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July, 1 1935

"My keenest interest is excited, not by what are called great questions and great cases but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore some profound interstitial change in the very tissue of the law."—MR. JUSTICE HOLMES, *Collected Essays*, p. 269.

COMMENTS

N. R. A. LEGISLATION BEFORE THE COURTS

Immediately after the National Industrial Recovery Act became effective it became by far the most popular subject for comment by most law periodical writers. At least ninety articles concerning some or all phases of the Act have appeared in the law reviews of this country. Most of these articles were in the nature of prophecies, either direct or indirect, as to the reception which would be accorded the Act by the courts in the legal controversies which it was sure to provoke. Unfortunately, the oracular powers of those authors cannot yet be praised nor condemned, since most of the questions they raised have not yet been determined by our Supreme Court.

In the past few months there seems to have been a scarcity of articles concerned with this subject. In fact, it has been possible to find law reviews which did not contain a single article discussing the constitutional rights of the Blue Eagle. This article is not inspired by any belief that this dearth is unfortunate, but is intended as a summary of the cases which have been decided to date involving the National Industrial Recovery Act. Classification has proved awkward, but the cases will be discussed from the viewpoint of the various attacks which have been made upon the Act and the codes formulated thereunder.

(1) Does Congress have the power to regulate the transaction?

By far the greatest part of all the cases decided under the codes discuss principally the problem of whether the transactions sought to be regulated can be controlled by Congress under the commerce clause of the Constitution. This is the first hurdle for the proponents of the codes. It appears that no other grounds for exercising this power of regulation have been strenuously advanced, and it appears very doubtful, in the view of past decisions, if any other grounds could be successfully upheld. The Supreme Court has asserted that the national government derives no powers from the general welfare clause in the Preamble of the Constitution¹, and that the existence of an emergency does not create power, but may furnish the occasion for the exercise of existing power². The few cases involving N. R. A. legislation which mention this argument dismiss it very briefly³, except in the case of *Richmond Hosiery Mills v. Camp*⁴ which held that in times of national emergency, transactions which ordinarily would have no effect on interstate commerce, might have a burdening effect, thus giving Congress the power to regulate.

Of course, it is well settled that the Federal Government has the power under the commerce clause to regulate intrastate transactions or commerce which is burdening upon or inextricably intermingled with interstate commerce⁵. This is, of course, the doctrine relied upon to uphold most of the codes. Opponents rely upon Supreme Court decisions which have held that manufacturing, mining, production of oil, and generation of electricity are not commerce⁶. The question presented in most of these border-line cases resolves itself into whether the transaction sought to be regulated sufficiently affects interstate commerce to be a proper subject for regulation by the federal government. Since this is the first attempt by Congress to regulate many of these industries, there is little precedent to which the courts can look, and consequently there is no uniformity in the decisions of the lower courts.

The case of *Harry Victor et al v. Harold Ickles*⁷, which was an attack upon the provisions of the Petroleum Code regulating the giving of premiums in the retail of gasoline, held that retailing gasoline was an intrastate transaction which affected interstate commerce. The argument advanced was that the petroleum industry as a whole covered the entire United States, and that whenever a price war started in one locality, it spread across state lines and affected the industry as a whole, thus affecting interstate commerce. However, in *U. S. v. Suburban Motor Service Corporation*⁸ this argument was expressly denied by the court, which stated that if any price war extended across state lines it was an accidental, secondary, and remote result of the intrastate transaction. This court held that rules No. 2 and No. 17 of Article V of the Code of Fair Competition for the Petroleum Industry⁹ were not constitutional regulations under the commerce clause. The cases of *U. S. v. Bob*

1. *Jacobson v. Massachusetts*, 197 U. S. 11, 25 S. Ct. 358 (1905).

2. *Wilson v. New*, 243 U. S. 332, 37 S. Ct. 298 (1917); *Home Building and Loan Association v. Blaidell*, 54 S. Ct. 233 (1934).

3. *J. F. Purvis et al. v. Bazemore*, 5 F. S. 230 (S. D. Fla. 1933); *U. S. v. Suburban Motor Service Corp.*, 5 F. S. 798 (N. D. Ill. 1934); *U. S. v. Schechter* 8 F. S. 136 (E. D. N. Y. 1934).

4. 7 F. S. 139 (N. D. Ga. 1934).

5. *Minnesota Rate Cases*, 230 U. S. 352, 33 S. Ct. 729 (1913); *U. S. v. Feger*, 250 U. S. 199, 34 S. Ct. 445 (1919); *Stafford v. Wallace*, 258 U. S. 495, 42 S. Ct. 397 (1922).

6. *U. S. v. E. C. Knight*, 156 U. S. 1, 15 S. Ct. 249 (1895); *Hammer v. Dagenhart*, 247 U. S. 251, 38

S. Ct. 529 (1918); *Oliver Iron M. Co. v. Lord*, 262 U. S. 172, 43 S. Ct. 562 (1923); *Utah Power & Light v. Pfost*, 286 U. S. 165, 52 S. Ct. 548 (1932); *Champion Refining Co. v. Corporation Commission*, 286 U. S. 210, 52 S. Ct. 559 (1932).

7. Sup. Ct. Dis. of Columbia, Dec. 1, 1933, 61 Wash. L. Rep. 370, 2 S. C. D. C. (N. S.) 58.

8. 5 F. S. 798 (N. D. Ill. 1934).

9. Rule 2—Any merchant who offers for sale at retail or wholesale, motor fuels, lubricants, gasoline, or naphtha, in so far as his business pertains to those products, is bound by this Code.

Rule 17—No one engaged in the sale of petroleum products shall give away free goods, or other things of value.

*Lieto*¹⁰ and *U. S. v. Mills*¹¹ also denied that the operation of a filling station came within Federal regulation as interstate commerce.

The cleaning and pressing industry was held in *U. S. v. Spotless Dollar Cleaners*¹² to come within the federal power under the commerce clause. In that case the defendants were operating in the city of New York, but doing the actual cleaning and pressing in a New Jersey plant. The case of *J. F. Purvis, et al v. Bazemore*¹³, where the transaction was carried on wholly within one state, was contra.

Two recent cases which appear to be exactly contra have come up under the Code of Fair Competition for the Retail Lumber Trade. Both cases were prosecutions for the sale of lumber below the minimum price prescribed by code authorities. In *U. S. v. Canfield Lumber Co.*¹⁴ it was held that this transaction could be regulated as a transaction in interstate commerce. The court stressed the fact that the defendant company, located in Omaha, advertised in a paper which had a large circulation in Iowa, and that the company knew that much of the lumber sold from its Omaha yard was taken into Iowa. In the very recent case of *U. S. v. Sutherland Lumber Co.*¹⁵ it was held that the selling of lumber at retail was a purely intrastate transaction which did not affect interstate commerce, even though the lumber might be sold to customers who would take it across state lines.

Selling an automobile under the list price and allowing more than the code allowance for a used car in the trade-in were held not to be transactions affecting interstate commerce in *U. S. v. Kinnebrew Motor Co.*¹⁶

In *Hart Coal Co. v. Sparks, U. S. Atty.*¹⁷ and *U. S. v. Gearhart*¹⁸ the mining of coal was held not to be subject to regulation as a transaction affecting interstate commerce. In the latter case the coal was sold to wagon drivers at the mouth of the mine, and much of it was immediately transported across the state line, but the court denied that the government had shown that this had any effect upon interstate commerce. In *U. S. v. Eason Oil Co.*¹⁹ the drilling of an oil well was held to be an intrastate transaction not subject to the control of the federal government, but the power to control manufacturing as a transaction affecting interstate commerce was upheld in *Richmond Hosiery Mills v. Camp.*²⁰

Several cases have arisen under the administration of the A. A. A. involving this problem of power under the commerce clause, especially relative to the establishment of minimum milk prices. In *Edgewater Dairy Co. v. Wallace*²¹ it was held that the sale in Chicago of milk produced in Illinois was not a transaction affecting interstate commerce, but *U. S. v. Shissler*²² held that since much of the milk sold in Chicago came from without the state, that the sale of all milk there, regardless of where produced, was within the current of interstate commerce. *Douglas v. Wallace*²³ held that the sale of milk in the Oklahoma City area was wholly intrastate in nature, and *U. S. v. Neuendorf*²⁴ came to the same conclusion for Des Moines.

Worthy of note is the case of *U. S. v. Calistan Packers*²⁵ which affirmed the power of the federal government to allot the number of peaches which each packer could sell.

In *U. S. v. Schechter*²⁶ the court ruled on a demurrer to an indictment charging six defendants with conspiracy to violate the N. R. A. and the Code of Fair Com-

10. 6 F. S. 32 (N. D. Tex. 1934).
 11. 7 F. S. 547 (D. Md. 1934).
 12. 6 F. S. 725 (S. D. N. Y. 1934).
 13. 5 F. S. 230 (S. D. Fla. 1933).
 14. 7 F. S. 694 (D. Neb. 1934).
 15. U. S. Dis. Ct., W. D. Mo., decided Dec. 27, 1934.
 16. 8 F. S. 535, (W. D. Okla. 1934).
 17. 7 F. S. 16 (W. D. Ken. 1934).

18. 7 F. S. 712 (D. Colo. 1934).
 19. 8 F. S. 365 (W. D. Okla. 1934).
 20. Supra note 4.
 21. 7 F. S. 121 (N. D. Ill. 1934).
 22. 7 F. S. 123 (N. D. Ill. 1934).
 23. 8 F. S. 379 (W. D. Okla. 1934).
 24. 8 F. S. 403 (S. D. Ia. 1934).
 25. 4 F. S. 660 (N. D. Cal. 1933).
 26. 8 F. S. 136 (E. D. N. Y. 1934).

petition for the Live Poultry Industry. The alleged conspiracy was in connection with the New York City poultry market, and the court held that this business was within the power of Congress to regulate.

It must be remembered that in all these cases there are many arguments advanced that the business in question is a transaction affecting or burdening interstate commerce. In most businesses today the raw materials, or if a retail business, the finished product, is purchased from another state. Even if the transaction sought to be regulated is the rare instance where everything is produced, handled, and consumed within the state, there is probably a competitive business which operates in interstate commerce. The labor market today is said to extend over state lines; price wars in major industries will surely cross state lines. It has been argued that whenever a retailer undersells a competitor who purchases some of his goods in another state, that since the competitor is losing trade he will not purchase as much, and consequently interstate commerce will suffer.²⁷ Just how far the Supreme Court will extend the powers of the Federal Government under the commerce clause is the primary question. But certainly, if all these arguments were given full credence by the courts, there would be few businesses over which the national government could not exercise some control.

(2) *Is the Regulation Imposed a Violation of Due Process?*

However, this first hurdle is not by any means the end of the constitutional question. If the government has the power to regulate, it is then in the position of a state government regulating an intrastate transaction under the general police power, and the Vth Amendment restricts the power of the Federal Government exactly as the XIVth Amendment restricts the states. But there is very little law to be found in the decisions under the N. R. A. on this point. The cases which deny the power of the Federal Government under the Commerce Clause, rarely go any further, as they need not. The decisions which uphold the power of the Federal Government frequently dismiss the validity of the regulation with a few sentences.

The Act itself authorizes the adoption of Codes of Fair Competition for each industry. The codes which have been adopted have provided against "destructive price-cutting" by the establishment of minimum and "sticky" prices. The minimum prices are arbitrarily determined "cost" prices. They have provided for minimum wages, maximum hours of employment, and, in the case of some manufacturing codes, for maximum "machine hours." Of course these provisions involve an entirely new conception of fair competition. Selling below cost has never been held to unfair competition by the courts before this act, and when the "cost" is an arbitrary or hypothetical one determined by the average of the industry, it makes the question even more doubtful.

The right of the government to fix prices has long been thought to be limited to industries "affected with a public interest"²⁸. But in the recent case of *Nebbia v. N. Y.*²⁹ the court said that the words "affected with a public interest can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good." Some cases decided under the N. R. A. have

27. U. S. v. Sutherland Lumber Co., supra note 15.

28. *Munn v. Illinois*, 94 U. S. 113 (1876).

29. 291 U. S. 502, 54 S. Ct. 505 (1934).

upheld these minimum price regulations (including the forbidding of premiums³⁰), and at least two cases have expressly denied that these are valid regulations³¹.

In this connection it might be conceivably argued that the government has the power to fix prices and that the existence of an emergency is an occasion for the exercise of this power, on the basis of some of the war-time cases³².

The case of *Richmond Hosiery Mills v. Camp*³³ upheld the validity of a regulation limiting the mills to the operation of two shifts a week. *Willamette Valley Lumber Co. v. Watzek*³⁴ is another case upholding a provision for "maximum machine hours." In that case all the mills in the district embraced by this code (about four hundred and eighty mills) were restricted to thirty hours of operation a week. The plaintiffs in this case had been one of the few mills operating two shifts before the code, and this restriction cut them to thirty per cent of normal production, whereas one-shift mills were only cut to sixty per cent of normal production. The plaintiff had contracts which it could not perform on this limited schedule and brought a bill to restrain the enforcement of this restriction. The bill was denied, and the restriction was held valid, because it was unavoidable that some mills should suffer more than others.

But in the case of *Cleaners and Dyers Board of Trade v. Spotless Dollar Cleaners*³⁵ the court held invalid a blanket minimum rate which had been fixed for both "cash and carry" cleaners, and "call, credit, and deliver" cleaners.

This problem of federal regulation of businesses completely out of the utility field, and unaffected with, at least the older conception of, public interest is a new field. It seems that the same considerations which guided the court in determining the validity of legislation under the police power of states as controlled by the XIVth Amendment should control the power of the Federal Government as limited by the Vth Amendment.³⁶

(3) *Other Constitutional Objections to the N. R. A.*

Until the year 1935 the Supreme Court of the United States had never held an act of Congress invalid as a delegation of legislative power. From the famous case of the *Brig of Aurora*³⁷ decided in 1813 there had been an unbroken line of decisions upholding the validity of Congressional Acts attacked on this ground³⁸ involving such varied matters as flexible tariff, and the condemnation of bridges which imperiled navigation. But the first case to come before the Supreme Court involving the constitutionality of N. R. A. legislation, *Panama Refining Co. v. Ryan*³⁹, held

30. U. S. v. Spotless Dollar Cleaners, supra note 12; U. S. v. Shissler, supra note 22; U. S. v. Canfield Lumber Co., supra note 14; Harry Victor v. Harold Ickes, supra note 7; U. S. v. Suburban Motor Service Corp., supra note 8.

31. Mississippi Hardwood Co. v. McClanahan, U. S. Dis. Att'y., U. S. Dis. Ct., W. D. Tenn., decided Oct. 6, 1934; U. S. v. Sutherland Lumber Co., supra note 15.

32. Block v. Hirsch, 256 U. S. 135, 41 S. Ct. 458 (1921); Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 S. Ct. 465 (1921); Highland v. Russell Car and Snowplow Co., 279 U. S. 253, 49 S. Ct. 314 (1929).

33. Supra note 4.

34. 5 F. S. 689 (D. Ore. 1934).

35. Sup. Ct., N. Y. Co., N. Y., decided Feb. 26, 1934, Federal Trade & Industry Vol. II p. 8094.

36. Adkins v. Children's Hospital of the Dis. of

Colum., 261 U. S. 525, 43 S. Ct. 394 (1923). In this case the Supreme Court held unconstitutional a statute fixing minimum wages for women, and is the last expression of the Court on this subject. The case contains an interesting summary of all the authorities up to that time relative to social legislation which impaired freedom to contract.

37. The Brig of Aurora v. U. S., 7 Cranch 382 (1813).

38. Field v. Clark, 143 U. S. 649, 12 S. Ct. 1295 (1892); Buttfield v. Stranahan, 192 U. S. 470, 24 S. Ct. 349 (1904); Union Bridge Co. v. U. S., 204 U. S. 364, 27 S. Ct. 367 (1907); Mongahela Bridge Co. v. U. S., 216 U. S. 177, 30 S. Ct. 356 (1910); U. S. v. Grimaud, 220 U. S. 506, 31 S. Ct. 489 (1911); Hampton & Co. v. U. S., 276 U. S. 394, 48 S. Ct. 348 (1928); Norwegian Nitrogen Products Co. v. U. S., 288 U. S. 294, 53 S. Ct. 350 (1933).

39. ----- U. S. -----, 55 S. Ct. 241 (1935).

that section 9(c) (40) of the N. R. A. was an unconstitutional delegation of legislative power to the President.

It must be remembered that this decision is very narrow. Section 9(c) is an unique provision, aimed solely at "hot oil" shipments and has no counterpart in the provisions relating to any other industries. It was held to be an invalid delegation of legislative power because: (1) no general policy was stated; (2) there was no fixing of standards by Congress; and, (3) no finding of fact nor proclamation of this finding was made by the President.

There have been no decisions in lower federal courts that any of the other provisions of the N. R. A. are invalid as delegations of legislative power, although in one case⁴¹ the court stated that it was convinced that the N. R. A. as a whole was an invalid delegation of power, but since it was an inferior court it would not decide the case on that basis, there being no precedent for ever holding an act of Congress invalid for this reason.

(4) *Miscellaneous Matters Arising under the N. R. A.*

One question which has arisen under the N. R. A. is who may bring a suit under it. It appears that anyone may bring a suit to attack the Act who is seriously affected by it, but in one case⁴² an employee was not allowed to test the validity of regulations setting the maximum number of hours his employer could operate. The court said that nothing in the code prevented the employer from hiring as many necessary or unnecessary employees as he desired.

As to suits to enforce the Act, the Federal Trade Commission can sue (in the Circuit Court of Appeals) to enforce the codes since violation of them is unfair competition. United States District Attorneys are expressly authorized in the act to bring suits, but competitors have been denied the right⁴³. The N. R. A. contains no express provision authorizing a competitor to sue as does the Anti-Trust Act.

If employees wish to sue to enforce the act, under the Norris Act they have to exhaust all the remedies (arbitration boards) provided for in the N. R. A.⁴⁴, and even then it has not been settled that the employee is entitled to equitable relief⁴⁵.

But in several cases⁴⁶ employees have been allowed to collect back wages for the difference between what they actually received and the amount the code required they should have been paid, as third party beneficiaries of a contract made between the employer and the President.

One interesting case presented by the codes was that of *State of Texas v. Standard Oil Co.*⁴⁷, where the defendant was being prosecuted for violation of the state anti-trust act, the alleged violation having taken place before the adoption of the N. R. A.

40. "The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine, . . . , or imprisonment . . . , or both."

41. *U. S. v. Suburban Motor Service Corp.*, supra note 8, involving the code of Fair Competition for the Petroleum Industry.

42. *Ralph Starring v. James B. Frazier, Jr., and Southern Mills*, 4 F. S. 818 (D. Tenn. 1933).

43. *J. F. Purvis et al. v. Bazemore*, 5 F. S. 230 (S. D. Fla. 1933); *Stanley v. Peabody Coal Co.*, 5 F. S. 612 (S. D. Ill. 1933); *Western Powder Mfg. Co. v. Interstate Coal Co.*, 5 F. S. 619 (E. D. Ill. 1934); *Chicago Flexible Shaft Co. v. Katz Drug Co.*, 6 F. S. 193 (D. Del. 1934).

44. *John Stanley v. Peabody Coal Co.*, supra note 43.

45. *Ibid.*

46. *Elizabeth Greleck v. Samuel Amsterdam*, Mun. Ct. Phila, Federal Trade & Industry Service, Vol. II, p. 8156.

47. *Dis. Ct. of Travis County, Texas*, decided Oct. 12, 1933, Federal Trade & Industry Service Vol. II p. 8004.

The defendant set up as a defense that the acts complained of were legal and compulsory under the N. R. A.; and since the Act has no saving clause, the court refused to convict the defendant because the N. R. A. was the binding law in effect at the time the conviction was sought. In this connection many final decrees forbidding certain acts are now being modified to the effect that nothing in them shall be construed as forbidding the defendant to comply with all provisions of the N. R. A.⁴⁸

Few cases have arisen yet under the labor provisions of the Act. In one employees were allowed to sue as third party beneficiaries and enjoin the employer from interfering with their right to join a union and bargain collectively⁴⁹. In another case the U. S. District Court refused to take jurisdiction of a suit which the defendant union sought to remove from a state court. The union was being prosecuted for carrying on an unlawful strike, and the union claimed that its acts were justified by the N. R. A.⁵⁰ In the case of *J. & T. Cousins v. Shoe & Leather Workers Industrial Union*⁵¹ the court struck out the defense that the plaintiff was violating the N. R. A. in the plaintiff's suit for an injunction against unlawful picketing. It seems that this defense might have been good as invoking the doctrine of "unclean hands against the plaintiff. It must be remembered in these labor disputes that the Norris-LaGuardia Anti-Injunction Act holds that no U. S. court shall issue a permanent or temporary injunction in a labor dispute without a hearing of witnesses in open court with an opportunity to cross-examine.⁵²

Any general summary of cases such as this is always unsatisfactory, and the most that the writer can hope is that he has succeeded in a small measure in giving a rough, cross-section view of the various types of cases arising under the National Industrial Recovery Act and the varying decisions which have resulted.

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48. *U. S. v. Southern Hardware Jobber's Assoc.*, U. S. Dis. Ct., E. D. of Vir., decided Nov. 24, 1933; *U. S. v. Standard Oil of Calif.*, U. S. Dis. Ct., N. D. Calif., decided Sept., 1933.

49. *Wisconsin State Federation of Labor v. Simplex Shoe Co.*, Cir. Ct. of Milwaukee Co., Wis., decided Oct. 13, 1933, *Federal Trade & Industry Service Vol. II p. 8011*.

50. *Motor Truck Assoc. of Western Mass., v. Roy M. Dailey*, U. S. Dis. Ct. of Mass., decided Dec. 8, 1933.

51. *Sup. Ct. of Kings County, N. Y.*, decided Nov. 18, 1933, *Federal Trade & Industry Service Vol. II, p. 8021*.

52. *U. S. v. Weirton Steel Co.*, 7 F. S. 255 (D. Del. 1934).