Michigan Law Review

Volume 37 | Issue 6

1939

LABOR LAW - EXTENT OF JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD

Ward P. Allen
University of Michigan Law School

LABOR LAW — EXTENT OF JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD[1] — "What possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce?"[2] It is "clear that the mere reduction in the supply of an article to be shipped in interstate commerce, by the illegal or tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction on that commerce."[3] Strange sounding words, these, so completely have these doctrines been repudiated in the National Labor Relations Act[4] and the cases supporting it.[5] The law is anything but static; and the legal touchstone of this "extension" of the interstate commerce power over the labor relations of an entire business is furnished by Chief Justice Hughes in the *Jones-Laughlin Steel Corporation* case:[6]

> "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. . . . Although activities may be intrastate in character when separately considered, if they have

[1] For a comprehensive general discussion of this problem, see Mueller, "Businesses Subject to the National Labor Relations Act," 35 MICH. L. REV. 1286 (1937). See also 52 HARV. L. REV. 491 (1939).

[2] Harlan, J., in Adair v. United States, 208 U. S. 161 at 178-179, 28 S. Ct. 277 (1907).

[3] Taft, C. J., in United Leather Workers' International Union v. Herkert & Meisel Trunk Co., 265 U. S. 457 at 471, 44 S. Ct. 623 (1924).

[4] 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. 1938), §§ 151 et seq.

[5] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615 (1937); National Labor Relations Board v. Fruehauf Trailer Co., 301 U. S. 49, 57 S. Ct. 642 (1937); National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U. S. 58, 57 S. Ct. 645 (1937); Washington, Virginia, & Maryland Coach Co. v. National Labor Relations Board, 301 U. S. 142, 57 S. Ct. 648 (1937); Associated Press v. National Labor Relations Board, 301 U. S. 103, 57 S. Ct. 650 (1937). (All of these decisions were handed down on April 12, 1937.) Of the reversal by these cases of the earlier general doctrines as to interstate commerce, see 32 ILL. L. REV. 196 (1937), wherein it is pointed out that, "Viewed against a backdrop of constitutional adjudication stretching only from Alton Railroad v. Railroad Retirement Board [Railroad Retirement Board v. Alton R. R., 295 U. S. 330, 55 S. Ct. 758 (1935)] to Carter v. Carter Coal Co. [298 U. S. 238, 56 S. Ct. 285 (1936)], these decisions are indeed surprising reversals of judicial attitude toward the exercise of federal power. But examined against a broader historical background of judicial interpretation of the commerce clause, they may more fairly be regarded as a return to normalcy." However, another writer, of opposite opinion, has ventured the statement that "the five decisions rendered on April 12, 1937, create a new United States." HENDRICK, BULWARK OF THE REPUBLIC xx-xxi (1937).

[6] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 at 36-37, 57 S. Ct. 615 (1937) (italics added).

> 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. . . . The question is necessarily one of degree."

Thus the National Labor Relations Board acquires jurisdiction over labor relations, provided they are so related to interstate commerce that unfair labor practices with respect to them may lead to industrial strife which will burden or obstruct that commerce. But what does the Court mean by "close and substantial relation"?

Of great importance in the determination of this question by the courts are such factors as the extent to which the given industry is unionized and the employers organized on a national scale, the possibility of a contagious spread of labor trouble, the nature of the employer's business, etc.; not to mention those "imponderables dangerously entwined in social dynamite" which may, unconsciously, be determinative of a given case. It is obvious that the indefiniteness of the test of whether the particular activity will have an appreciably deleterious effect upon interstate commerce precludes a complete determination by a mere reference to one factor alone. Nevertheless, there may often be found a few considerations, relatively simple in their application, which because of their simplicity are pardonably given great weight. So, if a business "imports" raw materials from outside the state or ships its product to other states, there is little doubt but that the relationship to interstate commerce is "close";[7] and the exact determine when the requirement of substantiality is satisfied.

In considering these amounts, certainly the percentage of the company's total business so involved should be important. Before the "Labor Board Cases,"[8] decided by the United States Supreme Court in April, 1937, jurisdiction of the board had been denied by the Circuit Court of Appeals for the Fourth Circuit, on the authority of the *Schecter* case,[9] over a business where as much as eighty per cent of its

[7] And yet one court has recently refused to find "close" relation to interstate commerce in a situation wherein the business would have seemed to be in reality interstate in character. National Labor Relations Board v. Fainblatt, (C. C. A. 3d, 1938) 98 F. (2d) 615. Here cloth was brought into the state directly from mills and after being cut, tailored, and pressed, the cloth was delivered either to outstate customers directly, or to another firm situated in a neighboring state. Because of the fact that the outstate firm which sold the finished product controlled the interstate movement, and used its trucks for transportation of the cloth, the court decided that the company in question was not subject to federal regulation.

[8] See cases cited in note 5, supra.

[9] Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935).

raw materials were imported from outside the state, and over fifty per cent of the product exported beyond state lines.[10] But now there is little difficulty where the percentage of "imports" and "exports" of a business is over fifty per cent.[11] Likewise, there is generally said to be no jurisdiction if the percentage involved in interstate commerce is very small.[12] Other factors, such as those first mentioned, undoubtedly enter to determine, within that range, where the limit will be found in a given case.

In the recent important case of *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*,[13] there were no imports, and but thirty-seven per cent of the product passed beyond the state lines; yet this was held a sufficiently "substantial" portion to permit of federal regulation. But again other factors enter; in this case the board was only seeking to regulate labor relations of the warehousemen, teamsters, and stevedores—employees most directly connected with the interstate commerce aspects of the business.

As low as twenty-five per cent of importation of raw materials has been held "substantial";[14] and the board, in cases which have not

[10] Foster Bros. Mfg. Co. v. National Labor Relations Board, (C. C. A. 4th, 1936) 85 F. (2d) 984. See also Myers v. Bethlehem Shipbuilding Corp., (C. C. A. 1st, 1937) 88 F. (2d) 154 at 155.

[11] National Labor Relations Board v. Friedman-Harry Marks Clothing Co. (2 cases), 301 U. S. 58, 57 S. Ct. 645 (1937), where ninety-nine per cent of the materials came from outstate, and eighty-two per cent of the product was exported to other states; National Labor Relations Board v. American Potash & Chem. Corp., (C. C. A. 9th, 1938) 98 F. (2d) 488; Jeffery-De Witt Insulator Co. v. National Labor Relations Board, (C. C. A. 4th, 1937) 91 F. (2d) 134, cert. den. 302 U. S. 731, 58 S. Ct. 55 (1938), where there was an eighty-five per cent importation of materials and ninety-nine per cent of the product was exported; National Labor Relations Board v. Fruehauf Trailer Co. (2 cases), 301 U. S. 49, 57 S. Ct. 642 (1937), where the percentages were fifty per cent for imports and eighty per cent for exports; Bowen v. James Vernor Co., (C. C. A. 6th, 1937) 89 F. (2d) 968, with similar percentages; Donnelly Garment Co. v. International Ladies' Garment Workers' Union, (D. C. Mo. 1937) 21 F. Supp. 807, eighty per cent of the product exported, importations not stated; National Labor Relations Board v. Carlisle Lumber Co., (C. C. A. 9th, 1937) 94 F. (2d) 138, where though all the materials came from within the state, ninety per cent of the product was exported; Mooresville Cotton Mills v. National Labor Relations Board, (C. C. A. 4th, 1938) 94 F. (2d) 61, with a similar situation.

[12] See Hill v. Darger, (D. C. Cal. 1934) 8 F. Supp. 189, affd. (C. C. A. 9th, 1935) 76 F. (2d) 198 (involving the AAA); Myers v. Bethlehem Shipbuilding Corp., (C. C. A. 1st, 1937) 88 F. (2d) 154, where the corporation was engaged in shipbuilding and also doing a "small amount"of other manufacturing involving interstate transportation of raw materials. Reversed on the ground that the court had no jurisdiction to grant an injunction against the board, 303 U. S. 41, 58 S. Ct. 459 (1938).

[13] 303 U. S. 453, 58 S. Ct. 656 (1938), affirming (C. C. A. 9th, 1937) 91 F. (2d) 790.

[14] See Stout v. Pratt, (D. C. Mo. 1935) 12 F. Supp. 864, affd. (C. C. A. 8th, 1936) 85 F. (2d) 172, but this is poor authority, for, although Judge Otis held that,

reached the courts, has gone somewhat beyond the courts in finding "substantial" portions as low as from fifteen to twenty-five per cent.[15] But another possibility suggests itself; suppose a business imports directly some seventeen per cent of its materials and exports about twenty per cent of the product. Would the theory upon which regulation is based permit the addition of the two figures to obtain a percentage which is "substantial"? It might seem so, treating the "imports" and "exports" together as an interstate commerce unit. The difficulties surrounding this question make understandable the impractical attempt of some judges to select an arbitrary figure in determining the jurisdiction, with little reference to other considerations.[16]

In determining whether the labor relations of a business bear a "close and substantial relation" to interstate commerce, still another factor enters to complicate the picture. Basically, does the jurisdiction of the board rest only upon the extent to which the particular business is engaged in, or related to, interstate commerce, or does it depend upon the effect of a stoppage of the business upon interstate commerce in general? In other words, is the size of the business a factor of importance? It might seem so at first blush; and that, although a large percentage of its shipments are across state lines, if its gross volume is so small as to have a negligible effect upon interstate commerce if it were interrupted, then jurisdiction would not attach; and it is to be remembered that the decision initiating this revitalization of the commerce clause did involve an industry of large size and of highly nationalized character.[17]

Yet Congress has the power to regulate and protect all interstate commerce; there is no express limitation in the Federal Constitution. And, granting that there is sufficient connection between unfair labor

by the terms of the act twenty-five per cent would be a sufficiently "substantial" portion, he came to the conclusion that parts of the act were invalid.

[15] In the Matter of International Filter Co., 1 N. L. R. B. 489 (1936); In the Matter of Brown-Saltman Furniture Co., 7 N. L. R. B. 1174 (1938) (the imports here being made through jobbers).

[16] Wilbur, J., dissenting in the Circuit Court of Appeals from the decision in the Santa Cruz Case, proposed that the limit be set at fifty per cent, all companies "importing" and "exporting" less than that not to be subject to federal regulation. He said: "The line must be drawn somewhere and it seems to me that it must at least be drawn so that control will reside in the sovereignty most affected by the action." National Labor Relations Board v. Santa Cruz Fruit Packing Co., (C. C. A. 9th, 1937) 91 F. (2d) 790 at 799. In a concurring opinion in the same case, Haney, J., expressed a very different view: "I do not believe that it is important whether ninety-eight per cent of respondent's production or only one per cent of it, actually moved in interstate commerce. So long as one per cent of the goods so moved, the unfair labor practice obstructed the movement to that extent. The effect would therefore be direct and immediate." Ibid., at p. 796.

[17] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615 (1937).

practices of employers and interstate commerce to allow regulation under any circumstances by the federal government, why should the government have to wait until some major labor catastrophe in a major industry occurs before it can act? Assuming no constitutional obstacle, the statute itself seems to include within its scope the regulation of small businesses. The rule of construction that, "the exceptions from a power mark its extent"[18] argues this conclusion, for the express exemption from the act of the employment of children by their parents and of domestic servants[19] might be taken to indicate that the act was intended to apply irrespective of the size of the business. The board has freely assumed jurisdiction of very small businesses,[20] and there is some indication that the courts will not consider size a factor.[21]

The discussion thus far has related to businesses which "import" or "export" directly across state lines. But suppose the company in question purchases its raw materials from an intermediate jobber within the state, or sells its product to local customers who themselves engage in interstate commerce. May the relationship of the company to interstate commerce nevertheless be considered sufficiently "close" to permit of federal regulation? This question was considered in *National Labor Relations Board v. Idaho-Maryland Mines Corporation*,[22] and it was there held that the presence of an intermediate jobber within the state insulated the company from federal regulation. This line of limitation, while arbitrary, at least has the merit of simplicity; but, discarding the possibility that there may be a distinction between buying and selling

[18] Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1 at 190 (1824).

[19] 49 Stat. L. 450 (1935), 29 U. S. C. (Supp. 1938), § 152 (3): "The term 'employee' . . . shall not include any individual employed . . . in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

[20] In the Matter of Greensboro Lumber Co., 1 N. L. R. B. 629 (1936) (where the company employed from thirty to fifty men); In the Matter of Appalachian Electric Power Co., 3 N. L. R. B. 240 (1937) (with about sixty-five employees); In the Matter of Novelty Steam Boiler Works, 7 N. L. R. B., 969 (1938) (sixty men employed); In the Matter of Edwin E. Cox, Printer, Inc., 1 N. L. R. B. 594 (1936) (where some fifty-five men were employed).

[21] "The Act is not confined in its jurisdiction to industries operating on a nation-wide scale. It extends to and embraces within its scope *all activities, large or small*, which are, or which affect, 'commerce' as defined in it." National Labor Relations Board v. Bell Oil & Gas Co., (C. C. A. 5th, 1937) 91 F. (2d) 509 at 512 (italics added). See also Jefferey-De Witt Insulator Co. v. National Labor Relations Board, (C. C. A. 4th, 1937) 91 F. (2d) 134, cert. den. 302 U. S. 731, 58 S. Ct. 55 (1938), where only eighty-nine persons were employed and there was a yearly gross business of only $23,000. And see Stout v. Pratt, (D. C. Mo. 1935) 12 F. Supp. 864 (supra, note 14).

[22] (C. C. A. 9th, 1938) 98 F. (2d) 129. (For other facts in the case, see infra, note 27.)

in this regard, the limitation would seem to be rejected by the Supreme Court in its recent decision of *Consolidated Edison Co. v. National Labor Relations Board*,[23] wherein jurisdiction was based solely on the ground that customers of the companies operated in interstate commerce. If this may be taken to mean that jurisdiction may hinge merely on the use the customers make of the product, many possibilities suggest themselves. If a manufacturer within a state, for example, sells to jobbers who resell part of the goods in interstate commerce, is the manufacturer subject to the Wagner Act? The contrary has been asserted.[24] Yet the board has sustained its own jurisdiction over a small printing shop whose customers, with the help of the printer, ship some of the printed matter in interstate commerce.[25] If, however, the immediate purchaser is not an independent jobber, but a subsidiary sales corporation which engages in interstate commerce in reselling the product, there would seem to be little difficulty in holding the parent subject to the National Labor Relations Act, and the board has so decided.[26] Going a step further, may there be regulation of the labor relations of a mine, all of whose output goes locally to a non-affiliated steel company? [27]

In the *Consolidated Edison* case, the business was a monopoly, which suggests the possibility that perhaps the question whether or not the interstate customers could easily and quickly find another source

[23] (U. S. 1938) 59 S. Ct. 206. For a discussion of another aspect of this important decision, see 37 MICH. L. REV. 660 (1939).

[24] Oberman & Co. v. Pratt, (D. C. Mo. 1936) 16 F. Supp. 887, reversed, however, on the ground that no court has jurisdiction to enjoin the board, (C. C. A. 8th, 1937) 89 F. (2d) 786.

[25] The case concerned the Ann Arbor Press of Ann Arbor, Michigan. One of its customers whose interstate shipments of printed matter formed the basis of the board's determination of jurisdiction was the MICHIGAN LAW REVIEW. The complaint was finally withdrawn, however, because a settlement was obtained between the employer and his employees.

[26] In the Matter of General Foods Corp., Diamond Crystal Salt Division, 7 N. L. R. B. 563 (1938). For another example of this unitary treatment of an enterprise approved in the Jones-Laughlin case, see Lyons v. Eagle-Picher Lead Co., (C. C. A. 10th, 1937) 90 F. (2d) 321. See also National Labor Relations Board v. Hopwood Retinning Co., (C. C. A. 2d, 1938) 98 F. (2d) 97.

[27] National Labor Relations Board v. Idaho-Maryland Mines Corp., (C. C. A. 9th, 1938) 98 F. (2d) 129, in addition to the problem discussed supra (note 22) also involved a situation somewhat similar to this. The product of the mine, which was located in California, was sold to a government mint in San Francisco and to a California refinery which sold the refined gold to the same mint. The metal was commingled with other purchases and shipped by the San Francisco mint to the mint in Denver, Colorado. Although the court stated that jurisdiction would not attach on this basis, the case is doubtful authority, for the court also made the statement that the shipment to the Denver mint was "an administrative act of the government," and thus, presumably, not interstate commerce.

of supply would have to be considered; the argument would be that, if they could, their interstate commercial operations would not be impeded, and the company supplying them would thus not be amenable to the board's regulation. Yet another important feature which might serve as a limitation is that the customers involved in the case were themselves interstate instrumentalities. Moreover, the production, delivery, and use of the electricity by the customers were all practically instantaneous; and because of the telephone companies, radio stations, and interstate carriers served, it might be said that, in effect, the Edison company was itself engaged in interstate commerce. The difficulties in setting adequate boundaries to the board's jurisdiction once the principle of the *Edison* case is fully accepted, in addition to the dubious propriety of thus widening the scope of federal regulatory power, militate strongly against the extension of the theory of that case much beyond its facts, upon which the decision is supportable.

With those companies whose immediate operations are purely intrastate in character there is an added factor involved in the *Edison* case which will in the future undoubtedly become of greater moment in the problem of determining the propriety of asserting federal jurisdiction. These intrastate concerns are subject to state Labor Relations Acts[28] and to the regulation of state boards, if any exist. The Edison Companies were not only subject to such state labor regulation, but were also subject to state control as public utilities. The Supreme Court seemed to indicate[29] that, at least where, as in this case, the difficulties arose prior to the passage of the state act and where no appeal had been made to the state board, such facts were not relevant. The Court suggested, however, that the assertion of federal power might not be justified if the regulatory authority of the state had been invoked.

But suppose it be determined that there is a sufficiently "close and substantial" relation to interstate commerce to allow federal regulation, at least to some extent: does this necessarily comprehend all the employees, or might there be certain groups within the company whose relation to the interstate commerce transactions would be considered too remote? In the *Santa Cruz* case, the labor trouble, as before stated, was confined to the warehousemen, teamsters, and stevedores who were involved in the actual shipment of the product; and therefore it cannot be taken as necessarily determinative of the issue here raised. The question was considered by the Court in connection with the Railway

[28] At least five states have enacted "baby" Wagner Acts: Mass. Acts (1937), c. 436; N. Y. Laws (1937), c. 443, art. 20; Pa. Laws (1937), No. 294; Utah Laws (1937), c. 55; Wis. Laws (1937), c. 51. In general, see 51 HARV. L. REV. 722 (1938).

[29] (U. S. 1938) 59 S. Ct. 206 at 214.

Labor Act in the *Virginian Railway* case,[80] wherein it was decided that as to "back shop" employees engaged in repair work on engines and cars used in interstate commerce by the railroad, a continuous stream of which were passing through the back shops for repairs, the act clearly applied. The Wagner Act cases seem not to have considered the matter specifically, and decisions on the point involving other federal legislation should not be held controlling.[81] It might well be argued, however, that the very fact that the employer has in a single enterprise associated all the groups of employees is proof of sufficient interdependence to necessitate their treatment as a unit for the purposes of jurisdiction. Moreover, the nature of the regulations imposed argue against any splitting up of the employees of a particular company. As to the employees of any employer it may be said that: "The relation between them is not tenuous. The effect on commerce cannot be regarded as negligible."[82]

Ward P. Allen

---

[80] Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 57 S. Ct. 592 (1937).

[81] " . . . the commerce power is as much dependent upon the type of regulation as its subject matter." Virginian Ry. v. System Federation No. 40, 300 U. S. 515 at 557, 57 S. Ct. 592 (1937).

[82] Virginian Ry. v. System Federation No. 40, 300 U. S. 515 at 556, 57 S. Ct. 592 (1937).