioner to the danger, substantial, though possibly indefinable in its extent, of interruption of the transportation service. The cause is not remote from the effect. The relation between them is not tenuous. The effect on commerce cannot be regarded as negligible. . . .

Affirmed.

Case Questions

1. What questions does the court say are presented for decision?
2. What was the purpose of the suit originally brought by System Federation?
3. State the facts giving rise to the dispute.
4. State the decision of the District Court.
5. Outline the two defenses imposed by the petitioner Railway Co.
6. How does the court dispose of the defenses of the Railway Co.?
7. Discuss the "back shop" question raised in this case.

SECTION 75. ADMINISTRATION AND ENFORCEMENT OF THE ACT

Three major agencies are invoked by the Railway Labor Act to effectuate its administrative aspects, the National Mediation Board, the National Railroad Adjustment Board, and the Interstate Commerce Commission. Least important of these three is the Interstate Commerce Commission, so its duty under this Act will be disposed of initially.

Coverage of the Railway Labor Act extends over all steam railroads in interstate commerce, including express companies, Pullmans, bridges, lighters, ferries, terminal facilities, refrigeration, storage and delivery service, but not trucking service. The Act does not apply to any street, interurban, or suburban electric railway unless such railway is operating as part of a general steam railroad system. The Interstate Commerce Commission has power to investigate and decide whether any railway operated by electric power comes under the sweep of the Act. At this point it is well to reiterate that the coverage of the Railway Labor Act and the National Labor Relations Act is mutually exclusive.

The most important agency created by the Railway Labor Act is the National Mediation Board. It is composed of three impartial members appointed by the President, no more than two of whom can be of the same political party. Their term extends for three years. Its powers and duties may be classified into four categories:

(1) Representation questions under Sec. 2, Ninth. These are treated in Section 76 of this volume.

(2) Mediation questions under Sec. 5 of the Act. These concern the reconciliation of differences between the carrier and the labor organization at the time they are negotiating *new* agreements with references to wages, hours, and working conditions. Note that the Mediation Board has no power to dictate conditions to be incorporated or to require that new agreements be reached upon the expiration of existing agreements. It is merely an intermediary having the duty to bring the parties into negotiation.

(3) Questions concerning the interpretation of agreements entered into between the parties through the mediation efforts of the Board. If the parties have reached an agreement without the aid of the Mediation Board, and an interpretation question later arises out of the agreement, the National Railroad Adjustment Board has sole interpretative jurisdiction. Sec. 5, Second. By far the greater bulk of interpretation questions are under National Railroad Adjustment Board jurisdiction as a consequence of the above rule.

(4) In some instances, labor disputes may reach a critical stage upon failure of *negotiation* between the parties. If *mediation* is ineffective, the Mediation Board is bound to propose *arbitration* under Sec. 5, First. If arbitration is accepted by the parties, resolution by arbitration is binding upon them. If arbitration is spurned, the Mediation Board, in its discretion, may certify the dispute to the President, who then may create an *emergency board* of investigation. The emergency board is given 30 days to submit a report to the President. During the period of investigation and for 30 days after the report is tendered, the parties must maintain the *status quo*. After a maximum of 60 days, the parties are free to resort to the coercive tactics that the Act is designed to render unnecessary or, at least, forestall.

We have observed that the National Railroad Adjustment Board was created by the 1934 amendment (see Sec. 5) to interpret questions "growing out of *grievances* or out of the *interpretation* . . . of [existing] agreements concerning rates of pay, rules, or working conditions. . . ." Sec. 3, First, (i). [Author's italics.] The N.R.A.B. is made up of 36 members, of whom 18 are representative of the carriers and of railway organizations. The Act requires the carriers and labor unions to pay the salaries of their own representatives.

The N.R.A.B. itself is divided into four divisions, each of which has several jurisdiction over disputes classified in accord with the occupational classification of railroad employees. Sec. 3, First, (a) and (h). From a sequential standpoint, powers of the Board are exercised as follows:

(1) If a dispute grows out of an agreement concerning grievances, rates of pay, rules, or working conditions, such dispute is originally subject to direct negotiation and settlement between the parties.

(2) Failing settlement by negotiation, the parties *may* petition the Board to entertain jurisdiction. Sec. 3, First, (i), provides that ". . . disputes may be referred by petition of the parties *or by either party* to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." [Author's italics.]

(3) Failing settlement by the N.R.A.B. because of a deadlock, which is common, Sec. 3, First, (1), provides for appointment of a neutral referee to sit with the Board to break the deadlock. If the N.R.A.B. is unable to agree upon a neutral referee, the Mediation Board may be requested to appoint one.

The Act does not specifically make it mandatory to submit interpretation controversies to either the N.R.A.B. or the N.M.B. The aggrieved party may elect to pursue his remedy in the courts, in

which case he is bound by the results of his election. Awards of the N.R.A.B. are enforcible in the District Courts under Sec. 3, First, (p), should the carrier fail to comply. ". . . Such suit . . . shall proceed in all respects as other civil suits, except that on trial . . . the findings and order of the . . . Adjustment Board shall be prima facie evidence of the facts therein stated. . . ." Under the National Labor Relations Act, the findings of fact of the N.L.R.B. are *conclusive* upon the court if supported by substantial evidence. This is not true under the Railway Labor Act, and serves to make enforcement more of a judicial rather than an administrative proceeding. The petitioner, however, under the R.L.A. enforcement procedure, is not taxed for costs of the suit, nor for reasonable attorney's fees if he prevails. Either the labor organization or an employee benefitted by the award may petition for enforcement.

The fairly recent Supreme Court decision in *E. J. & E. Ry.* v. *Burley*, reprinted in this section, is a classic in its delineation of jurisdiction between the National Mediation Board and the National Railroad Adjustment Board. The decision is important also for its determination of the extent of a labor organization's authority to act for its members in settling or compromising their *monetary claims* against a carrier. If the labor organization refers an agreement interpretation dispute to the N.R.A.B., and an adverse award is made, may the affected employees pursue their remedy in the courts, or are they bound by their union's election of remedy against the carrier?

Patterson v. *C. & E. I. R. R.*, the second case in this section, involves an individual employee who petitioned the N.R.A.B. for a hearing on his complaint. It was denied by the Board on the theory that it could hear only major cases, that is, those involving unions and carriers and not individual employees and carriers. The court resolves the issue of mandatory jurisdiction.

The question of election of remedy in foreclosing the rights of a claimant is made the subject of the *Ramsey* decision, which is the third and last of the cases in this section.

ELGIN, JOLIET & EASTERN RY. CO. v. BURLEY

United States Supreme Court, 1945. 325 U.S. 711, 65 Sup. Ct. 1282

RUTLEDGE, J. This cause, arising upon an amended complaint, brings for decision novel and important questions concerning the authority of a collective bargaining representative, affecting the

operation of the Railway Labor Act of 1934. 48 Stat. 1185. 45 U.S.C. Sec. 151ff. The ultimate issues are whether such an agent has authority, by virtue of the Act or otherwise, either to compromise and settle accrued monetary claims of ten employees or to submit them for determination by the National Railroad Adjustment Board to the exclusion of their right, after the settlement and after the Board's adverse decision, to assert them in a suit brought for that purpose. The claims are for "penalty damages" for alleged violation of the starting time provisions of a collective agreement, varying from $3,500 to $14,000, and in the aggregate amounting to $65,274.00.

The District Court rendered summary judgment for the carrier, holding that the Board's award was a final adjudication of the claims, within the union's power to seek and the Board's to make, precluding judicial review. The Court of Appeals reversed the judgment, 140 F. 2d 488, holding that the record presented a question of fact whether the union had been authorized by respondents "to negotiate, compromise and settle" the claims. . . .

The issues are not merely, as the Court of Appeals assumed, whether the Brotherhood had authority to compromise and settle the claims by agreement with the carrier and whether on the record this presents a question of fact. For petitioner insists, and the District Court held, that the award of the Board was validly made, and is final, precluding judicial review. We do not reach the questions of finality, which turn upon construction of the statutory provisions and their constitutional validity as construed. Those questions should not be determined unless the award was validly made, which presents, in our opinion, the crucial question. Respondents attack the validity and legal effectiveness of the award in three ways. Two strike at its validity on narrow grounds. Respondents say the Brotherhood had no power to submit the dispute for decision by the Board without authority given by each of them individually and that no such authority was given. They also maintain that they were entitled to have notice individually of the proceedings before the Board and none was given.

The third and most sweeping contention undercuts all other issues concerning the award's effects, whether for validity or for finality. In substance it is that the award, when rendered, amounts to nothing more than an advisory opinion. The contention founded upon language of the opinion in *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, regards the Act's entire scheme for the settlement of grievances as wholly conciliatory in character, involving no element of legal effec-

tiveness, with the consequence that the parties are entirely free to accept or ignore the Board's decision.

At the outset we put aside this broadest contention as inconsistent with the Act's terms, purposes and legislative history. The *Moore* case involved no question concerning the validity or the legal effectiveness of an award when rendered. Nor did it purport to determine that the Act creates no legal obligations through an award or otherwise. Apart from the affirmance by equal division in *Washington Terminal Co.* v. *Boswell, supra,* both prior and later decisions here are wholly inconsistent with such a view of its effects. *Cf. Virginian Ry. Co.* v. *System Federation,* 300 U.S. 515. . . .

The difference between disputes over grievances and disputes concerning the making of collective agreements is traditional in railway labor affairs. It has assumed large importance in the Railway Labor Act of 1934, substantially and procedurally. It divides the jurisdiction and functions of the Adjustment Board from those of the Mediation Board, giving them their distinct characters. It also affects the parts to be played by the collective agent and the represented employees, first in negotiations for settlement in conference and later in the quite different procedures which the Act creates for disposing of the two types of dispute. Cf. Secs. 3, 4.

The statute first marks the distinction in Section 2, which states as among the Act's five general purposes:

> "(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

The two sorts of dispute are sharply distinguished, though there are points of common treatment. Nevertheless, it is clear from the Act itself, from the history of railway labor disputes and from the legislative history of the various statutes which have dealt with them, that Congress has drawn major lines of difference between the two classes of controversy.

The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

In general the difference is between what are regarded traditionally as the major and minor disputes of the railway labor world. The former present the large issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid. Because they more often involve those consequences and because they seek to create rather than to enforce contractual rights, they have been left for settlement entirely to the processes of non-compulsory adjustment.

The so-called minor disputes, on the other hand, involving grievances, affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so. Because of their comparatively minor character and the general improbability of their causing interruption of peaceful relations and of traffic, the 1934 Act sets them apart from the major disputes and provides for very different treatment.

Broadly, the statute as amended marks out two distinct routes for settlement of the two classes of dispute, respectively, each consisting of three stages. The Act treats the two types of dispute alike in requiring negotiation as the first step toward settlement and therefore in contemplating voluntary action for both at this stage in the sense that agreement is sought and cannot be compelled. To induce agreement, however, the duty to negotiate is imposed for both grievances and major disputes.

Beyond the initial stages of negotiation and conference, however, the procedures diverge. "Major disputes" go first to mediation under the auspices of the National Mediation Board; if that fails, then to acceptance or rejection of arbitration, Cf. Sec. 7; *Trainmen* v. *Toledo*,

P. & W. R. Co., 321 U.S. 50; and finally to possible presidential intervention to secure adjustment. Sec. 10. For their settlement the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. Sec. 5, First, (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration.

The course prescribed for the settlement of grievances is very different beyond the initial stage. Thereafter the Act does not leave the parties wholly free, at their own will, to agree or not to agree. On the contrary, one of the main purposes of the 1934 amendments was to provide a more effective process of settlement.

Prior to 1934 the parties were free at all times to go to court to settle these disputes. Notwithstanding the contrary intent of the 1926 Act, each also had the power, if not the right, to defeat the intended settlement of grievances by declining to join in creating the local boards of adjustment provided for by that Act. They exercised this power to the limit. Deadlock became the common practice, making decision impossible. The result was a complete breakdown in the practical working of the machinery. Grievances accumulated and stagnated until the mass assumed the proportions of a major dispute. Several organizations took strike ballots and thus threatened to interrupt traffic, a factor which among others induced the Coordinator of Transportation to become the principal author and advocate of the amendments. The sponsor of the House insisted that Congress act upon them before adjournment for fear that if no action were taken a railroad crisis might take place. The old Mediation Board was helpless. To break this log jam, and at the same time to get grievances out of the way of the settling of major disputes through the functioning of the Mediation Board, the Adjustment Board was created and given power to decide them.

The procedure adopted is not one of mediation and conciliation only, like that provided for major disputes under the auspices of the Mediation Board. Another tribunal of very different character is established with "jurisdiction" to determine grievances and make awards concerning them. Each party to the dispute may submit it for decision, whether or not the other is willing, provided he has

himself discharged the initial duty of negotiation. Sec. 3, First (i). Rights of notice, hearing, and participation or representation are given. Sec. 3, First (j). In some instances judicial review and enforcement of awards are expressly provided or are contemplated. Sec. 3, First (p); cf. Sec. 3, First (m). When this is not done, the Act purports to make the Board's decisions "final and binding." Sec. 3, First (m).

The procedure is in terms and purpose very different from the pre-existing system of local boards. That system was in fact and effect nothing more than one for what respondents call "voluntary arbitration." No dispute could be settled unless submitted by agreement of all parties. When one was submitted, deadlock was common and there was no way of escape. The Adjustment Board was created to remove the settlement of grievances from this stagnating process and bring them within a general and inclusive plan of decision. The aim was not to dispense with agreement. It was to add decision where agreement fails and thus to safeguard the public as well as private interests against the harmful effects of pre-existing scheme.

The collective agent's power to act in the various stages of the statutory procedures is part of those procedures and necessarily is related to them in function, scope and purpose.

The statute itself vests exclusive authority to negotiate and to conclude agreements concerning major disputes in the duly selected collective agent. Cf. *Virginia Ry. Co.* v. *System Federation, supra.* Since the entire statutory procedure for settling major disputes is aimed only at securing agreement and not decision, unless the parties agree to arbitration, this exclusive authority includes representation of the employees not only in the stage of conference, but also in the later ones of mediation, arbitration and conciliation.

Whether or not the agent's exclusive power extends also to the settlement of grievances, in conference or in proceedings before the Board, presents more difficult questions. The statute does not expressly so declare. Nor does it explicitly exclude these functions. The questions therefore are to be determined by implication from the pertinent provisions. These are the ones relating to rights of participation in negotiations for settlement and in proceedings before the Board. They are in part identical with the provisions relating to major disputes, but not entirely so; and the differences are highly material. . . .

In the view we take the Act guarantees to the aggrieved employee more than merely the right to be heard by the union and the carrier.

We cannot say that the terms of the proviso to Section 2, Fourth and of Section 3, First (j) are so limited. Moreover, Section 3, First (p) expressly states that the statutory suit to enforce an award in favor of an aggrieved employee may be brought by "the petitioner," presumably the collective agent, or by the employee. All of these provisions contemplate effective participation in the statutory procedures by the aggrieved employee.

His rights, to share in the negotiations, to be heard before the Board, to have notice, and to bring the enforcement suit, would become rights more of shadow than of substance if the union, by coming to agreement with the carrier, could foreclose his claim altogether at the threshold of the statutory procedure. This would be true in any case where the employee's ideas of appropriate settlement might differ from the union's. But the drastic effects in curtailment of his pre-existing rights to act in such matters for his own protection would be most obvious in two types of cases; one, where the grievance arises from incidents of the employment not covered by a collective agreement, in which presumably the collective interest would be affected only remotely, if at all; the other, where the interest of an employee not a member of the union and the collective interest, or that of the union itself, are opposed or hostile. That the statute does not purport to discriminate between these and other cases furnishes strong support for believing its purpose was not to vest final and exclusive power of settlement in the collective agent.

We need not determine in this case whether Congress intended to leave the settlement of grievances altogether to the individual workers, excluding the collective agent entirely except as they may specifically authorize it to act for them, or intended it also to have voice in the settlement as representative of the collective interest. Cf. *Matter of Hughes Tool Company*, 56 N.L.R.B. 981, modified and enforced, *Hughes Tool Co.* v. *National Labor Relations Board, supra.* The statute does not expressly exclude grievances from the collective agent's duty to treat or power to submit to the Board. Both collective and individual interests may be concerned in the settlement where, as in this case, the dispute concerns all members alike, and settlement hangs exclusively upon a single common issue or cause of dispute arising from the terms of a collective agreement. Those interests combine in almost infinite variety of relative importance in relation to particular grievances, from situations in which the two are hostile or in which they bear little or no relation of substance to each other and opposed to others in which they are identified.

Congress made no effort to deal specifically with these variations. But whether or not the collective agent has rights, independently of the aggrieved employee's authorization, to act as representative of the collective interest and for its protection in any settlement, whether by agreement or in proceedings before the Board, an award cannot be effective as against the aggrieved employee unless he is represented individually in the proceedings in accordance with the rights of notice and appearance or representation given to him by Section 3, First (j). Those rights are separate and distinct from any the collective agent may have to represent the collective interest. For an award to affect the employee's rights, therefore, more must be shown than that the collective agent appeared and purported to act for him. It must appear that in some legally sufficient way he authorized it to act in his behalf.

Petitioner's contrary view, as has been indicated, regards the settlement of grievances as part of the collective bargaining power, indistinguishable from the making of collective agreements. The assumption ignores the major difference which the Act has drawn between those functions, both in defining them and in the modes provided for settlement.

To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as part of the power to contract "concerning rates of pay, rules, or working conditions." It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a pre-existing collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.

But it does not cover changing them with retroactive effects upon accrued rights or claims. For it is precisely the difference between making settlements effective only for the future and making them effective retroactively to conclude rights claimed as having already accrued which marks the statutory boundary between collective bargaining and the settlement of grievances. The latter by explicit definition includes the "interpretation or application" of existing agreements. To regard this as part of the collective bargaining power identifies it with making new agreements having only prospective operation; and by so doing obliterates the statute's basic distinction between those functions.

The Brotherhood had power, therefore, as collective agent to make an agreement with the carrier, effective for the future only, to settle the question of starting time, and that power was derived from the Act itself. In dealing within its scope, the carrier was not required to look further than the Act's provisions to ascertain the union's authority. But it does not follow, as petitioner assumes, that it had the same right to deal with the union concerning the past. That aspect of the dispute was not part of the collective agent's exclusive statutory authority. . . .

Since upon the total situation we cannot say as a matter of law that respondents had authorized the Brotherhood to act for them in Docket No. 7324, whether in submitting the cause or in representing them before the Board; since it is conceded also that they were not given notice of the proceedings otherwise than as the union had knowledge of them; and since further they have denied that they had knowledge of the proceedings and of the award until after it was entered, the question whether the award was effective in any manner to affect their rights must be determined in the further proceedings which are required. The crucial issue in this respect, of course, will be initially whether respondents had authorized the Brotherhood in any legally sufficient manner to represent them, individually, in the Board's proceedings in Docket No. 7324.

Until that question is determined, it is not necessary for us to pass upon the important issue concerning the finality and conclusive effect of the award, or to determine the validity and legal effect of the compromise agreement. We accordingly express no opinion concerning those issues.

The judgment is affirmed. The cause is remanded for further proceedings in conformity with this opinion.

Case Questions

1. State the question presented.
2. What was the decision of the District Court?
3. On what grounds did the Circuit Court reverse?
4. Whom does the Supreme Court sustain? Why?
5. Indicate the difference between (a) disputes over grievances and (b) disputes in the making of collective agreements. Which Board has jurisdiction over each?
6. Trace the course of "major" disputes and of "minor" disputes.
7. Were the affected employees given notice of the N.R.A.B. proceeding?
8. Distinguish the bargaining agent's power with respect to grievances and bargaining matters.
9. What does the Court say is the crucial issue in this case?

PATTERSON v. CHICAGO AND EASTERN ILLINOIS RAILROAD CO.

United States District Court, Northern District of Illinois, 1943.
50 Fed. Supp. 334

HOLLY, D. J. Plaintiff, a former employee of the Chicago and Eastern Railroad Company, hereinafter referred to as the Railroad, who claims that he was wrongfully discharged by the Railroad, has filed his complaint herein praying that a writ of *mandamus* be issued directed to the National Railroad Adjustment Board, Second Division (hereinafter referred to as the Board), commanding it to hear the controversy between plaintiff and the Railroad, upon the merits and enter an award therein. In the alternative he asks for a money judgment as damages for the wrongful discharge or that under the terms of the Federal Declaratory Judgment Act this Court enter a declaratory judgment adjudging the rights of all the parties herein.

I am of the opinion that an order should be issued directing the Board to hear and determine the case.

Congress by Chapter 8, Title 45, U. S. C. A. (the National Labor Railway Act) created a Board to be known as the National Railroad Adjustment Board for the purpose of hearing disputes between carriers and their employees. The purpose of the Act, Section 151 (a) is stated to be to avoid any interruption of commerce or the operation of any carrier engaged therein and, among other things, to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions and disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

It is further provided, Section 132, that all disputes between the carrier and its employees shall be considered and, if possible, decided with all expedition in conference between representatives designated and authorized so to confer, respectively, by the carrier and the employees thereof interested in the dispute. Representatives for this purpose shall be designated by the respective parties without interference by the other and representatives of the employees need not be persons in the employ of the carrier. Employees are given the right to organize and bargain collectively through these representatives of their own choosing, the majority of any craft or class of employees to have the right to determine who shall be representative of the craft or class. In the case of a dispute between the carrier and its employees arising out of a grievance or out of an interpretation or application of an agreement concerning rates of pay, rules, or working conditions, it is made the duty of the designated repre-

sentative or representatives of such carrier and such employees, within ten days after the receipt of notice of the desire of either to confer with respect to such dispute, to specify a time and place at which such conferences shall be held. Section 153 provides for the establishment of a Board and its composition by divisions, the second division to have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, car men and the helpers and apprentices of the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. It seems to be conceded that plaintiff's employment brings him within the group mentioned in this division. It is further provided by said Section [sub-division (i)] that disputes between an employee and a carrier growing out of grievances or out of an interpretation or application of agreements concerning the rates of pay, rules, or working conditions shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes but, failing to reach an adjustment in this manner, the dispute may be referred by petition of the parties or by either party to an appropriate division of the Adjustment Board and [sub-section (j)] that the parties may be heard either in person, by counsel, or by their representatives, as they may respectively elect, and the appropriate division of the Adjustment Board shall give due notice of all hearings to the employees and the carrier involved in the dispute.

A majority vote of all members of the Division is competent to make an award with respect to any dispute submitted to it.

In the complaint plaintiff alleges that in violation of his seniority rights he was dismissed from employment by the Railroad on September 3, 1931, the carrier stating at the time that he was laid off because of the depression and the decrease of business; that he complied with all the regulations of the railroad concerning the maintenance of his position of seniority but that the railroad has wrongfully refused to reinstate him as an employee; that on May 8, 1933, in reply to his protest against the failure to give him the employment due him by virtue of seniority, the Vice President wrote him a letter stating that in view of injuries which he claimed to have sustained resulting in a suit filed by him against the company it would be inconsistent for the railroad to do otherwise than omit his name from the seniority roll. . . .

Plaintiff further avers that at the time of his employment and discharge there was no labor union which included his employment as coal chute laborer and that he was not at that time and is not

now a member of any union which could act upon his behalf; that he attempted to prevail upon the union now controlling employees of his type to present his claim to the Board but that the union replied that it could not and would not represent him because he had not been a member at the time of his wrongful discharge; that having been unable to adjust his claim with the proper officers of the railroad, he filed his complaint with the National Railroad Adjustment Board praying re-instatement to his full seniority rights together with back pay from the time of his wrongful discharge, but said Board entered an order on March 31, 1942, that it would not assume jurisdiction over the matter nor hear the controversy for the reason that the petition was presented by an individual rather than by a union on his behalf and that this had been a consistent practice by all divisions of the Board in all cases presented by individuals. . . .

First: Did the plaintiff conduct his negotiations with the railroad in the manner provided by statute? The statute, Section 152 (Second) provides that the dispute between the carrier and its employees shall be considered and *if possible* decided with all expedition in conference between representatives designated and authorized so to confer, but I do not think that Congress meant to exclude from consideration by the Board, disputes between the carrier and employees not members of a union. All that is important is that the parties to a dispute make an honest effort to settle their differences before burdening the Board with them. It is true that where the employees of a craft or class have organized and by majority vote selected a representative, negotiations for settlement are to be carried on by the representative selected by the organization. But I do not think the benefits of the Act are confined to employees who are organized.

There was no organization, at the time of plaintiff's discharge, of the employees engaged in the kind of work plaintiff was doing. A union of such employees was organized in 1939, long after plaintiff's discharge, and it could not be said to represent him. He did, however, request the organization to take up his case, but it refused on the ground that he was not a member. He had no one to represent him. He did, however, in person take up his case with officials of the railroad, conferring first with the President of the Road who referred the matter to the Vice President and General Manager, who denied his request. This was confirmed by the Trustee who was operating the Railroad. There could be no need for further conferences.

In my opinion he had done all he was required to do in the way of attempting to settle the dispute.

The other question remains, does the Board have jurisdiction to determine a dispute between a carrier and an individual employee, unrepresented by an organization, or is its jurisdiction limited to a dispute brought to it by a carrier or an organization of its employees? I am of the opinion that in a case where there is a dispute between the carrier and individual employee who has no organization to represent him, that is, where there is no organized group of which he could become a member, he may himself present his dispute to the Board and demand a hearing. In Section 153 (j) it is provided that on the hearing the parties may be heard either *in person* or by counsel or by other representatives, as they may elect. This provision indicates, it seems to me, that the Board should hear controversies presented by the individual, where there is not one authorized by the Act to represent him. . . .

Assuming the allegations of the complaint to be true, as I must for the purpose of this motion, I am of the opinion that the Board erred in refusing to take jurisdiction of this case.

Plaintiff prays for a writ of *mandamus* to compel the Board to hear the case. The writ of *mandamus* has been abolished [F.R.C.P. 81 (b)] but the Court may, when appropriate, by order direct the Board to hear the case.

The motion of defendants to dismiss the complaint will be denied. Ordered accordingly.

Case Questions

1. What was the purpose of plaintiff's action?
2. What wrongful action on the part of the company did plaintiff assert?
3. Was there a union representing plaintiff?
4. Did plaintiff first negotiate with the carrier?
5. What was the court's conclusion?

RAMSEY v. CHESAPEAKE & OHIO RAILROAD CO.

United States District Court, Northern District of Ohio, 1948.
75 Fed. Supp. 740

KLOEB, D. J. This matter is before the Court upon the motion of defendant for summary judgment supported by affidavits. . . .

This case is based on alleged violation by the defendant of the Railway Labor Act, (Tit. 45 U.S.C.A., Secs. 152, 153), on the ground

of claimed discriminations against the plaintiff because of his union activities. . . .

The grievances of the plaintiff reached the National Railroad Adjustment Board, Fourth Division, on appeal. The finding of the Board, dated August 28, 1946, is attached to and made a part of the amended bill of complaint. The opinion states that the claim and request involved was—

> "that said Glenn Ramsey be reinstated in his former position as Yard Patrolman with pay for all time lost and with seniority rights unimpaired."

The opinion of the Board states:

> "It appears that there is no written contract between the National Council, Railway Patrolmen's Union, A. F. of L., and the respondent carrier, and hence no question of violation or interpretation of contract is involved in this proceeding.
>
> "The *sole charge* is that the carrier discharged Yard Patrolman Glenn Ramsey for union activities in violation of Paragraph 4 of Section 2 of the Railway Labor Act.
>
> "It is sufficient to say that the accusation is not substantiated by the evidence. On the contrary, the record shows that the carrier made repeated efforts to induce Ramsey to accept the position at Columbus, to which it assigned him, and his refusal to do so left the carrier no alternative but to dismiss him." (Italics supplied.)

The Board further found "upon the whole record and all the evidence" that the carrier and employee involved in the dispute were such within the meaning of the Railway Labor Act; that it had jurisdiction "over the dispute involved herein," and that the parties to the dispute were given due notice of hearing thereon.

It is the contention of counsel for the defendant, in support of motion for summary judgment, that this finding and decision of the Board is final and conclusive upon the parties. In support they cite the case of *Berryman* v. *Pullman Co.*, 48 Fed. Supp. 542 . . . which does not seem to have reached the higher courts on review. It was there held: "1. The remedy provided by the Railway Labor Act by submission of dispute to the adjustment board is not exclusive, but once a dispute is submitted to the board an award made is final except in so far as it contains a money award. Railway Labor Act. Sec. 3 (m), 45 U.S.C.A. Sec. 153 (m). . . ."

There seems to be no question but that the Board had jurisdiction of all of the grievances of the plaintiff set forth in his amended bill of complaint, under the provisions of Tit. 45 U.S.C.A., Sec. 153 (i), *supra.*

Reference to the statements referred to in the submission to the National Railroad Adjustment Board indicates that all of the grievances of the plaintiff were presented to the Board, although the Board in its opinion does not seem to have made specific findings upon all the facts involved.

It would seem that, having presented his grievances to the Board, the plaintiff was bound by its decision under the language of Sec. 153 (m), reading as follows:

> "(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, *and the awards shall be final and binding upon both parties to the dispute,* except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute." [Author's italics.]

This seems to be in accord with the general law on the subject *res judicata:*

> "The general rule is that a former adjudication settles all issues between the parties that could have been raised and decided as well as those that were decided. . . ."

In addition to the case of *Berryman* v. *Pullman Co., supra,* relied upon by counsel for defendant, we find the recent case of *Kelly* v. *Nashville, C. & St. L. R. R. Co.,* 21 L.R.R.M. 2246 (D. C. Tenn. 1/15/48, Darr, J.). In this case, the plaintiff was employed under the terms of a collective bargaining contract with a brotherhood of locomotive engineers. There the plaintiff made the claim that he was wrongfully discharged prior to the institution of his suit. The plaintiff's grievance was submitted to the National Railroad Adjustment Board for settlement under the provisions of the Railway Labor Act (Tit. 45 U.S.C.A., Sec. 151, *et seq*). The defendant moved for summary judgment, and filed an affidavit and the disposition of the plaintiff in support. The court held that the plaintiff made an election of remedies, warranting dismissal of his court action based on the same grievance, saying:

> "The Railway Labor Act sets up a procedure and method by which an employee of a carrier who is aggrieved concerning his labor relations may submit his grievances to the Adjustment Board, but the remedy offered is not exclusive. Such employee may bring a suit at law to settle the dispute without first submitting the controversy to the Adjustment Board. *Moore* v. *Illinois Central R. Co.,* 312 U.S. 630, 634. . . .
>
> "The Railway Labor Act is especially set up whereby there may be a voluntary adjustment of grievances like unto the plaintiff's. The Adjustment

Board may give complete relief by ordering the reinstatement of the employee without disturbance of his seniority and award him pay for all time lost. . . . The exact question posed here does not seem to have been judicially determined. . . .

"After consideration of the cases herein cited and a contemplation of the Railway Labor Act and its purposes, I conclude that Congress created an agency, to be composed of experts upon questions that might arise, whereby grievances between carriers and employees may be settled justly and also place a minimum responsibility upon the courts.

"If one who is aggrieved and entitled to the benefits of the Act places his grievance for adjudication by the Adjustment Board upon merit, his voluntary action thereby fixes exclusive jurisdiction. In other words, such person may take the remedies provided by the Act, or he may bring his suit in a court. He cannot do both. The award of the Board and the final judgment of a court are equally final."

The case of *Williams* v. *A. T. & S. F. Ry. Co.*, 204 S.W. 693 (Sup. Ct. Mo. 9/8/47), is also in point. This was a suit for violation of seniority rights as locomotive fireman. The court there held:

"Where railroad firemen participated until final disposition in proceedings held to determine fireman's seniority and proceedings were in accordance with regulations for locomotive firemen which constituted collective bargaining agreement between railroad and its firemen, and then presented his claim to National Railroad Adjustment Board and the Board decided against fireman, fireman was not denied due process of law and could not litigate the same question in the Court. 45 U.S.C.A., Sec. 151, 152, 153 (m)."

To the same effect is *Austin* v. *Southern Pac. Co.*, 123 P. (2d) 39 (C.A. Cal. 1942), where it was held:

"Where railway employee made election to invoke jurisdiction of Adjustment Board to determine question of his seniority rights, award or determination of board was final and conclusive. Railway Labor Act, Sec. 3(m), 45 U.S.C.A. Sec. 153(m)."

In view of the foregoing, it would seem that the motion for summary judgment should be sustained. . . .

Case Questions

1. State the claim made by Ramsey before the N.R.A.B.
2. Was the decision adverse to Ramsey? Why?
3. State the rule of the *Berryman* case. Does this court follow the rule?

SECTION 76. DESIGNATION OF BARGAINING REPRESENTATIVES

The National Mediation Board has original jurisdiction over representation issues. The rights granted and the procedure followed closely parallel those under the National Labor Relations Act.

Sec. 2, Fourth of the Railway Labor Act permits employees to ". . . bargain collectively through representatives of their own choosing" and to be free from employer interferences in their organizational efforts. The procedure for designation of representatives, election, and certification is stated in Sec. 2, Ninth of the R.L.A. The rules of the Board prescribe a petition by those interested in securing bargaining agency rights, such petition to be supported by a substantial (35%) showing of interest. Following this, an election may be held, with certification accruing to the majority representative in accord with the political election principle. The R.L.A. permits certification without the necessity of a formal election, that is, the representative may prove his majority status by means of signature lists or cards or by a consent election.

The case of *Brotherhood of Railroad Trainmen* below addresses itself to the major difficulty in representation matters, namely, the determination of the appropriate "class or craft unit." The limitations imposed on the N.M.B. in this regard are the high points of the decision.

BROTHERHOOD OF RAILROAD TRAINMEN v. NATIONAL MEDIATION BOARD

United States Court of Appeals for the District of Columbia, 1936.
88 Fed. (2d) 757

GRONER, J. By Act of June 21, 1934, Congress amended the Railway Labor Act for the avowed purpose of correcting defects that had become evident as the result of eight years' experience. The Act of 1926 (44 Stat. 577) had created certain definite legal obligations enforceable by judicial proceedings for the purpose, among other things, of safeguarding the rights of employees to bargain collectively with the carrier through representatives of their own choosing without interference by the carrier. *Virginian Railway Co.* v. *System Federation, etc.* (C.C.A.), 84 F. (2d) 641, 645. The amendment provided for a Board called the National Mediation Board, to which might be referred any dispute arising among the carrier's employees as to who was the representative of such employees in making contracts and working agreements with the carrier in accordance with the requirements of the act. The Board is authorized in such a case

to investigate the dispute and to certify the name of the organization authorized to represent the employees involved, and to this end to cause a secret ballot of the employees in such manner as should insure a choice without interference or coercion. And in the election the Board is authorized to establish rules to govern the election and to "designate" who shall participate. Section 2, paragraph fourth, of the act provides that the majority of any craft or class shall have the right to determine who shall be the representative of the craft or class for the purposes of the act.

In the spring of 1935 a dispute arose among the road conductor employees of the Norfolk & Western Railway Company as to who should be the representative of that craft or class. At that time the conductors were represented by the Order of Railway Conductors, and the brakemen employees by appellant, the Brotherhood of Railroad Trainmen. As the result of the dispute, the Brotherhood invoked the jurisdiction of the Board for the certification of the proper representative of the craft. The Board, having assumed jurisdiction, promulgated a ruling limiting the conductor employees eligible to vote to those "regularly assigned as Road Conductors or on Road Conductors' Extra Boards . . . as of August 22, 1935."

Out of a total of 605 employees on the conductors' roster, only 294 were listed by the Board as qualified to vote, since only that number were regularly assigned as conductors or on conductors' extra boards on that date. The remainder, as the record discloses, worked a portion of their time as part-time, extra, or emergency conductors and the balance of the time as brakemen. In the election held by the Board a large majority of the 294 regular conductors voted for representation by the Order of Railway Conductors, and a certificate to that effect from the Board to the carrier followed.

The question on this appeal is whether the decision of the Board, excluding part-time conductors from participation in the election, was a mistake of law so clearly erroneous as to make the decision arbitrary. There are other points made, one of which we shall notice.

In the railroad business the employees have for many years been divided into crafts, and in many instances these crafts form a continuous line of employments through which an employee may progress from the lower ranking crafts to the higher. The craft of brakemen comes immediately beneath the craft of conductors, and in the case of the Norfolk & Western, as doubtless also in the case of the other railroads, the custom has been at different periods to hold examinations among the senior ranking brakemen, and such brakemen as qualify are entitled to be and are placed on the com-

pany's roster of conductor employees, are given certificates as conductors, and are eligible for service as conductors when called. They acquire seniority as conductors from the date of their certification as such, *and they also continue to acquire seniority as brakemen;* but unless and until jobs are open they continue to work as brakemen. Seniority is the test for availability to a particular job, and so the highest ranking men on the conductors' seniority list are regularly assigned as conductors. The next highest ranking conductors are first called to fill vacancies, and when extra boards are established, the names of these conductors are placed on what are called "extra boards" and are drawn therefrom. When more men than are assigned regularly as conductors and on conductors' extra boards are needed for emergency, part-time, or irregular work as conductors, they are drawn in the order of seniority from those persons on the conductors' list who are then working as brakemen. The demand for such emergency conductors fluctuates seasonally and otherwise.

The bill alleges in the case of four of the emergency conductor employees who joined the Brotherhood in bringing this suit that in the eight months preceding the election one of them was assigned to work 203 working days, of which he worked 179 days as conductor and 24 as brakeman; that another was assigned to work 246 days, of which he worked as conductor 217 days and 29 as brakeman; another was assigned 266 days, of which 243 were worked as conductor and 23 as brakeman; still another, that he was assigned 336 days, of which 156 were worked as conductor and 180 as brakeman. Each of these employees alleged he was not permitted to vote because he was not "regularly assigned as a road conductor" or on the "extra board" on August 22, 1935, and each alleged that he was in fact then a member of the craft or class of conductor employees and vitally interested in any dispute affecting that craft. The bill further alleged that all the 308 excluded conductor employees had been assigned and served the railway in the capacity of conductor "a substantial portion of their time from January 1, 1935, up to and including the date on which said election was held"; and that many of them had served a greater portion of their time in such capacity as conductors than they had in the capacity of brakemen. As to all it is charged in the bill that they are in the employ of the carrier and hold certificates as road conductors and are carried on the company's roster as conductor employees; that they are governed and controlled by the carrier as to their services under the terms of the working agreement between the company and its conductor employees; that they have earned and are continuing to earn and will in the future earn senior-

ity rights as conductors; that they serve and are required to serve as brakemen when there are no available assignments as conductors as provided in the working agreement between the company and the conductor employees, and are entitled in the order of seniority to the first available assignment as conductors; and on this basis it is claimed that they have a present, vested, and vital interest in any dispute involving the craft or class of conductor employees of the carrier.

The Board, in reaching a decision of eligibility to vote, placed its determination upon what is said to be its settled practice of limiting those eligible to vote for representation of a class or craft to "those who have a present interest in the wages, rules and working conditions of the class whose representation is to be determined." And this brings us to a consideration of the act and the existing working agreement which is made an exhibit with the bill.

The general purpose of the Labor Act was to promote peaceful and conciliatory consideration of labor disputes and especially to secure the right of collective bargaining, through a representative chosen by a majority of the employees in a particular craft or class. It is not going too far to say that the basic and underlying purpose of the act was to insure representation in accordance with established custom to those employees whose interests are involved. But the act leaves uncertain the precise or exact meaning of the words "class or craft," and we think obviously for the reason that it was intended by Congress to adopt the designation of class or craft as determined by the then current working agreement between the railroad and particular groups or classes of its employees. And we find justification for this conclusion in paragraph 7 of section 2, which provides that: "No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act." In other words, that no carrier shall change the terms of its working agreement with any class of employees, as that class is embodied in and declared to exist by the working agreement, except in accordance with the terms of the agreement or in conformity with the act. In the light of this provision—and of the general scheme of the act as a whole—we think it is obvious that how classes are to be formed and who shall compose them are matters left to the employees themselves; and so we think that by reference to the terms of the working agreement which the employees have made, is to be found at least some evidence of who

are members of the craft or class covered by that agreement. The Board also recognizes that this is a criterion, for in its First Annual Report to Congress, after noting that the act does not give it authority to define the crafts or classes, it says: "So far as possible the Board has followed the past practice of the employees in grouping themselves for representation purposes and of the carriers in making agreements with such representatives."

An examination of the working agreement in the present case reveals that the term "conductor" as a class includes not only regularly assigned and extra board conductors but emergency conductors as well. For example:

Article 26, 1(a): "Conductors will be considered in line of promotion in accordance with seniority, ability, and fitness."

Article 26, 1(c): "The rights of conductors will commence on the day they pass the required examinations. . . ."

Article 26, 1(f): "Conductors may not voluntarily relinquish their rights as conductors and assert seniority as brakemen without losing their rights as conductors thereby."

Article 26, 1(l): "Seniority lists of conductors in road service will be posted semi-annually, in January and July of each year."

Article 26, 3: "On divisions or seniority districts where there is maintained an extra list of conductors, no emergency conductors will be used, except in case of extreme emergency where no extra conductor can be obtained."

Article 26, 2(a): "When increasing the extra conductor lists at Crewe, Roanoke, Bluefield, Portsmouth, and Joyce Avenue, the oldest emergency conductor or conductors on the seniority district will be assigned. . . .

"At terminals where extra conductor lists are not maintained, permanently vacant or newly put on pool runs will be filled by assigning thereto the oldest emergency conductor or conductors on the seniority district. . . ."

And by a supplementary agreement, effective November 1, 1932, the purpose of which was to relieve unemployment, the monthly mileage limitation agreement was amended to provide that: "1(c). The maximum monthly mileage limitation applying to men who work part time as conductor and part time as trainman in the same calendar month shall be 3500 miles, or its equivalent. . . ."

These references to the subsisting agreement between the craft and the carrier show, we think, that the excluded emergency conductors are in fact included under that agreement and that when

they work as conductors they are controlled by its terms. In that agreement they have a present interest—varying in degree according to the amount of work done under it. As to some of them, as the bill shows, their wages and terms of service for the greater part of their time were controlled and regulated by the agreement. In this view it seems clear that, applying the Board's own test to the facts of the case, these individual appellants show a present interest of a substantial nature. But as we shall later point out, there is nothing in the agreement itself which shows definitely who participated in electing the representative to act for the conductors in its making, that is to say, whether all or only a part were then considered eligible to vote.

The Board, as we have seen, confined the right to participation to those conductors regularly assigned or on the *extra boards* on August 22, 1935. But no reason is given for making a distinction between conductors on the extra boards and emergency conductors; but, as opposed to that distinction, we find in the agreement that extra boards are not maintained in all lines of service on all seniority districts, and that when no such boards are maintained the senior emergency conductors on the district are assigned to fill vacancies. In the absence of anything to the contrary, upon which a proper distinction can be based, it is a fair conclusion that emergency conductors, when there are no extra boards, have the same "present interest" as those conductors on the extra boards when such boards are maintained. But because it is impossible to determine this question without a fuller disclosure of the facts, we express no opinion on the question and suggest it only as showing the necessity for a fuller hearing than was had. . . .

We perfectly recognize that the intent of Congress was to clothe the Board with large discretionary powers in the conduct of elections for the appointment of representatives between the carrier and the craft, and we have no desire to impinge upon or curtail this very proper discretion. The subject is an involved one, and this fact is recognized by the Board and pointed out in plain language in its report to Congress to which we have referred. But this fact all the more shows the necessity of full hearings whenever a dispute arises. And obviously the lack of such a hearing in the present case has left us, as it must have left the Board, without the necessary data on which to form an opinion. In this circumstance, if the matter of interest alone is to be adopted as the test, we should hesitate to hold that an emergency conductor whose service time on the railroad is

spent 50 per cent as conductor and 50 per cent as brakeman should not be classified, for the purposes of agreement making, as a conductor. But, as we have seen, the intent of Congress, in leaving undefined by the act the personnel of the class authorized to choose a representative, was to adopt and confirm the grouping as it then was recognized and established by mutual agreement of employee and carrier. And this introduces another element as to which the record is wholly silent. We do not know if, in the character of grouping we have mentioned, emergency conductors were voting members of the conductor group as of the time of the passage of the act or whether at that time they were regarded by the men themselves for agreement making as members only of the brakemen group, and nothing in the so-called hearing afforded by the Board throws any light upon the subject. From all of this it is obvious that the Board acted in this dispute without affording appellants any real hearing, and this, it is needless to say, was the sort of arbitrary action which no court—when its jurisdiction is invoked—can approve.

In this situation, our conclusion is that the case should go back to the District Court with directions to set aside its former order and remand the case to the Board with instructions to annul its certification and to afford the contesting employees and Brotherhood a full hearing and then to reach a decision based only on evidence adduced at the hearing and supplemented by a finding of facts on which it rests its conclusion. When this has been done it may appear that the result of the election would have been the same, so that no new election will be required; but in any event the courts, if then called upon to review the matter, will have before them a record on which to determine whether the decision is arbitrary or capricious. Enough appears here to justify us in finding, for the reasons stated above, that the present decision—especially if made, as alleged, as the result of information only in the possession of the Board and withheld from appellants—is without legal effect and should be corrected in the way we have indicated.

Reversed and remanded.

Case Questions

1. State the question of the case in the words of the court.
2. What is the test for availability to a particular job?
3. What rule was followed by the N.M.B. in determining eligibility to vote?
4. Who determines how "classes" are to be formed?
5. Did the Board hold a hearing in the instant case?
6. What was the final order of this court?

SECTION 77. DISCRIMINATION UNDER THE RAILWAY LABOR ACT

In Section 74 were included the *Texas & New Orleans* and *Virginian Railway* decisions of the Supreme Court. While these cases were catalogued to show the genesis of the Railway Labor Act, they are authority for the propositions that a carrier is under an enforceable duty to bargain collectively and in good faith and that it may not interfere with or dominate any labor representative. The final major consideration is that of discrimination. Discrimination for labor union adherence or nonadherence is prohibited employer carriers by Sec. 2, Fourth of the Act. We shall not further develop this rule as applied to carriers, since the law of the Railway Labor Act closely parallels that of the National Labor Relations Act on all counts detailed above, whether the issue be interference, domination, discrimination, or refusal to bargain.

Refinement of the idea of discrimination is necessary in the sense that the normal concept of this term has now been held by the Supreme Court to extend to labor organizations as well as to carriers. The *Steele* decision in this section might as logically have been classified under Section 76 on representation, for the court treats of union discrimination in terms of the labor organization's duty to represent all in the designated class fairly, whether they are members of the organization or not and regardless of their race or creed. The Supreme Court has not, as yet, construed a case under the National Labor Relations Act, or its 1947 amendment, that raises a question to which the *Steele* rule might be applicable. However, we saw in Section 66.4 of this volume that the National Labor Relations Board is currently applying the *Steele* case mandate at the Board level.

STEELE v. LOUISVILLE & NASHVILLE R. COMPANY

Supreme Court of the United States, 1944. 323 U.S. 192, 65 Sup. Ct. 226

STONE, C. J. The question is whether the Railway Labor Act . . . imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation. . . .

The allegations of the bill of complaint, so far as now material, are as follows: Petitioner, a Negro, is a locomotive fireman in the employ of respondent railroad, suing on his own behalf and that of his fellow employees who, like petitioner, are Negro firemen employed by the Railroad. Respondent Brotherhood, a labor organization, is, as provided under Sec. 2, Fourth of the Railway Labor Act, the exclusive bargaining representative of the craft of firemen employed by the Railroad and is recognized as such by it and the members of the craft. The majority of the firemen employed by the Railroad are white and are members of the Brotherhood, but a substantial minority are Negroes who, by the constitution and ritual of the Brotherhood, are excluded from its membership. As the memmership of the Brotherhood constitutes a majority of all firemen employed on respondent Railroad, and as under Sec. 2, Fourth, the members because they are the majority have the right to choose and have chosen the Brotherhood to represent the craft, petitioner and other Negro firemen on the road have been required to accept the Brotherhood as their representative for the purposes of the Act. . . .

Until April 8, 1941, the petitioner was in a "passenger pool," to which one white and five Negro firemen were assigned. These jobs were highly desirable in point of wages, hours and other considerations. Petitioner had performed and was performing his work satisfactorily. Following a reduction in the mileage covered by the pool, all jobs in the pool were, about April 1, 1941, declared vacant. The Brotherhood and the Railroad, acting under the agreement, disqualified all the Negro firemen and replaced them with four white men, members of the Brotherhood, all junior in seniority to petitioner and no more competent or worthy. As a consequence petitioner was deprived of employment for sixteen days and then was assigned to more arduous, longer, and less remunerative work in local freight service. In conformity to the agreement, he was later replaced by a Brotherhood member junior to him, and assigned work on a switch engine, which was still harder and less remunerative, until January 3, 1942. On that date, after the bill of complaint in the present suit had been filed, he was reassigned to passenger service.

Protests and appeals of petitioner and his fellow Negro firemen, addressed to the Railroad and the Brotherhood, in an effort to secure relief and redress, have been ignored. Respondents have expressed their intention to enforce the agreement of February 18, 1941, and

its subsequent modifications. The Brotherhood has acted and asserts the right to act as exclusive bargaining representative of the firemen's craft. It is alleged that in that capacity it is under an obligation and duty imposed by the Act to represent the Negro firemen impartially and in good faith; but instead, in its notice to and contracts with the railroads, it has been hostile and disloyal to the Negro firemen, has deliberately discriminated against them, and has sought to deprive them of their seniority rights and to drive them out of employment in their craft, all in order to create a monopoly of employment for Brotherhood members. . . .

The Supreme Court of Alabama took jurisdiction of the cause but held on the merits that petitioner's complaint stated no cause of action. It pointed out that the Act places a mandatory duty on the Railroad to treat with the Brotherhood as the exclusive representative of the employees in a craft, imposes heavy criminal penalties for willful failure to comply with its command, and provides that the majority of any craft shall have the right to determine who shall be the representative of the class for collective bargaining with the employer, see *Virginian R. Co.* v. *System Federation,* 300 U.S. 515, 545, 57 Sup. Ct. 592, 598, 81 L. Ed. 789. It thought that the Brotherhood was empowered by the statute to enter into the agreement of February 18, 1941, and that by virtue of the statute the Brotherhood has power by agreement with the Railroad both to create the seniority rights of petitioner and his fellow Negro employees and to destroy them. It construed the statute, not as creating the relationship of principal and agent between the members of the craft and the Brotherhood, but as conferring on the Brotherhood plenary authority to treat with the Railroad and enter into contracts fixing rates of pay and working conditions for the craft as a whole without any legal obligation or duty to protect the rights of minorities from discrimination or unfair treatment, however gross. Consequently it held that neither the Brotherhood nor the Railroad violated any rights of petitioner or his fellow Negro employees by negotiating the contracts discriminating against them. . . .

But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority. Since petitioner and the other Negro members of the craft are not members of the Brotherhood or eligible for membership, the

authority to act for them is derived not from their action or consent but wholly from the command of the Act. Section 2, Fourth, provides: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. . . ."

By the terms of the Act, Sec. 2, Fourth, the employees are permitted to act "through" their representative, and it represents them "for the purposes of" the Act. Sections 2, Third, Fourth, Ninth. The purposes of the Act declared by Sec. 2 are the avoidance of "any interruption to commerce or to the operation of any carrier engaged therein," and this aim is sought to be achieved by encouraging "the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions." Compare *Texas & N. O. R. Co.* v. *Brotherhood of Railway & S. S. Clerks*, 281 U.S. 548, 569, 50 Sup. Ct. 427, 433, 74 L. Ed. 1034. These purposes would hardly be attained if a substantial minority of the craft were denied the right to have their interests considered at the conference table and if the final result of the bargaining process were to be the sacrifice of the interests of the minority by the action of a representative chosen by the majority. The only recourse of the minority would be to strike, with the attendant interruption of commerce, which the Act seeks to avoid. . . .

The labor organization chosen to be the representative of the craft or class of employees is thus chosen to represent all of its members, regardless of their union affiliations or want of them. As we have pointed out with respect to the like provision of the National Labor Relations Act, 29 U.S.C.A. Sec. 151 *et seq.*, in *J. I. Case Co.* v. *National Labor Relations Board, supra*, 321 U.S. 338, 64 Sup. Ct. 580, "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employers with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit. . . ." The purpose of providing for a representative is to secure those benefits for those who are represented and not to deprive them or any of them of the benefits of collective bargaining for the advantage of the representative or those members of the craft who selected it. . . .

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally

the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. *J. I. Case Co.* v. *National Labor Relations Board, supra,* 321 U.S. 335, 64 Sup. Ct. 579, but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representative of a craft, all of whose members are not identical in their interest or merit. . . . Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations. . . .

So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good

faith. Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action. . . .

We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty.

The judgment is accordingly reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed.

Case Questions

1. State the question for decision.
2. Who is the petitioner and why?
3. Had petitioner appealed to the union and Railroad Co. for redress?
4. Discuss the import of the decision on this case as handed down by the Supreme Court of Alabama.
5. State the reasons for reversal by the United States Supreme Court.
6. Discuss "relevant differences" in relation to the making of trade agreements.
7. Does the Railway Labor Act deny to a labor organization the right to determine eligibility to its membership?

SECTION 78. INJUNCTIONS UNDER THE RAILWAY LABOR ACT

The employment of the injunction has previously been treated in conjunction with the enforcement of orders issued by the N.M.B. and the N.R.A.B. Remaining for consideration, however, is the effect of the Federal Anti-Injunction Act upon railway labor disputes. This topic is fully treated in the *Railroad Trainmen* decision below. May a carrier secure a federal court injunction against labor violence if it has failed to submit the dispute to the arbitration procedure detailed in the Railway Labor Act? Is arbitration compulsory under the Act? This decision should be read bearing in mind the thought that the Supreme Court has uniformly held that compulsory arbitration laws are unconstitutional.

BROTHERHOOD OF RAILROAD TRAINMEN v. TOLEDO, PEORIA & WESTERN RAILROAD

Supreme Court of the United States, 1944. 321 U.S. 50, 64 Sup. Ct. 413

RUTLEDGE, J. The important question is whether the District Court properly issued an injunction which restrained respondent's employees, conductors, yardmen, enginemen, and firemen, from interfering by violence or threats of violence with its property and interstate railroad operations. The sole issues that concern us are the existence of federal jurisdiction and whether the requirements of the Norris-LaGuardia Act (29 U.S.C. secs. 107, 108, 47 Stat. 71, 72) were satisfied.

The case arises out of a long-continued labor dispute relating to working conditions and rates of pay. Negotiations between the parties, beginning in October, 1940, failed. A long course of mediation, with the aid of the National Mediation Board, resulted likewise. Accordingly, on November 7, 1941, the mediator proposed arbitration pursuant to the Railway Labor Act's provisions. 45 U.S.C. sec. 155, First (b), 48 Stat. 1195. Both parties refused. Thereupon, as the Act requires, the Board terminated its services. *Ibid.* This occurred November 21, 1941. . . .

With the bombing of Pearl Harbor on December 7, the Mediation Board again intervened, strongly urging both sides to settle the dispute in view of the national emergency. At the Board's request the employees had postponed the strike indefinitely. Further conference failed to bring agreement and on December 17 the Board again urged that the disputants agree to arbitration under the statute. This time the employees accepted. But respondent continued its refusal, though it also continued to urge the appointment of an emergency board. And, while the record does not show that respondent was notified formally of the employees' agreement to arbitrate until December 28, neither does it appear that respondent did not know of this fact before that time. . . .

The strike took effect at the appointed time. Picket lines were formed. Respondent undertook to continue operations with other employees. It employed "special agents" to protect its trains and property. Clashes occurred between them and the working employees on the one hand, and the striking employees on the other. Various incidents involving violence or threats of violence took place. Some resulted in personal attacks, others in damage to property and interruption of service. The respondent sought the aid of public authori-

ties, including the sheriffs of counties along its right of way and police authorities in cities and towns which it served. Some assistance was offered, but in some instances the authorities replied they had forces inadequate to supply the aid respondent requested and in others no reply was given. The parties are at odds concerning the extent of the violence, the need for public protection, and the adequacy of what was supplied or available. But the findings of the District Court are that the violence was substantial and the protection supplied by the public officials was inadequate. These incidents took place through the period extending from December 29, 1941, to January 3, 1942. . . .

Three principal issues have been made in the lower courts and here. Stated in the form of petitioners' contentions, they are: (1) The District Court was without jurisdiction, since there is no claim of diversity of citizenship and, it is said, no federal question is involved; (2) the evidence was not sufficient to show that the public authorities were unwilling or unable to furnish adequate protection for respondent's property; and (3) respondent did not make every reasonable effort to settle the dispute as required by the Norris-LaGuardia Act. Without passing upon the others, we think the last contention must be sustained.

Section 8 of the Norris-LaGuardia Act (29 U.S.C. sec. 108, 47 Stat. 72) provides:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

The question, broadly stated, is whether respondent made "every reasonable effort" to settle the dispute, as the section requires. On the facts this narrows to whether its steadfast refusal to agree to arbitration under the Railway Labor Act's provisions made the section operative. We think it did, with the consequence that the federal courts were deprived of the power to afford injunctive relief and respondent was remitted to other forms of legal remedy which remained available.

Respondent was subject to the Railway Labor Act. Its provisions and machinery for voluntary arbitration were "available." Resort to them would have been a "reasonable effort to settle" the dispute. Clearly arbitration under the Act was a method, both reasonable and

available, which respondent refused to employ, not once, but repeatedly and adamantly. If it had been used, it would have averted the strike, the violence which followed, and the need for an injunction.

Section 8 demands this method be exhausted before a complainant to whom it is available may have injunctive relief. Broadly, the section imposes two conditions. If a complainant has failed (1) to comply with any obligation imposed by law or (2) to make every reasonable effort to settle the dispute, he is forbidden relief. The latter condition is broader than the former. One must not only discharge his legal obligations. He must also go beyond them and make all reasonable effort, at the least by the methods specified if they are available, though none may involve complying with any legal duty. Any other view would make the second condition wholly redundant. It clearly is not the section's purpose, therefore, by that condition, to require only what one is compelled by law to do. Yet, as will appear, this would be the effect of accepting respondent's position.

It is wholly inconsistent with the section's language and purpose to construe it, as have respondent and the lower courts, to require reasonable effort by only one conciliatory device when others are available. The explicit terms demand "*every* reasonable effort" to settle the dispute. Three modes are specified. They were the normal ones for settlement of labor disputes by the efforts of the parties themselves and the aid of agencies adapted specially for the purpose. The Railway Labor Act provided for all of them, with the aid of governmental machinery in the stages of mediation and arbitration. Section 8 is not limited to railway labor disputes. But it includes them. And its very terms show they were used in explicit contemplation of the procedures and machinery then existing under the Railway Labor Act and with the intent of making their exhaustion conditions for securing injunctive relief, not singly or alternatively, but conjunctively or successively, when available. This purpose of Congress is put beyond question when the section's legislative history is considered in the light of the history and the basic common policy of the two statutes, the Railway Labor Act and the Norris-LaGuardia Act.

The policy of the Railway Labor Act was to encourage use of the nonjudicial processes of negotiation, mediation and arbitration for the adjustment of labor disputes. Cf. *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.*, 320 U.S. 323; *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U.S. 338. The

over-all policy of the Norris-LaGuardia Act was the same. The latter did not entirely abolish judicial power to impose previous restraint in labor controversies. But its prime purpose was to restrict the federal equity power in such matters within greatly narrower limits than it had come to occupy. It sought to make injunction a last line of defense, available not only after other legally required methods, but after all reasonable methods, as well, have been tried and found wanting. This purpose runs throughout the Act's provisions. It is dominant and explicit in sec. 8. In short, the intent evidenced both by words and by policy was to gear the section's requirements squarely into the methods and procedures prescribed by the Railway Labor Act. . . .

. . . Respondent's failure or refusal to arbitrate has not violated any obligation imposed upon it, whether by the Railway Labor Act or by the Norris-LaGuardia Act. No one has recourse against it by any legal means on account of this failure. Respondent is free to arbitrate or not, as it chooses. But if it refuses, it loses the legal right to have an injunction issued by a federal court or, to put the matter more accurately, it fails to perfect the right to such relief. This is not compulsory arbitration. It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court. . . .

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

Case Questions

1. Outline the failure of negotiations incident to the eventual dispute.
2. Did the employees agree to arbitration?
3. Disclose the incidents to the strike.
4. What did the District Court find as to the adequacy of police authorities?
5. What does Sec. 8 of the Norris-LaGuardia Act provide? Does it include railway labor disputes?
6. Why did the Court refuse the injunction?
7. Explain why the court believed that its action was not an unconstitutional requirement of compulsory arbitration.

SECTION 79. JUDICIAL JURISDICTION AND REVIEW

The functions of the National Mediation Board, the parent agency of the Railway Labor Act, were previously stated as including mediation, representation questions, and a limited class of interpretation questions. The courts have shown a strong inclination to refuse judicial review of N.M.B. orders and proceedings. The same is not applicable, however, to decisions of the Adjustment Board concerning the interpretation and application of existing collective agreements.

While Sec. 3, First (m) provides that orders of the Adjustment Board "shall be final and binding . . . except insofar as they shall contain a money award," yet Sec. 3, First (p) of the Act virtually enables the adverse party to secure a trial *de novo* in resisting a petitioner's suit for enforcement of the award. The practical effect, then of Sec. 3, First (p) is to open the way for complete judicial review except that the petitioner makes out a *prima facie* case by introducing a transcript of the Adjustment Board's proceedings and award. The task of the party adversely affected is made more onerous in that the *prima facie* case rule shifts the burden of proof to him, whereas otherwise it would rest upon the petitioner. Sec. 3, First (p) further broadens the powers of the court over the N.R.A.B. for it provides explicitly that the court may "enforce or set aside" the Adjustment Board's rulings. These, then, are the rules applicable to *enforcement* and *review* cases under the Act.

Further narrowing of the Adjustment Board's jurisdiction over interpretation cases springs from the permissible possibility that, in an *independent* action, an employee may elect to pursue his rights under a trade agreement entered into pursuant to the Railway Labor Act, in the courts rather than before the Adjustment Board. Thus an employee, in asserting third-party beneficiary contract rights need not exhaust his administrative remedy before having his day in court. With respect to the above rule, the Supreme Court has shown mixed favor. Its more recent pronouncements, of which the *Pitney* decision, the first case reprinted in this section, is representative, reveal that the Court is attempting to give the N.R.A.B. a greater degree of original jurisdiction, *especially as to jurisdictional disputes arising out of existing agreements.*

Following the *Pitney* reprint is found the *Pullman* decision which illustrates the rule that, in enforcement proceedings under Sec. 3, First (p), the party adversely affected secures what is tantamount to a trial *de novo.*

The final case in this chapter is that of the *Railroad Yardmasters*. This decision will give the reader not only a summary of enforcement procedure, but also, more significantly, an idea as to the due process of law requirements of an Adjustment Board proceeding.

ORDER OF RAILWAY CONDUCTORS OF AMERICA v. PITNEY

Supreme Court of the United States, 1946. 326 U.S. 561, 66 Sup. Ct. 322

BLACK, J. This case requires us to consider to what extent a Federal District Court having charge of a railroad reorganization has power to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents in view of the provisions in the Railway Labor Act . . . giving such power to the administrative agencies established thereunder. Each union claims that its respective collective bargaining agreement entitled it to supply conductors for five daily freight trains operated within the Elizabeth Port, New Jersey, yards of the railroad and both pressed their contentions on the reorganization trustees appointed under the provisions of Sec. 77 of the Bankruptcy Act. 11 U.S.C., Sec. 205. The two unions are the Order of Railway Conductors (O.R.C.), which represents road conductors who ordinarily operate trains outside the yards, and the Brotherhood of Railroad Trainmen (B.R.T.), which represents yard conductors who ordinarily operate trains inside the yards. But here, the practice over a period of years had been that at times yard conductors manned some trains outside the yard and road conductors manned some trains within the yard, including the five freight trains here involved. In 1940 the railroad in response to pressure by the O.R.C. agreed that thereafter only road conductors would man the outside trains. However, O.R.C. conductors continue to operate the five daily freight trains within the yard. In 1943 the railroad was prevailed upon by the B.R.T. to agree to substitute B.R.T. yard conductors for the O.R.C. conductors operating these five trains.

Thereupon O.R.C. brought this suit in the reorganization court. It alleged that its members had for the past 35 years operated the trains in issue as a result of negotiations as to rules, rates of pay and working conditions between it and the railroad and that the 1940 contract specifically provided that this situation would not be changed without further agreement. Thus, the proposed displacement of O.R.C. conductors would violate Sec. 6 of the Railway Labor

Act which makes it unlawful for a carrier or employee representatives to change "pay, rules, or working conditions," unless 30 days written notice of the intended change shall have been given and the controversy has been finally acted upon by the Mediation Board. The O.R.C. asked the court to instruct its trustees not to displace road conductors and to enjoin them permanently from taking such action so long as O.R.C.'s contracts with the road were not altered in accordance with the provisions of the Railway Labor Act.

Answers were filed by the trustees and the B.R.T. as intervenor. The case was referred to a Master who, after a hearing, found that O.R.C.'s collective bargaining contracts did not provide that its conductors were to operate the five freight trains and that the B.R.T. contract allotted these lines to its members. The District Court sustained these findings and accordingly dismissed the petition on the merits. The Circuit Court of Appeals held that the petition should be dismissed on jurisdictional grounds because it thought that the remedies of the Railway Labor Act for the settlement of disputes such as here involved are exclusive. 145 F. 2d 351. It further stated that if it should be mistaken on the jurisdictional question, then it agreed with the District Court that the road conductors must lose on the merits.

Section 77(n) of the Bankruptcy Act provides that "No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees except in the manner prescribed in the Railway Labor Act. . . ." 47 Stat. 1481. Section 1 of the Railway Labor Act defines a carrier, subject to it, as including "any receiver, *trustee,* or other *individual or body, judicial* or otherwise, when in the *possession of the business of any such 'carrier'*. . . ." And Sec. 2, Seventh, of the Act provides that "no carrier, its officers or agents, shall change the rates of pay, rules, or working conditions of its employees, as a class as *embodied in agreements* except in the manner prescribed in such agreement or in Sec. 6 of this Act." Section 6, as we have seen, prohibits such changes unless notice is first given and its requirements are otherwise complied with. Section 2, Tenth, of the Act makes it a misdemeanor, punishable by both fine and imprisonment for a carrier wilfully to violate Sec. 6.

These sections make it clear that the only conduct which would violate Sec. 6 is a change of those working conditions which are "embodied" in agreements. But the answers here specifically denied that the O.R.C. agreements provided that road conductors operate the five trains in question. This put in issue the meaning of the

contracts that allegedly embodied the working conditions which the trustees were about to change. The court, therefore, had to interpret these contracts before it could find that Sec. 6 had been violated.

In interpreting the contracts the court might act in two distinct capacities. First, it might do so in the capacity of a "judicial" "body" in the "possession of the business" of a "carrier" within the meaning of Sec. 1 of the Railway Labor Act. As such it would have to interpret the contracts in order to exercise the jurisdiction conferred by the Bankruptcy Act to control its trustees so as to insure the preservation and proper administration of the debtor's estate. But such instructions, while binding on the trustees, and, just as any other order, subject to appellate review, amount to no more than the decision any other carrier would sooner or later make about the course it must follow and, therefore, can not finally settle the dispute between Union and employer.

Finally to settle that dispute the reorganization court would have to act in the further capacity of a tribunal empowered to grant the equitable relief sought, even though granting that relief requires interpretation of these contracts. But Congress has specifically provided for a tribunal to interpret contracts such as these in order finally to settle a labor dispute. Section 3, First (i) of the Railway Labor Act provides that disputes between a carrier and its employees "growing out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . may be referred by either party to the Adjustment Board. The Board can not only order reinstatement of the employees, should they actually be discharged, but it can also under Sec. 3, First (o) and (p) grant a money award subject to judicial review with an allowance for attorney's fees should the award be sustained. Not only has Congress thus designated an agency peculiarly competent to handle the basic question here involved, but as we have indicated in several recent cases in which we had occasion to discuss the history and purpose of the Railway Labor Act, it also intended to leave a minimum responsibility to the courts.

Of course, where the statute is so obviously violated that "a sacrifice or obliteration of a right which Congress . . . created" to protect the interest of individuals or the public is clearly shown, a court of equity could, in a proper case, intervene. *Texas & N. O. R. Co.* v. *Brotherhood of Ry. & Steamship Clerks,* 281 U.S. 548; *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515. But here it does not clearly appear whether the statute has been violated or complied

with or that the threatened action "would be prejudicial to the public interest." *Pennsylvania* v. *Williams,* 294 U.S. 176, 185. We have seen that in order to reach a final decision on that question the court first had to interpret the terms of O.R.C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a "document" in terms of the ordinary meaning of words and their position. . . . For O.R.C.'s agreements with the railroad must be read in the light of others between the railroad and B.R.T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice, and custom, that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then. See *Thompson* v. *Magnolia Petroleum Co.,* 309 U.S. 478, 483-484. . . . Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute. Until such time O.R.C. can not show irreparable loss and inadequacy of the legal remedy. The court of equity should, therefore, in the exercise of its discretion stay its hand. . . .

We hold that the District Court had supervisory power to instruct its trustees as it did. And a review of the evidence persuades us that the court's findings on which such instructions were based are not clearly erroneous. To the extent that its order constitutes instructions to its trustees, it is affirmed. Of course, in this respect it is no more binding on the Adjustment Board than the action of any other carrier. But the court should not have interpreted the contracts for purposes of finally adjudicating the dispute between the unions and the railroad. The dismissal of the cause should therefore be stayed by the District Court, so as to give an opportunity for application to the Adjustment Board for an interpretation of the agreements. Any rights clearly revealed by such an interpretation might then, if the situation warrants, be protected in this proceeding. It is so ordered.

Case Questions

1. State the question presented for resolution by the court.
2. What provision of the Railway Labor Act is invoked by O.R.C.?

3. State the holding in the District Court and in the Circuit Court of Appeals.
4. State the gist of Sec. 77 (n) of the Bankruptcy Act.
5. What conduct does Justice Black believe would violate Sec. 6 of the R.L.A.?
6. Who is empowered with original jurisdiction to decide what is "embodied" in agreements?
7. When may equity courts intervene under the R.L.A.?
8. Why does Justice Black believe this dispute is referable to the N.R.A.B. and not to the N.M.B. or the courts?

ORDER OF SLEEPING CAR CONDUCTORS v. PULLMAN CO.

United States District Court, Eastern District of Wisconsin, 1942.
47 Fed. Supp. 599

DUFFY, D. J. . . . This is an action under . . . the Railway Labor Act, and is instituted pursuant to Sec. 3(p) of the Act [45 U. S. C. A., Sec. 153(p)]. Conductor W. T. Martin had been discharged by the defendant for alleged improper and offensive conduct toward a woman passenger. Pursuant to the contract between the defendant and the Order of Sleeping Car Conductors, hearings were had before various officials, all of which sustained the discharge. On December 9, 1938, on petition of the Order of Sleeping Car Conductors, a dispute growing out of the claimed grievance of Conductor Martin by reason of his discharge was presented to the National Railroad Adjustment Board, Third Division. A deadlock developed, and the National Mediation Board selected Mr. Dozier A. DeVane to act as referee. After a hearing an award (No. 862) was entered, providing that the case should be remanded for a rehearing in accordance with the opinion rendered.

Thereafter, hearings were again held before the various officials of the defendant, and the discharge of Conductor Martin was again sustained. A petition was filed with the National Railroad Adjustment Board, Third Division, and once more it was necessary for the National Mediation Board to appoint a referee. An award (No. 1482) was entered, which did not pass upon the truth or falsity of the charges against Conductor Martin, but determined that the defendant had had two opportunities to have the woman present with reference to whom Conductor Martin had been accused of making improper advances, and that Conductor Martin had been deprived of a fair hearing, and ordered him reinstated with back pay. The

complaint alleges that the defendant has refused to comply with said order, and that Conductor Martin is entitled to $8,200.00 in back pay, plus reasonable attorney fees; and the prayer of the complaint is that the court make such order and enter such judgment by writ of *mandamus*, or otherwise as may be appropriate, in order to enforce the order and award of the Third Division of the National Railroad Adjustment Board.

It is the contention of the plaintiffs that this court should first determine whether the award of the Railroad Adjustment Board is correct and entitled to enforcement by this court on the ground on which the award was made, namely, that the discharged conductor was not afforded a fair and impartial hearing of his grievance; and that only in the event that the court should determine that question against the plaintiffs would there be any occasion to consider the original issue of the actual guilt or innocence of Conductor Martin. The defendant contends that there has never been a decision by the Adjustment Board upon the fundamental issue in the case, that is, whether Conductor Martin was guilty or innocent of the charges which caused his removal from the service; that it conducted the various hearings in the usual and customary manner; and that at said hearings it had no power to subpoena or require the attendance of the woman passenger.

Under Rule 46 of the agreement between the Order of Sleeping Car Conductors and the defendant, Conductor Martin was entitled to a fair and impartial hearing. Rule 55 provides:

> "In the adjustment of all disputes between the Company and the conductors, conferences will be granted and disputes handled in accordance with the requirements of the Railway Labor Act."

The Railway Labor Act provides [45 U. S. C. A., Sec. 153(i)]:

> ". . . disputes . . . growing out of grievances . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes. . . ."

It is my opinion that the trial to be held before this court will be a trial *de novo*. Sec. 3 of the Railway Labor Act [45 U. S. C. A., Sec. 153(p)] provides:

> "If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States . . . a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court in

the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated. . . ."

Sec. 16(2) of the Interstate Commerce Act contains almost word for word the same provisions as heretofore quoted. This section has many times been construed by the courts. See: *Meeker and Co.* v. *Lehigh Valley Railroad Co.*, 236 U.S. 412.

At the pre-trial conference, counsel for the plaintiffs suggested that it was discretionary with this court as to whether there should be a trial *de novo*. It is my opinion that there is no discretion; but if there were, I would exercise it in favor of having a trial *de novo*. Conductor Martin is entitled to have these serious charges against him determined in a court of law. The lady passenger will be subject to the subpoena of this court. With the presumption created by the Act, it would seem to be essential that the defendant present the testimony of this lady. The statement was made by counsel for defendant at the pre-trial conference that they would use every endeavor to have her present at the trial and would have a subpoena issued.

The trial will afford the first opportunity for the attorneys for Conductor Martin to cross-examine the lady who entered the complaint, and it will likewise be the first opportunity when the defendant company could have compelled her attendance. It may, therefore, be understood that a trial *de novo* will be had.

Case Questions

1. Why was Martin discharged?
2. What was the N.R.A.B. order?
3. What was the contention of the plaintiffs as to the review powers of the court?
4. What was the defense interposed by the Railroad Co.?
5. Why did the court order a trial *de novo*? What issue was to be decided at this trial?

RAILROAD YARDMASTERS OF NORTH AMERICA v. INDIANA HARBOR BELT R. R. CO.

United States District Court, Northern District of Indiana, 1947.
70 Fed. Supp. 914

SWYGERT, D. J. This is an action brought under the Railway Labor Act for enforcement of an order of the National Railroad

Adjustment Board. Defendant E. E. Matthews died since the start of the suit. The two remaining defendants filed motions to dismiss the complaint.

The motions to dismiss are granted for the reasons: (1) The Adjustment Board order fixes no time limit for compliance, (2) the award and order are too vague and indefinite for enforcement, and (3) the defendant C. P. Barker had no notice of the hearing before the Adjustment Board.

The plaintiff says that only if the award involves a payment of money, does the Railway Labor Act require a time to be fixed in its order for compliance. It is true the language of subsection (o) of section 3 of the Act is susceptible of this limited construction. On the other hand, it is so worded that the phrase "on or before a day named" can be construed to qualify all of the sentence preceding that phrase rather than only the words: "and, if the award includes a requirement for the payment of money," etc. To resolve the doubt, the statute as a whole must be considered.

Subsection (q) provides, "All actions at law based upon the provisions of this section shall be begun within two years[1] from the time the cause of action accrues under the award. . . ." Under subsection (p) it is only in the event the carrier does not comply that an application may be made to the district court for an enforcement of the award. The application may not be made immediately following the issuance of an award, monetary or otherwise. It must be conditioned upon non-compliance. It follows that the statute of limitations embodied in the act is tolled from the date of the award to the time when compliance is required. Certainly, the statute of limitations cannot begin to run until such time as the complaining party has a right to begin his suit. Therefore, a time for compliance must be fixed in order to date the beginning of the running of the statute of limitations.

Subsection (p) of section 3 provides that a petitioner may file an application for enforcement "If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order." There is nothing in this subsection to indicate that the clause, "within the time limit in such order" applies solely to monetary awards. Rather, a reading of it indicates that it applies to any and all awards and that it inferentially, at least, requires a time limit to be fixed for compliance of the Board's order. However,

[1] This is known as a Statute of Limitations.

any doubt about its meaning is removed when what has just been said as to the limitations section is taken into consideration.

Moreover, if plaintiff's view is correct, it might well be argued that subsection (p) applies solely to *monetary awards* and that a resort to the district court for enforcement of the order may not be made when other than a monetary award is made. Obviously this construction would be an unreasonable one and would pervert the purpose of subsection (p).

The order incorporates by reference the award and contains no added specifications. The award itself reads merely, "Complaint disposed of per findings." The findings recite, "We find, as represented by petitioner, that the facts presented in this docket are contrary to the provisions of controlling Rule 7(a) of the Yardmasters' Agreement, and so hold." This so-called finding is not a finding of facts; it is a conclusion of law. It is a conclusion based on facts that are not in the findings but apparently are in the "docket," whatever that may be. True, a statement of claim precedes the findings but whether this statement is identical with the facts "presented" in the docket is not revealed.

Furthermore, the statement of claim itself is indefinite. It does not contain the names of the two yardmen over whom the dispute arose. Extraneous evidence would have to be adduced to give the award meaning.

On this point, I think the following statement in *System Federation No. 59 of Railway Employees Department of American Federation of Labor* v. *Louisiana & A. Ry. Co.*, 5 Cir., 119 Fed. (2d) 509, 513, applies:

> "The act contemplates not merely general conclusions, but precise and definite findings of fact and final and definite awards, capable of enforcement, not vague general outlines which must be filled in by the courts."

The provision in the Act that the findings and order shall be prima facie evidence of facts stated therein requires the findings to be a definite and complete statement of the ultimate facts and not a legal conclusion based upon undisclosed findings.

The provision of subsection (m) of section 3 requiring the Board to interpret its award where a dispute arises over interpretation has to do with the ascertainment of the intent of the Board as expressed in its award. It does not require the parties to ask the Board to supply omitted findings.

The defendant Barker was not a party to the proceeding before the Board. From ought that appears, he was given no notice of its hearing. Subsection (j) of section 3 requires the Board to give "due notice of all hearings to the employee or employees . . . involved in any disputes submitted . . ." to the Board. Barker was one of the employees involved in the dispute. His seniority rights are vitally affected.

Plaintiff says, "he is now given his day in court (by making him a party to this court action) and he can assert whatever rights he may have and they can be determined by the court." The answer to this contention is twofold. First, it ignores a plain requirement of the statute. Second, this is not a hearing *de novo* in the full meaning of that term because the findings and order are prima facie evidence of the facts stated therein. Here, this prima facie evidence was found by the Board in a hearing of which Barker had no notice. To mention the possible prejudice and disadvantage resulting to him by his failure to get notice is but to state the obvious.

The plaintiff cites *Estes, et al.* v. *Union Terminal Co.*, 5 Cir., 89 Fed. (2d) 768, in support of its contention as to notice. A reading of the opinion in that case indicates that Lane, the "involved" employee, had actual notice of the hearing before the Adjustment Board although he received no formal notice from it. It would also appear that the Circuit Court of Appeals would have taken an entirely different view had it not been for Lane's actual knowledge of the hearing. . . .

Case Questions

1. What was the statute of limitations as to actions under subsection (g)? When did it begin to toll?
2. May a party adversely affected by a *monetary* award resist enforcement in the courts? Does the same rule apply to nonmonetary awards?
3. Why did the court state that the Board's findings of fact were really conclusions of law?
4. What else did the court find in error in the Board's proceedings?
5. Did the court grant the motion to dismiss?

CHAPTER 11

INCIDENTS OF UNION MEMBERSHIP

SECTION 80. SUABILITY OF UNIONS

It is the purpose of this chapter to survey the rules of law that govern the internal affairs of unincorporated associations, since labor organizations are in this category. We propose to determine whether a labor union can sue or be sued; what powers it may exercise with respect to selecting its members; whether having admitted members to full or partial exercise of rights in the association's purposes and affairs, it may suspend, expel, or otherwise discipline its members, and, if so, to what degree this power is vested in the body; what are the liabilities and duties of the officers to the constituents; what are the converse duties of the members to the body as a whole; how an aggrieved member of the association may secure a redress of grievances against the association in the event of arbitrary or discriminatory treatment; and finally, what is the extent of a parent national's authority over the local body.

This section is directed to the answer of the first proposition, namely: What is the suability character of a labor organization? At common law, a labor organization was classed as a partnership. It could be a party plaintiff only in the names of all its members; it could be a party defendant only if personal service of summons (process) was had against one or more of its constituents. Any money judgment secured was not against the association as an entity and could only be satisfied out of the assets of the members who had had benefit of personal service of summons.

As can be appreciated, these partnership rules of law made for no end of tribulation in suing and being sued, especially the latter. In the *Coronado* decision reprinted in this section the Court laments the above difficulties and searches for a solution. Here, as usual, the officers of the Mine Workers' Union had been personally served. A defense interposed by the labor organization was that it could not be sued as a corporate entity since it was an unincorporated association. In most jurisdictions, including the federal courts, this had been a valid defense. The Court renders its answer below.

UNITED MINE WORKERS OF AMERICA v. CORONADO COAL COMPANY

Supreme Court of the United States, 1922. 259 U.S. 344, 42 Sup. Ct. 570

TAFT, C. J. . . . Second. Were the unincorporated associations, the International Union, District No. 21, and the local unions suable

in their names? The United Mine Workers of America is a national organization. Indeed, because it embraces Canada it is called the International Union. Under its constitution, it is intended to be the union of all workmen employed in and around coal mines, coal washers and coke ovens on the American continent. Its declared purpose is to increase wages and improve conditions of employment of its members by legislation, conciliation, joint agreements and strikes. It demands not more than eight hours a day of labor. The union is composed of workmen eligible to membership and is divided into districts, sub-districts and local unions. The ultimate authority is a general convention to which delegates selected by the members in their local organizations are elected. The body governing the union in the interval between conventions is the International Board consisting of the principal officers, the president, vice-president and secretary-treasurer, together with a member from each district. The president has much power. He can remove or suspend International officers, appoints the national organizers and subordinates, and is to interpret authoritatively the constitution, subject to reversal by the International Board. When the Board is not in session, the individual members are to do what he directs them to do. He may dispense with initiation fees for admission of new locals and members. The machinery of the organization is directed largely toward propaganda, conciliation of labor disputes, the making of scale agreements with operators, the discipline of officers, members, districts and locals, and toward strikes and the maintenance of funds for that purpose. It is admirably framed for unit action under the direction of the National officers. It has a weekly journal, whose editor is appointed by the president, which publishes all official orders and circulars, and all the union news. Each local union is required to be a subscriber, and its official notices are to be brought by the secretary to the attention of the members. The initiation fees and dues collected from each member are divided between the national treasury, the district treasury and that of the local. Should a local dissolve, the money is to be transmitted to the National treasury. . . .

The membership of the union has reached 450,000. The dues received from them for the national and district organizations make a very large annual total, and the obligations assumed in travelling expenses, holding of conventions, and general overhead cost, but most of all in strikes, are so heavy that an extensive financial business is carried on, money is borrowed, notes are given to banks, and in every way the union acts as a business entity, distinct from its mem-

bers. No organized corporation has greater unity of action, and in none is more power centered in the governing executive bodies.

Undoubtedly at common law, an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member. *Pickett* v. *Walsh,* 192 Mass. 572. . . . But the growth and necessities of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection, which their members have found necessary. Their right to maintain strikes, when they do not violate law or the rights of others, has been declared. The embezzlement of funds by their officers has been especially denounced as a crime. The so-called union label, which is a quasi trademark to indicate the origin of manufactured product in union labor, has been protected against pirating and deceptive use by the statutes of most of the States, and in many states authority to sue to enjoin its use has been conferred on unions. They have been given distinct and separate representation and the right to appear to represent union interests in statutory arbitrations and before official labor boards. . . . More than this, equitable procedure adapting itself to modern needs has grown to recognize the need of representation by one person of many, too numerous to sue or to be sued . . . and this has had its influence upon the law side of litigation, so that, out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such an organization as this has come to be recognized in some jurisdictions, and many suits for and against labor unions are reported in which no question has been raised as to the right to treat them in their closely united action and functions as artificial persons capable of suing and being sued. It would be unfortunate if an organization with as great power as this International Union has in the raising of large funds and in directing the conduct of four hundred thousand members in carrying on, in a wide territory, industrial controversies and strikes, out of which so much unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in the course of such strikes. To remand persons injured to a suit against each of the 400,000 members to recover damages and to levy on his share of the strike fund, would be to leave them remediless. . . .

Though such a conclusion as to the liability of trade unions is

of primary importance in the working out of justice and in protecting individuals and society from possibility of oppression and injury in their lawful rights from the existence of such powerful entities as trade unions, it is after all in essence and principle merely a procedural matter. As a matter of substantive law, all the members of the union engaged in a combination doing unlawful injury are liable to suit and recovery, and the only question is whether when they have voluntarily, and for the purpose of acquiring concentrated strength and the faculty of quick unit action and elasticity, created a self-acting body with great funds to accomplish their purpose, they may not be sued as this body, and the funds they have accumulated may not be made to satisfy claims for injuries unlawfully caused in carrying out their united purpose. . . .

In this state of federal legislation, we think that such organizations are suable in the federal courts for their acts, and that funds accumulated to be expended in conducting strikes are subject to execution in suits for torts committed by such unions in strikes. . . .

For these reasons, we conclude that the International Union, the District No. 21 and the twenty-seven Local Unions were properly made parties defendant here and properly served by process on their principal officers.[1]

Case Questions

1. Describe the organization of the union as to (a) its purposes, (b) the means whereby these are to be achieved, (c) the power of its officers, (d) its structural integration, and (e) its financial transactions.
2. What was the character of an unincorporated association at common law? In suing or being sued, what does this necessitate?
3. At common law, did some jurisdictions recognize that unions were suable as an artificial entity? Were they a minority?
4. What was the conclusion of the Supreme Court as to the suability of labor organizations?
5. Against whom was process served by the Coronado Coal Company?

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[1] Sec. 301(a) of the National Labor Relations Act enables a union to sue or be sued for breach of contract in the Federal courts where the other party is the employer. Sec. 301(b) provides "Any money judgment against a labor organization . . . shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." Sec. 301(d) stipulates "The service of summons . . . upon an officer or agent of a labor organization . . . shall constitute service upon the labor organization." Sec. 303(b) permits damaged parties to sue for damages in the Federal courts if a labor organization engages in unlawful strikes and boycotts prohibited by Sec. 303(a).

Even though the above section may be repealed by the Congress, the parties will be left in their common law position in the Federal courts as detailed in the *Coronado* case.

SECTION 81. ADMISSION TO MEMBERSHIP

The technical doctrine of *delectus personae,* or choice of the person, applies in full vigor to the acquisition of membership in a labor organization. The leading case on this subject is *Mayer* v. *Journeymen Stone Cutters* reprinted in this section. The present validity of the *Mayer* decision will be discussed following its text.

Membership in unions has been restricted for a variety of reasons and by a number of methods. The reason for limitation is generally to secure a monopolistic price for labor by restricting its supply, or at least to keep membership at such a level that it will not serve to drug the market. Methods by which admission to membership have been restricted include the following:

1. Outright exclusion of any new workers for a stipulated period, regardless of qualifications or ability to pay initiation fees.
2. Usage of the junior membership device under which it is assured that all senior members are first placed on available jobs.
3. Usage of the apprentice device under which the new man may be kept in a learner's status for an unduly long period of time.
4. Usage of the work permit system by which needed workers are given temporary permits by the union to work. (See Section 85 of this volume, *Walsche* v. *Sherlock,* page 778.) The permit holder pays a substantial part of his earnings to the union, but has no membership rights. His permit is usually terminable at will.
5. The final method is restriction through the imposition of severely high initiation fees, ofttimes scaling one or two thousand dollars. Sec. 8 (b) (5) of the National Labor Relations Act makes it an unfair labor practice for unions to exact excessive or discriminatory initiation fees. If the 1947 Act is repealed, the above provision, desirable as it is for even the average worker, will fall with it.

MAYER v. JOURNEYMEN STONE-CUTTERS ASSOCIATION

Court of Chancery of New Jersey, 1890. 47 N.J.Eq. 519, 20 A. 492

GREEN, V. C. The complainants comprise two classes—*first,* 17 individuals and copartnerships, embracing all of the members of the Master Stonecutters' Association of the city of Newark, a voluntary association, not incorporated, composed of master stonecutters, engaged in the business of cutting, dressing and selling stone for building and other purposes, in the counties of Essex and Hudson; and *second,* two individuals, Jacob Hahn and Henry Zimmerman, who are alleged to be skilled journeymen stonecutters residing in Essex county. . . .

The relief prayed for in the bill is, that this court shall require the defendant association to admit Hahn and Zimmerman, and all

other journeymen stonecutters residing in Newark and vicinity, to be members of the association, on paying the customary dues and fulfilling the rules imposed upon other members, and to give to each the customary card or other usual evidence of such membership; and (2) that the association, its officers and agents and stewards, be enjoined from denouncing Hahn and Zimmerman as "scabs," or in any manner persecuting or injuring them on account of their exercising their lawful trade without being admitted to such membership; and from attempting to coerce or intimidate the complainants, who are master stonecutters, or any other master stonecutters, from employing Hahn and Zimmerman, or other skillful journeymen, whether members of said association or not, by means of strikes, boycotts or other methods of violence or intimidation; and that an account be taken of the damages and losses suffered by the complainants respectively, by reason of the action of the association defendant, its officers and agents, and that they may be decreed to pay the same, with a prayer for further relief.

This prayer for relief is based on the allegations that the master stonecutters complainants are, in the prosecution of their business, constantly in need of a body of skilled journeymen stonecutters, in order to enable them to fulfill their contracts; that Hahn and Zimmerman are such skilled journeymen stonecutters, desirous of obtaining employment at their trade, but prevented from doing so by the acts of the defendants complained of. These are recited substantially as follows, *viz.:* That it is the avowed purpose of the association defendant to embrace within its membership all the journeymen stonecutters who shall be permitted to pursue their trade in Newark and its vicinity; to prevent any journeyman stonecutter not a member of the association from working at his trade in Newark and vicinity; and to coerce any master stonecutter to refuse to employ any such journeyman not a member of the association. That the means adopted by the association to accomplish those objects are denunciations and persecution applied to the offending workmen, and boycotting and strikes applied to the offending employer.

That the by-laws adopted by the said association provide that any member who works in any place styled in the association as a "scab-shop," or who violates the constitution of the association, is to be denounced as a scab, and forfeits his claim as a member. That similar methods of coercion are employed by the association to prevent journeymen not members from working, and to deter employers from giving them work, by declaring the shops of such employers "scab-

shops," and publicly declaring such workmen as "scabs," and also as to both such workmen and employers, by resorting to strikes and boycotts.

That the by-laws of the association also provide for a "shop steward," to be placed in every master stonecutter's shop or yard, to see that the rules of the association are carried out; that, under the practice and regulations of the association, such "shop steward" is required immediately to order a strike of all the workmen in any shop, if the employer allows any journeyman to work unless he produces a card of the association showing that he is a member thereof in good standing, and, if such strike should prove ineffiecient, it is the policy and practice of the association to coerce the employer further by boycotting and other alleged unlawful deeds.

That in the month of May, 1889, or about that time, the association, by resolution, determined to admit no more members for the space of one year, thus excluding from employment all stonecutters seeking work not already admitted to membership; that in the summer of 1889 the complainants Hahn and Zimmerman, who reside in Essex county, with families dependent on their labor, applied for admission to said association, and offered to pay all dues and contributions, and to fulfill its obligations, in order that they might obtain work at their trade; but their application was refused on no other ground except the said resolution to exclude all new members; that afterwards Hahn and Zimmerman applied to two of the complainant master stonecutters for work as journeymen, but they were refused such employment on no other grounds than that they were not members of the association, and that their employment would result, under the rules of the association, in a general strike of the other workmen and in disaster to their business.

It is further alleged that, in consequence of their exclusion by said association, Hahn and Zimmerman have been deprived of the power of exercising their trade, in which they could have made a living and supported their families, and have been compelled to abandon their trade, and work at inferior labor with lower wages; that two master stonecutters complainants were, at the time of the application by Hahn and Zimmerman to the defendant association for membership, in need of larger numbers of skilled journeymen stonecutters than they could obtain from among the members of the association, and would have given them employment, but from the danger to their business which they knew would ensue, and that for these reasons they were obliged to refuse, and did refuse, to employ

the two men; that Hahn and Zimmerman are able and anxious to exercise their trade for the support of their families, and that all of the master stonecutters complainants are in need of their services as stonecutters and willing to give them employment; that the two are only prevented from working, and said employers from giving them work, by the exclusion of them from the association, and the coercion of the employers to refuse them work because they are not members.

The bill asserts that the right of the two to exercise their trade is a right of property, and the right of the master stonecutters to employ laborers to work and needed in their business is also a right of property, and that the action and proceedings of the association deprive complainants of their said rights of property, and are subversive of the interest of society.

That the master stonecutters have, in consequence, been prevented from fulfilling certain contracts, which has been of considerable damage, and that the laborers have lost their wages, and that these injuries extend to all master stonecutters in Newark and its vicinity, as well as to all skilled laborers not members of said association.

It alleges that the complainants have no adequate remedy at law; that the injury is one continuing from day to day; that any attempt to seek redress by action at law would require a multiplicity of suits, in which their actual damages could not be repaired.

The defendants have answered the various allegations of fact set up in the bill, and also insist that the matters complained of are not such as entitle the complainants to any relief in this court, and that the relief prayed for is not cognizable by this court, and pray the same benefit of such defense as if they had demurred to the bill.

It appears that the complainants Hahn and Zimmerman did make some effort to obtain admission into the defendant association, but it is quite clear that they did not make application for membership regularly, as required by the by-laws, and that the question was never considered or passed upon by that body. But if it were otherwise, has this court power to require the admission of a person to membership in a voluntary association, when it has been denied by the society?

These organizations are formed for purposes mutually agreed upon; their right to make by-laws and rules for the admission of members and the transaction of business is unquestionable; they may require such qualifications for membership and such formalities of election as they choose; they may restrict membership to the original

promotors, or limit the number to be thereafter admitted. The very idea of such organizations is association mutually acceptable, or in accordance with regulations agreed upon; a power to require the admission of a person in any way objectionable to the society is repugnant to the scheme of its organization. While courts have interfered to inquire into and restrain the action of such societies in the attempted exclusion [expulsion] of persons who have been regularly admitted to membership, no case can, I think, be found where the power of any court has been exercised, as sought in this case, to require the admission of any person to original membership in any such voluntary association. Courts exist to protect rights, and where the right has once attached they will interfere to prevent its violation, but no person has any abstract right to be admitted to such membership; that depends solely upon the action of the society, exercised in accordance with its regulations, and, until so admitted no right exists which the courts can be called upon to protect or enforce.

Neither is it clear upon what ground of jurisdiction the court can inquire into the action of the defendant association in the passage of the resolution complained of. It is alleged in the bill that this was to shut the door to admission to membership for one year, and to confine employment to the present membership. It appears from the testimony, however, that it was passed to prevent the admission of persons known as "harvesters." This is a term used in the trade to designate foreigners, skilled workmen, who come to this country when work is plentiful and wages high, get employment, and in the winter return with their earnings to their homes in foreign countries; and that such was its scope is shown by the fact that persons, not coming within that class, were admitted to membership after the passage of the resolution. In the light of national legislation, with reference to the importation of contract labor, it can scarcely be said that such action is against the policy of the law. But the body has clear right to prescribe qualifications for its membership; it may make it as exclusive as it sees fit; it may make the restriction on the line of citizenship, nationality, age, creed or profession, as well as number. This power is incident to its character as a voluntary association, and cannot be inquired into, except on behalf of some person who has acquired some right in the organization, and to protect such right. . . .

Whatever may have been the rule of the common law with reference to such acts as are under consideration, and however criminal many of them may have heretofore been considered, the legislature

of this state has greatly changed the law which declared combinations to effect such purposes unlawful. By the act of 1883 (Supp. Revision, p. 774, sec. 30) it is provided that "it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise or encourage, by peaceable means any person or persons to enter into any combination for or against leaving or entering into the employment of any person or persons or corporations."

In fact, the policy of the law, with reference to such combinations, was revolutionized, and what before that time would have been held to be an unlawful combination and conspiracy, became in this state a lawful association, and acts which had been the subject of indictment became inoffensive to any provision of our law. Nothing has been proved in this case to warrant a finding that the defendants have done or threatened aught that is not legalized by this act of the legislature. It is true that much of intent is charged in the bill which might overstep the boundary line defined by the law, but there is no evidence to sustain the assumption that any unlawful act to the injury of the complainants' rights of property is threatened by the defendants. They have agreed not to work with any but members of their association, and not to work for any employer who insists on their doing so, by withdrawing from his employment; so long as they confine themselves to peaceable means to effect these ends, they are within the letter and spirit of the law, and not subject to the interference of the courts. These considerations result in the conclusion that this court has no jurisdiction to grant the relief prayed for, and that the bill must be dismissed.

Case Questions

1. What is the basis of Hahn and Zimmerman's complaint?
2. State the union rule applied to members working in nonunion shops.
3. Outline the role played by a shop steward.
4. Is the right to exercise a trade a right of property?
5. Why do the complainants bring this suit in equity rather than at law?
6. Does the court have power to require the union to admit Hahn and Zimmerman? Why or why not?
7. What are "harvesters"?
8. How complete is a union's right to exclude? Illustrate. Does the same right exist as to expulsion?
9. What is the court's decision on the complaint?

SECTION 81. ADMISSION TO MEMBERSHIP (Continued)

The *Mayer* decision continues to be sound law upon the general rights of a labor organization *to prescribe its own rules for admission.* Being a voluntary association, it may admit or exclude as it chooses, for good reason or no reason. We have seen that Sec. 7 of the National Labor Relations Act gives to labor the right to join labor organizations or to *refrain* from joining them. Sec. 8 (b) (1) makes it an unfair labor practice for a union "to restrain or coerce employees in the exercise of the rights guaranteed in Sec. 7: *Provided,* that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

Thus the National Labor Relations Act reiterates the admission to membership rule of the *Mayer* case. At this point, however, the *Mayer* decision and the National Labor Relations Act follow divergent paths. Union membership or its lack, except for the limited forms of union security permitted by Sec. 8 (a) (3), can no longer be made a condition precedent to securing work. Sec. 8 (b) (2) raises the conduct of the *Mayer* case to the unfair labor practice level. It forbids:

(1) A union from applying pressure on an employer in violation of the union security requirements of Sec. 8 (a) (3).

(2) Discrimination by a union against an employee who has been excluded from membership for any reason other than his failure to pay regular dues or the initiation fee.

Further than this, where a labor organization has a union security agreement in effect, it may enforce it only if the dues and initiation fees are reasonable within the meaning of Sec. 8 (b) (5). The practical effect, then, of the National Labor Relations Act is to preserve the admission rule of the *Mayer* case, but its detrimental effect upon men such as Hahn and Zimmerman is no longer possible. A labor organization may exclude whom it pleases, but, except as explained above, the *result* of the exclusion does not serve to deprive a worker of his right to pursue gainful employment.

Should these provisions be repealed by the 1949 Congress, the union worker will be called upon to relinquish beneficial rights in the interest of strengthening the union's disciplinary powers over him. Arbitrary expulsion of the union member is made possible again, as well as the arbitrary exclusion of the worker seeking entrance to the union as a condition precedent to pursuing his voca-

tional calling or trade. This is but another instance of individual rights being surrendered in return for collective security and the fostering of a monopolistic labor market which controls its price by restricting entrance to the trade.

The *Corsi* decision of the Supreme Court, reprinted below, upheld the New York civil rights law, which prohibited discrimination in a labor organization's admission policies when such discrimination was based on race, color, or creed. This decision may open the way for the states to enact legislation further limiting the right of a union to exclude for the reasons mentioned in the *Corsi* case.

RAILWAY MAIL ASSOCIATION v. CORSI

Supreme Court of the United States, 1945. 326 U.S. 89, 65 Sup. Ct. 1483

REED, J. The appellant, Railway Mail Association, questioned the validity of Section 43, and related Sections 41 and 45, of the New York Civil Rights Law, which provides, under penalty against its officers and members, that no labor organization shall deny a person membership by reason of race, color, or creed, or deny to any of its members, by reason of race, color, or creed, equal treatment in the designation of its members for employment, promotion, or dismissal by an employer. Appellant contended that it was not a "labor organization" subject to these sections, and that if they were held to apply to it, they violated the due process and equal protection clauses of the Fourteenth Amendment of the federal Constitution. . . . The New York Court of Appeals rejected these contentions. . . .

The appellant, Railway Mail Association, a New Hampshire corporation, is an organization with a membership of some 22,000 regular and substitute postal clerks of the United States Railway Mail Service. . . .

Appellant first contends that Section 43, and related Sections 41 and 45, of the New York Civil Rights Law, as applied to appellant, offends the due process clause of the Fourteenth Amendment as an interference with its right of selection to membership and abridgment of its property rights and liberty of contract. We have here a prohibition of discrimination in membership or union services on account of race, creed, or color. A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion

of the policy manifested in that amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color, or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees.

To deny a fellow-employee membership because of race, color, or creed may operate to prevent that employee from having any part in the determination of labor policies to be promoted and adopted in the industry and deprive him of all means of protection from unfair treatment arising out of the fact that the terms imposed by a dominant union apply to all employees, whether union members or not. In their very nature, racial and religious minorities are likely to be so small in number in any particular industry as to be unable to form an effective organization for securing settlement of their grievances and consideration of their group aims with respect to conditions of employment. The fact that the employer is the Government has no significance from this point of view. . . .

The judgment is affirmed.

Case Questions

1. State the provisions of the New York Civil Rights Law.
2. What defense does it make?
3. How does the court answer the defense?
4. What is the purpose of the Fourteenth Amendment?

SECTION 82. EXPULSION AND SUSPENSION OF MEMBERS

The expulsion of a union member is a serious matter and much more difficult of accomplishment than is his original exclusion. At the time a worker is admitted to membership, he acquires certain vested rights that are protected against unjust action, in the first instance by the constitution and by-laws of the labor organization, and as a last resort by the courts, provided the expelled or suspended member has first exhausted his internal remedy without securing just satisfaction.

Expulsion cases comprise the largest body of the law on the internal affairs of unincorporated associations. They arise, originally and ostensibly, out of an alleged infraction of rules. Charges are brought against the member, a trial is had, and a decision is made. In reviewing expulsion and suspension cases, the reviewing court searches the union's proceedings to ascertain whether the following requirements of a fair trial were had:

(1) The accused was given notice of the charges.
(2) The charges were specific and in sufficient detail to apprise the defendant of the nature of the accusation.
(3) Trial was had before unbiased members.
(4) Trial was had in accord with the rules of the association.
(5) The defendant was given opportunity to defend and rebut.
(6) Adverse witnesses testified in the presence of the defendant.
(7) The proceedings were brought in good faith and for violation of a just and reasonable rule, whether express or implied.
(8) There was evidence to support the charge.

The *Polin* and *Cohen* decisions in this section treat in greater detail the material above covered. Both decisions involve expulsions based upon conflict with officers of the union. The *Polin* case is authority for the proposition that a union member's rights are contractual. Because expulsion and suspension are of such great importance, a complete series of supplemental cases follow at the end of this section. All cases represent soundly reasoned law. The reader's attention is called particularly to the supplemental case *Abdon* v. *Wallace,* for it involves suspension of a local by the parent organization.

POLIN v. KAPLAN

Court of Appeals of New York, 1931. 257 N.Y. 277, 177 N.E. 833

KELLOGG, J. The plaintiffs were members of an unincorporated association known as the "Moving Picture Machine Operators' Union

of Greater New York, Local No. 306." The recording secretary of the union presented charges against the plaintiffs to the association at one of its regular meetings. The charges were three in number. Briefly stated, they were as follows: Charge No. 1. The plaintiffs had violated section 6, article 10, of the constitution, in that they had brought an action in the Supreme Court of the State, in which they had charged the officers of the union with having violated the constitution and by-laws, and had sought redress therefor. Charge No. 2. The plaintiffs had circulated printed articles of a libelous nature, containing statements charging the officers of the union with violations of the constitution and by-laws, and other illegal practices, and such statements were false and malicious. Charge No. 3. The plaintiffs had violated their oaths of obligation to the union "by committing the acts charged in specifications 1 and 2, and refusing, on numerous occasions, to obey the mandates of the union, and also the will of the majority of said union. Also, in failing to keep confidential the work of the body of the union." The union, at a regular meeting, made the charges cognizable, and referred them to the executive board to try the same and make their report. This was the procedure prescribed by article 10, section 1, of the constitution. The board heard the proof offered in respect to the charges, and made a report sustaining them. Thereupon the union, at a regular meeting, confirmed the report, and imposed these penalties: For the violation specified in charge No. 1, $500; for that specified in charge No. 2, $500; for that specified in charge No. 3, expulsion from the union. Thereafter the plaintiffs instituted these actions to have the proceedings adjudged to be null and void, to procure the plaintiffs' reinstatement, and to recover damages.

The constitution and by-laws of an unincorporated association express the terms of a contract which define the privileges secured and the duties assumed by those who have become members. As the contract may prescribe the precise terms upon which a membership may be gained, so may it conclusively define the conditions which will entail its loss. Thus, if the contract reasonably provides that the performance of certain acts will constitute a sufficient cause for the expulsion of a member, and that charges of their performance, with notice to the member, shall be tried before a tribunal set up by the association, the provision is exclusive, and the judgment of the tribunal, rendered after a fair trial, that the member has committed the offenses charged and must be expelled, will not be reviewed by the regularly constituted courts. *Belton* v. *Hatch,* 109

N.Y. 593, 17 N.E. 225, 4 Am. St. Rep. 495; *Matter of Haebler* v. *New York Produce Exchange,* 149 N.Y. 414, 44 N.E. 87. A court "cannot review the proceedings or re-examine the merit of the expulsion." Per MILLER, J., in *Wilcox* v. *Supreme Council Royal Arcanum,* 210 N.Y. 370, 376, 104 N.E. 624, 626, 52 L.R.A., N.S., 806. This is not to say, however, that a court will decline to interfere, if an expulsion has been decreed for acts not constituting violations of the constitution and by-laws, and not made expellable offenses thereby, either by terms expressed or implied. In such an instance, the expulsion is not within the power conferred by the contract. Accordingly, the proceedings will be set aside and the associate restored to membership. *People ex rel. Bartlett* v. *Medical Society of Erie County,* 32 N.Y. 187; *Amalgamated Society of Carpenters* v. *Braithwaite* (1922), 2 App. Cas. 440, 470. In the latter case a trade unionist was threatened with expulsion on the ground that, in violation of a rule of his union, he had become a participant in a profit-sharing scheme instituted by his employer. The House of Lords held that his act was not, within its strict meaning, a violation of the rule, and that an injunction lay to prevent the expulsion. The contention, as stated by counsel, was, "that no member of a trade union can restrain by injunction his expulsion from the union." Lord Wrenbury said: "My Lords, I think it well to say plainly that in my opinion this contention is absolutely untenable."

We think, also, that in every contract of association there inheres a term binding members to loyal support of the society in the attainment of its proper purposes, and that for a gross breach of this obligation the power of expulsion is impliedly conferred upon the association. It has been said by the Supreme Court of California that an association may expel a member upon one of two grounds, *viz:* "First, a violation of such of the established rules of the association as have been subscribed or assented to by the members, and as provide expulsion for such violation; second, for such conduct as clearly violates the fundamental objects of the association, and if persisted in and allowed would thwart those objects or bring the association into disrepute." (*Otto* v. *Journeymen Tailors' Protective & Benevolent Union,* 75 Cal. 308, 314, 17 P. 217, 219, 7 Am. St. Rep. 156.) The Supreme Court of Pennsylvania has said that, if the charter of an association contains no express provision for expulsion it may nevertheless be had if the member "has been guilty of some infamous offense, or has done some act tending to the destruction of the society." (*Weiss* v. *Musical Mut. Protective Union,* 189 Pa. 446, 451, 42 A. 118, 120, 69 Am. St. Rep. 820.) We subscribe to these views.

Charge No. 1. This charge, as we have stated, is that the plaintiffs in bringing an action against the officers of the union, violated section 6 of article 10 of the constitution. That section is entitled "Order of Appeal" and provides in part: "The order of appeal shall be: 1. To the Local Union from its own or its officers' decision." It then provides that subsequent appeals shall be from the decision of the local union to the international president of the alliance, from the decision of the president to the general executive board, from the decision of the board to the international alliance in convention assembled. It provides in conclusion: "The penalty for violation of the above order of appeal shall be not less than five hundred ($500.00) dollars or expulsion from this Union or both." As the first appeal must be to the local union "from its own or its officers' decision," it is perfectly obvious that the section relates only to appeals from the decisions of a lower tribunal within the association to a higher tribunal, within the union. When the plaintiffs brought action against the officers of the union, no decision of the association had then been rendered against them; therefore, they could not take an appeal as provided by the section. Obviously, they violated no express provision of the constitution and by-laws, for which expulsion was provided as a penalty, by bringing the action. Moreover, in so doing, they displayed no disloyalty to the union, and performed no act injurious to the society or tending to its disruption. The purpose of the action was to procure restoration to the treasury of the union of moneys alleged to have been misappropriated by its officers. It was the absolute right of the plaintiffs to bring the suit, whether they could successfully maintain it, or not, and they might not be expelled for having so done. Therefore charge No. 1 utterly failed.

Charge No. 2. The plaintiffs were charged with circulating among the members of the union false and malicious statements setting forth acts of misconduct on the part of its officers, similar to those charged in the action brought. No rule contained in the printed copies of the constitution and by-laws of the union, submitted to us as correctly expressing the same, forbids the circulation among members of statements concerning the union officers, which are libelous, nor does any rule provide, as a penalty for so doing, for the fining or expulsion of the member. . . .

Charge No. 3. This charges the plaintiffs with a violation of their oaths of obligation to the union, in that they were guilty of misconduct, as set forth in charges 1 and 2. For this charge the penalty decreed was expulsion. We have already shown that charge No. 1

was wholly unfounded, in that the acts charged were not violations of the constitution and by-laws, in respect to any term thereof whether expressed or implied. Thus the plaintiffs stand expelled for two alleged violations in combination, one of which furnished no grounds whatsoever for an expulsion. We cannot assume that the union would have expelled the plaintiffs for the violation asserted in charge No. 2 standing by itself. Especially is this true when it appears that for such violation the plaintiffs were punished by the infliction of no other penalty than a fine of $500. Manifestly, the violation asserted in charge No. 1 entered into the decision, as an essential ground for the expulsion decreed. It follows that the plaintiffs were expelled without power and illegally. They should be reinstated.

It has been found that the plaintiff Polin, as a result of the action of the union in expelling him, has suffered a loss of wages amounting in the aggregate to $1,955. He is entitled to a recovery of this amount. It has also been found that he has incurred expenses for legal services amounting to $5,000. The services involved are those performed in this very action. No recovery may be had therefor.

It has been found that the plaintiff Schneider has suffered a loss of wages amounting to $1,622.40, for which he should have a recovery. His expenses for legal services in this action amounted to $3,500, for which no recovery may be had.

The judgments should be reversed and judgment directed in favor of plaintiff in each action, setting aside the proceedings of the union, restoring plaintiff to membership, and awarding to plaintiff Polin a recovery of $1,955, and to plaintiff Schneider a recovery of $1,622.40, with interest from June 3, 1930, together with costs in all the courts.

Judgment accordingly.

Case Questions

1. State the charges made by the secretary of the union.
2. What is plaintiff asking in this suit?
3. What do the constitution and by-laws of an unincorporated association express?
4. Under what conditions will a court review expulsion proceedings?
5. For what reasons may a union validly expel? Need the rule be written or in the by-laws?
6. What was the "order of appeal" that was provided here?
7. What was the reason for plaintiff's action against the officers? Was this a protected action?
8. Why does charge No. 2 fail?
9. What remedial action is ordered by the court?

COHEN v. ROSENBERG

Supreme Court of New York, Appellate Division, 1941.
262 App. Div. 274, 27 N.Y.S. (2d) 834

COHN, J. Plaintiff was a member of defendant, Local Union 802, American Federation of Musicians. The by-laws of the Union provided that a member desiring to propose an amendment was required to submit it to the secretary. Such an amendment could be considered only at a meeting held in the month of September. Any proposed change in the by-laws was to be published in the "Official Journal" immediately prior to such meeting. In accordance with the by-laws, plaintiff mailed to the secretary a proposed amendment. The proposal in substance recited that it had been "publicly stated" that the election of officers of the Union held in December, 1936, was conducted "in such a fraudulent, dishonest and crooked fashion as to cast doubt upon the right of the present officers to hold their respective offices"; it then recommended that the by-laws relating to elections be held inoperative for the year 1938 and that the election to take place on December 15, 1938, be conducted by the Honest Ballot Association.

The officials of the Union did not publish plaintiff's resolution. Instead, they notified him to appear before the trial board to answer a charge of "unfair dealing to the Local and its duly elected Officers." As directed, plaintiff presented himself for trial. At the outset of the hearing the chairman amplified the charge by stating that plaintiff was "being brought up for publicly sending this through the mails wherein he charges the Officers of undermining the Union and conducting the Election in a fraudulent and crooked fashion." In his defense of the charge, plaintiff stated that the resolution which he proposed did not accuse anyone of wrongdoing nor did it assert that the election had been dishonestly conducted. Plaintiff also showed that other members had complained to the International Executive Board of the Union concerning the December, 1936, election and that many discussions relative to it were frequently had between groups of members within the halls of the Union and elsewhere.

Nonetheless, plaintiff was found guilty of the charge, was fined $1,000 and was expelled from membership in the Local. Thereafter he exhausted every right of appeal within the Union itself before seeking relief by means of the present action.

At the trial in the Supreme Court plaintiff, among other things, proved that all members of the trial board who presided at the hear-

ing of the charge made against him were officers elected at the December, 1936, election.

Plaintiff contends that these judges were disqualified to act because of bias, prejudice and interest in the subject matter of the controversy, and hence were without jurisdiction to try him. In view of the nature of the charge which led to his expulsion from the Union, we think the plaintiff's grievance is a just one. The members of the Union's trial board obviously were disqualified by a direct interest in the subject matter of the controversy. As expressed by Judge Miller in *Wilcox* v. *Supreme Council Royal Arcanum,* 210 N.Y. 370, 379, 104 N.E. 624, 52 L.R.A., N.S., 806, "It is as though a judge defamed were to try the defamer for a criminal libel."

Defendant urges that plaintiff did not defame the trial board members; that if opprobrium was cast upon any one by the wording of plaintiff's resolution, it was upon the persons who had conducted the 1936 election. With this contention we are unable to agree, in view of the statement made by the chairman of the trial board and the attitude assumed by the members thereof throughout the trial in regarding the resolution as an accusation that the officers were "undermining the Union and conducting the Election in a fraudulent and crooked fashion."

Where proceedings to try a member of a labor union are conducted regularly and with proper regard for the accused's legal rights, the courts will not interfere with a determination of the union (*Polin* v. *Kaplan,* 257 N.Y. 277, 282, 177 N.E. 833; *Matter of Pratt* v. *Rudisule,* 249 App. Div. 305, 307, 292 N.Y.S. 68; *Young* v. *Eames,* 78 App. Div. 229, 79 N.Y.S. 1068, affirmed 181 N.Y. 542, 73 N.E. 1134). As stated by this court in the case of *Rubens* v. *Weber,* 237 App. Div. 15, 19, 260 N.Y.S. 701, speaking through Martin, J., now Presiding Justice: "Courts are very reluctant to interfere with or to direct the affairs of such organizations. Where there has been an injustice perpetrated, the courts will interfere to correct abuses or to protect rights."

In this case the evidence establishes that the members of the Union's trial board were disqualified to serve as judges upon plaintiff's trial. For this reason the expulsion was invalid. This determination, however, is without prejudice to the right of the defendant Local Union to properly try plaintiff upon the charge preferred against him.

The judgment should be reversed with costs and judgment directed for the plaintiff to the extent of reinstating plaintiff to full membership in the defendant Union.

Case Questions

1. Why was plaintiff expelled?
2. Did he exhaust his internal remedy?
3. Were the members of the trial board unbiased? Who were they?
4. What was the court's decision and why?

SUPPLEMENTAL CASES—EXPULSION AND SUSPENSION

ABDON v. WALLACE, 165 N.E. 68, 1929. The Indiana Appellate Court set aside the suspension of a local union's charter when the suspension had resulted from the local's refusal to expel a member who had been called upon to testify under subpoena before the Interstate Commerce Commission upon the safety feature of a new type locomotive headlight. The member gave testimony under oath that was adverse to adoption of the new type of headlight and that was contrary to the view on the matter of the Grand Chief Engineer, who then demanded expulsion of the witness. The court held that a parent body could not cause expulsion of a local member, nor the suspension of a local union for its failure to expel, because truthful testimony was given. The Grand Chief Engineer's conduct was described by the court at page 75 as being "out of keeping with principles of common honesty."

The rule under which the local was suspended provided: "Sec. 12. Any member or division who, by verbal or written memorandum to anyone, calculated to interfere with national legislative matters offered by our legislative representative members at Washington . . . shall be expelled when proven guilty as per section 49 of the Statutes."

SPAYD v. RINGING ROCK LODGE, 270 Pa. 67, 113 Atl. 70. A member of a labor organization signed a petition to the legislature requesting a reconsideration of the Full Crew law which was favored by the union. The rules of the union provided the penalty of expulsion of any member using his influence against the union's lobbyist. When Spayd was expelled, he appealed to the courts and the expulsion was set aside as violative of his constitutional right to petition for a redress of grievances.

LOVE v. GRAND INTERNATIONAL, 139 Ark. 375, 215 S.W. 602, 1919. An expulsion of a member was upheld where he circulated information against the interests of the union and contrary to an express rule of the organization's constitution and by-laws.

GRAND INTERNATIONAL v. GREEN, 210 Ala. 496, 98 So. 569, 1923. The court here sustained a verdict for punitive damages for malicious expulsion had against the union by plaintiff Green, who showed that the reason for expulsion was his declaration of allegiance to this country at a time when war was imminent between the United States and Germany. His declaration was in protest of contemplated strike action by the association at that time.

SPIEGEL v. LOCOMOTIVE ENGINEERS, 166 Minn. 366, 207 N.W. 722, 1926. The plaintiff sued the Association for insurance benefits as a beneficiary of deceased who had been expelled from the Brotherhood for scab activity in a strike contrary to its by-laws. The union, in expelling the decedent, held a trial, but, because no written charges were furnished the member and because of paucity of evidence against him, the proceeding was held void by the court for arbitrariness. Judgment for plaintiff.

Suspension without notice of charges was found illegal also in *Bricklayers* v. *Bowen*, 183 N.Y. Supp. 855, 1920.

BEESLEY v. CHICAGO JOURNEYMEN PLUMBERS, 44 Ill. App. 278, 1892. The expelled plaintiff sought restoration, which was refused by the court. He had been expelled for misrepresentation of his qualifications, being in reality, as shown by the evidence, a bricklayer and not a plumber. The union committee had offered to test his practical qualifications and prescribed a test known as "wiping a joint," which plaintiff refused to undergo.

SECTION 83. DUTIES OF OFFICERS

It is the obvious duty of a union officer to represent his constituents fairly, to abide by the constitution and by-laws of the association, and to deal honestly with its funds. The *Dusing* case below develops these obligations more fully.

DUSING v. NUZZO

Supreme Court of New York, 1941. 177 Misc. 35, 29 N.Y.S. (2d) 882

BERGAN, J. The defendant labor union is a branch of the International Hod Carriers, Building and Common Laborers' Union, known as Local 17. It is governed, accordingly, by the constitution and general rules of the International and by its own local constitution. The local constitution (Article X, Sec. 1) requires annual elections of officers and delegates be held annually in June. It is conceded no election has been held since 1937. The same constitution (Article V, Sec. 5) requires that the secretary-treasurer shall at each regular meeting "render a detailed written report showing all monies received by him, and from what sources" and shall (Sec. 6) at the regular meeting "at least once each month, render a detailed written report showing the financial transactions and standing of the local." In addition Section 9 provides that the auditors or trustees shall, at the end of each quarter, audit the secretary-treasurer's books and shall "render a detailed report quarterly to the local showing the financial transactions and condition of the local for the preceding quarter." It is conceded the detailed quarterly reports have not been made, and it is readily found, to the extent that it is not conceded, that the detailed financial reports required by Sections 5 and 6 have not been made.

Plaintiffs are members of the local union. This action is for judgment in the nature of a mandatory injunction requiring that an election be held and for an accounting of the union funds. There is singularly little real dispute of fact in the case. The first question of law presented, and it is crucial, is whether the controversy is justiciable, i.e., whether it is a subject requiring any judicial determination of rights. Ordinarily internal disputes in labor unions, as in private associations and fraternal orders, do not present questions for judicial determination.

The concurrence of three elements is necessary for judicial intervention: (a) a property right or its equivalent must be involved; (b) a violation of the constitutional or charter requirements in the

act complained of must be shown; (c) resort to the internal processes of the organization for redress must have been exhausted or shown to be futile, which is to say that resort to a court has become an imperative necessity.

By analogy the cases of suspension of membership in labor unions and charter regulations of locals define the principles involved. In *O'Keefe* v. *Local 463 of United Ass'n of Plumbers and Gasfitters of United States and Canada*, 277 N.Y. 300, 14 N.E. 2d 77, 117 A.L.R. 817, the action of the union was sustained because it followed the authority of the constitution and by-laws, notwithstanding hardship to plaintiffs. "The tests of whether the law affords redress for such harm are the legality, good faith, and freedom from malice of the union." 277 N.Y. at page 309, 14 N.E. 2d at page 80. In *Nilan* v. *Colleran*, 283 N.Y. 84, 27 N.E. 2d 511, the acts complained of were in conformity with the constitution and rules of the union and were not interfered with.

But where the act of expulsion is illegal, appropriate equitable relief will follow. *Klein* v. *Morrin*, 248 App. Div. 153, 288 N.Y.S. 1105, affirmed, 273 N.Y. 553, 7 N.E. 2d 689. And the constitution and by-laws of a union measure, in respect of expulsion, at least, the contractual rights of members. *Polin* v. *Kaplan*, 257 N.Y. 277, 177 N.E. 833. Where the proceedings suspending a member are void, a party aggrieved is not required to appeal within the union, but may apply immediately to the court. *Shapiro* v. *Gehlman*, 244 App. Div. 238, 243, 278 N.Y.S. 785. . . .

In view of these principles and of the fact that the constitution of the local union has been clearly violated, plaintiffs have made out a cause of equitable relief requiring an election and an accounting if they have an interest in the subject of which equity will take cognizance.

It is argued that a court of equity will intervene only to protect property rights, and since it has been held that the elections of officers of fraternal societies are not property rights of members, the argument advances to the point that union members stand in the same position of equitable disability in the right to an election of their officers.

But a labor union is not a social club. It is an economic instrumentality conceived in the necessities of making a living under the expansive influence of modern industrial concepts. The individual workman is impotent to deal with a great industrial organization.

Aggregates of capital can only be met on equal terms by labor in the aggregate of union organization. The success of the result is dependent upon the responsiveness and the ability of the leader of the union. He is not the arbiter of social pleasure; he is the dispenser of bread and it is not difficult to hold that the union member has an enforcible interest in union elections of which the court in equity will be cognizant. It is as real and as needful of equitable protection, surely, as money or chattels.

The right to membership in a union is empty if the corresponding right to an election guaranteed with equal solemnity in the fundamental law of the union is denied. If a member has a "property right" in his position on the roster, I think he has an equally enforcible property right in the election of men who will represent him in dealing with his economic security and collective bargaining where that right exists by virtue of express contract in the language of a union constitution. Where an election is required by the law of a union, the member denied the right to participate is denied a substantial right which is neither nebulous nor ephemeral. . . .

Certainly the admitted violations of the fiscal directions of the local constitution, existing over a long period, require that the officers account to the members for their money. The proof indicates that the gross income from dues and fees from 1938 to 1940, inclusive, was about $200,000. The per capita and initiation payments due to the International during the period would be about $40,000. It seems incredible that the local union could have expended $160,000 in the period for administering its own local affairs. Yet, on November 26, 1939, the union's bank balance was $16,153.95, and a little over a year later (Dec. 27, 1940) it was $107.93. Since the accounting directions of the constitution, the observance of which could have checked dissipation, have not been followed, and since the fiscal officers have a fiduciary relationship to the members, I think an accounting is the only complete and adequate remedy. The plaintiffs have "an interest in the general funds of the organization." *Blek* v. *Kirkman,* 148 Misc. 522, 266 N.Y.S. 91, 92. . . .

Defendants contend they have been acting in respect of supervision of elections and of fiscal matters under the direction of the International union. In substance, the International vice president directed that meetings be suspended, a direction which was subsequently withdrawn, and further directed that actions of the executive board be ineffective until they receive "my official approval" and

that the reports of collections and disbursements be made every two weeks "to me." This was in pursuance of letters of October 25, 1937, and November 3, 1937. The specific authority for this action under the International constitution is not apparent, but if there was authority, the prohibition on meetings was withdrawn the following year and acted upon, and the right to the meetings, the elections and the fiscal accounts to members at the meetings was then revived.

I find that the plaintiffs have exhausted whatever remedy exists within the International by application to its officers and that redress has been effectually denied and ignored. Moreover, the International itself has not had an election of officers in thirty years, and defendant Nuzzo, who has been active for years in its affairs, was unable to say by what authority its officers occupy their offices. The futility of applying to an organization thus antipathetic to the elective process for failure of a subordinate union to comply with the directions of its charter in these respects need not be labored.

I see no ground to restrain permanently the prosecution of charges that have been made against plaintiffs. Prosecution will be restrained, however, until the election has been had and the judgment may so provide. The judgment also shall provide that the election follow the directions of the constitution, but the court cannot otherwise undertake to supervise it. . . .

Case Questions

1. What duty did the treasurer fail to perform per the by-laws?
2. What is the purpose of plaintiff's suit?
3. State the general rule as to internal disputes.
4. State the three elements required for judicial intervention into an internal affair of a union.
5. When is a member not required to exhaust his internal remedy?
6. How does the court answer the defensive argument that equity protects only property rights?
7. Why does the court order an accounting?
8. How long has it been since an election was held?
9. Does the court order an election? Will it supervise the election?

SECTION 84. DUTIES OF MEMBERS

Any member of an unincorporated association who would successfully resist expulsion or suspension must fairly abide by that association's valid rules; must identify himself with the commonweal; and must support it financially and otherwise. Financial levies, such as initiation fees, dues, and assessments, are within the power of an association to assess if for the furtherance of the association's legitimate objectives, notwithstanding that the purpose of a particular levy is inconsistent with the individual member's own personal desires or ideas. The will of the majority governs whether or not the minority shall likewise be bound. This is the rule that DeMille was faced with in the case that follows.

DE MILLE v. AMERICAN FEDERATION OF RADIO ARTISTS

District Court of Appeal, Second District, California, 1946.
175 Pac. (2d) 851

YORK, P. J. As a member of American Federation of Radio Artists, Los Angeles Local (hereinafter referred to as AFRA), which is an affiliate of the national organization bearing the same name (hereinafter referred to as National), plaintiff by the instant action sought to restrain both organizations and the board of directors of AFRA from suspending him for his refusal to pay a One Dollar assessment which the union levied against its membership for financing its campaign in opposition to the "Right of Employment Act," an initiative measure appearing on the ballot in the State election of November 7, 1944, as "Proposition No. 12." A temporary restraining order and an order to show cause were duly issued and defendant union interposed a demurrer to the complaint, as amended, which was sustained without leave to amend. From the judgment dismissing the complaint, denying application for a preliminary injunction, dissolving the restraining order and discharging the order to show cause, plaintiff has perfected this appeal.

Appellant is a radio artist and for more than eight years immediately prior to December 7, 1944, the date on which the complaint herein was filed, had been engaged in the presentation of a radio program as the producer of the Lux Radio Theatre of the Air, under contract with the J. Walter Thompson Company, said program being broadcast over the Columbia Broadcasting System. For his services in connection with said program, appellant received a total remuneration of $98,200 per year. . . .

On August 16, 1944, appellant received a notice that by action of the board of directors of AFRA, each member thereof had been assessed $1 to finance the campaign in opposition to Proposition No. 12 to be submitted to the electorate at the election of November 7, 1944. This notice set forth reasons for the opposition of organized labor to said proposition and stated that failure to pay the assessment before September 1, 1944, would result in suspension. . . .

Proposition No. 12, to which reference has heretofore been made, provided that: "Every person has the right to work and to seek, obtain and hold employment, without interference with or impairment or abridgment of said right because he does or does not belong to or pay money to a labor organization."

The official bulletin of AFRA published in July, 1944, which was mailed to the entire membership, including appellant, contained the following announcement: "Membership meeting of AFRA will be held Monday, July 17th, at 8:30 P.M. at Studio 2 at CBS. On the Agenda there will be an explanation by Mr. Gene Kelly of the erroneously termed 'Right of Employment' Bill. . . . The 'Right of Employment' Bill, if passed in the Fall Elections, will sound the death knell to Labor. This innocent-sounding bill has been so presented to the public that over 180,000 signatures appeared on the petition to have it placed on the ballot. This means that as members of Organized Labor we must do everything in our power to educate the public to undoing the harm they have set in motion, in many cases quite ignorantly, to the very people they thought they were helping. . . . A program is being mapped out which will call for vigorous action by all of us whose present standards of living are plainly at stake. . . ."

Appellant claimed in the trial court, as he does here, that respondents had no authority to levy the assessment; had no authority to levy any assessment for the stated purpose, and that the procedure to suspend him was contrary to and did not conform to the Constitution and By-Laws of AFRA. Appellant also asserts that by respondents' acts his constitutional rights to suffrage, free speech, life, liberty and the pursuit of happiness were invaded; that he was compelled to pay a tax for the exercise of his constitutional right to work; and that section 251 of 2 U.S.C.A., the Corrupt Practices Act of the United States, was violated.

As hereinbefore stated, respondent is an open union which admits to membership all persons desiring to work as performers in the radio entertainment industry. Its organic law is set forth in the

articles of agreement and constitution of National, and in the articles of agreement, constitution and by-laws of AFRA, by the terms of which each applicant, upon attainment of membership, is bound. Contrary to appellant's contention, the articles of agreement may be consulted for an explanation of the aims and objects sought to be effected by the respective constitutions. The articles of agreement of AFRA are to the effect that "We, the undersigned . . . constitute ourselves a voluntary association . . . to advance, protect," etc., all those connected with radio performances, agree that AFRA its present members, "the undersigned," and persons hereafter becoming members, are to be governed by the constitutions and by-laws and all lawful rules of the National and that "the same shall be binding upon us and all subsequent members of this local." The articles of agreement of National is substantially in the same form and recites the additional purpose "to secure proper legislation upon matters affecting" the professions of the various members.

Section 1, Article XI of National's constitution provides that initiation fees, dues and assessments shall be fixed by the locals for all members thereof, subject to approval of the National board of directors. This is a direct grant of power to the locals, including AFRA, to levy assessments. Article V provides that no person shall become a member of National or any Local unless he shall sign an application substantially providing that "he agrees to be bound by the respective Constitutions of the Association and Local . . . and by any by-laws, rules, regulations and orders existing or thereafter lawfully enacted pursuant to such Constitutions and any amendments thereto." Section 5 of Article VIII provides, among other things: "Subject to the provisions of the Charter and Constitution granted by the Association, and of this Constitution, each Local shall be autonomous and shall manage and govern its own affairs within the territory of its jurisdiction."

The constitution of AFRA, section 1, Article V, provides practically the same terms of membership as found in the constitution of National. Section 2, Article V, exempts honorary members but no others, from payment of dues and assessments. Article IX provides that matters not covered by the constitution and which are contained in the by-laws shall have equal force and effect with the constitution, that Local Boards shall have power to make rules supplementing the constitution and by-laws regarding all matters not covered by them, and that all lawful rules and orders made by the Local Board shall be binding upon each member from the time when lawfully made or

given. By section 4, Article II, by-laws of AFRA, the Local Board is authorized to adopt rules supplementing the constitution and by-laws and covering matters not contained therein, such rules to have equal force and effect with the constitution and by-laws.

Under the power and authority given by the foregoing, the board of directors of AFRA did not exceed its power in levying the assessment herein questioned. . . .

Appellant argues that he personally favored Proposition No. 12, which would have made union shops illegal, and contends that by paying the assessment to AFRA, he was giving expression to sentiments contrary to those which he holds, in violation of his rights of suffrage, freedom of speech, expression of thought, and the right of assembly.

In clubs, fraternal and civic organizations, business and professional organizations, private corporations and voluntary associations of all kinds, the doctrine of the acceptance by the minority of the decisions of the majority and those whom they have elected to determine the policies of the organization, is the basic principle of their organization and functioning. Also, it is well recognized that the minority in accepting the decisions made by the majority, individually reserve the right to disagree with the decisions so made, because it rarely happens in any action taken by an organization that it represents the unanimous belief of the membership. Therefore, no inference could possibly arise that appellant individually approved either the assessment or AFRA's stand against Proposition No. 12, and furthermore, he was entirely free to work in support of the proposition, regardless of the union's opposition.

From the time appellant became a member of AFRA, he was bound not only by the constitutions and by-laws of the National and Local organizations, but also by the will of the majority of the membership, as lawfully expressed in accordance with such constitutions and by-laws. As a member of AFRA, appellant was contractually bound to submit to disciplinary action for his failure to pay the assessment levied.

The Federal Corrupt Practices Act, 2 U.S.C.A. Sec. 251, denounces contributions by labor organizations "in connection with any election" at which certain designated federal candidates, to-wit, presidential or vice-presidential electors, senators or representatives in Congress "are to be voted for." Proposition No. 12 was on the ballot at which there were candidates for all of these offices, but the funds

were used not "in connection with" the election of such officers, but only in opposition to the said proposition. An act of Congress prohibiting expenditures in the election of federal officers cannot interfere with a state election at which electors vote at the same time for state officials, or on proposed amendments to the state constitution, or other matters.

From the foregoing it appears that the $1 assessment levied by AFRA in connection with its opposition to Proposition No. 12 was for a union purpose, was duly authorized under the constitution and by-laws of said organization and that the suspension of appellant for nonpayment thereof must be sustained.

SUPPLEMENTAL CASE—DUTIES OF MEMBERS

FROELICH v. MUSICIANS MUTUAL BENEFIT ASSOCIATION, 93 Mo. App. 383, 1902. The union passed a resolution imposing a boycott on a transit company. Members who patronized the company by riding on its vehicles were subject to fine. Plaintiff did so use the facilities, was fined, and, upon his refusal to pay the fine, was expelled. The court granted an injunction against the Association, holding the resolution to have been illegally adopted.

In the above case, the court was evidently searching for a means of rationalizing its decision to secure an expedient result. It could have based its decision on the ground that the rule was unreasonable.

Case Questions

1. What was De Mille seeking to accomplish in this action?
2. Why was he suspended?
3. What was Proposition No. 12?
4. Why did De Mille believe the levy unjust?
5. Complete this sentence, "In clubs . . . the doctrine of the acceptance by the minority of the decisions of the majority. . . ."
6. How did the Court circumvent the Federal Corrupt Practices Act?
7. What was the Court's decision in the main case?

SECTION 85. EXHAUSTION OF INTERNAL REMEDY

In Section 82 of this volume were investigated the requirements laid down by the courts to govern the conduct of valid expulsion or suspension proceedings. If these requirements are met, the courts are loath to disturb the decision of the association in these matters, under the theory that the issue, being primarily one of local concern, should be locally decided.

There is another condition precedent to court review that is uniformly followed in the disposition of appeals of this type. That is the rule obliging a petitioner who has been suspended, expelled, or otherwise unjustly treated by an association to exhaust his internal remedy in the association before bringing his case to the courts. To this general rule we find appended two exceptions. They are treated adequately in the *Walsche* and *Johnson* decisions in this section.

WALSCHE v. SHERLOCK

Court of Chancery of New Jersey, 1932. 110 N.J.Eq. 223, 159 Atl. 661

BERRY, V. C. The complainants are four members of local No. 11 of the International Association of Bridge, Structural and Ornamental Ironworkers, which is an unincorporated labor union having its principal office at 60 Brandford Place, Newark, N. J. . . .

The complainants seek to restrain the above-named officers of local No. 11 from using what is commonly known as the "permit" and "card index" system, or, if permitted to use said system, restrain from discrimination against the complainants and other members of the local by said officers. The bill alleges that "under the 'permit' system the members of the Local union were permitted to seek employment . . . but could not commence work without having first procured from . . . Sherlock, or his assistant, a permit authorizing him to accept such employment from the particular employer and on the particular piece of work for which he had secured employment. . . ."

. . . It is further charged that the card index system has completely failed of its purpose because the defendants Sherlock and O'Neill have not administered it honestly, but, on the contrary, have fraudulently exercised it so that favoritism has resulted, and friends and supporters of Sherlock and O'Neill have been assigned to the best jobs, while the complainants and others opposed to the regime of Sherlock and O'Neill have been either left without work or assigned to the more dangerous and less lucrative jobs. Other abuses of the system and illegal practices by the defendant officers are

charged in the bill. The defendants deny any abuse of the system and any fraudulent or illegal practices, and claim to have administered the permit and card index systems with absolute honesty and without favoritism. Generally speaking, however, I think that substantially all of the allegations of the bill of complaint are sustained by the evidence, although the defendants had not, at the time of the suspension of the final hearings, put in all their proof with respect to the misuse of the card index permit system. But all the principal defendants had testified, and, as the testimony stands, I am inclined to believe that complainants' evidence presented the true picture. However, another defense interposed, and the one with which we are now more particularly concerned, is that this court is without jurisdiction in the premises because the complainants have not exhausted the remedies within the organization provided by its Constitution.

It is admitted by the complainants that they have not exhausted these so-called remedies, but they claim they are not obliged to do so because the pursuit of them would be futile and would amount to a denial of justice, and that, if their compliance with the card-index-permit-system is required because of their contract of membership, such contract is void as violative of their constitutional right to freely dispose of their own labor, and the constitutional rights of employers anxious to employ them, to the free flow of labor of such employers. . . .

The general rule is that the provisions of the constitution and by-laws of a voluntary association become a part of the contract entered into by a member when he joins that association, and this rule is not in dispute. It is also a general rule of law that in controversies between a member and the association the remedies within the organization provided in the constitution and by-laws must be exhausted before appeal to the courts. . . .

Under some circumstances, however, the rule of exhaustion of internal remedies will not be enforced, even where the requirement was assented to when the litigant became a member, as where the pursuit of those remedies would be futile, illusory, and vain. *Lindahl* v. *Supreme Court, etc. Foresters*, 100 Minn. 87, 110 N.W. 358, 8 L.R.A. (N.S.) 916, 117 Am. St. Rep. 666. The requirement of exhaustion of remedies was there considered a denial of substantial justice because the tribunal of final appeal would not meet for three years. In *Kane* v. *Supreme Tent*, 113 Mo. App. 104, 87 S.W. 547, a delay of two or three years before the final tribunal met was con-

sidered sufficient to excuse the exhaustion of remedies within the order; and in *Brown* v. *Supreme Court, etc. Foresters,* 176 N.Y. 132, 68 N.E. 145, the rule was held not to apply where no meeting of the tribunal of last resort was to be held for over a year and then in a distant city; and, generally, it is held that, where the appeal would be futile, the remedies within the order need not be exhausted because "the law does not require a vain form." *Barbrick* v. *Huddell,* 245 Mass. 428, 139 N.E. 629, 632; *Correia* v. *Portuguese Fraternity,* 218 Mass. 305, 105 N.E. 997, 979; *Malloy* v. *Carroll,* 272 Mass. 524, 172 N.E. 790. Although in *Mulcahy* v. *Huddell,* 272 Mass. 539, 172 N.E. 796, a possible delay of four years before the meeting of the tribunal of last resort was held not of itself sufficient to excuse compliance with the rule. See also, generally on this subject, *Puleio* v. *Sons of Italia,* 266 Mass. 328, 165 N.E. 118 . . . *Local Lodge No. 104* v. *International Brotherhood, etc.,* 158 Wash. 480, 291 P. 328 (1930). . . . The exception to the general rule requiring an exhaustion of remedies are best stated in 19 R.C.L. 1231, Sec. 41, as follows: "So a member is justified in neglecting to exhaust his remedies within the order where it appears that an opportunity to present his claim and have a fair determination of it has been denied by the very conduct of the association itself, or where the means of redress afforded within the organization are unreasonable in their nature. Thus although the constitution and by-laws of an association provide for the submission of controversies between it and its members to various courts and tribunals within the order, and expressly declare that no member shall be entitled to bring any civil action or legal proceeding until he shall have exhausted all the remedies so provided, if the manner in which the courts are organized and the expense and delay incident to the proceedings are obstacles that amount almost to a denial of justice, and if it appears that adequate redress cannot be obtained from the internal tribunals, there may be a resort to the civil courts in the first instance."

The defendants contend that the following successive remedies were open to the complainants, and that none of them have been pursued: (1) Appeal to the district council (this is said to be an independent remedy and not mandatory); (2) appeal to the general president; (3) appeal to the general executive board; (4) appeal to the general executive council; (5) appeal to the regular convention. . . .

But, assuming that the international officials might graciously extend to these complainants the right to the successive appeals men-

tioned, when the attitude of the international officers in this particular controversy, the probable necessity of pursuing all four appeals to the end, the uncertainty as to the time and place of holding of the next regular convention at which the final appeal might be heard, the delay and expense necessarily incident to these successive appeals, the financial ability of the complainants, the loss in wages likely to be suffered by them in pursuing their so-called remedies, and their inability to compel the attendance of witnesses before the appellate tribunals, together with the fact that Walsche's appeal to the general president had passed unnoticed, are all considered, it is apparent that this cumbersome procedure, if pursued, would amount to a denial of justice even if the complainants were successful on their last appeal. Five appellate remedies are claimed to be open to the complainants. The very number of these so-called remedies and the alleged necessity of their complete exhaustion justifies this statement. And, if five such appeals may be required, why not twenty-five? The increased number of successive compulsory appellate remedies would certainly tend to the exhaustion of the complainants which suggests itself as the design of the author of this constitution.

I am of the opinion, therefore, that the pursuit of these so-called remedies within the order by these complainants would have been futile, illusory, and vain, and that it was not, therefore, necessary for them to exhaust such remedies before appealing to this court. . . .

. . . Under the rules of the international and local, a refusal of the complainants to work under the card-index-permit-system is sufficient cause for expulsion. Such a result would mean that these complainants would be deprived of the means of earning a livelihood at their trade in this community. Their contract via the union being void, the union should be restrained from suspending or expelling them, or otherwise depriving them of any of the rights of membership, because of their failure or refusal to work through that system.

I will advise a decree in accordance with these conclusions.

Case Questions

1. What system do complainants seek to restrain by the union? Why?
2. With whom does the court agree as to the charges of favoritism?
3. What is the principal defense?
4. Will the time factor excuse exhaustion of remedy? How much time?
5. How many successive appeals are there in this case?
6. Would the appeals here "tend to exhaustion of the complainants?
7. State the exception to the general rule requiring an exhaustion of remedies.

JOHNSON v. INTERNATIONAL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS

Supreme Court of Nevada, 1930. 52 Nev. 400, 288 Pac. (2d) 170

COLEMAN, J. On and some time prior to September 13, 1926, the plaintiff was a member of local union No. 971, a subordinate of the International of the United Brotherhood of Carpenters and Joiners of America, an unincorporated benefit society. At a meeting held on the date mentioned, a motion was adopted by said local expelling plaintiff from membership therein.

The complaint alleges, *inter alia*, that plaintiff was willfully, wrongfully, and maliciously expelled from defendant organization, and that no written charges were filed against him; that he was not given a trial as guaranteed by the constitution and laws of the organization; and alleged that he had exhausted all remedies available to him within the organization.

The complaint pleads section 55 of the constitution and laws of the defendant organization, which provides that charges alleging an offense must be made in writing and must specify the offense or offenses charged and the section violated, and must be signed by the member making the charge; that the charges must be read at the meeting and lay over until the next meeting; that the member charged must be notified and furnished a copy of the charges by registered mail; that all charges must be referred to a trial committee; that the accused shall be allowed until the next regular meeting to appear and reply; that the chairman of the committee shall summon the accused in writing, together with the witnesses for and against him.

The constitution and laws also provide that any member having a grievance may appeal to the general president for redress, subject to a further appeal to the general executive board and a final appeal to the general convention. It also provides that a member must exhaust his resources allowed by the constitution and laws within the organization before taking his case to the civil courts.

The defendants answered, denying, *inter alia*, the material allegations of the complaint alleging that no written charges were filed against the plaintiff and that he was wrongfully, willfully, and maliciously expelled from defendant organization without written charges having been filed against him. The answer admits that no trial was given the plaintiff, but alleges that he pleaded guilty to the charges which had theretofore been preferred.

Upon the trial, a judgment was entered dismissing the suit at

the cost of plaintiff, upon the ground that he had not exhausted his remedies within the defendant organization.

The evidence, though conflicting on that point, shows that a written charge was presented against the defendant on September 13, 1926, as follows:

"The following is the statement made by D. E. Johnson in the presence of Chas. Varney and Chas. Warner.

"Why in hell don't they change the name of the S. of a B. of an organization from the United Brotherhood of Carpenters and Joiners of America to the Contractors and Petty Politicians Association. (Signed) Chas. H. Varney."

After the charge was read, the defendant stated that a part of the matter stated was true and that a part of it was false, and demanded a trial as provided in the laws of the organization. The chairman of the local held that the plaintiff had pleaded guilty and that no trial was necessary.

The minutes of the local, as corrected, read: "Motion by Brother C. H. Varney that Brother D. E. Johnson be expelled for trying to create dissension and working against the harmony of the United Brotherhood."

The motion was adopted, and Johnson was requested to leave the hall. Thereafter Johnson took an appeal to the general president, who dismissed the appeal on the ground that the local acted for the best interest of the membership; but he took no further appeal.

Section 54, par. B, of the constitution, provides: "Any officer or member who endeavors to create dissension among the members or works against the interest and harmony of the United Brotherhood . . . shall be expelled. . . ."

Paragraph B, sec. 55, of the constitution and laws of defendant organization, is as follows: "All charges must be made in writing, and must specify the offense or offenses, and the Section of the Constitution and Laws of the United Brotherhood so violated, and be signed by the member or members making such charges."

The charge fails utterly to comply with this requirement. It does not specify any offense; neither does it specify the section of the constitution and laws alleged to have been violated. To constitute an offense, it must specifically charge that he was guilty of some act or acts prohibited by some law of the organization.

Assuming that it was the intent to charge Johnson with violation of section 54, par. B, an endeavor to create dissension is an essential element of the offense to be embraced in the charge. This element is not embraced in the charge against Johnson; hence he was not

charged with the offense of endeavoring to create dissension among the members. While the language Johnson is charged with using is scandalous and reprehensible, it does not necessarily charge him with endeavoring to create dissension. We appreciate that courts should not be anxious to require such charges to be strictly technical, but they should convey to the accused a knowledge of the charge made against him. This was no doubt the purpose of providing that the charge should refer to the section upon which the charge is based.

As the charge did not contain an essential element of an offense, Johnson might have admitted the truth of everything contained therein unreservedly, and still not plead guilty to violating a law of the organization.

But, if we were to concede that the written charge alleged an offense, the judgment would have to be reversed, for the reason that there was no plea of guilty, nor a trial. It is clear that Johnson never intended to plead guilty, for the reason that he demanded at the time a trial as guaranteed by the constitution and laws. The failure to afford Johnson this privilege renders the proceedings absolutely null and void. In *Wachtel* v. *Noah Widows' & Orphans' Soc.*, 84 N.Y. 28, 38 Am. Rep. 478, it is said: "It is well settled that an association whose members become entitled to privileges or rights of property therein cannot exercise its power of expulsion without notice to the person charged, or without giving him an opportunity to be heard."

While there seem to be some authorities which hold that, whether an expulsion be void or irregular, the aggrieved party must exhaust his remedies within the offending body, *the great weight of authority is to the effect that, where the proceedings resulting in suspension, expulsion, or other penalty, are not conducted in compliance with the requirements of the organization itself, or are contrary to law and the fundamental principles of justice, the aggrieved member may apply at once to the civil courts for relief. . . .* [Author's italics.]

Entertaining the views expressed, it follows that the judgment and order appealed from must be reversed, with instructions to the trial court to proceed in accordance with the views herein expressed.

Case Questions

1. Why was plaintiff expelled?
2. Describe the expulsion procedure.
3. Did the expulsion procedure violate the by-laws of the association?
4. Had plaintiff exhausted his internal remedy? Did the court require him to?
5. State the rule of the case.

CHAPTER 12

STATE LAWS

SECTION 86. STATE REGULATION OF LABOR UNIONS

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The recent controversy over the activities of unions has produced an unprecedented amount of state legislation in addition to the Labor-Management Relations Act. No discussion of the current pattern of labor regulation would be complete, therefore, without some indication of the scope of state activity in the field. Lack of space makes impossible an extended analysis of the problems involved in recent enactments, but the following summary will give some indication of their extent.

ANTI-CLOSED-SHOP LEGISLATION

Sixteen states have laws, either statutes or constitutional amendments, declaring closed shop agreements unlawful.[1] Five others have statutes which permit such contracts, but closely restrict and regulate their use.[2]

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[1] Ariz. Const. Amend. adopted Nov. 5, 1946 and Ariz. Laws, 1947, C. 81; Ark. Const. Amend. No. 34 and Ark. Laws, 1947, C. 101; Del. Laws, 1947, H.B. 212, § 30; Fla. Const. Amend. adding to Sec. 12 of the Declaration of Rights; Ga. Laws, 1947, Act No. 140; Iowa Laws, 1947, S.B. 109; La. Gen. Stat. (Dart 1939) tit. 100, § 65; Neb. Const. Art. 15, §§ 13, 14, 15; N.C. Laws, 1947, H.B. 229; N.D. Laws, 1947, H.B. 151 (This law is inoperative until submitted to and approved by the electors); S.D. Const. Art. VI, § 2 and S.D. Laws, 1947, S.B. 224; Tenn. Laws, 1947, S.B. 367; Tex. Laws, 1947, H.B. 23; Va. Laws, 1947, C. 2, §§ 1-8. The New Mexico and Ohio Legislatures have passed proposed constitutional amendments outlawing closed shop agreements which are to be submitted to the electors at the next general election. N.M. Laws, 1947, H.J. Res. 15.

[2] Colo. Laws, 1943, S.B. § 17; Kan. Laws, 1943, S.B. 264, § 8(4); Mich. Cum. Supp. (Mason 1940) § 8628-14; N.H. Rev. Laws (1942), C. 212, § 21, as amended by N.H. Laws, 1947, C. 194 and C. 212, §§ 21(a), 21(b), 21(c) and 21(d) as added by N.H. Laws, 1947, C. 194; Wisc. Stat. (1943), C. 111, sub. C. I, § 111.06(1)(c)1, as amended. *E.g.*, Michigan will allow an employer to enter into a union shop contract only if the union contracted with is the sole one established among his employees and is recognized by a majority of them as their representative. New Hampshire condones such agreements only when the following conditions are met: (a) two-thirds of the employees must vote in favor of a closed shop contract in a secret ballot conducted by the labor commissioner; (b) the union must satisfy the commissioner that its fees and dues are not unduly burdensome; (c) such contracts must include a clause that the union will not discriminate in race, color, creed, sex, age, etc., in accepting or retaining members; (d) a clause must be included that the union will not expel a member except for cause, through proper channels and subject to an appeal to the labor commissioner; and (e) unions desiring closed shop agreements must file an annual report and complete financial statement with the commis-

The statutes prohibiting closed shop agreements generally provide that it is "unlawful for any firm or association to enter into any contract, oral or written, in which membership or non-membership in a labor organization is made a condition of employment or continuation thereof." All of these statutes, with the exception of Maine, seem to cover union shop as well as closed shop agreements.[3]

Various methods are employed for enforcing these statutes: fines and imprisonment,[4] civil actions against the employer or union and union officers by any person deprived of employment because of such a prohibited agreement,[5] and injunction.[6] In five states such contracts are simply declared unlawful and unenforceable and no attempt is made to impose affirmative sanctions.[7]

In conjunction with the provisions pertaining to closed shop agreements, a number of states have added sections making it unlawful to require payment of fees or assessments to unions as a condition of employment.[8] The Georgia and Iowa statutes [9] also forbid employers to deduct fees or assessments for a labor union from an employee's pay, unless authorized to do so by a written order from the employee.

California and Alabama have limited the privilege of closed shop contracts without legislative action. By judicial decree California [10] will not allow the enforcement of a closed shop contract if the contracting union refuses membership to a racial minority, while Ala-

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sioner. The Kansas and Wisconsin statutes require a majority vote of the members of a collective bargaining unit and a vote of two-thirds of the voting employees, respectively, before closed shop agreements will be lawful.

[3] Me. Rev. Stat. (1944), C. 25, § 41-A specifically states that nothing in the act will be construed to prohibit the making or maintaining of union shop contracts.

[4] Ark. Laws, 1947, C. 101, § 4; Del. Laws, 1947, H.B. 212, § 27; Ga. Laws, 1947, Act No. 140, § 9; Iowa Laws, 1947, S.B. 109, § 6; Me. Rev. Stat. (1944), C. 25, § 41-A; Nebr. Laws, 1947, L.B. 344, § 3; S.D. Laws, 1947, S.B. 224, § 3; Tenn. Laws, 1947, S.B. 367, § 5. *E.g.*, the Tennessee statute makes violations of the act misdemeanors punishable by a fine of not less than $100 nor more than $500 and imprisonment for less than one year, and each day the contract continues in effect is a separate violation.

[5] Ariz. Laws, 1947, C. 81, § 6; Del. Laws, 1947, H.B. 212, § 28; Ga. Laws, 1947, Act No. 140, § 8; N.C. Laws, 1947, H.B. 229, § 6; Va. Laws, 1947, C. 2, § 6.

[6] Ariz. Laws, 1947, C. 81, § 7; Del. Laws, 1947, H.B. 212, § 9; Ga. Laws, 1947, Act No. 140, § 8; Iowa Laws, 1947, S.B. 109, § 7.

[7] Florida, Louisiana, Maryland, North Dakota and Texas. A constitutional question is raised by some of the statutes as to the impairment of contract obligations. *E.g.*, Ga. Laws, 1947, Act No. 140, § 4, which declares closed shop provisions void in any contract "heretofore" or "hereafter" made.

[8] Del. Laws, 1947, H.B. 212, § 20; Ga. Laws, 1947, Act No. 140, § 5; Iowa Laws, 1947, S.B. 109, § 4; N.C. Laws, 1947, H.B. 229, § 5; Va. Laws, 1947, C. 2, § 5.

[9] Ga. Laws, 1947, Act No. 140, § 6; Iowa Laws, 1947, S.B. 109, § 5.

[10] Blakeney v. California Shipbuilding Corporation, 10 Labor Cases 62,727 and *James* v. *Marinship Corporation*, 25 Cal. (2d) 721, 155 P. (2d) 329 (1944).

bama [11] makes it illegal to employ force, coercion, etc., in the obtainment of such a contract.

PROHIBITION OF SECONDARY BOYCOTTS

Fourteen states have outlawed secondary boycotts.[12] The majority of these statutes are aimed at protecting an employer from any work stoppages or refusals to handle the goods of another employer merely because a labor dispute exists between the latter and the union.[13] However, some statutes are more comprehensive, outlawing secondary boycotts intended to induce others not to trade with, buy from, sell to, work for, or have business dealings with such employer.[14] Other states have incorporated provisions within their labor relations acts, stating that secondary boycotts are an unfair labor practice, without making any distinction as to the type of boycott employed or methods used.[15] Relief from violations of all of these statutes is provided by injunction proceedings.[16]

FINANCIAL STATEMENT AND REPORTS

Nine states [17] have enacted laws necessitating unions to file annual reports and financial statements, while two require only the former.[18]

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[11] *Hotel & Restaurant Employees International Alliance* v. *Greenwood*, 12 Labor Cases 63,722.

[12] Calif. Labor Code (1937), §§ 1131-1136, as added by Calif. Laws, 1941, C. 623 as amended by Calif. Laws, 1947, C. 278; Del. Laws, 1947, H.B. 212, § 2(g); Ga. Laws, 1947, Act No. 141, C. 5 and 6; Ida. Laws, 1947, C. 265; Iowa Laws, 1947, S.B. 111; Minn. Laws, 1947, C. 486; Mo. Laws, 1947, S.B. 79, § 8; N.D. Laws, 1947, H.B. 160, § 13 (This law is inoperative until submitted to and approved by the electors); Ore. Laws, 1947, S.B. 323; Pa. Public Laws, 1168, § 6(d) as added by P.L. 558; S.C. Code (1942) § 6628; Tex. Laws, 1947, S.B. 167, §§ 1-9; Utah Ann. Code (1943), § 49-1-16(2)(e); Wisc. Stat. (1943), C. 111, sub. C. I, § 111-04(2)(g).

[13] *E.g.* Ore. Laws, 1947, S.B. 323.

[14] *E.g.* Minn. Laws, 1947, C. 486, §§ 2 and 3.

[15] Delaware, Pennsylvania, Utah and Wisconsin. *E.g.* Wisc. Stat. (1943). C. 111, sub. C. I, § 111.04(2)(g).

[16] In 1943 the Alabama legislature passed the Bradford Act (Ala. Acts, 1943, No. 298, § 12) in which secondary boycotts were termed unlawful. The Alabama Supreme Court invalidated this section as being in violation of the rights granted under the fourteenth amendment of the United States Constitution. *Alabama State Federation of Labor* v. *McAdory*, 246 Ala. 1, 18 So. (2d) 810 (1944).

[17] Ala. Acts, 1943, No. 298, § 7; Colo. Laws, 1943, S.B. 183, § 20(1); Del. Laws, 1947, H.B. 212, §§ 11 and 12; Ida. Laws, 1943, C. 76, § 1; Kan. Laws, 1943, S.B. 264, §§ 4 and 5; Mass. Initiative Petition, §§ 1-5; N.D. Laws, 1947, H.B. 160, §§ 2 and 3 (This law is inoperative until submitted to and approved by the electors); S.D. Laws, 1943, C. 86, § 1; Tex. Rev. Civil Stat. (1925), 5154a, § 3. The New Hampshire statute requiring labor organizations to file annual reports and financial statements affects only those unions entering into closed shop agreements. N. H. Rev. L. (1942), C. 212, § 21-b.

[18] Fla. Laws, 1943, C. 21968, § 6; Utah Ann. Code (1943), §§ 49-13-1 and 49-13-4.

The information required in the annual reports varies from the comprehensive Delaware statute to that of Florida. In the former [19] unions must file the names of their officers, the companies in which they operate, the amount of annual dues and assessments, initiation fees, the total number of members with any limitations on memberships, the method and date of the last election of officers including the tabulation of the total vote cast, the date of the last financial statement furnished to members describing the method employed for distribution, and a copy of the constitution and by-laws of the union. Florida,[20] on the other hand, requires only the name and address of the union, of all officers, and any national affiliations.

The financial statements required show great divergency as evidenced by the Delaware statute [21] requiring submission of the salaries of all officers and any other payments made by the union; South Dakota [22] necessitating this, plus the purposes for which any expenditures were made, and the Texas law [23] compelling unions to declare all property owned.[24]

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[19] Del. Laws, 1947, H.B. 212, § 11.

[20] Fla. Laws, 1943, C. 21968, § 6. The Utah statute [Utah Ann. Code (1943) §§ 49-13-1 and 49-13-4] has similar requirements. The status of the Florida law is dubious since *Hill* v. *Florida ex rel. Watson*, 325 U.S. 538 (1944). The Florida Supreme Court had upheld the validity of the statute on the basis of the state police power. However, the United States Supreme Court reversed saying: "It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining." It appears that the requirement to file a report (§ 6) is still valid, although the penalties imposed for failure to do so (§ 14) are unconstitutional. The Florida Attorney General is still of the opinion that all organizations in Florida must comply with the provisions of Section 6. Op. A.G., 046-502, Dec. 5, 1946.

[21] Del. Laws, 1947, H.B. 212, § 12. For failure to file the required reports and financial statements, those responsible are liable to a fine and six months confinement. Penalties are also provided for false registration and reports.

[22] S.D. Laws, 1943, C. 86, § 1. No provisions are made in this statute concerning the initial registration of unions. North Dakota, on the other hand, makes it a prerequisite of organization that all unions file both an initial registration and annual financial reports. N.D. Laws, 1947, H.B. 160, §§ 2 and 3. (This law is inoperative until submitted to and approved by the electors.)

[23] Tex. Rev. Civil Stat. (1925), 5154a, § 3.

[24] Two registration statutes have fallen in the courts. The Colorado law was invalidated when the court voided the compulsory incorporation provisions of the Colorado Peace Act of 1943 (Colo. Laws, 1943, S.B. 183, § 20) as violating freedom of speech and assembly. *American Federation of Labor* v. *Reilly*, 113 Colo. 90, 155 P. (2d) 145 (1944). However the Court specifically stated that it would not pass directly on the question of the validity of the reporting requirement, but that it must fail since it was included in the provision establishing incorporation of labor unions. The Idaho Act (Ida. Laws, 1943, C. 76, § 1) was declared unconstitutional since it violated the constitutional provision that an act embrace but one subject. *American Federation of Labor* v. *Langley* (Idaho Sup. Ct.), 168 P. (2d) 831 (1946). Registration statutes have been upheld on the basis of the state's right of regulation of internal affairs by the exercise of its police power. *E.g. Alabama State Federation of Labor* v. *McAdory*, 246 Ala. 1, 18 So. (2d) 810 (1944).

Minnesota and Wisconsin [25] do not require the submission of reports or financial statements to the Secretary of State, but they do charge union officers responsible for money to furnish a complete financial statement to all union members. Delaware, Florida, and Texas [26] also require the maintenance of account books open to inspection by union members at reasonable times. The Texas statute also specifies that such books are to be available for grand juries and all judicial and quasi-judicial inquiries.

Florida, Massachusetts, North Dakota, and South Dakota,[27] in addition to requiring reports, stipulate that such are public documents, open to inspection by anyone. Delaware and Texas [28] specify that such reports are confidential and only available to state employees and commissions, while Alabama [29] declares the records to be of a confidential nature, but still permits inspection by any member of the union concerned upon request. Kansas and Utah are silent upon the nature and availability of such reports.

REGULATION OF UNION ELECTION AND OFFICERS

Two states now have statutes which restrict the right of certain persons to hold union offices. Texas [30] prohibits aliens and persons convicted of a felony, whose rights have not been restored, from serving as an officer or organizer of any union, to which Delaware [31] adds a prohibition against communists.

Three states [32] provide standards for union election: (1) requiring them to be held annually; [33] (2) by secret ballot; (3) stipulating the majority required for election of officers; [34] and (4) prescribing

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[25] Minn. Laws, 1943, C. 625, § 4; Wisc. Stat. (1943), C. 111, sub. C. I, § 111.08.

[26] Del. Laws, 1947, H.B. 212, § 24; Fla. Laws, 1943, C. 21968, § 7; Tex. Rev. Civil Stat. (1925), 5154a, § 9.

[27] Fla. Laws, 1943, C. 21968; Mass. Initiative Petition, §§ 1-5; N.D. Laws, 1947, H.B. 160, § 4 (This law is inoperative until submitted to and approved by the electors); S.D. Laws, 1943, C. 86.

[28] Del. Laws, 1947, H.B. 212, § 15; Tex. Rev. Civil Stat. (1925), 5154a, § 3.

[29] Ala. Acts, 1943, No. 298, § 7; Ala. Admn. Bulletin No. 6, State Dept. of Labor, Jan. 6, 1944.

[30] Tex. Rev. Civil Stat. (1925), 5154a, § 4a.

[31] Del. Laws, 1947, H.B. 212, § 21.

[32] Del. Laws, 1947, H.B. 212, § 19; Minn. Laws, 1943, C. 625, §§ 2 and 3. Tex. Rev. Civil Stat. (1925), 5154a, § 4.

[33] The Minnesota statute is the least strict requiring that officers be elected at the end of each term, which is not to exceed four years.

[34] The Delaware act stipulates that at least a majority vote is required, although unions, if they so desire, may impose more stringent requirements. The Minnesota statute states that unions may provide in their constitutions for whatever type of election they wish and in the absence of any provisions, the candidate receiving the largest number of votes cast in the ballot shall receive the office.

notice to union members before an election is held. Delaware adds a requirement for a certification of the election results by a disinterested party and authorizes any member dissatisfied with the outcome to petition a court of equity for a review of the entire proceeding. The notice prescriptions vary from the Minnesota statute which stipulates only that notice be given a reasonable time before the election to the Delaware requirement of a written or printed notice to each member fifteen days before the election.[35]

CONTROL OF UNION AGENTS

Statutes have been passed in two states requiring business agents of unions to obtain a license from the Secretary of State.[36] These statutes require that applicants be citizens of the United States, and the Florida law further provides that no license will be issued to one convicted of a felony, or who is not a person of good moral character.

Although issuance is mandatory under the Kansas law upon meeting the requirements, the Florida statute places discretionary power as to issuance in a board composed of the Governor, the Secretary of State and Superintendent of Education.[37]

Failure to comply with the provisions of these two acts is a misdemeanor, subjecting the violators to a fine and imprisonment.

Texas requires that all paid union organizers obtain an organizers card from the Secretary of State. Upon application the issuance of this card is mandatory.[38]

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[35] Texas requires that the union members be notified of the election at least seven days prior to the actual balloting.

[36] Fla. Laws, 1943, C. 21968, § 4; Kan. Laws, 1943, S.B. 264, § 3.

[37] Under the Florida statute application is made to the Secretary of State. Objections to the issuance of a license may be filed with the Secretary and both are then submitted to the Board which will issue a license if they find the applicant qualified.

The United States Supreme Court invalidated the Florida statute in *Hill* v. *Florida*, 235 U.S. 538 (1944). However, the Florida Attorney General in Op. A.G. 046-502, Dec. 5, 1946, stated that business agents of unions were still required to obtain licenses under § 4, it being understood that agents of unions under the National Labor Relations Act, engaged solely in such activity affecting interstate commerce, are not business agents as defined in the Florida statute. A question still remains as to the validity of this provision when viewed in the light of *Thomas* v. *Collins*, 323 U.S. 516 (1944), as to whether requiring agents to obtain licenses from a board with discretionary power is a reasonable regulation of freedom of speech.

[38] Tex. Rev. Civil Stat. (1925), 5154a, § 5. In *Thomas* v. *Collins*, 323 U.S. 516 (1944), it was declared that a state has the power to regulate labor unions with a view to protecting the public interest. However, when the licensing provisions are applied to a general speech given at a mass meeting intending to encourage union membership, it is a violation of freedom of speech. This decision reserves the question of whether requiring paid union organizers soliciting memberships from individuals to obtain licenses would be constitutional.

SUABILITY OF UNIONS

Seven states [39] have specific laws which authorize suits by or against unions as entities.[40] Such statutes provide that unions may sue or be sued in their "common name" or by "such usual name as the association may have assumed."

Some divergency is found among the various states in the prescribed methods of service. Florida [41] provides that service may be had upon any person in charge of the business of the labor organization. The Nebraska [42] law merely requires that a copy of the summons be left at the union's usual place of business with any member of the organization. The Minnesota statute [43] stipulates that by operating within the state, a labor union is deemed to have appointed the Secretary of State its agent for service of summons. Louisiana [44] alone has no specific provisions as to the methods of serving process on unions.

If recovery is had against the unions, five of the states [45] specify that execution may be had only against the common property and assets of the union and not against the individual members. Delaware, however, provides that any union member who is made a party to the suit and either appears or is served with summons, will also be liable for the judgment obtained.[46]

Seven states [47] have enacted statutes to aid in the enforcement of collective bargaining agreements, providing either that such contracts

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[39] Del. Laws, 1947, H.B. 212, § 8; Fla. Laws, 1943, C. 21968, § 11; Kan. Laws, 1943, S.B. 264, § 10; La. Laws, 1946, Act No. 180, § 3(a); Minn. Laws, 1947, C. 527; Nebr. Laws, 1947, L.B. 276 amending Nebr. Rev. Stat. (1943), § 25-313; S.D. Laws, 1947, S.B. 225, § 1. Ariz. Laws, 1947, C. 81, § 6, provides that unions may be sued or sue as an entity in their common name for violations of the Anti-Closed Shop statute.

[40] Such statutes are in contrast to states which permit the use of class actions in suits against labor organizations, without specific statutory provisions.

[41] Fla. Laws, 1943, C. 21968, § 11. The Kansas statute is similar, requiring service to be made on either the president or another officer of the union, the business agent, a manager, or person in charge of the organization business. Kan. Laws, 1943, S.B. 264, § 10.

[42] Nebr. Laws, 1947, L.B. 276, amending Nebr. Rev. Stat. (1943), § 25-314.

[43] Minn. Laws, 1947, C. 527.

[44] La. Laws, 1946, Act No. 180, § 3(a).

[45] Florida, Kansas, Louisiana, Nebraska and South Dakota. See note 39 *supra*.

[46] Del. Laws, 1947, H.B. 212, § 8.

[47] Calif. Labor Code (1937), § 1126; Colo. Laws, 1943, S.B. 183, § 6(2)(c) and § 22; Del. Laws, 1947, H.B. 212, § 8; Mo. Laws, 1947, S.B. 79, § 5; N.D. Laws, 1947, H.B. 160, § 8 (This law is inoperative until submitted to and approved by the electors); S.D. Laws, 1947, S.B. 225, § 2; Tex. Laws, 1947, H.B. 73.

meet the requirements of mutuality [48] or merely that they shall be enforceable at law or equity.[49] Colorado makes the breach of such a contract an unfair labor practice, while Texas limits its approval to a provision making a union liable for damages growing out of a strike or picketing in breach of a contract.

PROHIBITION OF POLITICAL CONTRIBUTIONS BY UNIONS

Alabama, Delaware and Texas [50] have passed legislation making it unlawful for any labor organization to make financial contributions to a political party or person who may be a candidate for any public office. The Delaware act proscribes not only the making of such contributions, but also the soliciting of funds by a union.

The Alabama statute makes violations of the act misdemeanors, subjecting the offending party to not more than a fine of $500 or more than one year's imprisonment or both. Texas subjects the union as well as the officer or agent violating the statute to a fine.

REGULATION OF STRIKES

Twelve states have now placed definite restrictions on the calling of strikes.[51] Such statutes vary greatly, extending from legislation which merely requires union officers to notify the State Department of Labor that a strike is being called,[52] to comprehensive enactments providing for strike votes, notice and cooling off periods.[53]

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[48] *E.g.* The North Dakota statute specifies that collective bargaining agreements meet the requirements of mutuality and are equally binding on the union and employer. Enforcement of such contracts are provided for by an action in the Court of the district wherein the union may be sued in its common name. The order of the court is binding on both parties.

[49] *E.g.* California, Missouri and South Dakota.

[50] Ala. Acts, 1943, Act No. 298, § 17; Del. Laws, 1947, H.B. 212, § 23; Tex. Rev. Civil Stat. (1925), 5154a, § 4b. The Alabama statute was declared unconstitutional in that it violated the constitutional provision that acts shall encompass but one subject. *State Federation of Labor* v. *McAdory*, 246 Ala. 1, 18 So. (2d) 810 (1944). It should be noted that this is not a declaration that prohibiting political contributions is in violation of the constitution.

[51] Colo. Laws, 1943, S.B. 183, § 6(2)(e); Del. Laws, 1947, H.B. 212, §§ 5 and 2(f); Fla. Laws, 1943, C. 21968, § 9(3); Ga. Laws, 1941, Act No. 293, §§ 3, 4, 6 and 8; Ill. State Bar Stat. (1943), C. 10, § 26; Kan. Laws, 1943, S.B. 264, §§ 8(3) and 8(5); La. Laws, 1946, Act No. 180, § 3(b); Mich. Cum. Supp. (Mason 1940), §§ 8628-1 to 8629-21; Minn. Stat. (1941), C. 179, §§ 179.06, 179.11(8), 179-11(10); Mo. Laws, 1947, S.B. 79, §§ 3 and 4; N.D. Laws, 1947, H.B. 160, §§ 9, 10 and 11 (This law is inoperative until submitted to and approved by the electors); Wisc. Stat. (1943), C. 111, sub. C. I, § 111.06(2)(d).

[52] *E.g.* Illinois, see note 51 *supra*.

[53] *E.g.* North Dakota, see note 51 *supra*. This statute provides that written notice must be given to the employer and upon receipt thereof, the employer and union must each appoint a representative, who in turn will select a third person, to conduct a strike vote by secret ballot. The three judges of the election must prepare written tabulations of the election result and deliver copies to both the employer and labor organization. A majority vote of the

Of the nine states which require strike votes, seven require that a majority vote of the employees in the affected unit is needed before a strike may be called,[54] while the remaining two necessitate a majority of the votes actually cast.[55] The strike vote is to be conducted by a secret ballot, with reasonable notice thereof furnished to all the employees concerned.[56] The Louisiana statute, however, makes no provisions for the machinery to be followed, merely stating that strikes must be approved by the labor organization in advance.

Written notice of an impending strike must be given to the employer in three states,[57] and Michigan and Minnesota require, in addition, notification of the state labor agency. Colorado and Missouri only require that the State Industrial Commission be notified prior to a strike election, while no notice to the employer is necessary.

In Colorado, Michigan and Minnesota, the state labor agencies will, upon receipt of the strike notice, attempt to bring about a settlement of the dispute, but on failure to do so the strike vote will be conducted.

Violations of the provisions covering strike elections and notices are misdemeanors under the statutes, subjecting the violators to fines and imprisonment. Michigan further provides that legal and equitable remedies will be available to enforce the statutory requirements.

RESTRICTIONS ON PICKETING

All of the states have declared the use of force and violence in picketing as unlawful acts by general rout and riot statutes. However, thirteen states have passed statutes directly affecting picketing.[58] They vary principally in their definitions of what picketing is illegal.

Some of the prohibitions are directed against certain forms of picketing without regard to its purpose. Thus four states declare

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employees who cast votes is necessary for the calling of any strike. However, no strike may be called until thirty days has expired from the date of the election tabulation.

[54] Colorado, Delaware, Florida, Kansas, Michigan, Missouri and Wisconsin.

[55] Minnesota and North Dakota.

[56] Under the Minnesota act proof of publication of notice of the strike vote in a trade union paper of general circulation among the union members is conclusive proof of reasonable notice.

[57] Georgia, Minnesota and North Dakota.

[58] Colo. Laws, 1943, S.B. 183, § 6(2)(e); Del. Laws, 1947, H.B. 212, § 10; Fla. Laws, 1943, C. 21968, § 9(11); Ga. Laws, 1947, Act No. 141, § 3; Kan. Laws, 1943, S.B. 264, §§ 8(15) and 8(16); Mich. Acts, 1947, Public Act 318; Nebr. Rev. Stat. (1943), § 28-812; N.D. Laws, 1947, H.B. 160, § 12 (This law is inoperative until submitted to and approved by the electors); S.D. Laws, 1947, S.B. 226, §§ 1-6; Tex. Laws, 1947, H.B. 41; Va. Laws, 1946, C. 229; Utah Ann. Code (1943), § 49-1-16(2)(d); Wisc. Stat. (1943), §§ 343, 683.

mass picketing unlawful.[59] In Texas such picketing is described as any form of picketing where more than two pickets are posted at one time within fifty feet of any entrance, or within fifty feet of each other, or where either ingress or egress to a place of business is obstructed. South Dakota defines mass picketing in terms of percentages of the number of striking employees involved.[60]

Other prohibitions are stated in terms of the purpose or result of the picketing. Thus in ten states picketing so as to interfere with the exercise of the right of any person to carry on a lawful employment is unlawful[61] and in Nebraska, loitering about, patrolling or picketing a place of business for the purpose of inducing others not to trade with such business is unlawful.

In Delaware the prohibition is framed in terms of the tendency of the picketing to disturb the peace and lead to injury to property. North Dakota and Colorado ban any type of picketing where a strike has been called without a majority being obtained in the necessary strike election, and such picketing may be restrained.

Violations of the picketing statutes constitute misdemeanors, punishable by fines and imprisonment.[62] In Utah and Wisconsin the labor relation boards may issue orders prohibiting such picketing and invoke the aid of the courts for enforcement. Delaware leaves within the discretion of the Courts of Chancery the limiting of the number of pickets, prescribing the distance from the plant in which picketing shall be engaged in, and the methods and manners to be employed.

PREVENTION OF DISCRIMINATION IN UNION MEMBERSHIP

In an effort to prevent labor unions from discriminating in the admission or retention of members, five states have passed fair employment practice laws.[63] Connecticut, Massachusetts, New Jersey and New York have enacted comprehensive statutes following the same general pattern.

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[59] Colorado, Georgia, South Dakota and Texas.

[60] The South Dakota statute specifies that mass picketing is present where a greater number than 5% of the first one hundred striking employees and 1% of the employees in excess of this number engage in picketing.

[61] Florida, Georgia, Kansas, Michigan, Nebraska, South Dakota, Texas, Utah, Virginia and Wisconsin.

[62] *E.g.* Fla. Laws, 1943, C. 21968, § 14: provides for a fine not to exceed $500 or imprisonment not to exceed six months, or both.

[63] Conn. Laws, 1947, S.B. 346; Mass. Gen. Laws (1932), C. 6, § 56 and C. 151B; N.J. Laws, 1945, C. 169, codified in N.J. Cum. Supp. Rev. Stat. (1937), C. 25, Tit. 18; N.Y. Con. Laws, C. 18, Art. 12; Wisc. Stat. (1943), C. 111, sub. C. II, §§ 111.31 to 111.37

Under these statutes an appointed commission is charged with investigating all cases of discrimination.[64] Labor organizations discriminating against any person because of race, color, religion, national origin or ancestry are guilty of an unfair employment practice. Upon a complaint by the aggrieved person the commission investigates the charge and attempts to eliminate the practice. This failing the commission conducts a complete hearing and upon a finding of an act of discrimination, issues a cease and desist order. Such orders are enforceable by the courts, which may review the proceedings of the hearing to determine whether the finding is supported by evidence and according to law.[65]

In addition to the provisions allowing court orders for enforcement of the commission's orders, violations of the acts are punishable by fines and imprisonment.[66]

The Wisconsin fair employment law provides for the investigation and study of discrimination and publication of the commission's findings. However, there are no positive preventative provisions included therein.[67]

REGULATION OF LABOR DISPUTES INVOLVING PUBLIC UTILITIES

Eleven states passed legislation in 1947 regulating labor disputes involving public utilities.[68] Kansas, Minnesota and North Dakota had previously enacted statutes on this subject.[69]

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[64] Mass Gen. Laws (1932), C. 6, § 56, provides for the creation of a Fair Employment Practice Commission composed of three members appointed by the Governor. N.J. Cum. Supp. Rev. Stat. (1937), C. 25, Tit. 18, § 18:25-7, creates in the Department of Education a division known as the "Division Against Discrimination," consisting of the Commissioner of Education and seven members appointed by the Governor. N.Y. Con. Laws, C. 18, Art. 12, § 128, establishes an Anti-Discrimination Commission of five members appointed by the Governor.

[65] All of the statutes provide for further appeals to the State Supreme Courts.

[66] Under the Massachusetts [Mass. Gen. Laws (1932), C. 151B, §§ 6 and 8] and New Jersey [N.J. Cum. Supp. Rev. Stat. (1937), C. 25, Tit. 18, §§ 18:25-19 and 18:25-26] laws, in addition to the provisions allowing court orders for enforcement of the commission's orders, violations of the acts are punished by a fine of not more than $500 or confinement not exceeding one year, or both. The New York statute (N.Y. Con. Laws, C. 18, Art. 12, § 134 and N.Y. Laws, 1944, C. 692), provides for a recovery of not less than $100 or more than $500 by the person aggrieved from the officer or member of the union guilty of discrimination. Persons violating the act are also subject to fine of $100 to $500 and imprisonment of from thirty to ninety days or both.

[67] N.H. Rev. Laws (1942), C. 212, § 21-a, states that non-discrimination in accepting members into the union is necessary before such unions will be permitted to enter into closed shop agreements.

[68] Fla. Laws, 1947, C. 23911, § 1-19; Ind. Laws, 1947, C. 341, § 1-18; Mass. Laws, 1947, C. 596; Mich. Acts, 1947, Public Act No. 318; Mo. Laws, 1947, H.B. 180, § 1-22; Nebr. Laws, 1947, L.B. 534; N.J. Cum. Supp. Rev. Stat. (1937), C. 13B, Tit. 34; Pa. Acts, 1947, Act No. 485; Tex Laws, 1947, S.B. 178; Va. Laws, 1947, H.B. 6-X, § 1-18; Wisc. Laws, 1947, C. 414.

[69] Kan. Gen. Stat. (1935), § 44-620; Minn. Stat. (1941), § 179.07; N.D. Rev. Code (1943), § 38-0217.

The Indiana act presents the majority of the provisions included in the statutes passed in five states.[70] Employers rendering electric power or light, gas, water, telephone and transportation service to the public are covered by this act.

The enactment provides for the establishment of a panel of ten persons appointed by the Governor to serve as conciliators, plus thirty persons to act as members of the Boards of Arbitration. Where an impasse is reached in a dispute between one of the above employers and his employees, either party may petition the Governor to appoint a conciliator to attempt a settlement. If in the opinion of the Governor [71] an interruption of the service is likely and such will endanger the public safety and health, he will appoint one of the ten conciliators to the dispute. If this procedure fails, the Governor will designate a Board of Arbitration.[72] Each party to the dispute may designate one representative to sit with the board in an advisory capacity. The Board shall promptly hold hearings, giving both parties adequate opportunity to present evidence, and upon completion thereof, make written findings of fact, a written decision and issue necessary orders. Where a valid contract is still in force, the board may only determine the proper interpretation thereof, but where no contract exists, the board may establish rates of pay and conditions of employment comparable to prevalent wages in similar industries.

A certified copy of the Board's order is filed in the circuit court, and unless modified by mutual agreement of the parties, is binding on both for one year. Either party may petition the court for review of the order and the court's decision will be final.

While the procedures provided in the act are being carried out, the statute makes it unlawful for the labor organization to strike. Violations constitute a misdemeanor punishable by a fine and imprisonment.[73] Equitable relief may also be sought by any person adversely affected by a violation of the act.

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[70] Florida, Michigan, Minnesota, Pennsylvania and Wisconsin. However, the Minnesota statute has no provisions for enforced arbitration, only conciliation for a period, free from strikes.

[71] Wisconsin places this responsibility in the Wisconsin Employment Relations Board instead of the Governor. Wisc. Laws, 1947, C. 414, § 111.52.

[72] The Minnesota and Pennsylvania statutes also provide for the Governor to appoint the board. However, in Florida and Michigan the employer and labor organization are each permitted to appoint one voting member to the three man board of arbitration.

[73] Under the Indiana statute such misdemeanors are punishable by a fine of not less than $500 nor more than $2,500 and not more than six months imprisonment.

The Massachusetts, Missouri, New Jersey and Virginia statutes provide for state seizure where such disputes endanger the public health or safety. The Virginia act furnishes a good example of such a statute. When negotiations are discontinued between the employer and the union, the Governor may request both parties to submit to arbitration, but if the parties are unwilling and decide to strike, notice must be furnished the Governor. If the Governor determines that such a strike is a menace to the public the Governor may proclaim that when service is interrupted, he will take possession of the utility for the commonwealth. It is unlawful to interfere with the operation of the utility during the period of state control, and picketing is prohibited near or adjacent to any work. The status quo is maintained as to wage rates and conditions of employment. When the Governor is satisfied that normal operation may be resumed, the utility is returned to private control. Violators of this statute are subject to fines and imprisonment,[74] and engaging in an unlawful strike subjects the labor organization to a fine for each day that service is interrupted.[75]

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[74] Such fines are to be not less than $10 nor more than $1000 and imprisonment for not longer than twelve months. The labor union is liable to a penalty not to exceed $10,000 for each day the service of the utility is interrupted.

[75] The Kansas statute provides for the state labor commissioner to take over and operate public utilities in which suspension will affect the public welfare. In Nebraska a Court of Industrial Relations has been established which in the case of a dispute in a public utility may order bargaining to be commenced or resumed. This court is composed of three members appointed by the Governor, with the consent of the Legislature. After a complete hearing the court may issue all necessary orders such being given the same force and effect as district court orders, enforceable by contempt proceedings. Violations of such are also punishable by fine and confinement. Appeals from the Court of Industrial Relations lie in the state Supreme Court. It should be noted that the Nebraska Constitution, Art. XV, § 9, provides that laws may be passed providing for the investigation, submission and determination of labor disputes.

A North Dakota statute [N.D. Rev. Code (1943), § 38-0217], provides that in the event of a strike in any coal mine or public utility which threatens the lives and property of the populace the Governor may seize and operate the mine or utility. However, no other provisions are included in the statute as to procedure, enforcement or penalties.

SECTION 87. STATE LAWS AND THE NATIONAL LABOR RELATIONS ACT OF 1947

The National Labor Relations Act of 1947 infringes upon state laws regulating labor at two major points. The first is occasioned by Sec. 10(a), which provides:

> "That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute . . . is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

The second provision of the 1947 Act which affects state laws has been discussed previously at Section 22 of this volume. Reference is made to Sec. 14(b) stating "Nothing in this Act shall be construed as authorizing . . . agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution is prohibited by State or Territorial law." As will be recalled, the Labor Management Relations Act permits *limited* forms of union security; but, if a state wishes to outlaw *all* forms of compulsory unionism, it may do so without conflict with the Labor Management Relations Act of 1947. Repeal of this section by the 1949 Congress seems imminent.

The *Linde Air Products* decision in this section shows the court handling a question of conflicting jurisdiction between a state agency and the National Labor Relations Board. Sec. 10(a) clearly does not permit the N.L.R.B. to cede jurisdiction to the state agency, but the court does not directly base its decision on Sec. 10(a).

LINDE AIR PRODUCTS COMPANY v. JOHNSON

United States District Court, Third Division, 1948. 77 Fed. Supp. 656

NORDBYE and JOYCE, D. J. The above-entitled cause came before the Court upon the motion of plaintiff for a preliminary injunction enjoining defendant from assuming any jurisdiction with respect to, or of taking any action or procedure upon, the request of the labor organization known as United Electrical, Radio and Machine Workers of America, C.I.O., for investigation and certification of representatives for collective bargaining at the plant of the plaintiff.

The Linde Air Products Company, of Duluth, Minnesota, is engaged in the production and distribution of compressed industrial

gases. Its business extends throughout the United States. . . . That it is engaged in interstate commerce affirmatively appears from the petition herein. The United Electrical, Radio and Machine Workers of America, C.I.O., claim the right to represent the majority of the employees at plaintiff's Duluth plant. On November 22, 1947, the Union served upon the Labor Conciliator of Minnesota, Leonard W. Johnson, a request for the investigation and certification of representatives for collective bargaining under Section 16 of the Minnesota Labor Relations Act. A hearing was called by the Conciliator in response thereto for December 5, 1947, and then continued to December 8, 1947, and upon plaintiff's filing a special appearance and a motion for dismissal on the grounds that the request of the Union for certification is not within the jurisdiction of the Minnesota Labor Relations Act because the plaintiff is engaged in interstate commerce and that there is pending a representation proceeding covering the same employees before the National Labor Relations Board, the Labor Conciliator declined to grant the motion and declines to dismiss the petition. It was on or about December 5, 1947, that a petition was filed by plaintiff with the Regional Director of the National Labor Relations Board pursuant to Section 9 (c) (1) (B) of the Labor Management Relations Act, 1947. But that petition was dismissed because of the failure of the Union to comply with Sections 9 (f), (g) and (h) of that Act. Defendant intends to assume jurisdiction of the matter for certification of representatives, and plaintiff now requests an order of this Court for a temporary injunction enjoining the State Labor Conciliator from proceeding with the hearing originally set for December 8, 1947. . . .

In assigning the above reasons as grounds for refusing the issuance of a temporary injunction, defendant has failed to recognize the basic issue presented by plaintiff's petition. Plaintiff is not attacking the constitutionality of the Minnesota Act. Its position is that, as applied to the field of labor relations in interstate commerce, Congress has preempted that field. If the Labor Conciliator of Minnesota has no jurisdiction to proceed to determine the appropriate unit for collective bargaining of the employees at plaintiff's plant, it would follow that plaintiff would be required to pursue administrative remedies set up in a tribunal which has no authority under the law to act. . . .

The National Labor Relations Board has recognized the petition of the plaintiff, but because of the refusal of the officials of the Union to certify that they are not Communists and that they do not believe

in the principles of Communism, etc., has refused, in a notice to plaintiff dated December 11, 1947, to proceed to determine the appropriate bargaining unit for plaintiff's employees under the National Labor Relations Act by reason of the provisions of the Labor Management Relations Act, 1947. The question is not, however, whether the National Labor Relations Board has acted in determining the appropriate bargaining unit; "rather, whether Congress has asserted its power to regulate that relationship." *Pittsburgh Rys. Co. Substation Operators and Maintenance Employees' Case,* 54 A. (2d) 891, 896. By its legislation in the Labor Management Relations Act, 1947, Congress has usurped the field of labor relations where the employer and employees are engaged in interstate commerce. The determination, therefore, of the appropriate bargaining unit of plaintiff's employees is exclusively within the jurisdiction of the National Labor Relations Act. Any state power in that regard is therefore suspended and cannot be constitutionally exercised. There is no concurrent jurisdiction. This seems to be the clear teaching of the *Bethlehem Steel Company* case, 330 U.S. 767, the *Pittsburgh Railway Company* case, 54 A. (2d) 891. . . . Attention may be directed to the language of the court in the *Pittsburgh Railway Company* case, which succinctly sets forth the view of that court on the identical question presented herein (p. 896 of 54 A. [2d]):

"The criterion to determine validity of the exercise of state power is not whether the agency administering federal law has acted upon the relationship in a given case; rather, it is whether Congress has asserted its power to regulate that relationship. The Pennsylvania Labor Relations Board could not constitutionally entertain the petition for determination of the bargaining unit and certification of a bargaining agent. In so doing, it was acting upon subject matter regarding which Congress had asserted its power of regulation and jurisdiction over which had properly been delegated to the National Labor Relations Board. It is unnecessary to pass upon other issues presented in these appeals. . . ."

. . . To urge, therefore, that the plaintiff herein must submit itself to a non-jurisdictional board and pursue the remedies afforded therein before it can apply for equitable relief seems utterly unsound. The damage which will result if plaintiff is required to submit itself to a non-jurisdictional board seem apparent. It would be required to pursue a futile course which would involve time and expense and for which there is no adequate remedy at law. The established relationships of employer and employee are illegally

threatened. *A. F. of L.* v. *Watson,* 327 U.S. 582, 595. It is entirely probable that irreparable injury would result. To proceed before a State Labor Board which has no jurisdiction, particularly under the circumstances herein, might well frustrate the entire purpose of the National Labor Relations Act and infringe upon plaintiff's right under the Labor Management Relations Act, 1947. The temporary injunction prayed for should be, and is, granted. It is so ordered.

Case Questions

1. Is the Linde Co. engaged in interstate manufacture?
2. Explain the cause of the difficulty here.
3. Why did the N.L.R.B. refuse to certify the union?
4. What is the plaintiff's argument and why does the court agree?

SECTION 88. STATE INTERFERENCE WITH REPRESENTATION RIGHTS

In Chapters 5, 6, and 7 of this volume, covering strikes, pickets, and boycotts, we saw the Supreme Court delineating certain rules with respect to the constitutionally protected aspects of the above pressure tactics. We saw that, if the states went beyond the permissible lines of demarcation in limiting or proscribing certain constitutional rights on the part of labor organizations and their members, their legislative enactments or judicial holdings were subject to voidance and reversal by the Supreme Court.

One area of investigation has remained untouched. That is the degree to which a state may limit, directly or indirectly, the right of a labor organization to designate a representative for purposes of collective bargaining. Sections 9(f), (g) and (h) of the Labor Management Relations Act prescribe certain filing, financial statement, and noncommunist affidavit requirements as prerequisite to the exercise of bargaining rights by labor organizations. The question raised by the decision in *Hill* v. *Florida,* reprinted in this section, is whether a state may also prescribe certain prerequisites to the exercise of representation rights, especially if such prescription is in irreconcilable conflict with federal legislation on the same subject.

As a general rule, it should be remembered that if the Federal Government, under a valid exercise of its delegated powers, legis-

latively preempts a field, state legislation in conflict therewith must give way.

HILL v. STATE OF FLORIDA

Supreme Court of the United States, 1945. 325 U.S. 538, 65 Sup. Ct. 1373

BLACK, J. The only question we find it necessary to decide in this case is whether a Florida statute regulating labor union activities has been applied to these petitioners in a manner which brings it into irreconcilable conflict with the collective bargaining regulations of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C.A. 151 *et seq.* That Federal Act, we decided in *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board,* 315 U.S. 740, 62 Sup. Ct. 820, 826, 86 L. Ed. 1154, did not wholly foreclose state power to regulate labor union activities. Certain conduct, such as mass picketing, threats, violence, and related actions, we held were not governed by the Wagner Act, and hence, Wisconsin was free to regulate them. We carefully pointed out, however, that had the state order under consideration, "affected the status of the employees, or . . . caused a forfeiture of collective bargaining rights, a distinctly different question would arise." That question which we so distinctly reserved in the Wisconsin case has now arisen in this case.

The Attorney General of Florida filed a bill for injunction against the petitioner union and its business agent, Hill, in a state court. He sought to restrain both of them from functioning as such until they had complied with the Florida statute. The basis for the relief sought against Hill was that he had for a pecuniary reward acted as a business agent in violation of Section 4; the basis for the relief sought against the union was that it had operated without obtaining a state license as required by Section 6. Section 4, which was invoked against Hill, provides that no one shall be licensed as a "business agent" of a labor union who has not been a citizen of the United States for more than 10 years, who has been convicted of a felony, or who is not a person of good moral character. Application for a license as a "business agent" must be accompanied by a $1.00 fee and a statement signed by officers of the union setting forth the agent's authority. The statute then provides that the application be held for 30 days to permit the filing of objections to the issuance of a license. A Board composed of the Governor, the Secretary of State, and the Superintendent of Education then passes on the application, and if it finds the applicant measures up to the standards of the

act, as it sees them, it authorizes the license to be issued, to "expire on December 31 of the year for which issued unless sooner surrendered, suspended, or revoked." . . .

Motions by Hill and the union to dismiss the bill on the ground that the state statute violated the Fourteenth Amendment and conflicted with the Wagner Act were denied. Answers were then filed admitting violations of Sections 4 and 6. The court held the licensing and reporting provisions valid. Hill was enjoined from further acting as the union's business agent until he obtained a state license. The union was enjoined from further functioning and operating until it made the report and paid the fee to the Secretary of State. The State Supreme Court affirmed. 19 So. 2d 857.

It is apparent that the Florida statute has been so construed and applied that the union and its selected representative are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida. The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective bargaining, and to protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. To this end Congress made it illegal for an employer to interfere with, restrain or coerce employees in selecting their representatives Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. "Full freedom" to choose an agent means freedom to pass upon that agent's qualifications.

Section 4 of the Florida act circumscribes the "full freedom" of choice which Congress said employees should possess. It does this by requiring a "business agent" to prove to the satisfaction of a Florida Board that he measures up to standards set by the State of Florida as one who, among other things, performs the exact function of a collective bargaining representative. To the extent that Section 4 limits a union's choice of such an "agent" or bargaining representative, it substitutes Florida's judgment for the workers' judgment.

Thus, the "full freedom" of employees in collective bargaining which Congress envisioned as essential to protect the free flow of commerce among the states would be, by the Florida statute, shrunk to a greatly limited freedom. No elaboration seems required to demonstrate that Section 4 as applied here "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." . . . It is not amiss, however, to call attention to the fact

that operation of this very section has already interfered with the collective bargaining process. An employer before the Labor Board defended its refusal to bargain with a duly selected representative of workers on the ground that the representative had not secured a Florida license as a business agent. *In the Matter of Eppinger & Russell Co. et al.*, 56 N.L.R.B. 1259. The Board properly rejected the employer's contention, holding that Congress did not intend to subject the "full freedom" of employees to the eroding process of "varied and perhaps conflicting provisions of state enactments." Cf. *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111, 64 Sup. Ct. 851, 88 L. Ed. 1170.

Since the Labor Board has held that an employer must bargain with a properly selected union agent despite his failure to secure a Florida license, it is argued that the state law does not interfere with the collective bargaining process. But here, this agent has been enjoined, and if the Florida law is valid he could be found guilty of a contempt for doing that which the act of Congress permits him to do. Furthermore, he would, under Section 14 of the state law, be convicted of a misdemeanor and subjected to fine and imprisonment. The collective bargaining which Congress has authorized contemplates two parties free to bargain, and cannot thus be frustrated by state legislation. We hold that Section 4 of the Florida Act is repugnant to the National Labor Relations Act. . . . *Reversed.*

Case Questions

1. What conduct may be legislatively limited by a state?
2. State the mandates of Sec. 4 of the Florida statute.
3. What was the effect of Sec. 4 on the business agent and the union?
4. Indicate the nature of the conflict between the Florida law and the National Labor Relations Act.

CHAPTER 13

THE FAIR LABOR STANDARDS ACT

SECTION 89. EARLY ATTEMPTS TO REGULATE WORKING CONDITIONS

There were very few attempts at wage and hour regulation in America prior to the twentieth century. This was occasioned, as we have seen in Chapters 2 and 3, by three basic factors: first, the restrictive effects upon early labor associations of judicial doctrines such as conspiracy and contractual interference; second, the relatively weak and disorganized condition of American labor; third, the concept of a free and unfettered competitive market. These three basic factors served to nullify many of the early efforts aimed at the alleviation of working conditions, even as applied to female and child labor.

The first group to enjoy Federal favor as to improvement of working conditions were the workers in the Federal navy yards. President Martin Van Buren, by executive order in 1840, established a ten-hour working day in this area. In 1868, Congress enacted legislation reducing this to eight hours per day; by 1892, all Federal employees, and all workers employed under contracts to which the Federal government was a party, were accorded the benefits of an eight-hour day.

Having ameliorated the condition of its own employees, at least as to hours of labor, Congress turned its attention to public interstate carriers. The Hours of Service Law of 1907 and the Adamson Act of 1916 were enacted to regulate the hours of employment for interstate train service employees. Both laws found favorable judicial treatment by the Supreme Court as being a constitutional exercise of the federal power over interstate commerce. Heartened by success in the directions above indicated, Congress turned its attention to the then pressing problem of child labor exploitation in mine, mill, and factory.

In 1916, striking out again under its commerce power, Congress passed legislation that made unlawful the shipment or delivery for shipment in interstate commerce of goods produced with the aid of child labor. By definition, child labor included all persons under sixteen years of age in mine or quarry operations, and all under fourteen engaged by mills, canneries, shops, or factories. The law

permitted employment of persons in mills, canneries, shops, and factories between fourteen and sixteen years of age, subject to the proviso that night work was forbidden, as were hours of work in excess of eight per day.

In *Hammer* v. *Dagenhart,* the first case in this section, the Supreme Court held, five to four, this legislation to be an unlawful Federal exercise of the commerce power granted by the Constitution. Following the reprint of the *Hammer* case is found *Bailey* v. *Drexel Furniture Company.* Having failed to control child labor under its power to regulate interstate commerce, Congress enacted similar legislation under its taxing power. Chief Justice Taft phrases the issue in the *Bailey* decision as follows: 'Does this [Child Labor Tax] law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate [interstate commerce] by the use of the so called tax as a penalty?"

HAMMER v. DAGENHART

Supreme Court of the United States, 1918. 247 U.S. 251, 38 Sup. Ct. 529

DAY, J. A bill was filed in the United States District Court for the Western District of North Carolina by a father in his own behalf and as next friend of his two minor sons, one under the age of fourteen years and the other between the ages of fourteen and sixteen years, employees in a cotton mill at Charlotte, North Carolina, to enjoin the enforcement of the act of Congress intended to prevent interstate commerce in the products of child labor. Act of Sept. 1, 1916, c. 432, 39 Stat. 675.

The District Court held the act unconstitutional and entered a decree enjoining its enforcement. This appeal brings the case here. . . .

The attack upon the act rests upon three propositions: First: It is not a regulation of interstate and foreign commerce; Second: It contravenes the Tenth Amendment to the Constitution; Third: It conflicts with the Fifth Amendment to the Constitution. . . .

The power essential to the passage of this act, the Government contends, is found in the commerce clause of the Constitution which authorizes Congress to regulate commerce with foreign nations and among the States.

In *Gibbons* v. *Ogden,* 9 Wheat. 1, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power, said, "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed." In other words, the power is one to control the means by which commerce is carried on,

which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate.

The first of these cases is *Champion* v. *Ames*, 188 U.S. 321, the so-called *Lottery Case*, in which it was held that Congress might pass a law having the effect to keep the channels of commerce free from use in the transportation of tickets used in the promotion of lottery schemes. In *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, this court sustained the power of Congress to pass the Pure Food and Drug Act which prohibited the introduction into the States by means of interstate commerce of impure foods and drugs. In *Hoke* v. *United States*, 227 U.S. 308, this court sustained the constitutionality of the so-called "White Slave Traffic Act" whereby the transportation of a woman in interstate commerce for the purpose of prostitution was forbidden. In that case we said, having reference to the authority of Congress, under the regulatory power, to protect the channels of interstate commerce:

"If the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls."

In *Caminetti* v. *United States*, 242 U.S. 470, we held that Congress might prohibit the transportation of women in interstate commerce for the purposes of debauchery and kindred purposes. In *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U.S. 311, the power of Congress over the transportation of intoxicating liquors was sustained. . . .

In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power. . . .

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation.

"When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state." (Mr. Justice Jackson in *In re Green*, 52 Fed. Rep. 113.) This principle has been recognized often in this court. *Coe* v. *Errol*, 116 U.S. 517; *Bacon* v. *Illinois*, 227 U.S. 504, and cases cited. If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States. *Kidd* v. *Pearson*, 128 U.S. 1, 21.

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other States where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the State of production. In other words, that the unfair competition, thus engendered, may be controlled by closing the channels of interstate commerce to manufacturers in those States where the local laws do not meet what Congress deems to be the more just standard of other States.

There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions. In some of the States laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such States may be at an economic disadvantage when compared with States which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other States and approved by Congress.

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution. . . .

We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in inter-

state commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.

For these reasons we hold that this law exceeds the constitutional authority of Congress. It follows that the decree of the District Court must be affirmed.

Case Questions

1. Under what power did Congress enact the 1916 Child Labor Law?
2. State the instances in which the Supreme Court upheld the legislative exercise of the commerce power.
3. At the time of this case, was production for interstate commerce regulable under the commerce power? Why?
4. How did the court dispose of the unfair competition argument?

BAILEY v. DREXEL FURNITURE COMPANY

Supreme Court of the United States, 1922. 259 U.S. 20, 42 Sup. Ct. 449

TAFT, C. J. This case presents the question of the constitutional validity of the Child Labor Tax Law. The plaintiff below, the Drexel Furniture Company, is engaged in the manufacture of furniture in the Western District of North Carolina. On September 20, 1921, it received a notice from Bailey, United States Collector of Internal Revenue for the District, that it had been assessed $6,312.79 for having during the taxable year 1919 employed and permitted to work in its factory a boy under fourteen years of age, thus incurring the tax of ten per cent, on its net profits for that year. The company paid the tax under protest, and after rejection of its claim for a refund, brought this suit. On demurrer to an amended complaint, judgment was entered for the Company against the Collector for the full amount with interest. The writ of error is prosecuted by the Collector. . . .

The law is attacked on the ground that it is a regulation of the employment of child labor in the States—an exclusively state function under the Federal Constitution and within the reservations of the Tenth Amendment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation conferred by Sec. 8, Article 1, of the Federal Constitution. We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax

with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value, we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than sixteen years; in mills and factories, children of an age greater than fourteen years, and shall prevent children of less than sixteen years in mills and factories from working more than eight hours a day or six days in the week. If an employer departs from this prescribed course of business, he is to pay to the Government one-tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. *Scienter* is associated with penalties not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it? . . .

Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the

great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detail measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.

The difference between a tax and penalty in sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard.

The case before us cannot be distinguished from that of *Hammer* v. *Dagenhart*, 247 U.S. 251. Congress there enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children within the same ages and for the same number of hours a day and days in a week as are penalized by the act in this case. This court held the law in that case to be void. . . .

In the case at the bar, Congress in the name of a tax which on the face of the act is a penalty seeks to do the same thing, and the effort must be equally futile.

The analogy of the *Dagenhart* case is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax, and the legislative motive in its exercise is just as free from judicial sus-

picion and injury. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a State in order to coerce them into compliance with Congress's regulation of state concerns, the court said this was not in fact regulation of interstate commerce, but rather that of State concerns and was invalid. So here the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution. . . .

For the reasons given, we must hold the Child Labor Tax Law invalid and the judgment of the District Court is affirmed.

Case Questions

1. Under what power did Congress enact the Child Labor Tax Law?
2. On what grounds was payment resisted?
3. What is the difference between a tax and a penalty?
4. Does the court bring this situation within *Hammer* v. *Dagenhart*? Explain.

SECTION 89. EARLY ATTEMPTS TO REGULATE WORKING CONDITIONS (Continued)

Following the adverse pronouncements in the *Hammer* and *Bailey* decisions, Congress recognized the then current futility of dealing with the problems of child labor through the ordinary legislative process. It turned, therefore, to its last recourse, namely, amendment of the Constitution to permit the regulation of child labor under 18 years of age. At this writing, some 28 states have ratified the Congressional resolution of 1924, but this number is insufficient to support the proposed Amendment.

During this time, the states were not supine in the matter of regulating working conditions, particularly as to females and minors, and males where hazardous occupations were involved. While the Federal government found itself unable to encroach upon *intrastate* matters under its commerce and taxing power, the states began to exercise their residual *police power*. The police power was defined in Chapter 1. By 1923, some fourteen states had enacted legislation that covered the regulation of working conditions as to minors,

women, and men, either with respect to hours, minimum wages, or hazardous occupations.

The constitutionality of these state exercises of police power did not long remain unchallenged. The proponents of regulatory legislation were heartened by the following favorable Supreme Court decisions: in *Holden* v. *Hardy*, 169 U.S. 366, decided in 1898, the court sustained a Utah statute restricting hours of labor in mines and smelters; in *Muller* v. *Oregon*, 208 U.S. 412, decided in 1908, the court upheld an Oregon statute which forbade the employment of females in certain industries over ten hours during any one day; in 1915 in *Bunting* v. *Oregon*, 243 U.S. 246, it sustained an Oregon statute limiting hours of employment as to adult males; two years later, the validity of a workmen's compensation law was upheld in *Mountain Timber Co.* v. *Washington*, 243 U.S. 219, as was a state minimum wage law covering minors and women, *Stettler* v. *O'Hara*, 243 U.S. 629.

By 1923, however, the Supreme Court began to question the soundness of some of these earlier decisions, and in the *Adkins* decision, reprinted in this section, it reversed the trend of its former liberality of interpretation. This decision involves the District of Columbia Minimum Wage Law of 1918, which fixed minimum wages for women and children in the District. The Act was attacked as abridging the freedom of contract guaranteed against Federal impairment by the due process clause of the Fifth Amendment. Since the Fourteenth Amendment protects the right of contract from state impairment, the decision was applicable to state laws on minimum wages as well as the Federal laws.

ADKINS v. CHILDREN'S HOSPITAL OF THE DISTRICT OF COLUMBIA

Supreme Court of the United States, 1923. 261 U.S. 525, 43 Sup. Ct. 394

SUTHERLAND, J. The question presented for determination by these appeals is the constitutionality of the Act of September 19, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia. 40 Stat. 960, c. 174.

The act provides for a board of three members, to be constituted, as far as practicable, so as to be equally representative of employers, employees and the public. The board is authorized to have public hearings, at which persons interested in the matter being investigated may appear and testify, to administer oaths, issue subpoenas

requiring the attendance of witnesses and production of books, etc., and to make rules and regulations for carrying the act into effect. . . .

The appellee in the first case is a corporation maintaining a hospital for children in the District. It employs a large number of women in various capacities, with whom it had agreed upon rates of wages and compensation satisfactory to such employees, but which in some instances were less than the minimum wage fixed by an order of the board made in pursuance of the act. The women with whom appellee had so contracted were all of full age and under no legal disability. The instant suit was brought by the appellee in the Supreme Court of the District to restrain the board from enforcing or attempting to enforce its order on the ground that the same was in contravention of the Constitution, and particularly the due process clause of the Fifth Amendment.

In the second case the appellee, a woman twenty-one years of age, was employed by the Congress Hall Hotel Company as an elevator operator, at a salary of $35 per month and two meals a day. She alleges that the work was light and healthful, the hours short, with surroundings clean and moral, and that she was anxious to continue it for the compensation she was receiving and that she did not earn more. Her services were satisfactory to the Hotel Company and it would have been glad to retain her but was obliged to dispense with her services by reason of the order of the board and on account of the penalties prescribed by the act. . . .

The statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment. That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this Court and is no longer open to question. . . .

Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining. . . .

There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be an-

swered. It will be helpful to this end to review some of the decisions where the interference has been upheld and consider the grounds upon which they rest.

(1) *Those dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest.* There are many cases, but it is sufficient to cite *Munn* v. *Illinois*, 94 U.S. 113. The power here rests upon the ground that where property is devoted to a public use the owner thereby, in effect, grants to the public an interest in the use which may be controlled by the public for the common good to the extent of the interest thus created. . . .

(2) *Statutes relating to contracts for the performance of public work. Atkin* v. *Kansas*, 191 U.S. 207; *Heim* v. *McCall*, 239 U.S. 175; *Ellis* v. *United States*, 206 U.S. 246. These cases sustain such statutes as depend, not upon the right to condition private contracts, but upon the right of the government to prescribe the conditions upon which it will permit work of a public character to be done for it, or, in the case of a State, for its municipalities. We may, therefore, in like manner, dismiss these decisions from consideration as inapplicable.

(3) *Statutes prescribing the character, methods and time for payment of wages.* Under this head may be included *McLean* v. *Arkansas*, 211 U.S. 539, sustaining a state statute requiring coal to be measured for payment of miners' wages before screening; *Knoxville Iron Co.* v. *Harbison*, 183 U.S. 13, sustaining a Tennessee statute requiring the redemption in cash of store orders issued in payment of wages; *Erie R. R. Co.* v. *Williams*, 233 U.S. 685, upholding a statute regulating the time within which wages shall be paid to employees in certain specified industries; and other cases sustaining statutes of like import and effect. In none of the statutes thus sustained was the liberty of employer or employee to fix the amount of wages the one was willing to pay and the other willing to receive interfered with. Their tendency and purpose was to prevent unfair and perhaps fraudulent methods in the payment of wages and in no sense can they be said to be, or to furnish a precedent for, wage-fixing statutes.

(4) *Statutes fixing hours of labor.* It is upon this class that the greatest emphasis is laid in argument and therefore, and because such cases approach most nearly the line of principle applicable to the statute here involved, we shall consider them more at length. In some instances the statute limited the hours of labor for men in certain occupations and in others it was confined in its application to

women. No statute has thus far been brought to the attention of this Court which, by its terms, applied to all occupations. In *Holden* v. *Hardy*, 169 U.S. 366, the Court considered an act of the Utah legislature, restricting the hours of labor in mines and smelters. This statute was sustained as a legitimate exercise of the police power, on the ground that the legislature had determined that these particular employments, when too long pursued, were injurious to the health of the employees, and that, as there were reasonable grounds for supporting this determination on the part of the legislature, its decision in that respect was beyond the reviewing power of the federal courts.

That this constituted the basis of the decision is emphasized by the subsequent decision in *Lochner* v. *New York*, 198 U.S. 45, reviewing a state statute which restricted the employment of all persons in bakeries to ten hours in any one day. . . .

In the *Muller* case [1] the validity of an Oregon statute forbidding the employment of any female in certain industries more than ten hours during any one day was upheld. The decision proceeded upon the theory that the difference between the sexes may justify a different rule respecting hours of labor in the case of women than in the case of men. It is pointed out that these consist in differences of physical structure, especially in respect of the maternal functions, and also in the fact that historically woman has always been dependent upon man, who has established his control by superior physical strength. The cases of Riley, Miller and Bosley follow in this respect the *Muller* case. But the ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller* case (p. 421) has continued "with diminishing intensity." In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. . . .

The essential characteristics of the statute now under consideration, which differentiate it from the laws fixing hours of labor, will be made to appear as we proceed. It is sufficient now to point out that the latter as well as the statutes mentioned under paragraph (3) deal with incidents of the employment having no necessary effect upon the heart of the contract, that is, the amount of wages to be paid and received. A law forbidding work to continue beyond a

[1] 208 U.S. 412, 1908.

given number of hours leaves the parties free to contract about wages and thereby equalize whatever additional burdens may be imposed upon the employer as a result of the restrictions as to hours, by an adjustment in respect of the amount of wages. *Enough has been said to show that the authority to fix hours of labor cannot be exercised except in respect of those occupations where work of long continued duration is detrimental to health.* [Author's italics.] This Court has been careful in every case where the question has been raised, to place its decision upon this limited authority of the legislature to regulate hours of labor and to disclaim any purpose to uphold the legislation as fixing wages, thus recognizing an essential difference between the two. It seems plain that these decisions afford no real support for any form of law establishing minimum wages.

If now, in the light furnished by the foregoing exceptions to the general rule forbidding legislative interference with freedom of contract, we examine and analyze the statute in question, we shall see that it differs from them in every material respect. It is not a law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequences may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee. The price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment; and, while it has no other basis to support its validity than the assumed necessities of the employee, it takes no account of any independent resources she may have. It is based wholly on the opinions of the members of the board and their advisers—perhaps an average of their opinions, if they do not

precisely agree—as to what will be necessary to provide a living for a woman, keep her in health and preserve her morals. It applies to any and every occupation in the District, without regard to its nature or the character of the work.

The standard furnished by the statute for the guidance of the board is so vague as to be impossible of practical application with any reasonable degree of accuracy. . . .

It has been said that legislation of the kind now under review is required in the interest of social justice, for whose ends freedom of contract may lawfully be subjected to restraint. The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good, and the line beyond which the power of interference may not be pressed is neither definite nor unalterable but may be made to move, within limits not well defined, with changing need and circumstance. Any attempt to fix a rigid boundary would be unwise as well as futile. But, nevertheless, there are limits to the power, and when these have been passed, it becomes the plain duty of the courts in the proper exercise of their authority to so declare. To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.

It follows from what has been said that the act in question passes the limit prescribed by the Constitution, and, accordingly, the decrees of the court below are *affirmed.*

Case Questions

1. State the purpose of the District of Columbia Act.
2. How was the edict of the Act to be accomplished?
3. What objection was made to the Act?
4. Outline the statutes that are related to this one and that were constitutionally upheld.
5. Why was the statute here held an unwarranted infringement upon freedom of contract?

SECTION 90. CONSTITUTIONALITY OF STATE WAGE AND HOUR LEGISLATION

Following through on the dictates laid down in its *Adkins* decision, the Supreme Court directed a further series of hammer blows at wage and hour enactments. The immediate effect of the *Adkins* holding was the repeal, clouding, or invalidation of most previously enacted state legislation directed toward the amelioration of working conditions, whether of men, women, or children. The Arizona law was upset by the Supreme Court in 1925 in *Murphy* v. *Sardell*, 269 U.S. 530, and the Arkansas law met a similar fate two years later in *Donham* v. *West-Nelson Mfg. Co.*, 273 U.S. 657.

As the result, however, of the terrific economic pressure generated by the great industrial crisis of the thirties, many states found it desirable to re-enact wage and hour legislation to turn the tide. In designing this new legislation, the states sought meticulously to avoid the pitfalls laid down by the *Adkins* ruling. By 1936, New York's fair wage statute was being subjected to the scrutiny of a reconstituted Supreme Court. The hopes of labor's proponents were suddenly extinguished when the Supreme Court, in the *Morehead*[1] decision, upheld the overthrowal of the New York law by the Supreme Court of New York. These hopes were as suddenly and unexpectedly revived, however, by the far-reaching and favorable decision rendered by the same Supreme Court a year later in the *West Coast Hotel* case, which is reprinted in this section. Not only did the court uphold Washington state's protective statute that embraced women and minors, but it went even further: it expressly overruled the *Adkins* pronouncement.

WEST COAST HOTEL CO. v. PARRISH

Supreme Court of the United States, 1937. 300 U.S. 379, 57 Sup. Ct. 578

HUGHES, C. J. This case presents the question of the constitutional validity of the minimum wage law of the State of Washington.

The Act, entitled "Minimum Wages for Women," authorizes the fixing of minimum wages for women and minors. Laws of 1913 (Washington), chap. 174; Remington's Rev. Stat. (1932), Secs. 7623 *et seq.* It provides:

"SEC. 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power

[1] *Morehead, Warden* v. *New York*, 298 U.S. 587, 1936.

declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

"SEC. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to employ women workers in any industry within the State of Washington at wages which are not adequate for their maintenance." . . .

The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service. . . .

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was $14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of the State, reversing the trial court, sustained the statute and directed judgment for the plaintiffs. *Parrish* v. *West Coast Hotel Co.*, 185 Wash. 581; 55 P. (2d) 1083. The case is here on appeal.

The appellant relies upon the decision of this Court in *Adkins* v. *Children's Hospital*, 261 U.S. 525, which held invalid the District of Columbia Minimum Wage Act, which was attacked under the due process clause of the Fifth Amendment. . . .

. . . The Supreme Court of Washington has upheld the minimum wage statute of that State. It has decided that the statute is a reasonable exercise of the police power of the State. In reaching that conclusion the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the *Adkins* case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of the state court demands on our part a reexamination of the *Adkins* case. The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the *Adkins* case was reached, and the economic con-

ditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration.

The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause invoked in the *Adkins* case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. . . .

This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (*Holden* v. *Hardy*, 169 U.S. 366); in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (*Knoxville Iron Co.* v. *Harbison*, 183 U.S. 13); in forbidding the payment of seamen's wages in advance (*Patterson* v. *Bark Eudora*, 190 U.S. 169); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (*McLean* v. *Arkansas*, 211 U.S. 539); in prohibiting contracts limiting liability for injuries to employees (*Chicago, B. & Q. R. Co.* v. *McGuire*, *supra*); in limiting hours of work of employees in manufacturing establishments (*Bunting* v. *Oregon*, 243 U.S. 426); and in maintaining workmen's compensation laws (*New York Central R. C.* v. *White*, 243 U.S. 188; *Mountain Timber Co.* v. *Washington*, 243 U.S. 219). In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. *Chicago, B. & Q. R. Co.* v. *McGuire, supra, p. 570.*

The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was deci-

sively met nearly forty years ago in *Holden* v. *Hardy, supra,* where we pointed out the inequality in the footing of the parties. We said (Id., 397):

"The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority."

And we added that the fact "that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself." . . .

It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the State has a special interest. That phase of the subject received elaborate consideration in *Muller* v. *Oregon* (1908), 208 U.S. 412, where the constitutional authority of the State to limit the working hours of women was sustained. We emphasized the consideration that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence" and that her physical well being "becomes an object of public interest and care in order to preserve the strength and vigor of the race." We emphasized the need of protecting women against oppression despite her possession of contractual rights. . . .

We think that the views thus expressed are sound and that the decision in the *Adkins* case was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed. Those principles have been reenforced by our subsequent decisions. . . .

With full recognition of the earnestness and vigor which characterize the prevailing opinion in the *Adkins* case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women

and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? . . .

Our conclusion is that the case of *Adkins* v. *Children's Hospital, supra,* should be, and it is, overruled. The judgment of the Supreme Court of the State of Washington is *affirmed.*

Case Questions

1. Who won this case in the Supreme Court of Washington?
2. On what grounds is the decision of the Supreme Court of Washington now attacked?
3. Does the Constitution expressly speak of freedom of contract?
4. May this freedom be abridged?
5. What does the court say on the subject of equality of bargaining power?
6. What does the Court do with the *Adkins* decision?

SECTION 91. CONSTITUTIONALITY OF FEDERAL WAGE AND HOUR LEGISLATION

Elated by the Supreme Court's action in the *West Coast Hotel* decision, the President of the United States declared in his annual message to Congress delivered January 3, 1938, ". . . the people of this country, by an overwhelming vote, are in favor of having Congress—this Congress—put a floor below which individual wages shall not fall, and a ceiling beyond which the hours of individual labor shall not rise. . . .

"Wage and hour legislation, therefore, is a problem which is definitely before this Congress for action. It is an essential part of economic recovery. It has support of an overwhelming majority of our people in every walk of life. . . ."

The Congress reacted to this plea by speedily enacting the Fair Labor Standards Act[1] declaring that, "The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce," and holding that "It is hereby declared to be the policy of this Act, through the exercise by Congress of its *power to regulate commerce among the several States*, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power." [Author's italics.]

The Fair Labor Standards Act became effective October 24, 1938. It has three broad objectives: (a) the establishment of minimum wages—a "floor" under wages reflecting 1938 concepts of a "rudimentary minimum standard of living"; (b) the establishment of a ceiling upon hours of labor—the ultimate purpose of which was to increase the scope of employment by increasing the cost of overtime work, that is, work in excess of forty hours per week; and (c) the discouragement of the employment of "oppressive child labor."

[1] Public Law 718, 75th Cong., 52 Stat. 1060.

The constitutionality of the Act was upheld by the Supreme Court in *U. S.* v. *Darby Lumber Co.* in 1941. The decision represents a resounding victory for labor's adherents. It is included in this section not only because it disposes of the constitutional objections raised by the Darby Company, but because it summarizes the principal provisions of the Act.

In addition to the *Darby* holding, other attempts to overturn the Act as a violation of freedom of the press, *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186 (1946); as an authorization of unreasonable searches and seizures, *Oklahoma Press* once again; and as providing arbitrary and discriminatory bases for exemption, *Mabee* v. *White Plains Publishing Co., Inc.,* 327 U.S. 178 (1946), all failed. The administrative aspects of the Act, connected with the manner of prescribing minimum wages in industry, were held not to violate the Fifth and Tenth Amendments in *OPP Cotton Mills* v. *Administrator,* 312 U.S. 126 (1941).

UNITED STATES v. DARBY LUMBER CO.

Supreme Court of the United States, 1941. 312 U.S. 100, 61 Sup. Ct. 451

STONE, J. The two principal questions raised by the record in this case are, first, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, second, whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. A subsidiary question is whether in connection with such prohibitions Congress can require the employer subject to them to keep records showing the hours worked each day and week by each of his employees including those engaged "in the production and manufacture of goods, to-wit, lumber, for 'interstate commerce.' "

The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaration of policy in Sec. 2 (a) of the Act, and the reports of Congressional committees proposing the legislation . . . is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under

conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. . . .

. . . Section 15 (1) makes unlawful the shipment in interstate commerce of any goods "in the production of which any employee was employed in violation of section 6 or section 7," which provide, among other things, that during the first year of operation of the Act a minimum wage of 25 cents per hour shall be paid to employees "engaged in (interstate) commerce or the production of goods for (interstate) commerce," Sec. 6, and that the maximum hours of employment for employees "engaged in commerce or the production of goods for commerce" without increased compensation for overtime, shall be forty-four hours a week. Sec. 7.

Section 15 (a) (2) makes it unlawful to violate the provisions of Secs. 6 and 7 including the minimum wage and maximum hour requirements just mentioned for employees engaged in production of goods for commerce. Section 15 (a) (5) makes it unlawful for an employer subject to the Act to violate Sec. 11 (c) which requires him to keep such records of the persons employed by him and of their wages and hours of employment as the administrator shall prescribe by regulation or order.

The indictment charges that appellee is engaged, in the State of Georgia, in the business of acquiring raw materials, which he manufactures into finished lumber with the intent, when manufactured, to ship it in interstate commerce to customers outside the state, and that he does in fact so ship a large part of the lumber so produced. There are numerous counts charging appellee with the shipment in interstate commerce from Georgia to points outside the state of lumber in the production of which, for interstate commerce, appellee has employed workmen at less than the prescribed minimum wage or more than the prescribed maximum hours without payment to them of any wage for overtime. Other counts charge the employment by appellee of workmen in the production of lumber for interstate commerce at wages at less than 25 cents an hour or for more than the maximum hours per week without payment to them of the prescribed overtime wage. Still another count charges appellee with failure to keep records showing the hours worked each day a week by each of his employees as required by Sec. 11 (c) and the regulation of the

administrator . . . and also that appellee unlawfully failed to keep such records of employees engaged "in the production and manufacture of goods, to-wit lumber, for interstate commerce."

. . . The district court quashed the indictment in its entirety upon the broad grounds that the Act, which it interpreted as a regulation of manufacture within the states, is unconstitutional. It declared that manufacture is not interstate commerce and that the regulation by the Fair Labor Standards Act of wages and hours of employment of those engaged in the manufacture of goods which it is intended at the time of production "may or will be" after production "sold in interstate commerce in part or in whole" is not within the congressional power to regulate interstate commerce. . . .

While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is governed." *Gibbons* v. *Ogden,* 9 Wheat. 1, 196. It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. . . . It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles, . . . stolen articles, . . . kidnapped persons, . . . and articles such as intoxicating liquor or convict made goods, traffic in which is forbidden or restricted by the laws of the state of destination. . . .

But is is said that the present prohibition falls within the scope of none of these categories; that while the prohibition is nominally a regulation of the commerce, its motive or purpose is regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states. . . .

The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. . . .

. . . Section 15 (a) (2) and Secs. 6 and 7 require employers to conform to the wage and hour provisions with respect to all employees engaged in the production of goods for interstate commerce,

As appellee's employees are not alleged to be "engaged in interstate commerce," the validity of the prohibition turns on the question whether the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it.

. . . The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 421. . . .

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. . . .

We think also that Sec. 15 (a) (2), now under consideration, is sustainable independently of Sec. 15 (a) (1), which prohibits shipment or transportation of the proscribed goods. As we have said, the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed to the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as "unfair," as the Clayton Act has condemned other "unfair methods of competition" made effective through interstate commerce. . . .

. . . Congress, to attain its objective in the suppression of nation-wide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume

or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. . . .

. . . Sec. 15 (a) (5) and Sec. 11 (c). These requirements are incidental to those for the prescribed wages and hours, and hence validity of the former turns on validity of the latter. Since, as we have held, Congress may require production for interstate commerce to conform to those conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. The requirement for records even of the intrastate transaction is an appropriate means to the legitimate end. . . .

. . . Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime of "not less than one and one-half times the regular rate" at which the worker is employed. Since our decision in *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours. . . .

The Act is sufficiently definite to meet constitutional demands. One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines, is warned that he may be subject to the criminal penalties of the Act. No more is required. *Nash* v. *United States,* 229 U.S. 373, 377.

We have considered, but find it unnecessary to discuss other contentions.

Reversed.

Case Questions

1. What enactment is subjected to scrutiny in this case? What questions are presented?
2. State the provisions of the Act brought out by the court.
3. Indicate the defense used by the company.
4. Does the court hold the Fair Labor Standards Act to be within the commerce power? Why?
5. Does the court uphold the record-keeping requirement of the Act?
6. Discuss the unfair labor competition argument in this decision.

SECTION 92. COVERAGE OF THE ACT

Employees in general are entitled to the benefit of the enactment if they are "engaged in commerce, or in the production of goods for commerce." Coverage under the Act is determined worker-by-worker on an individual employee basis. Completely exempt from coverage of the Act under Sec. 13 (a) are the following classes of employers and employees:

(1) The United States, the states, and their political subdivisions.

(2) Labor organizations, except when acting as employers.

(3) "Any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator)."

(4) "Any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

(5) "Any employee employed as a seaman."

(6) "Any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act."

(7) "Any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employm nt in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof."

(8) "Any employee employed in agriculture."

(9) "Any employee to the extent that such employee is exempted by regulations or orders of the Administrator" [regarding "(1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued . . . (by the) Administrator . . . and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator . . ."].

(10) "Any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published."

(11) "Any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in" [the Act].

(12) "To any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, stor-

ing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products."

(13) "Any switchboard operator employed in a public telephone exchange which has less than five hundred stations."

According to Sec. 13 (b), the maximum hour provisions of the enactment do not apply "with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act." [52 Stat. 1067, 29 U.S. Code, Sec. 213 (b).]

According to Sec. 13 (c), "The provisions of Section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions."

Difficult questions of coverage arise, however, with respect to employees not specifically exempted, in determining whether such employees are actually engaged *in interstate commerce* as the Act requires them to be. The National Labor Relations Act of 1947 is more embracive, since the jurisdictional requirement is satisfied if the activities of the employer *affect interstate commerce.* The effect of this distinction is the subject of the *Kirschbaum, McLeod,* and *Higgins* decisions, which are reprinted in that order in this section.

A. B. KIRSCHBAUM CO. v. WALLING

Supreme Court of the United States, 1942. 316 U.S. 517, 62 Sup. Ct. 1116

FRANKFURTER, J. . . . The employees here are engaged in the operation and maintenance of a loft building in which large quantities of goods for interstate commerce are produced. Does the Fair Labor Standards Act extend to such employees?

The facts in the two cases differ only in minor detail. In No. 910, the petitioner owns and operates a six-story loft building in Philadelphia. The tenants are, for the most part, manufacturers of men's and boys' clothing. In No. 924, the petitioners own and operate a twenty-two story building located in the heart of the New York City clothing manufacturing district. Practically all of the tenants manufacture or buy and sell ladies' garments. Concededly, in both cases

the tenants of the buildings are principally engaged in the production of goods for interstate commerce. In No. 910, the petitioner employs an engineer, three firemen, three elevator operators, two watchmen, a porter, a carpenter, and a carpenter's helper. In No. 924, the controversy involves two firemen, an electrician, fourteen elevator operators, two watchmen, and six porters. These employees perform the customary duties of persons charged with the effective maintenance of a loft building. The engineer and the firemen produce heat, hot water, and steam necessary to the manufacturing operations. They keep elevators, radiators, and fire sprinkler systems in repair. The electrician maintains the system which furnishes the tenants with light and power. The elevator operators run both the freight elevators which start and finish the interstate journeys of goods going from and coming to the tenants, and the passenger elevators which carry employees, customers, salesmen, and visitors. The watchmen protect the buildings from fire and theft. The carpenters repair the halls and stairways and other parts of the buildings commonly used by the tenants. The porters keep the buildings clean and habitable. . . .

To search for a dependable touchstone by which to determine whether employees are "engaged in commerce or in the production of goods for commerce" is as rewarding as an attempt to square the circle. The judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula. Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn, under a federal enactment, between what it has taken over for administration by the central Government and what it has left to the States. To a considerable extent the task is one of accommodation as between assertions of new federal authority and historic functions of the individual States. The expansion of our industrial economy has inevitably been reflected in the extension of federal authority over economic enterprise and its absorption of authority previously possessed by the States. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government. . . .

We start with the weighty opinions of the two Circuit Courts of Appeals that the employees here are within the Act because they were engaged in occupations "necessary to the production" of goods for commerce by the tenants. Without light and heat and power the tenants could not engage, as they do, in the production of goods for

interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity. The normal and spontaneous meaning of the language by which Congress defined in Sec. 3(j) the class of persons within the benefits of the Act, to wit, employees engaged "in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof," encompasses these employees, in view of their relation to the conceded production of goods for commerce by the tenants. The petitioners assert, however, that the building industry of which they are part is purely local in nature and that the Act does not apply where the employer is not himself engaged in an industry partaking of interstate commerce. But the provisions of the Act expressly make its application dependent upon the character of the employees' activities. And, in any event, to the extent that his employees are "engaged in commerce or in the production of goods for commerce," the employer is himself so engaged. Nor can we find in the Act, as do the petitioners, any requirement that employees must themselves participate in the physical process of the making of the goods before they can be regarded as engaged in their production. Such a construction erases the final clause of sec. 3(j) which includes employees engaged "in any process or occupation necessary to the production" and thereby does not limit the scope of the statute to the preceding clause which deals with employees "in any other manner working on such goods." . . .

We agree, however, with the conclusion of the courts below. In our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation "necessary to the production of goods for commerce." . . .

In both cases the judgment is affirmed.

Case Questions

1. What question was presented to the court?
2. State the activities in which the employees were engaged.
3. Discuss this statement: "The provisions of the Act expressly make its application dependent upon the character of the employees' activities."

McLEOD v. THRELKELD

Supreme Court of the United States, 1943. 319 U.S. 491, 63 Sup. Ct. 1248

REED, J. This certiorari brings here for examination a judgment of the Circuit Court of Appeals for the Fifth Circuit, 131 F. 2d 880, which held that a cook, employed by respondents to prepare and serve meals to maintenance-of-way employees of the Texas & New Orleans Railroad Company, is not engaged in commerce under Sections 6 and 7 of the Fair Labor Standards Act and therefore not entitled to recover for an alleged violation of that act.

The respondents are a partnership with a contract to furnish meals to maintenance-of-way employees of the railroad, an interstate carrier. The meals are served in a cook and dining car attached to a particular gang of workmen and running on the railroad's tracks. The car is set conveniently to the place of work of the boarders and in emergencies follows the gang to the scene of its activities. Employees pay the contractor for their meals by orders authorizing the railroad company to deduct the amount of their board from wages due and pay it over to the contractor. The petitioner worked as cook at various points in Texas along the line of the road during the period in question.

As the extent of the coverage by reason of the phrase "engaged in commerce" is important in the administration of the Fair Labor Standards Act, we granted certiorari.

In drafting legislation under the power granted by the Constitution to regulate interstate commerce and to make all laws necessary and proper to carry those regulations into effect, Congress is faced continually with the difficulty of defining accurately the precise scope of the proposed bill. In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority. The proposal to have the bill apply to employees "engaged in commerce in any industry affecting commerce" was rejected in favor of the language, now in the act, "each of his employees who is engaged in commerce or in the production of goods for commerce." Sections 6 and 7. See the discussion and reference to legislative history in *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, and *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564. The selection of the smaller group was deliberate and purposeful.

McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a railroad lie completely outside that clause. Our question is whether he was "engaged in commerce." We have held that this clause cov-

ered every employee in the "channels of interstate commerce," *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, as distinguished from those who merely affected that commerce. So handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce, while those employees who handle goods after acquisition by a merchant for general local disposition are not. Employees engaged in operating and maintaining privately owned toll roads and bridges over navigable waterways are "engaged in commerce." *Overstreet* v. *North Shore Corp.*, 318 U.S. 125. So are employees of contractors when the employees are engaged in repairing bridges of interstate railroads. *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 318 U.S. 740, 742.

In the present instance, it is urged that the conception of "in commerce" be extended beyond the employees engaged in actual work upon the transportation facilities. It is said that this Court decided an employee engaged in similar work was "in commerce" under the Federal Employers' Liability Act and that it is immaterial whether the employee is hired by the one engaged in the interstate business since it is the activities of the employee and not of the employer which are decisive.

Judicial determination of the reach of the coverage of the Fair Labor Standards Act "in commerce" must deal with doubtful instances. There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce. See *Kirschbaum Co.* v. *Walling, supra*, 520. However, the test of the Federal Employers' Liability Act that activities so closely related to interstate transportation as to be in practice and legal relation a part thereof are to be considered in that commerce, is applicable to employments "in commerce" under the Fair Labor Standards Act.

The effect of the over-refinement of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment, we hope, is not to be repeated in the administration and operation of the Fair Labor Standards Act. Where the accident occurs on or in direct connection with the instrumentalities of transportation, such as tracks and engines, interstate commerce has been used interchangeably with interstate transportation. But where the distinction between what a common carrier by railroad does while engaging in commerce between the states, i.e., transportation, and interstate commerce in general is important, the Federal Employers' Liability Act was construed prior to the 1939 amendment as applying to transportation only.

The *Smith* case construed the Employers' Liability Act to apply to a cook and caretaker employed by the railroad to care for a camp car used for feeding and housing a group of the railroad's bridge carpenters. At the time of the accident the cook was engaged in these duties. In holding the cook was "in commerce" this Court said: "The circumstance that the risks of personal injury to which plaintiff was subjected were similar to those that attended the work of train employees generally and of the bridge workers themselves when off duty, while not without significance, is of little moment. The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act." 250 U.S. 101, 104.

Such a ruling under the Federal Employers' Liability Act, after the *Bolle, Industrial Commission,* and *Bezue* cases, *supra,* note 9, should not govern our conclusions under the Fair Labor Standards Act. These three later cases limited the coverage of the Federal Employers' Liability Act to the actual operation of transportation and acts so closely related to transportation as to be themselves really a part of it. They recognized the fact that railroads carried commerce and were thus a part of it but that each employment that indirectly assisted the functioning of that transportation was not a part. The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase, "production of goods for commerce."

It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from

their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other.

We agree with the conclusion of the District Court and the Circuit Court of Appeals that this employee is not engaged in commerce under the Fair Labor Standards Act.

Affirmed.

Case Questions

1. What activities was McLeod engaged in?
2. Distinguish the coverage of goods handlers in wholesaling and retailing.
3. Is there a "single concept of interstate commerce"?
4. What is the "test" of employee coverage under the Fair Labor Standards Act?

HIGGINS v. CARR BROTHERS CO.

Supreme Court of the United States, 1943. 317 U.S. 572, 63 Sup. Ct. 337

DOUGLAS, J. . . . Higgins claims minimum wages and overtime compensation alleged to be due him under Sections 6 (a) and 7 (a) of the Fair Labor Standards Act between January 1939 and July 1940. Prior to that time, respondent, which conducts a wholesale fruit, grocery and produce business in Portland, Maine, had been selling and delivering its merchandise not only to the local trade in Maine but also to retailers in New Hampshire. For the period here in question the New Hampshire trade had been discontinued and all sales and deliveries were solely to retailers in Maine. The only additional facts which we know about respondent's course of business are accurately summarized in the following excerpt from the opinion of the Supreme Judicial Court: "It buys its merchandise from local producers and from dealers in other states, has it delivered by truck and rail, unloaded into its store and warehouse and from there sells and distributes it to the retail trade. While some of the produce and fruit is processed, much of it is sold in the condition in which it is received. The corporation owns all of its merchandise and makes its own deliveries. It makes no sales on commission nor on order with shipments direct from the dealer or producer to the retail purchaser." Higgins' employment involved work as night shipper putting up orders and loading trucks for delivery to retail dealers in Maine or driving a truck distributing merchandise to the local trade.

Petitioner in his brief describes the business in somewhat greater detail and seeks to show an actual or practical continuity of move-

ment of merchandise from without the state to respondent's regular customers within the state. But here, unlike *Walling* v. *Jacksonville Paper Co.*, there is nothing in the record before us to support those statements nor to impeach the accuracy of the conclusion of the Supreme Judicial Court of Maine that when the merchandise coming from without the state was unloaded at respondent's place of business its "interstate movement had ended." Some effort is made to show that the court below applied an incorrect rule of law in the sense that it gave the Act too narrow a construction. In that connection, it is argued that respondent is in competition with wholesalers doing an interstate business and that it can by underselling affect those businesses and their interstate activities. As we indicated in *Walling* v. *Jacksonville Paper Co.*, that argument would be relevant if this Act had followed the pattern of other federal legislation such as the National Labor Relations Act [see 29 U.S.C., Sec. 152 (7), Sec. 160 (a)] and extended federal control to business "affecting commerce." But as we pointed out in *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, this Act did not go so far but was more narrowly confined.

Thus petitioner has not maintained the burden of showing error in the judgment which he asks us to set aside.

Affirmed.

Case Questions

1. Describe Higgins' employment duties.
2. What is he requesting?
3. Why does the court hold Higgins not to be engaged in interstate commerce?
4. Distinguish coverage under the National Labor Relations Act and the Fair Labor Standards Act.

SECTION 93. MINIMUM WAGE PROVISIONS OF THE ACT

Sec. 6 (a) of the Fair Labor Standards Act requires the payment of workers at the minimum prescribed rate of 40 cents an hour by 1945. In view of the gross changes in the general price level since 1938, Congress is currently contemplating upward revision of the statutory minimum to about 70 or 80 cents an hour.

The minimum wage provisions of the Act are mandatory whether the employee is paid by the hour, week, or under a wage incentive plan. They impose an obligation upon an employer to pay the prescribed wages "free and clear," the only permissible diminution being upon the conditions imposed by Sec. 3 (m), namely, the "wage paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." Facilities furnished by employers, however, such as safety caps, company police, and explosives, among others, are presumed to be primarily for the benefit or convenience of the employer and their costs will not be recognized as reasonable and may not be included in computing minimum wages.

The payment of the minimum wage and overtime compensation prescribed by the Act must be paid to the employee in cash or by negotiable instrument, payable at par, except as otherwise permitted by Sec. 3 (m). Scrip, token money, credit cards, coupons, and similar devices are not considered proper media of payment under the Act.

Interpretative Bulletins of the Wage-Hour Administrator have indicated that deduction of the below items, among others, from the minimum wage are to be allowed:

(1) Attachment and garnishment.
(2) Claims pursuant to bankruptcy orders.
(3) Check-off of union dues if the N.L.R.A. is complied with.
(4) Voluntary contributions made for athletic, charitable, fraternal, religious, or social purposes from which the employer derives no benefit.
(5) Deductions made for the purchase of U. S. savings bonds, when authorized by the employee.
(6) Dental service where furnished to employees desiring such care.
(7) Insurance, where the legal burden of the employees' premiums is not upon the employer, and where the employer derives no profit from the arrangement.
(8) Lodging, where reasonable.
(9) Back rental for company housing at cost.

(10) Deductions for a sick benefit fund, where the legal burden of paying contributions does not rest upon the employer, and where such deduction is voluntarily authorized by the employees, and where said employer receives no profit from said fund.
(11) Payments on employees' accounts in stores operated independently of the employer when voluntarily authorized by the employee and no profit results to the employer.
(12) Social security and state unemployment compensation assessments against employees payable by the employer.

In the case of *Walling* v. *Peavy-Wilson Lumber Co.*, the important provisions of which are presented in this section, the court undertook consideration of the use of company "facilities" as being in lieu of a portion of the minimum wage required under the Fair Labor Standards Act.

The employees of the Peavy Company lived in what was, for all intents and purposes, a company-owned town. The Company made numerous deductions from the wages of its employees in the months following the enactment of the Fair Labor Standards Act, including deductions for coupons issued in lieu of cash wages, for rent of company-owned houses, for purchases at the company store, for drugs, for tools, for ice water and water coolers, and for a number of other things. The court undertook to determine whether or not such deductions were permissible under Sec. 3 (m) of the Act.

The second major question in this case concerns payment for traveling time spent by workers in reaching and leaving their work stations.

WALLING v. PEAVY-WILSON LUMBER COMPANY

United States District Court, W. D. Louisiana, Shreveport Division, 1943.
49 Fed. Supp. 846

PORTERDIE, D. J. . . . In connection with its lumber-manufacturing operations in Florida, defendant employed, during the period from October 24, 1938, through October 31, 1941, an average of approximately 325 employees, exclusive of executive, office and company store employees. These employees have been and are engaged in various classes of work which include the felling of timber, transporting of logs from the timberlands to the manufacturing plant, and the different operations at the manufacturing plant. Approximately 200 are employed at the mill and about 125 are employed in log-cutting, skidding, right-of-way and track-laying operations in the woods.

During the period from October 24, 1938, through October 31, 1941, defendant's lumber sales amounted to between $800,000 and $900,000 annually. Substantial portions of the lumber manufac-

tured by defendant are shipped by it to points outside the state of Florida. . . .

Holopaw, Florida, is, for all practical purposes, a company-owned town. There are some 265 tenant houses, a large general store, and several churches, mainly built with funds of the company, located in the vicinity of the sawmill and business office of defendant. Defendant has been operating the plant at Holopaw since February, 1934. The plant, including the sawmill, the power house, and other appurtenant buildings, together with some 200 tenant houses comprising the town, was purchased in February, 1934, from the J. M. Griffin Lumber Company at a total lump sum price of $82,500. . . .

The employees of the company may, but are in no manner required to, rent dwellings from the company. They may trade at the company store but that is strictly a matter of choice. The small store operated by the railroad tie company has offered no serious competition to defendant's store, though all the laborers are free to purchase at the other stores, or at the city of Orlando and at St. Cloud, Kissimmee, the county seat, and elsewhere, and, also, are free to order goods from wherever they please. The company store carries a full assortment of merchandise and the prices are invariably not higher than elsewhere, not higher even than in the nearby city of Orlando, and oft-times cheaper.

The Administrator's regulations, part 531, defining the term "reasonable cost" to the employer "of furnishing" the employee "with board, lodging, or other facilities" with respect to Section 3(m) of the Act, 29 U.S.C.A. Sec. 203(m), were issued after an informal conference. . . .

During the period from October 24, 1938, through October 31, 1941, defendant made numerous deductions from the wages of almost all of its employees, including deductions for coupons issued in lieu of cash wages, for rent of company-owned houses, for purchases at the company store, for drugs, for tools, for ice water and water coolers, for medical attention, for loans and advances, and for a number of other things. By reason of the location of defendant's plant, practically the only living quarters and the only source of food, water and essential supplies available to employees were those furnished by the defendant.

During the first year of the operation of the Fair Labor Standards Act approximately 250 of defendant's hourly rate employees were employed at the bare minimum rate, according to defendant's records. During the two succeeding years the number so employed was approximately 210.

Although the Administrator's regulations provided a procedure whereby any employer might apply for a specific determination of the cost of particular facilities furnished by him, defendant never filed such an application or petition.

For at least a year after the effective date of the Act, defendant paid employees their earnings in scrip or coupons in lieu of cash, if the employee requested his pay between the regular bi-monthly pay days. On the back outside cover of the coupon books the following statement was written: "The coupons in this book are good only for merchandise purchased at the store of Peavy-Wilson Lumber Company, Inc., and will not be replaced if lost. They are not Transferable."

These coupons had no regular redemption date. They could be redeemed in cash only at 90 per cent of face value. For the first few months after the operative date of the Act, defendant itself discounted the scrip in cash at 90 per cent of the face value. Thereafter (about January, 1939), defendant made a deal with the town barber, Mr. Homer Ett, whereby the barber was given the privilege of discounting the scrip, and in return the rent payable to the company by the barber for the building used as a barber shop was raised from $40 per month to $75. When the discounting was subsequently discontinued, the barber's rent was reduced again to $40 per month. In addition to the increase in the barber's rent, the defendant, when it observed the profits being made by the barber from the discounting, required the barber to give the company 40 per cent of his discount.

By the above negotiations defendant continued to profit from the discounting of coupons. Since the effective date of the Act, employees of defendant have been deprived of some of their wages by the discounting transactions. Some employees receiving the bare minimum wage were victims of these discounts, which repeatedly reduced their weekly wages below the minimum required by Section 6 of the Fair Labor Standards Act. Such discounting, therefore, resulted in repeated violations of Section 6 of the Act. Defendant discontinued the issuance of scrip on November 3, 1939, after there had been two inspections of defendant's plant by a Wage and Hour Division inspector and when it appeared that litigation would be instituted by the Administrator. Shortly before discontinuing the issuance of coupons, defendant had ordered a large stock of the coupon books, which books were on hand at the time suit was instituted and remained unused, and were a loss of nearly $500 to the defendant.

Previous to discontinuance, some amount of scrip or coupons was used at the company store where merchandise, groceries, and other goods were sold to employees, and these articles were not furnished at the actual cost to defendant within the meaning of Section 3(m) of the Act and the Administrator's Regulations, Part 531.

A number of employees employed at the bare minimum wage made purchases at the company store with coupons for which deductions were made from their wages. Therefore, these deductions resulted in numerous and repeated violations of Section 6 of the Act. . . .

The Act has been definitely validated as to constitutionality in the case of *United States* v. *Darby*, 312 U.S. 100, 657, but Section 3(m) has been untouched and uninterpreted, and the validity of the various regulations of the Administrator of the Wage and Hour Division under Section 3(m) has never been presented.

Accordingly, before passing upon the merits as to whether or not the injunction should issue in any manner, that is, generally inclusive of all points of violation or only modifiedly prohibiting the repetition of certain acts, or should issue at all, we should consider the attack seriously made by defendant on (a) the meaning of Section 3(m), (b) the validity, effect and meaning of the regulations purported to be issued under Section 3(m), and dispose of the constitutional questions involved in considering Section 3(m) and the regulations under it. . . .

For the purpose of ready reference, we quote Section 3(m): "(m) 'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." . . .

The plaintiff admits that the verbiage of Section 3(m) came out of the conference committee of both houses of Congress on June 12, 1938. The plaintiff's position (the government's) is that the Act is essentially a *cash* wage statute, that Section 6(a) of the Act *literally* requires the payment of basic wage in cash only, and that Section 3(m) provides the only exceptions to the cash wage requirement. The contention of the government is that the purpose of Section 3(m) is to protect the basic wage from indiscriminate and unlimited deductions for charges arising out of profit-making transactions between employer and employee, and that this purpose would be wholly defeated unless the phrase "or other facilities" be interpreted so as to include the relation of landlord and tenant, merchant and customer.

The representatives of the government make the point very seriously that the purpose of Congress in its enactment of Section 3(m) was to protect against abuses of the company village system. They admit that prior to the enactment of the act there was no discussion or debate regarding the precise definition of the words "board, lodging, or other facilities." They seem to overlook the Crawford amendment, previously quoted, but show that the Congressional debates on wage and hour legislation contain many references to the necessity of protecting "victims of low wage scale and the company store system." . . .

Frankly, we must admit that the purpose of the Regulation was to attempt to eliminate the ills of the past existing in our mining and lumber industries, and, in certain cases, was to prevent an invasion of the Act through profit-making transactions between employer and employee in which the employee is generally recognized not to be on equal contracting terms with his employer. So, though the question be close, we rule that the phrase "or other facilities" is to include the relation of landlord and tenant, and merchant and customer, and further, that subsection (b) of Section 531.1 of the Original Regulations of the Administrator, issued October 20, 1938, is legally permissible.

A condition of numerous accountings existed between defendant and its employees such as we know to be very common at sawmill plants; in truth, we doubt that there would be an exception in all of the southeastern United States.

Long prior to the filing of the suit in this case defendant established the custom of accommodating employees by making payments for their accounts, at their requests and upon their respective orders, and charging the amounts so paid against the payroll accounts of the employees respectively. For instance, the company would pay accruing premiums on insurance policies held by the employee and charge to his account the amount of the premium. At the request of a negro employee or a white employee, as the case might be, the company paid money into one of the two charity funds, one wholly controlled and handled by the negroes, and the other wholly controlled and handled by the white employees. If an employee subscribed a certain amount each month or week to the support of one of the churches in the community at which he was a member, the company would pay the amount of his subscription and charge it to his account if given an order to do so. The company would pay orders given by the employees to the community barber and to the person operating the community

pressing club. The company would, at the employee's request, make payments on account of an automobile. The company handled orders given by the employee, drawn on it, to pay for gasoline and for innumerable other things, including the taking up for the employee of C.O.D. packages from mail order houses at the Post Office. Each of such advancements was charged to the extent, and to the extent only, of the moneys paid out. Nothing whatsoever was charged to the employee by the company on account of the cost of rendering such service or the cost of stationery and stamps which might be used in complying with the employee's requests. If an employee owed a third person money, he would frequently give to his creditor an order on the company in discharge of his debt. . . .

A placing side by side of Section 6(a) and Section 3(m) of the Act, we believe, will disclose the absence of any prohibition of mutual accountings between employer and employees. The provision from 6(a) that every employer shall pay not less than 25¢ an hour, though fully indicative that the payment should be in cash, does not denote the want of authority in the laborer to contract that some of the cash due him be paid for this, to that one, and the other. The long record in this case discloses no coercion, to even the slightest degree, as to what the employee had or had not to order or direct to be paid from his cash wages. Further, the record shows a complete absence of evidence showing any one of the laborers to have been defrauded of one cent in any of the numerous types of accountings and for a period of better than three years.

We believe that in the case of *Southern Ry. Co.* v. *Black*, 4 Cir., 127 F. 2d 280, 283, the following language is proof that the purpose of the Fair Labor Standards Act was not to interfere with the methods and practices by which an employee's compensation is to be paid (127 F. 2d at page 283): "The purpose of Congress in the passage of the Fair Labor Standards Act was to provide that employees be compensated for their labor at not less than the minimum wage, not to interfere with the methods and practices by which the compensation was paid (*Williams* v. *Jacksonville Terminal Co., supra*); and if the employee receives for his labor the minimum which the statute requires, it cannot be important whether he receives it direct from the employer or, with the employer's consent, from the employer's patrons." . . .

We believe that we should quote further from the *Jacksonville Terminal* case, *supra*, 62 S. Ct. at pages 669, 671:

"We stated in the discussion of the notice given by the terminals to their employees that its effect was to transfer the tips covered by the notice to the credit of the terminals. But this terminal credit in the hands of the red caps, assert petitioners in both cases, cannot be utilized as cash paid to the employee by the employer. . . .

"To interpret 'pay-wages' as limited to money passing from the terminal to the red cap would let construction of an important statute turn on a narrow technicality. It, of course, can make no practical difference whether the red caps first turn in their tips and then receive their minimum wage or are charged with the tips received up to the minimum wage per hour." . . .

We believe there is nothing in the Act to prohibit an employer and employee from agreeing on an amount for house rent or agreeing upon the purchase price of an article of merchandise, provided there be not the prohibited profit of the Administrator's Regulation made in the transaction; and further, we see nothing in the Act to prevent the further voluntary agreement, either expressed or implied, that the amount of house rent or the price of the merchandise may be deducted from the wage due. . . .

We should immediately bring to our mind here that the plant, which the estimate of Coats and Burchard Company, reputable professionals in the line, estimated as being worth $1,393,805 in 1926, was bought by the defendant for the relatively small sum of $82,500. The plaintiff contends that the actual cost of the houses is $10,065—the proportionate part for the village houses out of the total plant cost—and that this actual cost should serve as the basis for the computation of rent cost. The defendant contends that they made a tremendously good bargain when they purchased this plant in the very depth of the depression, and that the capital outlay on which to compute the rental they should receive from the village houses should be based on the actual value or worth of the houses at the time they are rented, irrespective of the low purchase price. We could not imagine any case where the factual background could draw the issue of difference in interpretation more sharply and widely than in this case. . . .

The argument of the defendant is that "reasonable cost" means a return on "fair value," and that, insofar as the Administrator's determination deviates from the "fair value" concept, it is unconstitutional.

The plaintiff's position may be outlined as follows: 1. The Administrator's determination as set forth in Regulations, Part 531, is binding as legislation and cannot be set aside or modified by the courts unless palpably arbitrary or capricious, or unless unconstitutional.

2. The Administrator's regulation is a valid exercise of the authority conferred upon him by section 3(m) and is clearly designed and adapted to achieve the purpose of Congress.

A. The literal language of the statute, as well as the legislative history, established that "cost" and not "fair value" was intended to be the standard in enforcing section 3(m).

B. The "actual cost" standard is the only practicable interpretation if the purpose of section 3(m) to prevent evasions of the Act is to be accomplished.

3. There is no constitutional requirement entitling employers to a return on the value of services or facilities furnished in lieu of wages.

We agree with plaintiff's view that the Administrator's Regulation under Section 3(m), defining what is thereunder "reasonable cost," as just above quoted, to be the "actual cost," is legally correct.

We do not fail to realize the hardship on the defendant in such a rule because it robs the defendant of the fruits of a prudent good bargain; and, concomitantly and additionally, we realize that if there be no reward for astuteness in business the converse will become true, that there will be no punishment for poor dealings. What we mean here is that the defendant might as well have paid the Coats and Burchard estimate for the plant of $400,000 when it bought on February 6, 1934, instead of just paying $82,500.

The reason why we may legally and conscientiously take this position in the face of a full appreciation of its shortcomings and difficulties is that we firmly adhere to the plaintiff's position that we are not dealing here with the "fair value" principles applied in public utility rate making, nor are we dealing here with a direct and comprehensive regulation of prices to be charged by grocery stores and landlords; we are dealing primarily in shaping and maintaining minimum wage and maximum hour standards for employees engaged in interstate commerce or the production of goods for interstate commerce, and consequently any regulation of prices charged for rent or merchandise resulting from the operation of Section 3(m) is merely incidental to the accomplishment of the wage and hour standard provided by the Act. The charges made by ordinary landlords, and merchants, are not affected at all by Section 3(m), nor are the charges made by the employer regulated, except to the extent to which the employer *may choose to furnish facilities* in lieu of the minimum wages and the overtime compensation required by the substantive provisions of the Act.

The determination by the Administrator in Regulations, Part 531, is binding as legislation and cannot be set aside or modified by the courts unless palpably arbitrary or capricious, or unless unconstitutional. The Congress may delegate to administrative agencies the power to issue regulations, having the force and effect which they would have if Congress itself had written the regulations into the statute. *Gray* v. *Powell,* 1941, 314 U.S. 402, 62 S. Ct. 326, 86 L. Ed. 301; . . .

We believe that since Section 3(m), as interpreted by the Administrator's Regulation, is plainly designed and adapted to the constitutional end of enforcing fair wage and hour standards, the fact that curtailment of the employer's profits from the sale of merchandise and the renting of houses to employees incidentally results, cannot invalidate the regulation.

Secondly, the constitutional objection urged by the defendant cannot prevail. Even if it be assumed that Congress is without power directly to regulate prices of grocery stores and amounts charged by landlords generally, regulations providing the conditions under which such charges may be credited to an employer as wages paid are clearly valid as "appropriate aids to the accomplishment of some purpose within an admitted power of the national government." See *United States* v. *Darby,* 312 U.S. 100. . . .

Store Operations

Since we have ruled and held valid the Administrator's Regulations under 3(m), we should quote here the regulation affecting store operations, since it is to be the basic premise of this discussion:

"Section 531.1—Reasonable cost under section 3(m) of the act.

"The term 'reasonable cost' in section 3(m) of the act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.

"(a) Reasonable cost does not include a profit to the employer or to any affiliated person.

"(b) The reasonable cost to the employer of furnishing the employee board, lodging or other facilities (including housing) is hereby determined to be the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5½ per cent) for interest on the depreciated amount of capital invested by the employer; provided that if the total so computed is more than the fair rental value (or the fair price of the commodities

or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices."

To avoid duplicity, the items in the findings of fact which may relate to the store operations are not repeated here, but should be borne clearly in mind as permanent premises. . . .

We pretermit the discussion of the issuance of scrip at the store because this practice of the defendant was immediately discontinued upon the first objection made by the government representatives, and will be condemned by this decision. . . .

We must come to the conclusion that the defendant has not violated through its store operations Section 3(m) of the Act, nor the Administrator's Regulation thereunder, previously quoted in full.

The following are additional findings of fact upon which the above conclusion is based:

If the gross profits on sales of merchandise of the company are compared with the merchandising experience of other merchants throughout the United States, it is apparent that its gross profit margin is very much less than that necessary for other merchants to make any money at all—so that unless the costs of its sales were very much less than the goal figures which merchants generally are seeking to achieve in the sale of merchandise, then it would seem inevitable that the company lost money in its sale of merchandise.

In any event, it appears that its net profits on charge sales to company employees could not have exceeded twelve hundred to fourteen hundred dollars in the year 1939, which was the last year in which the company to any appreciable degree sold merchandise on charge accounts to minimum wage employees. . . .

Housing Furnished by Defendant

. . . The court was well impressed with the qualifications of Mr. C. Walton Rex as an expert to give evidence as to the estimated cost of the rental value of the houses. . . .

Mr. Rex's finding was in corroboration of what Mr. Melton found to be in the same premises (Dft. Ex. M). To illustrate Mr. Rex's computation (See R. 1789, 1790), for the year 1939 (Dft. Ex. X, p. 5), we show the following, which exemplifies that the defendant lost the sum of $1,605.97 in its operation of renting:

To begin with, he figures the total collectible rent at.	$22,104.00
Here, as in defendant's Exhibit O, page 22, he makes the same allowance for vacancy and rent loss, namely, ten per cent	2,210.40
And arrives at the same amount of collectible income, namely	$19,893.60
In both exhibits, he shows, and for the same reason, the cost of collection of rent and clerical at 5%	994.68
He takes the cost of repairs and maintenance from the company's records in the amount of	3,987.75
The figure on insurance is on the depreciated value of $38,242.82 at $1.50 per hundred	585.18
Cost of lights and water is on the figure furnished by electrical engineer Michaels at cost	8,952.12
The return on the investment is figured at 5½% on the depreciated value, or	2,103.30
The depreciation for year 1939 based on the use life of the property is	4,315.82
The taxes for the year 1939 are the same as at page 22 of defendant's Exhibit O, namely	318.63
Social Security for 1939 is likewise the same, and at cost	242.09
Making the total expenses for the year 1939	$21,499.57
And the loss, making no allowance whatsoever for the actual value of the property on June 25, 1938, is	$ 1,605.97

It is not necessary to illustrate similarly for the years 1940 and 1941, in which latter two years the Rex computation on the second hypothesis shows the respective losses of $5,939.29 and $5,797.87. . . .

Travel Time

A consideration of this subject excludes mill employees, and involves only the employees engaged in defendant's logging operations. These employees had a definite work place, well known to all of them, situated at or near the point where timber was being felled. They were and are required to report for work at that place, and at no other.

Defendant's plant and village at Holopaw are located on the Florida East Coast Railway, which extends north through the timber tract and on to the east coast of Florida. The distance from Holopaw to the south end of the timber tract in Osceola County is nine miles; to the extreme north end of the timber tract, twenty-seven miles. The main part of the timberlands in Orange County has a width of from twelve to fifteen miles, and the maximum length north and

south is twelve miles. The south boundary line of the timber tract in Orange County is fifteen miles from the plant. . . .

The defendant makes no requirement with respect to the place of residence of any employee; their place of work in the timberland is well known to them, and that is the only place at which they are required to report for work. Most of the logging employees reside in the community of Holopaw; some reside elsewhere. However, from a practical and economical viewpoint, the employees can hardly do anything else but live in the village.

The means of travel to and from the timberlands are entirely optional with the employees. They may use such means of conveyance as they elect. At times some of them have traveled to and from work by means of their own automobiles. During most of the time a number of the employees who complete their work earlier than 5:30 p.m., the hour of leaving for the return trip, return to Holopaw in the afternoon by means of the trains of the Florida East Coast Railway.

The company operates from the town of Holopaw in the morning a train to the point of work. This train returns in the afternoon. The train is operated by the defendant as an accommodation and convenience to the employees. It leaves a certain point in the community at approximately the same time each morning and will transport the employees to their work if they desire to ride on it. The same is true of the return trip in the afternoon. The defendant did not and does not require any employee to use the conveyance; they may use any other conveyance or means of travel they choose. However, the employees, from the practical and economical viewpoint can do nothing else but use the work-train; therefore, most of the employees take advantage of the train travel provided for their accommodation and convenience. It is decidedly the most convenient means of going to and from their work and costs them nothing. . . .

The average time required for the trip from Holopaw to the point of work is approximately 60 to 75 minutes, with a like period for the return trip. Ordinarily, it is approximately 10½ to 11½ hours from the time the train leaves Holopaw in the morning until its return in the afternoon in working an eight-hour day. Employees are not checked on the train in the morning or on and off in the afternoon. No supervision whatever is exercised over them, nor do employees of the company do any work before reaching the place of taking up their actual labor or after the cessation of work at the point of actual labor.

The only employees of the defendant who do any walking before reaching the point at which they engage in work are the log sawyers and the right-of-way crew. The cypress log sawyers walk from the railroad track constructed alongside the cypress heads a distance running from 200 to 750 feet to their actual point of work. The average time required for such sawyer to walk from the railroad to where he is cutting in the timber is around 7 minutes. They may return within a like period. Occasionally such cypress log sawyer has to walk in water. Most of the time it is not very deep—rarely would he ever walk in water that is waist deep.

Pine log sawyers, when they ride the train, walk from the point where they get off the train to the point of work. This distance varies from practically nothing to a distance of 1500 feet. The time required for the walk would be from practically nothing to a maximum of 12 minutes, depending upon whether the sawyer is cutting alongside the railroad track or a distance of as much as 1500 feet away. Pine timber is in open woods in which there is no difficulty in walking.

With respect to the contention of plaintiff that the timberlands abound in poisonous snakes, there are only three kinds of poisonous snakes in Florida: the rattlesnake, the cottonmouth moccasin, and the coral snake. The evidence does not show a single instance where any employee of the company has ever been bitten by any kind of snake, poisonous or otherwise.[1] Poisonous snakes have rarely been seen in the area where the timber work is being performed. The fact is well known that snakes leave an area in which timber is being felled. . . .

From the evidence in this case it appears (1) that the train furnished by the defendant upon which the employees may ride to and from their work is furnished as an accommodation and convenience to the employees; (2) that the defendant's employees in the timberlands have a definite place to work, to them well known, at which they are required to report for work, and such employees are not required to report to any other place; such employees are not checked on the train in the morning or on and off in the afternoon; they may travel to their place of work by whatever means they choose; (3) from a practical and economical viewpoint, the employees can do nothing else but use the free work-train; (4) the time expended by the employees in traveling and walking is for the benefit of the

[1] This contention is advanced because travel time under dangerous conditions is a factor in determining its compensability by the employer.

employees as well as for the benefit of the defendant and in the furtherance of its business.

The plaintiff's contention is that time spent by defendant's employees in traveling and walking to and from the woods is an integral part of such employee's work and should be paid for acccording to the standards provided in the Act. It is the plaintiff's position that these woods employees have begun their working day when they report and meet at the track where the labor train is waiting to transport them to the woods, and that their working day does not end until the labor train has returned them to the same meeting place.

The Administrator's Interpretative Bulletin No. 13, issued in July, 1939, and distributed to employers, including the defendant, contained the following explanation of "hours worked": "9. The problem of travel time, in relation to hours worked, arises in a great variety of situations and no precise mathematical formula will provide the answer in every case. The question is often one of degree; if the time spent by an employee in traveling is reasonably to be described as 'all in a day's work,' such time should be considered hours worked under the act. . . . 12. If a crew of workers is required to report for work at a designated place at a specified hour and all the employees are then driven to the place where they are to perform work, the time spent in riding to such place should be considered hours worked. Similary, the time spent returning from the place at the close of the day's work should be considered hours worked."

While the Administrator's interpretative bulletins do not have the same binding force as regulations issued pursuant to explicit statutory authority, they are entitled to great weight. *United States* v. *American Trucking Associations*, 310 U.S. 534, 549, 60 S. Ct. 1059, 84 L. Ed. 1345; *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 62 S. Ct. 1216, 86 L. Ed. 1682. In the latter case, decided on June 8, 1942, the Supreme Court said: "While the interpretative bulletins are not issued as regulations under statutory authority, they do carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application." 62 S. Ct. at page 1221, footnote 17.

There have been varying conclusions made by our courts of first instance concerning the classification of travel time as to whether it be work-time or not. The strongest case in calling travel time work-time is that of *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123*, D.C., 40 F. Supp. 4. The time spent by the underground ore-

mining employees in being transported from the surface to points of varying distance below the surface and back again at the end of the shift was the type of time before the court in that case. As a fact the court decided that there was nothing restful or pleasurable for the laborers in this trip. "The cars in which the employees have been transported have not been designed for comfort, have frequently been merely ore cars bearing remnants of iron ore muck. The cars have been nearly always crowded to the extreme. The positions which the men have been required to assume during the transportation varies from a crouch with their bodies overlying one another to a rigid propping of legs and arms against the sides of the car and the fellow passengers. These positions were assumed partially because of the press of human bodies in the cars and partially because of the necessity of keeping head and body in a deflected position in order to avoid injury from collision with low points in the roofs of the mine slopes or with projections from the roofs. These conditions have occasionally resulted in injuries of various kinds to the employees when the required degree of restraint and alertness has been relaxed. The trips were, of course, in the comparative darkness and enclosure of an artificially lighted mine. The air was humid and malodorous, the ventilation relatively poor and the heat increasing with the descent into the mine. These conditions are recited not for the purpose of censure of the plaintiff's manner of maintenance of their mines, for these conditions may well be normal conditions in iron ore mines and practically inevitable. Nevertheless, the conditions are clearly conditions peculiar to the occupation of the men in the class represented by the defendants, conditions replete with hazards, conditions requiring physical exertion and mental alertness, and conditions unpleasant and burdensome to those encountering them." 40 F. Supp. 9.

We believe that the situation just described is so different from the situation in the instant case that the conclusion in the *Muscoda* case should not be the conclusion here. An additional factual difference in the two cases is that the transportation in the *Muscoda* case was under the strict control and supervision of the company; contra in the instant case. . . .

In *Dollar* v. *Caddo River Lumber Co.*, D.C., 43 F. Supp. 822, the court specifically held that there was nothing due the intervenor for overtime under the following circumstances: ". . . that most of the time between the dates mentioned in this paragraph he (intervenor) was employed as a tong-hooker and was transported from his place of residence to the place of work by the defendant in a truck or other

conveyance furnished by the defendant and in returning from his place of work to his home in the same conveyance was not calculated by the defendant in the payment made to him for overtime worked; that the conveyance furnished by the defendant to the intervenor and others was furnished as an accommodation to the intervenor and other employees and they were notified by the defendant that the conveyance would leave a certain point at a certain time and that if they desired to be conveyed to and from their work that they would be so conveyed upon being present at the time the conveyance left for the place of work and returned from the place of work to their homes; that the defendant company did not require the intervenor or any other employee to use such conveyance and the intervenor and other employees were at liberty to use any other conveyance they might desire; . . . that there is now nothing due the intervenor for overtime." 43 F. Supp. at page 823.

In order that we might show the different conclusions as to whether the time be work-time or not, depending upon the factual background, we make the following quotation from the case of *Walling* v. *Dierks Lumber & Coal Company,* D.C. W.D. Ark., decided on November 13, 1942 (Not to be reported): "Defendant provides a conveyance upon which its employees may ride if they choose from their homes (or wherever they may choose to catch the conveyance along the road it travels) to their work places and return. This conveyance is furnished by defendant as an accommodation and convenience to the employees, and they were and are notified by defendant that the conveyance leaves a certain point at a certain time and will transport them to and from their work if they desire to ride on it. The defendant did not and does not require any employee to use such conveyance and the employees were and are at liberty to use any other conveyance or means of travel they may choose, and at times the employees, or some of them, would and do provide their own means of transportation to and from their work. . . . The time spent by the employees complained of in traveling to and from their work, whether on and by their own means or on a Company conveyance provided and furnished as an accommodation and convenience to them, is not "time worked" or time for which they are legally entitled to receive compensation under the Fair Labor Standards Act." . . .

In this case, the daily three hours of travel time become overtime hours, since the worker has put in his full eight hours. If these be considered "time worked," the statute places these three hours at one and a half times the regular rate of pay. Then this is doubled against

the company by the Statute. Sec. 7(a), 29 U.S.C.A. Sec. 207(a). The three hours of time, which really brought the company nothing, become nine hours per day at full pay. Why was not time used in travel to and from the actual place of work—a very commonly existing and necessary situation—allowed at one-quarter or one-half pay instead of at one and one-half pay, and without doubling? The answer, we believe, is that all the various detailed and practical applications of such general legislation as the F.L.S.A. cannot be provided for in the initial legislation.

Since the accommodation is furnished free by the defendant, and the necessity of the travel is the result of necessary economy in sawmill operations, and the village system is such a great improvement for the laborers in sawmills from the previous condition of the portable sites in the forest, and the provisions of the law are that defendant will have to pay three hours' work-time for only one hour of travel when during that hour no actual labor is performed, we are compelled to the conclusion, both legally and equitably, that this travel time is not work-time under the Act. . . .

Since composing the above on travel time, the *Muscoda* case, *supra,* has been affirmed in its declaration that time spent underground from the time the laborers are required to report at the portal of the mine until they emerge therefrom at the end of their shift, less the fixed lunch period during which the employees are relieved of all duties, was work-time. See *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123 et al.,* 5 Cir., 135 F. 2d 320, decided March 16, 1943. After reading the full text of the opinion of the circuit court, we find no reason to change our reasoning and holding. The factual differentiations drawn previously command the opposite conclusion.

Community Medical Service. Doctor, Nurse, and Medicine

The plaintiff contends that the deductions for medical attention were excessive, and also that the deductions for drugs were excessive, and that, since the majority of the employees agreeing with the defendant for the medical and nursing service were paid but their minimum wage, there resulted violations of the Act. We believe the plaintiff's conclusion is motivated in the main by the fact that the company's own records showed yearly a clear and substantial excess of income over expenses. We believe the defendant's explanation at the trial of this case on this subject is true, because the bookkeeping made allocations of the doctor's salary, etc., which were substantially

erroneous, and more, the bookkeeping showed no expense whatsoever for administrative or clerical costs, etc. . . .

Tools

The defendant charged its loggers with saws, axes, axe handles, wedges, and coal oil. The Regulation of the Administrator is as follows (Sec. 531.1):

"(d) The cost of furnishing 'facilities' which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

"The following list of facilities found by the Administrator to be primarily for the benefit or convenience of the employer is meant as illustrative rather than exclusive: (1) Tools of the trade and other materials and services incidental to carrying on the employer's business. . . ."

We determine and declare the regulation to be legal.

The defendant contends that the sawyers of both cypress and pine logs were paid on a contract basis under the terms of which they furnish their services and their respective tools. We find this to be true. These laborers never worked overtime. A computation on the basis of eight hours per day and forty hours per week (no matter how much less they actually worked) will show them to be amply paid above the minimum wage per hour. The plaintiff recounters with the statement (but we do not use this contention for our decision) that these woods laborers worked much longer than the hours recorded and that their earnings were almost always less than the amount required by the Act, and often less than the minimum wage.

It has long been the custom of the trade that log cutters are to furnish their tools. This custom may not prevail against nor supersede the requirements of a regulatory law. *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123,* D.C., 40 F. Supp. 4, and cases cited therein.

We believe the laborers should be furnished their tools free of charge, as the tools should be considered fundamentally a part of defendant's plant. Otherwise it could as well be deduced that the laborer working at the mill should be charged a rent use of the large plane or the large saw which he uses at the mill in the performance of his work. . . .

Furnishing of Fuel Wood

The defendant persisted in showing that in its furnishing of fuel wood, delivered to its tenants, at $1.00 per truck load, when it could

readily have sold it to others at $2.95, it lost yearly a sum of surely over $10,000.00. The original complaint included this item as a violation, but, by oral amendment, it was withdrawn. . . .

Conclusions of Law

1. Defendant and its employees, throughout the period involved in this suit, have been engaged continuously in the production of lumber for interstate commerce and in activities necessary for such production.

2. The minimum wage and overtime provisions of the Fair Labor Standards Act of 1938 are applicable to defendant's employees.

3. The Fair Labor Standards Act is constitutional.

4. The provisions of Sections 6 and 7 of the Act are mandatory and impose an absolute obligation upon an employer subject to the Act to pay the prescribed minimum wage and overtime compensation free and clear. Deductions from such prescribed wages are permissible only upon the conditions imposed by Section 3(m) of the Act.

5. Section 3(m) of the Act is not invalid for indefiniteness and uncertainty. It furnishes a sufficiently definite guide for administrative action and constitutes a valid delegation of power to the Administrator.

6. Under Section 3(m) the Administrator is empowered to determine the "reasonable cost" to employers of furnishing facilities to employees as part of the wages prescribed by the Act. There is no constitutional or statutory requirement that the Administrator hold a formal hearing prior to the promulgation of his determination.

7. The Act does not require nor contemplate a determination of "reasonable cost" of facilities furnished by each individual employer. The establishment of a general determination or regulation pursuant to which the cost of such facilities may be calculated meets the statutory requirements and does not violate constitutional requirements of due process. . . .

8. The Administrator's Regulations, Part 531, issued pursuant to Section 3(m), are legislative in character, and are binding upon the courts unless palpably arbitrary or capricious, or unless unconstitutional.

9. The Administrator's Regulations, Part 531, constitute a valid exercise of the authority conferred upon him by Section 3(m), and are reasonably designed and adapted to achieve the purpose of Congress to protect the basic wage and hour standards. The "actual

cost" standard, as defined in the Administrator's regulations, is practicable and reasonable. It cannot be said to be arbitrary or capricious in view of the literal language of the statute, the legislative history, and practical considerations of administrative convenience.

10. There is no constitutional requirement entitling employers to a return on the value of services or facilities furnished in lieu of wages.

11. The Administrator's regulations defining "reasonable cost" are sufficiently definite, certain, and intelligible to constitute valid regulatory measures.

12. The restrictions of Section 3(m) and the Administrator's regulations are applicable irrespective of whether the deductions from wages are voluntary on the part of the employee. A voluntary agreement to permit excessive deductions is no more valid than a direct agreement by the employee to *accept* less than the minimum wage. Voluntary agreements between employer and employee which are prohibited by or inconsistent with the provisions of the law are illegal.

13. Defendant has repeatedly violated Sections 6 and 15(a) (2) of the Fair Labor Standards Act by making deductions from the wages of many of its employees employed at the bare minimum rate prescribed by the Act, as follows:

(a) By discounting at less than face value coupons issued in lieu of wages.
(b) By discounting such coupons through a third party under an arrangement whereby defendant shared the profits and benefits.
(c) By deducting from wages the face amounts of coupons used for the purchase of merchandise, groceries and other goods sold by the company-owned store at prices returning more than the reasonable cost to defendant of furnishing such articles or facilities.
(d) By making charges and deductions from wages for ice and mechanical water coolers.
(e) By making or permitting deductions from wages for loans made to employees by the Holopaw Savings and Investment Company, an association affiliated with defendant in various ways.
(f) By making deductions from wages for milk and ice purchased by employees from third parties through transactions from which defendant secured profits and benefits.

14. Defendant has continuously and repeatedly violated Sections 6, 7. 11(c) and 15(a) (2) of the Act by failing to keep records.

15. An occupational custom or usage not to pay for travel or waiting time cannot operate to avoid the requirements of this Act of Congress.

16. Defendant has repeatedly violated Sections 6, 7 and 15(a)(2) of the Act by making deductions from the wages of woods employees for saws, axes, and other tools used and needed in their work for defendant.

17. Evidence of repeated violations in the past over a substantial poriod of time is sufficient "cause shown" to entitle the Administrator to the injunctive remedy under Section 17 of the Act.

18. Discontinuance of violations under official pressure or because of the imminence of litigation, before or immediately after complaint is filed, does not afford grounds for denying an injunction, under Section 17 of the Act. Nor do protestations of good faith and intention to comply in the future constitute grounds for denying injunctive relief. . . .

Case Questions

1. Describe the activities conducted by the Company.
2. State the price paid for the town by Peavy. Do they seek a return on this price? What is the court's conclusion?
3. What deductions were made by the company?
4. How were some of the workers paid?
5. What was the redemption value of the payment media? Who profited?
6. What section of the F.L.S.A. is here in issue? State its purpose.
7. Did the court deem lawful the practice of the employer in making accommodation payments for his employees? Why?
8. Do "tips" constitute wages for minimum wage computation?
9. Discuss completely the store operations of defendant and the court's conclusion thereto.
10. Did the company make a profit from rentals to its workers?
11. Why does the court conclude that the travel time here is not compensable?
12. If travel to and from the workplace is dangerous, this fact may make for compensability. Discuss the dangers and hardships brought out in the facts.
13. What weight attaches to the Administrator's interpretative bulletins?
14. Discuss travel time in the *Tennessee Coal and Iron* case cited in the opinion.
15. State the conclusions of the court as to tools, coupon and scrip transactions, loan transactions, and deductions for ice and milk.

SECTION 94. MAXIMUM HOUR PROVISIONS OF THE ACT

Sec. 7 (a) of the Act requires that, subject to the exemptions of Sec. 7 (b), all employees be paid at "one and one half times the *regular* rate at which he is employed" for all hours in excess of forty (40) in any one week.

The following exemptions from the above overtime premium payments are permitted by Sec. 7 (b).

(1) Employees in industries found *seasonal* by the Administrator. Such employees may be worked in excess of forty (40) hours per week for a period of fourteen (14) weeks without payment at the premium rate; however, the time and one half rate is required on all hours worked in excess of twelve (12) in any one day or in excess of fifty-six (56) in any week.

(2) Employees working under a valid collective bargaining agreement which provides that no employee shall be employed more than one thousand (1,000) hours in twenty-six (26) consecutive work weeks or more than two thousand and eighty (2,080) hours in fifty-two (52) consecutive work weeks.

Questions on Section 94

1. What is the requirement of Sec. 7 (a)?
2. List the exemptions of Sec. 7 (b).

SECTION 94.1. CONCEPT OF THE WORKWEEK AND WORKING TIME

In order to understand the implications of the maximum hour provisions of the Fair Labor Standards Act, it is necessary for us to determine what constitutes "working time" and what is meant by "workweek."

The Wage and Hour Division has clarified the term "working time" by setting forth:

(1) That an employer need not count as working hours regular periods when an employee is relieved of all duties in order to eat meals.

(2) That rest periods of less than 20 minutes in duration must be counted as working time.

(3) That customary rest periods of more than 20 minutes may or may not be working time depending upon whether or not the employee can use the period for rest or relaxation.

(4) That, generally, time idle because of interruptions beyond an employee's control constitutes time worked if the employee must remain on hand because work may be resumed at any time or because

the interval is too brief to be utilized effectively by the employee in his own interest.

(5) That, ordinarily, periods of inactivity while on duty, as in the case of messengers and so forth, count as time worked.

(6) That waiting time spent by homeworkers at a plant checking in and being assigned work is working time.

(7) That time spent on call constitutes working time only if the employee is required to remain in or around the company premises.

Some of the above declarations are subject to possible alteration or modification as they are tested under the Portal-to-Portal Act of 1947 (P.L. 49, 80th Congress, 1st Sess.). Under the terms of that legislation, an employer will not be liable on claims based on the following activities:

(1) Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities that such employee is employed to perform.

(2) Activities that are preliminary to or postliminary to said principal activity or activities.

The employer is liable for the above-enumerated activities if they are compensable by express provisions in a written or unwritten contract of employment, or if they are compensable by custom and practice that is not inconsistent with the express provisions of the contract of employment.

A "workweek" is defined as any seven consecutive days starting within the same calendar day each week. Said workweek may commence on any day and need not coincide with a calendar week.

Each workweek is a separate unit insofar as the computation of overtime pay is concerned. Hours worked in two or more weeks may not be averaged so as to cancel out overtime hours. In the *Black* v. *Roland* case, reprinted in this section, the District Court held that an argument presented by an employer company that it was not violating the Act if it treated all of the various weeks during which an employee worked as a whole, "balancing the amounts of statutory overpayments in some weeks against statutory underpayments in others," was contrary to the "well-established interpretation" of the Act that the individual week was "inviolate and inflexible as the unit of work."

BLACK v. ROLAND ELECTRICAL COMPANY

United States District Court, D. Maryland, 1946. 68 Fed. Supp. 117

COLEMAN, D. J. This is a suit for unpaid overtime compensation alleged to be due the plaintiffs by the defendant, and also for an

additional equal amount as liquidated damages and for counsel fee, brought under Section 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C.A. Sec. 216(b).

This litigation originated in this Court by a suit to enjoin alleged violations of the Fair Labor Standards Act brought by the Administrator of the Wage and Hour Division, United States Department of Labor, against the present defendant, the Roland Electrical Company, which is a corporation engaged in Baltimore in the business of buying and selling new and used electrical motors of various types; repairing, reconditioning and rebuilding used motors, and installing and repairing private, commercial and industrial wiring systems. . . .

(1) *Did the defendant violate the provisions of Section 7 of the Fair Labor Standards Act, 29 U.S.C.A. Sec. 207, in applying the amounts actually paid the plaintiffs in excess of the requirements of that section in some weeks, as a credit against payments in other weeks when compensation for overtime did not, in fact, equal the amounts prescribed by that section; and* (2) *was the defendant justified, in determining the amount of overtime compensation due the plaintiffs under the Act, in deducting from such amounts regular year-end bonuses paid to the plaintiffs?* [Author's italics.]

The present suit covers the period from October 24, 1940, to January 10, 1945, during some part of which all of the present plaintiffs were employed by the defendant. The following is an accurate, brief description of defendant's employment practices as they affected the plaintiffs during the overall period in question, which give rise to the two questions, above stated, here in issue: Irrespective of the total hours worked in any work-week, defendant paid time and a half for all time worked in excess of eight hours in any one week-day and in excess of four hours worked on Saturday, and also time and a half for all time worked before or after the regular working hours of any given work-day. In other words, at times it was customary for the employee to work after 5 o'clock on regular week-days; after 12 o'clock, noon, on Saturdays and before or after regular working hours. For all work during such periods, plaintiffs were paid one and one half times their regular wage. As a result, the wages that a given individual received in some weeks was actually in excess of those prescribed by the Act, and in other weeks, it was less.

It was also the practice of the defendant, in the year 1941 and each succeeding year, to pay its employees a bonus amounting to 5% of his gross pay, determined as of the end of November of each year. On the pay-day preceding Christmas, each employee was given a com-

pany check for such bonus, less social-security and withholding tax. This was a voluntary payment on the part of the defendant, no previous arrangement having been entered into between the defendant and its employees with respect to the payment of any bonus.

We will consider the two questions at issue in the order in which they have been above stated and, therefore, first, the question whether the defendant violated the Act in applying, as compensation for overtime work, the amounts it paid the plaintiffs in some weeks in excess of the statutory requirement, as a credit against payments in other weeks which did not equal the statutory requirement.

While there appears to be no reported decision which interprets Section 7 of the Fair Labor Standards Act when applied to a state of facts precisely like those here involved, nevertheless, in view of the extensive interpretations which have been given to that section, in dealing with other and not unrelated situations, by the Supreme Court and the Circuit Court of Appeals for this Circuit, as well as by other Federal Courts, we believe from those interpretations we are required to rule that the defendant may not make the credits as proposed.

A basic principle held to underlie Section 7 is that the week is the inflexible work unit. [Author's italics.] See *Overnight Motor Transportation Co. Inc.* v. *Missel,* 316 U.S. 572, 62 S. Ct. 1216, 86 L. Ed. 1682; *Walling* v. *Helmerich & Payne,* 323 U.S. 37, 65 S. Ct. 11, 89 L. Ed. 26. As was said in the first of these cases (316 U.S. 572, at page 579, 62 S. Ct. 1216, at page 1221, 86 L. Ed. 1682): "Neither the wage, the hour nor the overtime provisions of sections 6 and 7 on their passage spoke specifically of any other method of paying wages except by hourly rate. But we have no doubt that pay by the week, to be reduced by some method of computation to hourly rates, was also covered by the act. It is likewise abundantly clear from the words of section 7 that the unit of time under that section within which to distinguish regular from overtime is the week." Also, in the same decision it was declared to be basic by the provisions of both sections 6 and 7 of the Act that they were designed to require payment for overtime at time and a half the regular pay where that pay is above the statutory minimum, as well as where equal to it. . . . Likewise, it necessarily follows that the Act requires prompt payment at the end of each week to the employee of the amounts then due him, *Rigopoulos* v. *Kervan,* 2 Cir., 140 F. 2d 506, 151 A.L.R. 1126, as a corollary of which it is now established law that the employee may not deprive himself of full compensation according to the

express provisions of the Act, prior to a judicial determination of his rights thereunder, by any agreement of compromise and settlement, even though entered into in all good faith. *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 65 S. Ct. 895.

As a result of the aforegoing, we believe this Court is required to hold, inequitable as it may seem, that the present contention of the plaintiffs and not that of the defendant must prevail. Let us clarify the precise factual situation by the following illustration: According to its general pay policy, the defendant company works its employees eight hours a day for five days each week, from Monday through Friday, and four hours on Saturday, or a total of forty-four hours per week. Also, in accordance with its general pay policy, the defendant company pays its employees time and one half for all hours worked before or after the normal working hours, regardless of the number of hours that the given employee may have worked in the given week. Suppose then, that one of the plaintiffs in a given week has worked forty hours, four hours of which were after the close of the regular work day, and his hourly rate of pay is 50¢. The defendant company has figured the plaintiff's wages under the above circumstances as amounting to $21.00 for the week, computed as follows: For 36 hours at 50¢ an hour, $18 and for four hours at 75¢ an hour, $3. Since, as is undisputed, according to the requirements of the Act the plaintiff would be entitled to only $20, that is to say, for forty hours' work at 50¢ an hour, there being no statutory overtime, there can be no question that in so far as the strictly statutory obligation to pay is concerned, apart from the defendant's contractual obligation to the plaintiff, the defendant has actually made to the plaintiff an excess payment of $1. However, this is not the extent of defendant's contention in the present case. It goes further and contends that it is not violating the Act if it treats all of the various weeks during which the given plaintiff has worked, as a whole, balancing the amounts of statutory over-payments in some weeks against statutory under-payments in others, the result being that under such computation plaintiff has not been under-paid but over-paid. However, this argument, equitable as it appears to be, independently of the Fair Labor Standards Act, is directly contrary to the now well-established interpretation to be given to the Act arising primarily, as we have seen, from the basic theory that makes the individual week completely inviolate and inflexible as the unit of work.

While administrative interpretations of laws such as the Fair Labor Standards Act are not controlling unless consonant with such

laws when interpreted in the light of our constitutional requirements, the Wage and Hour Division of the United States Department of Labor, which is charged with the administration of the Fair Labor Standards Act, has rendered interpretations which we believe to be correct, and in conformity with our understanding of the Supreme Court's holdings. For example, in that Division's Interpretative Bulletin No. 4 (the latest) we find the following statements:

Paragraph 5. "The act takes a single workweek as its standard and permits no averaging of hours over two or more weeks. Thus, when an employee works 30 hours one week and 50 hours the next, he must receive time and one-half overtime compensation for the 10 hours over 40 worked the second week, even though the average number of hours worked in the two weeks is 40."

Paragraph 29. "It must be remembered that the Fair Labor Standards Act takes a single workweek as its standard and permits no averaging of hours over two or more weeks. For the purposes of the act each week stands alone. Time and a half overtime compensation must be paid the employee for all hours which he works in excess of 40 hours in a single workweek. The pay period need not, however, coincide with the workweek. Thus, there is no objection if the pay period is biweekly, semimonthly, or monthly. But the amount of compensation due the employee at each pay period must be computed on the basis of a single workweek."

Paragraph 43: "In other words, overtime compensation earned in a particular workweek must be paid at the regular pay period in which such workweek ends. Payment for a workweek, however, may not be postponed beyond the pay period in which it ends."

In this same Bulletin, in approving the basic principle of a so-called prepayment plan common with some industries, we find the following:

Paragraph 53: "Though overtime compensation due an employee must normally be paid at the time of the employee's regular pay period, there is no objection if the employer pays overtime compensation to become due to an employee in advance. This is the basic principle of the prepayment plan."

Paragraph 57: "It will be noted that only credits to the employer will be carried over beyond the pay period; credits to the employee, i.e., overtime compensation due the employee, will not be carried over beyond the pay period to be consumed by subsequent employer advances, but will be paid in cash at the pay period. In this way the employer will never be indebted to the employee."

Defendant's counsel contends that by Paragraph 69 of this same Interpretative Bulletin No. 4, the Wage and Hour Division has applied Section 7 in such a manner, to cases where a union contract or other agreement between an employer and his employees calls for the payment of overtime or other special compensation not required by the Act, as to permit the practice for which defendant is contending in the present suit. It is true that the basic question here presented to us, when reduced to its simplest terms, is whether or not overtime wages, paid by reason of a special arrangement or contract between employer and employee, can be treated as overtime payment under the Fair Labor Standards Act. However, it is to be noted that the ruling of the Wage and Hour Division last above referred to, upon which defendant relies, does not either expressly or impliedly cover, or purport to cover, the question which we now have under consideration, namely, the combining of weekly balances of debits and credits in one final accounting with the employee, but merely the balancing of the computation, in terms of the Act, of hours worked during, but not beyond, one given week, against the computation of wages due in terms of a union agreement or other agreement, for the same period. We agree with, and here adopt, the ruling thus laid down by the Wage and Hour Division as the one that must be applied in the present case where the facts, for any one given week, are similar to those covered by this ruling. . . .

In view of our conclusion on the first point here at issue, it must be obvious that the application of the same principle to the bonus question requires that we answer it likewise in favor of the plaintiffs. In the present case, the bonus was paid annually on the basis of 5% of the wages which the recipient had earned during the last eleven months. This fact, coupled with the fact that these bonus payments were carried on the books of the defendant company as employee compensation; that the company deducted them in computing its income, withholding and social security taxes, is stressed by the company as supporting its right to apply these bonuses as part of its obligation to the present plaintiffs under the Fair Labor Standards Act.

We are not impressed with this argument. It is true that incentive bonuses, paid in addition to regular, guaranteed base pay, are to be taken into account in the computation of the statutory regular rate for the purpose of determining overtime under the Act. . . . However, such a situation is not analogous to that in the present case. There, the bonuses were paid currently in direct relation to the piece

work being performed by the employee, as an incentive to a greater volume of production. In the present case, the bonuses, while scaled according to the employees' annual income, were really in the nature of an outright gift, as evidenced by the testimony, uncontradicted, to the effect that these payments had been instituted in 1941 in place of Christmas gifts, previously made by the defendant to its employees, in the form of a turkey or some other gift. . . .

The matter will be referred to a Special Master, for the purpose of determining the amount that may be due each of the several plaintiffs in conformity with this opinion, and reporting his findings to the Court, unless the parties are prepared to enter into a stipulation with respect thereto.

Case Questions

1. Indicate the purpose of this suit.
2. What two questions are raised?
3. How did defendant compute the overtime payments? How did it apply them?
4. How does the court rule on the "basic principle" underlying the work week under Sec. 7?
5. Why does the court hold the bonus payment herein made to be inapplicable to wipe out the overtime payment shortage?

SECTION 94.2 CONCEPT OF THE REGULAR RATE

The so-called regular rate of pay is the hourly rate where wages are paid on a uniform hourly basis. The additional compensation to be paid for the overtime hours (hours in excess of 40 in a workweek) is determined on the basis of one-half of this hourly rate multiplied by the number of hours worked in excess of 40 in the given workweek. For example, if an employee worked 50 hours in a workweek at the hourly rate of $.90, he would be paid as follows:

$$\begin{array}{lrcrcl} \text{Straight-time pay:} & 50 \text{ hrs.} & \times & \$.90 \text{ an hour} & = & \$45.00 \\ \text{Overtime pay:} & 10 \text{ hrs.} & \times & \frac{\$.90}{2} \text{ an hour} & = & \$\ 4.50 \end{array}$$

The total pay in the above instance would be $45.00 plus $4.50, or $49.50. The "regular rate," for purposes of computing overtime, is considered the gross pay before deductions from said wage in the form of group insurance contributions, union dues under a "check-off" plan, and the like.

The Wage and Hour Division of the Department of Labor has recognized two methods of computing the overtime pay, where an employee is paid at two different hourly rates during a given workweek. First, the employer may consider the "regular rate," upon which the overtime rate is calculated, to be the average hourly rate for the week. (Total wage divided by the total number of hours worked.) Second, an employer may pay overtime on the hourly rate applicable during an employee's overtime hours.

If an employee is paid on a weekly salary basis, his "regular rate" is computed by dividing the salary by the regular number of hours worked each week, or if no regular number of hours is worked, by the total number of hours worked. A contractual limit as to hours to be worked must be provided for.

If an employee is paid on a piecework basis, his "regular rate" is considered to be the total piecework earnings divided by the number of hours worked in the week. Any production or other related bonuses are to be included in the total earnings.

In the months following enactment of the Fair Labor Standards Act, there were numerous attempts to avoid the provisions of the legislation by manipulation of wages and hours. Some of these attempts at avoidance were deliberate, others were merely misinterpretations of the legislative intent. The various courts, in several important and far-reaching opinions, clarified and broadened the language of the Act and laid down judicial interpretations of vague points and obscurities.

In the *Missel* case, reprinted in this section, the United States Supreme Court rejected a contention that an agreement for a fixed weekly wage for irregular hours satisfied the requirements of this Act, when the total wage paid equaled or exceeded the wage computed at 40 hours times the statutory minimum plus overtime at the rate of 150 per cent of the minimum for the overtime hours (those in excess of 40). The court declared the provisions of Sec. 7 (a) of the Act to be clear and unambiguous, calling specifically "for 150% of the *regular*, not the *minimum* wage." A final weakness in defendant's case was the failure to provide for a contractual limit upon hours to be worked by Missel.

OVERNIGHT MOTOR CO. v. MISSEL

Supreme Court of the United States, 1942. 316 U.S. 572, 62 Sup. Ct. 1216

REED, J. This case involves the application of the overtime section of the Fair Labor Standards Act of 1938 to an employee working irregular hours for a fixed weekly wage.

Respondent, Missel, was an employee of the petitioner, Overnight Motor Transportation Company, a corporation engaged in interstate motor transportation as a common carrier. He acted as rate clerk and performed other incidental duties, none of which were connected with safety of operation. The work for which he was employed involved wide fluctuations in the time required to complete his duties. The employment of respondent began before the effective date of the Fair Labor Standards Act, October 24, 1938, and terminated October 19, 1940. Until November 1, 1938, his salary was $25.50 per week and thereafter $27.50. Time records are available for only a third of the critical period, and these show an average workweek of 65 hours, with a maximum of 80 for each of two weeks in the first year of the Act's operation and a maximum of 75 hours in each of three weeks in the second year. Nothing above the weekly wage was paid, because these maximum workweeks, computed at the statutory minimum rates with time and a half for overtime for the years in question, would not require an addition to the weekly wage.

Respondent brought a statutory action to recover alleged unpaid overtime compensation in such sum as might be found due him, an additional equal amount as liquidated damages, and counsel fee. The trial court, refusing to hear evidence on the precise amount claimed, decided in favor of the petitioner on the ground that an agreement for a fixed weekly wage for irregular hours satisfied the requirements

of the Act. Under such circumstances the court was of the view that pay would be adequate which amounted to the required minimum for the regular hours and time and a half the minimum for overtime. 40 F. Supp. 174. The Circuit Court of Appeals reversed with directions to enter judgment for the plaintiff in accordance with its opinion, an order which we interpret as authorizing a hearing in the trial court as to the amounts due. 126 F. 2d 98. As the questions involved were important in the administration of the Fair Labor Standards Act, we granted certiorari.

Petitioner renews here its contentions that the private right to contract for a fixed weekly wage with employees in commerce is restricted only by the requirement that the wages paid should comply with the minimum wage schedule of the Fair Labor Standards Act, Sec. 6, with overtime pay at time and a half that minimum, that in any event the Act does not preclude lump sum salaries in excess of the minimum, and that a contrary interpretation of the statute would render it unconstitutional.

It is plain that the respondent as a transportation worker was engaged in commerce within the meaning of the Act, and unless specifically exempted was entitled to whatever benefits the overtime provisions conferred.

While now conceding that *United States* v. *Darby*, 312 U.S. 100, settles the constitutional power of Congress to legislate against labor conditions detrimental to a minimum standard of living required for the general well-being of workers, petitioner argues that there is no power under the Constitution to regulate the hours or wages of workers whose pay, in every instance, at least equals the minimum and whose hours are not injurious to health. Freedom of contract between employer and employee, it is urged, is destroyed by such an interpretation. But hours or wages not patently burdensome to health may yet be subject to regulation to achieve other purposes. We assume here the statutory objectives discussed later, i.e., that the Act is aimed at hours as well as wages. The commerce power is plenary, may deal with activities in connection with production for commerce, and, as said in the *Darby* case, may extend "to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." p. 118. Long hours may impede the free interstate flow of commodities by creating friction between production areas with different length workweeks,

by offering opportunities for unfair competition, through undue extension of hours, and by inducing labor discontent apt to lead to interference with commerce through interruption of work. Overtime pay probably will not solve all problems of overtime work, but Congress may properly use it to lessen the irritations. Substandard labor conditions were deemed by Congress to be "injurious to the commerce and to the states from and to which the commerce flows." *United States* v. *Darby*, 312 U.S. 100, 113. To protect that commerce from the consequences of production of goods under substandard conditions, it may choose means reasonably adapted to those ends, including regulation of intrastate activities, p. 121, by minimum wage and maximum hour requirements, p. 123. Compare *Santa Cruz Co.* v. *Labor Board,* 303 U.S. 453, 466. If overtime pay may have this effect upon commerce, private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transactions "from the reach of dominant constitutional power." *Norman* v. *B. & O. R. Co.*, 294 U.S. 240, 306-311. If, in the judgment of Congress, time and a half for overtime has a substantial effect on these conditions, it lies within Congress' power to use it to promote the employees' well-being.

Statutory Construction. The petitioner attacks the basic conceptions upon which the Circuit Court of Appeals determined that the compensation paid by the respondent violated Sec. 7 (a) of the Act. That court felt that "one of the fundamental purposes of the Act was to induce work-sharing and relieve unemployment by reducing hours of work." We agree that the purpose of the Act was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work. Of course, this was one effect of the time and a half provision, but another and an intended effect was to require extra pay for overtime work by those covered by the Act even though their hourly wages exceeded the statutory minimum. The provisions of Sec. 7 (a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum, wage. By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage, and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the Act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. We conclude that the Act was designed to require payment for over-

time at time and a half the regular pay, where that pay is above the minimum, as well as where the regular pay is the minimum.

We now come to the determination of the meaning of the words "the regular rate at which he is employed." Since we have previously determined in this opinion, in the discussion of petitioner's objection to the application of the Act on the ground of unconstitutionality, that the scope of the commerce power is broad enough to support federal regulation of hours, we are concerned at this point only with the method of finding the regular rate under the contract with respondent. Congress might have sought its objective of clearing the channel of commerce of the obstacles of burdensome labor disputes by minimum wage legislation only. We have seen that it added overtime pay. The wages for minimum pay are expressed in terms of so much an hour. Sec. 6 (a) (1)—"Not less than 25 cents an hour" with raises for succeeding years or by order of the Administrator under Sec. 8. Cf. *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126. Neither the wage, the hour nor the overtime provisions of Sections 6 and 7 of their passage spoke specifically of any other method of paying wages except by hourly rate. But we have no doubt that pay by the week, to be reduced by some method of computation to hourly rates, was also covered by the Act. It is likewise abundantly clear from the words of Sec. 7 that the unit of time under that section within which to distinguish regular from overtime is the week. "No employer shall . . . employ any of his employees . . . (1) for a workweek longer than forty-four hours. . . ." Sec. 7 (a) (1).

No problem is presented in assimilating the computation of overtime for employees under contract for a fixed weekly wage for regular contract hours which are the actual hours worked, to similar computations for employees on hourly rates. Where the employment contract is for a weekly wage with variable or fluctuating hours, the same method of computation produces the regular rate for each week. As that rate is on an hourly basis, it is regular in the statutory sense, inasmuch as the rate per hour does not vary for the entire week, though week by week the regular rate varies with the number of hours worked. It is true that the longer the hours, the less the rate and the pay per hour. This is not an argument, however, against this method of determining the regular rate of employment for the week in question. Apart from the Act, if there is a fixed weekly wage regardless of the length of the workweek, the longer the hours the less are the earnings per hour. This method of computation has been approved by each circuit court of appeals which has considered

such problems. It is this quotient which is the "regulate rate at which an employee is employed" under contracts of the types described and applied in this paragraph for fixed weekly compensation for hours, certain or variable.

Petitioner invokes the presumption that contracting parties contemplate compliance with law and contends that accordingly there is no warrant for construing the contract as paying the employee only his base pay or "regular rate," regardless of hours worked. It is true that the wage paid was sufficiently large to cover both base pay and fifty per cent additional for the hours actually worked over the statutory maximum without violating Sec. 6. *But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage,* had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed rate. [Author's italics.] Implication cannot mend a contract so deficient in complying with the law. This contract differs from the one in *Walling* v. *Belo Corp., post,* p. 624, where the contract specified an hourly rate and not less than time and a half for overtime, with a guaranty of a fixed weekly sum, and required the employer to pay more than the weekly guaranty where the hours worked at the contract rate exceeded that sum.

In the Circuit Court of Appeals it was held that the liquidated damages provision, Sec. 16(b) of the Act, 52 Stat. 1069, was mandatory on the courts, regardless of the good faith of the employer or the reasonableness of his attitude. Petitioner attacks this conclusion as a denial of due process because, if the damage provision is mandatory, the employer is "without opportunity to test the issues before the courts," citing *Ex parte Young,* 209 U.S. 123, *Wadley Southern Ry. Co.* v. *Georgia,* 235 U.S. 651, and other similar cases. Petitioner points out that, if there was a failure to pay the statutory overtime, it resulted from an inability to determine whether the employee was covered by the Act.

Section 13 (b) (1) exempts from Sec. 7 employees for whom the Interstate Commerce Commission has power to establish maximum hours of service. This exemption was derived from the Motor Carrier Act of 1935, 49 Stat. 543, which authorized the Commission to regulate "maximum hours of service of employees." A definite order leaving employees with the duties of respondent subject to the Fair Labor Standards Act was not passed by the Commission until March 4, 1941, after respondent's employment ended. This conclusion, however, was foreshadowed by the ruling of the Commission, December

29, 1937, that it would limit regulations concerning maximum hours to employees whose functions affected the safety of operations. Other orders, bulletins and opinions pointing to the final conclusion intervened. These various determinations now make it clear that respondent was subject at all times since the effective date of the Fair Labor Standards Act to its provisions. The Interstate Commerce Commission never had the power to regulate his hours.

Perplexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee. The wages were specified for him by the statute, and he was no more at fault than the employer. The liquidated damages for failure to pay the minimum wages under Sections 6 (a) and 7 (a) are compensation, not a penalty or punishment by the Government. Cf. *Huntington* v. *Attrill,* 146 U.S. 657, 667, 668, 674, 681. The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages. *Atchison, T. & S. F. Ry. Co.* v. *Nichols,* 264 U.S. 348, 351. Nor can it be said that the exaction is violative of due process. It is not a threat of criminal proceedings or prohibitive fines, such as have been held beyond legislative power by the authorities cited by petitioner. Even double damages treated as penalties have been upheld as within constitutional power.

Affirmed.

Case Questions

1. What does this case involve? What is plaintiff suing for?
2. May Congress regulate overtime payments under the commerce power?
3. What does Sec. 7 (a) call for as to overtime payment?
4. How is the "regular rate" to be determined?
5. What deficiencies were present in this contract of hire?
6. What was Congress' intent in requiring premium overtime payment?
7. Why does the petitioner company believe the liquidated damage provision to be unreasonable? How does the court reply?

SECTION 94.3. VALIDITY OF SPECIAL COMPENSATION ARRANGEMENTS

The initial decision presented for analysis in this section is *United States* v. *Rosenwasser*. Herein is raised the issue of whether employees compensated under incentive wage systems are entitled to invoke the protection of the Act.

In the famous case of *Walling* v. *Belo Corporation*, the second reprint in this section, the court held permissible under the Act a plan whereunder the employer contracted with his employees to pay a stipulated hourly rate plus overtime of not less than one and one half times such rate for hours in excess of 40 per week; and, in addition, to guarantee at least a certain minimum weekly wage regardless of the number of hours worked each week. Further, the court declared it legal to hire an employee to work in excess of 40 hours per workweek if it was understood by the employee that the wage paid covered overtime hours and that additional compensation would be forthcoming if the hours worked exceeded the agreed workweek.

The *Helmerich* case is the last one presented for analysis. The court here rejects a plan designed to defeat the legislative intent of the Act. The employer, in order to continue substandard wages in effect, paid his workers under a so-called "split day" plan. "This plan arbitrarily divided each regular tour into two parts for purposes of calculating and applying hourly wage rates." To the first segment of time was applied a base rate, while to the latter remaining hours was applied an overtime rate, different from the base rate. Base and overtime rates were mathematically computed to result in the same total compensation existent theretofore.

UNITED STATES v. ROSENWASSER

Supreme Court of the United States, 1945. 323 U.S. 360, 65 Sup. Ct. 295

MURPHY, J. This is a direct appeal from the judgment of the District Court for the Southern District of California. That court sustained appellee's demurrer to an information charging violations of the minimum wage, overtime and record-keeping provisions of the Fair Labor Standards Act of 1938. . . . This was done on the ground that the Act is inapplicable where employees are compensated by piece rates, as is the case in appellee's garment business. We are thus met with the clear issue of whether the Act covers piece rate employees so as to subject their employers to its criminal provisions.

Neither the policy of the Act nor the legislative history gives any real basis for excluding piece workers from the benefits of the statute.

This legislation was designed to raise substandard wages and to give additional compensation for overtime work as to those employees within its ambit, thereby helping to protect this nation "from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health." Sen. Rep. No. 884 (75th Cong., 1st Sess.), p. 4; *United States* v. *Darby*, 312 U.S. 100. No reason is apparent why piece workers who are underpaid or who work long hours do not fall within the spirit or intent of this statute, absent an explicit exception as to them. Piece rate and incentive systems were widely prevalent in the United States at the time of the passage of this Act and we cannot assume that Congress meant to discriminate against the many workers compensated under such systems. Certainly the evils which the Act sought to eliminate permit of no distinction or discrimination based upon the method of employee compensation and none is evident from the legislative history.

The plain words of the statute give an even more unmistakable answer to the problem. Section 6 (a) of the Act provides that "every employer" shall pay to "each of his employees who is engaged in commerce or in the production of goods for commerce" not less than specified minimum "rates" which at present are "not less than 30 cents an hour." Section 7 (a) provides that "no employer" shall employ "any of his employees" for longer than specified hours in any week without paying overtime compensation "at a rate not less than one and one-half times the regular rate at which he is employed." The term "employee" is defined in Sec. 3 (e) to include "any individual employed by an employer," with certain exceptions not here pertinent being specified in Sec. 13, and the term "employ" is defined in Sec. 3 (g) to include "to suffer or permit to work."

A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame. The use of the words "each" and "any" to modify "employee," which in turn is defined to include "any" employed individual, leaves no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded. And "each" and "any" employee obviously and necessarily includes one compensated by a unit of time, by the piece or by any other measurement. A worker is as much an employee when paid by the piece as he is when paid by the hour. The time or mode of compensation, in other words, does not control the determination of whether one is an employee within the meaning of the Act and no court is justified in reading in an exception based

upon such a factor. When combined with the criminal provisions of Sections 15 and 16, the unrestricted sweep of the term "employee" serves to inform employers with definiteness and certainty that they are criminally liable for willful violations of the Act in relation to their piece rate employees as well as to their employees compensated by other methods. See *United States* v. *Darby, supra,* 125, 126.

The fact that Sec. 6 (a) speaks of a minimum rate of pay "an hour," while Sec. 7 (a) refers to a "regular rate" which we have defined to mean "the hourly rate actually paid for the normal, non-overtime workweek," *Walling* v. *Helmerich & Payne,* 323 U.S. 37, 40, does not preclude application of the Act to piece workers. Congress necessarily had to create practical and simple measuring rods to test compliance with the requirements as to minimum wages and overtime compensation. It did so by setting the standards in terms of hours and hourly rates. But other measures of work and compensation are not thereby voided or placed outside the reach of the Act. Such other modes merely must be translated or reduced by computation to an hourly basis for the sole purpose of determining whether the statutory requirements have been fulfilled. *Overnight Motor Co.* v. *Missel,* 316 U.S. 572, 579; *Walling* v. *Helmerich & Payne, supra,* 40. These hours standards are not so phrased as reasonably to mislead employers into believing that the Act is limited to employees working on an hourly wage scale. Nor can a court rightly use these standards as a basis for cutting off the benefits of the Act from employees paid by other units of time or by the piece. If that were permissible, ready means for wholesale evasion of the Act's requirements would be provided.

It follows that the court below erred in sustaining appellee's demurrer to the information. Its judgment is reversed.

Case Questions

1. What type of case is this, civil or criminal?
2. See Sec. 16 of the Fair Labor Standards Act in the Appendix. When may the imprisonment penalty be invoked?
3. What is the issue of the case?
4. How does the court determine the issue and what reasons does it advance?

WALLING v. BELO CORPORATION

Supreme Court of the United States, 1942. 316 U.S. 624, 62 Sup. Ct. 1223

BYRNES, J. This is a proceeding by the Administrator of the Wage and Hour Division of the Department of Labor to restrain the

respondent corporation from alleged violation of the Fair Labor Standards Act. The Administrator sought to prevent the use by respondent, under certain contracts with its employees, of wage agreements deemed by the Administrator violative of the time and a half for overtime provisions of Sec. 7 (a) as implemented by Sections 15 (a) (1) and (2).

The respondent, a Texas corporation, is the publisher of the Dallas *Morning News* and other periodicals, and the owner and operator of radio station WFAA. It has some 600 employees. Those in the mechanical departments work under a collective bargaining agreement and are not involved in the present dispute. The others, and particularly those in the newspaper business, work irregular hours. Prior to the effective date of the Act, October 24, 1938, respondent had been paying all but two or three of these employees more than the minimum wage required by the Act. They received vacations of approximately two weeks each year at full pay; special bonuses at the end of the year amounting to approximately one week's earnings; and full pay during periods of illness, sometimes continuing for weeks and sometimes for months. At the time of the trial, 28 superannuated employees were carried on the payroll at full rates of pay. Employees were permitted absences to attend to personal affairs without deductions from pay. When they were required to work long hours in any week, they were given compensating time off in succeeding weeks. Life insurance was carried for them at respondent's expense.

After the enactment of the Fair Labor Standards Act but before its effective date, respondent endeavored to adjust its compensation system to meet the requirements of the Act by negotiating a contract with each of its employees except those in the mechanical departments. These contracts were in the form of letters stating terms which were agreed to by the employees. The following is a typical letter:

"The Fair Labor Standards Act which goes into effect on October 24, 1938, provides for the following minimum wages and maximum hours of employment:

"First year—25¢ per hour minimum
44 hours maximum per week
"Second year—30¢ per hour minimum
42 hours maximum per week
"Third year—40¢ per hour minimum
40 hours maximum per week

except that employees may work more than the number of hours specified above, provided that overtime rates shall be a minimum of one and one-half times the basic rate.

"In order to conform our employment arrangements to the scheme of the Act without reducing the amount of money which you receive each week, we advise that from and after October 24, 1938, your basic rate of pay will be . . . 67 . . . cents per hour for the first forty-four hours each week, and that for time over forty-four hours each week you will receive for each hour of work not less than one and one-half times such basic rate above mentioned, with a guaranty on our part that you shall receive weekly, for regular time and for such overtime as the necessities of the business may demand, a sum not less than . . . $40. . . ."

In most cases, as in this example, the specified hourly rate was fixed at 1/60th of the guaranteed weekly wage. The result was that during the first year under the Act, when the statutory maximum of regular hours was 44, the employee was required to work 54½ hours before he became entitled to any pay in addition to the weekly guaranty. When the employee worked enough hours at the contract rate to earn more than the guaranty, the surplus time was paid for at the rate of 150% of the hourly contract wage. If the employee received an increase in pay, the hourly rate and weekly rate were readjusted.

For eighteen months the system embodied in these contracts was followed to the apparent satisfaction of employer and employees. Respondent was then advised that the arrangement was in violation of the Act and that it was liable to its employees in an amount of from 30 to 60 thousand dollars. It was informed by the regional director in Dallas and by an official in the Administrator's office in Washington that an employee's complaint had precipitated the investigation. These officials declined to give the name of the employee. . . .

Petitioner appealed to the Circuit Court of Appeals from the dismissal of its complaint. That Court affirmed the judgment of the District Court. 121 F. 2d 207. It found that the contracts were "actual bona fide contracts of employment" and that "they were intended to, and did, really fix the regular rates at which each employee was employed." We granted certiorari because of the importance of the question in the administration of the Act.

It is no doubt true, as petitioner contends, that the purpose of respondent's arrangement with its employees was to permit, as far as possible, the payment of the same total weekly wage after the Act as before. But nothing in the Act bars an employer from contracting

with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act.

The Act requires that for each hour of work beyond the statutory maximum, the employees must be paid "not less than one and one-half times the regular rate at which he is employed." This case turns upon the meaning of the words "the regular rate at which he is employed." Respondent contends that the regular rate under the illustrative contract, which is set out above and to which we shall refer throughout, is 67 cents an hour. Petitioner argues, however, that the 67 cents hourly rate mentioned in the contract is meaningless and that the agreement is, in effect, for a weekly salary of $40 without regard to fluctuations in the number of hours worked each week. Treating the contract as one for a fixed weekly salary, he urges that the regular hourly rate for any single week is the quotient of the $40 guaranty divided by the number of hours actually worked in that week. Under this formula the employee is entitled to the regular hourly rate thus determined for the first 44 hours each week and to not less than one and one-half times that rate for each hour thereafter.

In its initial stage the question to which this dispute gives rise is a question of law, a question of interpretation of the statutory term "regular rate." But it is agreed that as a matter of law employer and employee may establish the "regular rate" by contract. In the case before us, such an effort has been made, and in the example given the regular rate has been specified as 67 cents an hour. The difficulty arises from the inclusion of the $40 guaranty. The problem is whether the intention of the parties to set 67 cents an hour as the regular rate squares with their intention to guarantee a weekly income of $40. The Administrator's position is that these two objectives are inherently inconsistent and that the intention to fix the regular hourly rate at 67 cents is overridden by the intention to guarantee the $40 per week.

We cannot agree. In the first place, when an employee works more than 54½ hours in a single week, he is admittedly entitled to more than the $40 guarantee. The record shows that in such a case, the employee is paid at the rate of $1.00 an hour (150% × $.67) for each hour of overtime. In this situation, then, it is clearly the guaranty that becomes inoperative and the 67 cent hourly rate fixed by the contract that is controlling.

In the second place, although it is perfectly true that when the employee works less than 54½ hours during the week his pay is determined by the $40 guaranty, it does not dispose of the problem simply to pay this. The question remains whether the $40 contemplates compensation for overtime as well as basic pay. The contract says that the employee is to receive 67 cents an hour for the first 44 hours and *"not less than* one and one-half times such basic rate" for each hour over 44. Consequently, if an employee works 50 hours in a given week, it might reasonably be said that his $40 wage consists of $29.48 for the first 44 hours (44 × $.67) plus $10.52 for the remaining six hours (6 × $1.753). To be sure, $1.753 is more than 150% of $.67. But the Act does not prohibit paying more; it requires only that the overtime rate be "not less than" 150% of the basic rate. It is also true that under this formula the overtime rate per hour may vary from week to week. But nothing in the act forbids such fluctuation.

The gist of the Administrator's objection to this interpretation is that both the basic rate and the overtime rate are so "artificial" that the parties to the contract cannot fairly be supposed to have intended that it be so construed. It cannot be denied that the flexibility of the overtime rate is considerable, but this flexibility may well have been intended if it was the only means of securing uniformity in weekly income. Moreover, under the Administrator's interpretation, the regular rate in the example given is $40 divided by the number of hours worked each week. Since the number of hours worked fluctuates so drastically from week to week, this "regular" rate is certainly "irregular" in a mathematical sense. And inasmuch as it cannot be calculated until after the workweek has been completed, it is difficult to say that it is "regular" in the sense that either employer or employee knows what it is or can plan on the basis of it.

The artificiality of the method urged by the Administrator is accentuated by the nature of his counter-proposal of two plans by which the weekly wage of an employee whose hours vary from week to week may be stabilized. One of these officially approved plans is known as the "time-off plan" and is explained in Interpretative Bulletin No. 4. Under this plan the employment must be placed upon an hourly rate basis with no mention of a guaranty. The pay days must be spaced at intervals of two weeks or longer. If the pay period is set at two weeks and the employee is required to work overtime during the first week, he is given sufficient time off during the second week to keep his paycheck at a constant level. In our view, this

counter-proposal far exceeds in technicality the plan adopted by respondent. Moreover, its operation is to provide a ceiling but not a floor for the wage. Since the pay is by the hour and there is no guaranty, in a pay period in which an employee works few hours, his wage may fall far below the level aimed at.

The other officially approved arrangement is known as the "prepayment plan," and is also explained in Bulletin No. 4. Under this plan, virtually the same arrangement as that which we have been using as an example can stand. That is to say, an employee may be promised 67 cents an hour for the first 44 hours, $1.00 for each hour over 44, with a guaranty of $40 a week. However, in any week in which the employee's earnings at the stated hourly rates do not equal the $40 guaranty, the balance necessary to fulfill the guaranty must be treated as a loan to him. If in any succeeding week his earnings at the stated hourly rates exceed the guaranty, the excess is withheld by the employer as a repayment of the loan. But if his earnings do not exceed the guaranty in any succeeding week, and after receiving his pay check he does not return to work, the employer is presumed to make an effort to collect the excess amount paid to the employee in a previous week. If the employer does not recover this excess amount, then for all practical purposes the plan operates just as does the plan followed by the respondent in this case. About the only difference is that one is called a "guaranty plan," while the other is called a "prepayment plan." In the opinion of the Administrator, the "prepayment plan" is lawful; the "guaranty plan" is unlawful.

But the guaranty contract in this case carries out the intention of the Congress. It specifies a basic hourly rate of pay and not less than time and a half that rate for every hour of overtime work beyond the maximum hours fixed by the Act. It is entirely unlike the *Missel* case, *ante*, p. 572. In the contract in that case, there is no stated hourly wage and no provision for overtime. Under the decision in that case, an employer who engages a worker for a fixed weekly wage of $40 for irregular hours and works him 65 hours (in a year when the maximum workweek is 44 hours), owes the employee $46.38.[1] . . . For the same hours under the Belo contract, at the hourly contract rate of 67 cents, the worker would receive $50.48. There is a difference in compensation, but that is the agreement of the parties and it is within the letter and the intention of the law.

The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of "regular rate" when

[1] 75½ hours × 61½ cents per hour.

Congress has failed to provide one. Presumably, Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable. And that which it was unwise for Congress to do, this Court should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours. Where the question is as close as this one, it is well to follow the Congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected. This policy is based upon a common sense recognition of the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day. Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance. Congress has said nothing to prevent this desirable objective. This Court should not.

Affirmed.

Case Questions

1. Was the regular rate of pay under the Belo plan necessarily greater than the statutory minimum? Why?
2. Were the employees satisfied? Did it guarantee a limit below which earnings would not drop?
3. May an employee secure earnings greater than the $40 guaranty?
4. Explain the "time-off plan." Is it permissible?
5. Explain the "prepayment plan." Is it permissible?
6. What is the Court's decision on the Belo plan?

WALLING v. HELMERICH & PAYNE

Supreme Court of the United States, 1944. 323 U.S. 37, 65 Sup. Ct. 11

MURPHY, J. We are concerned here with the question whether certain provisions of employment contracts relating to the computation and application of regular and overtime wage rates conform to the requirements of Sec. 7 (a) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. Sec. 201 *et seq.*

Respondent is engaged in the production of oil and gas for interstate commerce and its employees admittedly are covered by the Act. Prior to October 24, 1938, the effective date of the Act, certain of respondent's employees worked 8-, 10- and 12-hour daily shifts, or "tours," and were paid a specified wage for each tour. These wages

were in excess of the minimum required by the Act, though the number of tours per week would often cause an employee to work more than the maximum hours allowed by the Act without overtime pay being required.

In order to maintain the same wage levels after the Act became effective, respondent made new employment contracts with the employees in question whereby they received their wages under the so-called "poxon" or split-day plan. This plan arbitrarily divided each regular tour into two parts for purposes of calculating and applying hourly wage rates. The first four hours of each 8-hour tour, the first five hours of each 10-hour tour, and the first five hours of each 12-hour tour were assigned a specified hourly rate described as the "base or regular rate." The remaining hours in each tour were treated as "overtime" and called for payment at one and one-half times the "base or regular rate." The contracts then recited that the "base rate" set forth "shall never apply to more than 40 hours in any work week."

These so-called "regular" and "overtime" hourly rates were calculated so as to insure that the total wages for each tour would continue the same as under the original contracts, thereby avoiding the necessity of increasing wages or decreasing hours of work as the statutory maximum workweek of 40 hours became effective. Only in the extremely unlikely case where an employee's tours totalled more than 80 hours in a week did he become entitled to any pay in addition to the regular tour wages that he would have received prior to the adoption of the split-day plan. Until more than 80 hours had been worked the plan operated so that the employee could not be credited with more than 40 hours of "regular" work, the remaining time being denominated "overtime." Hence, since the wages under the old system and under the split-day plan were identical, the original tour rates could be used as the simple method of computing wages for each pay period. The actual and regular workweek was accordingly shorn of all significance.

The District Court and the Circuit Court of Appeals both held that the split-day plan of compensation, under the decision of this Court in *Walling* v. *Belo Corp.*, 316 U.S. 624, did not violate the provisions of Sec. 7 (a) of the Fair Labor Standards Act. We cannot agree.

Section 7 (a) limits to 40 hours a week the number of hours that an employer may employ any of his employees subject to the Act, unless the employee receives compensation for his employment in excess of 40 hours at a rate "not less than one and one-half times

the regular rate at which he is employed." The split-day plan here in issue satisfies neither the purpose nor the mechanics of this requirement.

As we pointed out in *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, 577-578, the Congressional purpose in enacting Sec. 7 (a) was twofold: (1) to spread employment by placing financial pressure on the employer through the overtime pay requirement, see also *Southland Gasoline Co.* v. *Bayley*, 319 U.S. 44, 48; and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act. Yet neither objective could be attained under the split-day plan. It enabled respondent to avoid paying real overtime wages for at least the first 40 hours worked in excess of the statutory maximum workweek, thus negativing any possible effect such a payment might have had upon the spreading of employment. And the plan was so designed as to deprive the employees of their statutory right to receive for all hours worked in excess of the first regular 40 hours one and one-half times the actual regular rate. The statutory maximum workweek of 40 hours was by contract twisted into an 80 hour maximum workweek. No plan so obviously inconsistent with the statutory purpose can lay a claim to legality.

The split-day plan, moreover, violated the basic rules for computing correctly the actual regular rate contemplated by Sec. 7 (a). While the words "regular rate" are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek. *Overnight Motor Co.* v. *Missel, supra.* To compute this regular rate for respondent's employees, assuming the same wages and tours, required only the simple process of dividing the wages received for each tour by the number of hours in that tour. This regular rate was then applicable to the first 40 hours regularly worked on the tours and the overtime rate (150% of the regular rate) became effective as to all hours worked in excess of 40.

But respondent's plan made no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working. Nor did it attempt to apply the regular rate to the first 40 hours actually and regularly worked. Instead the plan provided for a fictitious regular rate consisting of a figure somewhat lower than the rate actually received. This illusory rate was arbitrarily allocated to the first portion of each day's regular labor; the latter portion was designated "overtime" and called for compensation at a rate one and one-half times the fictitious regular rate. Thus when an employee on regular eight-hour tours had actually worked 40 hours, respondent could point to the em-

ployee's contract and claim that he had worked only 20 "regular" hours and 20 "overtime" hours. Hence he was entitled to no additional remuneration for work in excess of 40 hours except in the unlikely situation, which never in fact occurred, of his actually working more than 80 hours. The vice of respondent's plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor did it allow extra compensation to be paid for true overtime hours. It was derived not from the actual hours and wages but from ingenious mathematical manipulations, with the sole purpose being to perpetuate the pre-statutory wage scale.

It is no answer that the artificial regular rate was a product of contract or that it was in excess of the statutory minimum. The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours actually worked in excess of 40. Any other conclusion in this case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act.

Nothing in this Court's decision in *Walling* v. *Belo Corp., supra,* sanctions the use of the split-day plan. The controversy there centered about the question whether the regular rate should be computed from the guaranteed weekly wage or whether it should be identical with the hourly rate set forth in the employment contract. There was no question, as here, pertaining to the applicability of the regular rate to the first 40 hours actually and regularly worked, with the overtime rate applying to all hours worked in excess thereof. . . .

We accordingly reverse the judgment of the court below with directions to remand the case to the District Court for further proceedings in conformity with this opinion.

Reversed.

Case Questions

1. Explain the operation of the split-day plan.
2. How did the lower courts hold? Does the Supreme Court agree?
3. Explain the grounds upon which the Supreme Court reversed, namely, the "vice of respondent's plan."

SECTION 95. CHILD LABOR PROVISIONS OF THE ACT

The child labor provisions of the Act forbid the shipment in interstate commerce of any goods produced in the United States with the assistance of child labor.

Sec. 3 (l) of the Act defines oppressive child labor as follows:

"'Oppressive child labor' means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous . . . or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age."

Under subsection (2) above, the Children's Bureau has forbidden employment of minors in the following age categories:

(1) Children between the ages of 16 to 18 may not be employed in the manufacture of explosives, coal mining, logging or sawmill operations, the operation of motor vehicles, and occupations involving exposure to radioactive substances.

(2) Children between the ages of 14 to 16 are prohibited from employment in all the activities listed in (1) above. In addition, they may not engage in manufacturing, mining, or processing operations, nor operate hoisting apparatus or power-driven machinery.

It is permissible to employ children from 14 to 16 years of age in any occupations not forbidden in (1) or (2) above, subject to the following limitations:

(a) Employment must be outside of school hours.

(b) Employment must not be for longer than 8 hours a day, or 40 hours a week, when school is not in session.

(c) Employment during school sessions is limited to 3 hours a day, or 18 hours a week.

Questions on Section 95

1. Who issues regulations concerning permissible child labor employment?
2. What employment limitations are placed on the 16 to 18 year age groups?
3. What qualifications are attached to the employment of minors in the 14 to 16 year age group?

SECTION 96. ADMINISTRATIVE ASPECTS OF THE ACT

Congress vested authority to administer and enforce the provisions of the Fair Labor Standards Act in the Wage and Hour Division of the Department of Labor. This Division is governed by an Administrator appointed by the President with the advice and consent of the Senate.

The most important function of the Administrator is to restrain violations of the enactment by instituting civil injunction suits in the Federal courts. If the violations are flagrant, criminal action may be had through the office of the Attorney General. In addition to his policing activities, the Administrator issues certificates granting permission to employers to employ apprentices, messengers, and physically and mentally handicapped persons at rates below the prescribed minimum.

The Congress vested in the Administrator the power to clarify and interpret the statute as well as police its enforcement. The findings of fact and bulletin interpretations of the Wage and Hour Division are accorded considerable respect in the courts.

Enforcement of the Act is accomplished through Sections 15, 16, and 17. A summary of these sections is given below:

(1) Section 15 forbids the interstate shipments of goods produced in violation of the wage, hour, and child labor provisions of the Act. In addition, it provides against discriminations as to employees who have filed complaints or engaged in proceedings under the Act, and, finally, makes it unlawful to falsify records and reports that are required by Section 11(c).

(2) Section 16 imposes a misdemeanor penalty for violations of Section 15. The penalty amounts to a $10,000 fine and/or imprisonment for not more than 6 months. The imprisonment penalty can be invoked only for offenses beyond the first conviction.

(3) Section 16 also provides that any employer violating the wage and hour provisions of the Act is liable to the affected employees to the extent of the minimum wage or overtime shortage, plus an equal amount as liquidated damages.

(4) Section 17 invests the district courts of the United States with authority to act on injunction proceedings instituted by the Administrator.

Questions on Section 96

1. What is the most important function of the Administrator? What are his subsidiary functions?
2. Outline the criminal sanction provided by Sec. 16 of the Act. Who pursues this remedy?
3. What is the significance of Sec. 17 of the Act?

APPENDIX

NATIONAL LABOR RELATIONS ACT AS AMENDED BY LABOR MANAGEMENT RELATIONS ACT, 1947

(49 Stat. 449, Public No. 198, 74th Congress, as amended by Act of June 23, 1947, Public Law 101, 80th Congress.)

AN ACT to diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Findings and Policies

Sec. 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Definitions

Sec. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or

any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 3 of this Act.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical na ture, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training

in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

National Labor Relations Board

Sec. 3. (a) The National Labor Relations Board (hereinafter called the "Board") created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

Sec. 4. (a) Each member of the Board and the General Counsel of the Board shall receive a salary of $12,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such

regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

Sec. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

Sec. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condi-

tion of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall

not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Representatives and Elections

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*,

That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelvemonth period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

(3) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file anually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in

the initial filing of subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

Prevention of Unfair Labor Practices

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C),

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence or

the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (a), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order on [of] the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).

Investigatory Powers

Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may admin-

ister oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

Sec. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

Limitations

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Sec. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Sec. 15. Wherever the application of the provisions of section 272 of chapter 10 of the Act entitled "An Act to estab-

lish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (U.S.C., title 11, sec. 672), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

Sec. 16. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

TITLE I

Effective Date of Certain Changes

Sec. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

Sec. 103. No provisions of this title shall affect any certification or representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

Sec. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

TITLE II

Conciliation of Labor Disputes in Industries Affecting Commerce; National Emergencies

Sec. 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes

in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

Sec. 202. (a) There is hereby created an independent agency to be known as the Federal Mediation and Conciliation Service (herein referred to as the "Service", except that for sixty days after the date of the enactment of this Act such term shall refer to the Conciliation Service of the Department of Labor). The Service shall be under the direction of a Federal Mediation and Conciliation Director (hereinafter referred to as the "Director"), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall receive compensation at the rate of $12,000 per annum. The Director shall not engage in any other business, vocation, or employment.

(b) The Director is authorized, subject to the civil-service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with the Classification Act of 1923, as amended, and may, without regard to the provisions of the civil-service laws and the Classification Act of 1923, as amended, appoint and fix the compensation of such conciliators and mediators as may be necessary to carry out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation of itemized vouchers therefor approved by the Director or by any employee designated by him for that purpose.

(c) The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year.

(d) All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 8 of the Act entitled "An Act to create a Department of Labor," approved March 4, 1913 (U.S.C., title 29, sec. 51), and all functions of the United States Conciliation Service under any other law are hereby transferred to the Federal Mediation and Conciliation Service, together with the personnel and records of the United States Conciliation Service. Such transfer shall take effect upon the sixtieth day after the date of enactment of this Act. Such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of Labor.

Functions of the Service

Sec. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by con-

ciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

Sec. 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute.

Sec. 205. (a) There is hereby created a National Labor-Management Panel which shall be composed of twelve members appointed by the President, six of whom shall be selected from among persons outstanding in the field of management and six of whom shall be selected from among persons outstanding in the field of labor. Each member shall hold office for a term of three years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and the terms of office of the members first taking office shall expire, as designated by the President at the time of appointment, four at the end of the first year, four at the end of the second year, and four at the end of the third year after the date of appointment. Members of the panel, when serving on business of the panel, shall be paid compensation at the rate of $25 per day, and shall also be entitled to receive an allowance for actual and necessary travel and subsistence expenses while so serving away from their places of residence.

(b) It shall be the duty of the panel, at the request of the Director, to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjustment shall be administered, particularly with reference to controversies affecting the general welfare of the country.

National Emergencies

Sec. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

Sec. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the

United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Members of a board of inquiry shall receive compensation at the rate of $50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U.S.C. 19, title 15, secs. 49 and 50, as amended), are hereby made applicable to the powers and duties of such board.

Sec. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate circuit court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 29, secs. 346 and 347).

Sec. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

Sec. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

Compilation of Collective Bargaining Agreements, etc.

Sec. 211. (a) For the guidance and information of interested representa-

tives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of all available collective bargaining agreements and other available agreements and actions thereunder settling or adjusting labor disputes. Such file shall be open to inspection under appropriate conditions prescribed by the Secretary of Labor, except that no specific information submitted in confidence shall be disclosed.

(b) The Bureau of Labor Statistics in the Department of Labor is authorized to furnish upon request of the Service, or employers, employees, or their representatives, all available data and factual information which may aid in the settlement of any labor dispute, except that no specific information submitted in confidence shall be disclosed.

Exemption of Railway Labor Act

Sec. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

TITLE III

Suits by and against Labor Organizations

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Restrictions on Payments to Employee Representatives

Sec. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or

release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and the employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U.S.C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U.S.C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) be con-

strued as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

Boycotts and Other Unlawful Combinations

Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or other self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Restriction on Political Contributions

Sec. 304. Section 313 of the Federal Corrupt Practices Act, 1925 (U.S.C., 1940 edition, title 2, sec. 251; Supp. V, title 50, App., sec. 1509), as amended, is amended to read as follows:

"SEC. 313. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer

of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both. For the purposes of this section 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

Strikes by Government Employees

Sec. 305. It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strike. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for reemployment for three years by the United States or any such agency.

TITLE IV

Creation of Joint Committee to Study and Report on Basic Problems Affecting Friendly Labor Relations and Productivity

Sec. 401. There is hereby established a joint congressional committee to be known as the Joint Committee on Labor-Management Relations (hereafter referred to as the committee), and to be composed of seven Members of the Senate Committee on Labor and Public Welfare, to be appointed by the President pro tempore of the Senate, and seven Members of the House of Representatives Committee on Education and Labor, to be appointed by the Speaker of the House of Representatives. A vacancy in membership of the committee shall not affect the powers of the remaining members to execute the functions of the committee, and shall be filled in the same manner as the original selection. The committee shall select a chairman and a vice chairman from among its members.

Sec. 402. The committee, acting as a whole or by subcommittee, shall conduct a thorough study and investigation of the entire field of labor-management relations, including but not limited to—

(1) the means by which permanent friendly cooperation between employers and employees and stability of labor relations may be secured throughout the United States;

(2) the means by which the individual employee may achieve a greater productivity and higher wages, including plans for guaranteed annual wages, incentive profit-sharing and bonus systems:

(3) the internal organization and administration of labor unions, with special attention to the impact on individuals of collective agreements requiring membership in unions as a condition of employment;

(4) the labor relations policies and practices of employers and associations of employers;

(5) the desirability of welfare funds for the benefit of employees and their relation to the social-security system;

(6) the methods and procedures for best carrying out the collective-bargaining processes, with special attention to the effects of industry-wide or regional bargaining upon the national economy;

(7) the administration and operation of existing Federal laws relating to labor relations; and

(8) such other problems and subjects in the field of labor-management relations as the committee deems appropriate.

Sec. 403. The committee shall report to the Senate and the House of Representatives not later than March 15, 1948, the results of its study and investigation, together with such recommendations as to necessary legislation and such other recommendations as it may deem advisable, and shall make its final report not later than January 2, 1949.

Sec. 404. The committee shall have the power, without regard to the civil-service laws and the Classification Act

of 1923, as amended, to employ and fix the compensation of such officers, experts, and employees as it deems necessary for the performance of its duties, including consultants who shall receive compensation at a rate not to exceed $35 for each day actually spent by them in the work of the committee, together with their necessary travel and subsistence expenses. The committee is further authorized, with the consent of the head of the department or agency concerned, to utilize the services, information, facilities, and personnel of all agencies in the executive branch of the Government and may request the governments of the several States, representatives of business, industry, finance, and labor, and such other persons, agencies, organizations, and instrumentalities as it deems appropriate to attend its hearings and to give and present information, advice, and recommendations.

Sec. 405. The committee, or any subcommittee thereof, is authorized to hold such hearings; to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Eightieth Congress; to require by subpena or otherwise the attendance of such witnesses and the production of such books, papers, and documents; to administer oaths; to take such testimony; to have such printing and binding done; and to make such expenditures within the amount appropriated therefor; as it deems advisable. The cost of stenographic services in reporting such hearings shall not be in excess of 25 cents per one hundred words. Subpenas shall be issued under the signature of the chairman or vice chairman of the committee and shall be served by any person designated by them.

Sec. 406. The members of the committee shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the committee, other than expenses in connection with meetings of the committee held in the District of Columbia during such times as the Congress is in session.

Sec. 407. There is hereby authorized to be appropriated the sum of $150,000, or so much thereof as may be necessary, to carry out the provisions of this title, to be disbursed by the Secretary of the Senate on vouchers signed by the chairman.

TITLE V

Definitions

Sec. 501. When used in this Act—

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

Saving Provision

Sec. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

Separability

Sec. 503. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

RAILWAY LABOR ACT

(Act of May 20, 1926, Pub. L. No. 257, 44 Stat. 577-587; Act of June 21, 1934, Pub. L. No. 442, 48 Stat. 1185-1197; Act of April 10, 1936, Pub. L. No. 487, 49 Stat. 1189)

AN ACT to provide for the prompt disposition of disputes between carriers and their employees, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

Definitions

Sec. 1. When used in this Act and for the purposes of this Act—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": Provided, however. That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this Act.

Third. The term "Mediation Board" means the National Mediation Board created by this Act.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the Supreme Court of the District of Columbia; and the term "circuit court of appeals" includes the Court of Appeals of the District of Columbia.

General Purposes

Sec. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom or association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates

of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eight paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all

violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

National Board of Adjustment—Grievances—Interpretation of Agreements

Sec. 3. First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

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

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee," to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the divi-

sion, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(u) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and

the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: Provided, however, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) hereof, with respect to a division of the Adjustment Board.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

National Mediation Board

Sec. 4. First. The Board of Mediation is hereby abolished, effective thirty days from the approval of this Act and the members, secretary, officers, assistants, employees, and agents thereof, in office upon the date of the approval of this Act, shall continue to function and receive their salaries for a period of thirty days from such date in the same manner as though this Act had not been passed. There is hereby established, as an independent agency in the executive branch of the Government, a board to be known as the "National Mediation Board," to be composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party. The terms of office of the members first appointed shall begin as soon as the members shall qualify, but not before thirty days after the approval of this Act, and expire, as designated by the President at the time of nomination, one on February 1, 1935, one on February 1, 1936, and one on February 1, 1937. The terms of office of all successors shall expire three years after the expiration of the terms for which their predecessors were appointed; but any member appointed to

fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board. Two of the members in office shall constitute a quorum for the transaction of the business of the Board. Each member of the Board shall receive a salary at the rate of $10,000 per annum, together with necessary traveling and subsistence expenses, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while away from the principal office of the Board on business required by this Act. No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member of the Board.

All cases referred to the Board of Mediation and unsettled on the date of the approval of this Act shall be handled to conclusion by the Mediation Board.

A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause.

Second. The Mediation Board shall annually designate a member to act as chairman. The Board shall maintain its principal office in the District of Columbia, but it may meet at any other place whenever it deems it necessary so to do. The Board may designate one or more of its members to exercise the functions of the Board in mediation proceedings. Each member of the Board shall have power to administer oaths and affirmations. The Board shall have a seal which shall be judicially noticed. The Board shall make an annual report to Congress.

Third. The Mediation Board may (1) appoint such experts and assistants to act in a confidential capacity and, subject to the provisions of the civil-service laws, such other officers and employees as are essential to the effective transaction of the work of the Board; (2) in accordance with the Classification Act of 1923, fix the salaries of such experts, assistants, officers, and employees; and (3) make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding, and including expenditures for salaries and compensation, necessary traveling expenses and expenses actually incurred for subsistence, and other necessary expenses of the Mediation Board, Adjustment Board, Regional Adjustment Boards established under paragraph (w) of section 3, and boards of arbitration, in accordance with the provisions of this section and sections 3 and 7, respectively), as may be necessary for the execution of the functions vested in the Board, in the Adjustment Board and in the boards of arbitration, and as may be provided for by the Congress from time to time. All expenditures of the Board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

Fourth. The Mediation Board is hereby authorized by its order to assign, or refer, any portion of its work, business, or functions arising under this or any other Act of Congress, or referred to it by Congress or either branch thereof, to an individual member of the Board or to an employee or employees of the Board to be designated by such order for action thereon, and by its order at any time to amend, modify, supplement, or rescind any such assignment or reference. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the Board. In conformity with and subject to the order or orders of the Mediation Board in the premises, and such individual member of the Board or employee designated shall have power and authority to act as to any of said work, business, or functions so assigned or referred to him for action by the Board.

Fifth. All officers and employees of the Board of Mediation (except the members thereof, whose offices are hereby abolished) whose services in the judgment of the Mediation Board are necessary to the efficient operation of the Board are hereby transferred to the Board, without change in classification or compensation; except that the Board may provide for the adjustment of such classification or compensation

to conform to the duties to which such officers and employees may be assigned.

All unexpended appropriations for the operation of the Board of Mediation that are available at the time of the abolition of the Board of Mediation shall be transferred to the Mediation Board and shall be available for its use for salaries and other authorized expenditures.

Functions of Mediation Board

Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 7 of this Act:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 7 of this Act it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this Act, shall be removed by such Board as provided by this Act, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this Act for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this Act. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a circuit court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after the approval of this Act every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

Changes in Pay, Rules, or Working Conditions—Procedure

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or

said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

Submission of Controversy to Arbitration

Sec. 7. First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.

Second. Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Third. (a) When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this chapter, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

(b) The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: Provided, however, That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

(c) Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Each member of any board of arbitration created under the provi-

sions of this chapter named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board, to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: Provided, however, That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

(g) A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he hereby is, authorized, and it shall be his duty, to issue such subpoenas. In the event of the failure of any person to comply with any such subpoena, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Interstate Commerce Act, as amended.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

Agreement to Arbitrate—Form and Contents

Sec. 8. The agreement to arbitrate—

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this chapter;

(c) Shall state whether the board of arbitration is to consist of three or of six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or circuit court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board

for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: Provided, That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and procedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: Provided, however, That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this chapter, delivered to such board of arbitration.

Award of Board of Arbitration—Filing

Sec. 9. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: Provided, however, That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this chapter: Provided further, That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: Provided, however, That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth. At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Sixth. The determination of said circuit court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Eighth. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Creation of Emergency Board

Sec. 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: Provided, however, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has

made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

Separability

Sec. 11. If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances, shall not be affected thereby.

TITLE II

Sec. 201. All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Sec. 202. The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee," respectively, in section 1 thereof. [May 20, 1926, c. 347, § 202, as added April 10, 1936, c. 166, 49 Stat. 1189; 45 U. S. Code, Sec. 182.]

Sec. 203. The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.

The National Mediation Board may proffer its service in case any labor emergency is found by it to exist at any time.

The services of the Mediation Board may be invoked in a case under this title in the same manner and to the same extent as are the disputes covered by section 5 of title I of this Act.

Sec. 204. The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I, of this Act.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

Sec. 205. When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the interpretation or application of agreements between said carriers by air or any of them, and any class or classes of its or their employees, covering rates of pay, rules, or working conditions, the National Mediation Board is hereby empowered and directed, by its order duly made, published, and served, to direct the said carriers by air and such labor organizations of their employees, national in scope, as have been or may be recognized in accordance with the provisions of this Act, to select and designate four representatives who shall constitute a board which shall be known as the "National Air Transport Adjustment Board." Two members of said National Air Transport Adjustment Board shall be selected by said carriers by air and two members by the said labor organizations of the employees, within thirty days after the date of the order of the National Mediation Board, in the manner and by the procedure prescribed by title I of this Act for the selection and designation of members of the National Railroad Adjustment Board. The National Air Transport Adjustment Board shall meet within forty days after the date of the order of the National Mediation Board directing the selection and designation of its members and shall organize and adopt rules for conducting its proceedings, in the manner prescribed in section 3 of title I of this Act. Vacancies in membership or office shall be filled, members shall be appointed in case of failure of the carriers or of labor organizations of the employees to select and designate representatives, members of the National Air Transport Adjustment Board shall be compensated, hearings shall be held, findings and awards made, stated, served, and enforced, and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 3 of title I of this Act. The powers and duties prescribed and established by the provisions of section 3 of title I of this Act with reference to the National Railroad Adjustment Board and the several divisions thereof are hereby conferred upon and shall be exercised and performed in like manner and to the same extent by the said National Air Transport Adjustment Board, not exceeding, however, the jurisdiction conferred upon said National Air Transport Adjustment Board by the provisions of this title. From and after the organization of the National Air Transport Adjustment Board, if any system, group, or regional board of adjustment established by any carrier or carriers by air and any class or classes of its or their employees is not satisfactory to either party thereto, the said party, upon ninety days' notice to the other party, may elect to come under the jurisdiction of the National Air Transport Adjustment Board.

Sec. 206. All cases referred to the National Labor Relations Board, or over which the National Labor Relations Board shall have taken jurisdiction, involving any dispute arising from any cause between any common carrier by air engaged in interstate or foreign commerce or any carrier by air transporting mail for or under contract with the United States Government, and employees of such carrier or carriers, and unsettled on the date of approval of this Act, shall be handled to conclusion by the Mediation Board. The books, records, and papers of the National Labor Relations Board and of the National Labor Board pertinent to such case or cases, whether settled or unsettled, shall be transferred to the custody of the National Mediation Board. [May 20, 1926, c. 347, § 206, as added April 10, 1936, c. 166, 49 Stat. 1189; 45 U. S. Code, Sec. 186.]

Sec. 207. If any provision of this title or application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Sec. 208. There is hereby authorized to be appropriated such sums as may be necessary for expenditure by the Mediation Board in carrying out the provisions of this Act.

FAIR LABOR STANDARDS ACT

Act of June 25, 1938, c. 676, 75th Cong., 3rd Sess., 52 Stat. 1060

AN ACT to provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. This Act may be cited as the "Fair Labor Standards Act of 1938."

Finding and Declaration of Policy

Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, or labor conditions detrimental the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

Definitions

Sec. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any

State; and for the purposes of this Act an employe shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

Administrator

Sec. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representatives may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

Industry Committees

Sec. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

Minimum Wages

Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8.

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations of orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5(e).

Maximum Hours

Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year

in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

Wage Orders

Sec. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classification, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

[Public Res. 88 of June 26, 1940, 76th Cong., 3rd Sess., Ch. 432, Sec. 3(d), 54 Stat. 616, provided as follows: "(d) No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands."]

Attendance of Witnesses

Sec. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U.S.C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

Court Review

Sec. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside

in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended.

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

Investigations, Inspections, and Records

Sec. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or

appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

Child Labor Provisions

Sec. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

Exemptions

Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to

(1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or

(2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or

(3) any employee employed as a seaman; or

(4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or

(5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or by-products thereof; or

(6) any employee employed in agriculture; or

(7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or

(8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or

(9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or

(10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or

(11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally re-

quired to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

Learners, Apprentices, and Handicapped Workers

Sec. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

Prohibited Acts

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment shall be prima facie evidence that such employee was engaged in the production of such goods.

Penalties

Sec. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be

maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. [52 Stat. 1069, 29 U.S.C., Sec. 216(b), as amended by Section 5, Public Law 49, 80th Cong., 1st Sess., effective May 14, 1947.]

Injunction Proceedings

Sec. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

Relation to Other Laws

Sec. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

Separability of Provisions

Sec. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

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