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CONSTITUTIONAL LAW-STRIKE AS INTERFERENCE WITH INTERSTATE COMMERCE

CONSTITUTIONAL LAW — STRIKE AS INTERFERENCE WITH INTERSTATE COMMERCE — Whether the federal courts have jurisdiction to apply the mailed fist of the injunction to the settlement of strike disputes sometimes depends on whether the strike is deemed an interference with interstate commerce.[1] Thus, the Supreme Court held in the recent case of *Levering & Garrigues v. Morrin*[2] that relief must be denied a group of New York structural steel fabricators who sought to enjoin the boycott activities of the iron workers union, because "... the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce." [3]

But when does a strike of union workers against an open shop employer have a different purpose than "compelling the employment of union labor"? Does not the refusal of the Supreme Court to consider the case on the merits, despite the finding of the master in chancery who heard the proofs that the strike constituted an injury to the general public,[4] indicate principally a growing reluctance on the part of the fed-

[1] United States Constitution, Art. 1, sec. 8, par. 3; 36 Stat. 1092 (1911); 38 Stat. 219 (1913); U. S. C., tit. 28, sec. 41, par. 8 (1926).

[2] 289 U. S. 103, 53 Sup. Ct. 549 (1933).

[3] Quotation from opinion of Sutherland, J., Levering & Garrigues v. Morrin, 289 U. S. 103 at 107, 53 Sup. Ct. 549 (1933).

[4] The findings of fact are thus summarized in the opinion of the lower federal court, delivered by Swan, J.:

> "The bill of complaint charges that defendants are attempting to compel the plaintiffs to operate upon a closed union shop basis, and that to effectuate this purpose they have, among other alleged illegal acts, put into effect a boycott of the plaintiffs within the metropolitan area in and about New York City by persuading, through threats and intimidation, owners, architects, and general contractors not to deal with plaintiffs. The referee . . . found as a fact that the boycotting charge was established and that the defendants intended to continue their efforts."

Levering & Garrigues v. Morrin, (C. C. A. 2d, 1932) 61 F. (2d) 115.

A more elaborate specification of the acts complained of is contained on page 11 of the brief for petitioners filed by Mr. Merritt Lane, of Newark, N. J., counsel for petitioners:

> "Briefly, the acts of the union, its locals and members were as follows: They agreed among themselves that none of their members would work upon steel fabricated by plaintiffs and others engaged in the same line of business operating open shop unless plaintiffs would enter into a contract with them agreeing to employ exclusively union men; they agreed among themselves that no one of their members would work upon buildings being erected by general contractors who had let to plaintiffs, although, on the particular work involved, no one of plaintiffs or other contractors operating open shop was concerned and all the work upon the particular building in all of its branches was being performed closed union shop; they agreed among themselves that no one of their members would work upon a building being erected by an owner, which owner, had, upon other work, employed a contractor who had let a contract to plaintiffs or other concerns engaged

eral judiciary to interfere in the settlement of capital-labor disputes? [5] If the courts were anxious to intervene, could not any strike which reduced the amount of traffic in interstate commerce be deemed an actionable interference therewith? An answer to these questions will be attempted below.

It is true that the courts have formulated a test which boasts certain logical attractions. As stated in *United Leather Workers' International Union v. Herkert & Meisel Trunk Co.*,[6] "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 to that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing manufacture to monopolize the supply, control the price, or

in the same business operating open shop; they agreed among themselves that they would call to their assistance members of other building trades unions (the building trades in the Metropolitan District of New York being in effect one hundred per cent unionized, so that no building can be erected without the aid of union labor), to the end that the members of such other building trade unions would decline to work upon any building upon which plaintiffs or others engaged in the same business operating open shop should have subcontracts for the fabrication and erection of structural iron and steel or for the contractors or owners who let contracts to plaintiffs or others engaged in the same business operating open shop."

The Master found, on page 91 of his report:

"To summarize the grounds on which I base my conclusion (that plaintiff's legal rights were being interfered with), the means employed by defendants to effectuate their purposes were without legal excuse or justification and therefore unlawful (1) because said 'means' have caused intentional damage to plaintiff's business through threatened injury to the business of innocent third persons, (2) because they amounted to intentional coercion of neutrals for the purpose of injuring plaintiffs, (3) because *they constituted an injury to the general public* (italics ours), and (4) because, after the strike of 1924 was actually over, and plaintiffs were carrying on with a full complement of workmen, defendants had no authority or standing to interfere between plaintiffs and their employes, or to create or attempt to remedy any grievance in their behalf."

[5] This reluctance perhaps nowhere better appears than in the opinion of Amidon, J., in Great Northern Ry. v. Brosseau, (D. C. N. D. 1923) 286 Fed. 414 at 422, where it is said: " . . . the doing of the acts mentioned . . . ought to be presumed to have as their primary purpose the promotion of the employes' side of the controversy, and not the obstruction of the mails and interstate commerce."

The somewhat ineffective provisions of the Clayton Act, 38 Stat. 730 (1914), and the far more drastic provisions of the Norris Act, 47 Stat. 70 (1932), U. S. C., tit. 29, sec. 101 (1933 Supp.), indicate a Congressional temperament that favors a *laissez faire* policy.

[6] 265 U. S. 457, 44 Sup. Ct. 623, 68 L. ed. 1104 (1924). The test formulated was applied here to justify the refusal to enjoin a strike which had paralyzed operations of a large trunk-making company, the court pointing out that the strike was not aimed at preventing plaintiff from shipping goods already manufactured, or receiving raw materials from other States, and that the restraint on interstate commerce was effected only through interference with production, and was hence "indirect."

discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said to burden" interstate commerce. The distinction is between an interference with manufacture[7] and an interference with the shipping of already manufactured goods.[8]

But the application of the test is not easy. Thus, in *Pittsburgh Terminal Coal Corp. v. United Mine Workers of America*[9] the defendant strikers relied on the fact that the plaintiff showed no interference with the shipping of coal already mined, yet the court found that an *intent* to interfere with interstate commerce could be inferred from the allegations of the plaintiff's bill. And in *Danville Local Union v. Danville Brick Co.*,[10] although it was alleged that the strike prevented the plaintiff from shipping brick to other States, yet the court found that the interference, " . . . confined to a single local industry . . . is so insignificant in its effect that it obviously cannot be said to have any direct or appreciable influence in restraining interstate commerce. . . . " The problem is not one for rule-of-thumb tests. As Mr. Justice Holmes has remarked, "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." [11]

[7] United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344 at 410, 42 Sup. Ct. 570, 66 L. ed. 975 (1922): " . . . coal mining is not interstate commerce and obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it or has necessarily such a direct, material and substantial effect to restrain it that the intent reasonably must be inferred."

[8] Decorative Stone Co. v. Building Trades Council, (D. C. S. D. N. Y., 1927) 18 F. (2d) 333; aff'd (C. C. A. 2d, 1928) 23 F. (2d) 426. Here the defendant union members refused to work on plaintiff's stone, although no attempt was made to unionize plaintiff's shop; and the court decided that the sole aim of the strikers was to exclude out-state artificial stone from the New York market. Artificial stone produced in New England could be sold at one-third the price of similar products manufactured in New York; it was darkly hinted that the strike was perhaps inspired by New York manufacturers of artificial stone. *Cf.* In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092 (1895); Pittsburgh Terminal Coal Corp. v. United Mine Workers of America, (D. C. W. D. Pa. 1927) 22 F. (2d) 559; United Leather Workers' International Union v. Herkert & Meisel Trunk Co. (C. C. A. 8th, 1922) 284 Fed. 446; reversed, 265 U. S. 457, 44 Sup. Ct. 623, 68 L. ed. 1104 (1924).

[9] (D. C. W. D. Pa. 1927) 22 F. (2d) 559.

[10] (C. C. A. 7th, 1922) 283 Fed. 909. The Court remarked at p. 910:

> "That acts which interfere with production ultimately diminish the quantity of goods moving in interstate trade is self-evident, and if the interference were sufficiently widespread the effect upon interstate commerce would be immediate and appreciable. But interference which is purely local in character and confined to a single local industry, as in this case, is so insignificant in its effect that it obviously cannot be said to have any direct or appreciable influence in restraining interstate commerce. . . . "

Cf. Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. ed. 346 (1888).

[11] Quoted in Loewe v. Lawlor, 208 U. S. 274 at 298, 28 Sup. Ct. 301, 52 L. ed.

Impelled, then, by the practical needs of each case, the Supreme Court has allowed labor free play unless the union's bargaining power is so great that the Court deems interference necessary.[12] While the distinction has not been pointed out by the courts, it appears that in many instances the size and extent of the business paralyzed by the strike have been determining factors.[13]

Injunction Given where Stricken Industry is Large

The dividing line seems to be neatly demarcated in the two famous *Coronado* cases.[14] In the earlier case, plaintiff's production of coal was 5,000 tons a week. Its annual products were worth $465,000, and seventy-five per cent thereof was shipped in interstate commerce. The strikers had the announced ambition of unionizing all the coal fields of the country, in order, among other things, to prevent interstate trade in non-union coal from interfering with interstate trade in union coal.[15]

488 (1908). In United States v. Patten, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. ed. 333 (1913), the Court held that the interference with interstate commerce was not remote but direct, where the result of a conspiracy between persons not themselves engaged in commerce compelled action by others that created artificial conditions which necessarily impaired commerce.

[12] As to governmental control of labor's bargaining power, see Wahrenbrock, "Federal Anti-Trust Law and the National Industrial Recovery Act," 31 MICH. L. REV. 1009 (1933), especially at 1024 *ff*. But whatever form Congressional control may take, the definition of the social policies to be furthered in the arbitration of capital-labor disputes is surely with the court. As stated in FRANKFURTER AND GREENE, THE LABOR INJUNCTION 203 (1930):

> "Judged by authoritative utterances, contemporary society rests upon certain assumptions: that social progress depends upon economic welfare; that our economic system is founded upon the doctrine of free competition, accepting for its gain the costs of its ravages; that large aggregations of capital are not inconsistent with the doctrine of free competition; but are, indeed, inevitable and socially desirable; that the individual workers must combine in order thereby to achieve the possibility of free competition with concentrated capital. The task of law . . . is to accept or reject concretely the implication of these assumptions."

[13] Powell, "The Supreme Court's Adjudication of Constitutional Issues in 1921-22," 21 MICH. L. REV. 174 (1922). The author sees a hint in the opinion of Taft, J., in the earlier Coronado case that the amount of production involved in a strike may determine whether the effect upon interstate commerce is sufficient to bring the conspiracy within the Sherman Act.

[14] United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344, 42 Sup. Ct. 570, 66 L. ed. 975 (1922); Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295, 45 Sup. Ct. 551, 69 L. ed. 963 (1925).

[15] Discussing the earlier Coronado case, Powell says in "The Supreme Court's Adjudication of Constitutional Issues in 1921-22," 21 MICH. L. REV. 174 at 184 (1922):

> "While seventy-five per cent of the product of the mines in question was customarily shipped in interstate commerce, this amounted to only 5,000 tons a week and could have no appreciable effect upon the price of coal generally or upon non-union competition throughout the country. The announced ambition of the

But the Court dismissed this factor as immaterial in view of the fact that the national body was not participating in the particular local strike, and that the conditions prevailing at a mine of this size could have no appreciable effect upon the price of coal generally. Instead of giving these reasons for refusing the injunction, however, the Court said: "In the case at bar, there is nothing in the circumstances . . . to indicate that . . . any of their accomplices, had in mind interference with interstate commerce. . . . "[16]

In the subsequent case, brought by the same company four years later, the situation facing the court was somewhat different, the production of the company having increased 25,000 tons per week, so that it was producing as much in a day as it formerly produced in a week. In that case the Court found that the strike necessarily had such a direct, material, and substantial effect to restrain interstate commerce that the intent to restrain commerce unlawfully must be inferred, and the injunction issued.[17]

In another coal strike case,[18] where the plaintiff mining company had a production of 17,000 tons daily, or three times larger than did the plaintiff in the second *Coronado* case,[19] the Court found that there was an interference with interstate commerce.

Even this pragmatic classification is not susceptible of definite and

United Mine Workers of America to unionize all the coal fields of the country in order, among other things, to prevent interstate trade in non-union coal from interfering with interstate trade in union coal, was dismissed as immaterial in view of the fact that the national body had not participated in the particular local strike."

See further discussion in 74 UNIV. PA. L. REV. 321 (1926).

[16] United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344 at 411, 42 Sup. Ct. 570, 66 L. ed. 975 (1921). See context quoted in note 7, supra.

[17] Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 455 Sup. Ct. 551, 69 L. ed. 963 (1925). It should be stated that the Court places more emphasis on the fact that evidence showed an intent to prevent sale of coal in commerce and showed the secret co-operation of the national union, than on the fact that the mine had become larger, pointing out that after the first trial plaintiff had unsuccessfully moved for re-hearing (42 Sup. Ct. 587 (1922)) on the ground that even at that time the *potential* capacity was 5,000 tons daily despite the actual production of only 5,000 tons a week, and saying at p. 309: "Whatever error . . . might have been made in stating the capacity of all the mines of the plaintiff could not affect our conclusion. . . . " Nevertheless, the Court carefully pointed out the notorious inaccuracy of estimates as to the total productive capacity of a mine, indicating that what counts is not potential capacity, but the actual amount of coal being shipped in commerce when the strike occurs. See 25 COL. L. REV. 104 (1925).

[18] Pittsburgh Terminal Coal Corp. v. United Mine Workers of America, (D. C. W. D. Pa. 1927) 22 F. (2d) 559. The court declared that since the strike greatly curtailed the amount of coal shipped in interstate commerce, an intent on the part of the strikers to interfere with commerce could be inferred.

[19] Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295, 45 Sup. Ct. 551, 69 L. ed. 963 (1925).

unvaried application. In the *Loewe* case,[20] for example, the plaintiff company's annual product was worth only $80,000, less than one-fifth that of the coal company in the early *Coronado* case where an injunction was refused. But in this case the Court faced the circumstance that the defendant union had already unionized 72 out of the 80 hat manufacturers in the country, and because of this element concluded that the strike should be enjoined, and therefore termed it an interference with interstate commerce.

In an early case,[21] a strike of draymen in New Orleans had paralyzed the freight traffic of the city. The mayor called a public meeting to discuss the emergency, and martial law was threatened. The Court found without discussion that interstate commerce had been restrained. Here again, the magnitude of the strike was appalling.

Other cases in which strikes were deemed to interfere with interstate commerce involved much larger amounts. In the famous case of *Duplex Printing Press Co. v. Deering*,[22] it appeared that there were only four large manufacturers of printing presses in the country. Three of them had agreed to union standards, and the strike was against the fourth. As pointed out by Mr. Justice Brandeis, in his thrilling dissenting opinion, if the injunction were given it would mean that the other three manufacturers would rebel from the rule of the union. Every printing press manufacturer in the country was thus involved in the case. The strike was deemed an interference with interstate commerce. Similarly, in *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association*,[23] in which an injunction was given, the union was battling for its existence against the largest cut stone quarry in the United States, with annual sales of $15,000,000.

[20] Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. ed. 488 (1908).

[21] United States v. Workingmen's Amalgamated Council of New Orleans, (C. C. E. D. La. 1893) 54 Fed. 994.

[22] 254 U. S. 443, 41 Sup. Ct. 172, 65 L. ed. 349 (1921).

[23] 274 U. S. 37, 47 Sup. Ct. 522, 71 L. ed. 916 (1927). The Court remarked at p. 47: "A restraint of interstate commerce cannot be justified by the fact that the ultimate objects of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint." Again the time-worn distinction was given lip-service, in this language (quoting from the second Coronado case):

> "The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act."

Injunction Refused where Stricken Industry is Small

Among the cases where an injunction has been refused because the restraint on interstate commerce is "indirect and remote" is *United Leather Workers International Union v. Herkert & Meisel Trunk Co.*[24] Here the strike paralyzed a business that was shipping $2,500,000 worth of trunks annually. The lower federal courts granted an injunction against the boycotting strikers, on the ground that it was an illegal conspiracy to restrain trade between States, since 90 per cent of the plaintiff's product was shipped to other States. But the decisions were reversed by the Supreme Court, which held that the effect on interstate commerce was "remote and indirect." It is interesting to note that in all the courts there were seven judges who felt there was no interference with interstate commerce, and six who felt there was.[25]

It appears that where an injunction is refused, courts are less eager to detail in their opinions the amounts involved in the cases. In the *Danville* case, before referred to,[26] however, the court pointed out that a single industry was affected by the strike. Other cases indicate a similar result. In *Aeolian Co. v. Fischer*,[27] the strike again interfered with a comparatively small business, and it was found that there was no restraint on commerce.[28]

Reasonableness of Restraint

There are, to be sure, other factors which weigh heavily with the courts. In many cases, the issue squarely presented to the court is

[24] (C. C. A. 8th, 1922) 284 Fed. 446, reversed, 265 U. S. 457, 44 Sup. Ct. 623, 68 L. ed. 1104 (1924). This is a border-line case, whatever standard of classification be adopted. The amount of production was only a few thousand dollars less annually than in the second Coronado case, 268 U. S. 295, 45 Sup. Ct. 551, 69 L. ed. 963 (1925). Methods employed by strikers were illegal, but not characterized with the heinous brutality that sometimes occurs.

[25] The decision of the Supreme Court is approved in 19 ILL. L. REV. 351 (1925), in which the author declares that the final result was sound *logically*, because there was no proof of the *power* of the strikers to obstruct commerce; and *socially*, because contrary results would lead to the rule that every strike could be brought into federal courts.

[26] Danville Local Union v. Danville Brick Co., (C. C. A. 7th, 1922) 283 Fed. 909.

[27] (D. C. S. D. N. Y. 1928) 27 F. (2d) 560. The decision is approved in 15 VA. L. REV. 278 (1929) on the ground that the defendant did not unlawfully restrain trade in order to obtain a benefit as a secondary result, but sought a benefit which incidentally restrained trade. It is submitted that such reasoning involves a *circulus in extrabilus*. It should be noted that plaintiff's business was limited to installation of pipe organs in New York churches and a few theatres not yet equipped with vitaphone equipment.

[28] Similarly, the case of Gable v. Vonnegut Machinery Co., (C. C. A. 6th, 1921) 274 Fed. 66, involved a strike at the shop of a comparatively small corporation making parts for the Overland automobile plant at Toledo, Ohio.

whether the balance of power in a particular dispute is to be inclined toward the side of labor or that of capital. A court favoring a militant laboring class is less ready than is a capitalistic court to find a restraint of commerce in strike activities.[29] Thus, Mr. Justice Brandeis declared boldly in his dissenting opinion in the *Bedford* case:[30] "I have no occasion to consider whether the restraint, which was applied wholly intrastate, became in its operation a direct restraint upon interstate commerce. For it has long been settled that only unreasonable restraints are prohibited by the Sherman law. . . . And the restraint was, in my opinion, a reasonable one."

In *Industrial Association of San Francisco v. United States*,[31] the building trade of San Francisco, it appeared, was seriously crippled because of the refusal of union house painters to use large and efficient brushes which would enable them to do more work in fewer hours! To combat these high-handed measures of the laboring aristocracy, the builders' exchange adopted an open-shop policy and refused to give building permits to union employers, thus decreasing sales of building materials, some of which were shipped from other States. The Court found that the purpose and effect of the plan was not to interfere with interstate commerce, but rather to encourage what was deemed a healthful open-shop policy.

In another case, an employment agency by which a group of ship-owners controlled employment of seamen was deemed a direct restraint on trade for the reason that the Court wished to reduce the complete control that ship-owners were enabled to exercise over their employes.[32]

[29] " . . . the restraint must be undue and unreasonable, such as to work injury to the public." (Syllabus.) Trenton Potteries Co. v. United States, (C. C. A. 2d, 1924) 300 Fed. 550; reversed, 273 U. S. 392, 47 Sup. Ct. 377, 71 L. ed. 700 (1927). How few cases can be measured by so confusing a yardstick! The Supreme Court nine years ago found that the paralysis of the building industry in San Francisco was a reasonable restraint of trade (Industrial Ass'n of San Francisco v. United States, 268 U. S. 64, 45 Sup. Ct. 403, 69 L. ed. 849 (1925), discussed infra in text). How would it have been described by Savage, C. J., who proclaimed 98 years ago, in People v. Fisher, 14 Wend. (N. Y.) 2 at 18 (1835): " . . . nor is the mechanic obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than one dollar per pair, but *he has no right to say that no other mechanic shall make them for less*. . . . Should the journeymen bakers refuse to work, unless for enormous wages, which the master bakers could not afford to pay, and they should compel all the journeymen in a city to stop work, the whole population must be without bread. . . . Such combinations would be productive of derangement and confusion, which certainly must be considered 'injurious to trade.' "

[30] Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n of North America, 274 U. S. 37 at 57, 47 Sup. Ct. 522, 71 L. ed. 916 (1927).

[31] 268 U. S. 64, 45 Sup. Ct. 403, 69 L. ed. 849 (1925).

[32] Anderson v. Shipowners' Ass'n of Pacific Coast, 272 U. S. 359, 47 Sup. Ct. 125, 71 L. ed. 298 (1926). The Court said that the restraint on commerce was direct, since the ships on which the men worked were engaged in commerce between

When proceedings were brought to enjoin boycott activities in the national railway strike of 1922,[33] the Court declared in the first paragraph of the opinion that the strike was a restraint of commerce, and proclaimed proudly: "Restraint of trade may not be adopted as a weapon in industrial warfare." Obviously, the case was one where only federal intervention would be effective. From a purely logical point of view, however, it is not so clear that the acts of the strikers, tested by the criterion of precedent, amounted to an "unreasonable restraint." [34]

Intent of Strikers

The actual intent of the strikers can seldom be learned. The union workers are only obeying orders. What the union leaders have in mind is a dark secret, and one which the courts do not try especially to discover. As said in *Brims v. United States*,[35] approving the following instruction of the lower court, "If he [the defendant] purposely engaged in the conspiracy alleged, and the necessary and direct result of such conspiracy was to *materially* restrain interstate commerce . . . he is legally chargeable with intending that result, and cannot be heard to say the contrary." [36]

It is suggested that whatever language is found in opinions as to the "actual intent," "apparent intent," or "necessary intent" of the strikers is purely make-weight.

Primary and Secondary Boycotts

There is likewise some indication in the cases that courts are more willing to find a restraint of interstate commerce in the case of a secondary boycott than in the case of a primary boycott.[37] It is true that

the States. Could it not as forcibly have been argued that the effect on interstate commerce was remote and indirect, on the ground that the hiring of men is no more commerce than is the mining of coal? *Cf.* United States v. Lehigh Valley R. R., 254 U. S. 255, 41 Sup. Ct. 104, 65 L. ed. 253 (1920); See Lay, "The Commerce Clause of the Constitution," 60 AM. L. REV. 161 (1926).

[33] United States v. Railway Employees' Department, A. F. of L., (D. C. N. D. Ill. 1922) 283 Fed. 479 at 495.

[34] 32 YALE L. J. 166 (1922).

[35] (C. C. A. 7th, 1927) 21 F. (2d) 889 at 891 (italics ours).

[36] In Pittsburgh Terminal Coal Corp. v. United Mine Workers of America, (D. C. W. D. Pa. 1927) 22 F. (2d) 559, for example, the defendants explicitly disavowed any intent to interfere with interstate commerce *per se*, and maintained that their only object was to obtain better conditions of employment. But since the output of the plaintiff's mine was 17,000 tons daily, the court found that the allegation in plaintiff's bill of such an intent was sufficient ground for imputing the intent. The words *intent* and *necessary effect* are used almost synonymously by the courts in this connection. See, e.g., United Leather Workers' Int'l Union v. Herkert & Meisel Trunk Co., 265 U. S. 457, 44 Sup. Ct. 623, 68 L. ed. 1104 (1924).

[37] In the first Coronado case, 259 U. S. 344, 42 Sup. Ct. 570, 66 L. ed. 975

in the case of a secondary boycott extended into several States there is a more direct interference with the shipping of the product in interstate commerce, and the situation nicely fits the distinction between production and transportation which has been formulated by the courts. But it should be observed that while a privileged form of strike may affect a manufacturer's access to interstate markets as much as a strike in which illegal methods are employed, only the latter, in most cases, will be spoken of as interference with interstate commerce.[38] And not all cases of secondary boycotts are deemed interferences with interstate commerce.[39]

Related Fields

In other fields, where the jurisdiction of the federal courts depends upon a finding of interference with interstate commerce, it is again found that the phrase is used as a make-weight to justify federal intervention in any particular case where intervention is deemed proper.

It has been held, for example,[40] that travelling baseball teams are

(1922), destruction of property was alleged, but little was proven beyond sporadic rioting and the firing of fusillades of shots. In the second Coronado case, 268 U. S. 295, 45 Sup. Ct. 551, 69 L. ed. 963 (1925), in which an injunction was granted, the evidence showed that the mine had been flooded, that several houses had been dynamited, and that two "scabs" had been deliberately murdered. In the Duplex case, 254 U. S. 443, 41 Sup. Ct. 172, 65 L. ed. 349 (1921), in which an injunction issued, the secondary boycott took the form of warning customers not to purchase or install plaintiff's presses, and threatening them with loss should they do so; threatening customers with sympathetic strikes in other trades; warning a trucking company not to haul the presses, and threatening trouble; inciting employes of customers of the printing press company to strike; threatening union men with loss of cards if they assisted in installing them; and threatening an exposition company with a strike if it permitted the presses to be exhibited.

Of course the distinction as between legal and illegal forms of boycott, as defined in part by the Norris Act, 47 Stat. 70, sec. 1 (1932), U. S. C., tit. 29, sec. 101 (1933 Supp.), must not be forgotten.

[38] Interference with interstate commerce found, secondary boycott: International Organization, United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Co., (C. C. A. 4th, 1927) 18 F. (2d) 839; certiorari denied, 275 U. S. 536, 72 L. ed. 413 (1927); Pittsburgh Terminal Coal Corp. v. Union Mine Workers of America, (D. C. W. D. Pa. 1927) 22 F. (2d) 559; Bedford-Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U. S. 37, 47 Sup. Ct. 522, 71 L. ed. 916 (1927); Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 Sup. Ct. 172, 65 L. ed. 349 (1921); Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. ed. 488 (1908).

No interference with interstate commerce found, primary boycott: Aeolian Co. v. Fischer, (D. C. S. D. N. Y. 1928) 27 F. (2d) 560, holding that mere refusal to work is not interference with interstate commerce; Danville Local Union v. Danville Brick Co., (C. C. A. 7th, 1922) 283 Fed. 909; Industrial Ass'n of San Francisco v. United States, 268 U. S. 64, 45 Sup. Ct. 403, 69 L. ed. 849 (1925).

[39] Decorative Stone Co. v. Building Trades Council, (D. C. S. D. N. Y. 1927) 18 F. (2d) 333, in addition to the principal case.

[40] Federal Baseball Club v. National League, 259 U. S. 200, 42 Sup. Ct. 465, 66 L. ed. 898 (1922). Discussed in 96 CENT. L. J. 237 (1923).

not interstate commerce, while travelling vaudeville teams are.[41] It has even been held that the ranging of cattle on a border ranch which lay partly in two States is a direct interference with interstate commerce — surely the Court could easily have reached an opposite conclusion.[42] A similar problem is raised when the question is at what point commerce ceases.[43] Again, in the group of cases in which the validity of statutes regulating the businesses of travelling salesmen,[44] railroad trains,[45] or radio broadcasting,[46] is questioned, the commerce concept is used to extend federal control over spheres of activity in which it is believed centralized control is desirable. Similar results are observed in cases which decide whether railroad employees working in train-yards are engaged in interstate commerce.[47] "Lines are pricked

[41] Hart v. Keith Vaudeville Exchange, 262 U. S. 271, 43 Sup. Ct. 540, 67 L. ed. 977 (1923). *Cf.* Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. ed. 297 (1895), for an invidious distinction between cases where transportation is a mere incident and those where it is the essential thing.

[42] Thornton v. United States, 271 U. S. 414, 46 Sup. Ct. 585, 70 L. ed. 1013 (1926). The decision is criticized in 21 ILL. L. REV. 636 (1927).

[43] See Isaacs, "Activity Subsequent to Interstate Commerce," 25 MICH. L. REV. 740 (1927) and 39 HARV. L. REV. 489 (1926).

[44] Real Silk Hosiery Mills v. City of Richmond, (D. C. N. D. Cal. 1924) 298 Fed. 126, holding that an anti-peddlers statute interfered with interstate commerce. Criticized in 11 VA. L. REV. 141 (1924). *Cf.* Lake Shore & M. S. Ry. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. ed. 702 (1899).

[45] Illinois Central R. R. v. Illinois, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. ed. 107 (1896). Discussed at length in Lay, "The Commerce Clause of the Constitution," 60 AM. L. REV. 161 (1926).

[46] Whitehurst v. Grimes, (D. C. E. D. Ky. 1927) 21 F. (2d) 787, holding invalid a municipal tax on radio stations for broadcasting privileges. The effect of this tax on the national broadcasting system might have been termed remote, but it was important to stamp out what might prove to be a disastrous multiplication of the scheme. Case discussed in 26 MICH. L. REV. 919 (1928).

[47] In Delaware, Lackawanna & Western R. R. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. ed. 1397 (1915), plaintiff was a coal miner digging coal that the defendant corporation, his employer, later used on trains which it operated in interstate commerce. It was held that this particular employe was engaged in mining, not in interstate commerce. But the case is near the border line, for in Scelfo v. Buffalo, R. & P. Ry., 211 App. Div. 243, 207 N. Y. S. 455 (1925), it was held that a man removing cinders from the railway track was engaged in interstate commerce. The case is discussed in 98 CENT. L. J. 111 (1925). The reason for which almost all railway employees are deemed to be engaged in interstate commerce is perhaps the eagerness of the court to bring employees under the provisions of federal employers liability acts. See Powell, "Constitutional Law in 1919-1920," 19 MICH. L. REV. 1 (1920); P. & R. Ry. v. Di Donato, 256 U. S. 327, 41 Sup. Ct. 516, 65 L. ed. 955 (1921); N. Y. Central Ry. v. Mohney, 252 U. S. 152, 40 Sup. Ct. 287, 64 L. ed. 502 (1920). *Cf.* Fenstermacher v. Chicago, R. I. & P. Ry., 309 Mo. 475, 274 S. W. 718 (1925); Gordon, "The Child Labor Law Case," 32 HARV. L. REV. 45 (1928); United States v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. ed. 663 (1911).

out by the gradual approach and contact of decisions on the opposing sides." [48]

In the case of capital-labor disputes, as in many fields, the commerce clause has given the federal courts an opportunity for centralization of control in cases where such a *modus operandi* has appeared to the courts to be meet and proper.

F. E. C.

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[48] Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. ed 112 (1911).