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NOTES FROM WAGNER'S FIRST SYMPHONY IN LABOR

On July 5, 1935, the National Labor Relations Act, more familiarly known as the Wagner Act, became part of the law of the land.[1] Generally speaking, it prohibited the employer from engaging in certain unfair labor practices, which it declared tended to create labor disputes. The unfair practices were defined to be (1) interference with, restraint, or coercion of employees in connection with their right of self-organization, or with their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) refusal to bargain collectively with the properly designated representative of the employees; (3) domination or interference with the formation or administration of any labor organization, or contribution of financial support to it (with certain defined exceptions); (4) discrimination in regard to hire or tenure of employment or any term or condition of employment tending to encourage or discourage membership in any labor organization except that an employer may agree with the properly designated bargaining representative that he will require membership in it as a condition of employment; (5) discharge or other discrimination against an employee because he has filed charges or given testimony under the Act.[2]

1. 29 U.S.C.A. Sec 151.
2. Secs. 7-8 of Act, 29 U.S.C.A. 158.

The Act set up the National Labor Relations Board as the enforcement agency and prescribed that it should have jurisdiction to prevent any person from engaging in any of the described labor practices "affecting commerce".[3]

Labor immediately acclaimed the Act as its Magna Charta, as having created that equality of position between employer and employee in which liberty of contract begins[4] and as having put an effective end to employer absolutism in industrial relations. On the other hand, many lawyers and judges believed that its life expectancy was short and that it was doomed to oblivion as soon as the Supreme Court was given the chance to snuff out its presumptive constitutionality. Others felt that a possibility existed that it would be sanctioned as to interstate agencies but that so far as the manufacturing or productive industries were concerned, its cause was lost.

There was much substance in the argument that such legislation was invalid. With respect to the relation of manufacture to commerce, the Supreme Court had said:

> "No distinction is more popular to the common mind or more clearly expressed in the economic and political literature than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different * * * If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to

3. Sec. 10a, 29 U.S.C.A. 160.

4. Coppage v. Kansas, 263 U S. 1-27. Justice Holmes dissent (1915).

regulate, not, only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate more or less clearly, an interstate or foreign market? Does not the wheat grower in the Northwest, and the cotton producer in the South plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the states, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are and must be local in all of the details of their successful management "[5]

And on the same subject, at a later time, it also said:

"Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of the power may result in bringing the operation of commerce into play, it does not control it and affects it only incidentally. Commerce succeeds to manufacture and is not a part of it * * * "[6]

It also declared that the possibility, or even certainty of exportation, of a product or article from a state did not determine it to be in interstate commerce before the commencement of its movement from the state, and that to hold otherwise would be to nationalize all industries.[7]

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5. Kidd v. Pearson, 128 U.S. 1-20 (1888).
6. U. S. v. E. C. Knight Co., 156 U.S. 1-12 (1895).
7. Heisler v. Thomas Colliery Co., 260 U.S. 245-259 (1922).

In connection with the problem of the relation of mining to commerce, it held:

> "Mining is not interstate commerce but like manufacturing is a local business subject to local regulation and taxation. Its character in this regard is intrinsic, *is not affected by the intended use or disposal of the product,* is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce."[8]

And also with regard to the production of oil:

> "Such production is essentially a mining operation and therefore is not part of interstate commerce even though the product obtained is intended to be and in fact is immediately shipped in such commerce."[9]

In the more recent New Deal days, the Court, by a unanimous vote, declared that articles transported in interstate commerce for interstate sale ceased to be in commerce upon reaching their destination. Consequently, the labor relations between the employer and employees at that point were a matter of state and not federal concern. Industrial strife in such a situation had no direct or immediate effect on commerce; at most, the effect was indirect and remote. Commerce had ended, and with it the Federal power to regulate had likewise ended.[10]

Chief Justice Hughes accorded little consideration to the government's contention that labor disputes would interfere with and interrupt the free flow of interstate commerce into a state:

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8. Oliver Iron Co. v. Lord, 262 U.S. 172-178 (1923).
9. Champlin Mfg. Co. v. Corporation Commission, 286 U S. 235 (1932).
10 A. L A. Schecter Poultry Corp. v. U.S. 295, U.S 495 (1935).

> "The mere fact that there may be a constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held for local disposition and use * * * It was not held, used, or sold by defendants in relation to any further transaction in interstate commerce and was not destined for transportation to other states. Hence, decisions which deal with a stream of interstate commerce where goods come to rest within a state temporarily and are later to go forward in interstate commerce * * * and with the regulations of transactions involved in the practical continuity of movement have no application here."[11]

Then came the Carter Coal Case which marked the outlawing of the Bituminous Coal Conservation Act of 1935.[12] Here the Court dealt with industrial relations before interstate commerce began, that is at the source of the commerce, while in the Schecter case, it dealt with such relations at the end or terminus of the interstate movement. Again the power of Congress to regulate was denied. Coal mining was again declared to be a local operation, the relations of employer and employees to be local relations. The majority of the Court by Justice Sutherland said:

> "That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture sub-

11. For examples of stream of commerce theory see: Swift & Co. v. U. S., 196 U.S. 375 (1905); Lemke v. Farmers Grain Co., 258 U.S. 50 (1922); Stafford v. Wallace, 258 U.S. 495 (1922); Chicago Bd. of Trade v. Alsen, 262 U.S. 1 (1923); Tagg Bros. & Moorehead v. U. S., 280 U.S. 420.

12. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

ject to federal regulation, under the commerce clause."[13]

"One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell or ship, the commodity to customers in another state, he engages in interstate commerce. In respect to the latter, to regulation only by the federal government. Production is not commerce; but a step in the production of commerce.[14]

"The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purpose of production not of trade. The latter is a thing apart from the relation of employer and employee, which in all producing occupations is purely local in character.[15]

" * * * And the controversies and evils, which it is the object of the Act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.[16]

"The distinction between a direct and indirect effect turns not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a

13. *Id.* p. 301.
14. *Id.* p. 303.
15. *Id.* p. 303.
16. *Id.* p. 309.

> single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined. It is quite true that rules of law are sometimes qualified by considerations of degree, as the government argues. But the matter of degree has no bearing on the question here."[17]

As the Wagner Act began to get into the Federal District, and Circuit Courts, the preponderance of judicial opinion was against its constitutionality and primarily because of the Carter and Schechter cases.[18]

Then came the Presidential election, the epidemic of sit down strikes, and the President's plan to enlarge the Supreme Court. Whether these events, or any one of them, had any effect upon the point of view of the Court, as is asserted by many, or whether they simply aided in impelling a re-examination of the

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17. *Id.* p. 308.

18. In his dissenting opinion in the Jones and Laughlin case, Justice McReynolds said: "The Court as we think departs from well-established principles followed in A. T. A. Schechter Poultry Corp. v. U. S., 295 U.S. 495, and Carter v. Carter Coal Co., 298 U.S. 238. Upon the authority of those decisions, the Circuit Court of Appeals of the Fifth, Sixth, and Second Circuits in the causes now before us have held the power of Congress under the Commerce Clause does not extend to relations between employers and their employees engaged in manufacture, and therefore, the Act conferred upon the National Labor Relations Board no authority in respect of matters covered by the questioned orders. In Foster Bros. Mfg. Co. v. National Labor Relations Board, 85 F2d 984, the Circuit Court of Appeals, Fourth Circuit, held the Act is applicable to manufacture and expressed the view that if so extended, it would be invalid. Six district courts, on the authority of Schechter's and Carter's cases, have held that the Board has no authority to regulate relations between employers and employees engaged in local production. No decision or judicial opinion to the contrary has been cited and we find none." (P 588).

National Relations Board v. Jones & Laughlin Steel Co., 301 U.S. 1, 81 L. Ed. 893-924 (1936).

fundamental commerce precedents, will probably never be known. However, the first symptom of a changing point of view appeared in March, 1937, when the Virginian Railway Co. case was decided.[19] It was held that "back shop" employees, that is, those engaged in heavy repairs on locomotives and cars withdrawn from service for long periods, bore such relation to the interstate activities of the carrier as to be regarded as part of them.

The Court said:

> "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. *Both Courts below have found that interruption by strikes of 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 interruptions of the transportation service. The cause is not remote from the effect."

This was an important, though not at all decisive step in the direction of sustaining the Wagner Act. It was distinguishable from a manufacturing case, if the desire to distinguish was present. Apparently, it was not, and on April 12, 1937, the Act was sanctioned as constitutional in four broad and sweeping decisions.[20] The taboo on Federal regulation of employers and

19. Virginian Railway Co. v. Septem Federation No. 40, 300 U.S. 515 (1937).
20. National Labor Board v. Jones & Laughlin Corp., 301 U.S. 1, 81 L. Ed.

employees engaged in production was thrust aside. This fact was held to be not determinative; "the question remains as to the effect upon interstate commerce of the labor practice involved".[21] The Schecter and Carter cases were dismissed with little consideration.[22] In the Schechter case, interstate commerce was brought in "only upon the charge that violations of these provisions as to hours and wages of employees and local sales affected interstate commerce". This was equally true of the Carter case although there is a reference in Justice Sutherland's decision to collective bargaining.[23] Apparently, it is the intention of the Court to limit their application to that problem.[24]

The Court declared that it was not obliged to shut its eyes to the "plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enter-

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893 (1937). *Id.* v. Freuhauf Tractor Co.;*Id* v. Friedman-Harry Marks Clothing Co.; *Id.* v. The Associated Press, 301 U.S. 103, 81 L. Ed. 953.

21. *Id.*, 301 U. S. 1 at p. 40, p. 913 L. Ed.

22. C. J. Hughes (Jones case, p. 40, p. 913 L. Ed.) said: "It is thus apparent that the fact that the employees there concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. In the Schechter case, we found that the effect was so remote as to be beyond the Federal power. To find immediacy or directness there was to find it almost everywhere, a result inconsistent with the maintenance of our Federal system. In the Carter case, the Court was of the opinion that the provisions of the statute relating to production were involved upon several grounds—that there was improper delegation of legislative power, and that the requirements not only went beyond any sustainable measure of protection of interstate commerce, but were also inconsistent with due process. These cases are not controlling here.

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"The Carter case was predicated largely upon U. S. v. C. C. Knight Co, 156 U.S. (1895) which in the opinion of the Court in the Jones case had long since been regarded as an unsound precedent." (P 576)

23. Carter case, p. 303

24. See note 21a.

prises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce to make the presence of industrial strife a matter of national concern".[25]

While in the Carter case, the ruling was that strikes of employees engaged in production exerted an indirect effect upon interstate commerce, that the magnitude of the indirect effect was of no consequence and that "the matter of degree has no bearing on the question,"[26] in the Jones case, quite the opposite was asserted. "The question is necessarily one of degree," said the Court.[27] The determining feature is not the source of the injury but the effect upon commerce.[28]

The Court did not find it necessary to discuss the current of commerce cases upon which the government strongly relied. It declared that:

> "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 spring 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; to adopt measures to promote its growth and insure its safety; to foster, protect, control, and restrain. The power is plenary and may be extended to protect interstate commerce no matter what the source of the dangers which threaten it. Although

25. *Id.*, p. 41, p. 914 L. Ed.
26 Note 15 *supra.*
27. Jones case *supra*, p. 37, p. 912 L. Ed.
28. Jones case *supra*, p. 31, p. 908 L. Ed.

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 or obstructions, Congress cannot be denied the power to exercise that control "[29]

The decision had a touch that was almost ironic. The cases which for the most part formed the precedent background for upholding the Act were those which resulted from efforts by employers to curb labor union activities.[30] The view was taken that if Congress has the power to prevent or restrain strikes which obstruct or interfere with the free flow of interstate commerce, it also has the power to regulate unfair labor practices on the part of employers which create the industrial strife. In other words, if Congress can act lawfully when commerce has been or is being affected, it can reach back to the source of the obstruction or interference and control it there.

Commerce was no longer to be considered academically. It was a practical conception. The Court felt that it could no longer shut its eyes to the fact that everywhere throughout the nation industries were transcending state lines in their operations and thus rendering state regulation inefficacious. It could no longer shut its eyes to the "plainest facts of our national life"[31] and ignore the obvious conclusion that refusal by employers in such industries to bargain collectively with their em-

29. Jones case *supra*, p. 36, p. 911 L. Ed.

30. Lowe v. Lawlor, 208 U.S. 274 (1908); United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922); *In re* Debs, 158 U.S. 564 (1895); Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n., 274 U.S. 37, 71 L. Ed. 916-51 A v. R 791 (1927); Local FBL v. U.S., 291 U. S. 293-78 L. Ed. 804 (1934); Leather Workers Int. Union v. Herkert & Merail Trunk Co., 265 U.S. 461 (1924); Industrial Ass'n. v. U. S., 268 U.S. 64-69 L. Ed. 849 (1925); Levering & Garrigues v. Morrin, 289 U.S. 103-77 L. Ed. 1062 (1933).

31. Jones case, p. 41, p. 914 L. Ed.

ployees and employment by them of unfair labor methods, in the past have resulted in the formation of industrial unrest and strikes, the effects of which have been felt through the entire country.[32]

The legal propriety of the substantive rights conferred by the Act on labor was taken by the majority of the Court as a well-recognized and established fact. Chief Justice Hughes said:

> " * * * In its present application the statute goes no farther than to safe-guard the rights 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 employers. This is a fundamental right."[33]

With the Jones, Frehauf, Friedman-Marks, and Associated Press decisions, it is apparent that collective bargaining has become a permanent fixture of American industrial life. The extent to which it must be recognized depends upon the extent to which the Act confers jurisdiction upon the National Labor Relations Board which constitutes its enforcement arm.

I.

Jurisdiction of the Board—In General

With reference to the jurisdiction of the Board, the Act specifically says:

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32. C. J. Hughes (p. 42, p. 914 L. Ed): "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 strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances."

33. P. 33, p. 909 L. Ed.

> "The Board is empowered, * * * to prevent any person from engaging in any unfair labor practice *affecting commerce* * * * "[34]

It also defines the term "affecting commerce":

> "The term 'affecting commerce' means in commerce or burdening or obstructing commerce or the free flow of commerce, or having led to or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."[35]

Obviously, there was no intention on the part of Congress to confer jurisdiction on the Board over all labor disputes. To do so would be virtually to destroy the state sovereignty over local affairs. As was said in the Jones case:[36]

> "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.
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> "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

34. Sec. 10(a), 29 U.S.C.A. 160a.
35. Sec 2 (7), 29 U.S.C.A. 152 (7)
36. P. 31, p. 908 L. Ed.

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 "[37]

The test to be applied in each particular case is whether the labor dispute or the unfair labor practice is resulting in obstructing or hindering or is likely to result in obstructing or hindering the free flow of interstate commerce or whether the particular conduct has a close and intimate effect upon interstate commerce.[38] The authority of the Board must be determined by the application of this test to the facts of each case and the factual determination of the Board if supported by evidence is conclusive.[39]

II.

Businesses Subject to Act

The labor relations of interstate railroads have long been recognized as subject to Federal regulation.[40] The Washington, Virginia & Maryland Coach case[41] and the Associated Press case[42] extend this doctrine to interstate motor carriers and interstate news agencies. It is perfectly obvious from these decisions that the industrial relations of other interstate agencies

37. Jones case, p. 37, p. 912 L. Ed

38. Jones case, p. 31, p. 908 L. Ed.

39. Sec. 10 (e), 29 U.S.C.A. 160 (c). Discussion of conclusiveness of finding, *infra.*

40. See Texas & N. O. R. Co. v. Brotherhood of R. & S.S. Clerks, 281 U.S. 548 (1930).

41. Wash., Va., & Md. Coach Co. v. Nat'l. Labor Relations Board, 81 L. Ed. 601 (1937).

42. The Associated Press v. N.L.R.B., 81 L. Ed. 603 (1937).

such as steamboat companies,[43] telegraph and telephone companies,[44] oil transmission companies,[45] companies transmitting gas and electricity and companies engaged in air transportation, and in radio communication[46] will likewise be within the domain of Federal control.

The control is not limited to those employees who are engaged in the various interstate movements. It includes those who may be regarded as necessary incidents of the movements. A statute conferring collective bargaining rights upon railway clerks who had no direct contact with the actual facilities of transportation was held to be within the competence of Congress.[47] Again in the Virginian Ry.[48] case, the bestowal of the same rights upon "back shop" employees or maintenance men was sustained against a contention that their employment was remote from interstate transportation.[49]

In the Associated Press Case, the discharged employee worked in the New York office of the company. There news was received from other states and foreign nations. Its news value was then determined, the material was rewritten and filed for transmission. Watson was engaged in this work. The Court was of the opinion that "strikes or labor disturbances amongst this class of employees would have as direct an effect upon the activities of the 'company' as similar disturbances amongst those who operate the teletype machines or as a strike amongst

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43. Gibbons v. Ogden, 9 Wheat. 1 (1824).

44. Pensacola Teleg. Co. v. Western Union Teleg. Co., 96 U.S. 1 (1878); Asso. Press Case, p. 607 (L. Ed.)

45. Pipe Line Cases (U. S. v. Ohio Oil Co.), 234 U.S. 548 (1914).

46. *In re* Los Angeles Broadcasting Co. (N.L.R.B.) Case No. R332—Dec. 6, 1937.

47. Brotherhood of R. & S.S. Clerks, *supra* note 34.

48. Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937).

49. See note 19.

the employees of the telegraph lines over which 'the company's' messages travel" [50]

III.

Manufacturing Industries

Obviously, it is the field of manufacture that the enforcement of the Wagner Act will meet with its greatest opposition. To what extent are the labor relations of employees engaged in production subject to the Act? Generally speaking, the test is whether the relations in the particular case bear a close and intimate relation to commerce. What constitutes such a close and intimate relation? Chief Justice Hughes says the question is "necessarily one of degree".

It has been suggested that the Court intended by the Jones case to limit the applicability of the Act to those "enterprises which make their relation to interstate commerce the dominant factor in their activities".[51] An examination of the full text of the opinion and of the opinions in the companion cases completely negatives this idea. It is patent that the Chief Justice was simply asking a rhetorical question which was peculiarly pertinent to the national scope of the operations of the Jones-Laughlin Company[52] and that he was not defining nor limiting the field of the Board's jurisdiction.

The Court made no effort to point out a precise range of

50. Asso. Press case, p. 129, p. 959 L. Ed.

51. Jones case, p. 41, p. 914 L. Ed.

52. C. J. Hughes said: "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." (P. 41, p. 914 L. Ed.)

operation for the Act. It offered no suggestion as to the percentage of the employer's business which had to be done in interstate commerce before the Labor Relations Board could assume jurisdiction.

In the Jones case, it was dealing with a highly integrated industry engaged in nation-wide operations, and the fourth largest steel producer in the United States. Its raw materials were drawn into Pennsylvania from various states and about 75% of its product was shipped to all parts of the nation. The Court contented itself with a discussion of the sphere of this company's activity and concluded that the close and intimate relation of its industrial labor relations to interstate commerce was sufficiently present to justify the application of the Act.

In the Friedman-Marks case, while the company's raw materials[53] were purchased largely from other states and its finished product sold principally in commerce,[54] it was a comparatively inconsequential figure in the clothing industry.[55] Here the Court's discussion centered itself largely on the nature of the industry as a whole, its place in the national industrial scheme, the size and character of the labor union involved, the fact that the union had over 125,000 men and women employed in the business, the effect of industrial strife in the past, and the peace which collective bargaining had brought to the portion of the industry which had recognized the desirability of bargaining.

In the Fruehauf case, the company was the largest of its kind in the country. It maintained 31 branch sales offices in 12 different states, and had distributors and dealers in the prin-

53. Woolen and worsted goods 99.57% from other states; cotton linings from several southern states. P. 71-72, p. 921-22 L. Ed

54. 82.8%. P. 73, p. 922 L. Ed.

55. It had 2/375 of the employees in the industry, 1/400 of the worth of the products sold and 1/3300 of the plants. (Justice McReynolds' dissent, p. 76-8, p. 924-5 L. Ed.

cipal cities in the country. More than 50% in value of its raw materials were transported in interstate commerce and more than 80% of its sales were of products shipped outside the state of manufacture.[56]

Out of these decisions comes the conclusion that certain factors are to be given consideration in determining the jurisdiction of the Board over the employer-employee labor relations in a given industry. They are: (1) its size and the scope of its interstate operations, (2) the degree of integration with other industries and (3) the size and scope of operations in the whole industry of the labor union involved.

The problem which is of most pressing importance is the percentage of an employer's business which must be done in commerce in order to justify invoking the Act. Justice McReynolds, in his dissent, seems to think that even if the Act is valid, it is not the relation of the employer's interstate purchases and sales to his total purchases and sales which controls, but rather the relation of his interstate business to the total business done in the industry. If the proportion is such that labor strife in the particular industry is not likely to have any affect on the interstate operations of the whole industry, then there is no room for Congressional regulation.[57] Unquestionably, the size of the interstate operations of a particular manufacturer in relation to those of the whole industry will always be an element for consideration, but it is hardly likely that it will ever become the determining one. It is reasonably deducible that Congress never intended, by the use of the unqualified word "commerce," to so limit the scope of the law.

Should the greater part of an employer's business be done in interstate commerce before the Act may be employed? If merely a substantial part is done in commerce, is that sufficient

56. Freuhauf case, p. 53-4, p. 919 L. Ed.
57. Justice McReynolds' dissent, Jones case, p. 94-6, p. 933 L. Ed.

to bring his labor relations under Federal regulation? Until the Supreme Court has had the opportunity to pass upon specific instances, these questions cannot be answered authoritatively. However, it does seem reasonable to expect liberal treatment by the Court in the administration of the Act. If, as the Jones case indicates, a rather strong nationalistic view is to be taken, then it is not a far cry from a holding that an interference with a single shipment in interstate commerce is such a restraint of trade as to constitute a violation of the Anti-Trust Act,[58] to a ruling that if one per cent of the products move in interstate commerce, the employer-employee labor relations may be governed by the Wagner Act. Such an extension of the Federal power would be unfortunate since it would make the National government supreme in the labor relations field and deprive the States of any effective power of regulation.

In considering the production businesses which are subject to the Act, four classes of enterprise must be kept in mind. *First,* those that receive their raw materials through the channels of interstate commerce and sell their finished products in interstate commerce; *second,* those that purchase their raw materials in intrastate commerce and sell the finished product in interstate commerce; *third,* those that purchase their raw materials in interstate commerce and make only intrastate sales of the finished product, and *fourth,* those that obtain their raw materials and sell their finished product entirely in intrastate commerce, but whose industry is a national one, and whose employees are members of a national union which has infused the entire industry, or the greater portion of it.

The first class presents the least involved problem. Obviously, the Labor Board has jurisdiction providing commerce is affected to the necessary "degree". What degree is requisite, of course, cannot be definitely stated. Judging by the decisions set

58. Steers v. U. S., 192 Fed. 1 (1911).

forth in the "First Annual Report,"[59] the Board has taken jurisdiction where fifty per cent, and upwards, of the raw materials and finished products of an employer reach the stream of commerce. There doesn't seem to be any good reason, in view of the nationalistic attitude of the court on the question, why thirty per cent or even ten per cent in some industries should not be sufficient. Ten per cent in a large industry, with nation-wide operations, might have just as much, or more, effect on interstate commerce than a smaller industry with a fifty per cent flow. Consequently, in each case there would appear to be a fact question for the Board to determine as to where the line of demarcation is between a 100% products flow, and a percentage which runs counter to the doctrine of a *de minimis*. The present attitude of the Board seems to be that it should have jurisdiction in all cases except those to which the rule of *de minimis* is applicable.[60]

In the Santa Cruz case, which is now awaiting decision by the Supreme Court, one of the Judges of the Ninth Circuit took the extreme view that the Board would have jurisdiction if only one per cent of its product had gone into interstate commerce. This expression was dictum, but it is interesting as an exposition of the opinion that no matter what the extent of the interstate business of the employer, if unfair labor practices may interfere with it, Congress may intervene.

Whether the Board or the Supreme Court is to be the final arbiter of the factual issue of degree of effect on commerce, is probably the most important problem now outstanding. If the

59. 1 N.L.R.B.

60. In the conclusion of its brief in the Santa Cruz Fruit Packing Co (decided by the Circuit Court of Appeals for the Ninth Circuit in July 1937, and which is now before the Supreme Court), the Board says: "questions as to the application of the Act are necessarily questions of degree, and that a doctrine of *de minimis* may well be applicable."

Santa Cruz Fruit Packing Co. v. Nat. Labor Relations Board, 91 Fed. 2d 790 (1937).

Board, on the basis of substantial proof before it, decides that commerce is sufficiently affected in a particular case to justify Federal regulation of the labor problems involved, is the court going to weigh the evidence independently and make its own finding thereon, or is it going to follow the mandate of the Act that the Board's judgment is conclusive? Much of the scope of the Federal power under the Act depends upon the answer to this question.[61] The Santa Cruz case now awaiting decision may go a long way toward disposing of this important issue.

So far as the second and third classes of enterprise are concerned, it is likely that the rule which controls the one will determine the other. In the Santa Cruz case, the employer purchased all of its raw materials within the state and sold less than 40% of its products outside the state. If the Carter case were to be read alone, it might be urged that since mining was held to be a preliminary step in the preparation for commerce and not a part of commerce, manufacture, here, was also such a preliminary step and, therefore, the power to regulate the labor relations was non-existent. However, in the light of the Court's apparent disposition in the Jones case to limit the application of the Carter case to wages and hours legislation, and its refusal to limit the operation of the Wagner Act to the so-called stream of commerce cases, it is not likely that the Carter doctrine will be at all decisive.

In the Consolidated Edison case recently decided by the Board, it appeared that all of the companies' physical properties are located in New York State.[62] In 1936, it and its affiliates furnished 97.5% of the total electric energy sold by central station companies in New York City and practically all in Westchester County. Its raw materials, coal, and gas-oil come

61. The question of the finality of the Board's determination will be discusses lated. See IV.

62. In Consolidated Edison Co. of N. Y. et al, case No. c-245, Nov. 10, 1937, recently affirmed by the Third Circuit.

from outside the state; some of its equipment is also purchased outside New York. It supplies electrical energy to large interstate railroads, the energy being used for lighting and operation of terminals, intrastate and interstate passenger trains. Steam service supplied by one of its affiliates is used to operate switches in the interstate tunnel of the Pennsylvania Railroad. It also supplies energy to the Federal Government for the operation in New York Harbor of light houses, beacon lights, custom houses, and warehouses; to the piers of trans-Atlantic and coastal steamship companies; to the Port of New York Authority for the operation of its terminal; to the Holland tunnel; to ferry companies for the operation of ferry slips and appurtenant buildings; to United States post offices; to the Western Union and Postal Telegraph Companies; to the New York Telephone Company for the operation of its system and exchanges in New York City; to R. C. A. communications for broadcasting purposes; and to airports, newspapers, etc.

Here the employer received raw materials in commerce and although the electric energy was sold within the state, it was supplied to various agencies of interstate commerce and was essential to their operation. The Board found the company to be under the control of the Act, and it seems reasonable to suppose from the existing decisions that the finding will be sustained. If back shop employees' labor disputes affect interstate commerce, it is difficult to deny that the operations of this company have the required vital and intimate relation to commerce which is essential to jurisdiction.

Where the line will be drawn in these types of cases, is speculative at this time. Much depends upon the attitude which the Supreme Court takes of the finality of the fact finding power of the Board.

In the last class of the four referred to, namely, enterprises which operate wholly intrastate, but which constitute unrelated parts of a national industry and the employees of which are

members of a nation-wide union which has infused the whole industry, lies the ultimate problem in Labor Board jurisdiction. Proponents of the view that jurisdiction exists, say that the likelihood of sympathetic strikes, especially if there is a history of such action in the industry, would tend to give a particular labor dispute a national complexion. They point to the fact that Chief Justice Hughes said that commerce is a practical conception and that the matter of labor disputes thereon is not to be treated in the abstract,[63] but rather in the light of practical experience. Therefore, (they say) that if the government could "aptly"[64] refer to the 1919-1920 steel strike in the Jones case, the court will listen to the past history of sympathetic strikes in such an industry, and also, because of the country-wide union set up, to the likelihood of such strikes.

This argument is not impressive. The fact remains that the manufacturer involved operates purely intrastate and that the other manufacturers engaged in the same business, although unrelated in ownership or control, also operate intrastate. Consequently, sympathetic strikes would all have an entirely intrastate character. If it should happen that a small percentage of some one company's products passed into commerce, it is doubtful that the fundamental intrastate character of the labor dispute would be altered.

IV.

Finality of the Board's Determination

Whether or not a particular labor practice affects commerce in such a close and intimate fashion as to be within the regulatory power of Congress, is left by the Act to be determined

63. Jones case, p. 42, p. 914 L. Ed.
64. Jones case, p. 43, p. 915 L. Ed.

by the Board. Provision is then made that the "findings of the Board as to the facts shall be conclusive, if supported by evidence."[65] The extent to which the Supreme Court recognizes this mandate will undoubtedly, in large measure, mark the limits of the jurisdiction of the Board. The contention is being advanced by some persons that it should be subject to the doctrine of the St. Joseph Stock Yards and Crowell v. Benson cases.[66] There, it was held that regardless of a statutory provision making the findings of an administrative body conclusive, when constitutional or jurisdictional problems are involved, the Court is under the duty to exercise an independent judgment on the facts. If the application of such a judgment indicates that the determination of the administrative agency is contrary to the weight of the evidence, then the determination cannot stand. It is true, of course, that the question of whether or not interstate commerce is affected in Wagner Act violation cases, is a constitutional one. If commerce is not affected, then the Act would be unconstitutional in its application.

However, in the Virginia Coach case, there appears to be some inclination toward confining the rule of independent review to the confiscation class of due process cases.[67] It is interesting to note that Justice Roberts, who wrote this opinion, concurred in the result in the Stock Yard case, but apparently not in the opinion; also, that Justice Brandeis disagreed with the principle, saying that:

> "If in a judicial review of an order of the Secretary, his findings supported by substantial evidence, are conclu-

65. Sec. 10e.

66. St. Joseph Stock Yards Co. v. United States, 80 L. Ed. 1035 (1936); Crowell v. Benson, 285 U.S. 22 (1922).

67. Justice Roberts said: "This is not a case of alleged confiscation (St. Joseph Stock Yards Co. v. U. S., 298 U.S. 349, nor is it one where the Board lacked jurisdiction (Crowell v. Benson, 258 U.S. 22) . . ."

Washington, Virginia & Maryland Coach Co. v. Nat. Labor Relations Bd., 301 U.S. 140, 147, 81 L. Ed. 965, 970 (1937).

> sive upon the reviewing court in every case where a constitutional issue is not involved, why are they not conclusive when the constitutional issue is involved? Is there anything in the Constitution which expressly makes findings of fact by a jury of inexperienced laymen, if supported by substantial evidence, conclusive, that prohibits Congress making findings of a fact by a highly trained and especially qualified administrative agency likewise conclusive, provided they are supported by substantive evidence."[68]

Justices Cardozo and Stone agreed that Justice Brandeis' view should be the law even though there was a tremendous weight of precedent against it and suggested that if there were to be a reconsideration of the matter, they would be unwilling to go along with the majority.

This situation presents an interesting background for speculation as to the nature of review to be adopted in the Wagner Act cases. It should be remembered that the present composition of the Court is somewhat different than it was when the St. Joseph case was decided. It now seems to be made up of four avowed liberals, Justices Brandeis, Stone, Cardozo, and Black, three equally avowed conservatives, Butler, McReynolds, and Sutherland, with Hughes and Roberts holding the balance of power. Chief Justice Hughes is probably committed to the

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68. Justice Brandeis concurring opinion, p. 1052 (L. Ed.)

* Since the above was written the situation has again changed. Justice Sutherland has announced his retirement and the President has nominated Solicitor General Stanley F. Reed to replace him. While the general impression of Mr. Reed is that he is more conservative than Justice Black, on the basis of his extensive participation in New Deal measures he must be looked upon at this time as probably aligned with the liberal Justices. Apparently, therefore, the Court will now be composed of five liberal Justices, two conservatives, and two who cannot be definitely categorized.

theory of independent judicial review. Judging by Justice Roberts' silence in the St. Joseph case, and his statement in the Virginia Coach case that since the employer was admittedly engaged in interstate commerce, the Court would not review the findings of the Board except to ascertain whether there was substantial evidence to support them, it may be that he will take the view that the independent judicial review should be limited to the question of interstate commerce. That is, if the weight of the evidence present shows that the employer is engaged in commerce, the finding of the Board that commerce is affected will not be reviewed if supported by substantial proof. Even this compromise view would lend tremendous force and efficacy to the administrative functions of the Board.

In any event, it is unlikely that the Court will review a finding that an employer has been guilty of an unfair labor practice, except to see that it is supported by substantial evidence. If there is an independent review, it probably will be limited to a determination of whether or not the weight of the evidence supports the conclusion of the Board that the "degree" of effect on commerce is sufficient to justify Federal control. And it may well be that the Court in its present temper and present organization will look to the weight of the evidence only in passing upon the question of whether or not the employer sells or buys in commerce, and leave the question of degree of effect of his labor relations on commerce to the Board, where substantial evidence to support its conclusion is in the record.

V.

Should the Scope of the Act be Enlarged

There can be no doubt that collective bargaining has become a permanent part of the industrial life of this country.

Both industry and labor must adjust themselves to it. Labor must not go hog wild with its new found source of power, and the employer must realize that labor is not merely a commodity to be bought and sold at his own arbitrarily fixed prices, but rather a human element which voluntarily adds its forces and energies to a form of partnership whose motive is mutual advantage. However, the state of the present law is not conducive to the attainment of this mutually satisfactory and harmonious ground. The Act is unilateral in all of its aspects. It puts a club in the hands of labor and offers no relief to an employer who is unjustifiably assaulted.

It has been suggested that the law only gives to labor what the industrialist has enjoyed for a few hundred years. To those in a position to espouse this kind of social philosophy, it can only be said that two wrongs never made a right, and that persistence in such an anti-social view will only tend to prolong the adjustment period.

The conflict within the ranks of labor has served to accentuate the one sided operation of the Act. Perhaps, if this internal strife did not exist and had not brought out into bold relief the utter helplessness of the employer in certain types of cases, it would have been years before a public clamor for mutualization arose.

During the still-raging struggle for labor union supremacy between the American Federation of Labor and the Committee for Industrial Organization, times almost without number the employer has found himself faced, not with a demand for recognition of one or the other, but with a bitter contest between the two for majority control of his employees. He was not a party to the proceedings and he certainly was not the umpire. He simply had to sit by and watch the demoralization of his business until one or the other faction thought it had sufficient control to risk a petition to the Labor Board for an election. Why did he have to sit by? Because the Act confers no authority on

the Board to entertain any kind of an original plea from an employer.

No impartial person who has observed the plight of the coastwise shipping companies on the Atlantic seaboard for the past year or so could possibly deny the equity of allowing an employer the privilege of petitioning for an election in such cases. The whole industry has been ravaged by this fratricidal war and tremendous losses have been sustained. Yet, during the period and until one side felt that it had mustered enough strength to ask for an election to determine the bargaining representative, the employers had to stand on the sidelines.

Among the contentions advanced against amending the law to make it bilateral are (1) that the employer has enough protection because of court decisions in many states which are adverse to labor in connection with the strike for a closed shop, restrictions on picketing, etc., (2) that if labor exceeds its rights, it would be better for the employer to appeal to a court of equity for an injunction and (3) that the criminal courts are authorized to deal with cases of violence.[69]

Assuming all of this to be true, obviously it would be better to have a concentration of jurisdiction in one Board—at least in practice, because, of course, the concurrent jurisdiction of some of the courts could not be eliminated, without constitutional amendment. This would obviate the necessity in most cases of having different phases of the same controversy passed upon by different tribunals, and perhaps even under different sovereignties.

It is also suggested[70] that when disputes arise under collective bargaining agreements, the fact that the employer has no right of appeal to the Board is of no particular consequence

69. See Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining*, 50 HARVARD LAW REV. 1071-1109.

70. Magruder, p. 1112.

because if there is a strike, it can be enjoined in equity. Here again the need for concentration of jurisdiction arises and it seems a much more appropriate and expeditious method of having the agreement construed to allow the Board to dispose of the matter on employer application. In such cases, it may even be that the Board helped to negotiate and to frame the particular bargaining agreement. Isn't it far more likely, therefore, that the Board is the better qualified agency to decide the dispute over its terms or its meaning.

In addition, under the present broad nationalistic view of the scope of the Federal power to regulate labor relations, it may well be that the jurisdiction of state courts of equity will be reduced to a minimum. This is so because in matters affecting commerce, the national authority is supreme, and if a particular employer is subject to the National Labor Relations Act, the view may be taken in a good many instances, that since Congress has exercised its regulatory power, the State Courts are powerless to act. If such a situation should develop, and it is not beyond the realm of possibility at the present time, the employer would be without remedy in any court.

Having in mind all these things, it seems reasonable to say that some amendments to the law for the purpose of mutualization will bring it more in keeping with recognized and accepted social, economic, and judicial process, without altering its fundamental spirit. The *first* change that suggests itself is: enlargement of the jurisdiction of the Board so as to permit it to call elections on the employer's application. This would aid the expeditious settlement of disputes as to majority control of employees by any particular union and would go a long way toward preventing the serious economic waste which has already burdened industry in so many instances of such jurisdictional disputes. It may be said that the employer would abuse this privilege by seeking an election at a time when he knew that a company union would prevail. There should be no difficulty

about this. The Board already has the power to pass upon the company union problem, and if in employer petition cases, the question is raised, it could be disposed of promptly as a preliminary step in the election process. However, in this connection, the company union charge, and the hearing thereon should not be permitted to delay the election unduly to the damage of the employer. Some such practice as is followed in the appellate courts of New Jersey with respect to the advancement of state matters on the argument list could easily be adopted in these cases, either by rule of the Board, or specific provision of the Act.

The *second* change that seems desirable is the cloaking of the Board with jurisdiction to police the agreements entered into between the employees' bargaining agent and the employer. This jurisdiction should be broad enough to permit the intervention of the Board when appealed to by either the employer or the bargaining agent.

Following the designation, by the majority of the employees, of an exclusive representative and the execution of a contract by that representative with the employer, the provisions of that contract should be enforced for the agreed term. If this is not done, labor relations problems are bound to be in a constant state of flux. Organization work of a rival union can begin the day after the agreement is made on behalf of the employees, and it can be persisted in until success is achieved. Then, unless there is some method of demanding respect for the existing contract, it can be ignored, and a new election petitioned for.

Employees cannot be prevented from abandoning one union and joining another. That is their right. However, when such action is taken, and a new majority representative results from an election, the terms of the old contract should be continued binding for the remainder of its agreed life. Knowledge of the existence of this rule would go a long way toward the mainten-

ance of industrial peace.

Some limitations on the rule are, of course, worthy of recognition. For example, the term of the agreement should not be unreasonably long. The Board, in its discretion, having in mind the conditions in the particular industry, should be permitted to pass upon its propriety. If, however, the Board had a hand in the negotiation and consummation of the contract, then the term should be considered binding.

Disputes that arise as to the proper construction of the language of a contract, as well as violations by either signatory, should be ironed out by the Board. If necessary, cease and desist orders with respect to adjudicated violations should be issued against either party. Only by such supervision and such policing, can the Act be equitably administered.

Labor's objection to this idea is that it relates to matters that ought to be controlled by it; that it should be permitted to discipline its own members for violations of such agreements. Whether this self-discipline is adequate is somewhat open to question in the light of the recent General Motors experience.

One further amendment seems requisite in order to complete the mutualizing process. The Act sets up an unfair labor practice code for employers. There is no real reason why one necessary party to our industrial society should be legislated into recognition of the practices that he may not employ in his labor relations, and the conduct of the other party be left free from such regulation. There is *just* a chance that if an unfair practice code for labor were included in the Wagner Act, it would be violated occasionally.

CONCLUSION

Judicial interpretation has not yet set the Act up in its full perspective. How extensive a jurisdiction has been conferred upon the Board is as yet unanswered, although the ghost

of Chief Justice Marshall's nationalism seems to be a welcome visitor in the conference room of the Supreme Court by the majority of the members, which indicates a liberal definition of its limits. Whether the next Congress will recognize the need for mutualization, remains to be seen. Only one thing is certain; this country is a reasonable country made up of reasonable people. Consequently, no one need doubt that the inexorable force of reason will ultimately demonstrate to the majority of the people where the level of equity lies in labor relations.

JOHN J. FRANCIS.

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