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## FIVE YEARS OF THE NORRIS-LaGUARDIA ACT

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The subject matter of the so-called Norris-LaGuardia Act<sup>1</sup> and its interpretation and application in the settlement of labor disputes are becoming increasingly important. This Act, in effect, limits the jurisdiction of the courts of the United States in issuing restraining orders or temporary or permanent injunctions in cases involving or growing out of labor disputes. The frequency with which such disputes have occurred and are occurring and the proportions that they are attaining would seem to justify at this time a discussion of the fifteen sections of the Act in the light of such judicial opinion and interpretation as has appeared during the five years of its existence. It may seem strange that neither the construction nor the constitutionality of the Act have been passed upon by the Supreme Court of the United States; this is, perhaps, accounted for by the fact that labor decrees, especially those against the unions, are seldom appealed.<sup>2</sup>

Despite the frequency with which the Supreme Court reverses the lower United States Courts, the twenty-odd cases that have arisen under the Act in the district courts and the circuit courts of appeals are, nevertheless, highly important.

Before the Act became law, the courts, particularly the district courts, had frequently issued injunctions so broad in their effect that they operated to restrain not only illegal, but legal activities as well, and they were based not only upon testimony in open court subject to cross-examination, but upon *ex parte* affidavits. These same courts, however, under the guidance of the

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\*New York City.

1. 47 STAT. 70 (1932), 29 U. S. C. A. §§ 101-115 (1936).

2. FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* (1930) 79-80.

specific provisions of the new Act, have rendered decisions that reveal (except in rare instances) a complete change of practice and attitude. It will, no doubt, make for clarity to discuss the Act section by section and to review the decisions that have interpreted such sections that have come under judicial review. This method of treatment would seem best adapted to showing the present situation as well as the change in practice and attitude of the lower courts.

#### SECTION 1. ISSUANCE OF RESTRAINING ORDERS AND INJUNCTIONS; LIMITATIONS; PUBLIC POLICY.

Section 1, or the enacting clause, denies to the courts of the United States jurisdiction to issue any restraining order or temporary or permanent injunction in a case "involving or growing out of labor dispute;"<sup>3</sup> except "in a strict conformity with the provisions of the Act." It also provides that such courts shall not issue any such order or injunction "contrary to the public policy declared in this Act," which is declared in Section 2. The first provision is directed toward securing "justice" for labor in the courts by means of certain procedural prerequisites. The second provision goes beyond mere procedure, and attempts to create in the courts a new and more uniform substantive approach to the problems of collective bargaining. This fact was recognized in *United Electric Coal Cos. v. Rice*,<sup>4</sup> where the court ruled that it had no jurisdiction to enjoin violence and unlawful picketing because the plaintiff-employer's closed-shop contract with a rival union was contrary to the public policy set forth in section 2. The court treated each mine of the employer as a separate bargaining unit and held that the employer must bargain with the union which constitutes the majority at each particular mine, and could not, without violating the public policy of the Act, sign a blanket contract with a union that represented a majority of *all* his employees and which controlled all his mines except the one in question.<sup>5</sup>

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3. Section 13 (a), (b), (c), discussed later, defines when a case involves or grows out of a labor dispute.

4. 9 F. Supp. 635 (E. D. Ill. 1934).

5. In *United Electric Coal Cos. v. Rice*, 80 F. (2d) 1 (C. C. A. 7th, 1935), cert. denied, 56 S. Ct. 590 (1936), the court interpreted the evidence, and on a substantially different set of facts reversed the lower court. The Circuit Court of Appeals based its decision on the assumption that the blanket contract was made while *all* the mines were controlled by the United Mine Workers, and that the one mine turned to the Progressive Union some time thereafter. Denial of certiorari may be rationalized on the basis that the Supreme Court felt that the total of plaintiff's mines was the bargaining unit or that the Supreme Court refused to go behind the facts as found by the C. C. A. as to the time that the contract was made.

## SECTION 2. PUBLIC POLICY IN LABOR MATTERS DECLARED.

This section provides that in the interpretation of the Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited by the Act, the "public policy of the United States" is as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted."

Section 2 is more than a mere preamble.<sup>6</sup> Congress having spoken, it is now the function of the courts to carry out Congress's policy rather than the one that the particular judge conceives to be desirable. The effect of Section 2 can hardly be confined to injunction suits; it is also bound to influence substantive principles in actions against unions for damages.

Is this Section, however, a boomerang to organized labor? In *Lauf v. Shinner*,<sup>7</sup> the union (which represented none of plaintiff's employees) had been picketing plaintiff's markets in Milwaukee to compel plaintiff to accept the union as the sole bargaining unit. The Circuit Court of Appeals, Seventh Circuit, accepted the employer's contention that the public policy of the Section required an injunction against the defendant union,<sup>8</sup> by enjoining the appellant union from picketing, from seeking to coerce the plaintiff to discharge its employees because they did not choose to join the union

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6. Cf. Jay Finley Christ, *The Federal Anti-Injunction Bill* (1932) 26 Ill. L. Rev. 516, 521, who describes Section 2 as unnecessary and insignificant.

7. 82 F. (2d) 68 (C. C. A. 7th, 1936).

8. Affirming an injunction granted in an unreported case by the federal district court of the eastern district of Wisconsin.

or to coerce the plaintiff to compel his employees to join the union, and from stating that the plaintiff was unfair to organized labor. The court said:

"Indeed, neither the employer nor any of his employees are engaged or involved in a labor dispute with anyone. The controversy, rather, seems to be a unilateral one with the sole object of coercing appellee to compel its employees to join the appellant union, in order that it may represent the employees in their dealings with the employer. Appellants seek to accomplish that result by picketing and damaging the employer's business. But, under the Norris-LaGuardia Act and the Wisconsin Labor Code, it would amount to a violation of both the federal and state law if appellee complied with appellants' demands, for under those laws the employer is specifically enjoined from influencing his employees in their choice of a union or their representative. The employees have refused to join the appellant union, they have organized their own union and have selected their own representative without interference or participation of their employer, and their rights in these respects are as fully protected by the laws as are those of appellants . . . . It being unlawful for appellee to dictate to its employees what organization they should join, or what representative they should select, . . . it follows that appellants' demand upon appellee was unlawful."<sup>9</sup>

Although Section 2 is undoubtedly directed against employer-controlled company unions, the court brushed aside the allegation that appellee was fostering a company union, with the assertion that such action would not be in contravention of the declared public policy of the Act.

Two unreported cases in the United States District Court, Chattanooga, Tenn., have taken a similar view and held that picketing by a labor union for a closed shop, where the union does not represent all of the employees of the plaintiff, is a violation of the public policy of Section 2: *Hedges-Walsh-Weidner Co. v. Duffy*<sup>10</sup> and *Colonial Baking Co. v. Hatzenbach*.<sup>11</sup> In both cases several employees were on strike though others remained at work. In the *Hedges* case there was mass picketing, which the court enjoined, permitting only three pickets at each gate, but the court's language was very broad and was based solely on Section 2:

". . . the discontented employees of the complainant and their associates, some of whom have never been employees of the com-

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9. *Id.* at 72.

10. Oct. 17, 1934, C. C. H. LABOR LAW SERVICE #16,066

11. Oct. 25, 1934, C. C. H. LABOR LAW SERVICE #16,051

plainant, and some of whom were not employees at the time the strike was called, congregated in such numbers and at such places with reference to the entrances to complainant's plant as that their presence constituted a constant menace to any person desiring to enter the plants of the complainant. This is unlawful. This is violative of the principle set forth in Section 2 of the Act of March 23, 1932, declaratory of the public policy in labor matters . . . the strike was caused by an effort to unionize complainant's business by coercion . . . . It is unfair for employers to discriminate against members of organized labor, and it is likewise unfair for organized employees to discriminate against employees who are not so affiliated. The unorganized employee by law must be free from interference, restraint, or coercion of employers of labor . . . . It is likewise, in order to fulfill the spirit of the public policy of the United States, necessary that the employers and unorganized employees be free from such interference, restraint or coercion on the part of members of organized groups or their agents."

In the *Colonial Baking* case peaceful picketing to secure a closed-shop contract was enjoined because of the Act, the court saying:

" . . . If the employer . . . had signed the proposed agreement . . . such act would have obligated his employees to become affiliated with a labor organization, or would at least have been a very significant indication that such course was preferred by the employer. Under this agreement unorganized employees, if they had been permitted to remain in the employ of the plaintiff, would have had surrendered by their employer and without their approval, their right of collective bargaining. It would have been delegated by the agreement to representatives of organized labor. That is violative of the policy of the United States . . . ."

The *Lauf*, *Hedges*, and *Colonial Baking* cases are directly in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Levering & Garrigues Co. v. Morrin*,<sup>12</sup> and also with *Cinderella Theater v. Sign Writers' Local Union*,<sup>13</sup> and *Miller Parlor Furniture Co. v. Furniture Workers' Industrial Union*.<sup>14</sup>

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12. 71 F. (2d) 284 (C. C. A. 2d, 1934). In fact Judge Spark's opinion in the *Lauf* case is not consistent with his opinion in *Progressive Miners v. Peabody Coal Co.*, 75 F. (2d) 460 (C. C. A. 7th, 1935), where a labor union sued to enjoin an employer from interfering with the workers' right of collective bargaining. (See *infra*, page 15.

13. 6 F. Supp. 164 (E. D. Mich. 1934).

14. 8 F. Supp. 209 (D. C. N. J. 1934).

This conflict in opinion indicates the need for a Supreme Court decision to determine whether or not Section 2 protects, and if so, how far it goes in "protecting the individual worker" against "coercion by unions." The Section, carefully read, presents no difficulty. It protects workers from the "*coercion of employers*," and makes no mention of coercion by employees. It is true that the section admits that the individual worker "should be free to decline to associate with his fellows," but that is *his* right, and to permit it to be set up vicariously by the employer, is to make illegal every strike for a closed shop or for union recognition.

There are two possible methods of carrying out the public policy of Section 2: (1) Refuse to allow the employer to set up the rights of third parties, his employees, in a suit against the union. If they are illegally coerced and can show damage, the employees may have an action against the coercing parties. (2) Let the majority prevail in each employment unit. This method has several disadvantages: it leaves the minority remediless; there will be difficulty in determining what constitutes the unit—the plant, or the entire organization of the employer; and in the case where non-union men are in the majority, it makes most union activities illegal, except possibly the most peaceful of persuasion. The last consideration is or is not a drawback, according to one's notion of how far unions should be allowed to go to protect themselves and their employers against competition with lower-paid non-union groups.

From a technical standpoint, the Norris-LaGuardia Act does not give any jurisdiction to enjoin violations of the public policy of Section 2. It merely declares that no injunctions shall be issued *contrary to* the public policy of Section 2. Even assuming that the Seventh Circuit in the *Lauf* Case and the Tennessee District Court in the *Hedges* and *Colonial Baking* cases were correct in their determination of what that public policy was, it is submitted that they were technically wrong in issuing an injunction because of Sections 1 and 2. Whether it is desirable that there be one public policy in restricting the issuance of injunctions, and a different public policy as the basis for issuing an injunction is, perhaps, debatable. On any assumption, however, it is believed that the *Lauf* and the *Colonial Baking* cases were wrong in enjoining peaceful picketing, since Section 4 (e) specifically forbids such an injunction, and any rationalization that there was no labor dispute was ill-founded.

SECTION 3. NONENFORCEABILITY OF UNDERTAKINGS IN CONFLICT WITH  
PUBLIC POLICY; "YELLOW DOG" CONTRACTS.

This Section makes it abundantly clear that the Norris-LaGuardia Act is not solely concerned with injunctive relief, at least in so far as undertakings or promises are concerned. It provides, among other things, that any undertaking or promise in conflict with the public policy declared in Section 2 shall not be enforceable in any of the courts of the United States and shall not afford any basis for the granting of "legal or equitable relief" by any such court. It specifically sets out, as one of such undertakings contrary to the public policy of the United States, the "yellow-dog" contract.<sup>15</sup>

No cases involving "yellow-dog" contracts have come before the federal courts since the passage of the Act.

SECTION 4. ENUMERATION OF SPECIFIC ACTS NOT SUBJECT TO RESTRAINING  
ORDERS OR INJUNCTIONS.

*Subdivisions (e) and (f) forbidding injunctions against giving publicity to the facts involved in a labor dispute and assembling peaceably to act.*

Section 4 denies to the federal courts jurisdiction to enjoin the specific acts enumerated therein.<sup>16</sup> Subdivision (e), forbidding injunctions against

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15. Section 3 reads:

"Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this chapter, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

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

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

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

The Bankruptcy Act grants further relief as to company unions and "yellow-dog" contracts when an employer is in bankruptcy. 11 U. S. C. A. 207, subsec. (1) and (m) (1936).

16. Section 4 provides:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in



"Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence," is particularly important. In *American Steel Foundries v. Tri-City Central Trades Council*,<sup>17</sup> the Supreme Court held in 1921 that Section 20 of the Clayton Act did not forbid an injunction against talking to those who have notified pickets of their unwillingness to be talked to and against group appeal on the picket line. The Supreme Court approved an injunction in that case forbidding more than one picket at each gate, and requiring that pickets should not approach individuals together, but singly, and should not in their efforts at persuasion obstruct an unwilling listener by importunate following. After this decision, similar injunctions were often given. That the Norris-LaGuardia Act, Section 4 (e), was intended to "overrule" the *American Steel Foundries* case is suggested by the case of *Cinderella Theater v. Sign Writers' Local Union*.<sup>18</sup> In that case, the defendant union established a patrol, who in groups of 2 or 3 walked abreast back and forth on the public sidewalk in front of the entrance of plaintiff's theater which employed a non-union sign writer. The patrol bore these signs: "Please do not patronize this theater," "Unfair to Sign

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such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

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

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

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

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

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

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

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

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

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

17. 257 U. S. 184 (1921).

18. 6 F. Supp. 164 (E. D. Mich. 1934).

Writers' Union," "This Theater Unfair to Organized Labor." Cards bearing similar language were distributed throughout the neighborhood. Plaintiffs did not show that defendants' acts were not peaceable or that there was any fraud or violence. The employer's suit was dismissed on the ground that Section 4 (e) and (f) specifically restricts the courts from issuing injunctions against the persistent giving of publicity to the facts involved in the dispute and against the persistent advising of other persons, without fraud or violence, not to work for the employer. In support of this view, the House Committee report to that effect was quoted. In view of the broad language of Section 4 (e) and (f), and the specific provision, "whether singly or in concert," in the first paragraph of Section 4, and the omission of the question-begging word "lawful" that appeared in Section 20 of the Clayton Act, a very strong argument can be made that group appeal, as well as importunate persuasion, are recognized as immune from injunctive relief by the Norris-LaGuardia Act.

In the *Cinderella Theater* case the plaintiff contended that its theaters were not unfair to organized labor, as alleged on the pickets' placards, and that, therefore, the advertising was false and fraudulent. The court refused to decide whether or not plaintiff was unfair to organized labor:

"I am of the opinion that the court in construing this statutory provision cannot split hairs on the question whether or not the plaintiffs are 'fair' or 'unfair' toward 'organized labor.' It is generally recognized that signs usually are mere sketches. It is not possible to tell a long story with them. What one person might call being unfair to organized labor another person might well call entirely fair . . . . The method used did not, in my opinion, involve 'fraud,' within the meaning of the statute."

However in the *Colonial Baking* case the Tennessee district court went into the question as to whether the employer was unfair to organized labor, as alleged in the union publicity, and stated, in enjoining the peaceful picketing:

"In view . . . . of the finding of the regional labor board as to the facts involved in this controversy I am forced to the conclusion that the representations made not only in the banner, but in the circulars . . . . are fraudulent as matter of law . . . ."

The court does not say just what the finding of the regional labor board was. If that finding was that the employer was not guilty of violating Section 7 (a) of the National Industry Recovery Act, it does not inevitably follow that it is fraudulent for a union to use the term "unfair to organized

labor" against such an employer. That term has long been understood to mean, among other things, that the employer has declined to enter into a closed-shop contract, although he does not discriminate against union men.

No case has squarely held mass picketing to be "violence" within the meaning of Section 4 (e). Mass picketing was enjoined in the *Hedges* case on the ground that no "labor dispute" was pending, or, alternatively, on the ground that it was coercion of the individual worker and therefore contrary to the public policy set forth in Section 2. In *Miller Parlor Furniture Co. v. Furniture Workers' Industrial Union*,<sup>19</sup> the court refused to decide the question as to whether mass picketing was enjoinable, because it found no proof of it in the case before it (only two strikers picketed one time) and stated:

"It is possible, and sometimes probable, that patrolling (or so-called picketing) may result in violence or indicate fraud. If large numbers of patrollers were engaged in such a manner as to interfere with the actual business affairs of a person or corporation, it might indicate fraud sufficient to hold such patrolling illegal, and to justify restraint; and in refusing an injunction in the instant case the court is not concluding that a situation might not arise where restraint would be issued based upon the act of patrolling alone."<sup>20</sup>

In *Knapp-Monarch Co. v. Anderson*,<sup>21</sup> defendants were guilty of violence and mass picketing, but the court refused an injunction in order to give local police another chance to stop it. The court indicated to the police that mass picketing was illegal under Illinois law and that the Norris-LaGuardia Act only restricted the federal courts and not the authority of the police and courts of Illinois, adding, by way of dictum:

"I may say also that the very fact that Congress has refrained from using the word 'picketing' in the Norris Act in defining and limiting the jurisdiction of the courts of the United States indicates the congressional intention to leave in those courts jurisdiction to restrain, if necessary, any picketing of a coercive, intimidating character . . . mass picketing, or picketing in crowds, inevitably results in intimidation or violence or both. The evidence in the case before the court bears out the truth of that statement."<sup>22</sup>

In *Lake Charles Stevedores v. Mayo*,<sup>23</sup> because of actual violence, mass picketing was enjoined, except as to one picket from each of two unions at each entrance.

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19. 8 F. Supp. 209 (D. C. N. J. 1934).

20. *Id.* at 210.

21. 7 F. Supp. 332 (E. D. Ill. 1934).

22. *Id.* at 339.

23. Nov. 26, 1935, C. C. H. LABOR LAW SERVICE #16,177 (W. D. La.).

Attorney General Mitchell in his opinion to President Hoover stated that the Act, when fairly construed, did not sanction "threats of violence." And so, what indications there are, point toward a holding that mass picketing, in some forms at least, is enjoinable. The test may possibly be that suggested in the *Miller Parlor Furniture* case—whether the mass picketing by blocking means of access prevents patrons from freely transacting business with the plaintiff. This sort of mass picketing, however, should be distinguished from the type of group appeal permitted in the *Cinderella Theater* case, which does not necessarily involve violence.

*Subdivision (g) and (i) forbidding injunctions against advertising, etc., of an intention to do any acts specified, or advertising, urging, or otherwise causing without fraud or violence such acts.*

Section 4 (g) and (i) was the basis upon which the Circuit Court of Appeals for the Second Circuit denied an injunction in *Levering & Garrigues Co. v. Morrin*.<sup>24</sup> The defendants (who were never employed by plaintiff) were four members of an international building trades union. Most of the building industry in New York's metropolitan district was completely organized except as to plaintiffs and other members of an employers' association (the Iron League), who operated on an open-shop basis. Defendants, seeking a closed shop, were attempting to induce owners, architects, and general contractors to let no sub-contracts to members of the Iron League by informing them that union men would not work for them if such sub-contracts were let. Plaintiff secured an injunction in the lower court against this action, but it was reversed on appeal as contrary to the Norris-LaGuardia Act. Judge Manton said:

"Now, under the statute, a District Court cannot restrain the notifying of parties by interested individuals (Section 4 (g) of an intention to refuse to work; nor can the court prevent, in the absence of fraud or violence, the giving of publicity to the facts in the controversy (Section 4 (e) or encouraging others to refuse to work (Section 4 (i). The fact that the notification and the publicity will result in coercing the parties informed and cause them to refrain from contracting with the appellees cannot be taken into consideration, for the court is without the power to prevent such notification. The court has not the power or authority to issue an injunction against these appellants who are engaged in a controversy arising

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24. 71 F. (2d) 284 (C. C. A. 2d, 1934) *cert. den.* 293 U. S. 595 (1934).

out of an attempt to establish a closed shop by notifying general contractors and architects of an intention of members of a union to refuse to work, nor can these appellees prevent these appellants from refusing to work or inciting sympathetic strikes.”<sup>25</sup>

Thus, the federal courts can not enjoin workers in the same general industry who by concerted refusal to work coerce neutral customers of a recalcitrant employer to refuse to deal with him, in order to coerce the employer himself to accede to union demands. Here is one type of secondary boycott—sympathetic strikes within the same general industry—that is not enjoinable. The courts have not yet answered the question as to whether the same result would follow when there is concerted refusal to buy. Although concerted refusal to work is specifically covered by Section 4 (a), (g) and (h), it is arguable whether withdrawal of patronage is covered by Section 4 (c), in view of the definition in Section 13 (b) of a person participating in a labor dispute. It is to be noted that in the *Levering* case no restraint of the interstate commerce was alleged; it was in the federal court because of diversity of citizenship.

Section 4 is an *absolute* prohibition upon the United States courts. It is not conditional upon the defendant using no methods of fraud or violence. Even after a federal court has made findings in accordance with Section 7 (a), (b), (c), (d), and (e), and acted in accordance with Sections 8 and 9, which are discussed later, the court has power to enjoin only the fraud or violence; it has no power in a labor dispute to enjoin the acts specified in Section 4. It is apparent from a reading of the Act that none of its sections perform the function of giving jurisdiction to the courts. All of its sections perform the function of taking away various portions of the jurisdiction previously given in prior judiciary acts. Thus, when Section 4 takes away the power to enjoin the acts specified therein, one must *not* infer the negative pregnant that it confers power to enjoin the acts not specified.

#### SECTION 5. DOING IN CONCERT OF CERTAIN ACTS AS CONSTITUTING UNLAWFUL COMBINATION OR CONSPIRACY SUBJECTING PERSON TO INJUNCTIVE REMEDIES.

This Section provides:

“No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the

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25. *Id.* at 287.

ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in Section 4 of this Act.”

Does this mean that the Sherman Act of 1890<sup>26</sup> and the anti-trust acts amendatory thereto, especially the Clayton Act of 1914,<sup>27</sup> are inapplicable to labor disputes? The Court in *Cinderella Theater v. Sign Writers' Local Union*,<sup>28</sup> raised this question, but expressed no opinion on the point. However, in *Dean v. Mayo*,<sup>29</sup> the owner of an interstate barge line sued under the Sherman Act to enjoin defendant members of a longshoremen's union, proved violence and also showed that he had complied with the negotiation requirement of Section 8 of the Norris-LaGuardia Act. The court found a violation of Sections 1 and 2 of the Sherman Act and the acts amendatory thereto, and accordingly enjoined the violence, permitting only two pickets at a time. Although it does not appear from the opinion that Section 5 of the Norris-LaGuardia Act was specifically called to the court's attention, the court's ruling, on the facts, is correct. Since Section 4 sanctions only peaceful activities, Section 5 can only sanction the doing in concert of such peaceful activities. Consequently, Section 5 must mean that the anti-trust laws will not form the basis of a suit in a labor dispute where the defendants have engaged in no fraud or violence but still remain as a basis of federal jurisdiction where interstate commerce is fraudulently or violently interfered with. It would seem that primary or secondary boycotts (local or interstate) which do not involve fraud or violence no longer form any basis for an injunction in the United States courts. As a result, one seeking an injunction under the anti-trust acts is no longer in a better position than the litigant who comes into such courts via diversity of citizenship and relies on the common law.<sup>30</sup> But *Lawlor v. Loewe*,<sup>31</sup> which allowed an action under the Sherman Act for treble the damages due to a nation-wide boycott of the plaintiff's hats, appears to be untouched by the Act.

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26. 26 STAT. 209.

27. 38 STAT. 730.

28. 6 F. Supp. 164, 172 (1934).

29. 9 F. Supp. 459 (W. D. 1934), *aff'd*, 82 F. (2d) 554 (C. C. A. 5th, 1936).

30. However, Attorney-General Mitchell in his opinion to President Hoover stated that the Act did not prevent suits by the United States to enjoin unlawful conspiracies under the anti-trust laws.

31. 235 U. S. 522 (1915).

SECTION 6. RESPONSIBILITY OF OFFICERS AND MEMBERS OF ASSOCIATIONS OR THEIR ORGANIZATIONS FOR UNLAWFUL ACTS OF INDIVIDUAL OFFICERS, MEMBERS AND AGENTS.

This Section<sup>32</sup> applies to both injunction suits and to actions for damages. Yet in *Mayo v. Dean*,<sup>33</sup> the appellants contended that the lower court's injunction against two of the defendants was improper because there was no evidence of actual participation in, or actual authorization of, the overt acts. This contention was overruled by the court, which said:

"... [Section 6] might prevent punishment for contempt or the recovery of damages, but clearly was not intended to apply to the issuance of an injunction to prevent future acts of coercion in a case where such relief would be proper . . . . The proof is sufficient to support the conclusion that members and at least one official representative of the International Longshoremen's Association and the local unions of that organization participated in the attempted coercion of plaintiff in furtherance of the conspiracy. It would be useless to issue an injunction against an organization unless it also restrained the constituted officers. The injunction properly issued against the named defendants and all others conspiring with them."<sup>34</sup>

It ought to be clear, however, that union funds cannot be made subject to execution because of damage done by an unauthorized union member, and that doctrines of apparent authority are inapplicable to labor cases. Furthermore, the *Cinderella Theater* case<sup>35</sup> indicates that the "clear proof" of participation required by Section 6 means more than a mere preponderance of the evidence. Another case where the court refused to draw "inferences" from the fact that violence occurred, and where it refused to credit the testimony of an officer of the plaintiff company where it was not corroborated by any other witness and was denied by the alleged miscreant, is the *Miller Parlor Furniture* case.<sup>36</sup>

32. Section 6 provides:

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

33. 82 F. (2d) 554 (C. C. A. 5th, 1936).

34. Cf. Section 7 (a) of Norris-LaGuardia Act, forbidding "blanket" injunctions. See p. 15, *infra*.

35. 6 F. Supp. 164, 171 (1934).

36. 8 F. Supp. 209, 210 (1934).

## FIVE YEARS OF NORRIS-LaGUARDIA ACT

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## SECTION 7. ISSUANCE OF INJUNCTIONS IN LABOR DISPUTES; HEARING; FINDINGS OF COURTS; NOTICE TO AFFECTED PERSONS; TEMPORARY RESTRAINING ORDER; UNDERTAKINGS.

This Section sets forth a code of equity practice which the best courts have always voluntarily adhered to—in non-labor cases, at any rate. It is an attempt to prevent federal equity courts from relaxing their vigilance when a labor union is the defendant. As held by the Circuit Court of Appeals, Seventh Circuit, in *Progressive Miners v. Peabody Coal Co.*,<sup>37</sup> it does not confer any new jurisdiction upon the courts to issue injunctions, but limits the jurisdiction previously exercised. Judge Sparks there held that the plaintiff labor union could not rely on Section 7 to enforce the rights of collective bargaining set forth in the National Industrial Recovery Act. A year later when the *Lauf* case<sup>38</sup> was before him (employer seeking injunction against union), he accepted the plaintiff's contention that the public policy set forth in Section 2 required an injunction against peaceful picketing.

Section 7 provides in part:

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination)<sup>39</sup> in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered,<sup>40</sup> and except after findings of fact by the court,<sup>41</sup> to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be con-

37. 75 F. (2d) 460 (1935).

38. 82 F. (2d) 68 (1936).

39. This provision is applicable to cases where the United States is a party plaintiff. *U. S. v. Weirton Steel Co.*, 7 F. Supp. 255 (D. C. Del. 1934). It is immaterial who the complainant may be if a labor dispute is involved and the defendant is a party thereto. The court refused to issue a temporary injunction solely on affidavits.

40. That such a provision is amply justified in labor cases is shown by the situation in *Miller Parlor Furniture Co. v. Furniture Workers' Industrial Union*, 8 F. Supp. 209 (D. C. N. J. 1934). "The variance between the allegations of the bill and ex parte affidavits annexed thereto, and the proofs, justifies the provisions of the statute requiring the hearing of testimony of witnesses in open court, with the opportunity for cross-examination, in all applications of this character." (p. 210).

41. These provisions of Section 7 were held not to apply to injunctions granted to a debtor being reorganized under Section 77B of the National Bankruptcy Act in *In Re Cleveland & Sandusky Brewing Co.*, 11 F. Supp. 198 (N. D. Ohio 1935). The court indicated, however, that the "bankruptcy court may not be used as a temporary refuge from the consequences of labor trouble" (p. 207). The decision is sufficiently treated and disapproved in (1935) 49 HARV. L. REV. 341.



tinued unless restrained,<sup>42</sup> but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;<sup>43</sup>

(b) That substantial and irreparable injury to complainant's property<sup>44</sup> will follow;

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

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

(e) That the public officers<sup>45</sup> charged with the duty<sup>46</sup> to protect complainant's property are unable or unwilling<sup>47</sup> to furnish adequate protection.

42. Thus threatened future injury rather than past illegal acts is the basis for injunctive relief.

43. Thus blanket injunctions are forbidden. Injunctions can only be granted against the proved wrongdoers, not against all who may have notice of the injunction, nor against all the world. As an example of the old practice, see the injunction in *In re Debs*, Petitioner, 158 U. S. 564 (1895), which is discussed by Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in 'inferior' Federal Courts—A Study in Separation of Powers* (1924) 37 HARV. L. REV. 1010, 1101.

44. "Property" includes not only tangible property, but the right to use that property. *Knapp-Monarch Co. v. Anderson*, 7 F. Supp. 332 (E. D. Ill. 1934) (noted in (1935) 35 COL. L. REV. 120). The court said: "When, as in this case, the plaintiff is unlawfully deprived of this right by any unlawful conduct which intimidates, puts in fear, or otherwise by unlawful means causes those who would otherwise work for plaintiff to refrain from so doing, and is thereby deprived of its right to use or dispose of its property, there results a direct injury to the plaintiff's property within the meaning of the Norris Act . . ." (p. 355).

By the same reasoning a labor union was granted an injunction against a railroad company against the latter's interference with the worker's right of self-organization. *System Federation No. 40 v. Virginia Ry. Co.*, 11 F. Supp. 621 (1935), *aff'd*, 84 F. (2d) 641, 644 (C. C. A. 4th, 1936), *cert. granted*, 57 S. Ct. 43 (1936).

45. The Governor of the State is not a public officer within the meaning of Section 7(e). *Laclede Steel Co. v. Newton*, 6 F. Supp. 625 (S. D. Ill. 1934), *aff'd*, 80 F. (2d) 636 (C. C. A. 7th, 1935).

46. Where the right to be protected is granted by an Act of Congress, local public officials are without authority or power to protect or enforce such rights. Thus the court in the *System Federation* case, 84 F. (2d) 641 (C. C. A. 4th, 1936), automatically found that Section 7 (e) was complied with. In *Cole v. Atlanta Terminal Co.*, 15 F. Supp. 131 (N. D. Ga. 1936), it was held that a mediation board constituted "public officers" within Section 7.

47. In the *Knapp-Monarch* case, 7 F. Supp. 332 (E. D. Ill. 1934), failure of police to prevent mass picketing was due to a misconception of their duty, rather than their unwillingness or inability. Therefore, the court advised the police that mass picketing was illegal under the law of Illinois and refused to find, until further trial, that the police were unable or unwilling to protect plaintiff's property.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct,<sup>48</sup> to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property . . . ."

There follows a proviso,<sup>49</sup> however, allowing the issuance of a temporary restraining order without notice, if the complainant alleges that unless such an order be issued without notice "a substantial and irreparable injury to complainant's property will be unavoidable;" such order may be issued upon testimony under oath sufficient to justify a court in issuing a temporary injunction upon a hearing after notice.

It is to be noted that Subdivision (e) of this Section denies injunctive relief to a plaintiff who can get help from the police and other public officers. Furthermore, he must first resort to self-help under the provisions of Section 8.

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48. In the *Hedges* case, Oct. 17, 1934, C. H. H. LABOR LAW SERVICE #16,066, the court held that the police could and did waive proper notice.

49. This proviso reads:

"*Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

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

For an application of this provision, see *Cinderella Theater Co. v. Sign Writers' Local Union*, 6 F. Supp. 830 (E. D. Mich. 1934).

# SECTION 8. NONCOMPLIANCE WITH OBLIGATIONS INVOLVED IN LABOR DISPUTES OR FAILURE TO SETTLE BY NEGOTIATION OR ARBITRATION AS PREVENTING INJUNCTIVE RELIEF.

This section denies an injunction to a plaintiff who has failed to make reasonable efforts at self-help.<sup>50</sup> It is an extension of the equitable doctrine of clean hands and is of paramount importance in limiting the power of the federal courts, unless the ruling in *United Electric Coal Cos. v. Rice*<sup>51</sup> is approved in other circuits. The Seventh Circuit held in this case that Section 8 is inapplicable where the defendants have been guilty of acts of fraud or violence which destroy the plaintiff's property. This decision practically renders the Section meaningless. By Section 4 the only acts which are *not* removed from the courts' power to enjoin are acts of fraud or violence. Since non-fraudulent and non-violent acts are not enjoined anyway because of Section 4, Section 8 serves no purpose unless it restricts the courts' power to enjoin fraudulent or violent acts. Furthermore, Section 8 is not ambiguous. If one can reasonably hold Section 8 to be ambiguous in this respect, it would follow that Section 7 or any other sections are also

## 50. Section 8 provides:

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

51. 80 F. (2d) 1 (1935). The trial court had found that there had been mass picketing and threats, and that the sheriff was unable and unwilling to furnish protection, but it denied relief because of Section 8 and the public policy sections 1, 2, and 3 of the Norris-LaGuardia Act. 9 F. Supp. 635 (E. D. Ill. 1934). The Circuit Court of Appeals, in reversing the trial court, while admitting that "Cases without number may be cited which hold committee reports, congressional debates, etc., will not be considered where the words of the statute are unambiguous and their meaning clear," and that "Such references may never be used to create doubt," yet in the next paragraph finds Section 8 ambiguous because: (1) Senator Norris said that the Act was intended to abolish "yellow-dog" contracts; (2) the Senate committee report said that "It is not sought by this bill to take away from the judicial power any jurisdiction to restrain by injunctive process unlawful acts, or acts of fraud or violence"; (3) the House sponsors said, "This bill . . . does not attempt to take away from the federal courts all power to restrain unlawful acts or acts of fraud or violence in labor disputes . . ."; (4) "the parties are hopelessly at variance over the breadth of the construction of the words of Section 8"; (5) "It appears to us that the doubt is not over the meaning of the words, but of their applicability . . ."; and (6) "Refusal to protect property from willful destruction by others is so contrary to our individual and collective sense of justice that it is quite impossible to extend the meaning of language so as to exclude such protection without affirmative and specific words to that effect" (pp. 8, 9).

Compare the cases cited in note 52, *infra*, where the courts did not find such an "extension" to be "impossible."

subject to implied exceptions as to fraud or violence. Prior district court cases have taken the view that a plaintiff who has not complied with Section 8 can get no relief in a United States equity court, even though the defendants are committing fraud or violence.<sup>52</sup>

A mere general allegation that "plaintiffs have done everything in their power to effect a voluntary and friendly adjustment of their differences with the respondents" is *not* a sufficient allegation of compliance with Section 8. The plaintiff must allege quite specifically just what has been attempted in the way of negotiation. Thus in *Stanley v. Peabody Coal Co.*,<sup>53</sup> where a labor union sued to enjoin a coal company from violating the coal code, the court denied a temporary restraining order, because the union did not allege that governmental machinery had been exhausted, particularly the machinery set up by the Bituminous Coal Code.

The Act sets up no standards by which the plaintiff's conduct may be judged—as to whether he has made every reasonable effort to negotiate. It is submitted that the interpretation which would best carry out the purpose of the Act in this connection is that employed by the lower court in the *United Electric* case:

"It is true that plaintiff's employees made no concrete offer of negotiations on any other basis than that the plaintiff recognize and make a contract with the Progressive Miners of America . . . . However, if plaintiff could not, or believed it could not, accede to such demands, even as to the mine at Freeburg, this did not relieve it of the duty to negotiate. The purpose of negotiation, and often the result, is to obtain modification of demands."<sup>54</sup>

The Circuit Court of Appeals took a contrary position:

"The desire to arbitrate disputes—to iron out differences with employees—is highly commendable. But it is a misnomer to designate, as an offer to arbitrate, a demand to break a contract with a third party against said party's objection and to surrender one's right to employ individuals because they happen to belong to a union . . . . other than that to which the demander belongs. Such a demand permanently closed the door of mediation."<sup>55</sup>

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52. *Cinderella Theater v. Sign Writers' Local Union*, 6 F. Supp. 164 (E. D. Mich. 1934); *Dean v. Mayo*, 8 F. Supp. 73 (W. D. La. 1934); and the lower court in the *United Electric* case, 9 F. Supp. 635 (E. D. Ill. 1934).

53. 5 F. Supp. 612 (S. D. Ill. 1933).

54. 9 F. Supp. 635, 642.

55. 80 F. (2d) 1, 7. The C. C. A. concluded the employer had made "every reasonable effort" at negotiation as required by the Act.

The lower court's view does not require the parties to "split differences" where their demands are irreconcilable, but only requires that the parties be willing to meet together and discuss, in good faith, the differences between them.

The question of what constitutes "available governmental machinery of mediation or voluntary arbitration" has arisen. In the *United Electric* case one of two mining unions had taken the dispute in question before the Bituminous Coal Labor Board, and made the employer and the other union parties to the proceeding. When the Coal Company later sued for an injunction, it set up its submission to the order of the Board (which order entirely coincided with the viewpoint of the Coal Company) as evidence of compliance with Section 8. The lower court rejected this contention, because (1) the Board was not "governmental machinery of mediation or voluntary arbitration" within Section 8, but was a body set up to determine controversies after all reasonable efforts toward settlement through arbitration and mediation have failed; (2) plaintiff did not initiate the Board proceedings, but was called before it; (3) the Board was without jurisdiction to declare rights in the dispute because the coal mining was intrastate. In reversing the decision, the Circuit Court of Appeals held that plaintiff had thereby complied with Section 8, for at the time, it was not known that the Board was invalid, and plaintiff had acquiesced in good faith.

The conjunction "or" is used four times in Section 8. The "or" following the word "order" gives no trouble, and the meaning of the "or" following the comma after the word "question" is relatively clear. But does the "or" after the word "negotiation" require the plaintiff to make every effort to settle the dispute by negotiation *and* with the aid of any available governmental machinery? Although the negative statement of Section 8 makes the meaning of "either . . . or" ambiguous, if Congress wanted the plaintiff to use *both* negotiation and governmental machinery, it could very easily have used the ambiguous "and." As a practical matter, one who refused to employ governmental machinery would generally also not be willing to negotiate and vice versa. One who fails to avail himself of governmental machinery, such as a mediation board, has been denied injunctive relief not only for non-compliance with Section 8, but also for non-compliance with Section 7 (e).<sup>56</sup>

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56. *Cole v. Atlanta Terminal Co.*, 15 F. Supp. 131 (N. D. Ga. 1936).

It has been decided that the final "or," between the word "mediation" and the word "voluntary arbitration," does not require the plaintiff to propose both. Thus in *Mayo v. Dean*,<sup>57</sup> the plaintiff employer solicited mediation by the Department of Labor. Both sides spent a week with the mediator trying to reach an agreement, but accomplished nothing because the plaintiff would not make a close-shop agreement and pay wages at the rates demanded, and the unions would not recede from their position. The union contended that Section 8 was not complied with, because plaintiff had not agreed to submit to arbitration. The court held:

" . . . we consider it was fully complied with by complainant by availing himself of the services of the mediator of the Department of Labor. He was not obliged to propose both mediation and arbitration. One or the other would be sufficient."

It has not yet been determined whether violation of a trade agreement would be failure "to comply with any obligation imposed by law" within the meaning of Section 8.

SECTION 9. GRANTING OF RESTRAINING ORDER OR INJUNCTION AS DEPENDENT ON PREVIOUS FINDINGS OF FACT; LIMITATION ON PROHIBITIONS INCLUDED IN RESTRAINING ORDERS AND INJUNCTIONS.

This Section requires complainants to make their bills and petitions specific.<sup>58</sup> Only the specific acts complained of in the complaint, and found by the court to have been committed, may be enjoined. General allegations of violence, fraud, etc., would seem to be insufficient as a basis for injunctive relief.

In *System Federation No. 40 v. Virginian Ry. Co.*,<sup>59</sup> the union was suing the railroad to enforce the union's right to collective bargaining. The lower

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57. 82 F. (2d) 554 (C. C. A. 5th, 1936).

58. Section 9 provides:

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

59. 11 F. Supp. 621 (1935), *aff'd*, 84 F. (2d) 641 (1936), *cert. granted*, 57 S. Ct. 43 (1936).

court required the railroad to recognize and treat with the union as the workers' representative. On appeal, the railroad contended that mandatory injunctions were forbidden by Section 9, which provides that an "... injunction ... shall include only a prohibition of such ... acts as may be expressly complained of in ... complaint." The Circuit Court of Appeals, fourth circuit, affirmed the lower court's decree:

"We think it clear, however, that the purpose of this provision was not to forbid the granting of mandatory injunctions in the rare cases in which they are proper, but to limit the scope of all injunctions in labor cases to matters specifically alleged in the bill and supported in the findings of fact of the court. Statutes in derogation of the ordinary equity powers of the court should be strictly construed; and a provision manifestly intended to provide against blanket injunctions, of which complaint had been frequently made prior to the passage of the statute, should not be construed to deprive the court of the power to enforce by mandatory decree a right created by act of Congress."

#### SECTION 10. REVIEW BY CIRCUIT COURT OF APPEALS OF ISSUANCE OR DENIAL OF TEMPORARY INJUNCTIONS; RECORDS; PRECEDENCE.

This section provides for the expedition of appeals from temporary injunctions.<sup>60</sup> In *New Negro Alliance v. Harry Kaufman, Inc.*,<sup>61</sup> this expediting provision was held not to apply to the courts of the District of Columbia.<sup>62</sup>

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60. Section 10 provides:

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

61. 78 F. (2d) 415 (Ct. App. D. C. 1935).

62. Since Section 13 (d) includes these courts within the term "court of the United States," it would appear that Congress intended cases from the Supreme Court of the District of Columbia to be expedited to the Court of Appeals of the District. But apparently without considering any of the sections of the Norris-LaGuardia Act, the Court of Appeals of the District of Columbia held that under the District Code only *final* (and not interlocutory) orders are appealable.

## SECTION 11. JURY TRIAL.

## SECTION 12. RETIREMENT OF JUDGE.

These Sections,<sup>63</sup> providing for jury trial in contempt cases, and for retirement of the judge where the contempt arises from an attack on the conduct of such judge, have yet to be construed.<sup>64</sup>

## SECTION 13. DEFINITIONS OF TERMS AND WORDS USED IN CHAPTER.

Section 13, containing various definitions, is the backbone of the entire Act.<sup>65</sup> The phrase, "Case involving or growing out of a labor dispute," occurs in Sections 1, 4, 7, 9 and 10, and is defined in Section 13 (a). The phrase, "any person or persons participating or interested in a labor dispute," occurs in Sections 4, 5, 6, and is defined in Section 13 (b). The phrase, "labor dispute," occurs in Section 8 and is defined in Section 13 (c). Presum-

63. Section 11 provides:

"In all cases arising under this chapter in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided*, That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court."

Section 12 provides:

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

64. *Hill v. U. S.*, 84 F. (2d) 27 (C. C. A. 3rd, 1936), *cert. granted*, 57 S. Ct. 23 (1936), held that Section 11 did not apply to a chicken racketeer held for contempt, because there was no labor dispute involved.

65. Section 13 provides:

"When used in this chapter, and for the purposes of this chapter—

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



ably this definition further limits the definitions set forth in 13 (a) and 13 (b). That is, the court in every case must decide, first, whether there is a labor dispute going on, and second, whether the particular case grows out of that labor dispute. In defining "labor dispute," Section 13 (c) specifically discards the old employer-employee test,<sup>66</sup> and provides that "The term 'labor dispute' includes any controversy concerning terms or conditions of employment . . . ." A possible interpretation of this is that Congress wanted to make sure that controversies concerning terms or conditions of employment would be held "labor disputes," but did not intend the definition to exclude other types of controversies between employer and employee. Thus, a strike by a union on behalf of itself and an employer's association to compel an employer to join an employer's association,<sup>67</sup> a strike to compel the employer not to patronize a corporation using labor-saving machinery,<sup>68</sup> a strike to compel an employer not to patronize another manufacturer, in a related step of manufacture, who runs non-union,<sup>69</sup> have been held legal. Or suppose a union pickets a "price-cutter" who, although now willing to hire union labor, may demoralize the market so that general union wage rates will later have to come down. The latter is hardly a controversy concern-

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

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

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

66. Yet in *United Electric Coal Cos. v. Rice*, 80 F. (2d) 1 (C. C. A. 7th), the court resurrected the old test by way of dicta, in a case where an employer was seeking to enjoin his employees. The dicta became a decision in *Lauf v. Shinner*, 82 F. (2d) 68 (C. C. A. 7th, 1936).

In the following cases, although the defendant labor union's members were never employed by the plaintiff, the Act was held applicable: *Levering v. Morrin*, 71 F. (2d) 284 (C. C. A. 2nd, 1934); *Cinderella Theater v. Sign Writers' Local Union*, 6 F. Supp. 164 (1934); *Dean v. Mayo*, 8 F. Supp. 73 (1934); *Miller Parlor Furniture Co. v. Furniture Workers' Industrial Union*, 8 F. Supp. 209 (1934).

67. *Sheehan v. Levy*, 238 S. W. 900 (Texas, 1922).

68. *Bayer v. Brotherhood of Painters*, 109 N. J. Eq. 257, 154 Atl. 759 (1931).

69. *Rutan Co. v. Hatters' Union*, 97 N. J. Eq. 77, 128 Atl. 622 (1925).

ing terms or conditions of employment.<sup>70</sup> Yet certainly the union may have a *bona fide* interest to protect here. The question is whether Congress intended to protect *that* interest. The original draft of Section 13 (c) was much broader. It, like the present New York Anti-Injunction Act,<sup>71</sup> contained the following phrase after the words, "conditions of employment:"

"or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee . . ."

Such a phrase adequately covers the situations previously outlined. But since Congress deleted it, there is a strong argument that Congress intended to narrow, a bit, the definition of labor dispute. As a result, something which is a "labor dispute" under the New York statute, may not be under the Norris-LaGuardia Act.

On the other hand Section 13 (a) provides that a case grows out of a labor dispute when it involves persons who are in the same industry, "or have direct or indirect interests therein." The quoted phrase is not included in the New York act, and consequently in this respect the New York statute is narrower. Is the food manufacturer in the same industry as the food retailer? The question is not as important under the federal statute as it is under the New York Act. Suppose a food-manufacturing union pickets a food retailer because the retailer sells food made by a non-union manufacturer. There is clearly a labor dispute, the important question being whether it involves persons in the same industry.

Section 13 (a) presents another question. It provides in what might have been intended as a "catch-all" clause, that a case grows out of a labor dispute when it involves

"any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined)."

But under Section 13 (b) one is a "person participating or interested in a labor dispute if relief is sought against him." Does the last clause in Section 13 (a) contemplate only a situation where several unions are engaged in a jurisdictional strike, and the employer seeks relief against all of them? Or

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70. This is probably the explanation of the decision in *Scavenger Service Corp. v. Courtney*, 85 F. (2d) 825, 832 (C. C. A. 7th, 1936), where the court, under similar facts, stated: "By no stretch of reasoning can we find a labor question involved in this controversy."

71. N. Y. Laws 1935, c. 477; Civil Practice Act § 876(a).

does it also cover situations where the employer sues only one union? In the latter case, injunctive relief is certainly not being sought against the employer. Possibly "relief" is broad enough to cover non-judicial methods of relief such as picketing, striking, etc.<sup>72</sup>

In the *United Electric* case, the plaintiff had a contract with the United Mine Workers and was being picketed by the Progressive Miners, another union, which had broken off from the United Mine Workers. The court said:<sup>73</sup>

"There was no *controversy* between appellant and appellees on any subject. Appellant's employees could join any union they wished. They could change membership in one union for that of another. They could quit work, individually or collectively. But they cannot assert they have a controversy with appellant because of the existence or exercise of such rights. They could not, with no controversy with appellant at stake, change membership in unions and then demand of appellant that it break a valid contract which it had with another union and call it a controversy.

"There is no evidence which would justify us in assuming that appellant, through the United, was seeking to change the labor contract with its employees. The record shows that the terms of the contract were not in dispute. The Progressives were willing to sign the same contract which had been made for them by their previous representative, the United. We cannot escape the conclusion, therefore, that the facts in this case present no labor controversy between appellant and the mine workers. On the other hand, it clearly appears that the controversy was between two unions; that appellant was not a participant therein and was interested only because it had made a contract with one union when that union represented all of its employees, including most of the appellees."<sup>74</sup>

Although in the *United Electric* case it may be conceded that there was no controversy concerning terms of employment, yet there actually was a "controversy . . . concerning the association or representation of persons

72. In *Cinderella Theater v. Sign Writers' Local Union*, 6 F. Supp. 164 (1934), plaintiff employed a non-union sign writer. The sign writers' union picketed the theater. It was not shown that any of them were ever employed by the plaintiff. The court, in refusing an injunction against the union, in its findings held: "The case involves . . . conflicting . . . interests in a labor dispute of persons participating or interested therein" (p. 669).

73. 80 F. (2d) 6.

74. Another case taking the view that where there is a jurisdictional strike (dispute between labor unions) the Act is inapplicable is *In Re Cleveland & Sandusky Brewing Co.*, 11 F. Supp. 198 (N. D. Ohio 1935).

in . . . maintaining . . . terms or conditions of employment," and in fact the employer was as much involved in that controversy as the opposing unions.

The Act, of course, applies to labor-plaintiffs<sup>75</sup> and suits by the government<sup>76</sup> as well as to complainant employers.

SECTION 14. INVALIDITY OF PROVISIONS OF CHAPTER; VALIDITY OF REMAINING PROVISIONS.

SECTION 15. REPEAL OF CONFLICTING ACTS.

By Section 14,<sup>77</sup> the unconstitutionality of one provision of the Act does not render the remaining provisions invalid,<sup>78</sup> and Section 15 provides that "All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed."

The Seventh Circuit has suggested<sup>79</sup> that later enactments providing for enforcement by injunctions supersede the Norris-LaGuardia Act wherever the enactments might be held to conflict; and the *National Labor Relations Act*,<sup>80</sup> Section 10 of which empowers the Labor Board to prevent certain unfair labor practices, provides in Section 10 (h) that when federal courts are enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board under Section 10, the jurisdiction of the courts sitting in equity shall not be limited by Sections 1 to 15 of the Norris-LaGuardia Act.

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75. *Stanley v. Peabody Coal Co.*, 5 F. Supp. 612 (S. D. Ill. 1933); *System Federation No. 40 v. Va. Ry. Co.*, 11 F. Supp. 621, *aff'd*, 84 F. (2d) 641 (C. C. A. 4th, 1936), *cert. granted*, 57 S. Ct. 43 (1936).

76. *U. S. v. Weirton Steel Co.*, 7 F. Supp. 255 (D. C. Del. 1934); noted in (1934) 34 COL. L. REV. 1147.

77. Section 14 provides:

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

78. Although the Supreme Court has not yet passed on the Norris-LaGuardia Act, it has been held constitutional in all the lower court cases in which the question was raised: *Levering v. Morrin*, 71 F. (2d) 284 (C. C. A. 2nd, 1934), *cert. denied*, 293 U. S. 595 (1934); *United Electric Coal Cos. v. Rice*, 80 F. (2d) 1 (C. C. A. 7th, 1935), *cert. denied*, 56 S. Ct. 590 (1936); *Cinderella Theater v. Sign Writers' Local Union*, 6 F. Supp. 164, 6 F. Supp. 830 (E. D. Mich. 1934). The rationale of these cases is that since Congress may abolish the inferior courts entirely, it may restrict their jurisdiction and curtail their remedies as it sees fit.

79. *International Alliance of Theatrical Stage Employees v. Rex Theater Corp.*, 73 F. (2d) 92 (C. C. A. 7th, 1934) (the employer sued under the NIRA as subscriber to the code for injunctive relief against the picketing of a labor union). The injunction was refused, however, on the ground that the plaintiff, itself, was violating other requirements of the code.

80. 49 STAT. 457 (1935).